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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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The Essence of the 1999-2002 Constitutional Reform in Indonesia

*Remaking the Negara Hukum*

A Socio-Legal Study

# The Essence of the 1999-2002 Constitutional Reform in Indonesia

*Remaking the Negara Hukum*

A Socio-Legal Study

PROEFSCHRIFT

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de graad van doctor aan de Universiteit Leiden,
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*door*

Jakob Tobing

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in 1943

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# Acknowledgements

On 10 August 2002, the plenary meeting of the 2002 Annual Session of People's Consultative Assembly of the Republic of Indonesia ratified the final changes to the 1945 Constitution, marking the completion of a four years long reform process.

Many people have commented on these changes and the amendment process, but not always adequately. That is why – as one of the actors in this process – I considered it necessary to write this PhD-thesis; as a form of accountability to history. It shows how my colleagues and I, without draft changes prepared in advance and guided by our nation's fundamental values discussed the amendment proposals for four years, struggling for a democratic constitution based on the rule of law.

It explains the difficulties we faced because concepts such as rule of law and constitutionalism were comprehended differently by the different actors involved. It also addresses how we managed an open process that interacted with challenges as the anger of people in some areas who felt unfairly treated by the central government, the desire to change the unitary state into a federal one, the desire of certain Muslims to introduce Islamic law, and so on. The process also interacted with those who did not agree to change the Constitution.

Coming from different backgrounds and positions, we went through a winding and tripping, time-consuming and tiring process, but with respect for each other and always trying to reach a consensus. Thus the deliberation process created a sense of ownership and shared responsibility of each faction for the success of constitutional reform. Indeed, every change made in the 1945 Constitution, except for one, about the appointed members of the People's Consultative Assembly, in the end were achieved through consensus.

And I wanted to write about this process not in the form of a practical, political book, but in the form of a doctoral dissertation. During the colonial period Leiden was the center of activity for Indonesian students in the Netherlands who were fighting for Indonesian independence. Influential figures in the history of legal development of the Netherlands Indies such as Cornelis van Vollenhoven and Snouck Hurgronje were professors at Leiden University. Besides that, Leiden University hosts a rich library of the Dutch East Indies and of modern Indonesia.

Thus, I decided to apply to Leiden University and I was fortunate to be accepted as a doctoral student at the Van Vollenhoven Institute for Law, Governance and Society (VVI) with Prof. Dr. Jan Michiel Otto, professor of Law and Governance in Developing Countries and director of the VVI as my supervisor.

His extensive knowledge and deep understanding of development issues of law and governance in developing countries with a broad diversity of norms and traditions, and particularly with a predominantly Muslim population, helped improve my perspectives. Moreover, his carefulness, patience and friendship were very supportive and encouraged me to complete my thesis through a long and often difficult period.

I am also very grateful to Prof. Dr. Adriaan Bedner, professor of Law and Society in Indonesia, and currently the chair of the VVI, who co-supervised my thesis, and who enriched my views with constructive comments.

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My sincere thanks also go to Peter Bakker of AlphaZet who did the lay-out and formatting which turned my manuscript into a book.

Nor will I ever forget the attention of friends in the VVI; Santy, Mies, Laura, Jacqueline and many others whom I cannot all mention one by one, which enabled me to live the academic life that I had left behind for a long time.

Thus, for several years, I was involved in many academic activities at the Van Vollenhoven Institute. Doing library research, writing the draft of my thesis, obtaining assistance from my supervisors, engaging in seminars and discussions, and so on. This even included off-campus activities, such as cycling together in a park in North Amsterdam.

Finally, but not least, I want to thank my beloved wife Adriana, my tough and reliable children, in-laws and grandchildren: Tumpal, my beloved son who passed away on 4 April 2021, Putri, Ruhut, Dewi, Sarah, Diky, Erika, Anezka, Prudence, Claudio, Bianca, Kiara and Kaleb. Your prayers, attention, understanding, support and patience have enabled me to realize this dream. Therefore, I dedicate this dissertation to my wife Adriana, to my children, my in-laws and my grandchildren and in memory of my beloved son Tumpal.

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# Abbreviations

| | |
|---|---|
| ABRI | *Angkatan Bersenjata Republik Indonesia* – Armed Forces of the Republic of Indonesia |
| AIPI | *Akademi Ilmu Pengetahuan Indonesia* – Indonesian Academy of Sciences |
| AIPI | *Asosiasi Ilmu Politik Indonesia* – Association of Political Science of Indonesia |
| ASPRI | *Asisten Pribadi* – Personal Assistant |
| B.F.O. | *Bijeenkomst voor Federaal Overleg* – Federal Consultation Meeting |
| B.J. Habibie | Baharuddin Jusuf Habibie |
| Balitbang PDI-Mega | *Badan Penelitian dan Pengembangan Partai Demokrasi Indonesia – Mega* – Research and Development Body of the Indonesia Democratic Party – Megawati Soekarnoputri |
| BBC | British Broadcasting Corporation |
| BIG | *Badan Informasi Geospatial* – Geospatial Information Agency |
| BKR | *Badan Keamanan Rakyat* – People's Security Agency |
| BP-7 | *Badan Pembina Pendidikan Pelaksanaan Pedoman Penghayatan dan Pengamalan Pancasila* – Board of Trustees of Education of the Implementation of Guidelines for the Comprehension and Application of Pancasila |
| BPH | *Bendoro Pangeran Haryo* – a high ranking noble of Javanese society |
| BPK | *Badan Pemeriksa Keuangan* – Audit Board |
| BPKKP | *Badan Penolong Keluarga Korban Perang* – Agency for Helping the Family of the War Victims |
| BP-MPR | *Badan Pekerja Majelis Permusyawaratan Rakyat* – Working Body of the People's Consultative Assembly |
| BPS | *Biro Pusat Statistik* – Central Statisic Bureau |
| BPUPK | *Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan* – Investigating Commission for Preparatory Works for Independence |
| BPUPKI | *Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia* – Investigating Commission for Preparatory Works for Independence of Indonesia |
| CBE | Commander of British Empire |
| CETRO | Center for Electoral Reform |
| CIDES | Center for Information and Development Studies |
| CINAPS | Centre for Indonesian National Policy Studies |
| CSIS | Centre for Strategic and International Studies |
| DDI | *Dewan Dakwah Islamiyah* – Council of Islamic Mission |
| DDII | *Dewan Dakwah Islamiyah Indonesia* – Indonesian Islamic Missionary Council |

| | |
|---|---|
| DI | *Darul Islam* – House of Islam/The Islamic State |
| DPA | *Dewan Pertimbangan Agung* – Supreme Advisory Council |
| DPAS | *Dewan Pertimbangan Agung Sementara* – Provisional Supreme Advisory Council |
| DPD | *Dewan Perwakilan Daerah* – Regional Representatives Council or Council for Representation of the Regions. |
| DPR | *Dewan Perwakilan Rakyat* – People's Representatives Council |
| DPRD I | *Dewan Perwakilan Rakyat Daerah Tingkat I* – Provincial People's Representatives Council |
| DPRD II | *Dewan Perwakilan Rakyat Daerah Tingkat II* – District/City People's Representative Council |
| DPR-GR | *Dewan Perwakilan Rakyat Gotong Royong* – Collaborative People's Representatives Council |
| DUD | *Dewan Utusan Daerah* – Council of Regional Delegations |
| ELS | *Europese Lagere School* – European Elementary School |
| ELSAM | *Lembaga Studi dan Advokasi Masyarakat* – Institute for Research and Policy Advocacy |
| F-ABRI | *Fraksi Angkatan Bersenjata Republik Indonesia* – Faction of the Armed Forces of the Republic of Indonesia. |
| FKIK | *Forum Kajian Ilmiah Konstitusi* – Forum for Scientific Study of the Constitution |
| F-KKI | *Fraksi Kesatuan Kebangsaan Indonesia* – Faction of Unity of Indonesian Nationhood |
| F-KP | *Fraksi Karya Pembangunan* – Faction of the Functional Group |
| FKPPI | *Forum Komunikasi Putra Putri Purnawirawan dan Putra Putri TNI Polri* – Communication Forum of Sons and Daughters of Retired Military and Police and Sons and Daughters of Military and Police |
| FMI | *Front Mahasiswa Islam* – Muslim Student Front |
| FOKO | *Forum Komunikasi Purnawirawan TNI dan Polri* – Communication Forum of the Retired Indonesian National Armed Forces and Indonesian National Police |
| F-PBB | *Fraksi Partai Bulan Bintang* – Faction of Crescent Moon and Stars Party |
| F-PDI | *Fraksi Partai Demokrasi Indonesia* – Faction of Indonesian Democratic Party |
| F-PDIP | *Fraksi Partai Demokrasi Indonesia Perjuangan* – Faction of Indonesian Democratic Party of Struggle |
| F-PDKB | *Fraksi Partai Demokrasi Kasih Bangsa* – Faction of Democracy and Love the Nation Party |
| F-PDU | *Fraksi Partai Daulatul Ummah* – Faction of People's Sovereignty Party |
| F-PG | *Fraksi Partai GOLKAR* – Faction of GOLKAR Party |
| FPI | *Front Pembela Islam* – Islamic Defender Front |
| F-PPP | *Fraksi Partai Persatuan Pembangunan* – Faction of United Development Party |
| F-REFORMASI | *Fraksi Reformasi* – Faction of Reformation, a faction in the MPR which was a combination of members of the National Mandate Party and the Welfare Party |

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| F-TNI/Polri | *Fraksi Tentara Nasional Indonesia/ Kepolisian Negara Republik Indonesia* – Faction of Indonesian National Military Forces and Indonesian Police |
| F-UD | *Fraksi Utusan Daerah* – Faction of Regional Delegations |
| F-UG | *Fraksi Utusan Golongan* – Faction of Delegations of Functional Groups |
| GAM | *Gerakan Aceh Merdeka* – Free Aceh Movement |
| GAMA | *Universitas Gajah Mada* – University of Gajah Mada |
| GBHN | *Garis-Garis Besar Haluan Negara* – State Policies in Outlines |
| GERINDO | *Gerakan Rakyat Indonesia* – Indonesian People's Movement |
| GMNI | *Gerakan Mahasiswa Nasional Indonesia* – Indonesian National Student Movement |
| GOLKAR | *Golongan Karya* – Functional Groups |
| GPII | *Gerakan Pemuda Islam Indonesia* – Indonesia Muslim Youth Movement |
| HMI | *Himpunan Mahasiswa Islam* – Muslim Students Association |
| IAIN | *Institut Agama Islam Negeri* – State Institute for Islamic Studies |
| ICMI | *Ikatan Cendekiawan Muslim Indonesia* – Indonesian Association of Muslim Intellectuals |
| IFES | International Foundation for Electorate System |
| IKADIN | *Ikatan Advokat Indonesia* – Union of Indonesian Advocates |
| IPB | *Institut Pertanian Bogor* – Bogor Agricultural University |
| IPKI | *Ikatan Pendukung Kemerdekaan Indonesia* – Association of Supporters of Indonesian Independence |
| IPPNU | *Ikatan Putera-Puteri NU* – Association of Son and Daughter of NU |
| IRI | International Republican Institute – a USA based NGO |
| ISEI | *Ikatan Sarjana Ekonomi Indonesia* – Indonesian Association of Economist |
| ISPI | *Ikatan Sarjana Pendidikan Indonesia* – Indonesian Association of Educationist |
| ITB | *Institut Teknologi Bandung* – Bandung Institute of Technology |
| JABODETABEK | *Jakarta – Bogor – Depok – Tangerang – Bekasi* – Areas of the Greater Jakarta |
| K.H. | *Kiai Haji* – the venerated haj |
| KAMI | *Kesatuan Aksi Mahasiswa Indonesia* – Indonesian Student Action Union |
| KAPI | *Kesatuan Aksi Pelajar Indonesia* – Indonesian High School Student Action Union |
| KAPPI | *Kesatuan Aksi Pemuda Pelajar Indonesia* – Indonesian Student and Youth Action Union |
| KIPP | *Komite Independen Pemantau Pemilu* – Independent Committee of Election Observers |
| KISDI | *Komite Indonesia untuk Solidaritas Dunia Islam* – Indonesian Committee for Solidarity of the Islamic World |
| KMA | *Koninklijke Militaire Academie* – Royal Military Academy |
| KMB | *Konperensi Meja Bundar* – Round Table Conference |
| KNIP | *Komite Nasional Indonesia Pusat* – Central Indonesian National Committee |
| KNPI | *Komite Nasional Pemuda Indonesia* – National Committee of Indonesian Youth |

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| KOMNAS HAM | *Komisi Nasional Hak-Hak Asasi Manusia* – National Commission for Human Rights |
| KOSGORO | *Kesatuan Organisasi Serbaguna Gotong Royong* – Union of Mutual Cooperation Multifunction Organizations |
| KOTI | *Komando Operasi Tertinggi* – Supreme Operation Command |
| KOWANI | *Kongres Wanita Indonesia* – National Council of Woman of Indonesia |
| KPPSI | *Komite Perjuangan Penegakan Syariat Islam* – Committee for the Struggle of Enforcement of Islamic Sharia |
| KPU | *Komisi Pemilihan Umum* – General Election Commission |
| KRMT | *Kanjeng Raden Mas Tumenggung* – a high ranking noble title which is conferred by the palace of Jogja to men outside the palace family |
| KWI | *Konferensi Waligereja Indonesia* – Bishops' Conference of Indonesia |
| KY | *Komisi Yudisial* – Judicial Commission |
| LEMHANNAS | *Lembaga Ketahanan Nasional* – Institute for National Resilience |
| LIPI | *Lembaga Ilmu Pengetahuan Indonesia* – Institute of Sciences of Indonesia |
| LPTP | *Lembaga Pengembangan Teknology Pedesaan* – Institute for Development of Rural Technology |
| LSM | *Lembaga Swadaya Masyarakat* – Non-Governmental Organization |
| Lt. Gen. | Lieutenant General |
| MA | *Mahkamah Agung* – Supreme Court |
| MASYUMI | *Majelis Syuro Muslimin Indonesia* – Indonesian Muslim Shura Council |
| MIAI | *Majelis Islam A'la Indonesia* – Indonesian Islamic Council |
| MK | *Mahkamah Konstitusi* – Constitutional Court |
| MKGR | *Musyawarah Kekeluargaan Gotong Royong* – Mutual Assistance Families Association |
| MPR | *Majelis Permusyawaratan Rakyat* – People's Consultative Assembly |
| MPR-RI | *Majelis Permusyawaratan Rakyat Republik Indonesia* – People's Consultative Assembly of the Republic of Indonesia |
| MPRS | *Majelis Permusyawaratan Rakyat Sementara* – Provisional People's Consultative Asssembly |
| MUI | *Majelis Ulama Indonesia* – Indonesia Ulema Council |
| NAMFREL | The National Citizens' Movement for Free Elections – an NGO for election watchdog based in the Philippines |
| NASAKOM | *Nasionalis-Agama-Komunis* – Nationalist – Religious – Communist |
| NDI | National Democratic Institute – a US based NGO |
| NGO | Non-Governmental Organization |
| NKRI | *Negara Kesatuan Republik Indonesia* – Unitary State of Republic of Indonesia |
| NU | *Nahdlatul Ulama* – Association of Muslim Scholars |
| OPM | *Organisasi Papua Merdeka* – Organization of Free Papua |
| ORBA | *Orde Baru* – New Order |
| ORLA | *Orde Lama* – Old Order |
| PAH | *Panitia Ad-Hoc* – Ad-Hoc Committee |
| PAM SWAKARSA | *Pasukan Pengamanan Masyarakat Swakarsa* – Self-initiated Public Security Forces |
| PAN | *Partai Amanat Nasional* – National Mandate Party |

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| PARKINDO | *Partai Kristen Indonesia* – Indonesian Christian Party |
| PARMUSI | *Partai Muslimin Indonesia* – Indonesian Muslim-followers Party |
| PBHI | *Perhimpunan Bantuan Hukum dan Hak Asasi Manusia Indonesia* – Association of Legal Aid and Human Rights of Indonesia |
| PBI | *Partai Bhinneka Tunggal Ika* – Unity in Diversity Party |
| PDI | *Partai Demokrasi Indonesia* – Indonesia's Democratic Party |
| PDI-P | *Partai Demokrasi Indonesia Perjuangan* – Indonesia Democratic Party of Struggle |
| PDR | *Partai Daulat Rakyat* – People Sovereign Party |
| PEPABRI | *Persatuan Purnawirawan Angkatan Bersenjata Republik Indonesia* – Union of Indonesia's Armed Forces Veteran. |
| PERADI | *Perhimpunan Advokat Indonesia* – Indonesian Advocates Association |
| PERMESTA | *Perjuangan Rakyat Semesta* – Universal People's Struggle |
| PERTI | *Pergerakan Tarbiyah Islamiyah* – Islamic Education Movement |
| PETA | *Pembela Tanah Air* – Defenders of the Fatherland |
| PGI | *Persekutuan Gereja-Gereja di Indonesia* – Council of Churches in Indonesia |
| PHI | *Pelajar Islam Indonesia* – Indonesia Muslim Student |
| PII | |
| PIR Wongsonegoro | *Persatuan Indonesia Raya-Wongsonagoro* – Greater Indonesia Unity-Wongsonagoro |
| PK | *Partai Keadilan* – Justice Party |
| PKB | *Partai Kebangkitan Bangsa* – National Awakening Party |
| PKI | *Partai Komunis Indonesia* – Communist Party of Indonesia |
| PKP | *Partai Keadilan dan Persatuan* – Justice and Unity Party |
| PNI | *Partai Nasional Indonesia* – Indonesia National Party |
| PNI-FM | *Partai Nasional Indonesia Front Marhaenis* – Marhaenist Front Indonesian National Party |
| PNI-MM | *Partai Nasional Indonesia Massa Marhaen* – Mass Marhaen Indonesian National Party |
| PNU | *Partai Nahdlatul Ummah* – Congregation Awakening Party |
| POLRI | *Polisi Republik Indonesia* – Police of the Republic of Indonesia |
| PP | *Partai Persatuan* – United Party |
| PPD I | *Panitia Pemilihan Daerah Tingkat I* – Election Committee of Provincial Level |
| PPD II | *Panitia Pemilihan Daerah Tingkat II* – Election Committee of District/Municipality Level |
| PPI | *Panitia Pemilihan Indonesia* – Indonesia Election Committee |
| PPMI | *Persaudaraan Pekerja Muslim Indonesia* – Brotherhood of Indonesia Muslim Workers |
| PPP | *Partai Persatuan Pembangunan* – United Development Party |
| PPTI | *Partai Politik Tarikat Islam* – Islam Sufism Political Party |
| PRD | *Partai Rakyat Demokratik* – People's Democratic Party |
| PRI | *Partai Rakyat Indonesia* – Indonesian People's Party |
| PRIM | *Partai Republik Indonesia Merdeka* – Independent Republic of Indonesia Party |

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| PRN | *Partai Rakyat Nasional* – National People's Party |
| PRRI | *Pemerintahan Revolusioner Republik Indonesia* – Revolutionary Government of the Republic of Indonesia |
| PSI | *Partai Sosialis Indonesia* – Indonesian Socialist Party |
| PSII | *Partai Syarikat Islam Indonesia* – Indonesian United Islam Party |
| PSII | *Partai Syarikat Islam* Indonesia – United Islamic Party of Indonesia |
| PSII | *Partai Syarikat Islam Indonesia* – Indonesian Islamic Association Party |
| PSMTI | *Paguyuban Sosial Marga Tionghoa Indonesia* – Indonesian Chinese Clan Social Association |
| PUDI | *Partai Uni Demokrasi Indonesia* – Indonesian Democratic Union Party |
| PUTERA | *Pusat Tenaga Rakyat* – People's Power Centre |
| PWI | *Persatuan Wartawan Indonesia* – Journalists Association of Indonesia |
| R. | *Raden* – a noble title among the Javanese and Sundanese |
| R.A. | *Raden Ajeng* – a noble title for a woman in Javanese culture |
| R.M. | *Raden Mas* – a noble title for man in Javanese culture |
| RIS | *Republik Indonesia Serikat* – United Republic of Indonesia |
| RMS | *Republik Maluku Selatan* – Republic of South Moluccas |
| SDAP | *Sociaal Democratische Arbeiders Partij* – Social-Democratic Workers' Party |
| SESKOAD | *Sekolah Staf dan Komando Angkatan Darat* – Army's School of Staff and Command |
| SMK | *Sekolah Menengah Kejuruan* – Vocational School |
| SMP | *Sekolah Menengah Pertama* – Junior High School |
| SOKSI | *Sentral Organisasi Karyawan Swadiri Indonesia* – Central Organization of Indonesian Workers |
| SPSI | *Serikat Pekerja Seluruh Indonesia* – All Indonesian Workers Union |
| TA | *Tenaga Ahli* – Group of Experts |
| TII | *Tentara Islam Indonesia* – Indonesia's Islamic Armed Forces |
| TNI | *Tentara Nasional Indonesia* – National Military of Indonesia |
| TNI | *Tentara Nasional Indonesia* – Indonesian National Armed Forces |
| TRITURA | *Tri tuntutan rakyat* – Three the People's Demands |
| UBK | *Universitas Bung Karno* – University of Bung Karno |
| UI | *Universitas Indonesia* – University of Indonesia |
| UKI | *Universitas Kristen Indonesia* – Christian University of Indonesia |
| UN | United Nations |
| UNAS | *Universitas Nasional* – National University |
| UNDP | United Nations Development Programme |
| UNFREL | University Network for a Free and Fair Election |
| UNPAD | *Universitas Pajajaran* – University of Pajajaran |
| UNPAR | *Universitas Katolik Parahyangan* – Parahyangan Catholic University |
| UNTAG | *Universitas 17 Agustus* – University of August the 17th |
| UNTEA | United Nation Temporary Executive Authority |
| US | United States |
| USA | United States of America |
| UUD 45 | *Undang Undang Dasar 45* – 1945 Constitution |

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| UUD NRI 1945 | Undang *Undang Dasar Negara Republik Indonesia tahun 1945* – 1945 Constitution of the State of the Republic of Indonesia |
| UUD RIS | *Undang-Undang Dasar Republik Indonesia Serikat* – Constitution of the United Republic of Indonesia |
| UUDS 1950 | *Undang Undang Dasar Sementara 1950* – Provisional Constitution of 1950 |
| WALHI | *Wahana Lingkungan Hidup Indonesia* – Indonesian Forum for Environment |
| WALUBI | *Perwakilan Umat Buddha Indonesia* – Representatives of Indonesian Buddhist |
| WANTANNAS | *Dewan Ketahanan Nasional* – National Resilience Council |
| WANTIMPRES | *Dewan Pertimbangan Presiden* – President's Advisory Council |
| WW II | World War II |
| YKPK | *Yayasan Kerukunan Persaudaraan Kebangsaan* – The Foundation of Harmony of National Brotherhood |
| YLBHI | *Yayasan Lembaga Bantuan Hukum Indonesia* – Indonesia's Legal Aid Foundation. |

# I Introduction

## 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*)[1] 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.[2]

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).[3] 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.[4]

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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 Secretariat 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.[5] 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.[6] 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.[7]

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.[8] 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."[9]

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".[10] 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.[11]

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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."[12] 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.[13]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.[14]

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."[15]

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,[16] 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.[17]

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

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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 Presidensiel "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.[18]

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."[19]

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."[20] 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.[21]

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

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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 judicature 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 Missio*n 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"[22] and "with all its shortcomings, the success of the constitutional amendment is worthy of appreciation as a remarkable achievement."[23] 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."[24]

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."[25] 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.[26] Edward Schneier argues that "[f]ew governments have undergone more rapid changes than that of Indonesia"[27] and Mirjam Künkler and Alfred Stephan write that "this world's largest Muslim-majority country strikes most observers as a democratization miracle."[28]

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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 Kunkler and Alfred Stephan, *Indonesian Democratization in Theoretical Perspective*, in Mirjam Kunkler 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."[29] 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:[30] "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."[31]

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."[32]

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.[33] 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 Bhuana 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.[34] It is inhabited by more than 268 million people,[35] 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-

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,[36] making Indonesia the country with the largest Muslim population in the world.[37] Indonesia was never a nation or a state before 1945.[38] Instead, it became a new unitary state with old heterogeneous societies.[39] Indonesian nationhood is of a *demos* type, as contrasted with an *ethnos* type: nations which have a common language, faith, and ethnic ancestry.[40] 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.[41] 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*).[42] It next occurred in the Constitutional Assembly forum from 1956-1959, the so-called *Konstituante*.[43]

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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.[44] 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.[45]

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[46]; communists attempting to establish a Soviet Republic; the military-instigated massacre of communists – and those accused of being communists – in 1965-1966;[47] separatism;[48] or by regional frustration and resistance against the central government.[49] 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.[50]

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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,[51] 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.[52] Meanwhile, Islamic fundamentalists intensified their activities.[53]

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,[54] and the possibility of severe conflicts exploding and causing a *"bellum omnium contra omnes"*[55] – 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, 1st 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.[56] For example, I also occasionally refer to the contents of the original meeting minutes that are not in the later revised minutes.[57] 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.[58] 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.[59]

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.[60] 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,[61] 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

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.

# II The Historic and Sacrosanct 1945 Constitution

## II.1 Indonesia's historic 1945 Constitution of Indonesia

The 1945 Constitution possesses a unique position in the history of modern Indonesia. As discussed below, it was framed by the founding fathers and mothers of the nation under the tight supervision of the Japanese World War II (WWII) military ruler during the last months of the Japanese occupation. However, it was finalized, ratified, and enacted after Indonesia proclaimed its independence on 17 August 1945. The Preamble of the Constitution, which was drafted free from the Japanese authority's intervention, contains the pure aspirations of Indonesia's struggle for independence and the state ideology of Pancasila. The Preamble has become a foundation and guiding star, providing the ideals of an independent Indonesia.[1] During the hard years of war defending independence and maintaining the integrity of the nation, the 1945 Constitution became the symbol of triumphant struggle, dignity, and the nation's unity. Thus, the 1945 Constitution has become sacrosanct.

However, the sacrosanct quality of the 1945 Constitution and the interests of its beneficiaries became a barrier for reform. Likewise, concerns over various ideas and political movements that sought to change the basic values of an independent Indonesia also became factors for maintaining its original draft.

The drafting of the 1945 Constitution was carried out when Indonesia was still under the authority of the Japanese military government at the end of the WWII era. It was written by the Investigating Commission for the Preparation of Independence (BPUPK)[2] and under the Japanese military ruler's supervision during the last months of WWII. The Japanese established the

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1 On 18 August 1945, PPKI ratified the Preamble of the 1945 Constitution by acclamation. However, the draft of the articles had been fiercely debated before finally being ratified with the note that the articles would be corrected later as soon as possible. Sekretariat Negara Republik Indonesia, *op.cit.*, p.p. 426, 454. An elucidation of the 1945 Constitution was added later in October 1945 when Soepomo served as Minister of Justice. The Elucidation was drafted by Soepomo and contains concepts that strengthened the understanding of integralism into the articles of the 1945 Constitution. Then, the Presidential Decree of 5 July 1959, officiated the Elucidation as part of the 1945 Constitution, so that the 1945 Constitution consisted of the Preamble, the Articles, and the Elucidation.

2 Known in Indonesia as *Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan - Dokuritsu Zyunbi Tyoosa Kai*.

BPUPK. During the BPUPK's sessions, General Itagaki Sheisiro, the Commander of Japan's Seventh Army, asserted that Indonesia should be a strong and firm chain within the Greater East-Asia co-prosperity sphere, with a crucial obligation towards defending East Asia.[3] Thus, most of the Constitution was tainted with fascist WWII Japanese ideas of integralism and of the hegemonic Greater East Asia Co-Prosperity Sphere project. The exception was the Jakarta Charter *(Piagam Jakarta)*, which was prepared without Japanese supervision by a team of 9 and was led by Soekarno. It was completed on 22 June 1945 and contains the state ideology, Pancasila, and the basic values of an independent Indonesia. Soekarno reported *Piagam Jakarta* to BPUPK on 10 July 1945. BPUPK did not discuss it, but then decided to replace it with a new draft. The new one was drafted by a team of four and included a Declaration of Independence (*Pernyataan Kemerdekaan*) and an Opening (*Pembukaan*).[4]

On 7 August 1945, Japan's military government dissolved BPUPK and established the PPKI (*Panitia Persiapan Kemerdekaan Indonesia*) or The Preparatory Committee of Indonesia's Independence). With no Japanese members, the PPKI did not have to report its activities to the Japanese authorities.[5]

Right after Japan was defeated, Indonesian leaders proclaimed Indonesia's independence on 17 August 1945. The following day, the PPKI held its first meeting. It discussed both BPUPK drafts, the Declaration of Independence with the Opening, and the draft Constitution.[6] At the request of Hatta and Soekarno, the Jakarta Charter, with the improvement of its 'seven words' was approved to replace the text of the Proclamation of Independence and the Opening prepared by BPUPK. Although the articles were debated substantively, due to a lack of time, it was ratified with a note that the articles should be improved as soon as possible.[7]

The 1945 Constitution, despite its background and weaknesses, immediately became the symbol of Indonesia's independence. The war to defend independence had entrenched the 1945 Constitution as the symbol of national pride, dignity, and unity.[8]

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3 See Sekretariat Negara Republik Indonesia, *op.cit*, p. 370. The Japanese Seventh Area Army was a field army of the Imperial Japanese Army formed during final stages of the Pacific War and based in Japanese-occupied Malaya, Singapore and Borneo, Java, and Sumatra.

4 Ibid., p.p. 213, 236 – 238.

5 See St. Sularto & D. Rini Yunarti, *Konflik Di Balik Proklamasi. BPUPKI, PPKI, dan Kemerdekaan*, Penerbit Buku KOMPAS, Jakarta, Agustus 2010, p.p. 14 – 20.

6 See Sekretariat Negara Republik Indonesia, *op.cit*, p.p. 412 – 420.

7 Ibid., p.p. 426, 455.

8 In practice, the substance of the symbolic Constitution is not adhered to in making the laws of its implementation, so it will produce laws that are substantively less effective. See *Law Making for Development, Exploration of Theory and Practice of the International Legislative Project*, J. Arnscheidt, B. Van Rooij, J.M. Otto (Eds.), Leiden University Press, 2008, pp. 63 - 65.

In the first years of independence, from 1945 to 1949, it was a nominal constitution despite being officially ratified. Which is to say, it was not implemented. The Constitution stipulates that the President shall hold the governing powers as the chief of the executive. However, the position of the prime minister as the chief executive was introduced under allegations from the Allied Forces that the 1945 Constitution was a Japanese creation. President Soekarno, whom the Allied Forces accused of collaborating with Japan, was then positioned only as a symbolic head of state.[9] However, as mentioned above, the symbolic status of the 1945 Constitution remained.

From 31 January 1950 to 17 August 1950, Indonesia became a federal republic and adopted a federal state constitution (UUD RIS).[10] However, on 19 May 1950, at the insistence of representatives of the states and the people, the federal government, along with the state representatives, agreed to return to a unitary state. This officially took place on 16 August 1950. Correspondingly, the Federal Constitution was replaced by a provisional 1950 Constitution (Undang Undang Dasar Sementara 1950 – UUDS 1950) which was prepared by a committee chaired by Soepomo.[11]

The UUDS 1950 that adheres to the parliamentary system was adopted from August 1950 to July 1959. However, this system caused political instability, economic setbacks, and regional upheavals. Thus, with support from the Armed Forces, President Soekarno issued a decree to re-enact the 1945 Constitution on 5 July 1959. From July 1959 to 1966, the Constitution was also not fully implemented during Soekarno's presidency. The multi-party system of that period did not comply with the design of the 1945 Constitution, which adopted a single-party system, with PNI[12] as the only political party.[13] As a result, President Soekarno was caught up in the politics of maintaining balance.

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9 On 13 December 1999 Ruslan Abdulgani testified before a PAH I public hearing that the Allied Forces decided not to talk to this 'Japanese puppet'. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 194.

10 With the opinion that it still had the right to the territory of Indonesia as its territory, the Dutch took military action to re-establish its authority over the territory of the former Dutch East Indies. As a result, there were prolonged wars in the period from 1945 to 1949 between the Dutch and Indonesian. Finally, through a round table conference mediated by the United Nations in The Hague, the Netherlands recognized Indonesian sovereignty on the condition that Indonesia change its form from a unitary state to a union state. In line with the negotiations, a team from Indonesia and the Netherlands worked to prepare a constitution for the United States of Indonesia, known as UUD RIS (*Undang-Undang Dasar Republik Indonesia Serikat* or The Constitution of the Republic of the United States of Indonesia). The Indonesian team was led by Soepomo.

11 Prof. Mr. Dr. R. Soepomo, a biography by Drs. A. T. Soegito. Departemen Pendidikan dan Kebudayaan, Pusat Penelitian Sejarah dan Budaya, Proyek Inventarisasi dan Dokumentasi Sejarah Nasional 1979/1980, p.p. 30, 36.

12 Known as *Partai Nasional Indonesia* of the Indonesian National Party.

13 Sekretariat Negara Republik Indonesia, *op.cit.*, pp. 503-505.

From 1967 to 1998, during the New Order era, the regime was determined to carry out the 1945 Constitution purely and consequently. However, this turned the 1945 Constitution into a tool to justify absolute centralization of power to the president, Suharto's later election as president for seven consecutive periods, the suppression of freedom of press, and so on.

Therefore, even though the Preamble of the 1945 Constitution managed to capture and formulate the essence of the virtues of the Indonesian independence and its ideals, the Constitution's provisions failed to establish an effective mechanism for guarding, applying, and carrying out those virtues. Even the existing mechanism has a tendency that is contrary to nurturing Indonesian people with an intact humanity towards becoming just, prosperous, and advanced. Nevertheless, the main political powers, including the armed forces, for decades accepted the Preamble, the Articles, and the Elucidation of the 1945 Constitution as one final and inviolable entity.

By contrast, decades of state practice highlighted the weaknesses of the 1945 Constitution. Whenever the Constitution was implemented consistently, there was an inevitable concentration of power in the hands of the president without sufficient supervision or limitation. The desire to have a democratic political system continued to grow among political activists, military, student and college activists, and other communities. However, the symbolic position of the 1945 Constitution and the interests of those who benefited from the system it established became a barrier to Constitutional reform. Additionally, concerns over various ideas and political movements seeking to change the basic values of the existence of the nation and an independent Indonesia were used as justifications to defend the original 1945 Constitution.[14]

## II.2 Aspirations for constitutional democracy during the colonial periods

The modern nationalist movements emerged in the Dutch East Indies (Indonesia) with the establishment of the Western education system in the late 19th century.[15] The Dutch Ethical Policy of 1901 significantly increased the number of indigenous people who received a higher Western educa-

14 Since independence, Indonesia has faced challenges from those who want to change Indonesia in accordance with their political beliefs, including those who want to establish an Islamic state or communist state, either through political activity or by force. Armed rebellions by DI / TII (the Darul Islam / Indonesian Islamic Army) took place in various regions from 1949 to 1962. In 1948, the Indonesian Communist Party (PKI) launched an uprising in Madiun, East Java and in October 1965 PKI tried to seize power.

15 See Robert van Niel, *The Emergence of the Modern Indonesian Elite*, van Hoeve, The Hague, 1960.

tion.[16] New generations were exposed to and studied the Western political ideals and doctrines, such as liberty, the nation-state, democracy, the rule of law, humanity, social justice, socialism, communism, and fascism. They also learned the Western methods of political and social struggle, such as the political party structure, trade unions and strike actions, while observing how democracy, fascism, and communism played out. This new elite then developed and promoted the idea of an independent and unified Indonesia that would bring together the disparate groups of 'Indonesian' people. From the beginning, they introduced this as a national movement, not a particular ethnic, religious, or primordial group movement.

On 28 October 1928, delegations of youth organizations from various regional, ethnic, and religious backgrounds convened at a conference in Batavia (Jakarta). They issued a declaration, renowned as *Sumpah Pemuda* (the Youth Pledge).[17] They pledged that the heterogeneous people of the country constituted one nation, Indonesia, with one motherland, Indonesia, and one national language, Indonesian. It was a landmark event in the country's history and formed the founding moment of the Indonesian nation, which was seminal in how Indonesia's future would take shape.

In the meantime, the Netherlands was also changing. Influenced by the development of humanism and democracy that flourished in Europe, the Dutch government softened its policy in the Dutch East Indies.[18] The moderate colonial policy had enabled the establishment of several political parties, which reflected ideologies of the time, i.e., nationalism, Islamism, integralism, socialism, and communism.[19] Besides, there were also many free and uncensored newspapers and radio stations. In 1918, the Dutch colonial government established a *Volksraad* (People's Council) that was intended to channel the views and grievances of the people to the government.[20] However, the Dutch Government later decided that the *Volksraad*[21]

16 R. A. Kartini,a prominent writer and pioneer in woman's rights in Indonesia and an Indonesian *Pahlawan Nasional* (National Heroine), graduated from ELS (Europese Lagere School – European Elementary School) in 1891. Her book *Door Duisternis Tot Licht*. 's Gravenhage, 1912 (English version, *Letters of a Javanese Princess* – London, 1921) inspired women's emancipation in the Dutch East Indies. Radjiman Wedyodiningrat, the chairman of BPUPK, graduated from STOVIA (*School tot Opleiding van Indische Artsen – Dutch East Indies Medical School)* in 1903-1904 and from the medical faculty of the University of Amsterdam in 1910.

17 The Youth Pledge declares: Firstly, We, the sons and daughters of Indonesia, acknowledge one motherland, Indonesia. Secondly, We, the sons and daughters of Indonesia, acknowledge one nation, the nation of Indonesia. Thirdly, We, the sons and daughters of Indonesia, uphold the language of unity, Indonesian.

18 See M.C. Ricklefs, *A History of Modern Indonesia since c. 1200*, Stanford University Press, 4th edition, 2008, p. 183.

19 See also Adriaan Bedner, *The Need for Realism*, p. 161.

20 Initially, Governor-General van Limburg Stirum encouraged the *Volksraad* to take on more responsibilities. See M.C. Ricklefs, *op. cit., p.* 208.

21 The Dutch government held elections for members of the *Volksraad* several times. Ibid., p. 194.

had become uncontrollable and trimmed its authority, which proved seminal to the future of political behaviour in Indonesia. Some prominent figures of the nationalist movement joined the *Volksraad*. However, the hard-liners saw no advantage and refrained from joining.[22]

The nationalist movements were divided into those willing ('the cooperative') and unwilling ('the non-cooperative') to cooperate with the colonial government. The cooperative movement operated within the colonial power system. It was unable to do much. The non-cooperative movement immediately came under the leadership of Soekarno, an ardent revolutionary and a great orator. It grew beyond the influence of his close ally, Mohammad Hatta, who wanted to build a movement that promoted national awareness and political education.[23] Soekarno emphasized a political programme of populist *macht vorming* (power formation) and *macht aanwending* (power mobilization). His camp was active outside the system and fought against it. The non-cooperative movements' mass-based politics revolved around solidarity and confronting the colonial government rather than around building a political organization and system.

The political world at that time was dominated by three ideologies: democracy, fascism, and communism. Until the end of World War II, the Third World leaders generally felt antipathy towards capitalism and were critical of fascism and communism. They tended to see socialism as an alternative, as shown by Jawaharlal Nehru in India,[24] Ho Chi Minh in Vietnam[25] and Kwame Nkrumah in Ghana.[26]

Generally, the Indonesian nationalist movements rejected fascism and communism and were highly critical of democracy. Soekarno asserted that fascism was contrary to Indonesia's spirit and sharply denounced the *Führerprinzip* adopted by the Nazi regime as creating a *Kadavergehorsamkeit*, a cadaver obedience.[27] Hatta insisted that fascism must be destroyed because, under fascism, people would only be further enslaved.[28] On the other hand, Soekarno also asserted that he was not a communist.[29] Both Soekarno and Hatta denounced Western practices of democracy. Soekarno criticized the Western democratic system for treating people unfairly, despite having a

22 Soekarno, *Sekali Lagi Tentang Sosionasionalisme Dan Sosiodemokrasi*, Fikiran Rakyat 1932, in Ir. Soekarno, *Dibawah Bendera Revolusi*, Yayasan Bung Karno, Jilid Pertama, 2005, p. 190.

23 Anthony Reid, *To Nation by Revolution, Indonesia in the 20th Century*, NUS Press Singapore, 2011, p. 19.

24 See Frank Moraes, *Jawaharlal Nehru, A Biography,* Jaico Publishing DPR, Mumbai, 2007.

25 See William J. Duiker, *Ho Chi Minh, A Life*, New York, 2000.

26 See David Birmingham, *Kwame Nkrumah: The Father of African Nationalism,* Ohio University Press, 1998.

27 See Pandji Islam, magazine, 1940, in Ir. Soekarno, *op. cit.*, pp. 460, 461. Hatta later used this precise term in a BPUPKI meeting in June 1945. See also Sekretariat Negara Republik Indonesia, *op.cit.,* p. 202. Cadaver obedience is defined as blind obedience or total abandonment of one's free will to the higher authority.

28 Mavis Rose, *Indonesia Free: A Political Biography of Mohammad Hatta*, Equinox Publishing (Asia) Pte. Ltd., 2010, p. 149.

29 Suluh Indonesia Muda, 1926, newspaper, in Ir. Soekarno, *op. cit.*, p. 18.

parliament.[30] Furthermore, according to Soekarno, the Western democracies ignored social justice and economic democracy. He preferred a single-party system.[31] Soekarno further rejected individualism and liberalism as the root causes of injustice, imperialism, and world problems.[32]

Hatta denounced the Western democratic system as crippled, manifesting political rights but not economic and social cohesion (*pergaulan sosial*). He asserted that the root of injustice was individualism, the basis of Western liberalism, which created modern capitalism and economic and political imperialism. In his view, Western individualism destroyed social cohesion, turning a good principle like "people's sovereignty" into a tool for exploiting the people (*pemakan rakyat*).[33]

However, Hatta supported democracy as such and strongly rejected a state with unlimited power.[34] In that regard, he emphasized that the indigenous democracy that lived in Indonesian society should be implemented, with its original principles adapted to present conditions.[35] Hatta asserted that the struggle for freedom was a struggle for democracy and humanity.[36] The law must rely on the sense of justice and truth that lives in the conscience of many people. Rules would be just and bring happiness if they were based on the sovereignty of the people.[37]Almost all colonial countries, namely the Netherlands, Great Britain, France, Belgium, and the United States of America had democratic systems, except for Italy and Japan. This likely contributed to the independence activists' critical stance towards Western democracies.

Regardless, Soekarno and Hatta attempted to find a middle ground to build a more appropriate democracy for Indonesia. However, they differed in how to overcome democracy's weaknesses. Both believed in the fundamentals of democracy. However, Soekarno was more concerned with overhauling manifestations of injustice.[38] Meanwhile, Hatta emphasized the need for deliberative process and economic democracy. They both found

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30 Fikiran Rakyat Daily, 1932 in Ir. Soekarno, *op. cit*., pp. 170 – 173. Later, in his famous 1 June 1945 speech, Soekarno asserted that in the Western democracy, there is no social justice and economic democracy. See Sekretariat Negara Republik Indonesia, *op.cit.,* pp. 79, 259.

31 Soekarno, *Achieving Independent Indonesia*, an article, March 1933 in Ir. Soekarno, *op.cit.*, 2005, p.283.

32 Sekretariat Negara Republik Indonesia, *op.cit.,* pp. 255 – 261.

33 Mohammad Hatta, *Daulat Ra'jat*, No. 1, 20 September 1931, in *Karya Lengkap Bung Hatta* (The Complete Works of Bung Hatta), LP3ES, 1998, p. 342.

34 Sekretariat Negara Republik Indonesia, *op.cit.,* p. 263.

35 Mavis Rose, *op. cit.,* p. 108 -109.

36 Ibid., p. 66. As quoted from M. Hatta, *"Propaganda"*, in *Portrait of a Patriot*, p. 156. It was first published in *Indonesia Merdeka*, 1926.

37 Mohammad Hatta, *Ke Arah Indonesia Merdeka* (Toward Independent Indonesia), in *Karya Lengkap Bung Hatta (Buku 1): Kebangsaan dan Kerakyatan*, Jakarta: Penerbit PT Pustaka LP3ES Indonesia, 1998, p. 343.

38 Later, Soekarno introduced his ideas on *"Rediscovering Our Revolution"* in his speech of 17 August 1959 and *"To Build a World a New"* in his speech at the XIV United Nations Plenary Session on 30 September 1960.

that independence was a prerequisite. However, their different standpoints had seminal consequences for the formation of the first Constitution (the 1945 Constitution) and post-independence governance practices.[39]

Another nationalist movement figure, Sutan Syahrir, would later become the first prime minister of Indonesia. He gained an appreciation of socialist principles and became a proponent of parliamentary democracy when studying at the Law Faculty of Amsterdam University and Leiden University from 1929 to 1931.[40]

In 1940, several young Indonesians signed-up as cadets in Bandung at the Royal Military Academy (*Koninklijke Militaire Academie*). These cadets included Tahi Bonar Simatupang, who later became the first Chief of Staff of the Indonesian Armed Forces. It also included Abdul Harris Nasution[41] who later became the second Commander of the Indonesian Armed Forces and the originator of Indonesia's dual-function military (*dwifungsi*). They both would become prominent military figures who shaped Indonesian politics in the 1950s.

Thus, before the Japanese occupation, ideas of constitutional democracy had already spawned in Indonesia. However, these ideas evolved around personal figures. Politics did not develop as institutionalized politics. Instead, it developed as mass political action outside and against the existing colonial power structures.

Japan invaded and defeated the Netherlands in March 1942 and then colonized Indonesia for three and a half years. The new colonial ruler dissolved political parties, closed newspapers and radio stations, and prohibited political activity.[42] Only the Indonesian Islamic Council (*Majelis Islam A'la Indonesia*) was permitted to stay open.[43] On the other hand, the Japanese ruler established the *Putera* (People's Power Centre),[44] led by Soekarno, Mohammad Hatta, Ki Hajar Dewantoro, and Kiyai Haji Mas Mansyur.

Japan also established the Indonesian voluntary army, PETA (*Pembela Tanah Air*), the local police (*Keibodan*), a semi-military youth group (*Seinendan*), and soldiers' helpers (*Heiho*). The Japanese authority also reorganized the neighbourhood system to make it easier to mobilize people if necessary.

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39 See also Herbert Feith, *The Decline of Constitutional Democracy in Indonesia,* PT Equinox Publishing Indonesia, 2007, pp. 40 – 43.

40 Rudolf Mrazek, *op. cit*., pp. 56 – 81. Sutan Syahrir did not finish his law degree when Hatta sent Sjahrir ahead of him to the Dutch East Indies in 1931, to help set up the Indonesian National Party (PNI). See also Asian Month, November 2017.

41 His book, *Fundamentals of Guerrilla Warfare,* was compulsory reading at West Point Military Academy, USA.

42 Law no. 3, 20 March 1942. See also Anthony Reid, *To Nation by Revolution*, *Indonesia in the 20th Century*, NUS Press, 2011, p. 23.

43 In 1943, the MIAI was abolished and replaced by Masyumi (*Majelis Syura Muslimin Indonesia* – Shura Council of Indonesian Muslim), a non-political organization and federation of Islamic organizations such as Nahdlatul Ulama and Muhammadiyah.

44 Putera stands for *Pusat Tenaga Rakyat*.

Japan also established a voluntary army corps in the environment of Islamic organizations, including *Hisbullah* (God's Army) and *Laskar Sabillillah* (God's Soldiers).[45] Japanese-trained PETA officers included Sudirman, who would become the first commander of the Indonesian Armed Forces, and Suharto, who would become Indonesia's second president.[46]

Nationalist leaders could foster nationalism and pursue independence through these Japanese-sponsored paramilitary youth organizations and other mass groups.[47] Likewise, the Japanese rulers transformed mainstream nationalists into a cooperative movement, a change from their non-cooperative stance during the Dutch colonial era. Most of its prominent figures, such as Soekarno and Hatta, cooperated with the Japanese. However, others refused to cooperate and went underground, including Sutan Syahrir and Amir Syarifuddin.[48] However, they all kept in contact.[49] The main discourse among cooperative Indonesian leaders during the Japanese colonial period focused on how to win the war against the common enemy, namely the Western countries. They promoted anti-Western, anti-individualist, and anti-capitalist attitudes, and prepared for Indonesia's independence.[50] The independence movement cooperated with the Japanese but was neither organized along political party lines nor supported by independent mass media.

Meanwhile, the Japanese were increasingly losing power. The American fleet had approached the Japanese islands. The atomic bombs blew up Hiroshima on 6 August 1945 and Nagasaki on 9 August 1945. Japan was on the verge of defeat. On 14 August 1945, the Japanese dissolved PETA and Heiho.[51] The following day, 15 August 1945, Emperor Hirohito announced

45 K.H. Zainul Arifin was appointed as the commander of *Hisbullah* and K.H. Masykur as the commander of *Laskar Sabilillah*. Both were prominent figures of Masyumi from an NU (*Nahdlatul Ulama*) background.

46 Prior to joining PETA, Suharto was a sergeant of the Dutch colonial military KNIL *(Koninklijk Nederlands-Indisch Leger)*.

47 John Ball, *Indonesian Law, Commentary and Teaching Materials*, Faculty of Law, University of Sidney, 1981, p. 90.

48 Amir Syarifuddin Harahap is the 3rd Indonesian Prime Minister (3 July 1947 – 29 January 1948). He was educated in Haarlem and Leiden in the Netherlands. In 1937, towards the end of the Dutch period, Amir led a group of younger Marxists in establishing Gerindo ('Indonesian People's Movement'), a radical cooperating party opposed to international fascism. He joined PKI and was executed by the Indonesian military in 1948 after the failed Communist rebellion.

49 Mavis Rose, *op. cit.*, p. 158.

50 Mohammad Hatta, *Untuk Negeriku*, *Menuju Gerbang Kemerdekaan* (For My Country, Towards the Gate of Independence), an autobiography, Penerbit Buku Kompas, April 2011, p. 64. Prime Minister Koiso announced in September 1944 that Indonesia would soon be free.

51 Bilveer Singh, *Dwifungsi ABRI: The Dual Function of the Indonesian Armed Forces*, Singapore Institute of International Affairs, 1995, p. 26.

Japan's surrender.[52] However, the three and half years of Japanese military administration had shaken Indonesia's social structure. The mass mobilization – unknown during the Dutch colonial time – reflected this change, turning into nationalist movements.[53]

On 17 August 1945, Soekarno and Hatta proclaimed Indonesia's independence. The proclamation took place in a spirit of revolution, without the presence of adequate political structures and with no sufficient experience in institutionalized politics. Nevertheless, the militarily trained youth groups and mass movements supported this proclamation.[54] The people were revolutionized through patriotic songs and public speeches in front of *rapat raksasa* (mass meetings).[55] A collective frame of mind formed during and after the Japanese occupation.

Later, Simatupang wrote that potential mass support, mass-participation, and weak institutionalized political structures is one of the recurrent patterns in the Republic's political life that fosters extra-party politics.[56]

## II.3 The making of the 1945 Constitution

Indonesia's first Constitution (i.e., the 1945 Constitution) was designed initially for "an independent Indonesia as part of Greater East Asia", according to its main drafter, Soepomo.[57] Building the Greater East Asia Co-Prosperity

52 Following the treaty of surrender, then Japanese military administration in Indonesia was under the control of and subject to the instructions of the Allies. See Janis Mimura, *'Japan's New Order and Greater East Asia Co-Prosperity Sphere: Planning for Empire,'* The Asia-Pacific Journal Vol 9, Issue 49 No 3, 5 December 2011.

53 Kishi Koichi, *Occupation in Indonesia*, in Joice C. Lebra, *Japan's Greater East Asia Co-Prosperity Sphere in World War II, Selected Readings and Documents,* Oxford University Press, 1975, p. 136.

54 One day before proclamation, Soekarno and Hatta were kidnapped by an ex-military youth group which was impatient with the sluggish older generations. They brought the leaders to Rengasdengklok. In this revolutionary environment, both leaders agreed to proclaim Indonesian independence on 17 August 1945. See, St. Sularto & D. Rini Yunarti, *op.cit.*, p. 56.

55 Sartono Kartodirdjo, *The Modern Indonesia, Tradition and Transformation.* Gajah Mada University Press, 1984, p. 88.

56 T.B. Simatupang, *The Role of the Military in Stabilization of Southeast Asian Nations with Special Focus on Indonesia*, an article in Bernhard Grossman (ed), Southeast Asia in the Modern World, Wiesbaden, Otto Harrassowitz, 1972, p. 275. Quoted from A.S.S. Tambunan, *Socio-Political Functions of the Indonesian Armed Forces, An Effort to Outline the Issues*, Pustaka Sinar Harapan, Jakarta, 1995.

57 Sekretariat Negara Republik Indonesia, *op. cit.*, pp. 368–369. Advice from Gunseikan (Chief of Japan's Military Government), 28 May 1945 and Congratulatory Remarks from Rikugun Taysoo (Commander of Japan's VIIth Army) – General Itagaki Seishoroo, 28 May 1945. See also The Elucidation of Soepomo, 15 July 1945. Ibid., p. 266.

Sphere was the Japanese colonial policy's project.[58] The Sphere was an autarkic bloc of Asian nations led by the Japanese and free of Western powers.[59] Its ultimate goal was securing the economic interests of Japan and proving its cultural superiority.[60] This project was Japan's geopolitical concept behind the Pacific War in WWII. It was a "pan idea" based on the geopolitical theory that the world would be divided into four pan-regions of large economic spheres. The regions would be centred around the "core" industrial nations of the United States, Germany, the Soviet Union, and Japan.[61] It served as a complex ideological matrix that combined various strands of Japanese technocratic and right-wing thinking. The Sphere was the geopolitical projection of the 'New Order' reformation led by Kishi Nobusuke. It meant to reorder Japan's society and then reconstruct the world.[62] This plan sought a new hierarchical, organic, functionalist Japanese community to replace the existing society, supposedly weakened by the individualism and capitalism advanced by Japan's economic development. Their technocratic vision affirmed neither capitalism nor socialism, but 'managerialism'.[63] The idea opposed Western materialistic, liberal, and individualistic values as well as communism.[64]

On 1 August 1940, Matsuoka Yosuke, the foreign minister in Prime Minister Konoye's second cabinet, announced the concept of the "Greater East Asia Co-Prosperity Sphere".[65] The idea covered the territories of Japan (including Korea, Taiwan, and Sakhalin), China, Manchukuo, French Indo-

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58 Janis Mimura, *Planning for Empire, Reform Bureaucrats and the Japanese Wartime State,* Cornell University Press, 2011, p. 171. On 1 August 1940, Japanese Foreign Minister Matsuoka Yôsuke announced the government's policy to build the so-called "Greater East Asia Co-Prosperity Sphere." The term Greater East Asia Co-Prosperity Sphere implied that in addition to the core region of Japan, Manchukuo, and China, the sphere would include Southeast Asia, Eastern Siberia, and possibly the outer regions of Australia, India, and the Pacific Islands.

59 Janis Mimura, *'Japan's New Order and Greater East Asia Co-Prosperity Sphere: Planning for Empire,'* The Asia-Pacific Journal Vol 9, Issue 49 No 3, 5 December 2011. The New Order conception that underlies the geopolitical idea was anti-individualist and anti-capitalist.

60 Ibid. Japanese leaders used the Greater East Asia Co-Prosperity Sphere in their propaganda in Japan and in other Asian countries. The leaders spoke of "Asia for Asians," the need to liberate Asian countries from Western imperialist powers, and economic co-prosperity for member nations of the autarkic bloc. As Japan occupied various Asian countries, they set up governments with local leaders who proclaimed independence from the Western powers.

61 Janis Mimura, *Planning for Empire, Reform Bureaucrats and the Japanese Wartime State,* Cornell University Press 2011, p. 189.

62 On 3 November 1938, Prince Konoye publicly declared Japan's intention to establish the New Order in East Asia. See *International Military Tribunal for the Far East*, chapter 7.

63 Janis Mimura, *op.cit.*, p. 14. To some extent, it resembles the idea of a *'negara pengurus'* (caretaker state) proposed by Hatta during a BPUPK meeting on 15 July 1945. See Sekretariat Negara Republik Indonesia, *op.cit.* p. 262.

64 Reischauer, Edwin O., Craig, Albert M., *Japan, Tradition & Transformation,* Revised Edition, Harvard University, Houghton Mifflin Company, Boston, 1989, p. 270.

65 Janis Mimura, *op.cit.*, p. 171.

china, and the Dutch East Indies (*Hindia Belanda*).[66] Yosuke stated that Japan must control the western Pacific.[67] On 24 January 1941, Konoye stated that a Mutual Prosperity Sphere in Greater East Asia was essential to the continued existence of Japan.[68] *Yomiuri*, a prominent Japanese newspaper, wrote that Japan must remove all elements in East Asia which would interfere with its plans. Britain, the United States, France, and the Netherlands would have to be forced out of the Far East. Asia was the territory of the Asians.[69]

The policy regarding Greater East Asia was controlled directly from Tokyo by the Ministry of Greater East Asia Ministry, which was in the hands of the military, after the military took control of the office from the Japanese Ministry of Foreign Affairs in 1942.[70] On 7 December 1941, Japan attacked Pearl Harbour and started the Pacific War in World War II. In Japan's view, this was a 'hundred-year' war between the architects of a new, fascist geopolitical order and the defenders of the old liberal capitalist order.[71] The war was far more than just a battle over resources.[72] The Greater East Asia Co-Prosperity Sphere idea was meant to rally those in the Japanese-occupied areas against imperialism and colonialism and encourage them to mobilize with Japan in the war and the peace that would follow.[73]

Clearly, Greater East Asia was a major and important project, projecting Japan's future existence.[74] Therefore, it is unsurprising that the independent states formed by Japan, such as Burma, the Philippines, and Indonesia, were supposed to comply with the New Order and the Greater East Asia Co-Prosperity project.

As revealed in Japan's confidential Secretariat Paper no. 3167,[75] the military administration's basic policy in the Southern areas was to guide the native inhabitants to assume their proper places and to cooperate in establishing the Greater East Asia Co-Prosperity Sphere under the Empire's

66 Peter Duus, *The Greater East Asia Co-Prosperity Sphere, Dream and Reality*, Stanford University, Journal of East Asian History, Volume 5, number 1 (June 2008) pp. 143–254.
67 Gordon W. Prange, *The Pacific War Online Encyclopaedia*, 1981.
68 Ibid.
69 Ibid.
70 See *Pacific War Online.*
71 Janis Mimura, *op.cit.,* p. 171. See also, Reischauer, Edwin O. and Craig, Albert M., *op.cit.*, p. 270.
72 The United States of America had, on 26 January 1940, terminated its Commercial Treaty with Japan. The embargo was extended and placed under a licensing system on 10 December 1940.
73 Ian Nish, "Greater East Asia Co-prosperity Sphere", in *The Oxford Companion to the Second World War*, general editor I.C.B. Dear (Oxford and New York), Oxford University Press, 1995, p. 501.
74 Janis Mimura, *op.cit.,* p. 172.
75 The Japanese Empire's Ministry of Navy, Secretariat Paper no. 3167, 14 March 1942.

leadership.[76] Billing themselves as Asia's champions against Western imperialism, the Japanese occupiers attempted to encourage and use nationalism to obtain local cooperation. Japan called its takeover a "liberation" in one area, the granting of "independence" to a native government in another and setting up a new native government in a third.[77]

In Burma, in March 1943, the Japanese authority established a so-called "Preparatory Committee" to frame a constitution. On 8 May 1943, a Preparatory Committee for the Independence of Burma was established.[78] The Committee included a wide variety of respected members and was chaired by Ba Maw. Japan granted Burma independence on 1 August 1943 on the condition that Burma should conclude a Treaty of Alliance with Japan and should declare war against Britain and the United States.[79]

Further, Document no. 73[80] states that a Preparatory Committee for Independence would be organized in Java. In the meantime, it would investigate and study independence-related matters and consider the Committee members' creative ideas, under the supervision of the Supreme Army Commander of Java. As a link in the Greater East Asia Co-Prosperity Sphere, the new nation was meant to maintain close and inseparable relations with the Empire.[81] On 11 May 1945, the Greater East Asia Ministry proposed that certain matters should be determined separately under the relevant circumstances.[82] These matters included declarations of war by the newly independent nations against the United States, Britain, and the Netherlands, and those nations' treaties with the Empire.

Against this background, on 1 March 1945 (Emperor Hirohito's birthday), the Japanese founded the BPUPK (The Investigation Commission for

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76 Harry J. Benda, James K. Irikura, Koichi Kishi, *Japanese Military Administration in Indonesia: Selected Documents.* Document no. 6. Translation Series no. 6, Southeast Asia Studies, Yale University, 1965, p. 26. As the confidential paper summarized, Imperial Japan aimed for permanent possession of these occupied territories. Thus, the basic policy of the Civil Administration in the Navy territory (Borneo, Sulawesi) was *eikyu senriu* (permanent occupation). To this end, administrative and other policies would be devised to facilitate the entire region's organic integration into the Japanese Empire. See Ooi Keat Bin, *The Japanese Occupation of Borneo, 1941-1945*, Routledge, New York, NY 10016, 2011, p.

77 Edwin O. Reischauer and Albert M. Craig, *op.cit.,* p. 272.

78 Thakin Nu, *Burma under the Japanese, Pictures and Portraits*, edited and translated by J.S. Furnivall, London, MacMillan and Company Ltd., Reprinted April 1954, pp. 28, 54. Thakin Nu, later known as U Nu, Prime Minister of Burma, wrote that some members of the committee were pro-Japan, "the puppets who would do whatever the Japanese Command wanted."

79 Ibid., pp. 38 – 69.

80 Document no. 73 on the Tentative Plan of the Southern Area Administration Office of the Army Ministry of Japan's Empire, 4 January 1945.

81 Harry J. Benda, James K. Irikura, Koichi Kishi, *op.cit.,* p. 263.

82 Ibid., p. 265; Also known as the *Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan*.

Preparations for Independence) in Jakarta.[83] The Japanese appointed sixty Indonesians as core members, including prominent independence movement figures from the Dutch colonial era.[84] Members were generally staff from various Japanese military authorities. Eight Japanese officials were added as special members.[85] The chairman was Radjiman Wedyodiningrat, co-founder and former Boedi Oetomo chairman and Boedi Oetomo's representative on the *Volksraad*. Ichibangase Yosio (Japanese) and Raden Panji Soeroso were appointed as Vice-Chairmen. Soepomo was selected as a member.[86] The Commission's member selection followed Japan's policy of embracing and obtaining support from local nationalist and independence movements.[87] Sutan Syahrir, another revolutionary independence leader, refused to join and went underground, in agreement with Soekarno and Hatta.[88] The Japanese authority enacted a working procedure requiring the Investigation Commission to report periodically to *Gunseikan*, the Japanese Military Administration.[89]

Thus, the 1945 constitution-making process was undeniably not an independent process for a truly independent state. The Japanese colonial government initiated and supervised the process, ensuring it was in Japan's interest.[90]

On the other hand, the process occurred at a time when many Western democratic countries were capitalist, colonialist, anti-freedom, and oppressive. During this period, many freedom fighters associated their struggles with anti-Western camps. This association coincided with the Japanese invaders' view that fascism was superior to liberalism and communism, a "third way" of overcoming capitalism's crisis and resolving class conflicts

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83 Subsequently, the English name of the Body was shortened to The Investigation Commission. The other committee, The Preparatory Committee for Indonesian Independence was also shortened to The Preparatory Committee. The Investigation Commission, chaired by Radjiman Wedyodiningrat, was dissolved on 7 August 1945 and replaced by a Preparatory Committee, chaired by Soekarno. The Investigation Commission had some Japanese special members. The Preparatory Committee had no Japanese members.

84 There was some level of negotiation between the Japanese authorities and Indonesian activists in selecting the members. However, the Japanese authority had the final say.

85 Later in July 1945, six more Indonesian members were added.

86 Sekretariat Negara Republik Indonesia, *op.cit.*, pp. xxv-xxvi.

87 Reischauer, Edwin O. and Craig, Albert M., *op.cit.*, p. 272.

88 See Rudolf Mrazek, op.cit., p. 222.

89 *Makloemat Gunseikan no. 23, 2605.* See Marsillam Simanjuntak, *Pandangan Negara Integralistik, Sumber, Unsur, dan Riwayatnya dalam Persiapan UUD 1945,* Pustaka Utama Grafiti, second printing, 1997, p. 75.

90 Radjiman Wedyodiningrat, in his foreword for the book titled *'Pidato 1 Juni Bung Karno'*, 1947, wrote "... even though (The Investigation Commission) session was under strict surveillance of the Japanese Government army." In his Address to the State in the Opening of the First Session of Provisional MPRS on November 10, 1960, Soekarno described the UUD 1945's drafting process as "under the threat of colonial bayonet", but Soekarno refuted that the UUD 1945 was Japanese-made. See also Marsillam Simanjuntak, *op.cit*., p. 77.

and authority in modern industrial society.[91] Such worldviews helped shape the independence struggle during the Japanese occupation. In general, independence fighters conformed to the anti-Western doctrines embraced by the Japanese.

During the Investigation Commission's opening ceremony on 28 May 1945, Mayor General Seisabaro Okasaki (the Head of Military Administration)[92] and General Itagaki Seishoro (the Seventh Army's Commander) asserted that an independent Indonesia was a link in the Greater East Asia Co-Prosperity Sphere.[93] Radjiman Wedyodiningrat,the Chairman of the Investigation Commission, made a similar statement.[94] That their messages were later adopted in the Constitution's draft Preamble[95] denotes that the Japanese authority had tight control on the Constitution's design.[96]

In his opening remark, Wedyodiningrat appealed to the Investigation Commission's members to search for the ideal basis of the newly independent state.[97] In response, Investigation Commission members submitted various ideas. Soekarno delivered his ideas in his famous speech on 1 June 1945, in which he proposed, among other things, the fundamental norms of an independent Indonesia and the five principles of *Pancasila* as the state's foundations. The *Pancasila* includes the Belief in the One and Only God (*Ketuhanan Yang Maha Esa*), a Just and Civilised Humanity (*Kemanusiaan Yang Adil dan Beradab*), Indonesia's Unity (*Persatuan Indonesia*), a Democratic Life guided by Wisdom in Deliberation and Representation (*Kerakyatan Yang Dipimpin oleh Hikmat Kebijaksanaan, Dalam Permusyawaratan Perwakilan*) and Social Justice for all of Indonesia's People (*Keadilan Sosial bagi seluruh Rakyat Indonesia*).[98]

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91 Janis Mimura, *op. cit*., p. 5.

92 Gordon W. Prange, *At Dawn We Slept, The Untold Story Of Pearl Harbour,* Penguin Books, 1991.On 1 November 1942, *Tojo* took the administration of the occupied territories completely out of the Foreign Office's hands with the creation of the Greater East Asia Ministry. Since the Army effectively controlled the Greater East Asia Ministry, it also had complete control of the occupied territories. The area army commanders had almost complete freedom to run local military governments as they saw fit.

93 Sekretariat Negara Republik Indonesia, *op.cit*., pp. 367 - 370.

94 Ibid., p. 374.

95 Ibid., p. 266. In this part, Soepomo was recorded explaining the draft of the "preamble" (*pembukaan*) which contains the idea of Indonesia as part of Greater East Asia. As concluded in Hatta's Vice-Chairman Preparatory Committee report to the Committee's plenary meeting on 18 August 1945, the *Mukadimah* (the original draft) revoked and replaced the draft preamble. The *Mukadimah* was prepared by the nine-person committee led by Soekarno.

96 Ibid., pp. 386-388. The Investigation Commission had to report the outcomes of the meeting to the Japanese Military Administration for further guidance.

97 Ibid., p. 92.

98 Sekretariat Negara Republik Indonesia, *op.cit*., pp. 63-84.

The Investigation Commission worked on the Constitution's draft from 29 May 1945 until 1 June 1945 and from 10 to 17 July 1945. Although the Japanese tightly controlled the process,[99] the Indonesian members attempted to smuggle ideas of true freedom and democracy into the draft. The Investigation Commission also formed a small eight-person committee, led by Soekarno, to formulate the state's foundation.[100] The committee struggled to resolve relations between religion and the state. At that time, 38 BPUPK members were in Jakarta. They were Jakarta residents and BPUPK members attending Jakarta's session of *Tyuo Sangiin* (the Japanese Army's Central Government's Advisory Board). Following BPUPK's governance procedures, Soekarno invited the 38 members to hold a meeting.[101] The meeting agreed to change the members and to increase the committee's size to nine members, consisting of Soekarno, Mohammad Hatta, Mohammad Yamin, Soebardjo, Maramis, Kahar Moezakir, Wahid Hasjim, Abikoesno, and Agoes Salim.[102]

Evading Japanese oversight, Soekarno and his Committee of Nine succeeded in reaching an agreement between the "Islamic group" and the "nationalist group". They managed to draft the Constitution's Preamble, entitled the *'Mukadimah'* (the Preamble), also known as the *Piagam Jakarta* (the Jakarta Charter).[103] The *Mukadimah* emphasized the values of true freedom, human dignity, social justice, people's sovereignty, and deliberative democracy, containing the *Pancasila* as the foundation of the state.

The translated draft of the *Mukadimah* was as follows:[104]

> Whereas Independence is truly the right of all nations and therefore colonization in the world shall be abolished, as it is not in accordance with humanity and justice;

99 It should be noted that the Japanese special members were always present during The Investigation Commission meetings.

100 The Committee of Eight consisted of Soekarno, Mohammad Hatta, Mohammad Yamin, M. Soetardjo Kartohadikoesoemo, R. Otto Iskandardinata, A. Maramis, Ki Bagoes Hadikoesoemo and K.H. Wahid Hasjim.See Sekretariat Negara Republik Indonesia, *op.cit.*, p. 88.

101 J.H.A. Logemann, *Nieuwe Gegevens Over Het Ontstaan Van De Indonesische Grondwet Van 1945*, N.V. Noord-Hollandsche Uitgevers Maatschappij Amsterdam - 1962, pp. 693-694.

102 See Sekretariat Negara Republik Indonesia, op.cit., p. 94. Replacement and addition of members, Abdul Kahar Moezakir, Agus Salim, and Abikoesno Tjokrosoejoso provided a more proportional presence for figures with Islamic and nationalist political background in the committee.

103 The draft, which is also known as *Piagam Jakarta* (Jakarta Charter), was agreed by the Committee of Nine on 22 June 1945 and reported to The Investigation Commission on 11 July 1945. See, Sekretariat Negara, *op cit*., pp. 163 – 205.

104 Sekretariat Negara Republik Indonesia, *op.cit.*, p. 385. The English version of the Mukadimah is translated into English based on the Preamble of the 1945 Constitution of the Republic of Indonesia, published by the Constitutional Court of the Republic of Indonesia, 2015.

> And the struggle of the movement towards the independence of Indonesia has now reached the moment of rejoicing to guide the people of Indonesia safely and soundly to the threshold of independence of the State of Indonesia, which is independent, united, sovereign, just and prosperous;
>
> By the Grace of God the Almighty and impelled by the noble desire to live a free national life, the people of Indonesia hereby declare their independence;
>
> Subsequent thereto, to form a Government of the State of Indonesia which shall protect the whole Indonesian nation and the entire native land of Indonesia and to advance the public welfare, to enhance the intellectual life of the nation, and to participate in the implementation of world order which is by virtue of freedom, perpetual peace and social justice, therefore the National Independence of Indonesia shall be composed in a Constitution of the State of Indonesia, which is structured in a form of the State of the Republic of Indonesia, with people's sovereignty based on the Belief in God with obligation to implement Islamic sharia to its followers, Just and Civilized Humanity, the Unity of Indonesia and a Democratic Life guided by Wisdom in Deliberation/Representation, and by realizing Social Justice for all the People of Indonesia.

The Committee of Nine's educational backgrounds and history of independence activism explains how they could produce such a Mukadimah script. They graduated from academic institutions in the Netherlands, the Netherlands-Indies, Egypt, and Mecca. They became leaders of national independence movements when receding liberalism, capitalism, and communism conflicted with 'superior' fascism.[105] They also encountered liberal-capitalist Western countries that were generally colonialist and anti-independence.

Unlike other parts of the 1945 Constitution, the Committee of Nine compiled the Mukadimah manuscripts without the Japanese military's supervision. Therefore, the original Mukadimah is the only part of the 1945 Constitution that is clean of fascist Japanese ideas and interests and contains the pure aspirations and ideals of independent Indonesia.

On 10 July 1945, the Committee of Nine reported the Mukadimah's draft to the BPUPK plenary meeting. However, despite being asked by many members to immediately discuss it, the Chairman of BPUPK, Radjiman, postponed it and prioritized discussing the draft contents of the Constitution. The following day, the Chairman invited members of BPUPK to prepare for the formation of a commission to draft the Constitution. But before continuing, Parada Harahap asked for time to convey his views on the Mukadimah manuscript reported by the Committee of Nine the day before. Basically, he warned that the Indonesian people should not forget Japan's great meritorious contribution to Indonesia in gaining independence and that an independent Indonesia was a member of the Greater East Asia family.[106] He noted that Indonesian independence documents should reflect both points. Then, BPUPK formed a committee to draft the

105 Janis Mimura, 2011.

106 See Sekretariat Negara Republik Indonesia, op.cit., pp. 164-165, 176-179, 213.

Constitution chaired by Soekarno with 19 members and a special Japanese Government Military officer member.[107]

On 11 July 1945, the Constitution's Drafting Committee discussed the draft of the Mukadimah. The Committee rejected the Mukadimah and set it aside.[108] Then Soekarno, the chairman of the Committee, appointed four members of the Committee, Soebardjo, Soepomo, Soekiman and Harahap to draft a new introduction to replace the Mukadimah.[109]

This four-person team (Team-4) was tasked with finalising the Preamble replacement by the following morning, 12 July 1945. After forming Team-4, the Constitution's Drafting Committee formed a small team of six members to draft the body of the Constitution. This small team consisted of six members: Wongsonagoro, Soebardjo, Maramis, Soepomo, Soekiman and Salim, with Soepomo as chairman (Team-6).[110] Team-6 was assigned to complete the draft Constitution and report it to the Constitution's Drafting Committee on 13 July 1945. All of Team-4's members who oversaw revising the Mukadimah, except Parada Harahap, were members of Team-6. Both teams were led by Soepomo and worked in intertwined time frames. This process shows that the Mukadimah's replacement and the drafting of the Constitution was carried out in the same spirit.

On 13 July 1945, at the urging of Gunseikanbu (the Japanese military government),[111] the Small Team submitted their draft Constitution at the Constitution's Drafting Committee's meeting.[112]

During that meeting, Wahid Hasjim proposed that the President should be a Muslim, that Islam should be the state religion, and that the state should guarantee the independence of other faith practitioners. However, others contested this proposal. Agoes Salim argued that the proposal nullified the compromise between the nationalist and Islamist camps. Salim asserted that they must respect their promise to protect other religions, with which Djajadiningrat, Wongsonagoro, and Oto Iskandardinata agreed.[113]

Regarding Article 29, Iskandardinata proposed inserting the phrase "The State shall be based on God with the obligation to implement Islamic Sharia for the adherents", which had been in the draft Preamble. Soepomo,

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107 The committee consisted of Soekarno (Chairman), Maramis, Oto Iskandardinata, Poeroebojo, Agus Salim, Subardjo, Soepomo, Mrs. Ulfah Santosa, Wachid Hasjim, Parada Harahap, Latuharhary, Susanto, Sartono, Wongsonegoro, Wurjaningrat, Singgih, Tan Eng Hoa, Husein Djajadiningrat, Sukiman. See Sekretariat Negara, *op.cit.*, p. 201.

108 It was set aside until 18 August 1945, when Sukarno and Hatta insisted on revoking the new text and reviving the original Mukadimah.

109 Ibid., p. 213. The four members completed the draft and reported it to the Committee on 14 July 1945. The new draft consists of Declaration of Independence and Preamble.

110 See Sekretariat Negara Republik Indonesia, *op.cit.,* p. 222.

111 See Sekretariat Negara Republik Indonesia, *op.cit.,* p. 146.

112 See Ibid,pp. 226-233. Therefore, the making of the Constitutional articles was certainly not based on the ideas and spirit contained in the draft Preamble prepared by the team of nine. Soepomo also emphasized that in preparing the Constitution, Indonesia must recognize itself as a country within the Greater East Asia environment. See Ibid, p. 266.

113 Ibid., pp. 224-225.

as head of the Small Team, expressed no objection to the proposal.[114] On the other hand, Maria Ulfah Santoso proposed including basic rights in the Constitution. However, Soepomo refused, saying that the state of Indonesia was based on the people's sovereignty.[115]

On 14 July 1945, Soekarno, as the chairman of the Constitution Drafting Committee, reported the Constitution's draft introduction – comprised of the Declaration of Independence and a short Preamble – to the Investigation Commission.[116]

The manuscript of the Declaration of Independence states, among other points:

> The victory of Dai Nippon Teikoku (the Japan Empire) over Russia in the 1905 war has inspired – the vehement determination of Indonesian people for freedom – with the spirit of Eastern nationalism. The example of how the Japan Empire triumphed, has spawned organized movements in Indonesian nation, ... demanding the right to freedom of every nation ...
>
> The demand of Dai Nippon Teikoku for the right of Asian freedom, based on equal right of every nation, has been contrary to the interests of Western imperialism ..., has eventually forced Dai Nippon to declare war against the USA and the Britain.
>
> Acknowledging and respecting the righteous intention of Dai Nippon Teikoku in the War of Greater East Asia, every nation within the Greater East Asia Co-prosperity Sphere ..., has been obliged to contribute with all the might and with full determination, to the joint struggle ....
>
> And now, our struggle has come to the moment of rejoicing, to bring Indonesian people safely and soundly to the gate of the state of Indonesia, which is free, united, sovereign, just and prosperous, who live as true members of the family of the Greater East Asia ....
>
> By the grace of Allah, the Almighty, … herewith the people of Indonesia declares independence.

The declaration of independence is followed by a short Preamble,[117] which states:

> In the name of Allah, the All Compassionate and Merciful,
>
> To form a Government of the State of Indonesia which shall protect the whole Indonesian nation and the entire homeland of Indonesia and in order to advance general prosperity, to develop the nation's intellectual life, … which is to be established as the State of the Republic of Indonesia with sovereignty of the people and based on the belief in God, with the obligation to implement Islamic shari'a for the adherents, ….

114 Ibid., p. 225.
115 Ibid., p. 225.
116 Ibid., pp. 235-238.
117 In which the first three paragraphs of the (original) Mukadimah were abolished.

The Investigation Commission agreed that the new Declaration of Independence and the short Preamble would be the first part of the Constitution.[118]

On 15 July 1945, Soekarno reported the draft Constitution to the Investigation Commission. On that occasion, Soepomo elucidated the draft and emphasized that the Constitution should not contain articles that were not aligned with the concept of the familial state (*negara kekeluargaan*).[119] He also reminded the Commission that the constitution should be made for the state to enrich the familial life of Greater East Asia and that Indonesia should realize its position as a state in the sphere of Greater East Asia.[120] Further, Soepomo asserted that the people's sovereignty would be implemented through the highest authority, a People's Consultative Body (*Badan Permusyawaratan Rakyat*). Therefore, it was not necessary to include basic rights in the Constitution.[121] He also confirmed that it should refute individualism and instead focus on the familyhood system. Soepomo emphasized that familyhood applied to the brotherhood of states within Greater East Asia, of which Indonesia was a member.[122]

Soepomo's description of the draft was similar to his previous presentation before the Investigation Commission on 31 May 1945. At that time, Soepomo stated that Indonesia should be built on the integralist *Staatsidee* (state idea) as adopted by Nazi Germany and fascist Imperial Japan. Soepomo elucidated that the integralist state of Indonesia did not need to guarantee individual rights vis-a-vis the state (*Grund und Freiheitsrechte*) because everyone was an organic part of the state and the state did not stand outside of personal freedom. He reminded the Investigation Commission that the integralist state was what the Japanese authority had recommended.[123] Election by the people for the people was not acceptable because it was based on the individualistic concept and the way of Western (parliamentary) democracies, i.e., a system that equated human beings with one another as mere figures, all of whom were of equal value. Instead, a people's deliberative council should elect the leader, linking them and the people.[124] Soepomo's opinion was identical to that of Jean Bodin, who argued that "the worst system is people's sovereignty (democracy), because the voting rights (votes) are counted, not weighed, while the number of the stupid, the sinners and the fools are a thousand times more than the honest."[125]

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118 See Sekretariat Negara Republik Indonesia, *op.cit.,* pp. 265, 267.

119 The nation as an extended family, whereby the economy is not only dependent on profit-making but also on social responsibilities.

120 See Sekretariat Negara Republik Indonesia, *op.cit.,* p. 266.

121 Ibid., p. 223. Later in that meeting of 13 July 1945, the name of the council was changed from *Badan Permusyawaratan Rakyat* to *Majelis Permusyawaratan Rakyat* (MPR).

122 Ibid., pp. 265-266.

123 Ibid., pp. 34-37, 40.

124 Ibid., p. 42.

125 See Bodin, Jean (1530-1596) in, *On Sovereignty, Six Books of the Commonwealth,* abridged and translated by M.J. Tooley, Seven Treasures Publications, 2009,pp. 230-239.

Thus, the Constitution's main text was drafted towards uniting leadership and the people and under the principle of state unity (*das Ganze der politischen Einheit des Volkes*). This principle was a national-socialist concept that, according to Soepomo, reflected Indonesian society. In this system, Soepomo underlined that the president is the Father of the nation, a true leader leading the way towards the noble ideals (*Führung als Kernbegriff-ein totaler Führerstaat).*[126]

Soekarno then urged the Investigation Commission to promptly finalize the Constitution so that freedom could soon be realized. In Dutch, he reminded the Commission that the "*uren die het lot van eeuwen beheerschen*", the hours that govern the fate of centuries had arrived.[127] Nonetheless, Mohammad Hatta emphasized the importance of government accountability to the people, the government's limitation of power, and the adherence of basic rights that should be stipulated in the Constitution.[128] In response, Soepomo emphasized that Indonesia rejected individualism and the class-state (*klasse-staat*), preferring a state that protected the whole nation and country, based on unity through social justice for all within the sphere of Greater East Asia.[129] Sovereignty was in the hands of the people and manifested itself in the MPR. The Constitution required a state based on the rule of law (*Rechtsstaat*) rather than power (*Machtsstaat*),based on a constitution rather than absolutist governance. It required a government system that gave predominance to the head of state, vesting the "concentrated power and responsibility" in the presidency.[130]

Previously, Soepomo had urged the Investigation Commission to choose a system that would suit the legal history (*Rechtsgeschichte*) and social structure of Indonesian society. He argued against choosing the individualistic-capitalistic Western system or the dictatorial communist system for the proletariat. He instead proposed an *integralist* state where the people and leaders would be politically unified, transcend any societal group, and be filled with the spirit of familial cooperation. Soepomo argued that there is no dualism between the state and the individual which would require a guarantee of fundamental rights and civil liberties (*Grund und Freiheitsrechte*) for the individual against the state.[131] Soepomo also referred to the Japanese Dai Nippon system, based upon the eternal and total inte-

126 During the discussion in the BPUPK, Soepomo used the German language many times, the language of Japan's ally during WWII.
127 Sekretariat Negara Republik Indonesia, *op.cit.,* p. 250.
128 Ibid., pp. 262-263. Hatta emphasized these values three years before the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot in Paris, France.
129 Ibid., pp. 265-266.
130 Ibid., pp. 273-274.
131 Ibid., pp. 36-37.

gration of His Royal Highness Tenno Heika, the state, and the people.[132] In this view, the state rests upon the principle of familyhood and Nazi-inspired concepts of the "leadership principle" (*Führungsprinzip*), "living space" (*Lebensraum*), and "national land planning" (*nationalen Raumordnung*). Furthermore, Soepomo underlined Hatta's argument that the state should be a unified national state, not an Islamic state.[133] Finally, he elucidated that the most important aspect in an integralist state is the livelihood of the nation in its totality. The state does not side with the most powerful or largest group and does not consider the individual interests at its core. Instead, the state guarantees the safety of the whole nation as an integrated unity.[134]

Until the end of the debate, many Investigation Commission members argued in favour of including the "*droits de l'homme et du citoyen*" (the basic rights of the citizen) in the Constitution.[135] Conversely, Soekarno encouraged the Commission to remove from the Constitution all civil rights recognized by the French Republic.[136]

Eventually, the Investigation Commission made several changes to the Constitution Drafting Committee's draft. The President and the Vice-President should be native Indonesians and Muslims. Freedom of religion was replaced with a stipulation that Indonesia shall be based on God and obliged to implement Islamic Sharia for adherents.[137] However, arguing that including people's basic rights, i.e., rights of assembly and association, would be contrary to the systematic of the Constitution's writing, Soepomo concluded that such matters would be regulated under ordinary laws.[138]

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132 In his statement before PAH I public hearing on 13 December 1999, Ruslan Abdulgani revealed his conversation with Soepomo in which the latter had stated that democracy is *manunggaling* (in unity), the unity between the Royal Highness and the people. Furthermore, Abdulgani concluded that during the vote on the form of the independent state of Indonesia, Soepomo was one of the six Investigation Commission members who voted for a monarchy. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 193. *Manunggaling*, or the full term "manunggaling kawulo lan Gusti" is an understanding among traditional Javanese society. It means a state in which a person has been able to surrender his life totally to God so that he can let God work through him.

133 Hatta asserted that the state should not be based on a separation between 'religion' and 'the state' but should instead be a modern state based on a separation between religious and state affairs. See Sekretariat Negara Republik Indonesia, *op. cit.,* pp. 38 – 39. On the other hand, Hatta (and Sartono) argued for a 'religiously neutral' state. See Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions,* University of California Press, 1 January 1972, p. 39.

134 Sekretariat Negara Republik Indonesia, *op. cit.,* pp. 36 - 37. However, as the leader of the Indonesian delegation in writing the 1949 Federal Constitution and the leader drafting the provisional 1950 Constitution, Soepomo agreed to adopt checks and balances in the parliamentary system and human rights.

135 Ibid., p. 250.

136 Ibid., pp. 259, 261.

137 Ibid., p. 267.

138 Ibid., p. 289.

The process was a political one. Ideas were debated politically, though often embellished with theoretical quotes.[139] In many instances, literature was used to justify or even disguise specific ideas. On the other hand, the drafting process occurred when the Mukadimah or Jakarta Charter, drafted by the Indonesian Committee of Nine, had been discarded. It was replaced by a Declaration of Independence and brief Preamble, both tainted by Japanese fascist ideas.[140] There is no record that the Japanese members of the Investigation Committee actively participated in the discussions. However, the description above shows how Japanese hegemonic interests were the deciding factors in the Committee's conclusions.

Thus, there had been arguments between the ideas of a true independent Indonesia and the ideas corresponding with Japanese interests.

In the meantime, various political attitudes based on integralism, nationalism, socialism, and Islamism also contributed to the debates. Only ideas that did not obviously oppose the ideas of Japanese fascism stood a chance.[141]

On 16 July 1945, the Investigation Commission approved the draft Constitution, containing the Declaration of Independence, the short Preamble, and the Articles.[142] On 18 July 1945, the Investigation Commission submitted the draft to the Commander of the Japanese Military Administration (*Gunseikan Kakka*).[143] However, the *Gunseikan Kakka* never responded.

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139 See, among others, Ibid., pp. 273 - 274. Soepomo quoted Hegel's view on sovereignty so often that Hegel's philosophy seemed to form his view on state matters. In that regard, it was in line with Japan's totalitarian system (*kokutai*), a kind of integralist-totalitarian system. However, on 15 July 1945, Soepomo mentioned some interesting points which contradicted the Hegelian principles he used to quote. Among others, he asserted that the government system should be based on a constitution and not on absolutism. See Sekretariat Negara Republik Indonesia, *op.cit.,* pp. 33, 35, 274.

140 See Ibid., pp. 238, 266. On 14 July 1945, Soekarno reported the draft of the Declaration of Independence and the (short) Preamble to the Investigation Commission. These stated, among others, that the independent state of Indonesia should enrich the familial life of Greater East Asia. Further, on 15 July 1945, before an Investigation Commission session, Soepomo asserted that the constitution was composed with the acknowledgement that: "... the state should prosper the life of the Greater East Asia. We should bear in mind Indonesia's position of being a state within the Greater East Asia."

141 The Investigation Commission should report its work periodically to *Gunseikan*, the Japanese Military Administration. See *Makloemat Gunseikan no. 23, 2605,* in Marsillam Simanjuntak, *op.cit.*, p. 75. The pre-independence drafting process of UUD 1945 also included Japanese Military Colonial Ruler representatives. It is understandable how compromises and pretences occurred in those circumstances. Immediately after Japan's actual surrender in WWII, on 7 August 1945, the Japanese authority formed a new Preparatory Committee, this time with no Japanese members. The Preparatory Committee then finalized the draft Constitution in a one-day meeting on 18 August 1945. See also Sekretariat Negara Republik Indonesia, *op.cit.,* pp. 412 - 420.

142 Sekretariat Negara Republik Indonesia, *op.cit.,* p. 361.

143 Ibid., pp. 386 – 388.

In the meantime, the Imperial Government of Japan continued with its plan. A cablegram[144] from 2 August 1945 revealed that Japan's government had simultaneously scheduled Indonesia declaring independence and war on Britain, the Netherlands, and the United States on 7 September 1945. Further, the document stated that after independence and before assigning a formal Envoy Extraordinary and Ambassador Plenipotentiary, a Japanese military commander in Jakarta would serve as a formal Minister for the Java region.[145] On 7 August 1945, Japan replaced the Investigation Commission with the Preparatory Committee for Independence of Indonesia (*Panitia Persiapan Kemerdekaan Indonesia*).[146] However, the Preparatory Committee did not immediately resume the process.

On the invitation of the Japanese authority for South-East Asia, three Indonesian leaders (Soekarno, Hatta, and Radjiman) flew to Dalath, Saigon to meet General Terauchi. They discussed Indonesian Independence Day, which the Japanese had scheduled for 7 September 1945. Upon the leaders' return on 14 August 1945, the youth leaders met Soekarno and Hatta. Anticipating that Japan would soon surrender after an atomic bomb had destroyed Hiroshima (6 August 1945) and Nagasaki (9 August 1945),[147] they urged Soekarno and Hatta to seize independence immediately and not wait for the Japanese plan. However, Soekarno and Hatta insisted that they should ask the Preparatory Committee for a decision.

Japan surrendered on 15 August 1945 and there was still no decision from Soekarno and Hatta.[148] Impatient with their uncertain attitude, the youths kidnapped them and brought them to Rengasdengklok to compel them to declare Indonesia's independence.[149] In short, Soekarno and Hatta agreed with the youth leaders to proclaim independence on 17 August

144 The cablegram was sent from General Terauchi, the Supreme Chief of Staff of Japan's Army I Corps for Southeast Asia, to the Deputy Chief (Vice Minister) on Independence for East Asia.

145 Document no. 80. See Harry J. Benda, James K. Irikura, Koichi Kishi, *op.cit*., pp. 275, 276. Burma was granted independence on 1 August 1943 on the condition that it conclude a Treaty of Alliance with Japan and declare war against Britain and the United States. Preceding independence, a constitution was drafted under the guidance of the Japanese authority. Together with the Philippines and Indonesia, Burma was part of the Greater East Asia Co-Prosperity Sphere. See Thakin Nu, *op. cit.,* pp. 38 – 69.

146 Subsequently, the Committee's name was shortened to the Preparatory Committee.

147 Emperor Hirohito declared Japan's surrender on 15 August 1945.

148 On 15 August 1945, the 16th Japanese Army affirmed that they would no longer support granting independence to Indonesia. This position was confirmed by the Seventh Area Army Commander, Itagaki Seishoro, in Singapore on 19 August 1945. Through this position, the Japanese maintained the status quo and transferred it to the Allied Forces. See Ken'Ichi Goto, Waseda University, *Caught in the Middle. Japanese Attitudes toward Indonesian Independence in 1945.* Journal of Southeast Asia Studies Vol. 27, No. 1 (March 1996), pp. 37 – 48. Published by Cambridge University Press on behalf of the Department of History of the National University of Singapore.

149 A national youth movement of Indonesia led by Chaerul Saleh, dr. Soetjipto and Sukarni kidnapped Soekarno and Hatta and urged them to proclaim independence immediately. See St. Sularto & D. Rini Yunarti, *op.cit*., p. 100.

1945. With their safety guaranteed by Admiral Takashi Maeda,[150] a Japanese officer sympathetic to the plan, Soekarno and his colleagues drafted the text of the proclamation in the late evening on 16 August 1945 at Maeda's residence[151] in Jakarta. They declared independence at 10:00 on 17 August 1945. In his speech, before declaring Indonesia's independence, Soekarno asserted that his previous attitude in favour of the Japanese had been merely a tactic towards achieving independence.[152]

The newly proclaimed state had neither a government nor a constitution. On 18 August 1945, the Preparatory Committee hastily strove to finalize the Constitution and elect a president and vice-president of the Republic of Indonesia.

The BPUPK plenary meeting minutes record that day consisting of three parts, each of which lasted approximately one hour. The first part discussed the Preamble to the Constitution. The second part discussed the Government Structure and the Constitution. The third part discussed the election of the president and vice president and the formation of the KNIP.[153]

In this regard, it is important to note that on the previous afternoon, Mohammad Hatta was informed by an officer of the Japanese Navy (Kaigun) that the representatives of Protestants and Catholics in the area controlled by the Kaigun strongly objected to one section of the draft Preamble: "Belief in God with the obligation to carry out Islamic law for its adherents". The provision in that sentence was regarded as discriminating against a minority group. If this "discrimination" were adopted, they preferred being outside the Republic of Indonesia. As is known, these areas, particularly Sulawesi and Kalimantan, were under the control of the Japanese Navy's and were planned to be made an "eikyu senryu" (permanent occupation), an annexed Japanese territory.[154]

Therefore, considering that the issue was very serious for the integrity of the nation and the state, the next morning before the PPKI meeting, Mohammad Hatta invited several Islamic religious leaders, members of the PPKI, Ki Bagus Hadikoesoemo, Wahid Hasyim, Kasman Singodimedjo and Teuku Hasan to discuss the matter. These leaders, realizing the seriousness

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150 Admiral Maeda was the liaison-officer between the Japanese Army and the Navy. In 1976, Maeda was honoured by President Suharto with the *Bintang Jasa Nararya,* the Republic of Indonesia's medal-of-honour.

151 Mohammad Hatta, *op. cit.,* p. 91. The author argues that Soekarno and Hatta were unwilling to use the text of the Declaration of Independence that had been prepared by Soepomo cs. Instead, Soekarno himself wrote the famous text of the Independence Proclamation and then typed the manuscript. This was confirmed to the author by Sajuti Melik, a journalist who typed the draft Proclamation, and a former member of parliament (1971–1982).

152 Sekretariat Negara Republik Indonesia, op.cit., 1995, p. 407.

153 See Ibid, pp. 412 – 455. KNIP (Komite Nasional Indonesia Pusat - the Central Indonesian National Committee).

154 See Ooi Keat Bin, *The Japanese Occupation of Borneo, 1941-1945*, Routledge, New York, NY 10016, 2011,

of this issue, wisely and immediately agreed to replace the sentence, "*Ketuhanan dengan kewajiban menjalankan syari'at Islam bagi pemeluk-pemeluknya*" (Belief in God, with the obligation to carry out Islamic law for its adherents) with "*Ketuhanan Yang Maha Esa*" (Belief in the One and Only God).[155]

At the beginning of the Preparatory Committee meeting on 18 August 1945, Soekarno explained that PPKI members had proposed various changes to the draft Constitution. Sukarno then advocated following the Investigation Commission's draft Constitution, reminding members that time was limited.

Soekarno and Hatta asserted that the draft Declaration of Independence and the short Preamble must be revoked and replaced by the draft Mukadimah (from 22 June 1945). Mohammad Hatta explained that "there was a Small Team which had composed a Preamble for our Constitution. But later, the Dokuritsu Zyunbi Tjoosakai revised the Preamble and broke it into two: The Declaration of Indonesian independence and a short Preamble."

Further, Hatta stated that PPKI members proposed to "revoke the Declaration of Independence and the short preamble and to replace them with the Mukadimah that was drafted by the Small Team, … in short, we return to the initial Preamble." In his explanation, Hatta also conveyed the draft Preamble's changes regarding belief in God as agreed that morning.[156]

Just like Hatta, Soekarno also affirmed that "… the Declaration of Independence which was drafted by the Investigation Commission should be resolutely revoked. Likewise, the introduction which was made by the Tyoosakai was completely removed, ...."[157] Then, Soekarno asserted that the title Mukadimah was replaced by Pembukaan.[158]

Then, Soekarno offered the draft of the Pembukaan to the PPKI plenary for approval. The PPKI plenary meeting unanimously agreed the text as the Pembukaan to the Constitution.[159]

In the subsequent plenary meeting, which lasted only one hour, PPKI discussed the draft Constitution.[160] Yet, although parts were corrected, it was impossible to rewrite its entirety in such a short time.[161] Nevertheless, Soekarno urged that the Constitution should be ratified that day. He reminded the PPKI that the situation was rapidly changing and admitted in Dutch that the Constitution was provisional, "*... een revolutionaire grondwet*" (a revolutionary constitution). He emphasized that the MPR should, as soon as possible and in a conducive environment, convene to make a

155 Mohammad Hatta, *"Untuk Negeriku, Menuju Gerbang Kemerdekaan",* an autobiography, Penerbit Buku Kompas, Januari 2011, pp. 95 – 98.

156 Sekretariat Negara Republik Indonesia, op.cit., 1995, p. 414.

157 Ibid., pp. 414-417.

158 As affirmed by Soekarno. Ibid., p. 417.

159 Ibid., p. 420.

160 This second part of the PPKI's plenary meeting lasted from 11.26 to 12.20 Indonesia Western Time. Ibid., p. 423.

161 In that respect, the claim that the original 1945 Constitution's constitutional system has been designed following the Preamble's values does not have a solid basis.

more complete and perfect Constitution.[162] The Preparatory Committee then approved the Constitution on the condition that it should be improved later, as soon as possible. Then, a constitutional amendments procedure was incorporated into the Constitution,[163] based on the proposals of Sam Ratulangi, Iwa Kusumasumantri, and Mohammad Hatta.[164]

In that way, the 1945 Constitution was drafted through a joint process of two different stages. The first stage was under the direction of the Japanese. The second stage was an independent process, one that was very short and revolutionary in spirit. The last stage boosted the character of the constitution-making significantly, changing it from a process under Japanese control into one that was vibrant, fiercely independent, and revolutionary.

On the other hand, it is important to note that since the Investigation Commission's first meeting, there was disagreement about the state's foundation.[165] The Islamists wanted Islam as the state's foundation while the nationalists wanted a secular basis.[166] Soekarno, for instance, in his famous speech on 1 June 1945, affirmed that Indonesia should be a state based on nationalism, a state of "all for all", which would not side with the largest group, but exceed, heed, and respect all groups, large and small.[167] Quoting Hatta, Soepomo stated that religious and state affairs should be separated.[168] As discussed above, just before the Preparatory Committee meeting on the morning of 18 August 1945, an agreement was reached to replace the "*tujuh kata*" from the draft Mukadimah and replaced with "Belief in the One and Only God".[169]

Further, the Preparatory Committee (PPKI) agreed to delete "should be a Muslim" as a requirement to the Presidency. Subsequently, Hatta explained to the PPKI's plenary that the 'seven-words' in the *Mukadimah* and the related Article had been removed, and that the phrase "*Ketuhanan*" (Belief in God) in the *Mukadimah* had been adjusted to "*Ketuhanan Yang Maha Esa*" (Belief in the One and Only God).[170] In that way, the Preamble of the 1945 Constitution, which does not mention Greater East Asia, was approved by The Preparatory Committee on 18 August 1945.[171]

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162 Sekretariat Negara Republik Indonesia, *op.cit.,* pp. 413, 426.
163 Ibid., p. 441.
164 Ibid., pp. 429-433
165 Ibid., pp. 38 – 40; 344 – 352.
166 Deliar Noer, *Partai Islam Di Pentas Nasional* (Islamic Parties at National Stage), PT Pustaka Utama Grafiti, First Printing, 1987, pp. 35 – 38.
167 Sekretariat Negara Republik Indonesia, *op.cit.,* p. 71.
168 Ibid., p. 38.
169 Mohammad Hatta, *op.cit.,* p.p. 95 – 98.
170 Sekretariat Negara Republik Indonesia, *op.cit.,* p. 415. The formulation of the first principle in the *Mukadimah*, which was "*Belief in God* with the obligation to implement Islamic Sharia for the adherents", was replaced by "*Belief in the One and only God.*"
171 There is no official English version of the 1945 Constitution. The text quoted here comes from the English version of the 1945 Constitution published by the Constitutional Court of the Republic of Indonesia, 2015.

THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA
PREAMBLE

Whereas Independence is truly the right of all nations and therefore colonization in the world shall be abolished, as it is not in accordance with humanity and justice.

And the struggle of the movement towards the independence of Indonesia has now reached the moment of rejoicing to guide the people of Indonesia safely and soundly to the threshold of independence of the State of Indonesia, which is independent, united, sovereign, just and prosperous,

By the Grace of God, the Almighty and impelled by the noble desire to live a free national life, the people of Indonesia hereby declare their independence.

Subsequent thereto, to form a Government of the State of Indonesia which shall protect the whole Indonesian nation and the entire native land of Indonesia and to advance the public welfare, to enhance the intellectual life of the nation, and to participate in the execution of world order which is by virtue of freedom, perpetual peace and social justice, therefore the National Independence of Indonesia shall be composed in a Constitution of the State of Indonesia, which is structured in a form of the State of the Republic of Indonesia, with people's sovereignty based on the belief in the One and Only God, Just and Civilized Humanity, the Unity of Indonesia and a Democratic Life guided by Wisdom in Deliberation/Representation, and by realizing Social Justice for all the People of Indonesia.

The Preamble contains the fundamental consensus on political and moral commitments of the people of Indonesia and affirms the state's adherence to independence, people's sovereignty, humanity, and social justice. It contains the desire, values, and goals of Indonesia's independence, exalted as noble ideals of the nation.[172] Also embodied in the Preamble is the *Pancasila*, the five principles: "Belief in the One and Only God", "Just and Civilized Humanity", "The Unity of Indonesia", "Democratic Life guided by Wisdom in Deliberation/Representation", and "Social Justice for all the People of Indonesia". These are the foundation of the state. They are an inclusive ideology representing a consensus between Muslims who called for Islam as the state philosophy and nationalists who wanted a non-religious state philosophy. Despite these disagreements, most articles in the draft Constitution remained intact.[173]

Aware of the possible flaws in the 1945 Constitution, Soekarno asserted that the Constitution is "an *express* Constitution, a *revolutie grondwet* that must be improved later at an appropriate time."[174] Based on Iwa Kusumasumantri's proposal,[175] the 1945 Constitution provides a constitutional

172 As comparison, see Gregoire Webber, *Post Conflict Constitutions and Constitutional Narratives* (quoted from Walter Bagehot, *The English Constitution*, 1867, New York. Oxford University Press, 2009), in a paper presented at the 2010 WG Hart Legal Workshop *Comparative Aspects on Constitution: Theory and Practice,* last updated 6 January 2011; p. 18.

173 Concurrently, the 'seven words' were also removed from the draft of Article 29.

174 Sekretariat Negara Republik Indonesia, *op.cit.*, p. 426.

175 Ibid., pp. 427- 428.

amendment procedure in Article 37.[176] At the insistence of Ratulangi,[177] Additional Provisions were added. These stipulate that within six months of its formation, the MPR shall convene to enact the Constitution as a provisional constitution.[178]

At the end of the meeting on 18 August 1945, Soekarno declared that the Constitution of the State of the Republic of Indonesia and its transitional rules were validly decided.[179] Hence, due to the different understandings of democracy and time constraints, the 1945 Constitution became a rather ambiguous constitution, adhering to the principles of democracy, human rights, and the rule of law through the Preamble and fascist ideas through the main Articles. However, Article 37 demonstrated its provisional and temporary nature.

Despite its shortcomings, the revolutionary spirit that surrounded its birth and the subsequent battles for defending independence elevated the 1945 Constitution to a symbol of a triumphant national struggle for independence and the dignity of the nation.[180]

### II.3.1 The first four years of the 1945 Constitution's implementation (1945–1949)

From 1945 to 1949, the 1945 Constitution was not actually implemented. Following the Allied Forces' allegations that the 1945 Constitution was a Japanese creation,[181] the Constitution's presidential system was not implemented. Sutan Syahrir, a social-democrat and anti-Japanese underground

176 Article 37 UUD 1945 states: (1) In order to amend the Constitution, no less than 2/3 of the total members of the People's Consultative Assembly shall be in attendance. (2) Decisions shall be taken with the approval of no less than 2/3 of its total members in attendance.

177 Sekretariat Negara Republik Indonesia, *op.cit.*, pp. 450, 451.

178 Previously, on 11 July 1945, Wongsonagoro reminded the Investigation Commission that, in due time, the new state's statute should be composed in a way that respected the people's sovereignty. See Sekretariat Negara Republik Indonesia, *op.cit.*, p. 173. The Investigation Commission's members were selected and appointed by Japan's military authority.

179 Ibid., p. 455.

180 Later, during the New Order era, all political powers, including the military and police, were obliged to be loyal to the 1945 Constitution. The first oath of the Soldier's Oath, embedded in Law nos. 20/1988 and 34/2004, asserts that the soldier is loyal to the Unitary State of the Republic of Indonesia, which is based on *Pancasila* and the 1945 Constitution of the Republic of Indonesia. See also Law nos. 3/1975 and 31/2002 on political parties.

181 On 13 December 1999, Ruslan Abdulgani testified before a PAH I public hearing that the British authority asserted not to talk to this 'Japanese puppet'. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 194.

activist, was appointed prime minister,[182] a position the 1945 Constitution does not mention. He was accountable to the KNIP (the Central Indonesian National Committee)[183] through a parliamentary-like government system. President Soekarno, whom the Allied Forces accused of collaborating with Japan, was then positioned as the head of state. The establishment of the PNI (Indonesia National Party) as the only state political party was cancelled and a multi-party system was introduced.[184] This move was an astute political manoeuvre by a faction led by Hatta and Syahrir to implement parliamentary democracy and to alienate Soekarno from the political leadership.[185]

The country was both overwhelmed by guerrilla warfare and a revolutionary atmosphere and by diplomacy seeking international support for Indonesian independence[186]. Unfortunately, the two sides of the struggle, guerrilla battle and diplomacy, were not running harmoniously and even conflicted occasionally. In the meantime, the Army was overwhelmed with civilian politics.[187] Soldiers played a multifaceted role in the guerrilla war against the Dutch and day-to-day governance, especially in the countryside.

182 Herbert Feith, *op.cit*., p. 43. Wim Schermerhorn, a Social-Democrat, was the Dutch Prime Minister from 1945 – 1946. Therefore, Indonesian leadership assumed that Sutan Sjahrir, a socialist, was the right person to deal with the then-socialist government of the Netherlands. Herbert Feith also wrote that the decision came from "a belief that the new Republic would gain wider international acceptance if it is headed by a leader of an anti-Japanese underground organization."

183 Also known as the *Komite Nasional Indonesia Pusat*. The Preparatory Committee established the KNIP on 22 August 1945, based on Article IV, Transitional Rule of UUD 1945. Edict of the Vice President no X/1945, dated 16 October 1945, stated that the KNIP – the Central Indonesian National Committee – was given legislative powers before the formation of the People's Consultative Assembly and DPR.

184 The PNI was the *Partai Nasional Indonesia*. During its fourth meeting on 22 August 1945, the PPKI decided to form PNI as the single state party. See Sekretariat Negara Republik Indonesia, *op.cit*., pp. 503 – 505. On 3 November 1945, Vice President Hatta issued an edict to encourage the establishment of political parties.

185 This action also contributed to future extra-constitutional political behaviour.

186 . As concluded in the first Cairo Conference on WWII on 7 November 1943 and considering herself was the holder of sovereignty over the territory, in July 1947 and in December 1948 the Netherlands conducted military operations to re-establish its control over the territory of the former Netherlands East Indies.

187 A negotiation between the Netherlands and Indonesia in Linggarjati, West Java, on 25 March 1947, led to three events. First, the Dutch Government recognized the status quo rule of the Republic of Indonesia over Java, Madura, and Sumatera. Second, the Indonesian and Dutch governments jointly organized the establishment of a state in the form of a federation under the name of the *Republik Indonesia Serikat* (RIS – The Unitary States of the Republic of Indonesia). Third, the RIS and Dutch government worked together in a union called the Union of Indonesia and the Netherlands. Subsequently, the Renville negotiations led to the cessation of the fighting and the establishment of demarcation lines (known as the *Van Mook* lines). Afterwards, Indonesian armed forces had to evacuate their strongholds in various locations.

The people appreciated soldiers, who would generally enjoy high social status. On the other hand, the up-and-down multi-party cabinets[188] were unable to do much to overcome the economic hardships.

The Indonesian military is one of the few armed forces in the world that has the character of a liberation army. During the power vacuum, after the Japanese surrendered and PETA and Heiho disbanded, various youth organizations spontaneously formed military organizations and armed themselves with seized Japanese armaments.

To avoid confrontation with the Allied Forces after the proclamation,[189] the new Republic established an agency called the BPKKP (Agency for Helping the Families of War Victims) instead of forming a military organization.[190] The Preparatory Committee formed the BKR (People's Security Organisation) as part of the BPKKP.[191] Nevertheless, youth groups and general mass organizations continued to build armed militia forces, which later integrated into the BKR.

Chaotic civilian politics, short-term cabinets, continued economic hardship, military dissatisfaction with the diplomatic negotiations, government programmes for reorganizing and streamlining the military, and rebellions by the *DI/TII* and *PKI-Madiun*[192] all further increased the military's disappointment with the existing civilian political system. The chaotic civilian politics also degraded the political parties' reputations and delegitimized the parliamentary and democratic system. While the Indonesian army evolved as a national army, it grew into a political army that systematically developed political links with the nation-state building process.[193]

In the meantime, attempts to make Islam the state's ideological foundation continued. On 17 December 1945, the political party Masyumi, following its statutes, issued an action programme to alter the 1945 Constitution to establish an Islamic state and society.[194] On 18 September 1948, the Communist Party (PKI) under Muso launched a rebellion and established a "Soviet Republic of Indonesia" in Madiun, East Java.[195]

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188 There were seven cabinets between 1945 and 1949.

189 The Allied Forces, following the Potsdam Declaration of 26 July 1945, would soon take over the East Indies from the Japanese.

190 The BPKKP was the *Badan Penolong Keluarga Korban Perang*. Sekretariat Negara Republik Indonesia, *op. cit*, pp. 500 – 502.

191 The BKR was the *Badan Keamanan Rakyat*.

192 DI/TII stands for *Darul Islam/Tentara Islam Indonesia* (The Islamic State/The Indonesian Islamic Army). PKI stands for *Partai Komunis Indonesia* (The Indonesian Communist Party).

193 Andi Widjajanto, *Transforming Indonesia's Armed Forces*, UNISCI Discussion Papers, no. 15, October 2007.

194 Deliar Noer, *op.cit.*, p. 119. At that time, NU still joined Masyumi.

195 TNI recaptured Madiun on 30 September 1948. The communist rebellion was destroyed two months later.

From December 1949 to August 1950, the unitary Republic of Indonesia became a member state of the federal Republic of Indonesia. Its territory was the region of the Yogyakarta sultanate (see below). During that period, the 1945 Constitution was the constitution of the unitary republic.

The above shows that in this period, the political structure did not advance and institutionalized politics did not evolve. The main issue of political contestations was the state ideology. During this period, the 1945 Constitution was merely regarded as a formal yet nominal Constitution that was not actually implemented.

## II.4 The provisional Constitutions: 1949 to 1959

### II.4.1 UUD RIS: 31 January – 17 August 1950

On 17 August 1945, Indonesia proclaimed her independence as a sovereign country, the Republic of Indonesia. In 1947 and 1949, the Dutch claimed their authority over the territory previously known as the *Nederlands Indie* (the Netherlands East Indies), as the 1943 Cairo Conference agreement implies.[196] The Dutch launched military actions during those years, framing it as enforcement of their territorial authority. However, Indonesia considered that this Dutch military aggression violated Indonesia's sovereignty, submitting as much to the United Nations. Peace negotiations between Indonesia and the Netherlands held in Linggarjati (1948) and Jakarta (the 1949 Roem-Roijen conference) failed to solve the dispute. In the meantime, the Dutch authority established several states throughout the country.

Eventually, with UN intervention, the Netherlands hosted a peace conference, the Round Table Conference, between 3 August – 2 November 1949 in The Hague. It was then that the Dutch finally recognized Indonesian independence, after which Western countries and the United Nations followed suit.[197]

The conference also agreed that Indonesia should be a federal state named the RIS (the Federal Republic of Indonesia),[198] with member states including the Unitary State of the Republic of Indonesia.

196 On 27 November 1943, the first Cairo Conference on WWII (attended by President Roosevelt of the United States of America, Prime Minister Winston Churchill of the United Kingdom, and Generalissimo Chiang Kai-shek of the Republic of China) concluded that "Japan be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914".

197 United Nations Security Council Resolution number 86 adopted on 26 September 1950.

198 The RIS stands for the *Republik Indonesia Serikat*.

The RIS and BFO (Federal Consultation Meeting) delegations[199] jointly prepared the Federal Republic's draft Constitution (UUD RIS)[200] under UN supervision at the Round Table Conference (KMB).[201] Soepomo, one of the prominent actors who drafted the 1945 Constitution, was a member of the Indonesian delegation.[202] The process involved government-appointed people isolated from the public. It took place from August to October 1949 in Scheveningen and The Hague, occurring alongside the KMB (23 August – 2 November 1949).

The KMB ended the war for Indonesian independence and transferred Indonesian sovereignty from the Dutch to Indonesia.[203] Both delegations of the Republic of Indonesia and BFO signed the UUD RIS on 29 October 1949.[204] On 31 January 1950, Indonesia enacted the 1949 Federal Constitution through the President's Decree no. 48. (c) State Gazette 50-3.[205]

Article 186 of the 1949 Constitution affirmed that the 1949 Federal Constitution was provisional.[206] Further, Indonesia was constituted as a federal state that adopted the principles of democracy and the rule of law,[207] human rights,[208] and an independent judiciary.[209]

The UN also influenced the successful incorporation of those principles into the 1949 Federal Constitution.[210] These principles (democracy and the rule of law) were thus artificially transplanted, incorporated into the Constitution through an isolated process by a hand-picked team.

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199 BFO was the *Bijeenkomst voor Federaal Overleg*. It was a forum of Federal Republic of Indonesia state representatives. The BFO delegation consisted of Sultan Hamid II (West Kalimantan) as the chairman, Ide Anak Agoeng Gde Agoeng (Indonesia Timur - East Indonesia) as Vice-Chairman, Soeparmo (Madura) as Vice-Chairman, A.A. Rivai (Bandjar), Saleh Achmad (Bangka), K.A. Moh. Joesoef (Belitung), Mochran Bin Hadji Moh. Ali (Dayak Besar – Greater Dayak), R. Sudjito (Jawa Tengah - Central Java), R. Tg. Djuwito (Jawa Timur - East Java), M. Jamani (Kalimantan Tenggara - Southeast Kalimantan), Adji Pangeran Sosronegoro (Kalimantan Timur - East Kalimantan), Mr. R. Tg. Djumhana Wiriaatmadja (Pasundan), Radja Mohammad (Riau), Abdul Malik (Sumatera Selatan - South Sumatera), and Radja Kaliamsjah Sinaga (Sumatera Timur - East Sumatera).

200 The RIS' Constitution was the *Undang Undang Dasar Republik Indonesia Serikat* (UUD RIS).

201 KMB stands for *Konperensi Meja Bundar*.

202 The delegation from the Republic of Indonesia to the KMB was led by Mohammad Hatta.

203 The USA government supported the Republic of Indonesia and pressured the Netherlands to transfer sovereignty after Indonesia showed its determination to suppress the 1948 Communist Madiun rebellion.

204 Following the KMB agreement, NKRI (*Negara Kesatuan Republik Indonesia* - the Unitary State of Republic of Indonesia) with its capital in Yogyakarta, became a member state of the RIS (*Republik Indonesia Serikat* – the Republic of United States of Indonesia). The 1945 Constitution was the NKRI's Constitution, yet it had a Prime Minister, dr. Halim.

205 The 1949 Constitution ended on 17 August 1950 when Indonesia again became a Unitary State of the Republic of Indonesia.

206 The Constitution of the Republic of the United States of Indonesia, Article 186.

207 Ibid., Article 1 (1).

208 Ibid., Articles 7 to 33.

209 Ibid., Article 145.

210 Herbert Feith, *op. cit.*, p. 43. See also, *UN Commission for Indonesia: special report to Security Council.* UN Security Council Document S/1417, 10 November 1949. Art. 45, p. 26.

### II.4.2 UUDS 1950: 17 August 1950 – 5 July 1959

In August 1950, following the demands of the Federal Republic's state delegations, Indonesia again turned into a unitary state. This change occurred just six months after the establishment of the Federal Republic. The 1949 Federal Constitution was then altered to become the 1950 Provisional Constitution (UUDS),[211] again affirming Indonesia as a unitary state. Soepomo chaired the government-appointed joint-committee between the Federal Republic and the Republic Governments to make the changes. The 1950 UUDS was promulgated under Law No. 7 of 1950. The law was passed in Jakarta on 14 August and put into effect on 17 August 1950.

The democratic and rule of law principles were again incorporated into the Constitution without the public's political involvement or commitment. However, this Constitution successfully obtained international recognition, which was essential for the young Republic. The 1949 and 1950 Constitutions are similar. They assert the principles of democracy, the rule of law, adherence to human rights, and an independent judiciary. The 1950 Constitution also affirms its provisional status in Article 134(1). Article 134(2) stipulates the formation of a Constituent Assembly (*Konstituante*) through a general election.

Indonesia adopted a parliamentary democracy, conducted the first democratic elections in 1955, established a parliament and Constituent Assembly, and attempted to draft a new and democratic constitution. Unfortunately, this was all to no avail. Six cabinets failed to stabilize the post-revolutionary situation and consolidate the democratic political system. During this period, people observed continuous disputes among the political parties while the short-term cabinets did not deliver. Newspapers reported officials' abuse of power and rampant corruption.[212] The Dutch still occupied West Irian, which President Soekarno told the people was evidence that Indonesia had not fully achieved its independence. The relationships between the central government and the regions were deteriorating. The Army felt neglected and mistreated. With parliament at its lowest point, the Army demanded its dissolution.[213] The Army was also caught up in internal disputes. Economic hardship, political disputes, instability, and the multi-party system's unreliability degraded the political parties' reputation. It also delegitimized the parliamentary and democratic system. This was a tumultuous period in independent Indonesia's history.

Against that background, channelling public discontent and fomenting nationalism and revolution gained more support than seeking to improve public administration and economic development.

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211 UUDS stands for *Undang-Undang Dasar Sementara*.

212 Pedoman Daily, newspaper, 14 August 1956.

213 The Army felt humiliated and degraded by the politicians in DPR who openly debated the Army's internal affairs.

In the meantime, the Army managed to overcome its internal bickering. Zulkifli Lubis' group, which saw a military junta as a solution,[214] had been purged. Thus, Soekarno, then a well-respected revolutionary leader cut off from actual power, saw his influence and power increase significantly, as did the Army under Nasution.The Army then moved closer to President Soekarno and began a new power constellation. According to Herbert Feith, the Army leaders contributed organized power and prestige, while the President contributed legitimacy.[215] However, Soekarno did not let the Army become too powerful. To that effect, he built a political equilibrium in which the PKI and the Army balanced each other out.

On 21 February 1957, President Soekarno proposed the so-called *Konsepsi Presiden* (The President's Conception) to break through the stagnant national revolution. It was a democracy with leadership (*demokrasi dengan kepemimpinan*)[216] where a National Council led by Soekarno would take precedence over the elected DPR (The People's Representatives Council – the Parliament). However, this idea was strongly opposed by, among others, Mohammad Natsir from Masyumi, who denounced the *Konsepsi* as dictatorial and against Islam.[217] In the meantime, the Army developed a Middle Way (*Jalan Tengah*) conception,[218] the embryo of the subsequent dual-function of the armed forces (*dwi-fungsi* ABRI).

On 14 March 1957, President Soekarno declared martial law and established a war authority organization that continued down to the village level, which enhanced the Army's control.[219] On 15 February 1958, a mutinous government, the PRRI, was declared in Sumatera, with its headquarters in Bukittinggi.[220] The PRRI included many pro-democracy leaders from Masyumi (Islamic Party) and PSI (Indonesian Socialist Party),[221] including Syafrudin Prawiranegara, Mohammad Natsir, Burhanuddin Harahap, Sumitro Djojohadikusumo, and Maludin Simbolon. The central government

214 Herbert Feith, *op.cit,* pp. 505-506.

215 Ibid, p. 602.

216 Mavis Rose, *op. cit.,* pp. 295 – 296. According to Hatta, Soekarno had not coined the term *"Demokrasi Terpimpin"* (Guided Democracy). They did not want a dictatorship but felt that democracy through political parties was not correct.

217 Audrey R. Kahin, *Islam, Nationalism and Democracy*, *A Political Biography of Mohammad Natsir,* NUS Press Singapore, 2012, p. 99. Mohammad Natsir launched a strong defence of the democratic system and denounced Guided Democracy as a democracy without opposition. See also, Deliar Noer, *op. cit.,* pp. 353 - 354.

218 The "Middle Way" is a concept developed by General Abdul Haris Nasution, the then Commander of the Armed Forces, where the Army, not as an organization but as exponents, is given the opportunity of having a limited role in civil administration, to participate in determining the policies of the state at high levels. See Crouch, Harold, *op.cit.*, p. 24.

219 Daniel S. Lev, *The Transition to Guided Democracy: Indonesian Politics 1957 - 1959*, First Equinox Edition, 2009, p. 7.

220 The PRRI stands for *Pemerintah Revolusioner Republik Indonesia* or the Revolutionary Government of the Republic of Indonesia. The author lived in Bukittinggi between 1948–1959.

221 The PSI stands for *Partai Sosialis Indonesia*.

launched a military operation in response. By October 1961, the dissidents were practically defeated and surrendered. Most of the prominent figures of PRRI were imprisoned.[222] The influence and leadership of the pro-democracy figures and political parties diminished, many of whom were involved in the failed mutiny.

### II.4.3 Konstituante – The Constituent Assembly: 1956-1959

As stipulated in Article 134 of the 1950 Provisional Constitution, a general election was conducted on 15 December 1955 to elect the Constituent Assembly's members (*Konstituante*).[223] It was a credible election where 514 representatives were elected[224] representing 20 political parties,[225] 11 non-party affiliated organizations, and 3 individual members. Subsequently, for almost three years, the *Konstituante* convened regularly to make a new and permanent Constitution. They agreed on almost all principles of parliamentary democracy and the supremacy of law, on the elaboration of human rights, independent judiciary powers, checks and balances, and other matters.[226] Unlike the previous 1950 Provisional Constitution,[227] the *Konstituante* came to understand that laws could not contradict the constitution. Likewise, they were reminded of the necessity of Constitutional provisions that require implementation.[228] Hence, they were in favour

222 See M.C. Ricklefs, *op.cit.,* pp. 299 – 307.

223 An election to elect members of Parliament was conducted on 29 September 1955.

224 According to the law, a total of 520 members should be elected. However, six members representing West Irian could not be elected because West Irian was still under Dutch rule.

225 The Konstituante's political seats were divided into 119 seats for the PNI (*Partai Nasional Indonesia* – Indonesian National Party), 112 seats for Masyumi (*Majelis Syuro Muslimin Indonesia* - Shura Council of Indonesian Muslims), 91 seats for NU (*Nahdlatul Ulama* – Association of Muslim Scholars), 80 seats for PKI (*Partai Komunis Indonesia* – Indonesian Communist Party), 16 seats for PSII (Partai Syarikat Islam Indonesia – Indonesian United Islam Party), 16 seats for Parkindo (*Partai Kristen Indonesia* – Indonesian Christian Party), 10 seats for *Partai Katolik* (Catholic Party), 10 seats for PSI (*Partai Sosialis Indonesia* - Indonesian Socialist Party), 8 seats for IPKI (*Ikatan Pendukung Kemerdekaan Indonesia* – Association of Supporters of Indonesian Independence), 7 seats for Perti (*Pergerakan Tarbiyah Islamiyah* – Islamic Education Movement), 5 seats for *Partai Buruh* (Labour Party), 3 seats for PRN (*Partai Rakyat Nasional* – National People's Party), 2 seats for PRI (*Partai Rakyat Indonesia* – Indonesian People's Party), 2 seats for Partai Murba (Musyawarah Rakyat Banyak – Common People Deliberative Party), 2 seats for PIR Wongsonegoro (*Persatuan Indonesia Raya* – Great Indonesia Unity), 2 seats for PRIM (*Partai Republik Indonesia Merdeka* – Independent Republic of Indonesia Party), 1 seat for PPTI (*Partai Politik Tarikat Islam* – Islam Sufi Political Party), 1 seat for *Partai Tani Indonesia* (Indonesian Peasant Party), and 1 seat for PIR NTB (Partai Indonesia Raya – Nusa Tenggara Barat – Great Indonesia Party of Nusa Tenggara Barat).

226 Adnan Buyung Nasution, *op.cit.,* pp. xxxii – xxxiv and pp. 257 – 258.

227 Article 95 (2) of UUDS 1950 states that a law cannot be judged.

228 Adnan Buyung Nasution, *op. cit.,* p. 236.

of an independent body with the authority to judge the constitutionality of laws.[229] However, despite agreeing on almost all other matters, the ideological conflict[230] on whether to have Indonesia based on Islam[231] or on nationalistic Pancasila hampered the process.[232] The proponents of Pancasila boycotted the meeting, and so the *Konstituante* was not able to make any decision. Eventually, the constitution-making process was halted. Although legally this situation should not have prevented the Constituent Assembly from continuing its work,[233] the boycott and the Army's later ban (see below) practically ended this process. Under these circumstances, on 23 April 1959 President Soekarno submitted a proposal to the *Konstituante* to reinstate the 1945 Constitution. Although most members supported the proposal, the Assembly could not secure the 2/3 of members required to decide. The Islamic factions agreed to reinstate the 1945 Constitution if 'the seven words' were included.[234] However, a vote rejected this suggestion. The *Konstituante* again failed to decide.

### II.5 Re-enacting the 1945 Constitution

On 3 June 1959, Army Chief of Staff, Lt. Gen. Nasution issued a regulation as the Central War Authority prohibiting all political activities. The DPR (People's Representatives Council)[235] and the *Konstituante* had to stop their activities. Previously, General Nasution met and urged President Soekarno to reinstate the 1945 Constitution as the solution to the ongoing political crisis.[236] Nasution argued that the President's conception would have a strong constitutional basis in the 1945 Constitution. On the other hand, with the 1945 Constitution in place, the Army could participate in the MPR. This supreme political institution consisted of members of parliament and delegations of functional groups which were appointed by the President. In the meantime, the public grew bored with these political disputes and were

229 Ibid, p. 237.

230 A grouping of nationalists (i.e., PNI, PKI, Parkindo, Partai Katolik, PSI, IPKI, and Murba) added up to 355 out of a total of 514 *Konstituante* members (66%). From this composition, one can see that neither the presence of the Islamic bloc alone nor the nationalist bloc could justify a Konstituante meeting for drawing up an agreement or deciding.

231 Mohammad Natsir, who previously accepted *Pancasila* and affirmed that there were no inherent contradictions or incompatibility between *Pancasila* and Islam and argued for 'Islamic democracy', seems to have become convinced that the breadth and flexibility of *Pancasila* allowed the President to fashion it into whatever they desired. See Audrey R. Kahin, *op. cit.*, pp. 99 – 101.

232 The disagreement had lasted since the making of the UUD 1945.

233 See Adnan Buyung Nasution, *op. cit.*, p. xxxv.

234 Ibid.

235 DPR stands for *Dewan Perwakilan Rakyat*. Hereinafter, the People's Representatives Council is referred to as DPR.

236 M.C. Ricklefs, *op.cit.*, p. 303.

suffering economic hardships. They became more receptive to President Soekarno's idea of guided democracy. As described by Feith, this situation was of major importance in the final abandonment of constitutional democracy.[237]

Having his *Konsepsi Presiden* opposed by most of the political parties, President Soekarno accepted Nasution's idea and declared the return to the 1945 Constitution on 5 July 1959.[238] Soekarno then formed a presidential cabinet with three military colonels holding ministerial posts.[239] Military officers were also included in the established National Council. Subsequently, military personnel also held governor, city mayor, and district-head positions.[240] Nevertheless, as Nasution described it in 1958, the Middle Way was not a vehicle for the military as an organization but for military individuals to participate in determining government policies.[241]

The decree also abolished the *Konstituante*. On 22 July 1959, the elected DPR agreed to work under the UUD 1945 Constitution. On 5 March 1960, the DPR was dissolved. On 24 June 1960, it was replaced by an appointed Collaborative People's Representatives Council or DPR-GR (*Dewan Perwakilan Rakyat Gotong Royong*).[242] Subsequently, following the 1945 Constitution, a Provisional People's Consultative Assembly (MPRS) was formed.[243]

## II.5.1 The end of constitutional democracy. The beginning of authoritarianism

### *II.5.1.1 President Soekarno: "Revolution first"*

The re-enactment of the 1945 Constitution ended the democratic eras and marked the beginning of the authoritarian era. From 1959 to 1966, the political system was overhauled to fit Soekarno's revolutionary ideas. However, the 1945 Constitution was not implemented. In 1959, President

237 Herbert Feith, *op. cit.*, p. 606.

238 The Presidential decree required the formation of MPRS (Provisional People's Consultative Assembly) and DPAS (Provisional Supreme Advisory Council) within the shortest possible time; the reimposition of UUD 1945; the invalidation of UUDS 1950 (Provisional 1950 Constitution); and the dissolution of the *Konstituante* (Constituent Assembly).

239 Colonel Soeprajogi, Minister for Economic Stability, Colonel Mohammad Nasir, Minister for Shipping, and Colonel Azis Saleh, Minister of Health. Colonel Isman was appointed as Advisor to the Indonesian Delegation to the United Nations.

240 See Lev, *op. cit.*, pp. 69 – 70; Crouch, Harold, *The Army and Politics in Indonesia*, Equinox, Jakarta, 2007, pp. 34, 38 – 41.

241 See above, Crouch, Harold, *op.cit.*, p. 24.

242 All members of the elected DPR, except those from Masyumi and PSI, were appointed as members of DPR-GR.

243 MPRS stands for *Majelis Permusyawaratan Rakyat Sementara*. MPRS consisted of members of DPR-GR and appointed representatives from functional groups, including the military.

Soekarno formed a Working Cabinet[244] with himself as the prime minister and Djuanda as the first minister. He then established *Front Nasional* (the National Front) to accomplish a national revolution, work on development, and seize back West Irian from the Dutch. In 1960, the elected DPR was dissolved and replaced by a President-appointed provisional DPR-GR. It was positioned as the President's accomplice. The President could issue a presidential decision, which had the same status as law. Then, the President established a provisional MPR. Its leaders became part of the cabinet and were given a ministerial rank. Further, Soekarno attempted to unite the main political parties, the PNI (National Party of Indonesia), PKI (Communist Party of Indonesia), and NU (the Ulema's Awakening Party)[245] into a group called NASAKOM (Nationalist-Religion-Communist).[246] Then, in 1960, Masyumi and PSI (the Socialist Party of Indonesia) were dissolved. Further, political parties' activities were limited. By decree, the number of political parties was reduced from 28 to 11. The *Front Nasional* and NASAKOM were Soekarno's way of implementing a single-party system. Thereby, the President became increasingly powerful. On 18 May 1963, by MPRS Decree no. III/1963, the MPR appointed Soekarno as president for life.

Meanwhile, the Communist Party PKI expanded its influence and the military increased its role in politics and the economy. Nevertheless, neither the military nor the Communist Party PKI controlled politics; both depended on Soekarno's blessing. In June 1962, the Army, Navy, Air Force, and Police were integrated into ABRI (Indonesian Armed Forces).[247] Then, in 1963, President Soekarno attempted to gain full control over ABRI by establishing KOTI (Supreme Operations Command),[248] with himself as Commander and the then Army Chief of Staff General Ahmad Yani as the Chief of Staff.

The competition and conflict between the communists and the armed forces continued to rise. On 30 September 1965, the PKI launched a coup but failed. After the Communist Party PKI was crushed in 1965 and President Soekarno fell (see below) the Army dominated the situation and later developed a political system with a dual-functioning military as the main executive body. However, as discussed later, it was General Suharto who controlled the power alongside the military, as this organization was positioned to ensure the implementation of his policies. Yet, during this authoritarian period, concern among students and intellectuals on political issues

244 The 1945 Constitution adheres to a presidential system, where the president is also the head of government. Correspondingly, Soekarno formed a cabinet where he was the "head" of the Cabinet, and the ministers did not represent the political parties. Soekarno named his cabinet the "working cabinet" (*kabinet kerja*).

245 NU stands for *Nahdlatul Ulama*.

246 NASAKOM stands for Nasionalis-Agama-Komunis.

247 ABRI stands for *Angkatan Bersenjata Republik Indonesia*.

248 KOTI stands for *Komando Operasi Tertinggi*.

continued to grow. Various student organizations and other intellectuals, either independents or those affiliated with political parties, were active in political discussions. Their active role in major political events, especially in overthrowing President Soekarno in 1966,[249] encouraged the influx of activists into the political elite. Many of these intellectual activists later became political party leaders.[250] Again, during this period, the political system did not advance much and extra-party politics strengthened.

*II.5.1.2 President Suharto: "Development first" and the end of the 1945 generation*

The failed October 1965 Communist coup had taken a toll on Army leadership. Under General Suharto's leadership, the Army fought back and dominated the political field, with students and other activists on its side. People roamed the streets demanding *Tritura* (Three Demands of the People): The Dissolution of the Communist Party-PKI, Retooling the Cabinet, and Decreasing the Prices.[251] Students spearheaded these protests, which were organized by KAMI (Indonesian Student Action Union),[252] KAPI (Indonesian High School Student Action Union),[253] and KAPPI (Indonesian Student Youth Action Union).[254]

Desperate, President Soekarno delegated his authority to General Suharto to control the situation, who immediately dominated it. Soon after he gained power, SESKOAD (Army's School of Staff and Command)[255] organized a seminar that recommended establishing a two-party system to ensure checks and balances. However, Suharto rejected the idea. In March 1967, the Provisional People's Consultative Assembly convened a special session that relinquished the presidency from Soekarno[256] and appointed General Suharto as the acting president.[257]

249 And later of President Suharto in 1998.

250 A high number of the political parties' leaders were student activists, such as Akbar Tanjung, Amien Rais, Cosmas Batubara, David Napitupulu, Djoko Sudiyatmiko, Jakob Tobing, Marzuki Darusman, Rahman Tolleng, Sarwono Kusumaatmadja, Rachmat Witoelar and Slamet Effendy Yusuf.

251 *Tritura* stands for *Tri Tuntutan Rakyat*.

252 KAMI stands for *Kesatuan Aksi Mahasiswa Indonesia*. The author, Jakob Tobing, was alternate Chairman of National Committee of KAMI. He was also a co-founder of KAMI of ITB (*Institut Teknologi Bandung* – Bandung Institute of Technology) and of KAMI consulate Bandung.

253 KAPI stands for *Kesatuan Aksi Pelajar Indonesia*.

254 KAPPI stands for *Kesatuan Aksi Pemuda Pelajar Indonesia*.

255 SESKOAD stands for *Sekolah Staf dan Komando Angkatan Darat*.

256 President Soekarno still had strong military support, especially from the Navy, Air Force, and elements of the Army. To avoid fighting amongst the people, Soekarno chose to obey the MPR's decision and quit as president. Later in 1998, in a similar position, President Suharto also took the same stance, resigning from the presidency despite still having strong support from groups in the military and others.

257 MPRS Decree No. XXXIII/MPRS/1967.

In his State Address on 16 August 1967, acting President Suharto denounced the past state governance practices. He expressed that the principles of people's sovereignty had shifted into the leader's sovereignty. He asserted that previous governments had seriously deviated from the 1945 Constitution, with head of state holding absolute power. The rule of law principles was abandoned and the country had become ruled by power. In practice, the basic principles of the constitutional system had changed into absolutism. The highest state authority was no longer in the hands of the Provisional People's Consultative Assembly. Instead, it was in the hands of the Great Leader of the Revolution. The Provisional People's Consultative Assembly was subordinate to the President. In the 1968 MPR Special Session, General Suharto was inaugurated as President.[258] During this session, the Deputy Speaker of the Provisional Assembly, Lt. Gen. Mashudi, Governor of West Java, led a team that drafted the Provisional People's Consultative Assembly decree. It intended to limit the presidential tenure to a maximum of two consecutive periods of five years. However, Suharto's team rejected the draft.[259] From that point onwards, Suharto held power for seven periods of 32 years.

Subsequently, the existing 11 political parties were forced to merge into two political parties, the PDI (Indonesia's Democratic Party)[260] and PPP (United Development Party).[261] A third political power, GOLKAR (The Functional Groups) was established.[262] Elections were conducted periodically over a five-year interval. With the military and civil servants' full support, GOLKAR dominated the elections and Suharto was elected consecutively as president for seven terms.

There were no checks and balances. There was no free press. The DPR rubber-stamped government policies. However, security was maintained and the economy grew rapidly. Suharto governed single-handedly, with the military as an instrument under his control. Strategic policies were decided in *Cendana*, Suharto's residence. The military, with its nationwide territorial reach, assured its implementation. Thus, the power shifted from the Armed Forces to Suharto. Eventually, Suharto realized that his 1945 generation

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258 MPRS Decree no. XLIV/MPRS/1968. The author took an oath as a member of DPR-GR/MPRS on 13 February 1968.

259 Lt. Gen. Mashudi reminded the author of this case in early 2000.

260 PDI stands for *Partai Demokrasi Indonesia*. It is the merger of PNI (*Partai Nasional Indonesia* - the Indonesian National Party), IPKI (*Ikatan Pendukung Kemerdekaan Indonesia* - the Association of the Supporters of Indonesian Independence), *Partai Murba* (Murba Party), *Parkindo* (*Partai Kristen Indonesia* - the Indonesian Christian Party), and *Partai Katolik* (Catholic Party).

261 PPP stands for *Partai Persatuan Pembangunan*. It is a merger of four Islamic religious parties, namely NU Party (*Partai Nahdlatul Ulama* – The party of The Awakening of Islamic Scholars), PSII (*Partai Syarikat Islam* Indonesia - United Islamic Party of Indonesia), Perti (*Persatuan Tarbiyah Islamiyah* – The Association of Islamic Education), and Parmusi (Partai Muslimin Indonesia – Indonesian Muslim-followers Party) .

262 GOLKAR stands for *Golongan Karya*.

would soon begin to disappear and that the situation would change. By 1988, the youngest of the 1945 generation who had fought for independence would reach retirement age.[263]

On 5 October 1981, in his Armed Forces Day address, President Suharto stressed that the Armed Forces should not slide towards militarism, authoritarianism, and totalitarianism. He stated that the 1945 generation, especially those still active in the Armed Forces, must encourage the growth of Pancasila democracy and constitutional life based on the 1945 Constitution.[264]

Then, Suharto, as the chairman of the GOLKAR Board of Trustees,[265] began to push for GOLKAR's transformation into an independent civil political force, reducing ABRI's involvement in politics, embracing emerging Muslim intellectuals and preparing for free elections.[266]

Further, Lt. Gen. (ret.) Sudharmono, the Minister/Secretary of State, was elected as Chairperson of GOLKAR's National Leadership Council in the GOLKAR National Conference in October 1983.[267] Within the framework of his program known as *tri-sukses* program,[268] development of GOLKAR organization's network and political training down to the villages level throughout Indonesia, began. Then, in line with the program, GOLKAR began to be weaned from the ABRI and KORPRI. However, not everyone was happy with the programs.

Meanwhile, Lt Gen. (ret.) TB Simatupang[269] repeatedly reminded the military that before ending their dedication, the 1945 liberating generation should build a more participatory political system as their final project. Simatupang reminded them that the doctrine during the struggle for independence was different from the doctrine required during development. He asserted the necessity of both a continued national struggle and renewal. Simatupang argued that Pancasila and the 1945 Constitution as the political system's foundation were strong enough. The dual-function

263 In 1998, the 1945 generation's youngest independence fighters were already reaching the age of retirement.

264 President Suharto's speech at the commemoration ceremony of ABRI's 36th birthday on 5 October 1981, Cilegon, West Java.

265 GOLKAR's Board of Trustees or Dewan Pembina GOLKAR was the body that holds the highest authority over GOLKAR.

266 This program is known as the *kemandirian* (self-reliance) GOLKAR program, comprised of self-reliance in organizing, political recruitment, and funding. GOLKAR gradually became detached from the support of the Armed Forces and civil servants.

267 See Sudharmono S.H. *Pengalaman Dalam Masa Pengabdian*, an autobiography, PT Gramedia Widiasarana, Jakarta, 1997, p. 322. In the National Conference, the author was appointed as the chairperson of the OKK section of the GOLKAR National Leadership Council, in-charge of organization, membership, and political training. For the same period, Suharto was also re-confirmed as Chairman of the GOLKAR Board of Advisory. The author was appointed as the chairperson of the Political Team of the Board.

268 The Tri-Sukses (tri-successes) program consisted of organization's consolidation, political training for cadres and to win the 1987 election.

269 Lt Gen. (ret.) TB Simatupang was one of the founders and the former Chief of Staff of the Armed Forces of the Republic of Indonesia.

military could continue. However, he emphasized that it should encourage political development and a *Demokrasi Pancasila* (Pancasila Democracy) to prevent political decay. It should not bolster militarism, authoritarianism, and totalitarianism.[270]

Previously, in 1981, Lt. Gen. Soedjono Humardhani, ASPRI (Personal Assistant)[271] to the President, told the author that President Suharto planned to step down in 1988 after 20 years in power. However, he and other close aides disagreed with this plan. Later, in a conversation at his residence, where the author was present, President Suharto also expressed this desire.[272] In 1987, Suharto shared his intention to resign with Sarwono Kusumaatmadja, GOLKAR's then Secretary-General, and with Mrs. Mien Sugandi, the then Women's Empowerment Minister.[273] On that occasion, Suharto considered changes to the political system.

Later, in 1993, Suharto established *Komnas HAM* (National Commission of Human Rights),[274] an internationally recognized independent organization. He also emphasized the Pancasila's integrative and inclusive character. He asserted it was not a rigid, dogmatic, and doctrinaire ideology, but instead an open ideology that requires continuous dialogue and deliberation.[275] He insisted that the UUD 1945 was sacred and must be maintained. Meanwhile, certain elite leaders often discussed democratization and free elections.[276] Suharto began preparing the new national leadership. Sudharmono, GOLKAR's then-chairman was named as a candidate for vice-president for the 1988-1993 term. This may have signalled that Sudharmono, then 61 years old, could be the next president from 1993-1998. As chairman, entrusted with modernizing GOLKAR with its *program trisukses* (the three-successes programmes),[277] Sudharmono was expected to continue the political modernization programme.[278] However, as Lt. Gen.

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270 See T.B. Simatupang, *Harapan, Keprihatinan dan Tekad, Angkatan '45 Merampungkan Tugas Sejarahnya,* (The Hope, The Concerns and The Determination. The 1945 Generation Accomplishing Its Historical Tasks). Inti Idayu Press, Jakarta, 2nd printing, 1986, pp. 91-194.

271 ASPRI stands for *Asisten Pribadi*.

272 The author was the head of Team A, in charge with politic and election, of *Dewan Pembina* (Board of Trustees) of GOLKAR, which was chaired by Suharto.

273 Sarwono Kusumaatmadja recalled the conversation on 12 December 2012.

274 Komnas HAM stands for *Komisi Nasional Hak Asasi Manusia*.

275 This assertion was always emphasized by his confidant and Cabinet Secretary, Lt. Gen. Moerdiono. See also, *BP-7*, p. 4.

276 The author was the Head of Political Section of the *Dewan Pembina* (Supervisory Council) of GOLKAR, which was chaired by Suharto himself (1983-1988). Many times, the author participated in the discussions. This was also revealed by Sarwono Kusumaatmadja on 12 December 2012.

277 The *Tri-sukses* program consisted of organizational consolidation, training political cadres, and winning the 1987 election.

278 The program was aimed at building GOLKAR as an independent civilian political power. See above.

Harsudiono Hartas[279] told the author,[280] if GOLKAR were independent, it could be controlled by people who were against Pancasila. Such control had to be prevented, or history would repeat itself, with the military building an extensive village-based territorial organization as occurred to inhibit the communist expansion in the 1950s and early 1960s. Lt. Gen. Harsudiono Hartas also rejected the idea that the military would be under a political system that adheres to civil supremacy. He stressed to the author that national politics was the responsibility of the Armed Forces as an organization, not Suharto's personal business. Later, Lt. Gen Supardjo Rustam, the Minister of Home Affairs, told the author that he also did not agree with the plan for free elections.

Meanwhile, various issues were circulating. It was alleged that Sudharmono had been involved in PKI, the Indonesian communist party.[281] Reports were widely circulated of Suharto's children participating in gambling and illicit businesses. Her eldest daughter, Mbak Tutut (Siti Hardijanti Rukmana), was rumoured to have been prepared to replace her father.[282] Meanwhile, senior army generals, such as Maraden Panggabean, Benny Murdani, and Ali Murtopo (Suharto's long-time colleagues), became concerned with the rumours regarding Suharto's children's being involved in business and gambling.[283] However, their advice to Suharto was met with an unfriendly response. Suharto's relationship with the military elite deteriorated.

An MPR plenary session in March 1988 discussed Sudharmono's nomination as vice-president. Brig. Gen. Ibrahim Saleh, a member of F-ABRI (the military faction) interrupted the proceedings. He stated that there should be an alternative candidate for vice-president. People believed this was the Armed Forces' political move to thwart Sudharmono's candidacy, although the Armed Forces' leadership refuted this.[284] Later, during an MPR general

279 Lt. Gen. Harsudiono Hartas was then ABRI's Socio-Political Chief of Staff.

280 The author was then GOLKAR's First Vice-Chairman in charge of organizing, political training, and elections.

281 See Retnowati Abdulgani Knapp, *Soeharto: The Life and Legacy of Indonesia's Second President,* an authorized biography, Marshal Cavendish (Asia) Private Limited, Singapore, 2007, p. 162.

282 Mbak Tutut was appointed as the deputy chairperson of GOLKAR from 1993-1998 and as chairperson of GOLKAR's faction in the 1997 MPR General Assembly. President Suharto then appointed her Minister for Social Affairs in 1998.

283 As General Maraden Panggabean disclosed to the author.

284 Benny Moerdani attempted to nominate General Try Sutrisno, his successor as Commander of the Armed Forces, for vice-president. Previously, on 29 February 1988, a week before an MPR general session, on 29 February 1988, and overshadowed by rumours that Benny Moerdani would stage a coup, President Suharto had replaced him as the Commander of the Armed Forces with General Try Sutrisno. See Julius Pour, *Benny Murdani Profil Prajurit Negarawan*, Penerbit Yayasan Kejuangan Panglima Besar Sudirman, cetakan kedua, Mei 1993, pp. 541-543. See also *Sudharmono, S.H., Pengalaman Dalam Masa Pengabdian, Sebuah Otobiografi*, Penerbit PT Gramedia Widiasarana Indonesia, Jakarta, 1997, p. 397.

session in 1993, ABRI managed to convince Suharto to nominate General Try Sutrisno[285] as the new vice-president. Without first consulting President Suharto, Lt. Gen. Harsudiyono Hartas[286] stated that ABRI would nominate General Try Sutrisno as the next vice-president.[287] It seems that ABRI did this to show that a national power struggle was an organization-wide issue, not just Suharto's personal issue.[288]

Suharto seemed unable to break away from the interests of many people around him. Despite repeatedly saying he would step down, he also repeatedly agreed to be re-elected President. His desire for political reform did not materialize. His intention to make GOLKAR an independent civil political power did not take place. This did not happen partly because there were oppositional elements around him, especially in the military, fearing that GOLKAR might be controlled by those against Pancasila and the unitary form of the Republic of Indonesia. Suharto may have begun to lose control over some of the younger military generations.[289] Suharto clearly envisaged a new political system. GOLKAR would be an independent civil and dominant political power in a three-party system, alongside the PPP and PDI. The military would no longer have a significant political role. The presidency would be held by someone he trusted.

However, the new national leadership of GOLKAR under Lt. Gen. Wahono was not serious about continuing the GOLKAR tri-success program and was leaning to ABRI.[290]

In the meantime, reform groups and ideas sprung up among the civilian and military elite, which contributed to the subsequent success of reform. Several GOLKAR leaders known as *GOLKAR Putih* (White GOLKAR) strove for internal reform, including Sarwono Kusumaatmadja,[291] the author Jakob Tobing,[292] Djoko Sudiyatmiko, Anton Priyatno, and Marzuki

285 General Try Sutrisno was then ABRI Commander.

286 Lt. Gen. Harsudiyono Hartas was then the Chief of Staff of Socio-Political Affairs of the Armed Forces.

287 ABRI nominated its Commander, General Try Sutrisno, for Vice-President without President Suharto's prior consent, which was against the law as stipulated in MPR Decree no. II/1973. General Try Sutrisno served as Vice-President from 1993 to 1998.

288 As once told to the author by Lt. Gen. Harsudiyono Hartas, then the Chief of Staff of Socio-Political Affairs of the Armed Forces.

289 Immediately after Suharto stepped down, several military personnel ruffled the GOLKAR Secretariat and destroyed all files regarding GOLKAR's reform programme. This was revealed to the author by Bambang Kancil, a staff of GOLKAR Secretariat General office.

290 Lt. Gen. Wahono was GOLKAR's chairman 1992 – 1997 and then elected as the Speaker of MPR. In his leadership, the author was the first Deputy Chairman in charge of organization and election.

291 Sarwono Kusumaatmadja was GOLKAR's Secretary General (1983–1988).

292 Jakob Tobing was GOLKAR's Head of Organization and Political Training Department (1983–1988), First Deputy Chairman (1988–1993), and Head of Political Team of *Dewan Pembina* GOLKAR. *Dewan Pembina* (GOLKAR's Supervisory Board) was chaired by President Suharto and could control GOLKAR's policies.

Darusman. In 1995, several former militaries and GOLKAR elites and opposition figures[293] established the Foundation of Harmony of National Brotherhood (YKPK)[294] to fight for reform and democratization.[295] In January 1996, the YKPK organized a seminar in Surabaya, in which many prominent intellectuals participated.[296] Lt. Gen. (ret) Wahono,[297] the new DPR's Chairman and MPR's speaker, gave the inaugural speech. This was followed by a solo violin performance of "Winds of Change".[298] The seminar recommended a broad programme of reform and democratization in culture, economics, and politics, including recommending that Suharto not run again in the 1998 presidential election.[299] At the outset, President Suharto accepted the recommendations amicably, but later turned and rejected them.[300]

Between April 1996 and March 1997, on President Suharto's request, several experts, mostly from LIPI (The Indonesian Institute of Sciences),[301] researched the reform of the dual-function military (*dwi-fungsi ABRI*). It evaluated the military's socio-political role and alternatives to the dual

293 Among others, Lt. Gen. Bambang Triantoro (former Army Deputy Chief of Staff), Abdurrahman Wahid (later the fourth President of Indonesia), Megawati Soekarnoputri (later the fifth President of Indonesia), Frans Seda (former Minister of Finance), Matori Abdul Djalil (later Minister of Defence), the author (later chairman of the 1999 Indonesian Election Committee and MPR's 1999–2002 Constitution Amendment Ad-Hoc Committee), Anton Priyatno, Potsdam Hutasoit, Ida Ayu Utami Pidada, Suko Sudarso, Pontas Nasution, Marzuki Darusman (later Attorney General), and Heru Lelono (later Special Assistant to President Susilo Bambang Yudhoyono).

294 YKPK stands for *Yayasan Kerukunan Persaudaraan Kebangsaan*.

295 Bambang Triantoro was the YKPK's Chairman, the author was the Vice-Chairman, and Matori Abdul Djalil was the Secretary-General.

296 YKPK, *PEMBAHARUAN, Gagasan YKPK (REFORM, the Ideas of YKPK),* YKPK (publisher), first printing, February 1997. The panellists were Umar Khayam, Soetandyo Wignjosoebroto, Mochtar Buchori, Abdurrahman Wahid, Mohammad Sobari, Dawam Rahardjo, Kwik Kian Gie, Rizal Ramli, Faizal H. Basri, Marie Pangestu, Frans Seda, Afan Gaffar, Maj. Gen. Syamsuddin, Midian Sirait, and Marzuki Darusman. Among others, Umar Khayam presented a paper *"Scrape the roots of feudal aristocratic culture. Develop a culture of modern democracy."*

297 Lt. Gen. Wahono was a close aid of President Suharto. When this former Commander of Strategic Forces was the Secretary for Supervision of Development Projects, his room in Binagraha, the president's office, was adjacent to President Suharto's room.

298 "Wind of Change" is a song by the German rock band Scorpions, recorded for their eleventh studio album, Crazy World (1990). The song was composed and written by the band's lead singer Klaus Meine. It was released as the album's third single in January 1991 and became a worldwide hit, just after the failed coup that led to the collapse of the Soviet Communist regime. See https://ultimateclassicrock.com/scorpions-wind-of-change.

299 YKPK, *op.cit.*

300 Responding to the YKPK's recommendation, in March 1997, President Suharto stated that he would not run again. However, judging that the reform program he wanted would not continue, he decided to run again in March 1998.

301 LIPI stands for *Lembaga Ilmu Pengetahuan Indonesia*.

function.[302] In March 1997, a seminar titled "Actualization of ABRI's Dual Function against the Development" was held at the Army Staff and Command School (SESKOAD)[303] in Bandung. The seminar argued that advancement in development had improved the public's critical power and political awareness. Therefore, it concluded, the military must be able to encourage the people's political participation.[304]

Thus, there were groupings and contestations between groups around Suharto, who argued about how the Indonesian political system should be built for the post-1945 generation. They debated who should inherit power. Military leaders did not want a civilian-led political system. They also wanted to reclaim the organizational power that was originally in the hands of the military, which Suharto had individually dominated. There were also groups that supported Suharto's actions and ideas for reform.

In the meantime, the New Order's intensive political indoctrination led to two conflicting outcomes. One, it suppressed society's critical capacity towards authority. However, people also learned that this heterogeneous nation required *Pancasila,* an open and inclusive ideology as a basis of living together as a nation and the motto *bhinneka tunggal ika* (unity in diversity), as the self-perspective of the very diverse Indonesian nation.

*II.5.1.2.1 Developmentalism*

Considering the approaches the President Suharto era adopted, it can be categorized as a period of developmentalism. Under his rule, economic development and growth became the regime's priorities. As these require stability and a concentration of authority, the other aspects of development were left behind, namely checks and balances, the supremacy of law, and human rights. Indeed, under the Suharto presidency, Indonesia saw remarkable economic growth. However, the implementation of policies for improving equality was not quite as successful.

On the other hand, an even distribution of income requires the active participation of the people, which in turn involves openness, the supremacy of law, and adherence to human rights. This failed under Suharto because the 1945 Constitution did not provide for a political system that limited powers, established checks and balances, or upheld the supremacy of law. The 1945 Constitution did not establish the people as the true holders of sovereignty.

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302 *"...Bila ABRI Menghendaki", Desakan-Kuat Reformasi Dwi-Fungsi ABRI, ("... If ABRI Wants", Strong-Pressure for Reform of the Armed Forces Dual Function*), Indria Samego et al., Mizan Pustaka, Bandung, 1998. The researchers were Indria Samego Ph.D., Dewi Fortuna Anwar, PhD., Ikrar Nusa Bhakti, Ph.D., M Hamdan Basyar, Maswadi Rauf, M.A., Riza Sihbudi, and Sr Yanuarti.

303 SESKOAD stands for *Sekolah Staf dan Komando Angkatan Darat*.

304 A. Malik Haramain, *Gus Dur, Militer, dan Politik*. LKiS Yogyakarta, 1st printing, February 2004, pp. 122-125.

# III Towards Amendment of the 1945 Constitution

## III.1 The end of the New Order and Habibie's presidency

Towards the end of his term in 1988, President Suharto repeatedly stated in limited circles that he would soon resign. 1998 was the end of the 1945 generation's active period (*Angkatan '45*). Suharto, born on 8 June 1921, was by then 77 years old. He had been in power for seven consecutive periods. The youngest *les révolutionnaires*, who were 17 years old at the outbreak of the revolution, were reaching 70 years of age. Suharto used to say that the New Order's continuous development programmes had generated large numbers of better-educated people, a relatively advanced national economy, and Indonesia's increased exposure to globalization. The young generation of military officers had not experienced revolution as a liberation army and had joined the military service as a profession. Suharto often opined that these officers had different attitudes towards power and a different comprehension of dedication to the people. In this context, Suharto began to talk repeatedly about the need to reform and the preparatory steps for the generational transition.[1]

Among others, Suharto wanted GOLKAR, the ruling political power, to be independent in political decision-making, political recruitment, and funding. The party also needed to detach itself from the armed forces (the military and police), which had been supporting it. He also discussed the idea of conducting free and fair elections in 1987, in which GOLKAR would compete openly and fairly with PPP and PDI. Suharto also endorsed forming ICMI (Association of Indonesian Muslim Intellectuals)[2] to give the growing number of Muslim intellectuals a place in the system. Accordingly, GOLKAR's chairman, Lt. Gen. (ret.) Sudharmono,[3] systematically built the GOLKAR infrastructure, preparing for a smooth and peaceful generational

1 See also III.5.2. The author was then the Head of the Political Team of GOLKAR's powerful *Dewan Pembina* (Supervisory Board, 1983–1988), which was led by Suharto himself. The *Dewan Pembina* was the highest authority that controls GOLKAR. The author occasionally joined Suharto in late evening casual conversations at his residence in Cendana street, Central Jakarta.

2 ICMI stands for *Ikatan Cendekiawan Muslim Indonesia*.

3 Sudharmono, a retired Army Lieutenant General, was a long-time confidant of Suharto, the fifth Vice-President of the Republic of Indonesia (1988–1993), and the former Minister of State Secretary (1978–1983).

transition.[4] Thereafter, the political elite began discussing reform, even amidst the ruling camp's inner circle.

Then, Sudharmono was elected as the Vice President[5] and Lieutenant General (Ret.) Wahono was elected as GOLKAR's chairman.[6]

However, Lieutenant General (Ret.) Wahono's leadership was focused more on replacing Suharto with others from a military background. Therefore, although efforts to prepare an independent GOLKAR and build a civilian-led political system continued, they were less organized and intensive.

Meanwhile, the armed forces' leaders did not agree with Suharto's plan. The Chief of Staff of the Armed Forces for Socio-Political Affairs stated to the author that the Armed Forces did not agree with the idea of an independent GOLKAR.[7] Previously, The Minister of Home Affairs stated to the author that he did not agree with the idea of free elections. He argued that it was not the time for free elections.[8]

Nevertheless, in another effort to ensure a smooth and peaceful transition, Suharto appointed B.J. Habibie as Vice President from 1998-2003.[9] Habibie was then minister of Science and Technology and was previously assigned to lead ICMI.

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4 [95] Under Sudharmono's GOLKAR leadership (1982–1987), the author was head of the department of organization, membership, and political education (cadre training). The author was also then the head of GOLKAR's Political Team of *Dewan Pembina* (the Board of Trustees).

5 During MPR's 1988 plenary session, a Armed Forces faction member in the MPR, B.G. Ibrahim Saleh attempted to thwart Sudharmono's vice-presidential candidacy. The author, as an MPR member, was at that plenary session. See also Julius Pour, *Benny Moerdani, Profil Prajurit Negarawan*, Yayasan Kejuangan Panglima Besar Sudirman, Jakarta, 3rd printing, August 1993, pp. 536 – 541. In his book, Sudharmono reveals that General Benny Murdani, then Commander of the Armed Forces, stated his disagreement that the Armed Forces propose Sudharmono as the vice-presidential candidate.See Sudharmono, S.H., *Pengalaman dalam Masa Pengabdian*, *Sebuah Otobiografi*, Penerbit PT Gramedia Widiasarana Indonesia, Jakarta, 1997, p. 397.

6 Under Wahono's GOLKAR leadership (1987–1992), the author was Deputy Chairman in charge of organization, membership, political education (cadre training) and general elections.

7 Lt. Gen. Harsudiono Hartas, The Chief of Staff of the Armed Forces for Socio-Political Affairs, reiterated the Armed Forces position to the author. The Armed Forces comprised of the Military and the Police, was led by The Commander of the Armed Forces, with five subordinate Chiefs of Staffs: The Chief of Staff of the Army, the Navy, the Air Force, Socio-Political Affairs, and the Non-Armed Forces Temporary Assignment (*Kekaryaan*), plus the Chief of the National Police.

8 Minister Soepardjo Rustam stated his opinion to the author in a meeting at the Minister's office. Sudharmono,GOLKAR's Chairman, disclosed the same thing to the author.

9 As Vice President, Habibie would have more chance to be elected as Suharto's successor.

Such was the situation at the end of the Suharto period: sharp divisions and disputes among the political elites around Suharto.[10] This situation developed in a society that was already filled with widespread democratic ideas, which was seminal to the success of the subsequent reform process.

Meanwhile, the 1997 financial crisis rapidly turned into a national economic crisis and significantly eroded the regime's legitimacy. A deep and wide political crisis ensued. Students took to the streets, staging demonstrations, urging Suharto to resign, and demanding democratization and the military's exit from politics. In response, Suharto consolidated his position and rotated the military's strategic positions. On 16 February 1998, Suharto appointed General Wiranto as the new Commander of the Armed Forces and empowered him with President's Instruction no. 16/1998. This gave Wiranto special and immense power to restore security and order.[11] Further, on 20 March 1998, Suharto appointed Lt. Gen. Prabowo Subianto, his son-in-law, the former Commander of the Army Special Forces, as the Commander of the powerful Army Strategic Command.[12]

On 12 May 1998, in a street rally demanding Suharto's resignation, four students from Jakarta's Trisakti University were shot dead and dozens more were injured. Thus, the political crisis escalated rapidly. Suharto still tried to convince the public that he could cope with the situation and promised reform measures. However, he failed to form a cabinet because many of his confidants deserted him in this time of crisis.[13] Likewise, the students and other dissidents refused the offer, pressed for his immediate resignation, and demanded freedom and democracy. Observing the situation on the ground, Suharto was very worried about the possibility of a clash that would surely take a big toll. Thus, on 20 May 1998, President Suharto resigned and Habibie was sworn in. Later, B.J. Habibie failed to retain the support of the Armed Forces and most non-ICMI groups.

### III.1.1 Impetus for reform

Immediately, President B.J. Habibie embraced the protesters. Hours after his inauguration, he asserted his commitment to gradually undertake reforms based on Pancasila and the 1945 Constitution.[14] Habibie initiated discourses

10 Thus, in fact, there was a sharp conflict between Suharto's idea of a civilian-led political system and groups trying to maintain military dominance. This fact differs from the argument that there were no serious divisions among the ruling authoritarian elite. See Donald L. Horowitz, *op.cit.*, p. 8.

11 Colonel Wiranto was the aide of the President of the Republic of Indonesia (1989–1993).

12 However, one day after President Suharto resigned, on 22 May 1998, President Habibie dismissed Lt. Gen. Prabowo Subijanto from his post, accusing him of organizing a coup against himself.See Bacharuddin Jusuf Habibie, *Detik-Detik yang Menentukan, Jalan Panjang Indonesia Menuju Demokrasi*, THC Mandiri, 2006, p. 102.

13 See I.3.

14 Gatra Magazine, 30 May 1998.

on reformation and issued policies to facilitate and encourage the reformation process. He formed a Team of Seven (*Tim Tujuh*), led by Ryaas Rasyid. He tasked them with drafting bills on political parties, elections, and on the new composition and structures of the MPR, DPR, and the local DPRs of Representatives.[15]

On the other hand, three days before resigning, on 18 May 1998, President Suharto issued President's Instruction no. 16/1998. This delegated special authority to the Commander of the Armed Forces (ABRI), General Wiranto, to restore security and order and if necessary, declare a state of emergency. Based on that instruction, General Wiranto gained immense power, but he did not use it to his advantage.[16] Whatever his motivation might have been, under his command, the military supported the political process in securing President Suharto's resignation and Vice-President Habibie's appointment as the new president.[17] Wiranto then took seminal measures for the continuation of reform. Working with officers close to him, he prepared a reform agenda within the military.[18] These officers included Lt. Gen. Agus Wijoyo, Lt. Gen. Agus Wirahadikusumah, and Lt. Gen. Susilo Bambang Yudhoyono.

On 29 June 1998, the DPR requested the MPR to convene a special session. Subsequently, the MPR decided to convene from 10 to 13 November 1998. In preparation for the special session, the MPR Working Body met on 15 September 1998. Lt. Gen. Agus Wijoyo from F-TNI/POLRI attended the meeting. He asserted the military meant to open vast opportunities for further elaboration of the 1945 Constitution and to consider the regulation of human rights and duties in MPR decrees.[19] Wiranto set up a team led by Lt. Gen. Susilo Bambang Yudhoyono,[20] then ABRI's Chief of Socio-Political Staff,to formulate "ABRI Main Ideas on Reform". These were subsequently discussed further in a seminar at SESKOAD (Army's School of Staff and

15 www.kpu.go.id, 05 May 2013, Pemilu 1999.*Tim Tujuh* finished its duty in 1998 after the new political laws were ratified. There was another *Tim Tujuh* formed by President Abdurrahman Wahid in May 2001. It was assigned to find a solution to the conflict between the President and Parliament.

16 With the extra-ordinary power delegated to him, Wiranto could have easily taken power as Suharto did in 1966. I suspect General Wiranto, former aide and confidant of President Suharto, was instructed by the President to obey the Constitution and safeguard the power transition.

17 Tempo Magazine, 26 October 2006, in A. Pambudi, *Sintong & Prabowo, Dari 'Kudeta L.B. Moerdani' sampai 'Kudeta Prabowo'*, MedPress, 2009, pp. 115–118. Later, Wiranto revealed that if he had taken power, there would have been a clash between the people and the military, in which the people would have been the victims. He did not want to betray the people. Wiranto used his special authority to ensure the constitutional transition of power from Suharto to Habibie. See Republica.co.id, 30 March 2014.

18 A. Malik Haramain, *op. cit.,* p. 117.

19 Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Dua, Jilid 3, *Risalah Rapat Badan Pekerja MPR-RI*, Sekretariat Jenderal MPR-RI, 1999, pp.23, 24.

20 In 2004, Susilo Bambang Yudhoyono was elected as the Indonesian president in a direct presidential election and re-elected in 2009.

Command)[21] in Bandung from 22 to 24 September 1998.[22] On 5 October 1998, General Wiranto, announced the adoption of a 'New Paradigm', gradually reducing the military's role in politics and encouraging the development of democracy and civil society.[23]

On 20 September 1998, Andi Mattalatta, the Chairman of the Faction of the Functional Group (FKP)[24] in the DPR and Y.B. Wiyanjono from the Faction of the Indonesian Democratic Party (F-PDI)[25] stated that amending the 1945 Constitution required revoking MPR Decree no. IV/1983 on Referendum.[26]

In the meantime, the opposition movements moved forward, pushing for reform. These movements were then represented by prominent figures. These included Megawati Soekarnoputri (daughter of the late President Soekarno) who had long led the movement against the New Order. It also included Abdurrahman Wahid (an intellectual and reformist leader of NU), Amien Rais (a critical campus intellectual and leader of Muhammadiyah), and Sultan Hamengkubuwono X (a well-respected reform-minded aristocrat Sultan of Yogyakarta).

President Habibie's free press policy had placed the military in the public spotlight.[27] Sharp criticism of the military's actions pressured it to be more accommodating to reform's demands. Examples of past actions included the *Trisakti* tragedy, the alleged involvement of military elements in racist atrocities in May 1998,[28] and military operations in Aceh, Maluku, Papua, and East Timor.[29] On 25 May 1999, Lt. Gen. Agus Wirahadikusumah, chief of the general planning staff division of the Indonesian Armed Forces, asserted that the Armed Forces agreed to amend the 1945 Constitution.[30]

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21 SESKOAD stands for *Sekolah Staf dan Komando Angkatan Darat*.

22 Members of the team included Nurcholish Madjid, Ryaas Rasyid, Afan Gaffar, Lt. Gen. Sayidiman Suryodiprodjo, and General Rudini.

23 *TNI Abad XXI: Redefinisi, Reposisi, dan Reaktualisasi Peran TNI dalam Kehidupan Bangsa* (TNI in the 21st Century: Redefinition, Reposition, and Reactualization of the TNI's Role in National Life), Jakarta, MABES TNI, pp. 22-25.

24 FKP stands for *Fraksi Karya Pembangunan*.

25 F-PDI stands for *Fraksi Partai Demokrasi Indonesia*.

26 Merdeka Daily, 21 September 1998. MPR Decree no. IV/1983 on Referendum stipulates that if the MPR would like to change UUD 1945, the MPR must first determine the people's opinion through a referendum. They believed the 1945 Constitution does not require a referendum prior to an amendment. In addition, the military, especially the army, has an extensive and very effective territorial network which can determine the outcome of the referendum, while they do not want changes to the 1945 Constitution. The author prepared the draft MPR Decree no. IV/1983 when the author was the Head of the Political Team of the Board of Trustees.

27 A. Malik Haramain, *op. cit*., pp. 115-116.

28 On 12 May 1998, four students were shot dead by unidentified troops while demonstrating at Trisakti University's campus, demanding President Suharto's departure. From 12–15 May 1998, anti-Chinese racist atrocities hit Jakarta.

29 Kompas Daily, 2 December 1999.

30 Republika Daily, 26 May 1999.

In sum, there were serious political divisions and contestations within the ruling regime, alongside the potential for open societal conflict. However, the situation could be controlled, physical clashes had been prevented and disputes successfully channelled to constitutional institutions. If President Suharto, who still had strong supporters and who was the Supreme Commander of the Armed Forces, had persisted or retaliated, the situation would have been much worse. Equally, the country would have been worse off if the opposition had insisted on enforcing reform through extra-parliamentary means. In that case, a physical clash would have been unavoidable.

In the meantime, aspirations to reform the 1945 Constitution had been voiced in academic and other political communities (See V.4.5.)

### III.1.2 The emergence of a new generation of political Islam

The early 21st-century constitution debate occurred as a new generation of well-educated and open-minded Muslims became politically more important. Under President Suharto, from the 1970s onwards, there was a substantial investment in educational programmes. Under the supervision of the Ministry of Religious Affairs, many educational institutions were established, promoting a non-ideological concept of Islam. The state institutes for Islamic studies (IAIN)[31] played key roles in the New Order policy, especially their post-graduate programmes in Jakarta and Yogyakarta.[32] Such programmes brought about great changes in traditional Muslim communities.[33] Many programme graduates became the new Indonesian elite, changing the Islam-state relationship. They developed the notion that Islam and Pancasila are not opposed: Pancasila as the state ideology is acceptable and final, and Indonesia will not become an Islamic state. The actual challenge, they concluded, was how to realize Pancasila's values into instrumental policies. There was a huge surge of Islamic intellectuals who adhered to a new way of thinking about the country's philosophy.[34] Most of them belonged to either Muhammadiyah or NU (The Awakening of Islamic Scholars),[35] Indonesia's two largest Islamic organizations.

Nurcholish Madjid (1939-2005), one of this area's major pioneers, asserted that Muslims should not dream of making Indonesia an Islamic state. Madjid welcomed the trend towards national convergence that

31 IAIN stands for *Institut Agama Islam Negeri*.

32 Mujiburrahman, *The Struggle of KPPSI in South Sulawesi*, in Martin van Bruinessen (Ed.), *Contemporary Developments in Indonesian Islam. Explaining the "Conservative Turn"*, ISEAS, 2013, p. 154.

33 ICMI, *Antara Status Quo dan Demokrasi* (Between Status Quo and Democracy), Nasrullah Ali-Fauzi (ed.) Penerbit Mizan, Bandung, 1995, p. 236.

34 Nurcholish Madjid (1987), *Islam, Kemodernan dan KeIndonesiaan* (Islam, Modernity, and Indonesian Identity), Mizan Publisher, Bandung, New Edition, 2008, pp. 3–17.

35 NU stands for *Nahdlatul Ulama*.

evolved around Pancasila's noble values. Madjid asserted that Pancasila is sufficient to accommodate Muslims' aspirations.[36] Abdurrahman Wahid, former chairman of Nahdlatul Ulama and later the fourth Indonesian president, asserted that there is always a majority in Indonesia, Muslim, or non-Muslim, who accepts Pancasila.[37] He further affirmed that an Islamic state is just an illusion that has no basis in Islamic teaching.[38]

Nahdlatul Ulama, Indonesia's largest Islamic organization, is known as a tolerant Muslim organization.[39] NU's *Rois Aam* (the General Guide, the most venerated ulema), KH. Sahal Mahfudh gave the *iftitah* (opening speech) at the NU's National Conference in Surabaya on 27 July 2006. In it, he reaffirmed NU's basic understanding, which respects differences of religion, traditions, and beliefs. Mahfudh further stated that one of NU's distinctive characteristics is its ability to apply the teachings of the sacred religious texts in a cultural context that is profane. NU believes that Islamic law can be implemented without formal institutions. Given the Indonesian nation's God-ordained conditions of a pluralistic population and society, NU concluded that Indonesia's unitary state based on Pancasila is already the final form for the Indonesian nation.[40]

Likewise, Ahmad Syafii Maarif argues that the people of Muslim-majority Indonesia regard democracy as realizing the Koranic principle of *shura*.[41] Maarif was a prominent Muslim reformist and the former chairman of Muhammadiyah, the second-largest Muslim organization in Indonesia.[42]

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36 Ibid., p. 173.

37 *Ilusi Negara Islam, Ekspansi Gerakan Islam Transnasional di Indonesia* (Illusion of Islamic State, Expansion of Transnational Islamic Movement in Indonesia), K. H. Abdurrahman Wahid (editor), LibForAll Foundation, 2009, pp. 17-18.

38 Ibid, p. 41.

39 The Nahdlatul Ulama (NU – Awakening of the Ulema) is a traditionalist Sunni Islam movement in Indonesia following the Shafi'i school of jurisprudence, which was founded on 31 January 1926 by inter alia K.H. Hasyim Asy`ari. NU embraces *Ahlussunnah wal jama'ah*, a mindset that takes the middle path (*wasatiyah*) between the extreme *aqli* (rationalist) and the extreme *naqli* (scripturalist) as the response to the puritanist Islam introduced by Wahhabism in Saudi Arabia. "NU was established to fight Wahabi," asserted KH. Said Aqil Siradj, the Chairman of NU. See *Laskar Penjaga Persatuan Islam*, Makassar, 7 January 2014. According to Akhmad Sahal, the leader of a special branch of NU in the USA, the characteristics of NU and Wahhabi are different. The Wahhabi understanding is "so narrow, so easy to accuse the heathen and the infidel Muslims." In contrast, NU's characteristics – as a representation of Ahlus Sunnah wal Jamaah (Aswaja) – are tolerance, moderation, uprightness, and balance. See Madina online, 22 September 2015.

40 *Iftitah* (Opening) speech of *Rois Aam* KH. MA. Sahal Mahfudh at the opening of the National Conference of NU, Surabaya, 27 July 2006.

41 Ahmad Syafii Maarif, *Islam dalam Bingkai keIndonesiaan dan Kemanusiaan* (Islam in the frame of Indonesian Identity and Humanity), Penerbit Mizan, Bandung, 2009, p. 148.

42 The Muhammadiyah was established by KH Ahmad Dahlan,a local Muslim scholar, on 18 November 1912 as a movement for "*al-ruju' ila al-Quran al-hadiths*", a movement back to the Quran and hadith with an emphasis on rational arguments instead of textual interpretations.

Further, Maarif affirmed that most new *santri*[43] accepted Pancasila as the state philosophy, which increased opportunities to build a nation without theological bickering.[44]

In December 1990, with President Suharto's blessing, the Association of Indonesian Muslim Intellectuals (ICMI) was founded.[45] It became a venue for new Muslim elites, modernists and traditionalists, to mix and bridge social gaps. As Nurcholish Madjid admits, it eased the feeling of being an outsider.[46] According to Jalaluddin Rakhmat, it created a sense of Muslims' returning power.[47] In the meantime, efforts increased to build interfaith communication. Interfaith dialogues were organized by prominent Muslim figures, such as Mukti Ali and Munawir Syadzali, and Christian-Catholics, such as TB Simatupang, Latuihamallo and Franz Magnis Suseno. At least among elites, such dialogues increased mutual understanding and cooperation among the various religious groups.[48]

This distinguishes new Muslim intellectuals from the older generations.[49] In the first two decades of Indonesia's independence, Islamic political circles were dominated by intellectuals who wished to develop Indonesia based on Islam. It rendered the unanimous acceptance of the Pancasila and the Preamble as the starting points of constitutional reform from 1999-2002. It saved the process from the same fate as the Konstituante.

Yet, it should be noted that besides those new intellectual elites, other Muslim groups continued to strive for Indonesia as an Islamic state, or at least for the implementation of Islamic Sharia as a constitutional obligation. Most of them are the successive generation of Islamist movements or the Darul Islam that fought for Islam as the state's foundation.[50] With democracy's rise, they had more freedom to express their political ideologies and

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43 *Santri*: students from a traditional Islamic boarding school.

44 Ahmad Syafii Maarif, *op.cit*., p. 175.

45 ICMI stands for *Ikatan Cendekiawan Muslim Indonesia*. Its first chairman was Ing. B.J. Habibie, then President Suharto's Minister of Science and Technology. He later became the Vice-President and then the third President of Indonesia. Through ICMI, Suharto hoped to build a new power that could balance the Army's political role, which was getting away from him.

46 ICMI, *op.cit.,* p. 300.

47 Ibid, p. 332.

48 Jan S. Aritonang, *Sejarah perjumpaan Kristen dan Islam di Indonesia*, BPK, Gunung Mulia, 2004, pp. 494 - 497. See also, Steenbrink, *Patterns of Muslim-Christian Dialogue in Indonesia, 1965 – 1998*, Published in EXCHANGE, vol. 29/2000, 2-22.

49 Initially, Mohammad Natsir accepted *Pancasila* as a state philosophy. However, after President Soekarno proposed 'Guided Democracy' in his *Konsepsi Presiden*, Natsir considered *Pancasila* as too flexible and amorphous, allowing the President to do whatever he or she desired. See, Deliar Noer, *op. cit*. pp. 133-134.

50 Isa Anshary was a leading figure of the fundamentalist wing of Masyumi, who fought for an Islamic state and maintained relationships with the rebellious Darul Islam. See, Mujiburrahman, *op. cit.,* pp. 159–161.

to develop their organizations.[51] Although so far they have lacked sufficient public political support, as shown by the election outcomes, one can witness a re-emergence of groups and movements promoting Islamic ideologies. For example, an early 2011 survey of students and religious teachers in Jabotabek shows that public schools are fertile ground for spreading intolerant ideologies.[52] They have paved their way into government institutions and to some extents have leading positions in discourses on issues related to Islam. As observed by Van Bruinessen, moderate and progressive Islam seems to be losing its power to define the terms of debate, leaving the initiative to those who promote intolerant Islamic ideologies.[53]

## III.2 The strengths and shortcomings of the 1945 Constitution

After occupying Indonesia during World War II, the Japanese formed the commission that drew up the 1945 Constitution. It was the outcome of two forces: efforts to achieve true Indonesian independence championed by prominent figures of the Indonesian independence movement and Japan's hegemonic plan to build the Greater East Asia Co-Prosperity Sphere. The Japanese formed the commission towards the war's end after occupying Indonesia.

Japan surrendered on 15 August 1945. On 17 August 1945, Indonesia proclaimed independence. On 18 August 1945, the country passed the 1945 Constitution. The 1945 Constitution then underwent an idealization and mystification process during the war of upholding and defending Indonesia's independence (See II.3.). Against this background, the 1945 Constitution had its strengths and shortcomings.

### III.2.1 The Constitution's strengths

#### *III.2.1.1 A symbol of independence*

The drafting of the 1945 Constitution and its position during the early days of Indonesian independence turned the 1945 Constitution into a symbol of Indonesian existence and dignity. As discussed previously, the Constitution marks the triumphant end of a long and persistent struggle for indepen-

51 Mujiburrahman, *op. cit.*, p. 157. Since the early decades of reform, there was a misguided understanding, as if democracy meant the freedom to do everything, including tear down the state. The increased activity of Islamic radicals was accepted as an unintended consequence of democracy. In those days, misperceptions and negligence allowed for the rise of radical movements and the infiltration of those ideas into the educational institutions, mosques, and society at large, both in rural and urban areas.

52 The report of Survey of the Institute of Islamic Studies and Peace (LaKIP), Jakarta, 2011.

53 Martin van Bruinessen, *Introduction: Contemporary Developments in Indonesian Islam and the "Conservative Turn" of the Early Twenty-First Century*, in Martin van Bruinessen (ed.), *op.cit.*, p. 4.

dence.[54] At least most mainstream Indonesian politicians appreciate the 1945 Constitution more for its symbolic dimension than its actual texts and contents.[55] In addition, the 1945 Constitution unites mainstream Indonesian political communities. Its symbolic status influences how it could be changed.

*III.2.1.2 The Preamble's Pancasila: A widely accepted unifying ideology*

The Preamble, as discussed above, is the only part of the original 1945 Constitution that is not tainted by Japanese WWII interests and ideas. It was formulated by an informal team of nine people, led by Soekarno and Hatta, who worked beyond the Japanese colonial authority's scrutiny. The Preamble's history and values provide the nation and people with a romanticized past and future sublime ideal worth fighting for. The Preamble contains the nationhood's foundation, the aspirational ideals, and the state's tasks.

These tasks include protecting all the people, land, and territorial integrity, improving public welfare, educating people, and participating in executing a world order based on freedom, perpetual peace, and social justice. The Preamble affirms the Indonesian state's existence based on people's sovereignty and the five principles, i.e., Pancasila. Section 4 of the Preamble lists these principles: The One and Only God, a Just and Civilized Humanity, The Unity of Indonesia, Democratic Life guided by Wisdom in Deliberation/Representation, and Social Justice for all the people of Indonesia. The Preamble embodies the proclamation's spirit and the new nation's aspirations.

Thus, the Constitution mythologizes a dream that goes beyond rationality. Such a dream is essential for providing an identity for and maintaining solidarity and unity in Indonesia's new and heterogeneous nation.

*III.2.1.3 Defining Indonesia's identity*

The 1945 Constitution's Preamble contains, among others, the principle of people's sovereignty based on the state's foundational principles, *Pancasila*. These principles affirm the Indonesian nationhood's inclusive perspective amidst its diverse population.

Article 1(1) affirms that Indonesia is a unitary republic. Article 35 states that the national flag of Indonesia shall be red and white (*Sang Merah Putih*). Article 36 states that the national language of Indonesia shall be Bahasa Indonesia.

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54 The TNI (*Tentara Nasional Indonesia* – National Military of Indonesia) and Polri (*Polisi Republik Indonesia* - Police of the Republic of Indonesia) require loyalty to the Unitary State of the Republic of Indonesia based on *Pancasila* and UUD 1945 through its Soldiers' Oath (*Sumpah Prajurit*) and Police Pledge (Police *Tri Brata*).

55 However, as history shows, this idolatry position of the UUD 1945 is also an impeding factor for improving it.

These provisions affirm the nation's identity, which is marked by a unified Indonesian society. National heroes and heroines from various regions across the archipelago pledged to uphold such a unified attitude through the Youth Pledge (*Sumpah Pemuda*) of 28 October 1928: "one nation, one country, and one national language, Indonesia". This unity is characteristic of Indonesian nationhood amidst its plurality.

*III.2.1.4 Basic principles of human rights*

The 1945 Constitution was made under the Japanese military administration's strict surveillance, three years before the 1948 United Nations Declaration of Human Rights. Nevertheless, it contains several basic principles of human rights.[56] The basis of the state is Pancasila, the five basic principles contained in the Constitution's Preamble. The five precepts are in one organic entity, complementing each other and being inseparable. The second precept, *Kemanusiaan yang Adil dan Beradab* (Just and Civilized Humanity), is the strong basis for appreciating humanity and inclusiveness. Although the Investigation Commission did not accept all of the proposals regarding fundamental rights, Article 27 guarantees equal rights for citizens before the law and in government. Article 28 states that "the freedom of association and assembly, to express verbal and written expression and else shall be stipulated by law." Article 29(2) asserts that the State guarantees all persons the freedom to worship according to his/her religion or belief. Although the Constitution does not fully recognize human rights, these provisions evidence the constitution-making process' strong aspiration towards respecting people's basic rights.

In addition, the existence of human rights elements in those articles provided a strong foundation for enhancing human rights provisions in subsequent constitutional amendments.

*III.2.1.5 Social welfare as a principal constitutional goal*

Articles 33 and 34 of the 1945 Constitution affirm social welfare as the objectives of the Preamble's inherent freedoms.

These articles assert that Indonesia will follow a development path that provides welfare and social justice for the people. They provide a foundation for government intervention in the economy to ensure this goal's achievement. They also form an important measure in implementing democracy and in furthering social human rights.[57]

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56 In the Investigation Commission meetings, on 13 July 1945, Maria Ulfah Santoso proposed that the Constitution should include a provision on basic rights. On 15 July 1945, Mohammad Hatta emphasized that basic rights, such as freedom of expression and association, should be stipulated in the Constitution. But the proposals were rejected. See Sekretariat Negara Republik Indonesia, *op.cit.*, pp. 225, 262.

57 Amartya Sen, *The Idea of Justice, In Memory of John Rawls*, First Harvard University Press paperback edition, 2011, pp. 345-348.

*III.2.1.6 The unitary state*

Article 1(1) of the 1945 Constitution states that Indonesia "shall be a unitary state in the form of a republic", providing the country and nation with an identity. This identity is important for a country that has historically seen numerous kingdoms and hundreds of cultural entities co-existing with no clear boundaries. The unitary state provides a common space and assures a fair living space for all people of Indonesia. It builds a sense of nationhood and collective identity for the heterogeneous population.

*III.2.1.7 The presidential system*

Concentrating executive power in the President allows the government to quickly address the social and political challenges that often confront developing countries like Indonesia. The 1945 Constitution fixes the presidential system, setting clear limits on the presidential term.

*III.2.1.8 Simplicity*

The 18 August 1945 version of the 1945 Constitution consists of a Preamble, 37 Articles with 68 clauses, 1 Transitional Provision with 4 Articles, and 1 Additional Provision with 2 clauses. Later, in October 1945, an Elucidation was added.[58] Assuming the Constitution contains adequate constitutional principles, a simple Constitution provides sufficient space for lower laws to creatively elaborate and translate its inherent principles while coping with dynamic situations.

Rigid and overly detailed Constitutional law would produce complications in Indonesia's fast-changing environment. As Wheare stated, one essential characteristic of the Constitution's ideal form is that it should be as short as possible.[59]

*III.2.1.9 Amendment procedures*

Article 37 establishes the Constitution's amendment procedure rules, a provision that is rare in a constitution.[60] It allows the Constitution to be amended following its own procedures. Thus, the 1945 Constitution can be updated without referring to an external or unconstitutional process, acts that often endanger the state's existence.

58 With the re-enactment of the UUD 1945 by Presidential Decree of 5 July 1959, the Elucidation was officially attached as an integrated part of the UUD 1945.

59 K.C. Wheare, *Modern Constitutions,* Oxford University Press, fifth impression, 1980,p. 34.

60 Andrew Harding, *Dynamics and Problems of Constitution-Making in Asia and Beyond*, Paper for Group Discussion Panel, KPI Congress VIII, UN Centre, 3–5 November 2006.

### III.2.2 The Constitution's shortcomings

The original 1945 Constitution also displays shortcomings, including an improper separation of powers,[61] obscure checks and balances, and a weak rule of law. These shortcomings stem from the authoritarian design of the Constitution's political system. The Elucidation only adds to the Constitution's vagueness, leaving space for those in power to manipulate the Constitution.

#### *III.2.2.1 Authoritarian nature*

As discussed in the previous chapter (II.3), the original Constitution's authoritarianism reveals the overall design of the political system. Based on the premise that the whole society is unified and related in a familial relationship, it established an MPR as the peoples' representation (*Vertretungsorgan des Willens des Staatsvolkes*), fully exercising the people's sovereignty. The MPR is the highest state institution, wielding unlimited power, electing the President, and holding every state institution accountable.[62] In this system, the President is the MPR's mandate holder (*mandataris*) and subordinate (*untergeordnet*).[63]

61 In his explanation before the Investigation Commission's plenary session on 15 July 1945, Soepomo confirmed that the 1945 Constitution indeed does not use a system that principally distinguishes between the state's three powers. See Sekretariat Negara Republik Indonesia, *op cit.*, p. 305.

62 Sekretariat Negara Republik Indonesia, *op cit.*, pp. 263–271. In his elucidation, Soepomo often used German terminologies.

63 The Elucidation of UUD 1945, Government System III.3.

The constitution presumes a one-party political system.[64] This design trapped the state into a politically stable system, but also one in which the President could only exercise his/her duties if he/she had control over the MPR. In other words, if the President did not control the MPR, the system would be unstable and paralyzed. It requires the President to control the majority of the MPR's members through a single-party system or one dominating political power. However, if the President controls the dominant political party that controls the MPR, then the highest power is in the President's hands. Thus, the principles of separation of powers, checks and balances, and the rule of law lose their influence. Yet, as described by Soepomo,the head of state must be a true leader, a guide toward noble ideals.[65] In this regard, the Elucidation of the 1945 Constitution emphasizes that the government's performance depends on the spirit and goodwill of leaders who will ensure that the government will perform its duties properly.[66]

64 On 22 August 1945, the Preparatory Committee decided to establish PNI (*Partai Nasional Indonesia* - Indonesian National Party) as the only political party, with Soekarno as its supreme leader. See Sekretariat Negara Republik Indonesia, *op.cit.,* pp. 503–505. The establishment of PNI as the only political party in independent Indonesia was the most important part of the one-party political system design of the 1945 Constitution, as Soekarno had envisaged. See Ir. Soekarno, *Under the Banner of Revolution*, *op. cit*., p. 283. One-party systems or dominant-party systems were common in Asia and Africa from the 1940s to 1970s. On the other hand, in a speech on 31 May 1945, Soepomo argued that whether a country is a republic, or a monarchy was not important. What was important is that the Head of State, either as the King, President or Duke, as in Burma, or the Fuhrer, should unite the state and nation. Further, Soepomo reiterated that how a country appoints a Head of State, whether with hereditary rights or only for a certain time, was merely a procedure. The important thing was not to elect a leader according to the Western democratic system, which equates humans with each other as mere numbers that are all the same worth. See Sekretariat Negara Republik Indonesia, *op.cit.,* pp. 41–42. On the other hand, Ruslan Abdulgani testified that Soepomo contended that the Constitution should adopt *Dai Ichi,* the Japanese unity and familial concept, so that democracy in Indonesia would unite the king and the people. Further, after a conversation with Soepomo, Ruslan Abdulgani concluded that on 10 July 1945, in the vote to determine the form of the independent state of Indonesia, 55 voted for a republic, 2 abstained, and Soepomo was one of the 6 Investigation Commission members who voted for a monarchy. It is most likely that there was an idea to set up an independent Indonesia as an absolute monarchy. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia, Tahun Sidang 2000, Buku Satu,* Edisi Revisi, Sekretariat Jenderal, 2010, pp. 193, 216. However, on 31 August 1945, under the pressure of the Allied Forces, the decision to establish PNI as the only political party was revoked by the KNIP (*Komite Nasional Indonesia Pusat* – The Central Indonesian National Committee). On 3 November 1945, the KNIP issued an announcement to allow people to establish political parties. The Central Indonesian National Committee (often abbreviated as KNIP) was established under Article IV, the Transitional Rules, the 1945 Constitution, and was inaugurated and commenced on 29 August 1945 until February 1950.

65 Sekretariat Negara Republik Indonesia, op.cit., 1995, p. 36.

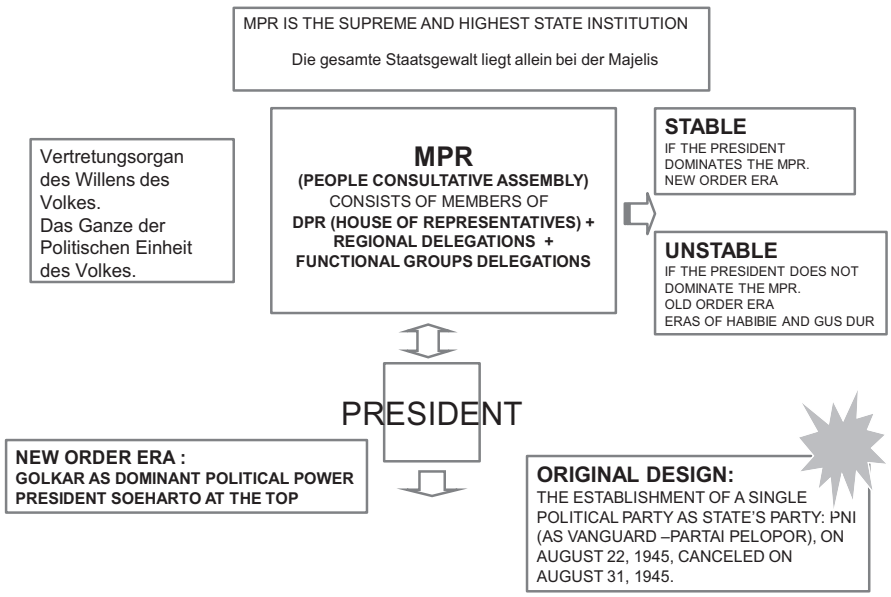
66 Elucidation of UUD 1945.

However, as Soerjanto Puspowardojo stated, in that regard, the original 1945 Constitution is too optimistic about the nature of mankind.[67]

Therefore, whenever the 1945 Constitution is exercised purely and consistently, it will build an authoritarian system of government.

*III.2.2.1.1 Figure no. 1: A diagram of the original 1945 Constitution*

The diagram of the original 1945 Constitution sums up the previous sections.[68]




*III.2.2.2 No stipulation on general elections*

The 1945 Constitution deliberately did not include provisions on elections. Soepomo elucidated that election by the people for the people was not acceptable because it was based on the Western system in which all human beings are equal and worth the same. According to Soepomo, the leader should be elected by a people's deliberative council so that the leader is integrated with the people.[69]

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67 Soerjanto Puspowardojo is a professor in philosophy at the University of Indonesia, Jakarta. Kompas Daily, 1 September 1999, Seminar on *"Assessing the Improvement of the UUD 1945, Toward a New Indonesia"* at the National Resilience Institute (Lemhannas), Jakarta, Tuesday, August 31, 1999.

68 Presented by the author at a lecture at Lemhanas (*Lembaga Ketahanan Nasional* – National Resilience Institute), Jakarta, 2002. In his elucidation for The Investigation Commission, Soepomo often used German terminologies.

69 See Sekretariat Negara Republik Indonesia, *op.cit.*, p. 42.

### *III.2.2.3 Inconsistencies and deficiencies*

The 1945 Constitution contains several statements in its articles and the Elucidation that are inconsistent with its espoused principles. For example, the Preamble and Article 1(2) affirm that Indonesia is based on the people's sovereignty, while Article 1(2) immediately asserts that sovereignty is fully exercised by the MPR, which in practice is controlled by the President (see above), instantly transforming people's sovereignty into state sovereignty.

Likewise, the 1945 Constitution does not affirm that Indonesia shall be a state based on the rule of law. It does not declare that judicial power is independent, as required in a democratic state that embraces the rule of law. It is the Elucidation that declares that Indonesia shall be a state based on the rule of law (*rechtsstaat*) rather than power alone (*machtsstaat*). It declares that the government is based on the constitution (basic law) rather than absolutism (unlimited power). Finally, it declares that the judicial power shall be independent.[70] However, the Elucidation's statement becomes meaningless since the MPR is the highest state institution, with unlimited power, to which every state institution is accountable, including the judiciary.

Further, the 1945 Constitution does not adopt a separation of powers system and intentionally rejects checks and balances.[71] Moreover, it does not admit fair, accountable, and periodic elections and political parties as instruments for implementing constitutional principles. Likewise, it adopts a presidential system while stipulating that the president is responsible to the MPR, which can dismiss the president[72] – a characteristic of a parliamentary system.

### *III.2.2.4 Ambiguity*

There are several ambiguous articles in the original 1945 Constitution, notably Articles 7, 28, and 33. Article 7 states that "The President and the Vice President shall hold office for a term of five years and shall be eligible for re-election". It does not expressly give the president a maximum term of office.It was manipulated to justify the seven-time election of President Suharto. Earlier, in 1963, when the 1945 Constitution was valid, the MPRS enthroned Soekarno as president for life. Later, in 2001, the MPR dismissed President Abdurrahman Wahid after only two years in office. Both actions were made possible by the provision that the MPR holds unlimited power and can interpret Article 7 according to its political interests.[73]

Article 28 states "Freedom of association and assembly, of verbal and written expression and the like, shall be stipulated by law". However, this

70 See Chapter IX of the original 1945 Constitution and its Elucidation.
71 See Sekretariat Negara Republik Indonesia, *op.cit.*, pp. 304–305.
72 See the initial 1945 Constitution, *Elucidation, State Government System, III.3.*
73 The Provisional MPR decree No. II/MPRS/1963, 18 May 1963.

does not guarantee the existence of or adherence to basic rights. Without its stipulation by law, the right does not exist.[74]

Article 33, although one of the 1945 Constitution's strengths, also contains a level of ambiguity. It was intended for the state to actively pursue the achievement of justice and prosperity. The original formulation also provides the opportunity to implement an all-state economy, etatism.

### *III.2.2.5 The mystified Elucidation*

The Elucidation, regardless of annotations intending to make the Constitution consistent with the values inherent in the Preamble, hardened the authoritarian nature of the original 1945 Constitution. The Elucidation emphasizes that Indonesia shall be a state based on the rule of law and that the government shall be based on the constitution rather than absolutism. However, the rule of law and the constitutional system become meaningless when the highest power of the state is vested in the MPR, to which all other high state institutions are accountable and when the MPR's power is unlimited.[75]

Besides, the Elucidation was not made by The Investigation Commission or The Preparatory Committee. Instead, it was composed by Soepomo and added to the 1945 Constitution in October 1945, when Soepomo was the Minister of Justice. Subsequently, it was formally attached to the 1945 Constitution by the Presidential Decree of 5 July 1959.

### *III.2.2.6 The sacrosanct status*

The sacrosanct and unassailable position of the 1945 Constitution, which gives it strength as a symbol of the nation, has also hampered critical thinking about its shortcomings and potential improvements.

On the one hand, the 1945 Constitution's Preamble contains basic principles for the existence of the state of Indonesia. It confirms *Pancasila* as the state's foundation, the form of the unitary state, and the commitment to advance public welfare, develop the nation's intellectual life, and participate in the execution of a world order based on freedom, perpetual peace, and social justice. On the other hand, these principles are not backed up with enforceable provisions and can be interpreted in various ways.[76]

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74 Lindsey argues that this article is a demonstration of the government's power to restrict rights. See Tim Lindsey, "*Indonesian Constitutional Reform: Muddling Towards Democracy*", 2002, 6 Singapore Journal of International and Comparative Law, pp. 276–277.

75 See Elucidation to the 1945 Constitution, Government System, III, IV, and Chapter II, Article 3.

76 See Bart van Klink, *Symbolic legislation: An Essentially Political Concept*. Bart van Klink, Britta van Klink (eds.), *Symbolic Legislation Theory and Developments in Bio law*, Springer: Cham 2016, pp. 19–35.

In its symbolical position, the 1945 Constitution forms a collective memory, especially among the Indonesian political and military mainstream, which is immediately suspicious of any desire to amend the 1945 Constitution, let alone to replace it completely.

## III.3 The People's Consultative Assembly Special Session and its results

Following the DPR's request,[77] from 10 to 13 November 1998, the MPR convened a Special Session to revise the MPR Decrees, to enable the election to be moved from 2002 to 1999, and to reduce the number of appointed military delegations in the DPR and MPR.[78]

However, groups of students, intellectuals, and workers refused this MPR Special Session. One group was the People's Democratic Party (*Partai Rakyat Demokratik* or PRD), a left-leaning militant political party, established and populated mostly by students. They regarded this Special Session as a way to prolong the New Order regime and legitimize the military's integration into politics.[79] They doubted that the election would be fair and clean. They insisted that a "people's committee" should be established as a new parliament before a general election.[80] Faizol Reza,[81] Chairman of the PRD, asserted that the priorities were reforming parliament and the election process, rather than electing a new president.[82] In other words, this group attempted to impose changes through a revolution.[83]

Conversely, another group consisted of organizations close to the military and GOLKAR, such as *Pemuda Pancasila* (Pancasila Youth*), Pemuda Pancamarga* (Pancamarga Youth),[84] and the FKPPI[85] and other elements of GOLKAR. They supported the validity of the presidency of BJ Habibie (a leading GOLKAR figure) as Suharto's replacement and the implementation of the MPR Special Session.

Islamic organizations also supported the implementation of the MPR Special Session and President B.J. Habibie, the Chairman of ICMI, who was

77 Decision No. 20/DPR-RI/1998, 29 June 1998.
78 MPR Decree No. XIV/MPR/1998.
79 Tempo Online, 3 November 1998.
80 PRD gave no explanation on how to form the "People's Committee".
81 Chairman of the Committee of the Central Board of the People's Democratic Party (PRD), student of the Language Faculty, University of Gajah Mada, Yogyakarta. Previously studied at the Faculty of Islamic Law, IAIN Sunan Kalijaga, Yogyakarta.
82 INFO-PEMBEBASAN, a journal published by the People's Democratic Party – Partai Rakyat Demokratik (PRD), http://www.peg.apc.org/~prdint1, accessed on 23 January 2012.
83 Lt. Gen. (ret) Djadja Suparman, *op. cit.*, pp. 140–146.
84 *Pemuda Pancamarga* is also known as Youth Wing of the Veterans.
85 FKPPI stands for *Forum Komunikasi Putra Putri Purnawirawan dan Putra Putri TNI/Polri* – the Communication Forum of Sons and Daughters of Retired Military and Police and Sons and Daughters of Military and Police.

regarded as a prominent Muslim representative. These included KISDI,[86] ICMI, CIDES,[87] and *Dewan Dakwah Islamiyah*,[88] which were organized through *Forum Silaturahmi Ulama-Habib*,[89] community leaders within the Jabodetabek area,[90] and the *Kongres Umat Muslim*.[91]

This group of Islamic organizations formed *PAM SWAKARSA* (Self-initiated Public Security Forces),[92] which was allegedly later mobilized and supported by ABRI's leadership.[93] This group saw the MPR Special Session as a constitutional means to achieve reform. It was, therefore, important for this group that the MPR Special Session did not fail. Occasionally, the two groups, supporters and opponents of the MPR Special Session, clashed physically. Often people in the streets were involved, mostly against the *PAM SWAKARSA*. Fatalities occurred.[94] Nonetheless, the government and prominent reformation figures reached an understanding, and the MPR held its Special Session from 10 to 13 November 1998.

While the MPR session was in progress, thousands of students from various universities in Jakarta, Tangerang, Bandung and its surroundings besieged the MPR complex and tried to occupy the MPR. They planned to compel the MPR to dismiss President Habibie and establish a presidium to govern the country. In the meantime, clashes between supporters and opponents of the MPR Special Session continued and many casualties occurred. On 13 November 1998, while the students took refuge in Atma Jaya Catholic University campus, they were shot at by unknown persons. Seventeen people were killed, including six students from various universities. More than 400 people were injured. General Wiranto, the Commander of the Armed Forces, claimed certain radical groups provoked clashes between students and the state apparatus to thwart the MPR Special Session.[95]

On the day the MPR session commenced, on the students' initiative,[96] four prominent reformist figures met at Gus Dur's residence in Ciganjur, Southern Jakarta, and issued the Ciganjur Declaration. These figures were Abdurrahman Wahid (Gus Dur), Amien Rais, Megawati Soekarnoputri, and

86 KISDI stands for *Komite Indonesia untuk Solidaritas Dunia Islam* – Indonesian Committee for Solidarity of the Islamic World.

87 CIDES stands for Center for Information and Development Studies.

88 Dewan Dakwah Islamiyah stands for Council of Islamic Missionary.

89 *Forum Silaturahmi Ulama-Habib* stands for the Forum of Friendship between Ulama-Habib.

90 *Jabodetabek* is an acronym for (an area marked by the cities of) Jakarta, Bogor, Depok, Tangerang, and Bekasi, or the Greater Jakarta area.

91 *Kongres Umat Muslim* stands for The Muslim Congress.

92 *PAM SWAKARSA* stands for *Pasukan Pengamanan Masyarakat Swakarsa*.

93 Kompas Daily, 10 June 2004. *"Kivlan Zein challenges Wiranto to court"*.

94 Tempo Magazine, 24 November 1998, *Pam Swakarsa: Actor or Victim?*

95 Kompas Daily, 23 November 1998.

96 The Ciganjur meeting's initiators were the Community of the Students of Bandung Institute of Technology, Jakarta Student Senate Communications Forum (FKSMJ), and Students of Siliwangi University.

Sultan Hamengkubuwono X.[97] They appealed to all parties to uphold the unity and the integrity of the nation in the spirit of Unity and Diversity and the Unitary State of the Republic of Indonesia, based on Pancasila and the 1945 Constitution, and to immediately carry out honest and fair elections overseen by independent teams.

The declaration asserted that an election would be a democratic way to end the transitional government of President B.J. Habibie and establish a legitimate new government. The declaration stated that three months (at most) after the May 1999 election, the MPR would need to form a new government. Further, they agreed that the dual function of the Armed Forces would be eliminated in phases and completed within six years (at most) from the date of the declaration, establishing a civil society.

The Armed Forces supported the MPR Special Session and believed it was necessary for maintaining the situation and for expediting the elections to 1999, a gateway for democratizing the country on a constitutional basis.[98]

The MPR Special Session was held amid scepticism and eventually produced decrees loaded with reform materials.

Among other points, the November 1998 MPR Special Session produced the following MPR Decrees:

1) No. VII/MPR/1998 on the Revision of and Additions to MPR Decree No. I/MPR/1983 on the Arrangement and Order of the MPR. The revised article states that "Revision to the Constitution should be implemented in accordance with the stipulations in Article 37 of the 1945 Constitution."[99] It removes the obstacles to amending the Constitution.
2) No. VIII/MPR/1998 on the Revocation of MPR Decree No. IV/MPR/1983 on Referendum.
3) No. XIII/MPR/1998 on the Limitation of the Term of Office of the President and Vice President of the Republic of Indonesia. This Decree sets a clear limit on the president's term in office, which can last a maximum of two periods. It hereby eliminates the ambiguous Article 7 of the 1945 Constitution.[100]
4) No. XIV/MPR/1998 on the Revision and Accretion of MPR Decree No. III/MPR/1998 on General Elections, the last time revised by MPR Decree No. I/MPR/1998. The new Decree states that the election will be conducted in 1999 instead of 2002. It also requires the democratization of political laws, including lifting restrictions on the number of political parties in Indonesia, which was at the time restricted to just three.

97 The four figures represented the then main political powers, which soon led the newly formed PDI-P, PKB, PAN, and GOLKAR party, which were the winners of the 1999 election.

98 The last election in the New Order era took place in 1997.

99 Article 104 of the revised MPR Decree No. I/MPR/1998.

100 Article 7 of original UUD 1945 says: The President and the Vice-President shall hold office for a term of five years and shall be eligible for re-election.

5) No. XV/MPR/1998 on the Implementation of Regions' Autonomy; Regulation, Division, and Just Utilization of National Resources; and Balanced National and Regional Financials within the Framework of the Unitary Republic of Indonesia.
6) No. XVII/MPR/1998 on Human Rights.

The MPR Special Session also assigned President Habibie to continue and consolidate the reformation process.[101] In response, Habibie asserted that the reform should be done through constitutional means rather than street actions.[102]

However, not all political powers agreed with changing the 1945 Constitution, despite enabling the possibility of change. Before the MPR Working Body Special Session's plenary meeting,[103] Rully Chairul Azwar[104] asserted that although GOLKAR had agreed to abolish MPR Decree No. IV/MPR/1983 on Referendum,[105] it did not mean that GOLKAR intended to change the 1945 Constitution. Azwar affirmed that until now, the 1945 Constitution, "in the totality of its soul, spirit and formulation", was the right constitution for Indonesia, whose independence was proclaimed on 17 August 1945.[106]

### III.4 The 1999 general election

Soon after the MPR Special Session, new laws on political parties and general elections were established. The DPR announced that the election would be conducted on 7 June 1999. Political activists established 141 new political parties and registered to participate in the election.[107] Among them were several prominent figures, such as Megawati Soekarnoputri, Abdurrahman Wahid, and Amien Rais. Soekarnoputri led PDI-P,[108] Wahid led PKB,[109] and Rais led PAN.[110] On the other hand, Akbar Tanjung took over the leadership

101 MPR Decree No. X/MPR/ 1998, Article 4.
102 Kompas Daily, 3 December 1998.
103 This meeting was held on 15 September 1998.
104 Azwar was speaking on behalf of F-PG (the MPR's largest faction in 1998).
105 This abolishment meant that changes to the 1945 Constitution could be performed using Article 37 of the Constitution.
106 Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Dua, Jilid 3, *Risalah Rapat Badan Pekerja MPR-RI,* Sekretariat Jenderal MPR-RI, 1999, p. 43. Previously, GOLKAR Extraordinary Congress, 9 to 11 July 1998, asserted that GOLKAR upholds the 1945 Constitution and *Pancasila*. Rully Chairul Azwar is a prominent figure of the FKPPI.
107 In accordance with Law No. 2/1999 on political parties, all political parties must include *Pancasila* as the foundation of the unitary state of the Republic of Indonesia, and the principles or characteristics, aspirations, and programmes of the political parties must not contradict *Pancasila*.
108 PDI-P stands for *Partai Demokrasi Indonesia Perjuangan* – Indonesia Democratic Party – Struggle.
109 PKB stands for *Partai Kebangkitan Bangsa* – Nation Awakening Party.
110 PAN stands for *Partai Amanat Nasional* – National Mandate Party.

of GOLKAR.[111] Eventually, 48 political parties (45 of which were new) could participate in the election.[112] In the meantime, the Armed Forces and civil servant corps asserted their neutrality and maintained an equidistant position towards all election contenders.[113]

Based on the new Law No. 3/1999 on Election, the Election Commission (*Komisi Pemilihan Umum* or KPU) was established. It consisted of representatives from the 48 political parties that had participated in the elections and five government representatives. KPU then elected Rudini, a retired four-star army general, former Chief of Staff of the Army, and former Minister of Home Affairs, as the chairman.[114] Further, in accordance with the law, KPU established the Indonesian Election Committee (*Panitia Pemilihan Indonesia* or PPI), consisting of the same number of representatives as KPU. Then, the KPU elected the author, Jakob Tobing, as the Chairman of PPI through a direct election during a plenary meeting. The author was previously a KPU member representing PDI-P.[115] According to the law, KPU functioned as the policymaker and was assigned with compiling the election outcomes at all levels into one national result. The PPI functioned as the organizing committee, establishing and overseeing an organizing committee at the provincial level, PPD I. Further, PPD I established and supervised PPD II at the district and city level. PPD II established and supervised PPS, which ran the election booths, conducted the elections, and computed its results. By law, PPI was authorized to compile election outcomes at every level and to count the election results at the national level. Subsequently, the tabulations were to be submitted to the KPU, presenting one comprehensive national election result.

The general elections were conducted fairly, peacefully, and simultaneously on 7 June 1999, except in some areas in North Sumatera.[116] Voter turnout was high. Of 118.217.393 registered voters, 105,786,661 cast a vote (89,48 %).[117] In accordance with Law No. 3/1999 on General Elections,

111 Akbar Tandjung, former chairman of HMI (Himpunan Mahasiswa Islam – Islamic Student's Association) and GOLKAR's former Vice Secretary General, was elected as GOLKAR's chairman in congress in 1998, defeating General (ret) Edy Sudradjat, former Commander of Indonesian Armed Forces and former Minister of Defence.

112 Law no. 3/1999 establishes requirements for political parties to take part in the 1999 General Election:
a. recognized in accordance with Law no. 2/1999 on Political Parties;
b. having a board of officials in more than half of Indonesia's provinces;
c. having a board of officials in more than half the number of districts/municipalities in the province referred to in point H.

113 During the old regime, ABRI and KORPRI were the backbones and main supporting powers of GOLKAR.

114 Rudini was the chairman of the MKGR party, one of the participating parties in the election.

115 The author represented PDI-P in KPU as a member (1999–2002). Previously, the author was the vice chairman of Supervisory Committee (PANWASLU) for the 1992 election and member of PANWASLU in the 1987 general elections.

116 www.kpu.go.id., accessed on 4 March 2012.

117 Ibid.

the election was open to domestic and international observers, who were present at the highest level down to the polling booth. The election was monitored by several domestic observers, the political parties themselves, several domestic NGOs, and international observers. Domestic observers included KIPP (*Komite Independen Pemantau Pemilu* – the Independent Committee of Election Observers), Forum Rector, and University Network for a Free and Fair Election (UNFREL). International observers included the European Union, Carter Center, NDI (National Democratic Institute), IRI (International Republican Institute), Australia, and Namfrel (National Citizens' Movement for Free Elections – Philippines).[118] After completing his observations in various areas, the Chairman of the Carter Center, the United States' former President Jimmy Carter, visited the KPU office in Jakarta on 9 June 1999. He met with Rudini and the author,affirming that the elections he had observed had gone well.[119] Later, Carter wrote in the International Herald Tribune that Indonesia had held a fair and democratic 1999 election.[120]

PPD II and PPD I successfully completed the vote count at their respective levels and endorsed it.[121] PPI also succeeded in counting votes for national elections. Signed by PPI leaders and representatives of government and all political parties participating in the election, PPI ratified the national level result in PPI's decision no. 335/15/VII/1999, dated 26 July 1999. Then, PPI sent a tabulation of election results from all levels to the KPU to be ratified nationally.

However, the KPU failed to compile the election results as reported by the PPI into one national election result as instructed by law.[122] While all political parties in the PPI agreed on the tabulations, representatives of the same political parties in the KPU failed to do so. The 27 out of 48 political parties that failed to win DPR seats refused to sign the results. They claimed that the elections had been rigged, forged, or manipulated. The political circles and the media nicknamed these parties the *"partai gurem"*, literally translated as "parties of the chicken lice". It became clear that these small parties expected to receive a seat in the Parliament, despite losing in the polls.

A KPU member from *Partai SPSI* revealed the expectation explicitly, stating that *Senayan* should also accommodate the small parties.[123] Conversely, *Partai Persatuan* (United Party) did not ask for a seat but urged the

118 See, among others, CNN World-Asia Pacific, 9 June 1999.

119 Jakarta, 9 June 1999.

120 International Herald Tribune, 16 July 2004. *Surprise: Muslim majority, fair election Indonesian voting.*

121 PPI took over the tabulation of the election result for South-East Sulawesi. It was conducted in Jakarta and witnessed by the chairman and representatives of PPD I from all over Indonesia and all political party representatives.

122 Article 66, Law No. 3/1999, on General Elections.

123 As stated by Rasyidi of *SPSI Party* (*Serikat Pekerja Seluruh Indonesia* – Indonesian Workers Association). *Senayan* is the name of the complex where the MPR buildings are located.

KPU to consider the value of the many residual votes[124] that should also be represented in Parliament.[125] This request of 27 small political parties prevented the KPU's 53 members from deciding or compiling the 1999 election results at a national level.

Commenting on this situation, the author testified that there were discussions among certain elements in the political parties to thwart the elections and let the KPU function as the KNIP (Central National Committee of Indonesia),[126] which in August 1945 functioned as the provisional MPR that formed the new government.[127] Anticipating the worst possibility, namely the failure of the democratic 1999 elections, the author, Adnan Buyung Nasution, and Oka Mahendra, together with Ryas Rasyid,[128] advised President Habibie to take over determining the election outcome. Habibie was by law in charge of the implementation of 1999 elections.[129] Then, as the PPI chairman, the author also sent the final tabulation directly to the President.[130] Based on the tabulation, and with a final check by the Election Supervisory Committee, President Habibie decided and promulgated the results of the 1999 elections with Presidential Decree No. 92/1999 on 4 August 1999.

In response, 18 small political parties, led by Sri Bintang Pamungkas of PUDI (the Indonesian Democratic Union Party),[131] reported the author to the police, on charges of manipulating the election results.[132] Years later, in 2004, these small parties still claimed that the 1999 election was invalid. They submitted their case to the International Tribunal in The Hague, the Netherlands, but it was rejected.[133]

Subsequently, the drawing of the DPR seats was conducted proportionally by PPI, based on the national votes obtained by each political party. The

124 The total vote gained by the small parties was 9,700,658 out of 105,786,661 active voters, equal to 9.17% of total votes. Source: KPU.

125 As stated by Mardinsyah of the *Partai Persatuan* (United Party). Republika Daily, 28 July 1999, *Partai Gurem Jangan Lagi Minta Kursi* ("Chicken lice" parties should not ask for seats anymore).

126 KNIP stands for *Komite Nasional Indonesia Pusat*.

127 See Jakob Tobing, *Berusaha untuk Turut Melayani*, *Memoar Politik Jakob Tobing*, KonPress, Jakarta, First Printing, 2008, p. 115.

128 Adnan Buyung Nasution and Oka Mahendra were members of the KPU representing government; Ryas Rasyid was the Director of the Institute of Governance Studies.

129 Article 8 paragraph (1) Law No. 3/1999 on General Elections.

130 PPI decision No. 335/15/VII/1999 on the Minutes and Certificate of Tabulation of PPD II, PPD I throughout Indonesia, and PPI, dated 26 July 1999.

131 PUDI stands for *Partai Uni Demokrasi Indonesia*.

132 Media Indonesia, newspaper, 12 October 1999, p. 13. Sri Bintang Pamungkas reported the author to the police headquarters, along with Adnan Buyung Nasution, Adi Andoyo, Andi Malarangeng, Afan Gafar, and Oka Mahendra.

133 Pelita Online, discussion on *"2004 election: Who will benefit?"*, Jakarta, 23 April 2004, accessed on 24 January 2012.

political parties newly entering the DPR[134] obtained 282 seats (61%), thereby outnumbering the established political parties, which won 180 seats or 39% of the total. The 462 elected members were added to the 38 appointed members from the military and the police, to make up a total of 500 DPR members. By law, the 1999 MPR had 700 members, which consisted of 500 DPR members plus 135 members elected by the provincial DPR (DPRD) and 65 members appointed by the President as the delegation of the functional groups. This composition fairly reflected the political landscape of the time.[135]

Thus, the 1999 democratic elections, with high voter turnout, the peacefulness of the process, observed by independent domestic and international observers, outweigh the accusations of result manipulation. It succeeded in forming an MPR with strong legitimacy for taking the necessary constitutional steps to overcome the various problems at hand. The 1999 democratic elections being held in the reform context shaped the basic attitude of elected MPR members to support the reform program. The establishment of the new MPR as the outcome of a broad-based political agreement, as manifested in the 1998 MPR Special Session decrees, effectively ended the conflict between those who demanded an extra-parliamentary solution to the crisis and those who wanted it conducted based on the existing rules. Likewise, this political agreement prevented unconstitutional attempts to take power. Although there was still some dissatisfaction with the intra-constitutional process, this step effectively turned an uncertain situation into a manageable political order necessary for undertaking a peaceful reform process.[136]

Thereby, the outcomes of both the 1998 MPR Special Session and the 1999 general election built a bridge for an intra-parliamentary and constitutional transition from an authoritarian to a democratic regime.

134 The new political parties were populated by opposition groups. Some of them were political prisoners during the old regime. On the other hand, the old political party leaderships were already in the hands of the reformists.

135 The hard-line Islam political parties were surprised by the outcomes. They assumed that the Islamic parties would win the 1999 election. See Sabili Magazine, July 1999 edition.

136 See also Donald L. Horowitz, op.cit., pp. 1–15.

### III.4.1 The outcome of the 1999 election

19 political parties managed to win seat(s) in the MPR. PDI-P successfully won the most, followed by the GOLKAR Party and the United Development Party (PPP). 10 political parties won less than 4 seats or less, in which 7 political parties won 1 seat each.[137]

## III.5 The new MPR

Based on Law no. 4/1999, the 1999 MPR had 695 members consisting of 500 DPR members, 130 members (18.7%) elected by the provincial DPR or DPRD I,[138] and 65 presidentially appointed MPR members (9.4%) from functional groups. The 500 DPR members consisted of 462 members (66.4%) from political parties elected in the elections and 38 members (5.5%) from the military and police appointed by the president.[139]

The composition of the 1999 People's Consultative Assembly was as follows:

1) 85.1% were elected members, and the president appointed 14.9%.
2) At least 424 (61%) members were from nationalist political parties and groups and 198 (28.6%) were from Islamist political parties,[140] although all religion-based political parties also had a nationalist character and vice versa.
3) The functional group was a cluster of loose and diverse political orientations of representatives of functional groups in society.
4) Many prominent figures of opposition groups, dissidents, and reform activists, including former political prisoners,[141] were elected in the 1999 election.[142]

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137 See Attachment III.1.

138 DPRD I stands for *Dewan Perwakilan Rakyat Daerah Tingkat I*.

139 UUD 1945 stipulated that the MPR should consist of DPR members plus delegations from the provinces and appointed members from functional groups. According to Law no. 4/1999, the total number of MPR members was 700, but 5 memberships from the East Timor province were cancelled, because East Timor voted for independence and became the Republic of Timor Leste.

140 For this analysis, FPDI-P, F-PG, and F-KKI were nationalist factions. Islamist factions were F-PPP, F-KB, F-PBB, F-Reformasi, and F-PDU. F-TNI/POLRI could be assumed to belong to nationalist groups. F-PDKB was a Christian/Catholic faction.

141 Some of them were former political prisoners, such as Soewarno (F-PDIP) and A.M. Fatwa (F-Reformasi).

142 Former opposition/dissident activists were now the MPR elected members from new political parties, such as Megawati Soekarnoputri, Amien Rais, Matori Abdul Djalil, and the author,and most of the presidentially appointed and DPRD I elected MPR members.

### III.5.1 The MPR's factions

In its plenary meeting on 2 October 1999, in accordance with its order, the MPR established its factions. Out of the 19 political parties which obtained seats in the MPR, 11 factions were established and ratified[143]: F-PDIP,[144] F-PG,[145] F-UG,[146] F-PPP,[147] F-KB,[148] F-Reformasi,[149] F-TNI/Polri,[150] F-PBB,[151] F-KKI,[152] F-PDU,[153] and F-PDKB.[154]

It should be noted from the outset that the MPR, in its plenary session on 3 October 1999, decided not to form a separate faction for MPR members from the Regional Delegates.[155] Instead, each of them was required to join one of the factions, except the F-TNI/Polri.

#### *III.5.1.1 F-PDIP*

The F-PDIP stands for *Fraksi Partai Demokrasi Indonesia Perjuangan* – The Faction of the Indonesian Democratic Party – Struggle. The F-PDIP, the faction of PDI-P (*Partai Demokrasi Indonesia Perjuangan* – the Indonesian Democratic

143 See Attachment III.2.

144 F-PDIP stands for *Fraksi Partai Demokrasi Indonesia Perjuangan* – the Faction of the Indonesian Democratic Party of Struggle.

145 F-PG stands for *Fraksi Partai GOLKAR* – the Faction of the GOLKAR Party.

146 F-UG stands for *Fraksi Utusan Golongan* – the Faction of the Delegations of Functional Groups.

147 F-PPP stands for *Fraksi Partai Persatuan Pembangunan* – the Faction of the United Development Party.

148 F-KB stands for *Fraksi Kebangkitan Bangs*a – the Faction of the National Awakening Party.

149 F-Reformasi stands for the Faction of the Reformation.

150 F-TNI/Polri stands for *Fraksi Tentara Nasional Indonesia/ Kepolisian Negara Republik Indonesia* – the Faction of the Indonesian National Armed Forces/Indonesian Police.

151 F-PBB stands for *Fraksi Partai Bulan Bintang* – the Faction of the Crescent Moon and Star Party.

152 F-KKI stands for *Fraksi Kesatuan Kebangsaan Indonesia* – the Faction of the Unitary of Indonesian Nationhood.

153 F-PDU stands for *Fraksi Partai Daulatul Ummah* – the Faction of the People's Sovereignty.

154 F-PDKB stands for *Fraksi Partai Demokrasi Kasih Bangsa* – the Faction of the Democracy and Love the Nation Party.

155 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 9. According to the original provisions of Article 2 paragraph (1) of the 1945 Constitution, the MPR was made up of members of Parliament and augmented by regional territory delegates and groups as provided by statutory regulations. Previously, MPR members who were regional territory delegates were grouped into a particular faction, i.e., the Faction of Regional Delegates. But during the MPR General Session in October 1999, the Faction of Regional Delegates was abolished, and its members were prompted to join other factions. Then, during the MPR 2000 Annual Session, a Faction for Regional Delegates was revived. However, MPR members from the Regional Delegates were not required to join. From then on, the MPR had 12 factions.

Party – Struggle)[156] and the winner of 1999 election, had 185 members in the MPR. Its membership comprised of 145 DPR members from the PDI-P and 40 MPR members from the Regional Delegates.

156 PDI-P is a nationalist party which was founded in 1997 as the successor of the Indonesian Democratic Party or the PDI (*Partai Demokrasi Indonesia*). The PDI-P, based on the ideology of *Pancasila*, the 1945 Constitution, adheres to a unitary form of the Republic of Indonesia, and the principle of *Bhinneka Tunggal Ika* (unity in diversity). PDI-P's chairperson is Megawati Soekarnoputri, the daughter of Soekarno, the founder of PNI and the first Indonesian President. Later, Megawati Soekarnoputri would become the 5th Indonesian President (2001–2004).
At the beginning of the reform era in the early 1990s, Megawati Soekarnoputri had invited several politicians and activists to join the PDI. They subsequently became involved in establishing the PDI-P. These included Arifin Panigoro (former student activist leader in the 1966 era), Theo Syafei (retired army Major General and former leader of the Armed Forces Faction of the DPR), Raja Kami Sembiring (retired army Major General and former leader of the Armed Forces Faction in the DPR), the author, Jakob Tobing (former student activist of the 1966 era, former member of the DPR for GOLKAR (1968–1997), former executive and First Deputy Chairman of GOLKAR National Executive Board and former Head of GOLKAR Board of Trustees Political Team (1973–1988; 1988-1993), and Zainal Arifin (former student activist leader of the 1966 era). Besides, several other activists and university lecturers were elected as members of the People's Consultative Assembly by the Provincial People's Representative Council (DPRD) and joined the F-PDIP. These included J.E. Sahetapy, Harjono, Frans Matruty, Hobbes Sinaga, and I Gusti Dewa Gede Palguna.
Soekarno's political thoughts and views, such as Marhaenism, *Pancasila*, nationalism, the unitary state, unity in diversity, and so on, were very influential in the PNI and later in the PDI-P. The 1945 Constitution or the UUD 1945 (*Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*) is perceived by many in the PDI-P, especially those with a long-standing PNI background, as President Soekarno's legacy that must be honoured and maintained.
Marhaenism is an ideology developed by Soekarno, which is essentially a struggle ideology formed by Socio-Nationalism, Democracy, and Socio-Religiosity. Although Marhaenism is occasionally related to Indonesian socialism, Marxism, and communism, it does not refer to the proletariat's spirit. Soekarno also used this term to refer to all Indonesians who lived in poverty, including laborers, small business merchants, fishermen, and any other low-income occupation group. Soekarno insisted that Marhaenism should be able to convince the low-income groups to unite and fight against anything that caused their troubles, including the colonizers. The ideology's goal was to throw off any kind of imperialism and reclaim the rights of the "small people" or the Marhaens in Indonesia. Apparently, the focus of Marhaenism was related to political independence, nationalism, and patriotism, and not so much to socio-economic equality, such as that promoted by Marxist socialism. (See Soekarno, *Indonesia Merdeka Suatu Jembatan*, in Ir. Soekarno, *Dibawah Bendera Revolusi*, Fifth Printing, June 2005, Publisher: Yayasan Bung Karno, pp. 285–289).
The PDI was established on 10 January 1973, as the imposed fusion of nationalist parties in the beginning of the New Order: The Indonesian National Party (*Partai Nasional Indonesia*), The Common People Deliberation Party or the Murba (*Partai Musyawarah Rakyat Banyak*) or the IP-KI (*Ikatan Pendukung Kemerdekaan Indonesia*), The Indonesian Christian Party or the Parkindo (*Partai Kristen Indonesia*), and the Catholic Party (*Partai Katolik*).

*Footnote 156 continues on the next page.*

### *III.5.1.2 F-PG*

The F-PG stands for *Fraksi Partai Golongan Karya* – The Faction of the Functional Groups Party. The F-PG is the faction of the GOLKAR Party (*Partai GOLKAR*), a metamorphosis of the non-party political ruling power, the GOLKAR (*Golongan Karya*) of Suharto's era.[157] The F-PG had 182 members in the MPR, which comprised of 120 DPR members from the Partai GOLKAR and 62 MPR members from the Regional Delegates.

### *III.5.1.3 F-UG*

The F-UG stands for *Fraksi Utusan Golongan* – The Faction of the Delegations of Functional Groups. The F-UG was comprised of 73 members of the MPR. The president appointed 65 of them. 8 members from the Regional Delegates joined the faction. This faction represented different functional groups, such as lawyers, farmers, women, labourers, teachers, and businessmen. It consisted of assorted groups with a variety of political colours.[158]

### *III.5.1.4 F-PPP*

The F-PPP stands for *Fraksi Partai Persatuan Pembangunan* – The Faction of the United Development Party. This is the faction of the Islam-based United

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The PNI was a nationalist party founded by Soekarno in 1927 and was the largest party in the PDI. Murba is a left-leaning political party, which was founded on 7 November 1948 by Tan Malaka, Sukarni, Chaerul Saleh, and Adam Malik, after the failed Communist rebellion in September 1948. IP-KI or The Association of Indonesian Independence Defenders was founded by General (ret.) A.H. Nasution in 1954. IP-KI's ideology was based on *Pancasila* and the 1945 Constitution.
In the 1999 election, both Murba and IP-KI were revived and contested but failed to win a seat. In the 2004, 2009, and 2014 elections, Murba and IP-KI did not meet the requirements to participate.
The Indonesian Christian Party or Parkindo (*Partai Kristen Indonesia*) was a Christian-based political party. Founded by Johannes Leimena and Melanton Siregar on 10 November 1945, it was dissolved on 11 January 1973.
The Catholic Party (*Partai Katolik*) was declared on 12 December 1949 as the fusion of seven existing Catholic parties.

157 GOLKAR based its ideology on corporatism, *Pancasila*, the 1945 Constitution, the unitary form of the Republic of Indonesia, and the principle of *Bhinneka Tunggal Ika* (Unity in Diversity). In the aftermath of President Suharto's resignation, led by Akbar Tanjung, the so-called reform-minded groups within GOLKAR managed to take over the organization, change its status and turn it into a political party, the GOLKAR Party. They labelled it a reformist political party.
The GOLKAR Party managed to obtain the second largest vote in the 1999 election. It did so by benefitting from the extensive and localized networks that GOLKAR had built during Sudharmono's era, its experienced organizers, and GOLKAR's agile politics during the MPR 1998 Special Session.

158 President Habibie appointed 65 members. Subsequently, 8 members from the Regional Delegates joined the Faction of the Delegations of Functional Groups. See pp. 105 and 109.

Development Party or the PPP (*Partai Persatuan Pembangunan*).[159] The F-PPP had 69 members, comprised of 58 DPR members of the PPP and 11 MPR members from the Regional Delegates.

### *III.5.1.5 F-KB*

F-KB stands for *Fraksi Kebangkitan Bangsa* – The Faction of the National Awakening Party. This is the faction of National Awakening Party or PKB (*Partai Kebangkitan Bangsa*).[160] F-KB had 58 members, comprised of 51 members of the DPR (DPR of Representatives) from the PKB and 7 members from the Regional Delegates.

### *III.5.1.6 F-Reformasi*

The F-Reformasi stands for The Faction of the Reformation. It had 48 members, which consisted of a merger of 34 DPR members from the National Mandate Party or the PAN (*Partai Amanat Nasional*),[161] 7 members

159 The PPP was established on 5 January 1973, as the government-imposed fusion of Islamic political parties at the beginning of the New Order. The PPP consisted of the Nahdlatul Ulama Party (Partai NU), the Muslim Party of Indonesia or the Parmusi (*Partai Muslimin Indonesia*), the Islamic Association Party of Indonesia or the PSII (*Partai Syarikat Islam Indonesia*), and the Islamic Educational Movement or the Perti (*Persatuan Tarbiyah Indonesia*). Partai NU was founded in Jakarta on 16 August 1998, with its main supporters coming from the environment of Nahdlatul Ulama. Parmusi (*Partai Muslimin Indonesia)* or the Muslim Party of Indonesia was officially declared on 20 February 1968 as a grouping of various Islamic organizations, with resemblances to Masyumi. PSII (*Partai Syarikat Islam Indonesia*) or Islamic Association Party of Indonesia was one of the Islamic political parties that had its root in the *Syarikat Islam* (Islamic League) founded by Haji Oemar Said Tjokroaminoto in 1912. PSII participated in the 1971 election. Perti (*Persatuan Tarbiyah Indonesia*) or the Islamic Educational Movement was established on 20 May 1930 in West Sumatera.

160 The PKB was founded on 11 May 1998 at Pesantren of Langitan, Central Java, with a strong endorsement by prominent *Kyai* (religious scholars), such as Kyai Cholil Bisri, Kyai Muchid Muzadi, and Kyai Abdurrachman Wahid (Gus Dur), and usually categorized as a moderate and conservative Islam-based political party. In the October 1999 MPR General Session, K.H. Abdurrachman Wahid was elected as the fourth President of the Republic of Indonesia.

161 The PAN was declared on 23 August 1998. It was declared by, among others, Amien Rais, Goenawan Mohammad, Albert Hasibuan, Emil Salim, A.M. Fatwa, Zoemrotin, and Alvin Lie Ling Piao. The PAN based its ideology on upholding and enforcing the people's sovereignty, justice, balanced material, and spiritual development, and based the party's ideals on religion, morality, humanity, and diversity. The PAN also emphasises its adherence to non-sectarian and non-discriminatory principles. The PAN's main support base comes from the environment of Muhammadiyah, one of the largest Islamic organizations in Indonesia. Amien Rais was once Muhammadiyah's chairman. This background, along with its collaboration with Partai Keadilan, an Islam-based political party, explains to some extent the distinct stance of F-Reformasi during the amendment process.

of the Justice Party (*Partai Keadilan*),[162] and 7 members from the Regional Delegates.

*III.5.1.7 F-TNI/Polri*

F-TNI/Polri stands for *Fraksi Tentara Nasional Indonesia/Kepolisian Negara Republik Indonesia* – The Faction of Indonesian National Armed Forces and Indonesian Police. In accordance with Law No. 4/1999, the Armed Forces or ABRI (*Angkatan Bersenjata Republik Indonesia*), which consisted of the military and the police, had 38 MPR representatives who were concurrently members of F-TNI/Polri in the DPR.[163]

*III.5.1.8 F-PBB*

The F-PBB stands for *Fraksi Partai Bulan Bintang* – The Faction of the Crescent Moon and Star Party. It is the faction of the Crescent Moon and Star Party or the PBB (*Partai Bulan Bintang*).[164] The F-PBB had 14 members in the MPR, which included 13 DPR members from the PBB and 1 member from the Regional Delegates.

*III.5.1.9 F-KKI*

The F-KKI stands for *Fraksi Kesatuan Kebangsaan Indonesia* – The Faction of the Unity of Indonesian Nationhood. It was a faction with 14 members, which included MPR members from several political parties. 4 members came from the Justice and Unity Party or the PKP.[165] 2 members came from

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162 The Justice Party or the PK (*Partai Keadilan*) declared its existence at the Al-Azhar Mosque, Kebayoran Baru, Jakarta, on 20 July 1998, and raised Nurmahmudi Isma'il as its first president. The PK's formation began with the Islam *da'wah* (proselytize) movements in leading college campuses in Indonesia in the 1980s. The Islam *da'wah* movement itself was initiated in 1967 by Muhammad Natsir, the fifth Prime Minister of the Republic of Indonesia from Masyumi (12 March 1946 – 26 June 1947). It was developed as a student *da'wah* movement by Imanuddin Abdulrahim in Masjid Salman in the Bandung Institute of Technology or ITB (*Institut Teknologi Bandung*) campus in Bandung. Based on Islam, the PK is the predecessor of the Prosperous and Justice Party or the PKS *(Partai Keadilan Sejahtera*).

163 Law No. 4/1999 on the Composition and Position of the MPR, the DPR, the DPRD, Chapter III, Article 11, paragraph (3). As initiated by ABRI and agreed by the main political powers prior to the 1999 election, this was a reduction from the previous 78 members of ABRI during the New Order era. See Deklarasi Ciganjur, 1998.

164 The PBB, established on 17 July 1998, is an Indonesian political party based on Islam. It regards itself as the successor of the political party Masyumi, successful during the early decades of independence. Masyumi is an Islam-based political party, which was originally founded in Yogyakarta on 8 November 1945 and was revived in Jakarta on 28 August 1998.

165 The PKP stands for *Partai Keadilan dan Persatuan*. It was founded in December 1998. It split from GOLKAR, initiated by retired General Wiranto, former commander of the Armed Forces at the end of Suharto's presidency.

the Indonesian Democratic Party or the PDI.[166] 1 member each came from the Association of Indonesian Independence Supporters Party or the IP-KI,[167] the Marhaen Mass Indonesian National Party or the PNI-MM,[168] the Marhaenist Front Indonesian National Party or the PNI-FM,[169] the Unity in Diversity Party or the PBI,[170] and the United Party or the PP.[171] 3 members came from the Regional Delegates.

*III.5.1.10 F-PDU*

The F-PDU stands for *Fraksi Persatuan Daulatul Ummah* – The Faction of the Unity of the Islamic Community. It was a faction in the MPR with 9 members, which included 4 members from the Congregation Awakening Party or the PNU,[172] 2 members from the People's Sovereignty Party or the PDR,[173] and 1 each from the Indonesian Islamic Association Party or the PSII[174] and the Indonesian Muslim Shura Council or Masyumi,[175] and 1 member from the Regional Delegates.

*III.5.1.11F-PDKB*

F-PDKB stands for *Fraksi Partai Demokrasi Kasih Bangsa* – The Faction of Democracy and Love the Nation Party. The F-PDKB was a faction of 5 members from the Democracy and Love the Nation Party or the PDKB.[176]

166 PDI stands for *Partai Demokrasi Indonesia*. It was one of the political parties during the New Order period, founded on 10 January 1973.

167 IP-KI stands for *Ikatan Pendukung Kemerdekaan Indonesia*. The IP-KI, founded by General A.H. Nasution on 20 May 1954, was a co-founder of the PDI.

168 PNI-MM stands for *Partai Nasional Indonesia Massa Marhaen*. The PNI-MM was a nationalist political party founded on 21 May 1998 in Jakarta, intended to revive the old PNI, which was founded by Soekarno in Bandung on 4 July 1927.

169 PNI-FM stands for *Partai Nasional Indonesia Front Marhaenis*. PNI-FM was initiated by Probosutedjo, Suharto's half-brother, and founded in Jakarta on 10 February 1999. Probosutedjo was a member of *Pemuda Marhaenis* (Marhaenist Youth), the PNI's youth-wing in 1927.

170 PBI stands for *Partai Bhinneka Tunggal Ika*. It was established on 11 June 1998.

171 PP stands for *Partai Persatuan*. The PP was a moderate Islam-based political party founded by HJ Naro in Jakarta on 3 January 1999 and was a splinter of the PPP.

172 The PNU stands for *Partai Nahdlatul Ummah*. The PNU, a political party based on Islam, founded in Jakarta on 16 August 1998, had its main support base in the environment of the Nahdlatul Ulama.

173 PDR stands for *Partai Daulat Rakyat*. The PDR was founded on 1 January 1999 and claimed to have its basis among workers, peasants, the informal business sector, fishermen, and other marginalized sectors.

174 PSII stands for *Partai Syarikat Islam Indonesia*.

175 Masyumi stands for *Majelis Syuro Muslimin Indonesia*. The PSII was an Islam-based political party that was originally founded in Solo on 16 October 1905 and was revived in Jakarta on 29 May 1998.

176 PDKB stands for *Partai Demokrasi Kasih Bangsa*. The PDKB was founded in Jakarta on 5 August 1998, with its main support base among Christians, Catholics, and Chinese descendants.

## III.6 The compositions of the factions

For details on this, see Attachment III.2.

## III.7 The MPR leaders

Following the MPR's procedural rules, the MPR's leadership shall consist of a chairman and seven vice-chairmen. For that purpose, the MPR's factions shall propose eight candidates to be elected by the MPR's members. The candidate who receives the most votes will be the chairman, and the other seven candidates will become vice-chairmen.[177] Then, in the fourth MPR plenary meeting on 3 October 1999, the MPR leadership election was held. Prof. Amin Rais (F-Reformation) was elected as the Chairman and Matori Abdul Jalil (F-KB), Hari Sabarno (F-TNI / Polri), Prof. Ginandjar Kartasasmita (F-Golkar), Kwik Kian Gie (F-PDIP), H.A. Nazri Adlani (F-UG), Husni Thamrin (F-PPP) and Prof. Jusuf Amir Faizal (F-PBB) were elected as the MPR's Vice-Chairmen. Further, the MPR's leadership shall, among others, determine tasks and work division among the MPR's Chairman and Vice-Chairmen.[178]

177 MPR Decree no. II/1999 on Rules of Procedure of the People's Consultative Assembly of the Republic of Indonesia.

178 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 11.

# IV The Constitution, Negara Hukum, and Constitutional Democracy

As described in Chapter III, the 1945 Indonesian Constitution was prepared by the Investigating Commission for the Preparation of Independence (BPUPK – *Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan*), a committee formed by the Japanese military authority during the final months of the Japanese occupation of Indonesia.

The 1945 Constitution was promulgated by the Preparatory Committee of Indonesia's Independence (PPKI – *Panitia Persiapan Kemerdekaan Indonesia*) on 18 August 1945 – one day after Indonesia's proclamation of independence – with an agreement to improve the 1945 Constitution's articles as soon as possible.[1]

In the first four years of independence, the 1945 Constitution was a nominal constitution. Even though it was officially the state's constitution, its rules were not implemented.

Since its formulation, efforts have been made to incorporate principles into the Constitution that respect people's sovereignty, such as freedom of speech, a state based on law, and limitations on power. Mohammad Hatta and Maria Ulfah Santoso, for instance, urged adherence to human rights and democracy and strongly rejected a state with unlimited power.[2] Later, at the beginning of "*reformasi*", students and activists demonstrated and loudly voiced the importance of freedom of speech, the rule of law, and democracy.[3]

One of the reasons put forward for improving the 1945 Constitution was that it had textual and contextual problems, was insufficient to support democracy, and did not contain enough clauses to escape authoritarianism.[4]

Thus, during the amendment process, the public and the MPR's factions discussed how to ensure that the Constitution includes principles such as popular sovereignty, rule of law, limitation of powers, and protection of human rights. However, comprehension of the principles varied. Some understood a 'state based on law' (*negara hukum*) from a legality perspective, while others found that the law must be formed through a democratic process that respects human rights.

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1 See II.1.

2 See Sekretariat Negara Republik Indonesia, *op.cit.*, p. 263.

3 *Reformasi* is a term that refers to the 1998 reform movement in Indonesia, which demanded and finally succeeded in overthrowing authoritarian rule and replacing it with democracy.

4 *Kompas Daily*, 1 September 1999, Seminar on *"Menilai perbaikan UUD 1945, Menuju Indonesia Baru" (Assessing the Improvement of the UUD 1945, Toward a New Indonesia)"* at the National Resilience Institute (Lemhannas), Jakarta, 31 August 1999.

This chapter first sets out a theoretical framework for understanding the essence of a constitution, rule of law and democracy, and a constitutional democracy. Secondly, it discusses the common narratives for describing constitution-making processes, notably those concerned with the rule of law and democracy. Finally, it discusses the relationship between the principles that shape a constitutional democracy and the constitutional amendment process.

## IV.1 The constitution

Oxford Dictionary defines a constitution as a body of fundamental principles or established precedents according to which a state or other organization is acknowledged to be governed. This section derives the following constitutional characteristics from academic publications that try to define what a constitution is or ought to be.

In its very idea, a constitution should reflect the views and wishes of those who are bound to it and preserve the founding norms, the nation's basic values, and the state's establishment. Thus, the Constitution often makes principles, structures, and symbols (e.g., republicanism, democracy, federalism, and separation of powers) unamendable, alongside rights and freedoms, pluralism, and national flags. It seems contrary to the idea of a constitution – which ought to reflect the views and wishes of those bound by it – that there could be enforceable limits to what the people's representatives may do. The unamendable sections reveal much about a constitution and its essential values.[5]

Harjono, an amendment committee member, argued that a constitution is an ideological, legal, political, economic, and social framework.[6] Elazar similarly argues there are three dimensions of a constitution: the frames of the government, the reflection and accommodation of socio-economic power realities, and the moral principles underlying the polity. Whereas the frames of the government are comprised of institutions and procedures, a constitution 'reflects and accommodates the aspirations and political views of the society', upheld by its representatives. The moral dimension of the

5 See Richard Albert, *The State of the Art in Constitutional Amendments*, in Richard Albert, Xenophon Contiades, Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendments*, Hart Publishing, Oxford and Portland, Oregon, 2017, pp. 7-8.

6 Harjono, is a lecturer of Constitutional Law at Airlangga University, Surabaya and was a member of MPR from F-PDIP (*Fraksi Partai Demokrasi Indonesia Perjuangan* – Faction of Indonesian Democratic Party – Struggle) in Ad-Hoc Committee for Amendment of the 1945 Constitution, 1999 - 2002. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan UUD Negara Republik Indonesia Tahun 1945, Tahun Sidang 2000, Buku Dua,* Edisi Revisi, Sekretariat Jenderal, 2010, p. 430.

constitution serves 'to limit, undergird, and direct ordinary political behaviour' within the constitutional system.[7]

In addition, a constitution matters because it provides a political structure that protects fundamental rights.[8]

Limiting government powers by distributing authority is at the heart of 'limited government'. The political structure envisioned in the constitution is so important to the values contained in this concept that this structure needs to be consistently upheld.[9]

Finally, in the words of Jimly Asshiddiqie, Indonesia's Constitutional Court's first chairman, the constitution is the highest and most basic law, the source of legitimacy or basis for authorizing other forms of law or regulation. Therefore, all regulations under the constitution can only be applied or enforced if they do not contradict the highest law.[10] However, a constitution solves nothing unless interpretation and enforcement apparatuses are in place.

### IV.1.1 Constitution Types

There are various kinds of typologies of constitutions, which can be used for different purposes, or which suit different scholarly disciplines.[11] This section outlines five constitution typologies that are relevant from this study's perspective: (1) normative, nominal or semantic, (2) authoritarian or democratic, (3) written or unwritten, (4) federal or unitary, and (5) flexible or rigid.

First, there is the *normative* constitution, which controls or governs the political processes within a particular country. It is an effective or strong constitution.[12] Secondly, the *nominal* constitution's contents do not always correspond to domestic political realities. Its text is mainly (or only) nominal and thus not really implemented, due to lack of appropriate conditions. Third, the *semantic* constitution, or "pseudo-constitution", only serves to formalize and legalize the monopoly of power already held by some groups. It is a clear means by which dictatorial governments disguise their

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7 Elazar D.J. (1985), *Constitution-making: The Pre-eminently Political Act*. In: Banting K.G., Simeon R. (eds), *The Politics of Constitutional Change in Industrial Nations.* Palgrave Macmillan, London. https://doi.org/10.1007/978-1-349-06991-0-9

8 Mark Tushnet, *Why Constitution Matters*, Yale University Press, 2010, pp. 1, 92, 173.

9 Martin H. Redish, *The Constitution as Political Structure*, Oxford University Press, 1995, p. 5.

10 See Jimly Asshiddiqie, *Konstitusi & Konstitusionalisme Indonesia,* Konstitusi Press, Jakarta, 2nd printing, 2006, p. 23.

11 See Dieter Grimm, *Types of Constitutions,* in Michel Rosenfeld and András Sajó, *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, pp. 98-99.

12 David Law and Mila Versteeg, *(Sham) Constitutions,* California Law Review, vol. 101, 4, 2013, p. 883.

authoritarianism or totalitarianism. Instead of limiting government power in favour of individual rights, those "constitutions" are meant to reinforce or strengthen an already oppressive political system.[13]

Another relevant distinction is between *authoritarian* and *democratic* constitutions. A democratic constitution is a body of fundamental law that defines, limits, and distributes government power in a government system based on popular sovereignty, checks and balances, adherence to human rights, and periodical and transparent circulation of powers. This study is concerned with making a democratic constitution meant to develop into a normative constitution, i.e., an effective prescriptive document to manage the state, defining its institutions, constraining or restricting the scope of state power, and encouraging and directing societal changes to achieve shared ideals. A particular form of authoritarian constitution is the weak constitution, which promises little in terms of rights and democratic principles.[14]

A third relevant distinction is between *written* and *unwritten* constitutions. A written constitution embodies the most important legal rules that govern a government in a document or collection of documents. An unwritten constitution means that there is no written constitution. Although the distinction between written and unwritten constitutions seems to be relatively unimportant,[15] there is no constitution that is fully written or unwritten.[16]

The written constitution is usually subject to a stringent amendment process, which protects important values, principles, and rights from a simple majority's damaging actions, thus limiting certain government actions. In that regard, judicial review has an essential part to play in protecting the written constitution.[17]

Fourthly, constitutions can be distinguished according to how government powers are distributed between the country's national and subnational governments. Thus, constitutions are classified as 'federal' and 'unitary'.

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13 See Karl Loewenstein, *Political Power and the Governmental Process*, The University of Chicago Press, second edition, 1965, pp. 147-153. Law and Versteeg bring both the nominal and the semantic constitution under the notion of sham constitution, as their major feature is that they do not deliver on their promises (ibid., p. 880).

14 Law and Versteeg, ibid., p. 883. Indonesia's original 1945 Constitution would qualify as a weak constitution.

15 Arend Lijphart, Patterns of Democracies, Government Forms and Performance in Thirty-Six Countries, Yale University Press, 1999, p. 217.

16 C.F. Strong, *Modern Political constitutions*, 1973, pp. 57-59, in Denny Indrayana, *Indonesian Constitutional Reform 1999 – 2002, An Evaluation of Constitution-Making in Transition*, Kompas Book Publishing, Jakarta, 2008, p. 30. Whereas, it is often said that the Indonesian constitution consists of the written 1945 Constitution and the unwritten constitution, but in this dissertation, the Constitution always refers to a written constitution, because Indonesia has not yet developed an accepted and sophisticated jurisprudence of unwritten constitutional law. See also Tim Lindsey, *Indonesian Constitutional Reform: Muddling Towards Democracy*, 2002, p. 6.

17 Martin H. Redish, *op.cit.*, pp. 7, 8.

In a *federal* constitution, government power is divided between national and subnational governments, where each government is legally independent within its own sphere. The federal (or national) government exercises its powers without the control of subnational governments and vice-versa. In particular, the federal and regional legislatures both have limited powers. Neither is subordinate to the other. Both are co-ordinated.

By contrast, in a *unitary* constitution, the national legislature is the country's supreme law-making body. It may permit other legislatures to exist and exercise their powers, but it has the legal right to overrule them. They are subordinated to it.[18]

Finally, constitutions can be *flexible* or *rigid*. Flexible constitutions can be amended by the legislature similarly as any other law, whereas rigid constitutions require a special amendment process containing certain legal obstacles. A rigid constitution can also be classified as a *supreme* constitution, being supreme over the legislature, requiring a special amendment process as stipulated in the constitution. Hence, a supreme constitution's amendment is not within the legislature's sole competence.

While both democracy and rule of law are vital to the discussion on Indonesia's constitutional change, both are contested concepts, as the following sections discuss.

## IV.2 Democracy and rule of law: constitutional democracy

### IV.2.1 Democracy

Deriving from classical Greek, democracy (*demokrasi* in Bahasa Indonesia) means power *(kratos)* of the people *(demos*). Historically, democracy has often arisen from struggles against despotic rule and social injustice.[19]

Colloquially, 'democracy' describes a government system where the supreme power is vested in the people and is exercised by them, directly or indirectly, through a representation system, usually involving periodic and free elections.[20]

Most political theorists consider democracy as the best form of government. Nevertheless, democracy is not an undeniable blessing.[21] Democracy is often claimed by regimes who implement a majoritarian system, where the legislative or executive majority applies the winner-takes-all principle.

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18 K.C. Wheare, *Modern Constitutions*, Oxford University Press, Fifth impression, 1980, pp. 14-19.

19 Robin Luckham, Anne Marie Goetz and Mary Kaldor, Democratic Institutions and Democratic Politics, in Can Democracy Be Designed? The Politics of Institutional Choice in Conflict-torn Societies, Sunil Bastian and Robin Luckham (ed.), Zed Books, 2003, p. 15.

20 Merriam-Webster Dictionary.

21 Larry Diamond, *Developing Democracy, Toward Consolidati*on, The John Hopkins University Press, 1999, p. 2.

While procedurally correct, it increases the chance of producing policies that are detrimental to minority groups. If 'democracy' says nothing about the content of law, it is substantively empty.

Democracy is generally claimed by authoritarian governments who, as in state socialism, declare to be enhancing people's welfare, while denying people's basic political rights. The latter have no right to choose their leader, no freedom of expression, and no free press. The ruler applies arbitrary power as a means to justify the end. This is a pseudo-democracy. In contrast, a normative or effective democracy should satisfy certain requirements, i.e., constitutional protection, an independent judiciary, free elections, freedom of opinion and association, and the existence of opposition and civic education.[22]

By itself, democracy is a procedurally blunt and unwieldy mechanism that does not guarantee morally good laws. It may even facilitate evil if there is no delineation of the good and just with respect to the law's content. Conversely, without proper democratic procedures, which are applied with certainty and equality, the law's content loses its legitimacy.

When democratic mechanisms are applied in a society without a democratic tradition or without efforts to build one, or when antagonistic subcultures or communities coexist, an organized cabal or subgroup can seize the reins of government power, then utilize the law to advance its particular agenda, while claiming democracy's conferred legitimacy.[23]

Furthermore, since a democratic legislature can change the law whenever it desires, this threatens the certainty of law, which differs from the classical and medieval understanding, where the rule of law was an enduring body of natural and customary laws.[24]

Therefore, democracy is not only a way, tool, or process, but should also incorporate values or norms that inspire the society, nation, and state. Democracy must have substance, namely principles that must be upheld. These include the principles of constitutionalism to limit the arbitrariness of power, including the tyranny of the majority.[25] Democracy is also understood as a political system where people's basic rights are embedded in the highest law, namely the constitution, which emphasizes that the majority's wishes and state power are subjugated to the constitution's fundamental principles.

Democracy never serves as an automatic remedy. It only opens opportunities to achieve the desired effects. Hence, achieving democracy depends on adopted and safeguarded rules and procedures, as well as how citizens use opportunities[26] and how an effective machinery enforces the fundamentals.

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22 See Sri Soemantri Martosoewignyo, *op.cit.*, pp. 42-43

23 Brian Z. Tamanaha, *On the Rule of Law, History, Politics, Theory*, Cambridge University Press, 2004, pp. 93 - 100. Cabal is "secret gang".

24 Ibid., p. 101.

25 Adnan Buyung Nasution, *Demokrasi Konstitusional, Pikiran dan Gagasan, op. cit.*, pp. 3, 12.

26 Amartya Sen, *Development as Freedom*, Alfred A. Knopf, New York, 1999, p. 155.

### IV.2.2 Rule of law

Like democracy, the rule of law has historical roots. Aristotle (384 – 322 BC) wrote, "Law should govern,"[27] and that "even the guardians of the laws are obeying the laws."[28] Roman statesman *Cicero* (136 – 43 BC) expressed that we are in bondage to the law in order that we may be free.[29] Lord Denning assumed that the *Magna Carta Libertatum* (1215) was the greatest constitutional document of all times – the foundation of individual freedom against the despot's arbitrary authority.[30] In 1690, John Locke warned that "wherever laws end, tyranny begins."[31] Thomas Paine wrote that "the law is king."[32] The phrase "*a government of laws, not men*", was made famous by John Adams, the second president of the United States of America.[33] These citations all refer to a state, a government, based on law. It is the law that governs, not a person. So, the rule *of* law is often contrasted with the rule *by* law, the latter referring to a state where a person decides and uses the law as an instrument to justify and legalize such decisions.[34]

While 'the rule of law' is an English expression that is well-known in countries with legal systems rooted in British colonialism or influenced by Britain, similar concepts exist in Germany, France, Italy, the Netherlands, Spain and in other states where law is influenced by jurisprudence. In Germany and the Netherlands, reference is made to the *Rechtsstaat*, while in France it is to État de droit. In Indonesia, rule of law corresponds to *'Negara Hukum'*, which translates to 'law-governed state' and is generally understood as a 'state based on the rule of law'.

While rule of law emerged in the context of national law, contemporary references to the rule of law are also embedded in international instruments of high standing, such as the preamble of the Universal Declaration of Human Rights and the European Convention of Human Rights. With the irresistible contemporary phenomenon of globalization, a transnational legal infrastructure is developing apace. With such background, besides the advancement of the rule of law within a state, the rule of law at international levels is growing. Civil, political, and human rights are explicitly

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27 Aristotle, Politic, Liberality and Law, Chapter XVI, art. 1287a.

28 *Aristotle's Politics and Athenian Constitution,* ed. and trans. John Warrington (J.M. Dent, 1959), book III, s. 1287, p. 97, in Tom Bingham, *The Rule of Law*, Penguin Books, 2010, p. 3.

29 The original Latin reads: "*Legum denique idcirco omnes servi sumus, ut liberi esse possimus*". Marco Tullio Cicero, from his oration *Pro A Cluentio*, on behalf of Aulus Cluentius, chapter 53, section 146.

30 Danny Danziger & John Gillingham, *1215: The Year of Magna Carta*, paperback edition, 2004, p. 278.

31 John Locke, *Second Treatise of Government*, chap. XVII, s. 202 (1690); Cambridge University Press, 1988, p. 400, in Tom Bingham, *op. cit.*, p. 8.

32 Lieberman, Jethro. *A Practical Companion to the Constitution*, University of California Press, 2005, p. 436

33 *The Massachusetts Constitution*, Part The First, art. XXX (1780).

34 Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme di Indonesia,* Konstitusi Press, 2nd printing, October 2006, p. 23.

set forth in multiple international and regional declarations. It is worth noting that at this level a qualitatively different kind of legal limitation on sovereigns holds government leaders personally accountable for especially egregious conduct. However, this thesis addresses the rule of law primarily at a domestic level.

With its global dissemination, 'rule of law' may have become meaningless because of its ideological abuse and general overuse.[35] For the former, authoritarian governments that claim to abide by the rule of law routinely use this phrase in oppressive terms.[36] For the latter, there is tendency to use the term as a shorthand description of any political system's positive aspects.[37] As noted on the cover of Tom Bingham's book, *The Rule of Law*, the 'rule of law' as the foundation of modern states and civilizations has recently become even more talismanic than that of democracy.[38]

Yet, rule of law is an essentially contested concept. It has served a wide variety of political agendas, from libertarianism to social welfare liberalism to soft authoritarianism, to state socialism.[39] Thus, as Tamanaha states, the rule of law stands in the peculiar state of being the preeminent legitimating political ideal in the world today, without agreement upon precisely what it means.[40] Among policy makers and practitioners who promote the rule of law abroad, there is also uncertainty about the rule of law's essence.[41] The 'rule of law' is an exceedingly elusive notion and its precise meaning is rarely articulated.[42] Proponents support the rule of law in the interests of freedom, in the preservation of order, and in the furtherance of economic development.[43] Everyone seems to both support it and have different interpretations about its exact meaning.

Before the concept is further unpacked, Tamanaha and others have also revealed a negative use of the 'rule of law'. They observed that despite its great contribution to human existence in its capacity to hold governments legally accountable, it also has a long history of aligning with liberalism in a conservative and anti-democratic manner. In that context, liberalism is the

35 Judith Shklar, *Political Theory and the Rule of Law*, in A. Hutchinson and P. Monahan (eds), *The Rule of Law: Ideal or Ideology*, Carswell, Toronto, 1987, p. 1.

36 Brian Z. Tamanaha, *op.cit.* p. 3.

37 Joseph Raz, The Rule of Law and its Virtue, in Raz, The Authority of Law: Essays on Law and Morality, Oxford University Press, 1979, p. 210.

38 Tom Bingham, *The Rule of Law,* Penguin Books, 2010.

39 Randall Peerenboom, Varieties of Rule of Law, An introduction and provisional conclusion, in Asian Discourses of Rule of Law. Theories and implementation of rule of law in twelve Asian countries, France and the U.S., Randall Peerenboom (ed.), Routledge, 2004, p. 1.

40 Brian Z. Tamanaha, *On the Rule of Law, History, Politics, Theory,* Cambridge University Press, 2004, p. 4.

41 Thomas Carothers, *Promoting the Rule of Law Abroad*, Carnegie Endowment for International Peace, Rule of Law Series, No. 34, January 2003, p. 3.

42 Brian Z. Tamanaha, *op.cit.*, p. 3.

43 Ibid.

dominant partner in the relationship, utilizing the rule of law to advance conservative and anti-democratic ends. Even today, aspects of this show up in liberal political and economic thought, in the relationship between the common law and legislation, in certain formulations of the rule of law, and in the realm of contemporary economic development.[44] This observation is confirmed in Hayek's argument that the rule of law is tightly wrapped with capitalism and liberalism. Hence, the rule of law cannot operate in the context of a socialist economy or the social welfare state.[45]

By contrast, Trubek and others affirm that the social welfare state does not necessarily threaten the rule of law, even relying upon it to function. The rule of law creates an area for government action not cabined by detailed legal restrictions.[46]

Regardless, the rule of law has specific limits in developing countries. Its aspect of formal legality (see below) is not appropriate or socially beneficial in a society with significant diversities, such as in developing countries in Asia and Africa, where communitarian cultural strains may clash with aspects of formal legality. Formal legality as 'rule-by-rules' is counterproductive in situations that require discretion, judgement, compromise or context-specific adjustments. In those circumstances, the legal rules frequently have an all-or-nothing consequence, resulting in winners and losers. In that context, communities, whether social, political, or commercial, are often better served if both sides can leave their dispute satisfied.[47]

An emphasis on formal legality potentially creates difficulties in such situations. As Tamanaha argues, cultures are different. Personal liberty, as much as the West takes it for granted, cannot be justified in universalist terms. In that regard, there is no standard formula for dealing with such situations other than to tread with care.[48] In the same vein, Asshiddiqie states that in societies with significant diversities, such as developing countries in Asia and Africa, it is unfair to enforce equal legal norms upon those who are not aware, who are in remote areas, and who are uneducated and unreachable. Without a societal basis that is aware of its rights and obligations, the law will not be obeyed, upheld, or effective.[49] Often that situation is similar to what Montaigne said about the incoherence of French society in

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44 Brian Z. Tamanaha, The Dark Side of the Relationship between the Rule of Law and Liberalism, NYU Journal of Law and Liberty, Vol. 33, 2008.

45 As argued by Hayek. See Brian Z. Tamanaha, *op.cit.*, p. 97.

46 See David Trubek, *Max Weber on Law and the Rise of Capitalism*, Wisconsin Law Review 720, 1972, in Brian Z. Tamanaha, *On the Rule of Law, History, Politics, Theory,* Cambridge University Press, 2004, pp. 97, 98.

47 Ibid., p. 121.

48 Ibid., pp. 138-139.

49 Jimly Asshiddiqie, *Menuju Negara Hukum Yang Demokratis* (Towards A Democratic State based on the rule of law), Secretariat General and Registrar of the Constitutional Court, Jakarta, 2008, p. 208.

the sixteenth century, where common law was so far apart from the prevailing Roman law that it was not even written in their language.[50]

In spite of these critical observations and its contested nature, the rule of law has remained a powerful concept and cannot be diminished as meaningless verbiage. Despite the lengthy debates about its proper interpretation, there is actually broad consensus as to its core meaning and basic elements.

In the nineteenth century, A. V. Dicey popularized the phrase "rule of law" and emphasized its three aspects: (1) no one can be punished or made to suffer except for a breach of law proved in an ordinary court, (2) no one is above the law and everyone is equal before the law regardless of social, economic, or political status, and (3) the rule of law includes the results of judicial decisions determining the rights of private persons.[51] Since then many authors have further elaborated and explained the concept.

Bedner argues that despite different understandings, virtually everyone agrees on the rule of law's twin functions. The first one is to curb arbitrary and inequitable use of state power. The second function is to protect citizens' property and lives from infringements or assault by fellow citizens.[52] Hence, it is paramount for a system to respect human rights and have an independent judiciary system.

Contemporary conceptualisations of the rule of law frame it as 'thin' and 'thick', corresponding with 'formal' and 'substantive'. Thin rule of law emphasizes formal legality and law-making procedures, but ignores the substance, possibly violating decency and morality. Thick rule of law provides both formal legality and the substance of the law that respects human dignity and its fundamental rights. In its broadest sense, the rule of law can be viewed as a continuum from thin to thick,[53] or from fewer to more numerous requirements.[54]

Bedner distinguishes 'formal', 'substantive', and 'control' elements. Formal elements assert that a state governs through general laws rather than individual decrees, that state actions are subject to law (legality), that legislation should be prospective, clear and certain (formal legality), and should be enacted by a democratically elected legislature. Substantive elements assert subordination of all law and its interpretations to fundamental principles of justice, protection of individual rights and liberties, furtherance of social and economic human rights, and protection of group rights. Control elements include an independent judiciary and other guardian institutions tasked with overseeing compliance with formal and substantive elements.

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50 See Biancamaria Fontana, *The Rule of Law in Montaigne's Essays*, in Jose Maria Paravall and Adam Przeworski (eds.), *Democracy and the Rule of Law*, Cambridge University Press, 2003, p. 306.

51 A.V. Dicey, An Introduction to the Study of Law of the Constitution, Mc Millan and Co, 1897.

52 Adriaan Bedner, *op. cit.*

53 Randall Peerenboom, *op.cit.*, pp. 2-4.

54 Brian Z. Tamanaha, *op.cit.*, p. 91.

The rule of law's formal elements does not bother with the law's substantive aims. They may serve various aims with equal efficiency.[55] Substantive elements deal with the content of the law and refer usually to the justice and morality principle. In that respect, the thickest version includes both formal and substantive elements (i.e., civil and political rights, social welfare rights, group rights), as well as the control elements.[56] In Roman terms, it has been characterised as a peculiar relationship between *jurisdictio* and *gubernaculum*, between justice and governance.[57]

A thin rule of law requires a variety of institutions and processes to satisfy the qualities of formal legality. In this sense, it includes public, prospective laws with qualities of generality, equality of application, and certainty. It also provides certainty and predictability. To that end, legal systems should have a hierarchical structure, so that particular norms conform to general ones.[58]

Even a legal system based on a limited thin rule of law has important virtues. At minimum it promises a degree of predictability and a limitation on arbitrariness, protecting certain individual rights and freedoms.[59] However, Peerenboom argues that we should not apply a thin rule of law to legal systems where the state uses law to govern but does not accept that the law binds the state and state actors. Such conditions do not fall under his definition of rule of law, as he classifies them as rule *by* law.[60] In that regard, Peerenboom reminds readers that thin and thick conceptions are analytical, rather than normative, tools. It is not a question of one being the right and the other the wrong way to conceive rule of law.[61]

It has been argued that thin or formal rule of law is morally neutral. However, Peerenboom noted that while thin and thick versions of rule of law are analytically distinct, there are no freestanding thin rule of law legal systems that exist independently of a particular economic, social, and cultural context.

The relationship between thick and thin can also be understood as concentric circles, with the smallest circle consisting of core thin elements, embedded within a thick rule of law. The thick conception is part of a broader social and political philosophy that addresses issues beyond the legal system and rule of law. However, including more comprehensive social and political philosophies into thick theories may remove the rule

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55 Ibid., p. 94.
56 Ibid., pp. 92, 112.
57 Gianlugi Pallombella, *The Rule of Law and Its Core*, in *Relocating the Rule of Law*, Gianlugi Pallombella and Neil Walker (eds.), Hart Publishing, Oxford and Portland, Oregon, 2009, p. 17.
58 Joseph Raz, *The Authority of Law*, Oxford, Clarendon Press, 1979, p. 210, in Jose Maria Maravall and Adam Przeworski, *Introduction* for *Democracy and The Rule of Law*, Jose Maria Maraval and Adam Przeworski (eds.), Cambridge University Press, 2010, p. 1.
59 Ibid., p. 6.
60 Randall Peerenboom, *op.cit*., p. 2.
61 Ibid., p. 6.

of law's distinctiveness, as it gets swallowed up in normative merits or demerits of the particular social and political philosophy.[62] Therefore, the thickest version might lack any useful function. In such a situation, a non-democratic legal system may conform to the rule of law's requirements better than any of the older Western democracies' legal systems.[63] The thickest version ensures the supremacy of regular power as opposed to arbitrary power.[64] In democracies, using arbitrary power is considered an anathema to the rule of law. Constitutional limits on power, a key feature of democracy, require adherence to the rule of law. It is the supreme check on political power used against people's rights. Without regulating state power through a system of laws, procedures, and courts, democracy could not survive.[65]

Placing crucial restraints on regimes does not decrease inequity because these constraints are devoid of substantive content. Thus, tensions may exist between formal legality, with its general characteristics and applied equality, and social values and objectives, such as distributive equality and individual justice.

Purely formal legality may strengthen an authoritarian regime's grip by enhancing its efficiency and according it a patina of legitimacy. In this way, the law can institutionalize slavery without breaking the thin rule of law.[66] Within limits on state power lies the idea of a bill of rights. This is a difficult area since there is no universal consensus on the rights and freedoms that are fundamental. Tamanaha admits that these clusters are often abstract, lacking precise content. In that regard, the rule of law should always be subject to evaluation from the standpoint of justice and the community's good.[67] No single approach will satisfy everyone. Each produces its own insights and has its own drawbacks.[68]

It must be accepted that the outer edges of certain fundamental rights are unclear. In each society there is often much agreement on where lines are to be drawn at any time, even though standards change over time and courts also clarify them. A thick conception assumes that citizens have moral rights and duties to one another and political rights against the state as a whole. In a constitutional democracy these moral and political rights should be recognized in positive law so they may be enforced on demand. However, it should be underlined that these rights are not granted by positive law, but rather act as a background and integral aspect of positive law.

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62 Randall Peerenboom, *op.cit.*, p. 6.

63 Joseph Raz, *The Rule of Law and its Virtue*, in Randall Peerenboom, *op.cit.*, p. 6.

64 Black's Law Dictionary, Bryan A. Garner (Editor in Chief), Abridged 9th Edition, West Publishing Company, 2010, p. 1137.

65 When the rule of law is understood to mean that the government is limited by law, the heritage of this idea pre-exists liberalism, it is not inherently tied to liberal societies or to a liberal form of government. See, Brian Z. Tamanaha, *op.cit.*, p. 137.

66 Joseph Raz, *The Rule of Law and its Virtue*, p. 221, in Brian Z. Tamanaha, *op.cit.*, p. 93.

67 Brian Z. Tamanaha, *op.cit.*, pp. 115-141.

68 Randall P. Peerenboom, *op. cit.*, p. 2.

In such instances, it is the judges' responsibility to make decisions that "best fit the background moral rights of the parties" by framing and applying overarching political principles consistently to existing rules and principles. These principles go beyond the rules and can resolve apparent conflicts between them. In this regard, applying a controlling principle will usually be evident and here, a society's views on these subjects cohere at the highest level of political and moral principle, so that judges who study the issues with sufficient acuity and dedication can find a correct legal outcome in light of the dispute's contestable nature.[69]

People's participation is essential to make the rule of law work, as law is not self-interpreting or self-applying. The weaknesses to be avoided can be reintroduced by resorting to the rule of law. At the moment of application, rules cannot do without the injection of human reason, insight, and judgement, and can never be insulated completely from abuse at the hands of individuals acting in bad faith. To prevent the latter, the judiciary was introduced as the law's special, professional guardian, putting aside the individual judge. They are the ones who ensure that other government officials are held to the law. The separation of powers, which has established judicial independence and prestige, alongside the social presence of lawyers, have induced the extraordinary growth of a legal tradition and its extensive social penetration. Hence, the ultimate risk is that the rule of law might become the rule of judges, a matter of real concern. Centuries ago, Aristotle insisted that the judge's characteristics and orientation is one of the rule-of-law's most essential components.[70]

In general, states agree on the importance of rule of law elements. However, they may interpret or weigh them differently, considering stability or individual liberty. The former may result in limiting civil society, freedom of association and speech,[71] as was indeed the case in Indonesia under the New Order. In those days, Mochtar Kusumaatmadja already stated that law has both the function to maintain order and is an instrument to realize social change.[72]

In the following period of *Reformasi*, Indonesian legal scholars have looked at the rule of law as an instrument of social change. Similarly, Mohammad Mahfud MD argued that the rule of law must reconcile the principles of certainty and justice. It should also find a proper balance between law as a tool and cultural mirror of society, and between an instrument to uphold order and advance society.[73] Speaking broadly about law's

69 Ronald Dworkin, *Political Judges and the Rule of Law*, 64 Proceeding of the British Academy, 1978, pp. 259, 262, in Brian Z. Tamanaha, *op.cit.,* pp. 102-103.

70 Brian Z. Tamanaha, *op.cit.,* pp. 123-125.

71 Ibid., p. 3.

72 See Mochtar Kusumaatmadja, *Fungsi dan Perkembangan Hukum Dalam Pembangunan Nasional* (Function and Development of Law in National Development), Padjadjaran, Volume III, No. 4, 1970, pp. 5-16.

73 Mohammad Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi* (Building the Politics of Law, Upholding the Constitution), Rajawali Pers, Jakarta, 2011, pp. 26, 28.

function in modern society, Satjipto Rahardjo said that law as an instrument of social engineering requires a conscious use to achieve desired order, societal conditions, and changes.[74] Therefore, modern law is not merely about recording societal behaviours, but also an instrument for policies to create new conditions and change existing ones. Thus, the legal function has shifted to become more active. This is a larger process of community development, namely the political power that becomes stronger, more monolithic in the state's hands, and interferes in the sphere of social life.[75] Therefore, while law should serve as the means to make changes in society, the rule of law itself is also a desired objective. Fulfilling the twin functions of the rule of law is a worthy goal indeed.

A democratic constitution as the fundamental law which contains the ultimate objectives of a nation serves in changing and shaping that nation to achieve the desired objectives. It must build from the past and reflect the future by indicating the direction of the nation's destiny. Of course, it needs to be understood that social changes driven by law occur slowly and gradually.[76] Nevertheless, it can be expected that those in power repeatedly espouse the virtue of being bound by law; in the course of time, this rhetoric may become a prime cultural value, a view of government and law shared by most everyone.[77]

Hence, rule of law provides a useful heuristic guide for legal reforms in that rule of law theoretical elements (e.g., thin or thick) can clarify and prioritize reform areas to highlight the relationship between various elements. It provides structure to what otherwise could be a chaotic, piecemeal reform process.[78] Therefore, I conclude in saying, with Tamanaha, that in spite of its limitations and risks, the rule of law is a major achievement deserving preservation and praise.[79]

### IV.2.3 Constitutional democracy: democracy and rule of law

In the concept of 'constitutional democracy', elements of both democracy and rule of law are intertwined. Simply speaking, a constitutional democracy is "a democracy that has a constitution setting it as such."[80] However, democracy and the rule of law can also conflict with one another. Actually,

74 Satjipto Rahardjo, *Hukum dan Perubahan Sosial; Sebuah Tinjauan Teoretis Serta Pengalaman-Pengalaman di Indonesia* (Law and Social Changes; A Theoretical View and Experiences in Indonesia), Genta Publishing, Jogyakarta, 2009, p. 129.
75 Ibid, p. 131.
76 Satjipto Rahardjo, *op. cit.*, p. 148.
77 Brian Z. Tamanaha, *op. cit*. p. 141.
78 Randall Peerenboom, *Varieties of Rule of Law*, in Randall Peerenboom (ed)., *op.cit.*, p. 13.
79 Brian Z. Tamanaha, *op.cit.*, p. 4.
80 This quote is taken from an on-line discussion about the concept, contribution by A Knight, https://en.wikipedia.org/wiki/Talk%3AConstitutional_democracy, accessed on 24 December 2020.

they are embodied in two distinct institutional systems: (1) democracy in elections and parliaments and (2) rule of law in law-making and law-enforcement by the executive and judiciary. Their main intersection is in the legislative process. Once legislation is issued through this process, law takes on a life of its own. So, the fact that legislation passes from one set of institutions to another, each operating according to its distinct norms and expectations, suggests the likelihood of more mundane tension between democracy and law.[81]

Institutions that use democratic procedures to determine the law's content can still produce evil laws, similar to formal legality.[82]As stated previously, popularly elected regimes often manipulate the law in the name of democracy, using a winner-takes-all approach. For instance, they may justify discriminatory policies against the fundamental rights of minorities as 'democratic'.[83]

Hans Kelsen's 1920-1950 work is still relevant to the discussion of complex relations between democracy, rule of law, and the branches of state power. Having witnessed the rise of authoritarianism, Kelsen conceptualized how law could effectively protect fundamental rights. First, a sovereign state must limit itself by law, thus becoming a rule of law state. Second, there should be a clear hierarchy of legal norms, the highest of which empowers a constitution's makers, as the basic law attributing authorities to the three branches of state power. Third, a state should enact in a constitution its fundamental values and the institutional framework to protect them, thus limiting the government's power. Kelsen asserts that the legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms, wherein the highest is a hypothetical basic norm. This basic norm is the highest reason for the validity of all legal norms, i.e., it is not given by God, nature, tradition, or ideology, but by the legal norm itself.

Further, Kelsen underlines that the catalogue of fundamental rights and freedoms in a constitution tries to prevent a statute that violates such rights and freedoms, such as freedom of conscience or equality. While legislators could enact such laws, Kelsen argued that the laws' effects could be prevented if contesting and abolishing such statutes can occur. In doing so, the higher norm, a constitutional provision, should prevail over the ordinary statute's creation and content.[84] In contrast, the ordinary statute does not have power to abolish or amend the constitution's higher norm.

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81 John Ferejohn and Pasquale Pasquino, *Rule of Democracy and Rule of Law*, in Jose Maria Maravall and Adam Przeworski (eds.), *op. cit.*, p. 243.

82 Brian Z. Tamanaha, *op. cit*. p. 100.

83 See Tom Ginsburg, Judicial Review in New Democracies. Constitutional Court in Asian Cases, Cambridge University Press, 2003, p. 2.

84 See Hans Kelsen, *Pure Theory of Law*, Translation from the Second (Revised and Enlarged) German Edition by Max Knight, University of California Press, 1967, pp. 221-224.

Consequently, when Hans Kelsen drafted Austria's constitution, he proposed establishing a constitutional court, the *Verfassungsgerichtshof*, with the power to review the laws' constitutionality.[85] By adopting the constitutional review principle, he intended to ensure that the statutes created in a legislative process would not violate the constitution. This constitutional court protects the democracy from its own excesses and is adopted precisely because it could be counter-majoritarian, able to protect the substantive values of democracy from procedurally legitimate elected bodies.[86] Thus, people's sovereignty would be subjugated to the constitution.

If all laws are determined by parliament, no other legislative institution is needed. However, because parliament is an institution that also needs to be supervised, the constitution should create a separate institution, commonly called the Constitutional Court.[87]

Thus, a constitutional court forms part of a broader system of institutional arrangements designed to empower and limit the government at the same time. This system forms the institutional foundation for the rule of law and for constitutional democracy. It recognizes certain institutional devices and procedures that limit government's power, such as:[88]

a. Separation and sharing of powers. State power is separated and divided among the different branches of state power. Each branch has a primary responsibility for certain functions, such as legislative, executive and judicial functions. A branch may also share part of its function with another branch;
b. Checks and balances. Certain state institutions have enough power to counterbalance the power of other institutions. Checks and balances may include a judicial institution with judicial review authority, i.e., to examine and cancel actions or laws of other institutions considered contrary to the constitution or lower legislation;
c. Due process of law. Individual rights to life, liberty, and property are protected by the guarantee of due process of law;
d. Leadership succession through elections. Elections ensure that positions in key state institutions – notably legislatures, but also other institutions – will be contested at periodic intervals and that the post-election transfer of authority is accomplished in a peaceful and orderly process.

85 See Sara Lagi, *Hans Kelsen and the Austrian Constitutional Court (1918-1929)*, Coherencia vol. 9 no. 16 Medellin January/June 2012.
86 Tom Ginsburg, Judicial Review in New Democracies. Constitutional Court in Asian Cases, Cambridge University Press, 2003, p. 2.
87 I.D.G. Palguna, *MAHKAMAH KONSTITUSI, Dasar Pemikiran, Kewenangan, dan Perbandingan dengan Negara Lain*, Konstitusi Press, 1st printing, 2018, pp. 75 – 77.
88 Text adapted after Center for Civic Education, www.civiced.org., *Part Two*: *Constitutional Democracy, An Outline of Indices.*

Hence, a democratic government system based on people's sovereignty should have its structures, powers, and limits of government set forth in a constitution. This form of democracy, renowned as constitutional democracy, believes that although the peoples' freely chosen representatives should govern, those elected officials must respect certain substantive limitations on their authority.[89] In a deliberative democracy, one of the principal purposes of a constitution is to protect not the rule of the majority but democracy's internal morality.[90]

## IV.3 Constitution-making

To successfully create an effective democratic constitution or change an authoritarian constitution into an effective democratic one, managing the process of constitution-making is crucial. As Vivian Hart observes, how the constitution is made and what it says matters.[91] This process is about establishing the shared ideals or agreed values and an effective machinery to implement and enforce them. For the constitution to be 'normative' or effective, there should be a symbiotic relationship between the constitution's text and the political and social practices.[92]

There are three basic routes to constitution-making, namely by an expert commission appointed by a caretaker government, by a special elected body or constituent assembly with the sole mandate of constitution-making, or by a newly elected legislature with the additional duty of drafting a constitution.[93]

In the past, it was often conducted by hand-picked elites who worked in isolation from the public, for instance, the 1787 US Constitution and the original 1945 Indonesian Constitution.[94]

The constitution-making's form may also reveal the shape of future domestic political relations.[95] When they are framed and adopted, constitutions tend to reflect the dominant beliefs and interests, or compromises therein, which are characteristic of society at the time. The prevailing values

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89 Walter F. Murphy, *Constitutional Democracy, Creating and Maintaining a Just Political Order.* The John Hopkins University Press, Baltimore, 2007, p. 10.

90 Cass R. Sunstein, *Designing Democracy. What Constitutions Do*. Oxford University Press, 2001,p. 10.

91 Vivien Hart, *Democratic Constitution Making*, United States Institute of Peace, Special Report, July 2003.

92 Edward Schneier, Crafting Constitutional Democracies, The Politics of Institutional Design, Rowman & Littlefield Publishers, 2006, p. 2.

93 Andrea Bonime-Blanc, Constitution Making and Democratization: The Spanish Paradigm, in Framing the State in Time of Transition: Case Studies in Constitution Making, Laurel E. Miller (editor with Louis Aucoin), United States Institute of Peace Press, Washington D.C., 2010, p. 424.

94 See Chapter III, Constitution Making in Indonesian History.

95 Andrea Bonime-Blanc, op.cit., p. 422.

and norms in a society also influence the norms in a constitution.[96] A constitution is the result of a parallelogram of forces – political, economic, and social – which operate at the time of its adoption. Constitutions tend to embody or reflect or protect the social opinions of those who frame them.[97]

In Harjono's words (see IV.1), a constitution is simultaneously an ideological, legal, political, economic, and social framework. There should be sufficient common paradigmatic ground for the framework to be accepted or legitimate. Thus, whatever the constitution's formulation, if the nation's main components do not share this common ground, the Constitution's text will remain as mere words on a page.[98]

Webber asserts that the constitution-making narrative that conceives of a constitution as a written instrument adopted by 'the People' in a given moment of special law-making is foreign to so many constitution-making practices but remains so dominant in theory. To consider 'the People' as having one voice is more idealized than real. 'We the People' in the United States' constitutional history meant fewer than five percent of the new nation's adult population.[99] This romanticized constitutional narrative fails to capture the experience of constitution-making.

Making a constitution is a far more complex and contingent undertaking than the received narrative would allow. It is both a political and ideally participatory exercise for all citizens and a technical task for experts to ensure that the process can capture legitimacy and efficacy at the same time. It includes the political management of conflict that makes law and government possible.[100] Indeed, some sort of manageable political order is necessary to ensure a situation that protects the process of reason-giving in constitution-making.[101] Therefore, the making of a constitution during a crisis should also form part of attempts to prevent conflict and promote reconciliation. It is to prevent the common people's condition from worsening into the *bellum omnium contra omnes* and to manage it into a condition of 'covenant of one with every other.'[102]

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96 Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme di Indonesia* (Constitution and Constitutionalism in Indonesia), published by collaboration of the Constitutional Court of Republic of Indonesia and the Centre of Study of Constitutional Law, Law Faculty, University of Indonesia, 2004, p. 29.

97 K.C. Wheare, *op.cit.* pp. 67, 70.

98 Harjono, is a lecturer of Constitutional Law at Airlangga University, Surabaya and was a MPR member from F-PDIP (*Fraksi Partai Demokrasi Indonesia Perjuangan* – Faction of Indonesian Democratic Party – Struggle) in Ad-Hoc Committee for Amendment of the 1945 Constitution, 1999 - 2002. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan UUD Negara Republik Indonesia Tahun 1945, Tahun Sidang 2000, Buku Dua,* Edisi Revisi, Sekretariat Jenderal, 2010, p. 430.

99 Edward Schneier, *op. cit*., p. 3.

100 Gregoire C N Webber, *Post-Conflict Constitutions and Constitutional Narratives*, Department of Law, London School of Economics and Political Sciences, in 2010 WG Hart Legal Workshop: *Comparative Aspects on Constitutions: Theory and Practice.*

101 Cass R. Sunstein, *op.cit.* pp. 6, 239.

102 Thomas Hobbes, *Leviathan*, R. Tuck (ed.), Cambridge University Press, 1991, in Gregoire C N Webber, *op. cit*., p. 11.

To that end, the consensual process is best, since it requires the participation of all – or at least most – political groups. Agreements and compromises are achieved through political responsibility rather than dogmatic solutions. However, it is not easy to achieve agreement among those responsible for drafting a constitution.[103] As Sunstein puts it, the process of deliberation in constitutional arrangements may face a pervasive problem: widespread and enduring disagreement. In that case, one should turn the disagreement into a creative force or by making it unnecessary for people to agree when it is not possible. A process in which people agree on practices or outcomes, despite disagreement or uncertainty about fundamental issues, is the solution to a deadlocked deliberation.[104]

Making South Africa's constitution was preceded by a compromise that the past human rights abuses and oppressions were forgiven.[105] Constitution-making compromises often cause ambiguities, but their obvious advantage can be that none of the involved political powers fully oppose the texts, with most supporting them.[106] Hence, a constitution produced by such process should not be regarded as just the intended result of conflict management, but rather a more stable and sustainable outcome to keep conflicts at bay.[107]

In this regard, the process should clearly answer 'for whom' the constitution is made. The constitution is for the population that has a history, culture, and political aspirations, since states cannot be built from the outside.[108] The process must answer the political challenges currently facing the country.

It is worth noting that Thailand's 1997 Constitution was referred to as a 'People's Constitution' because of its people's participation and it's drafting process was perceived as ideal. It was also the most comprehensive and well-considered constitution in Thailand's history. Nevertheless, it only survived for a short period of time.[109] The remarkable instability and constitution cycle illuminate the importance of including influential stakeholders in a constitution-making process during a crisis, including a military with a history of political involvement.[110]

A comparison between the constitution-making process in occupied Japan after World War II and in US-occupied Iraq demonstrates that proper constitution-making should acknowledge historical and cultural aspects.

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103 K.C. Wheare, *op. cit.,* p.33.
104 Cass R. Sunstein, *op.cit.,* pp. 8-9.
105 Andrew Harding, *ditto.*
106 Andrea Bonime-Blanc, *op. cit.,* p. 422.
107 Gregoire C N Webber, *ditto.*
108 Simon Chesterman, State-Building, the Social Contract, and the Death of God, paper presented at The Future of State building: Ethics, Power and Responsibility in International Relations, University of Westminster, London, October 2009.
109 Andrew Harding & Peter Leyland, *Historical Analysis and Contemporary Issues in Thai Constitutionalism,* Oxford: Hart Publishing, 2011, pp. 22-24.
110 See also, Siddharta Chandra and Douglas Kammen, *op.cit.,* p. 97.

Japan's constitution adopts the history and culture of society and effectively manages the state's political dynamics, while in Iraq these were not considered properly and the constitution was much less effective.[111]

Constitution-makers often borrow from one another, not only within the framework of a particular constitutional tradition but across traditions as well. However, eventually those mechanisms must be integrated in a matter that is true to civil society's spirit for which the constitution is designed.[112]

Regarding the constitution-making process' time limits, Arato recommends that the process should be conducted with a time limit, so that no group can use delaying tactics to get its way.[113] It is not always relevant that transitional constitution-making should occur quickly to capture the moment.[114] When the political order has been controlled by the reformers, the processes may take a longer time. The transition itself may be defined as an evolutionary process coupled with regime change. Such a period may contain the pluralization and mobilization of society from below, the liberalization of socioeconomics policies, the constitutionalizing of political activity, and the liberalization and possible democratization of the bureaucracy.[115] With reformers in a controlling position, the deadline need not be too rigid to create more space for reasoned, far-sighted exchanges in a consensus-seeking process.

The constitution-making process, no matter how romanticised or mythologised, is always a political process. Elazar stated that the following could be a truism, that constitution-making is a pre-eminently political act. In the words of Bismarck, "Politics is the art of the possible, the attainable – the art of the next best."[116] Although academic theory and principles are involved in making constitutions, combining those elements and adapting them to the constituency is an art.

It is an ever-greater art to endow the constitution with legitimacy. Constitutional legitimacy involves consent. Consensual legitimacy, Elazar concluded, is utterly necessary for a constitution to have real meaning and last. Since rule can be imposed by force, constitutions can only exist as meaningful instruments by consent. This is another demonstration that constitution-making is a pre-eminently political act.[117]

The constitution's draft contains many principles that cannot be addressed simply by agreeing or disagreeing. In that regard, to use a referendum to decide on enacting a draft constitution may offer a quick and

111 Philipp Dan/Zaid Al-Ali, *The Internationalized Pouvoir Constituent – Constitution-Making Under External Influence in Iraq, Sudan and East Timor,* Max Planck Yearbook of United Nations Law, Martinus Nyhoff Publisher, Volume 10 no. 1, June 2006.

112 Daniel J. Elazar, *op.cit.*

113 See Jon Elster, *op.cit.*, p. 395.

114 Edward McWhinney, Constitution-Making Principles, Process, Practices, 1981, p. 16.

115 Andrea Bonime-Blanc, *op.cit.*, pp. 417-418.

116 Otto von Bismarck, Prussian Prime Minister, Founder and Chancellor of the German Empire, 1815-1898, quoted on 11 August 1867.

117 Daniel J. Elazar, *op.cit.*

clear-cut decision. However, in the end, it is a winner-takes-all solution that may render the citizenry divided and polarized. In Sunstein's words, as a constitution is like a basket full of various contested basic principles and arguments, patience and perseverance are required to find the solution, possibly including incompletely theorized agreements, practices, and outcomes, despite disagreement or uncertainty about fundamental issues.[118] Achieving such deliberative agreement should provide opportunities for the constitution functioning as a vehicle and driver of social change that will provide opportunities for the future development of new fundamental agreements. Thus, it is important to protect the process of reason-giving, ensuring something like a "republic of reasons".[119]

In conclusion, there is no one-size-fits-all constitution-making process. It should consider the state's peculiarities, the process should be democratic, and the outcomes must incorporate the democratic and rule of law principles, establishing a symbiotic relationship between the text and the state's subsequent practices.

### IV.3.1 Constitutional change and amendment

Having a constitution by itself does not solve anything. Constitutions matter because they provide political structures that protect fundamental rights.[120]

The opportunity to reform an existing non-democratic constitution usually comes with a crisis. Social and economic crises induce constitution-making. The link between crisis and constitution-making is quite robust.[121] In fact, the momentum of a constitution-making process often emerges in difficult and turbulent periods. Likewise, the emergence of liberalizers and democratizers within an authoritarian system creates a first-order force for political change who will then try to be in power, intending to ensure that changes are adhered to.[122] The feasibility of constitutional reform depends not only on the legal provisions that stipulate the method of change, but also the configuration of political and social groups.[123]

Therefore, constitutional change can occur in revolutionary or evolutionary fashion. In the latter case, it may happen by consensual process. In that case, it does not matter how fundamental the changes in substances are.

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118 See Cass R. Sunstein, *op.cit.,* p. 9.

119 Cass R. Sunstein, *op.cit.*, pp. 6, 239.

120 Mark Tushnet, *Why the constitution matters*, Yale University Press, New Haven and London, 2010, p. 1. (Emphasize added).

121 John Elster, *Forces and Mechanism in the Constitution Making Process*, Duke Law Journal, vol. 45, 1995, p. 370.

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

123 K.C. Wheare, *op. cit.,* p.23.

If they are performed in conformity with the provisions of the Constitution, the legal system's continuity will not be interrupted.[124] In that regard, although the effects of transitions may be revolutionary, the thread of continuity is never completely broken,[125] and the state and its legal order remain basically the same.[126]

In contrast, according to Hans Kelsen, revolution occurs whenever the legal order is nullified and replaced by a New Order illegitimately, in a way not prescribed by the first order.[127] Thus, the constitutional narrative of "We the People" suggests ideal conditions for constitution-making, but should be taken as ideal, an asymptotic condition to strive for that will never be fully achieved.

A complete changeover of a *flawed* constitution is usually carried out by a special committee or parliament through constitution-making.[128]

Besides constitution-making, there is also constitutional amendment, constitutional revision or accretion, and constitutional reform. However, these formal distinctions contribute very little to assess the substance of changes.[129]

In a limited change to the constitution, which is commonly referred to as constitutional change, it is an alteration that does not connote either improvement or deterioration. By contrast, constitutional amendments imply a change for the better.[130]

When conducting amendments, the existing constitution's substance requires evaluation and improvement so that immutable democratic principles are embedded in the outcome, such as democracy, rule of law, human rights, independent judicial power, checks and balances, and transparent and periodical circulation of powers. The enforcement institutions and mechanisms should also be embedded in the constitution. There should be no provisions that conflict with or weaken these values and mechanisms.

As has happened in many countries, the demand for far-reaching constitutional changes has been circumscribed by the complexity of having to carry out the changes within the existing Constitution's procedures and processes. *Githu Muigai* writes that, unless the amendment provision spe-

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124 Ralf Dahrendorf, *Transition: Politics, Economics, and Liberty*, 13 Washington Quarterly 134, 1990.

125 Ibid.

126 Hans Kelsen, *General Theory of Law and State*, 1946, pp. 125 – 128.

127 Ibid.

128 See above IV.3.

129 Michel Rosenfeld, *The Problem of "Identity" in Constitution-Making and Constitutional Reform*, Benjamin N. Cardozo School of Law, Jacob Burns for Advanced Legal Studies 2005, Working Paper no. 143, p. 22.

130 Adapted from The Law Dictionary. *Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.:* An alteration; substitution of one tiling for another. This word does not connote either improvement or deterioration as a result. In this respect it differs from amendment, which, in law, always imports a change for the better. In that regard, constitutional revision or accretion and constitutional reform, if they also result in improving the constitution, can be categorized as constitutional amendments. (Emphasize added).

cifically provides an amendment procedure whose mandate is to undertake 'any constitutional change', the standard amendment clause denotes a limited power that ought not to be invoked to make structural or fundamental changes inconsistent with the existing Constitution.[131]

There are important procedural and substantive questions on constitutional change. Procedural questions ask who the constitution-making actors should be, or which institutions should conduct the changes. They question the process' legality, to what extent the process conducted by the relevant institution is in line with the regulation's text.

Substantive questions ask to what degree constitutional change will be affected by formal amendment rather than by practice or interpretation. They question to what extent the change will affect the principles of constitutional democracy. There are close relations between these questions.

It is necessary to notice that forces that change constitutions may operate in one of two ways. As discussed above, they may change circumstances that, by themselves, do not change the constitution's wording, but which cause the constitution to mean something different from what it used to mean, or which change its balance.

The second and more obvious way that such forces operate is that they produce circumstances that change a constitution either by formal amendment, through judicial decision, or by the growth and establishment of a constitutional custom or convention.[132]

The Constitution usually entrusts the amendment process' procedures to Parliament. However, there is both judicial and academic controversy about the extent and scope of the amendment substance that Parliament may make to the Constitution.

Another controversy is how to reconcile the Constitution's supremacy with Parliament's sovereignty. It is contended that Parliament in its sovereignty has unlimited and illimitable authority to alter or amend the Constitution in any manner that it may deem fit, subject only to its own political judgement. Conversely, it is argued that under a written Constitution, Parliament has an amending or altering power, but no power to abrogate or create an entirely new Constitution. This argument stresses that altering the Constitution's basic structure cannot be an amendment but a revolution.[133]

Virtually every Constitution contains provisions for its amendment or alteration. Constitutional provisions on amendment are the gatekeepers to the constitutional text. They give political actors a roadmap to alter a constitution, to identify what is subject to or immune from change. They also encourage public deliberation on constitutional meaning and foster stability by making a constitution harder to change than regular legislation.

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131 Githu Muigai, *Towards a Theory of Constitutional Amendment*, East African Journal of Human Rights and Democracy 1 (2003), p.1.

132 K.C. Wheare, *op.cit.*, p.71.

133 Githu Muigai, *op.cit.*, p. 2.

Further, they enable transformative constitutional changes without recourse to revolutionary means.[134]

In that regard, William Marbury writes that the power to amend the Constitution which the Constitution granted to Congress was not intended to include the power to destroy the Constitution. The term amendment implied an addition or change within the framework of the original instrument that would best affect an improvement or better carry out the purpose for which it was framed.[135]

Besides, it is also necessary to pay attention to the basic values that are enshrined in the constitution, glorified and exalted by the nation (e.g., a unitary or union state, or a republic or monarchy government). Similarly, one should consider the national insight, whether based on ethnic grouping, religious sentiment, or transcending those differences. Finally, one should pay attention to the fundamental contents, including the ideals of the state's existence and the state's form, where the constitution entrenches these as formally unamendable provisions.[136]

In line with that, Marbury contended that the Constitution had a fundamental aspect that lays beyond the amending power and that amending the Constitution ad infinitum would destroy what the Constitution constituted. Marbury also argued that the Supreme Court had jurisdiction not only to review the procedure or form of an amendment, but also the substance thereof.[137]

By contrast, W.L.M. Frierson contended that there was no limitation on the amending power, which covered any amendment that was regularly proposed and ratified. Frierson further contended that the Constitution committed to Congress, rather than courts, the duty of determining when amendments were necessary, and courts could only look at the amendments' procedure rather than its substance.[138]

In that regard, unamendability limits the delegated amendment power but cannot block the primary constituent power – the sovereignty at the constitution's basis – from its ability to amend even the constitutional order's basic principles or structure. It means that a new constitutional identity cannot be achieved through regular amendment procedure but requires a different constituent process. Unamendability should therefore not be viewed as blocking all democratic avenues, but rather as proclaiming that one such avenue – the amendment process – is unavailable.

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134 Richard Albert, *op.cit.*, pp.1,

135 William Marbury, *Limitations Upon the Amending Power*, 33 Harvard Law Review (1919), p. 223.

136 Richard Albert, *The State of the Art in Constitutional Amendment*, in *The Foundations and Traditions of Constitutional Amendment*, Richard Albert, Xenophon Contiades and Alkmene Fotiadou (Eds.), Oxford and Portland, Oregon, 2017, p. 7.

137 William Marbury, *op.cit.*

138 W.L.M. Frierson, *Amending the Constitution of the United States*, 33 Harvard Law Review, 1919, p. 659.

The power to change unamendable principles does not reside within the constitutional amendment procedure. Instead, it is appropriately part of the sovereign people's primary constituent power, from which all legitimate power springs.[139]

Presently, there is a broad trend towards engaging the people themselves in constitutional matters. Indeed, the modern conception of primary constituent power is strongly associated with the notion of popular sovereignty. The recent proliferation of referendums is an indicator of such trends. However, there are many familiar difficulties associated with popular mechanisms such as referendums. These include determining who is eligible to participate, drafting of ballot questions, the lack of voter knowledge, fear of the majority's tyranny, and the historical associations of plebiscite abuse. Likewise, manipulations may occur by political elites or interest groups, so that referendums do not necessarily truly express the people's will. By contrast, popular participation should take place throughout a constitutional norms-creating process and not be limited solely to a 'yes' or 'no' referendum vote. A democratic primary constituent power must be committed to the people's sovereignty and be exercised in inclusive, participatory, and deliberative ways.[140]

In other words, while the process should be democratic, the immutable democratic constitutional principles must be embedded in the outcome. In that regard, the Federal Constitutional Court of Germany asserts that, *"There are constitutional principles that are so fundamental that they also bind the framer of the constitution."*[141]

In India's Supreme Court, it was argued that the Constitution by its nature has a basic structure whose alteration lies beyond the amending power set out by the Constitution.[142]

If the Constitution is both a framework for exercising public and private choices and constitutes the state upon certain shared core values, then implied limitations cannot possibly be in serious dispute. In that regard, Walter Murphy writes:

> *The Constitution includes not only the text of an amendment document but also certain choices and agreements. Because it 'constitutes' the nation, it imposes real limits not only on the procedure through which the constitution can be changed but also on the substance of valid changes. If an amendment exceeds these limits, it is proper for the institutions with authority to interpret the constitution to declare the amendment invalid.*[143]

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139 Yaniv Roznai, *Amendment Power, Constituent Power, and Popular Sovereignty, Linking Unamendability and Amendment Procedures*, in Richard Albert, Xenophon Contiades, Alkmene Fotiadou (eds), *op.cit.*, p. 25.

140 See *ibid*, pp. 30 - 31.

141 Walter F. Murphy, *op.cit.* pp. 499-504.

142 *Structuralism as a method of constitutional interpretation has a long and distinguished history* - See J. Fleming, *Constructing the Substantive Constitut*ion.

143 William Murphy, *"Slaughter House: Civil Rights and the Limits of Constitutional Change,"* Harvard Law Review, 1983, p. 21.

In that regard, Githu Muigai concludes that the proper scope for constitutional amendment must be determined by the need to retain the Constitution's fundamental structure, basic values, assumptions, principles and spirit. Any constitutional change outside the amending power would amount to a *de facto* revolution. It would abrogate the entire Constitution.[144]

144 Githu Muigai, *op.cit.*, p. 8.

# V The First Stage of The Process of Amendment of the 1945 Constitution, 6 October 1999 – 19 October 1999

## V.1 Preceding the amendment

The 1999 MPR General Assembly was scheduled from 1 October 1999 to 21 October 1999. To amend the 1945 Constitution, the MPR allocated a total of 14 days, from 6 to 19 October 1999.[1]

During an informal meeting before the October 1999 MPR General Session, the leaders of the political parties who won seats in the MPR and the leadership of the Armed Forces agreed to amend the 1945 Constitution in a constitutional way, while maintaining the Preamble, in which the state ideology Pancasila is embedded, and the unitary form of the Republic of Indonesia.[2] Along with the successful June 1999 election, the agreement paved the way for reform through a constituted authority, ruling out the possibility of extra-constitutional reform.

Previously, an agreement was achieved between prominent public figures, Abdurrahman Wahid (Gus Dur), Megawati Soekarnoputri, Amien Rais, and Sultan Hamengkubuwono X, known as the Ciganjur Declaration. The Declaration appealed to all parties to uphold the nation's unity and integrity based on Pancasila and the 1945 Constitution (see III.3). These agreements initiated the reform process and created a deliberation space. Thereby, constitutional reform began as an agreement-based transition.[3] However, many activists, scholars, and NGOs remained sceptical about whether the constitutional path could deliver necessary reforms.

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1 See Attachment V.1. The Working Schedule

2 Republika Daily, 29 September 1999, "The meeting between the Team of Seven Political Parties with the National Armed Forces of Indonesia. Amendment of UUD 1945 has been agreed". This agreement refutes the assumption that the ABRI took a non-interventionist stance during the transition process.

3 See Juan J. Linz, Alfred Stepan, Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe, JHU Press, 1996, p. 61. However, as eventually happened, the pact process ended when the reform process began to deal with fundamental issues, such as the reduction of the MPR's role and the abolishment of appointing MPR members.

## V.2 The 1999 People's Consultative Assembly's Plenary Session: Preparing the amendment

### V.2.1 Opting for amendment, not for replacement

Before the agreement to amend the 1945 Constitution was achieved, there were public discussions on whether to replace or amend it. Among others, Muchsan, a professor at the Law Faculty of Gajah Mada University, asserted that the 1945 Constitution should be completely renewed. On the other hand, Mohammad Mahfud MD, a professor at the same faculty, asserted that the Preamble should be upheld as the integrator of the nation. However, he agreed that the body of the 1945 Constitution, i.e., the articles, should be reformed.[4] Most political parties agreed with the latter position.

As discussed above, the 1945 Constitution was generally considered as the symbol of the national struggle's victory. Its symbolic value had been far greater than the actual meaning of its texts. Therefore, any attempt to revoke and replace it with a new constitution was fiercely resisted as being politically unrealistic, if not impossible. Things would have been different if the constitution in question was disliked or hated, as was the case in the Philippines in 1986 or South Africa in 1996.[5]

Further, most political elites believed that the Preamble of the 1945 Constitution contained the ideals, Indonesia's fundamental values and the appropriate foundation of the state for Indonesia. They also believed that the unitary form of the Republic of Indonesia was the right form of state for such a highly diverse nation. Furthermore, Articles 3 and 37 of the 1945 Constitution contain provisions that enable amendment, so there is no need for full replacement. Thus, in accordance with the agreements of 29 September 1999 between Indonesia's main political forces preceding the MPR general session, the factions agreed to improve the 1945 Constitution by amending it constitutionally on the condition that the Preamble of the Constitution and the unitary form of the Republic of Indonesia would be maintained.[6]

Subsequently, the MPR plenary session from 1 to 21 October 1999 agreed on the following working agenda:[7]

– Election of a new president and vice president from 1999-2004.

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4 Sabili Magazine, volume 2, 14 July 1999, p. 59.

5 The 1986 Freedom Constitution of the Philippines replaced the authoritarian and hated 1973 Constitution which was promulgated by President Marcos. The 1996 Democratic Constitution of South Africa promulgated by President Nelson Mandela replaced the hated apartheid Constitution of 1948–1994, after an interim Constitution between 1994–1996.

6 As summarized by Harun Kamil, the Chairman of PAH III BP-MPR on 7 October 1999. See Majelis Permusyawaratan Rakyat Republik Indonesia, op. cit., Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 84.

7 Ibid., pp. 21–38.

- Determining new Broad Outlines of State Policy (GBHN) for the 1999-2004 period.[8]
- Producing new MPR Decrees deemed necessary for the period.
- Reviewing the existing MPR Decrees, and
- Reforming the 1945 Constitution.

### V.2.2 Implementing Article 3 and Article 37 of the 1945 Constitution

Article 3 of the 1945 Constitution states that,

> The People's Consultative Assembly stipulates the Constitution and the Broad Outlines of State Policy.

Article 37 adds that,

> In order to amend the Constitution, no less than 2/3 of the members of the MPR shall be in attendance.
>
> Decisions shall be taken with the approval of no less than 2/3 of its total members in attendance.

These provisions make clear that the MPR has virtually unlimited authority.[9] As we will see in the ensuing chapters, the MPR's supreme position somewhat complicated the reform process.

### V.2.3 The procedure and the stages of discussion

To exercise its duties and authorities, including amending the constitution, the MPR passed Decree no. II / MPR / 1999 on the Rules of Procedure of the People's Consultative Assembly or the MPR. The decree regulated the formation of factions as well as the MPR's organs, sessions and meetings, decision-making procedures, and leadership.[10]

According to the Rules of Procedure, there are three types of MPR sessions. First, the MPR's General Session, held at the beginning of the Assembly's membership term of office. Second, the Assembly's Annual Session. Third, the Assembly's Special Session, held for special purposes.

The MPR's organs are the Leadership, the Working Body or Badan Pekerja (BP), the Commission or Komisi, and the Ad-Hoc Committee or Panitia Ad-Hoc (PAH). The Working Body and the Commission may form their own organ.

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8 GBHN stands for Garis-Garis Besar Haluan Negara.

9 Paragraph (2) of Article 1 of the 1945 Constitution states *"The sovereignty is in the hands of the people and exercised by the MPR in full."*

10 See Attachment V.2.

The Assembly's Working Body shall consist of 90 members, whose composition shall reflect the number of Assembly faction members.

The Working Body shall prepare drafts of the agendas and the decisions of the General Session, Annual Session, or Special Session. The Assembly's Leadership shall lead the Working Body. For that purpose, the meetings of the Working Body and the Ad-Hoc Committee must be conducted at least two months prior to the Annual Session and the Special Session.

The Working Body is also tasked with accommodating incoming materials, and conducting public hearings, comparative studies, seminars, workshops, and focus group discussions. To carry out its tasks, the MPR's Working Body (BP-MPR) may form Ad-Hoc Committees (PAH), whose leadership consists of a Chairman, two Vice Chairman, and a Secretary.

During the plenary sessions, the MPR may form Assembly Commissions, hold consultations, and finalize the decision draft to be ratified by the Assembly's plenary session. Every MPR member shall become a member of one of the MPR's Commissions, except for the MPR leadership.

The MPR meetings are open to the public, except for the leadership meetings, unless otherwise decided. Decision-making shall endeavour as far as possible to achieve a consensus. If this is impossible, a decision shall be made through a majority vote.[11] The decision-making shall pass four discussion stages, except for the Accountability Report of the President and other matters considered necessary by the Assembly.[12]

In conformity with these procedural rules, the amendment process of the 1945 Constitution was preceded by the factions' general views about the materials to be discussed at the plenary meetings during the MPR general session and followed by the establishment of the Badan Pekerja MPR (MPR Working Body), which would discuss the material further.

The first stage would be the plenary meeting of the MPR Working Body to further discuss the delivered materials, followed by the formation of an Ad-Hoc Committee(s) or PAH (Panitia Ad-Hoc). Then, the PAH, in this case PAH III, would discuss the materials to reach conclusions. Subsequently, the outcome of PAH III would be reported to the MPR Working Body, followed by the factions' views on the report. Based on the discussions, the MPR Working Body would prepare a report for the MPR plenary meeting.

The second stage would be for the MPR plenary meeting to hear the report of the Working Body, followed by the formation of MPR Commission(s) (Komisi). The report was to be preceded by an explanation of the Working Body leadership, which was concurrently also the MPR leadership. The report was followed by the factions' responses. Then a Commission C would be formed to resume the discussion, which would produce the final draft of the Constitution's amendment.

The third stage would be the Commission C discussion to prepare the Constitutional amendment's final draft.

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11 See TAP MPR no. II/1999 on Rules of the MPR, Article 84.

12 See V.3.1.

The fourth stage was a MPR plenary meeting to hear the Commission C report, which was to be followed by the responses from the factions and discussions at the plenary level. At this stage, the factions delivered their respective final statements.[13]

An MPR standing order stipulates further that a decision at the fourth level is sought as much as possible by means of deliberation and consensus. If that is not possible, a decision is taken by a majority of votes. However, decisions should be made by consensus only in MPR leadership meetings and in joint meetings of the MPR leadership, the leadership of MPR Commissions, the MPR Working Body, and in the PAH.[14]

In accordance with these rules, discussions were held and conclusions were reached by deliberation and consensus. The process was slow and cumbersome. Moreover, due to the absence of an academic paper, the observers from universities, NGOs, and other activists had difficulties following the amendment process and assessing the changes that could be achieved by the amendment process. On the other hand, as elaborated in the subsequent paragraphs, the deliberation and consensus approach created a situation in which all factions, including the small factions, could deliver their respective proposals and argue without fearing that their opinions would just be ignored.

Moreover, without an academic draft, the factions were encouraged to propose their own ideas and proposals, which in turn would create a sense of ownership and commitment among all factions that the amendment was their common task.

## V.3 The amendment's process

### V.3.1 The acting institutions and the process based on the rules of procedure

In accordance with the MPR rules of procedure, the MPR took the following actions. It formed a Working Body to prepare drafts of the decisions and decrees to be enacted by the MPR. In terms of its composition, the Working Body represented proportionally the faction members in the MPR.[15] Then, the Working Body formed Ad-Hoc Committees or PAHs (Panitia Ad-Hoc) to undertake specific tasks, also with proportional memberships.

In the MPR session which lasted from 1-21 October 1999, the Working Body formed four PAHs: PAH I to draft the Broad Outlines of State Policy,

13 See Attachment V.1.

14 MPR Decree No. II/1999, on Rules of Procedure of the People's Consultative Assembly, Articles 79 (6).

15 See Attachment V.3. The composition of the Factions in the MPR Working Body, October 1999.

PAH II for preparing MPR decrees and for reviewing the existing MPR decrees, PAH III to prepare the amendment of the 1945 Constitution, and PAH IV to prepare the MPR response to the President's accountability report.[16] The MPR plenary session allocated twelve days to the Working Body and PAHs to conduct their tasks.

The discussions began with the factions' general views and continued in the Working Body's plenary meeting. Then, the four PAHs discussed the topics to achieve conclusions. The PAHs then reported their meeting outcomes and whether there were agreements or not to the Working Body for further process. Throughout the entire process, either the PAH or Working Body could conduct public hearings or consultations during their meetings. Subsequently, the MPR Working Body reported the outcomes to the MPR plenary session for a final discussion and decision. To complete the outcome, the plenary formed four Commissions. Commission A was assigned to finalize the discussion on the draft of the Broad Outlines of State Policy of 1999-2004. Commission B was to finalize the draft of the new MPR decisions and decrees. Commission C was to finalize the draft of amendment of the 1945 Constitution. Commission D was to finalize the accountability report of the President. All MPR members were divided proportionally into these Committees.[17]

The MPR Working Body consisted of 90 members who were proportionally divided according to the number of members of each faction plus the MPR leadership.[18]

PAH III had 25 members, which were divided proportionally according to the MPR's faction membership. Harun Kamil from the faction of the Delegations of Functional Groups (Fraksi Utusan Golongan) was agreed to be the PAH III Chairperson.[19]

## V.4 The discussions

Thus began the process of amending the 1945 Constitution. However, at the outset, no one had thought that the scope of the proposed changes would be so extensive, which explains this MPR session's short duration. Only a small portion of the proposed changes could be completed during the MPR session in October 1999. The amendment process had to be continued during the next MPR annual session in 2000.

The discussions began in the MPR plenary meeting, in which the factions delivered their respective general views. Factions proposed numerous

16 In accordance with Article III.3 of the Elucidation of the 1945 Constitution, the president is accountable to the MPR.
17 See Chapter VIII, MPR Decree No. II/1999.
18 See Attachment V.4.
19 See Attachment V.5.

revisions to the articles of the 1945 Constitution. In the first MPR Working Body meeting, factions proposed to revise almost 70% of the original UUD 1945. Even more factions agreed to have a chance to propose additional topics in the subsequent meetings. The proposed changes ranged from "simple" topics, such as grammatical corrections in the original text of the 1945 Constitution,[20] to complicated conceptual topics such as sovereignty, human rights, limitation of powers, separation of powers, checks and balances, independence of judicial power and elections as an instrument of the circulation of powers.

Factions were aware that the amendment could affect the state system. Certain factions deemed a kind of academic draft necessary, as stated by the speakers of F-KB and F-PDI-P.[21] However, because of the limited time, the MPR Working Body did not respond to this suggestion. As a result, without a prepared comprehensive or academic draft, the factions had the opportunity to propose whatever they deemed necessary to democratize the 1945 Constitution. The proposals showed a strong desire by the factions to democratize the 1945 Constitution and reflected reform ideas thriving in society.

As political entities, the factions had their respective political platforms,[22] developed through interactions with their constituencies. The material proposed by the factions was compiled as the basic material for reforming the 1945 Constitution. This created a sense of ownership and commitment to the process within the factions, which would become a crucial factor in the sustainability and completion of the amendment.

The preparation of the first amendment was conducted from 6-21 October 1999. Since aspirations for change were high, and the backgrounds and motives for change were diverse, no significant agreement could be reached. However, at this stage, one important thing happened: changing the 1945 Constitution was no longer taboo. Eventually, the MPR agreed to continue and complete the process by 18 August 2000 at the latest.

### V.4.1 Forming the Ad-Hoc Committee III (PAH III) and the form of the amendment

In the first plenary meeting of the MPR Working Body on 6 October 1999, factions made different proposals regarding the kind of committee which would conduct the revisions. Some proposed an "in-house" instrument,

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20 The grammatical corrections included replacing the old spelling of "*diperhentikan*" with the new spelling "*diberhentikan*" in Article 17 verse (2) UUD 1945.

21 As stated by Khofifah Indar Parawansa (F-KB) and Harjono (F-PDI-P). Majelis Permusyawaratan Rakyat Republik Indonesia, op. cit., Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 90-92.

22 A political platform is a document stating the aims and principles of a political party.

i.e., an Ad-Hoc Committee or PAH (Panitia Ad-Hoc). Others preferred an independent committee that should be established especially for conducting constitutional reform. On the other hand, some scholars proposed the formation of a Commission of Amendment (Komisi Amandemen) which would involve scholars revising the 1945 Constitution.[23]

Towards the end of the MPR's plenary session, a F-PG spokesman, anticipating that the 1999 MPR session might not be able to complete all of these tasks, suggested that the task be completed by the Working Body. Alternatively, the Working Body could form a national committee or state commission consisting of MPR members and constitutional experts.[24]

Factions proposed different formats for the revision's legal form. For example, F-PDI-P, F-PBB and F-TNI/Polri proposed an MPR decree that would be attached to the original 1945 Constitution.[25] F-PG proposed enclosing the revision within the existing Constitution.[26] F-Reformasi, F-KKI, F-PDU, F-PPP, and F-PDKB proposed adding the revisions as an addendum to the original 1945 Constitution.[27]

In the end, the MPR Working Body agreed that the amendment would be conducted by an Ad-Hoc Committee (Panitia Ad-Hoc – PAH) and that the outcome would be added in the form of an addendum.

Further, the legal form of the amendment was determined at the end of the MPR October 1999 general session as an MPR decision on the revision of the 1945 Constitution. However, it was not classified as an MPR decree but categorized similarly as the decision of the PPKI on 18 August 1945 that ratified the 1945 Constitution.[28]

This conclusion confirmed that the amendment to the 1945 Constitution was conducted constitutionally in accordance with its provision.

### V.4.2 Public participation

In the first meeting on 7 October 1999, PAH III discussed the importance of public participation in the amendment process. However, although the factions were aware of the importance of involving society in the process,

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23 Ichlasul Amal from University of Gajah Mada proposed to the MPR to establish a Commission of Amendment (Komisi Amandemen), that involves experts and universities in undertaking revisions of the 1945 Constitution. See Kompas Daily, 25 August 1999.

24 As stated by Andi Mattalatta (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, op. cit., Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 41.

25 As proposed by Wijanarko Puspoyo (F-PDI-P), Hamdan Zoelva (F-PBB), and Taufiqurrachman Ruki (F-TNI/Polri). Ibid, pp. 22, 26, and 33.

26 As proposed by Tubagus Harjono (F-PG). Ibid, p. 23.

27 As stated by Muhammadi (F-Reformasi), Vincent Radja (F-KKI), Asnawi Latief (F-PDU), Lukman Hakim Saifuddin (F-PPP) and Seto Harianto (F-PDKB). Ibid, pp. 25, 27, 28, 31, and 32. Muhammadi and Latief explicitly referred to the form of addendum used in the amendment of the Constitution of the United States of America.

28 Ibid, p. 817.

due to the limited time allocated, there was little opportunity at this stage to involve the public in the amendment process.

### V.4.3 From a one to two-stage amendment process

Initially, the MPR had suggested that the amendment of the 1945 Constitution could be finalized during the MPR October 1999 session. This is what the public was demanding. However, the factions realized that it was impossible to complete the amendment during one single session. Hence, the factions selected several topics to finalize during the MPR 1999 session. They agreed to solve the rest in the subsequent session.[29]

Members from F-PDI-P, F-PPP, F-KB, and others urged PAH III to start by reviewing all articles of the 1945 Constitution one-by-one and to compare each faction's proposals, which would be useful for future discussions.[30] In this context, a member of F-Reformasi reminded the MPR not to forget to reform the Constitution as a whole.[31] Importantly, a F-PDI-P speaker reminded the MPR that the amendment should not hinder the effectiveness of the new president and vice president, who would soon be elected by the MPR general session.[32]

Considering the tight schedule and the large number of proposed changes, PAH III proposed an extension for finalizing the amendment until 18 August 2000, exactly 55 years after the PPKI passed the 1945 Constitution.[33] Eventually, the MPR decided to amend the 1945 Constitution in two stages, agreeing that the amendment should be finalized by 18 August 2000 at the latest.

### V.4.4 Voices and reasons for amending the 1945 Constitution

Activists and academic communities had discussed the need for revising the 1945 Constitution for a long time, even while the New Order was still in power. The main argument in support of amending the 1945 Constitution was its failure to respond democratically to the dynamic challenges encountered by the nation. On 6 October 1990, Soewoto Muljo Soedarmo of the University of Airlangga contended that the 1945 Constitution should

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29 Majelis Permusyawaratan Rakyat Republik Indonesia, op. cit., Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 26.

30 As expressed by Aberson Marle Sihaloho (F-PDI-P), Zain Bajeber (F-PPP) and Yusuf Muhammad (F-KB). Ibid., p. 40.

31 As reminded by Hatta Radjasa (F-Reformasi). Ibid., p. 43.

32 As stated by Harjono (F-PDI-P). Ibid, p. 650.

33 As among others proposed by Lukman Hakim Saifuddin (F-PPP), Hartono Marjono (F-PBB) and Sutanto (F-TNI/Polri). Ibid, pp. 652, 656, 815.

be revised to better accommodate national interests.[34] In 1997, students of the Law Faculty of Gajah Mada University, Yogyakarta had proposed a complete amendment concept to the DPR and MPR. On 24 July 1997, constitutional law observer Indra Ridwan submitted a draft amendment of the 1945 Constitution to the MPR. It asserted, among others, that the president's tenure should be limited to two consecutive periods.[35]

Legal Aid director Andi Rudyanto Asapa argued that Article 37 of the 1945 Constitution had been incorporated into the Constitution because the Founding Fathers realized that the Constitution was determined in haste and they anticipated changes.[36]

Kompas Daily reported that in September 1998, University of Gajah Mada, Yogyakarta, proposed a complete amendment of the 1945 Constitution. A leading Muslim intellectual, Nurcholish Madjid, in April 1999 stated that an amendment to the 1945 Constitution was necessary to build civilized politics.[37]

Similarly, human rights lawyer Adnan Buyung Nasution argued that some articles in the 1945 Constitution left room for the president to exert authoritarian rule.[38] Previously, Nasution had affirmed that the 1945 Constitution should be reformed because the framer, Soepomo, had conceived of the state as feudal, authoritarian, and even fascist.[39]

In August 1999, Himawan Estu Bagijo, a legal scholar from Airlangga University, Surabaya, stated that Article 1, paragraph (2)[40] of the 1945 Constitution actually eliminates people's sovereignty.[41]

On 30 August 1999, the Institute for National Resilience or Lemhannas (Lembaga Ketahanan Nasional) organized a discussion where Eep Saefullah, Matori Abdul Djalil, J.E. Sahetapy, and Salim Said argued that the 1945 Constitution had textual and contextual problems, was not sufficient to support democracy, and did not contain sufficient clauses to escape from

34 Kompas Daily, 7 August 1999.
35 Perspektif Magazine: No.26/I/1999, rubric Politika, issued on 22 to 28 April 1999.
36 Suara Pembaruan Daily, 5 January 1998, in the Panel Discussion entitled: "Reflections of the State Journey throughout the Year 1997 and the Prospects toward the Year 1998", organized by the Branch Executive Board of the Catholic Student Association of the Republic of Indonesia (PMKRI) St. Albertus Magnus, Ujung Pandang.
37 Kompas Daily, 12 April 1999.
38 Suara Pembaruan Daily, 30 April 1999.
39 Detak Weekly, no. 014, Tahun ke-1, 13-19 October 1998.
40 Article 1, paragraph (2) stipulates that the sovereignty is in the hands of the people and is implemented entirely by the MPR.
41 Surabaya Post Daily, OPINI, 18 August 1999:" Urgency of Revision of the Constitution".

authoritarianism. Thus, they asserted that the 1945 Constitution must be revised.[42]

There were also debates about what should be amended. Amin Arjoso from the Indonesian Democratic Party of Struggle or PDI-P (Partai Demokrasi Indonesia Perjuangan) had stated in July 1999 that if the party was to change the 1945 Constitution, it should first see what needed changing, but that the Preamble should be maintained.[43]

By contrast, Harun Al Rasyid, professor of constitutional law at the University of Indonesia, Jakarta, reiterated that the 1945 Constitution was a provisional Constitution. He argued that the main task of the MPR was to determine its validity.

Another issue of debate concerned the assumptions on which the 1945 Constitution had been constructed. Soerjanto Puspowardojo stated that the fundamental weakness of the 1945 Constitution was that it assumes that human beings are good creatures. Thus, the potential power of greed, materialism, and honour, as revealed by philosopher Immanuel Kant, remains entirely unregulated.[44]

Likewise, Mohammad Mahfud MD argued that the 1945 Constitution was too naïve and full of *hunudzhon* (positive prejudice). Mahfud argued that the 1945 Constitution entrusts the fate of the country to the wisdom of the state officials, not to the system.[45]

Within the PAH III, all factions expressed their concerns about the weaknesses of the 1945 Constitution, which allowed for centralized, authoritarian, and closed state practices and they criticized the Constitution's excessive concentration of presidential powers. They argued that the lack of a separation of powers and the failing mechanism of checks and balances as required by a democratic system, were reasons for revising the 1945 Constitution.

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42 Kompas Daily, 1 September 1999, Seminar on "Assessing the Improvement of the UUD 1945, Toward a New Indonesia" at the National Resilience Institute (Lemhannas), Jakarta, 31 August 1999. Lemhannas is a research institute that is often the pace setter of military politics. Eep Saefullah was a political science lecturer at the University of Indonesia, Jakarta; Matori Abdul Djalil was the Secretary General of the Foundation for Harmonious and National Brotherhood or YKPK (Yayasan Kerukunan dan Persaudaraan Kebangsaan), Chairman of the National Awakening Party or PKB (Partai Kebangkitan Bangsa), and he later became Minister of Defense. J.E. Sahetapy was a professor on Criminal Law at Airlangga University; Salim Said was a professor of political science and an observer of military politics.

43 Ibid. Previously, prior to the MPR 1999 general session, Alex Litaay, the Secretary General of PDI-P stated that an amendment to the 1945 Constitution was not necessary. See Republika Daily, 21 July 1999. Indeed, there was a faction within the F-PDI-P that was hesitant and even rejected an amendment to the 1945 Constitution. However, the F-PDI-P in PAH III, especially later in PAH I, showed unfaltering support and even took initiatives in proposing improvements to the 1945 Constitution.

44 Ibid. Soerjanto Puspowardojo was a professor in philosophy at the University of Indonesia, Jakarta.

45 Sabili Magazine, op. cit., p. 47.

A F-KB speaker stated that the original 1945 Constitution contains confusing formulations. It combines integralistic-totalitarianism with people's sovereignty and the rule of law with the rule of state power, both opposing ideas.[46]

Factions then emphasized that a reform of the Constitution was a prerequisite for national reform. Amending the 1945 Constitution was deemed necessary to provide the reform process with an adequate basic law and to assert that the constitution could impose limits on power, limiting power's arbitrary application.[47] The factions, including F-PDI-P, F-PG, F-KKI, F-PPP, F-PBB, F-PDKB, F-TNI/Polri and F-UG, asserted that the MPR should follow up on the aspirations of reforming the 1945 Constitution.[48]

The factions also reiterated that the original 1945 Constitution was a provisional constitution that was hastily promulgated and enacted after the proclamation.[49] The addition of a constitutional amendment article was intended for future improvements.[50]

Therefore, the amendment of the 1945 Constitution should be viewed as an attempt to remove the influence of state sovereignty ideology. It aimed to restore the principles of people's sovereignty and the rule of law, inherent in the Preamble and in the articles of the 1945 Constitution.

### V.4.5 Different versions of the 1945 Constitution, the Preamble, and the scope of the amendments

There are differences between the original 1945 Constitution (ratified on 18 August 1945) and the re-enacted 1945 Constitution (re-enacted on 5 July 1959). The original 1945 Constitution had no Elucidation compared to the re-enacted 1945 Constitution.[51]

The re-enacted 1945 Constitution listed the Jakarta Charter (Piagam

46 As stated by Syarif Muhamad Alaydrus (F-KB). Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 617.

47 However, the same factions also contended that the shortcomings were not caused by the existing UUD 1945 but because the provisions of UUD 1945 were not implemented correctly. See MPR Decree No. IV/1999 on GBHN 1999 – 2004.

48 As conveyed by Wijanarko Puspoyo (F-PDI-P), Tubagus Harjono (F-PG), Vincent Radja (F-KKI), Lukman Hakim Saifuddin (F-PPP), Hamdan Zoelva (F-PBB), Gregorius Seto Harianto (F-PDKB), Taufiqurrachman Ruki (F-TNI/Polri) and Valina Singka Subekti (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kedua, Jilid 3, op. cit., Sekretariat Jenderal MPR-RI, 1999, pp. 13-53. In the 2008 and 2010 revised version of the minutes, some parts of these records do not appear.

49 See Sekretariat Negara Republik Indonesia, op. cit., pp. 426.

50 The re-enacted Constitution was re-enacted through Presidential Decree of 5 July 1959 and disseminated to the public in State Gazette No. 150/1959.

51 The Elucidation was added in October 1945.

Jakarta) as a consideration of the Presidential Decree, which re-enacts it.[52] For some Islamic political communities, the Jakarta Charter that contains the 'seven words' (tujuh kata)[53] is not just historical but an integral section (see II.1.). This explains why a F-PPP speaker urged confirmation that the amendment object was the re-enacted 1945 Constitution. This point was later reiterated in the final MPR plenary meeting on 9 August 2002, as expressed by the speakers of F-PDU and F-PPP.[54] Other factions had no demur. The assertion was a relief to the Islamic political parties. It provided them with a political position that was, at the very least, not weaker than their past positions.[55]

This issue shows Islamic political parties' sensitivity towards the Jakarta Charter and their acceptance of the 1945 Constitution and Indonesian politics in general.[56] It forms the gateway to discourses on the relationship between religious laws (especially Islamic laws) and a state based on Pancasila's first principle, i.e., the belief in the One and Only God.

The assertion also ended an academic debate about whether the MPR should ratify the existing 1945 Constitution before an amendment (proposed by Harun Al Rasyid) or whether it could be assumed as already valid, since *stilzwijgend* (silently), the 1945 Constitution had been placed at the top of the hierarchy of laws (proposed by Ismail Suny). Both were professors from the University of Indonesia. Soewoto Muljo Soedarmo argued that from the supremacy of law point of view, based on the principle of *lex posterior derogat legi priori* (a later statute abrogates an earlier one), the 1945 Constitution had already been determined by the Presidential Decree of 5 July 1959.[57]

Regarding the scope of changes, F-PDI-P, F-PG, F-Reformasi, F-PBB,

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52 Presidential Decree 5 July 1959 affirmed "Bahwa kami berkeyakinan bahwa Piagam Jakarta tertanggal 22 Juni 1945 menjiwai Undang-Undang Dasar 1945 dan adalah merupakan suatu rangkaian kesatuan dengan konstitusi tersebut" (We believe that the Jakarta Charter, dated 22 June 1945 animates the 1945 Constitution and is a continuum with the constitution).

53 In bahasa Indonesia, the seven words (tujuh kata) consists of "dengan kewajiban untuk melaksanakan syariah Islam bagi pemeluk-pemeluknya" (with the obligation to implement the Islamic Sharia for its followers).

54 See Majelis Permusyawaratan Rakyat Republik Indonesia, op. cit., Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 641, 668.

55 As asserted by Zain Badjeber (F-PPP), Hartono Mardjono (F-PDU) and Chozin Chumaidy (F-PPP). At the end of the amendment process, the assertion was incorporated into the MPR decision of 10 August 2002, on the changes to UUD 1945. See Majelis Permusyawaratan Rakyat Republik Indonesia, op. cit., Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 829. In the Orde Baru era, the only Islamic political party, Partai Persatuan Pembangunan (PPP), was in an awkward position due to this seven-words issue. It was predictable that questions around the 'seven words' (tujuh kata) would become a significant issue in the amendment process.

56 The Jakarta Charter (1945) was a final draft of the Preamble before the famous 'seven words' were omitted.

57 Majelis Permusyawaratan Rakyat Republik Indonesia, op. cit., Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 450-459, 469.

F-KKI, F-TNI/Polri, F-PDU, F-PPP and F-UG speakers stated that the amendment should have a limit. Its purview was limited only to the Body and the Elucidation of the 1945 Constitution, with the Preamble maintained. Besides the Preamble, F-PDI-P, F-PG, F-Reformasi, F-PBB, and F-TNI/POLRI also emphasized upholding the unitary state and presidential system.[58] As reported to the MPR Working Body meeting on 14 October 1999, all factions agreed to revise the 1945 Constitution on the condition that the Preamble, the presidential system and the unitary state of the Republic of Indonesia would be maintained.[59] In the Indonesian context, altering the Preamble would open up debates that could lead to the dissolution of the unitary state as proclaimed on 17 August 1945.[60]

The unanimous agreement of all factions to preserve the Preamble and to maintain the unitary state removed the stumbling block to constitutional reform. Many groups in society, including nationalists, religious groups, the Armed Forces, and the Police supported an amendment only if the Preamble and unitary state were upheld.

The constitutional elements of the 1945 Constitution that were maintained include the Preamble, which contains the foundation of the state Pancasila, the unitary form of the state, the character of Indonesian nationhood, unity in diversity (Bhinneka Tunggal Ika), and Indonesian (bahasa Indonesia) as the national language. These were the values and ideas that remained constant throughout the reform period.

### V.4.6 The content

In the amendment's initial phase, the factions proposed a democratic constitution based on the rule of law. As discussed below, this included various ideas for building an independent judiciary, respect for human rights, and checks and balances. At the time, the proposals were generally still overshadowed by the understanding that the MPR was the highest state institution, the holder of people's sovereignty in full, to whom all state institutions were subjected and accountable. However, this attitude gradually diminished as the deliberations continued. The deliberative atmosphere and the involvement of expert teams would help to clarify and consolidate the reform ideas, as the following subsections describe.

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58 As conveyed by Amin Aryoso (F-PDI-P), Tubagus Haryono (F-PG), Muhammadi (F-Reformasi), Hamdan Zoelva (F-PBB), Vincent Radja (F-KKI), Taufiqurrachman Ruki (F-TNI/Polri), Asnawi Latif (F-PDU), Zain Bajeber (F-PPP) and Valina Singka Subekti (F-UG). Ibid., pp. 21 – 33.

59 Ibid., p. 562. In his book, Indrayana failed to see that there was an agreement to maintain the unitary form of the Republic of Indonesia. See Indrayana, op. cit., p. 192.

60 See the statements by the factions above.

### *V.4.6.1 Sovereignty and the MPR*

All factions asserted the importance of strengthening people's sovereignty. The 1959 UUD 1945 embraces the conception that the MPR is the holder of people's sovereignty. As Soepomo described in German: *Die gesamte Staatsgewalt liegt allein bei der Majelis*.[61] The conception is based on the understanding that the MPR is the manifestation of all people, so its power is declared unlimited. Based on that, F-PG, F-KB, F-Reformasi, F-PDU and F-UG tended to put MPR as the highest state institution.[62] In that regard, F-KB stated that all high state institutions, except the DPR, must be responsible to the MPR.[63]

Many academics, such as Miriam Budiardjo and Maswadi Rauf,[64] argued in favour of maintaining the MPR as the supreme body.[65] Harun Kamil (F-UG), Chairman of PAH III,[66] stated that the MPR (as the supreme institution) distributes power to other lesser institutions. Kamil argued that current problems were caused by a vagueness around the distribution. F-Reformasi proposed affirming MPR's authority by adding a new verse into Article 1, stating that the MPR shall distribute state power resolutely to the high state institutions, the President, the DPR, the Financial Audit Board, the Supreme Court, and the Supreme Advisory Board.[67]

The MPR general session was conducted based on MPR Decree No. II/1999, which indeed states that the MPR is the highest state institution and the holder of people's sovereignty in full.[68] However, from the beginning some challenged the MPR's supremacy and gradually, their voice became stronger. For instance, the F-PDKB speaker reminded the meeting that the MPR cannot exceed the people's sovereignty, as expressed through general elections, even if in the future the MPR would still be "the most powerful" institution. The F-PDI-P representative affirmed that state sovereignty is in the hands of the people and exercised both directly by the

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61 See the Elucidation of the 1945 Constitution, State Government System, III. Sometimes, Soepomo used German to express an idea.

62 As stated by Tubagus Haryono (F-PG), Abdul Kholiq Ahmad (F-KB), Muhammadi (F-Reformasi), Asnawi Latief (F-PDU), and Valina Singka Subekti (F-UG). Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kedua, Jilid 3, *Risalah Rapat ke-1 Badan Pekerja MPR-RI*, Sekretariat Jenderal MPR-RI, 1999, p. 17. (This part of the minutes does not appear in the 2010 Revised Edition of the minutes of Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 1999, pp. 22-25, 102.)

63 As stated by Khofifah Indar Parawansa (F-KB). Ibid., p. 69.

64 Both Miriam Budiardjo and Maswadi Rauf were professors of Political Science at the University of Indonesia.

65 As quoted by Valina Singka Subekti (F-UG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 1999,Edisi Revisi, Sekretariat Jenderal, 2010, p. 102.

66 Ibid.,p. 61.

67 As stated by Hatta Rajasa (F-Reformasi). Ibid., p. 107.

68 See MPR Decree No. II/1999, Chapter II, Article 2.

people through elections and by the MPR.[69] Earlier in the meeting, the F-PDI-P speaker argued that the MPR was not the distributor of power and that the president must be elected directly by people. He asserted that it is the people who delegate power to the institutions.[70]

As also denoted by the speakers from F-PPP, F-PBB and previously from F-PDI-P, factions began to question the MPR's omnipotence.[71] However, approaching the end of the MPR 1999 general session, F-TNI/Polri asserted that the people's sovereignty, exercised in full by MPR, should be maintained.[72]

In connection with the sovereignty debate, discussions on the MPR's membership and composition also reflected the different perceptions. In that context, it is relevant to consider membership opinions. Factions, including the appointed F-UG, agreed that all MPR members should be elected in an election, as expressed by the speakers from F-PG, F-UG, F-PBB, F-PPP,[73] and previously from F-PDKB.[74] However, later, F-PG asked the MPR to consider the existence of appointed members, who might be necessary to correct election outcomes. For example, an election cannot cover tribal chiefs and prominent scholars who do not want to run in the election, even though they are needed.[75] This stance was shared by F-TNI/Polri and F-KB. Then, F-TNI/Polri proposed retaining the appointed delegates of the functional groups, while the presence of provincial delegates could be reviewed.[76] By contrast, during the MPR plenary meeting on 19 October 1999, the speaker of F-PDI-P asserted that the socio-political role of the military should be reviewed and restructured to restore the function of the Armed Forces as a defence force. Further, F-PDI-P emphasized that the possibility that the president could abuse the Armed Forces should be removed by reviewing relevant articles in the 1945 Constitution, which were no longer appropriate.[77]

69 As stated by Gregorius Seto Harianto (F-PDKB) and Aberson Marle Sihaloho (F-PDI-P). Ibid., pp. 104, 115.

70 Ibid., p. 64.

71 As stated by Aberson Marle Sihaloho (F-PDI-P), Hamdan Zoelva (F-PBB) and Lukman Hakim Syaifuddin (F-PPP), Ibid., pp. 62, 73, and 273.

72 I Nyoman Tamu Aryasa (F-TNI/Polri) asserted that the supremacy of the MPR should be maintained. Ibid., p. 661.

73 As stated by Andi Mattalatta (F-PG), Valina Singka Subekti (F-UG), Hamdan Zoelva (F-PBB), and Zain Bajeber (F-PPP). Ibid., pp. 65, 82, 109, and 110. It should be noted that all members of F-UG were appointed.

74 As stated by Seto Harianto (F-PDKB). Ibid., p. 32.

75 As stated by Andi Mattalatta (F-PG). Ibid., p. 66.

76 As argued by Hendi Tjaswady (F-TNI/Polri). Ibid., p. 80.

77 As stated by Laksamana Sukardi (F-PDI-P). Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Ketiga, Jilid 13, *Risalah Rapat Paripurna Sidang Umum MPR-RI,* Sekretariat Jenderal MPR-RI, 1999, p. 72. This part does not appear in the 2008 and 2010 Revised Editions of the minutes of the meetings.

In the meantime, PAH I, established to draft the 1999 – 2004 Broad Outlines of State Policy, concluded that the military should participate in formulating the Outlines through its MPR membership.[78] Eventually, in the plenary session on 19 October 1999, the MPR determined MPR Decree No. IV/1999 on the Broad Outlines of State Policy. It confirmed the military's role in the political system as well as the MPR's position as the highest state institution.[79]

### *V.4.6.2 Limitation of powers*

Limitation of powers is one of the cornerstones of a democratic constitution. A democratic constitution seeks to limit the power of government through various procedural devices. These devices include a limitation of the president's tenure, establishment of a checks and balances mechanism, law-making procedures, and elections as an instrument for leadership succession. Stipulation of adherence to human rights, the supremacy of law, an independent judicial power, and the existence of independent institutions are also intended to limit the government's power. All factions that spoke in the MPR Working Body's first session argued in favour of the Constitution regulating limitations of power. The experiences under President Suharto's leadership incentivized the factions to request a limitation of the president's power. Thus, PAH III discussed various ways to limit such power.

The limitation of presidential tenure was quickly agreed because the MPR Special Session in November 1998 had previously determined (through MPR Decree No. XIII/1998) that a president's tenure is limited to a maximum of two consecutive periods of five years each. Further, the F-PDI-P, F-KB, F-Reformasi, and F-UG speakers[80] proposed limiting the president's power and controlling the legislature and judiciary. Speakers from F-PBB and F-KKI proposed placing the president in an equal position with other institutions to establish proper checks and balances.[81] Likewise, factions proposed strengthening the MPR's authority, relinquishing the concept of the president as the single authority to exercise power on behalf

78 In October 1999, PAH I of the MPR General Assembly was assigned to compose the Broad Outlines of State Policy (GBHN, Garis-Garis Besar Haluan Negara) for the period of 1999–2004.

79 See MPR Decree No. IV/1999 on Broad Outlines of State Policy (GBHN, *Garis-Garis Besar Haluan Negara*). Article 4 of the Decree stipulates that the MPR commissioned the president and other high state institutions to implement the GBHN and to report its implementation annually to the MPR. Further, in the section on Domestic Politics of the Decree, point J stipulates that the participation of the TNI in formulating the national policy is through the highest state institution, the MPR. This decree was drafted by PAH II which was tasked to draft the GBHN.

80 As conveyed by Widjanarko Poespoyo (F-PDI-P), Abdul Kholiq Ahmad (F-KB), Muhammadi (F-Reformasi), and Valina Singka Subekti (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.* Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 22, 24, 25, and 33.

81 As stated by Hamdan Zoelva (F-PBB) and Anthonius Rahail (F-KKI). Ibid. pp. 26 and 27.

of MPR, and convening an annual MPR session to supervise the president, as proposed by F-PG and F-TNI/Polri.[82] F-PDU proposed introducing a direct presidential election.[83] As emphasized by the F-UG speaker, a constitution should establish the limitation of powers, so that power cannot be arbitrary.[84]

Most of the speakers stressed need to limit the powers of the president. However, F-Reformasi and F-UG speakers reminded the MPR members that PAH III had agreed to retain the presidential system rather than changing it into a parliamentary system. This agreement stemmed from Indonesia's political instability during the 1950s.[85]

Eventually, in the MPR final plenary meeting on 19 October 1999, considering presidential power limits, the factions agreed to amend three articles. It was stipulated that in appointing Indonesian ambassadors, receiving accreditation of foreign ambassadors,[86] granting amnesty and dropping a case the president shall pay regard to the DPR's consideration. In granting clemency and rehabilitation, they will pay regard to the Supreme Court's consideration.[87] On granting titles, decorations, and other honours, the president shall abide by the law.[88] Through the above provisions, the amendment process began to put constitutional limits on the government to prevent abuse of power.

### *V.4.6.3 Checks and balances*

All factions in PAH III agreed that proper checks and balances were a very important principle that was absent from the 1959 version of the 1945 Constitution. Thus, the F-PBB, F-KKI, F-TNI/Polri, F-PPP, F-PDI-P and F-KKI speakers asserted that the 1945 Constitution should place the president on the same level as the other higher institutions.[89] One agenda item of the MPR General Assembly was the election of a new president. Therefore, F-PG asserted that first, proper checks and balances needed to be incorporated into the Constitution.[90]

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82 As proposed by Tubagus Haryono (F-PG) and Taufiqurrahman Ruki (F-TNI/Polri). Ibid., pp. 23 and 32.

83 As proposed by Asnawi Latief (F-PDU). Ibid., p. 28.

84 As emphasized by Valina Singka Subekti (F-UG). Ibid., p. 46.

85 As stated by Hatta Radjasa (F-Reformasi) and Harun Kamil (F-UG). Ibid., p. 94.

86 Article 13, UUD 1945.

87 Article 14, UUD 1945.

88 Article 15, UUD 1945.

89 As stated by Hamdan Zoelva (F-PBB), Vincent Radja (F-KKI), Taufiqurrachman Ruki (F-TNI/Polri), Lukman Hakim Saifuddin (F-PPP), Laksamana Sukardi (F-PDI-P) and Budi Waldus Waromi (F-KKI). Ibid., pp. 27, 32, 652, 807, and 813.

90 As expressed by Slamet Effendy Yusuf (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 251. The MPR was scheduled to elect a new president on 20 October 1999.

Nonetheless, most of the factions were still convinced that the MPR should continue to be the highest political body to which every other institution was accountable.[91]Positions started to shift somewhat. The F-PG reminded MPR members that checks and balances were now an internal mechanism within an institution. By comparison, checks and balances in a democracy are mechanisms between different institutions.[92] Likewise, F-PBB affirmed that requiring the DPR to report to the MPR was not appropriate, since members of parliament are representatives of the people. They asserted that the MPR should not intervene in the authority and functions of the DPR.[93]

*V.4.6.4 Negara Hukum (The rule of law state)*

The PAH III meeting on 8 October 1999 was set to discuss, among others, the chapter on Form and Sovereignty.[94] A F-KB member proposed adding a new verse to Article 1, which states that Indonesia is a state based on the rule of law ("*Indonesia adalah negara hukum"*). It was intended as an explicit commitment towards a solid foundation for law enforcement and as an answer to power manipulating the law, the speaker emphasized.[95] F-PBB and F-PG further argued that the Constitution should assert the principle of *negara hukum*, which hitherto was mentioned only in the Elucidation of the 1945 Constitution.[96]

Based on the proposals, Slamet Effendy Yusuf, who chaired the meeting, concluded that PAH III affirmed that the state should uphold the supremacy of law. Thus, Yusuf suggested to PAH III members to accept the following revision of section (1) of Article 1: Indonesia is a unitary state in the form of a republic and based on the rule of law ("*Negara Indonesia ialah negara kesatuan yang berbentuk republik dan negara hukum"*).Yet, though this proposal was accepted by other members, it was considered as an initial formulation that needed further elaboration.[97] As reminded by a speaker of F-PDI-P, PAH III had not yet come to an agreement on the substance of the phrase.[98]

In a PAH III meeting on 10 October 1999 to continue the discussion of Chapter I, Form and Sovereignty, Harun Kamil, who chaired the meeting, urged PAH III to approve the formulation that Indonesia is a unitary state in the form of a republic and based on the rule of law.[99] But some members,

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91 Ibid., p. 439.
92 As stated by Andi Mattalatta (F-PG). Ibid.
93 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 442.
94 In Indonesian, the title of the Chapter I is "Bentuk dan Kedaulatan" (The Form and the Sovereignty) which contains the form of the state and the people's sovereignty.
95 As conveyed by Yusuf Muhammad (F-KB). Ibid., p. 106.
96 As expressed by Hamdan Zoelva (F-PBB) and Andi Mattalatta (F-PG). Ibid., pp. 109 and 113. In Indonesian, the terminology of the rule of law is used interchangeably with *negara hukum* while rule by law is interchangeable with *negara berdasar hukum*.
97 Ibid., p. 117.
98 As stated by Harjono (F-PDI-P). Ibid., p. 129.
99 Ibid., p. 256.

notably a F-PDI-P speaker, argued that the current agenda focused on sovereignty, not the rule of law. Likewise, a F-Reformasi member stated that the topic was not a priority and that in further discussions, PAH III should use the original phrase of the article, because any newer version would first need further clarification.[100] In response, a F-PDI-P member reminded the other members that PAH III should be ethically bound by the agreement that stated that the Elucidation's normative issues should be moved to the articles.[101] In accordance, F-PBB argued that since the rule of law was included in the Elucidation, as agreed in the preliminary agreement, it could be directly transferred to the articles.[102] Thus, the speaker argued, the law would rule in the future, no longer being subordinate to the ruler. [103] Then, F-KB affirmed that the rule of law should be incorporated into Article 1. The speaker emphasized that it was important to accept the supremacy of law explicitly, so that the Constitution would guarantee equality before the law.[104] The speakers from F-PDI-P, F-TNI/Polri and F-PDKB also emphasized the importance of incorporating the rule of law into the 1945 Constitution.[105]

Nonetheless, F-Reformasi, while underlining the rule of law's importance, argued that the discussion about the rule of law was not a priority.[106] Likewise, F-TNI/Polri, though asserting that it was important to include the rule of law in Article 1, proposed to retain the original Articles 27, 28 and 29 of the 1945 Constitution. In practical terms, those articles already provided that the state be based on the rule of law. Article 27 of the 1945 Constitution, for example, stipulates that all citizens are required to respect the law.[107] Then, F-PDI-P argued that the rule of law is a principle directly related to human rights and that it would therefore be better to discuss it later, along with the issue of human rights. When discussing human rights, the speaker stated, the important issue is the supremacy of law, which means the protec-

100 As stated by Aberson Marle Sihaloho (F-PDI-P) and Patrialis Akbar (F-Reformasi). Ibid., p. 258.

101 As stated by Frans F.H. Matrutty (F-PDI-P). Ibid., p. 258. During the amendment process, among the members of the F-PDI-P there were frequent differences of opinion. Preceding the amendment process, all of the factions in PAH III agreed to conduct the reform of the 1945 Constitution with the conditions that, among others, the normative issues in the Elucidation should be moved to the articles of the 1945 Constitution. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 562.

102 See the MPR Working Body preliminary agreement concluded at the 1st meeting. Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 562.

103 As emphasized by Hamdan Zoelva (F-PBB). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 395

104 As asserted by Khofifah Indar Parawansa (F-KB). Ibid., p. 396.

105 As stated by Frans Matrutty (F-PDI-P), Hendi Tjaswadi (F-TNI/Polri) and Gregorius Seto Harianto (F-PDKB). Ibid., pp. 396-401.

106 As argued by Patrialis Akbar (F-Reformasi). Ibid., p. 396

107 As stated by Hendi Tjaswadi (F-TNI/Polri). Ibid., p. 397.

tion of human beings.[108] Hereby, the speaker stressed that he understood the rule of law as a principle that contains just and moral principles.[109] Accordingly, a F-PG speaker emphasized that the rule of law is not a simple term. It contains a number of principles, which a country should abide by to qualify as a state based on the rule of law.[110] Annoyed by the debate, F-UG urged discussing the supremacy of law during that same session.[111] Then, F-PDKB proposed discussing the topic together with Article 27 (1) of the Constitution, which states that "All citizens shall be equal before the law and the government and shall be required to respect the law and the government, without exceptions."[112]

In the ensuing PAH III meeting on 12 October 1999, Chairman Amin Aryoso attempted to compile the discussions' conclusions as follows:

*Alternative 1:*
The state of Indonesia is a unitary state with the form of a republic and based on the rule of law.

*Alternative 2:*
The state of Indonesia is a unitary state with the form of a republic which is based on the rule of law.

*Alternative 3:*
The state of Indonesia is based on the rule of law and is a unitary state with the form of a republic.[113]

Commenting on the conclusions, F-PPP suggested placing the principles regarding the rule of law in a separate section to be added to Article 1, making it clearer.[114] Similarly, F-UG argued that since there was a strong desire to uphold the supremacy of law, it should be incorporated into Article 1.[115] F-TNI/Polri supported that proposal, but considering that it needed a clearer understanding,proposed postponing the topic.[116] On the other hand, F-PDI-P argued that the state government system is not based only on the rule of law, but also on the Constitution, in which the rule of

108 As stated by Harjono (F-PDI-P). Ibid., p. 398.
109 Ibid. See also Brian Z. Tamanaha, *op. cit.,* pp. 92 and 112.
110 As stressed by Slamet Effendy Yusuf (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 399.
111 As demanded by Harun Kamil (F-UG). Ibid., p. 400.
112 As conveyed by Gregorius Seto Harianto (F-PDKB). Ibid., p. 401.
113 Ibid., p. 426.
114 As suggested by Zain Bajeber (F-PPP). Ibid., p. 429.
115 As stated by Valina Singka Subekti (F-UG). Ibid., p. 432.
116 As stated by Hendi Tjaswadi (F-TNI/Polri). Ibid., p. 434.

law is included. Therefore, the new provision was not necessary.[117] A F-PG member stated that the government simply needed more time to better understand how the rule of law should be understood in relation to the state.[118]

In a public hearing with experts on the same day, Soewoto Mulyo Soedarmo, Harun Al Rasyid, and Ismail Suny endorsed the view that the Constitution should affirm that Indonesia is a democratic state based on the rule of law ("*democratische rechtsstaat*").[119] In the following informal consultation, the F-PG and F-PBB speakers stated that the concept of the supremacy of law was acceptable to and strongly demanded by the public. However, as reminded by F-PDI-P, terminologies such as the supremacy of law and *rechtsstaat* contained conceptual substances that needed to be thoroughly discussed.[120] Therefore, PAH III agreed eventually to postpone the topic.

### *V.4.6.5 Human rights*

Because the 1998 MPR Special Session had passed a Decree on Human Rights,[121] the 1999 MPR session did not discuss the issue from the beginning. However, there was an interesting discussion regarding the election of a new president, which unveiled MPR members' perceptions on one facet of human rights, namely freedom from discrimination and racism.[122]

The original 1945 Constitution stipulates that the Indonesian president shall be an indigenous Indonesian citizen.[123] In reference to this provision, a F-PDI-P speaker emphasized that Indonesia is not racist and every citizen should be equal before the law.[124] F-PDU, F-PDKB, F-PG, F-PPP and F-PBB endorsed this stance and asserted that this clause is against the basic principle of Indonesian nationhood and against human rights. They proposed revising this article.[125] However, the F-Reformasi and F-UG speakers disagreed, saying that based on the historical background, the president

117 As argued by Aberson Marle Sihaloho (F-PDI-P). Ibid., p. 435.
118 As argued by Andi Mattalatta (F-PG). Ibid., p. 435.
119 Ibid., pp. 455 and 479. Soewoto Mulyo Soedarmo was a professor of constitutional law from Airlangga University, Surabaya. Harun Al Rasyid and Ismail Suny were professors of constitutional law from the University of Indonesia, Jakarta.
120 As stated by Andi Mattalatta (F-PG), Hamdan Zoelva (F-PBB) and Harjono (F-PDI-P). Ibid., pp. 485–486.
121 MPR Decree No. XVII/1998.
122 Among the political circles, this issue was related to the nomination of Abdurrahman Wahid, a self-claimed Chinese descendent, for president.
123 Article 6, verse 1, UUD 1945.
124 As asserted by Aberson Marle Sihaloho (F-PDI-P). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 65.
125 As asserted by Asnawi Latief (F-PDU), Gregorius Seto Harianto (F-PDKB), Hatta Mustafa (F-PG), Lukman Hakim Saifuddin (F-PPP) and Hamdan Zoelva (F-PBB). Ibid., pp. 76, 78, 133, 138, and 139.

should be an indigenous Indonesian.[126] In response, a F-PDI-P speaker emphatically asserted that the use of the term indigenous (*asli*) was a seed for Nazism.[127]

The discussion reflects how during the reform process, most members of the MPR upheld Indonesian nationhood, as manifested in the 1928 Youth Pledge (*Sumpah Pemuda*). The Pledge asserts that Indonesian nationality is not based on race, religion, and origin, but on people of diverse origins who are united in common ideals, by unity in diversity.[128]

### *V.4.6.6 Independent judiciary and its powers*

From the beginning, the independence of judicial power had been a concern of the MPR factions. In the first meeting of the MPR Working Body on 6 October 1999, the first speaker (F-PDI-P) proposed that the amendment should strengthen the Supreme Court. Similarly, F-KB proposed prioritizing three topics: the limitation of presidential power, the optimization of the highest and high state institutions (particularly the MPR and DPR), and the independence of judicial power.

Likewise, the F-PBB stated that the amendment must establish genuine checks and balances, in which the Supreme Court is a separate institution that is responsible solely for the morality of the law itself, not to the MPR or the DPR. The Supreme Court needs to be equipped with the power to conduct a judicial review of MPR Decrees against the constitution, as an effort to uphold the law's supremacy.[129]

F-KKI and F-PDU also affirmed that the Supreme Court should be independent, though some aspects, F-KKI argued, such as the selection and appointment of the Supreme Court justices, should occur in consultation with the MPR.[130] Further, F-PDU asserted that all judicial matters should be brought under the Supreme Court.[131] Similarly, F-UG proposed that the substance of the amendment should cover, among others, the autonomy of

126 As stated by Hatta Radjasa (F-Reformasi) and Valina Singka Subekti (F-UG). Ibid., pp. 108 and 147. Informally, they stated that during the constitution-making process in 1945, the clause was to prevent a Japanese-turned-Indonesian from becoming president. Further, Hatta Radjasa argued that Article 26 of the 1945 Constitution states that citizens shall be indigenous Indonesian people or people of foreign origin who have been legalized as citizens in accordance with the law. See Ibid., p. 140.

127 As asserted by J.E. Sahetapy (F-PDI-P). Ibid., p. 555.

128 Later, in the third stage amendment of November 2001, everyone agreed to remove the term *asli* (indigenous) and replace it with a formulation which says that the president shall be an Indonesian citizen by birth. Regarding the 1928 Youth Pledge (*Sumpah Pemuda*), see II.3.

129 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 26.

130 As argued by Vincent Radja (F-KKI) and Asnawi Latief (F-PDU). Ibid., p. 27.

131 As argued by Asnawi Latief (F-PDU). Ibid., p. 29.

a judicial body, entrusting the Supreme Court with the authority to conduct judicial review.[132]

In the first PAH III meeting on 7 October 1999, factions generally wanted to evaluate the judicial power, as stated by F-PG, F-PBB and F-PDU.[133] In that regard, F-PDI-P asserted that the Supreme Court should be strengthened, with Supreme Court judges appointed by the DPR.[134] Eventually, PAH III agreed to prioritize an amendment of Article 24 of the 1945 Constitution on enhancement and accountability of judicial institutions or the Supreme Court.[135] In the subsequent PAH III meeting on 9 October 1999, F-TNI/Polri proposed changing the title of Chapter IX from "Judicial Power" to "The Supreme Court". F-TNI/Polri stated that the Supreme Court (*Mahkamah Agung* or MA) should be accountable to the MPR.[136]

Most PAH III members affirmed that the judicial power should be independent from the executive, controlled only by the MA, and should therefore be autonomous. Hence, the faction members agreed that it should be equal to the other branches of power as a part of overall checks and balances.[137] F-UG, F-PPP, F-PDKB and F-KB asserted that the Supreme Court should be the highest court, organizing all courts under itself.[138]

Departing from the notion that the MPR is the supreme political body of the state, F-KB argued that members of all state institutions, except the DPR, should be elected, appointed, approved, and dismissed by the MPR.[139] Accordingly, F-UG and F-PPP proposed that the structure, status, power, and membership of the Supreme Court should be stipulated by an MPR decree.[140] Similarly, F-Reformasi argued that the chairman (Chief Justice) and deputy chairman of the Supreme Court should be elected and confirmed by the MPR.[141]

PAH III also discussed the possibility of including a separate article in the Constitution about the Supreme Court, the Prosecutor General and the Police, to ensure law enforcement.[142] During the session, F-PDI-P, F-PG,

132 As stated by Valina Singka Subekti (F-UG). Ibid., p. 33.
133 As conveyed by Andi Mattalatta (F-PG), Hamdan Zoelva (F-PBB) and Asnawi Latief (F-PDU). Ibid., pp. 41 and 44.
134 As argued by Aberson Marle Sihaloho (F-PDI-P). Ibid., p. 64.
135 Ibid., p. 85.
136 As stated by Hendi Tjaswady (F-TNI/Polri). Ibid., p. 230.
137 As stated by Patrialis Akbar (F-Reformasi), Hamdan Zoelva (F-PBB) and Andi Mattalatta (F-PG). Ibid., pp. 232, 233 and 235.
138 As stated by Valina Singka Subekti (F-UG), Zain Bajeber (F-PPP), Gregorius Seto Harianto (F-PDKB), and Yusuf Muhammad (F-KB). Ibid., pp. 230–234.
139 As argued by Khofifah Indar Parawansa (F-KB). Ibid., p. 69.
140 As stated by Valina Singka Subekti (F-UG) and Zain Bajeber (F-PPP). Ibid., pp. 230 and 234.
141 As stated by Patrialis Akbar (F-Reformasi). Ibid., p. 232.
142 As proposed by Yusuf Muhammad (F-KB), Hamdan Zoelva (F-PBB), Zain Bajeber (F-PPP), Andi Mattalatta (F-PG) and Aberson Marle Sihaloho (F-PDI-P). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 231, 233, 235 and 237.

F-UG, F-PP, and F-Reformasi proposed that the Supreme Court should hold the authority to conduct a judicial review of legislation below the Constitution. F-PBB proposed establishing an Honorary Council, which holds the function and authority to supervise and impose sanctions in the event the Supreme Court is proven to violate the law.[143] However, factions tended to conclude that the MPR has the authority to request accountability from the Supreme Court and dismiss its Chief Justice. A F-UG speaker then stated that although the MPR should be strengthened, the Supreme Court should be an autonomous institution into which other branches could not intervene.[144] Likewise, F-PBB warned that the MPR is a political institution that should not interfere with judicial matters.[145] Then, a F-PPP speaker argued that the MPR's authority to determine and dismiss the Chief Justice was not related to accountability but was merely administrative.[146]

Regarding principles of checks and balances and the rule of law, factions argued that there should be an option for legislative judicial review. In that regard, the F-PBB's preliminary view on the 7 October 1999 amendment's substances, stated that to uphold the supremacy of law, the Supreme Court should be given authority to conduct judicial review of laws and MPR Decrees.[147] Subsequently, the speakers from F-PG, F-Reformasi, F-PBB, F-UG and F-PPP proposed that the Supreme Court should serve as a constitutional court with the authority to review the law.[148] In that regard, a F-TNI/Polri speaker underlined a fundamental principle of judicial review: the constitutionality of a law should be tested on the basis of the 1945 Constitution.[149] F-PG supported the Supreme Court having the authority to actively conduct judicial reviews of laws and lower legislation.[150]

These discussions show that members of PAH III attached high importance to the constitution's supremacy. Eventually, PAH III did not manage to finalize the topic and agreed to postpone it to the subsequent stage.

143 Ibid., pp. 246–247.
144 As argued by Valina Singka Subekti (F-UG). Ibid., p. 439.
145 As expressed by Hamdan Zoelva (F-PBB). Ibid., p. 442.
146 As asserted by Zain Bajeber (F-PPP). Ibid., p. 445.
147 As conveyed by Hamdan Zoelva (F-PBB). See, Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 26.
148 As conveyed by Andi Mattalatta (F-PG), Patrialis Akbar (F-Reformasi), Hamdan Zoelva (F-PBB), Valina Singka Subekti (F-UG), and Zain Bajeber (F-PPP). Ibid., pp. 66, 72, 74, 230, 234.
149 As stated by Hendi Tjaswadi (F-TNI/Polri). Ibid., p. 79.
150 As stated by Andi Mattalatta (F-PG) Ibid., p. 235.

### *V.4.6.7 Elections as a constitutional instrument for circulation of power*

The 1959 version of the 1945 Constitution did not mention general elections. Paragraph (1) of Article 2 of the Constitution states that the MPR shall consist of the DPR members, augmented by regional and group delegates as provided for by law. Paragraph (2) of Article 6 stipulated that the president and vice president shall be elected by the MPR by a majority vote. The first elections in 1955 were based on the provisional 1950 Constitution. The next elections under President Suharto in 1971, 1977, 1982, 1987, 1992, and 1997 were based on electoral laws that explicitly stated that the election was intended for the New Order to achieve victory.[151] The first election after the collapse of the New Order was based on Law No. 3, 1999. It asserts that the election should be held democratically and be transparent, honest, and fair. The election should have direct voting, which is general, free, and secret.[152]

In the second meeting of the MPR's Working Body on 6 October 1999, F-Reformasi and F-PDU proposed that amendment of the 1945 Constitution should include a limitation of the president's power and a provision about the election of the president and vice president. F-PDU stated that there were public demands that the people should directly elect the president and vice president.[153] Similarly, F-PDI-P argued in favour of direct election by the people of the president and vice president.[154] F-UG proposed that the Constitution should regulate the elections for the DPR, the Regional Delegations and the president, instead of being stipulated by ordinary law as in the previous regime.[155] Similarly, F-PDI-P argued in favour of direct election by the people of the president and vice president.[156] Then, F-PG proposed that the Constitution should stipulate that the MPR and DPR should be formed through an election. However, F-PG noted the public opinion that wanted to retain appointed MPR members as corrections to the election results.[157] F-PPP, F-KB, F-PBB, F-KKI, F-PDKB and F-UG argued that all members of the MPR and DPR should be elected.[158] In that regard, F-PDKB proposed accommodating the functional group delegations in the Supreme Advisory Board. Further, F-PDKB argued that if the general election is a manifestation of people's sovereignty, the MPR should appoint the president and vice

151 See Law No. 15, 1969 on Election, Consideration (b).

152 See Law No. 3, 1999 on Election, Consideration (d) and Article 1 clause (2).

153 As stated by Muhammadi (F-Reformasi) and Asnawi Latief (F-PDU). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 25 and 28. Later in the meeting, Latief argued that F-PDU would like to have the president and vice president elected on one ticket directly by the people. See Ibid., p. 47.

154 As stated by Aberson Marle Sihaloho (F-PDI-P). Ibid., p. 64.

155 As stated by Valina Singka Subekti (F-UG). Ibid., p. 34.

156 As stated by Aberson Marle Sihaloho (F-PDI-P). Ibid., p. 64.

157 As stated by Andi Mattalatta (F-PG). Ibid., pp. 65, 66.

158 As stated by Zain Bajeber (F-PPP), Khofifah Indar Parawansa (F-KB), Hamdan Zoelva (F-PBB), Anthonius Rahail (F-KKI), Gregorius Seto Harianto (F-PDKB) and Valina Singka Subekti (F-UG). Ibid., pp. 67, 69, 74, 77, and 82.

president based on the outcomes of the general election. The MPR may not take sovereignty away from the delegates who have been declared through elections.[159]

Eventually, PAH III concluded that the election of the president and vice president was among the amendment priorities of the 1945 Constitution.[160] However, due to time constraints, the 1999 MPR general session could not finalize this issue and decided to postpone it to the next MPR 2000 annual session.

### *V.4.6.8 The law-making process*

Article 5 clause (1) of the 1959 version of the 1945 Constitution states that the president shall hold the power to make laws in agreement with the DPR. Factions considered that this provision gives too much power to the president and so should be revised. In that regard, F-PBB asserted that since members of parliament are elected by the people, the law-making process ought to be reversed: the DPR should make the law and the president should approve it.[161] Likewise, F-PDKB argued that in law-making, the DPR and president should jointly approve a bill.[162] F-TNI/Polri affirmed that the presidential law-making power should be limited.[163] On the other hand, considering that in a presidential system the president is the head of government, F-PDI-P argued that the president should also hold the right to propose a bill.[164]

Subsequently, reflecting on President Suharto's non-enactment of approved bills, F-PG proposed to give the DPR the constitutional right to enact a DPR-approved bill,[165] but, F-KKI, F-PDU, F-PDKB and F-UG maintained that the president and DPR should hold joint law-making powers.[166] F-PBB argued in a similar vein that the president should hold the right to approve or reject a DPR-concluded bill.[167] Not all factions agreed, however, as F-KB pointed out that the president was not in a position to approve, but could merely contra-sign a bill. In response, F-PBB argued that the president should have the opportunity to reject a bill, especially if elected directly by the people.[168]

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159 As proposed by Seto Harianto (F-PDKB). Ibid., pp. 77 and 78. The statement shows that Harianto had begun to abandon the notion that the MPR was the holder of people's sovereignty in full, as stated in the original 1945 Constitution.

160 Ibid., p. 84.

161 As stated by Hamdan Zoelva (F-PBB). Ibid., pp. 74 and 139.

162 As expressed by Gregorius Seto Harianto (F-PDKB). Ibid., pp. 78 and 145.

163 As stated by Hendi Tjaswadi (F-TNI/Polri). Ibid., p. 80.

164 As argued by Frans Matrutty (F-PDI-P). Ibid., p. 131.

165 As stated by Hatta Mustafa (F-PG). Ibid., p. 133.

166 As stated by Antonius Rahail (F-KKI), Asnawie Latif (F-PDU), Gregorius Seto Harianto (F-PDKB) and Valina Singka Subekti (F-UG). Ibid., p. 136, 144, 145, and 147.

167 As expressed by Hamdan Zoelva (F-PBB). Ibid., p. 138.

168 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 183.

When the discussions tended to conclude that the president should also have a law-making role, F-Reformasi asserted that the separation of authority should be clear: if the power to make a law belongs to the DPR, then the president's position is to execute the law.[169] In response, a F-PG speaker reminded the other members that if only the DPR can make the law and the president is only obliged to execute it, the DPR becomes a new dictator.[170] The F-PDI-P and F-PG speakers then argued that the DPR and the president should sit together to reach joint approval on a bill. They described such law-making as agreement by deliberative consultation, as highlighted by *Pancasila*'s fourth principle: "Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives."[171]

The law professors invited for a public hearing gave a different view.[172] Soewoto Moeljo Soedarmo, among others, stated that the idea of giving the DPR the authority to make laws and to give approval to the President is not a form of empowering the DPR, but instead makes it difficult. The formation of a law is a process, which can initially be carried out by the DPR and can also be carried out by the President. Suny emphasized that the power to make laws should remain in the hands of the executive. The DPR can take the initiative, but there are more experts in the executive.[173]

Eventually, PAH III continued with the original proposal because "we could listen to the opinions of the experts but did not have to follow the suggestions."[174] Thus, PAH III members continued the idea of transferring the authority to make laws which was originally in the hands of the President to the DPR.[175] PAH III also agreed that every bill shall be discussed by the DPR and the President in order to acquire joint approval. Furthermore, PAH III agreed that paragraph (2) of the old Article 20 would still be used with a slight change to "if such a bill fails to acquire joint approval, such a bill may not be submitted again in a session of the DPR during such a period."[176]

At the end, PAH III concluded and reported to the MPR's Working Body and then the MPR's plenary session that the DPR should have the authority to make laws. Before the bill would be passed as a law, the DPR and president should jointly approve a bill. The president would not necessarily have a veto. On the other hand, PAH III did not resolve what would occur

169 As argued by M. Hatta Rajasa (F-Reformasi). Ibid., p. 300.
170 As stated by Slamet Effendy Yusuf (F-PG). Ibid., p. 184.
171 As stated by Amin Aryoso and Harjono, both from F-PDI-P and Andi Mattalatta (F-PG). Ibid., p. 491.
172 Harun Al-Rasyid and Ismail Suny (University of Indonesia, Jakarta), Soewoto Moeljo Soedarmo (University Airlangga, Surabaya),and Sri Soemantri (University Pajajaran, Bandung).
173 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit*., Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p.p. 454, 472.
174 As stated by J.E. Sahetapy (F-PDI-P). Ibid., p. 546.
175 As proposed by Agun Gunandjar Sudarsa, Ibid., p. 377.
176 As concluded by Slamet Effendy Yusuf, the Vice Chairman of PAH III. See MPR., pp. 381-382.

if the president (as head of state) did not promulgate a jointly-approved bill as law. Although F-KB and F-TNI/Polri asserted it is imperative for the president (as head of state) to enact the law, F-PG noted that historically, the president had failed to promulgate certain laws after DPR approval.[177] Eventually, this issue was postponed. However, the account shows different opinions within PAH III on how to cope with the above situation. As stated by the speakers from F-PBB and F-PDKB, the MPR holds the authority to overcome the situation.[178] Thus, again the notion of the MPR as the highest and supreme political body remained influential among certain factions. Meanwhile, F-KKI insisted that the president should hold the power to veto a bill, even if the bill had been previously jointly approved by the DPR and president.[179]

In the end, the MPR decided that all agreement that could be reached on the law-making process should be included in the first amendment. [180]

## V.5 The outcomes of the first amendment

Below is the outcome of the first stage of the amendment process. Not all of the changes were discussed in the preceding sections.[181]

| *Articles* | *Original* | *First Amendment*[182] |
|---|---|---|
| 5 | (1) The President shall hold the power to make laws in agreement with the DPR. | The President shall be entitled to submit bills to the DPR. |
| 7 | The President and the Vice President shall hold office for a term of five years and shall be eligible for re-election. | The President and the Vice President shall hold office for a term of five years and may subsequently be re-elected for the same office for only one term of office. |

177 As stated by Khofifah Indar Parawansa (F-KB) and Hendi Tjaswadi (F-TNI/Polri). Ibid., pp. 142 and 148. The bill that was not enacted, among others, was *RUU Penyiaran* (the Bill on Broadcasting) in 1994.

178 As stated by Hamdan Zoelva (F-PBB) and Tunggul Sirait (F-PDKB). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 183 and 694.

179 As argued by F.X. Soemitro (F-KKI). Ibid., p. 692.

180 Ibid., pp. 798, 817–818.

181 The author chooses several topics in accordance with the title and the research questions of this dissertation.

182 The English version of the 1945 Constitution published by the Office of Registrar and the Secretariat General of the Constitutional Court of the Republic of Indonesia, 2015.

| | | |
|---|---|---|
| 9 | Prior to assuming office, the President and the Vice-President shall take an oath of office according to their religions, or solemnly promise before MPR or DPR as follows:<br><br>The oath of the President (the Vice President):<br>*In the name of God Almighty, I swear that I will perform the duties of the President (Vice-President) of the Republic of Indonesia to the best of my ability and as justly as possible, and that I will strictly observe the Constitution and consistently implement the law and regulations in the service of the country and the people.*<br><br>The Promise of the President (the Vice President):<br>*I solemnly promise that I will perform the duties of the President (Vice-President) of the Republic of Indonesia to the best of my ability and as justly as possible, and that I will strictly observe the Constitution and consistently implement the law and regulations in the service of the country and the people.* | 1) Prior to assuming office, the President and the Vice-President take an oath according to their respective religions or shall affirm a pledge before MPR or DPR as follows:<br><br>The oath of the President (the Vice President):<br>*In the Name of God, I swear to fulfil the obligations of the President of the Republic of Indonesia (the Vice President of Republic of Indonesia) to the best of my ability and as justly as possible, to strictly hold the Constitution and to enforce all the laws and regulations there under consistently and devote myself to the Country and the Nation.*<br><br>The pledge of the President (the Vice President):<br>*I solemnly pledge to fulfil the obligations of the President of the Republic of Indonesia (the Vice President of Republic of Indonesia) to the best of my ability and as justly as possible, to strictly hold the Constitution and to enforce all the laws and regulations there under consistently and devote myself to the Country and the Nation.*<br><br>2) If the MPR or the DPR cannot convene a session, the President and the Vice President take an oath in accordance with their respective religions or shall affirm a pledge before the Leadership of the MPR witnessed by the Leadership of the Supreme Court. |
| 13 | (2) The President shall receive the credentials of foreign ambassadors. | (2) In case of appointment of ambassadors, the President shall pay regard to the consideration of the DPR.<br>(3) The President receives the accreditation of ambassadors of other nations by having regard to the consideration of the DPR. |
| 14 | The President may grant clemency, amnesty, pardon and restoration of rights. | (1) The President grants clemency and rehabilitation by paying regard to the consideration of the Supreme Court.<br>(2) The President grants amnesty and abolition by paying regard to the consideration of the DPR. |

| | | |
|---|---|---|
| 15 | The President may grant titles, decorations and other distinctions of honours. | The President grants titles, decorations and other distinction of honours as regulated by law. |
| 17 | (2) These Ministers shall be appointed and removed by the President.<br>(3) These Ministers shall head government departments. | (2) The ministers shall be appointed and discharged by the President.<br>(3) Every minister shall be in charge of certain affairs in the government. |
| 20 | (1) Every law shall require the approval of the DPR.<br>(2) If a bill fails to reach joint approval, the bill shall not be reintroduced within the same DPR term of sessions. | 1) The DPR holds the power to make laws.<br>2) Every bill shall be discussed by the DPR and the President in order to acquire joint approval.<br>3) If such a bill fails to acquire joint approval, such a bill may not be submitted again in a session of the DPR during such a period.<br>4) The President shall ratify a bill having been jointly approved to become a law. |
| 21 | (1) Members of the DPR shall be entitled to submit proposals for bills.<br>(2) Should such a bill not obtain the sanction of the President notwithstanding the approval of the DPR, the bill shall not be resubmitted during the same session of the DPR. | Members of the DPR are entitled to submit proposals for bills. |

On 19 October 1999, the MPR decided (see IV.3.1) that the first amendment is part of the text of the 1945 Constitution, will not be separated from it, and will take effect on the date of its enactment.

## V.6 Analysis and comments

### V.6.1 The process

During the prolonged political crisis after the resignation of President Suharto in May 1998, the major political powers agreed under pressure to constitutionally reform the 1945 Constitution while maintaining the Constitution's Preamble and the Republic's unitary form (see III.5.1). The pressure came from activists, academic circles, NGOs, and reformists within the main political powers. The political powers who agreed were the government (President Habibie, General Wiranto, the Chief Commander of the Armed Forces), the existing political parties (GOLKAR, PPP, and PDI), as well as the leading opposition figures (Megawati Soekarnoputri, Abdurrahman Wahid, and Amien Rais).

The successful democratic elections on 7 June 1999 formed the People's Consultative Assembly or MPR (*Majelis Permusyawaratan Rakyat Republik Indonesia*). This new MPR affirmed the agreement to reform the 1945 Constitution and implement its provisions in amending the Constitution. This set the direction and the clear outer boundaries of the constitutional reform.

The factions' agreement and the MPR's decision to amend the 1945 Constitution enabled the Constitution's democratization.

The use of the 1959 version of the 1945 Constitution as the working text and the absence of a prepared academic draft meant the factions could consider and propose whatever changes they deemed necessary. If the factions could only discuss or consider a draft, they would have been put in an awkward position that might well have inhibited if not thwarted the 1945 Constitution's reform. In such circumstances, a sense of ownership and commitment – crucial factors for a lasting amendment process – would not have developed. The deliberative process, as stipulated by the MPR's rules of procedure, provided opportunities for the factions, big or small, to contribute actively to the process. All participants nurtured a sense of ownership and commitment.

The Armed Forces' attitude (the military and police) to abide by the Constitution and maintain public order and their active participation through their MPR faction (F-ABRI) in the amendment process established and maintained the orderly political atmosphere required for reasoned and peaceful deliberations. However, the Armed Forces faction (F-ABRI) tends to be conservative in responding to the proposed changes.

On the other hand, the aspiration for and the existence of various ideas about improving the 1945 Constitution among academics, activists, and ruling elites, as well as public attention in general, also enabled the amendment process. PAH III actively sought reform ideas and aspirations from university campuses and the public.[183] Only time constraints limited public hearings and participation at this stage of the MPR process.

There were also inhibiting factors. These included the absence of a comprehensive draft amendment to the 1945 Constitution, the amendment process' short, allocated timeframe, and the limited interactions between MPR activities and political community dynamics. All of this led to public dissatisfaction with the amendment process.

Political observers often had difficulty following MPR debates. One particular problem was that the factions often expressed inconsistent opinions about the meaning of constitutional reform, even though each faction was determined to improve the 1945 Constitution.

183 On 12 October 1999, PAH III invited to a public hearing three experts on constitutional law: Prof. Harun Al Rasyid S.H., Prof. Dr. Ismail Sunny and Prof Dr. Soewoto. On 13 October 1999, PAH III invited a prominent national figure, Dr. Roeslan Abdulgani and an expert on constitutional law, Prof. Dr. Sri Soemantri. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 450–484 and 509–540.

Likewise, certain communities resisted amending the 1945 Constitution, especially those who believed that the 1945 Constitution was a legacy of President Soekarno, the nation's respected father, and a symbol of independence that must be honoured. They argued that the Constitution had been perfect. For them, the problem was the lack of obedience to and non-implementation of the Constitution. This sentiment also lives among MPR members, especially within the F-PDI-P and F-UG.

At the end of the session, the MPR stipulated MPR Decree no. IX/1999. This stated that the MPR would continue the amendment, which must be completed no later than 18 August 2000. Further, the Decree assigned the BP-MPR to prepare the amendment draft.

No formal agreement bound the factions to use the first session's materials in the subsequent process. However, the factions agreed to compile this stage's materials as base materials for the next process. The slow and meandering deliberative process had built a sense of ownership among the factions and a commitment to accomplish the amendment. Without such commitment, the sustainability of the reform process was at stake.

### V.6.2 The substance

In their introductions to the deliberations, all factions emphasized their respective desire to reform the 1945 Constitution. The factions' discussions on reform and democratization show that the concepts which framed reform were enormously popular among the MPR members, if differing in meaning. These concepts included people's sovereignty, the limitation of powers, checks and balances, the rule of law, an independent judiciary, and elections as the constitutional instrument for the circulation of powers.

There was a general tendency to use the rule of law as a marker of the desired constitutional reform.[184] However, there was also the idea that judicial power should be controlled by the MPR as the holder of people's sovereignty in full.[185] Likewise, checks and balances was still understood by some as the distribution rather than the separation of powers, assuming a supreme state institution to which all state institutions are accountable.[186] At this stage, most of the proposed reforms still presumed the MPR was the state's supreme political institution which held people's sovereignty in full.[187]

Regarding the limitation of presidential powers, the MPR reaffirmed MPR Decree No. XIII/1998, restricting the president and vice president's terms to two consecutive periods and included this in the 1945 Constitu-

184 See among others, Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 106.
185 Ibid., p. 69.
186 See among others, Ibid., p. 499.
187 See Ibid., p. 439.

tion.[188] In law-making, the MPR shifted the centre of gravity from the president to the DPR. Subsequently, following Pancasila's fourth principle and the Constitution's presidential system, the factions agreed that the DPR and president should jointly approve a bill before enacting it. Likewise, they agreed that beside the DPR, the president would also be authorized to submit a bill. However, at this stage, factions could not agree on what would happen if the president failed to promulgate a DPR-approved bill. Factions agreed to resume this matter during the next MPR annual session, along with other pending material.

In sum, the discussion shows that the amendment process began to change the 1959 version of the 1945 Constitution towards a democratic constitution based on the rule of law. However, factions still had different understandings of a democratic constitution based on the rule of law.

This is unsurprising. Differences in understanding concepts as the rule of law are common. Randall Peerenboom has stated that rule of law is an essentially contested concept. It means different things to different people. It has served a wide variety of political agendas, from libertarianism to social welfare liberalism, from soft authoritarianism to statist socialism.[189] Joseph Raz noted the tendency to use the term as a shorthand description of the positive aspects of any political system.[190] Thus, as stated by Brian Z. Tamanaha, the rule of law stands in the peculiar state of being the world's preeminent legitimating political ideal, without an agreement on precisely what it means.[191]

On 21 October 1999, the MPR General Assembly was officially closed. Over the past two weeks, the MPR had tried its best to amend the 1945 Constitution. Despite the short time, a series of amendments to the 1945 Constitution had been carried out, marking the beginning of the reform of the 1945 Constitution.

Subsequently, the MPR decided to continue and agreed to complete the reform of the 1945 Constitution on 18 August 2000, exactly 55 years after the 1945 Constitution was enacted on 18 August 1945. Towards the end of November 1999, preparations began to proceed with the amendments to the 1945 Constitution.

188 See Article 7 of the 1945 Constitution.

189 Randall Peerenboom, Varieties of Rule of Law, An introduction and provisional conclusion, in Asian Discourse of Rule of Law. Theories and implementation of rule of law in twelve Asian countries, France and the U.S., Randall Peerenboom (ed.), Routledge, 2004, p. 1.

190 Joseph Raz, The Rule of Law and its Virtue, in Raz, The Authority of Law: Essays on Law and Morality, Oxford University Press, 1979, p. 210.

191 Brian Z. Tamanaha, *On the Rule of Law, History, Politics, Theory*, Cambridge University Press, 2004, p. 4.

# VI The Second Stage of the Amendment Process of the 1945 Constitution, 25 November 1999 – 18 August 2000

## VI.1 The working schedule of the second amendment stage

Unlike the amendment process in the first stage, the second amendment process was allocated quite a long time, from 25 November 1999 to 18 August 2000. It was expected that the amendment of the 1945 Constitution could be completed by 18 August 2000.[1]

## VI.2 The acting institutions and the amendment process

### VI.2.1 PAH I members and leadership, 1999-2000

On 25 November 1999, the MPR Working Body set up three Ad-Hoc committees. PAH I oversaw continuing the amendment. PAH II was to discuss the relevant MPR Decrees. A Special Ad-Hoc Committee (*PAH Khusus*) oversaw supporting the activities of PAH I and PAH II.[2] The number of PAH I members was increased.[3] Several MPR Working Body members were replaced. Among others, F-PDI-P withdrew Amin Aryoso. They replaced him with Jakob Tobing, the author. Most of the key persons of PAH III remained.[4]

Further, the leadership of PAH I changed. Jakob Tobing (F-PDI-P) was elected as chairman and Harun Kamil (F-UG) and Slamet Effendy Yusuf (F-PG) as Deputy Chairs. Ali Masykur Musa remained as secretary.[5] The leadership was collegial. The chairperson and the deputy chairmen alter-

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1 See Attachment VI.1. The second stage of the amendment process was carried out within the framework of the MPR 2000 annual session. The annual meeting itself was held from 7 to 18 August 2000, while the Working Body and Ad Hoc Committee activities began in November 1999. In the annual session, there were two main activities, namely the session where high state institutions submit performance reports and the meetings to continue amendments to the 1945 Constitution and to prepare any new MPR Decrees deemed necessary.

2 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 7. During the first stage, the draft constitutional amendment had been prepared by PAH III.

3 See Attachment VI.2.

4 This included Harun Kamil from the Functional Groups and chairman of PAH III, Slamet Effendy Yusuf and Andi Mattalatta from GOLKAR, J.E. Sahetapy, Harjono and Pataniari Siahaan from F-PDI-P, Zain Bajeber and Lukman Hakim Saifuddin from F-PPP, Yusuf Muhammad and Ali Masykur Musa from F-KB, and Patrialis Akbar from F-Reformasi and Hamdan Zoelva from F-PBB.

5 See Attachment VI.3. The list of the members of PAH I BP-MPR, 1999–2000.

nately led PAH I meetings. The secretary coordinated the arrangement and recording of meeting activities and led the activities of PAH I working teams, such as chairing the small team to draft PAH I's meeting outcomes.

### VI.2.2 The amendment's process

In accordance with MPR Decree No. IX/1999, the MPR continued amending the 1945 Constitution, reviewing certain existing MPR decrees and discussing new necessary decrees. The legal-organizational structure of the process at this second stage was similar to the first one. As stipulated by Article 92 of MPR Decree No. II/1999 on standing procedures,[6] the process consisted of four stages (see V.2.1.4).

Prior to the annual session in August 2000, PAH I still had 41 working days which were allocated to regular meetings, informal consultations, and the drafting teams.[7] After a two-day meeting of the MPR Working Body, PAH I resumed deliberations about amendment drafts from November 1999 to July 2000.[8] In August 2000, the MPR plenary session established Commission A (*Komisi A*) to discuss the outcomes of PAH I before the final MPR plenary meeting in August 2000.

At the beginning of the process, PAH I decided not to directly discuss the revision material chapter by chapter, but to review it as a whole, to have a comprehensive view of the changes. Then, after PAH I agreed to discuss the matters sequentially, the review was finalized chapter by chapter. In that way, PAH I could add new chapters if need be.

At the same time, another MPR Ad-Hoc committee, PAH II, was assigned to prepare eleven new MPR decrees to replace four existing MPR decrees. These four decrees were a decree on a situation in which the president and/or vice president of the Republic of Indonesia is incapacitated (Decree No. VII/MPR/1973), on Positions and Working Relationships of the Supreme State Institution with or among the State High Institutions (Decree No. III/MPR/1978), on Elections (Decree No. XIV/MPR/1998), and on Sources of Order of Law and Hierarchy of Legislation (Decree No. XX/MPRS/1966).

PAH II was also meant to draft new decrees on a Procedure for the President's Accountability, on the Role of the Armed Forces in State Affairs, on National Reconciliation, and on Decentralization.[9]

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6 MPR Decree No. II/MPR/1999 on Standing Orders and Procedures of the MPR.

7 From 7 to 18 August 2000, the MPR scheduled the annual session for the first time, during which the high state institutions (i.e., the President, the DPR, the General Auditor, the Supreme Court, and the Supreme Advisory Board) should deliver their respective accountability to the MPR. This meant affirming the MPR's supreme authority.

8 See Attachment VI.1, the Working Schedule of the 2nd Amendment.

9 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp 4–5.

Thus, two different committees (PAH I and PAH II) simultaneously carried out the MPR's reform process. To complicate matters, little of their work matched and some was contradictory.[10]

With over six months to carry out the assignment and in addition to the ordinary meetings, PAH I also scheduled programs to obtain broader input. Accordingly, PAH I organized visits to the regions, organized public hearings both in Jakarta and the regions, invited written proposals from the public, and conducted seminars and workshops and comparative studies abroad.[11] Furthermore, all PAH I meetings were basically open to the public. Likewise, to improve media coverage, periodic meetings with mass media were conducted. As the PAH I chairman stated, the amendment process should be rich, transparent, and lucid, involving as many parties as possible and providing opportunities for contemplation.[12]

Thus, in December 1999 and January 2000, PAH I dispatched eight teams to visit the regions. In cooperation with universities and research associations, PAH I conducted six seminars on politics, education, religion, socio-cultural matters, regional autonomy, constitutional law, and economics.[13] The seminar participants included academics, members of the province or district DPR, members from political parties, public figures, NGO activists, and representatives of mass organizations.

PAH I also dispatched teams to conduct public hearings in seven provinces: Maluku, North Maluku, South East Sulawesi, Central Sulawesi, Jambi, Bengkulu, and Central Kalimantan. The public hearing participants were similar to the seminar participants. Subsequently, the event outcomes were reported to PAH I.

The PAH I provincial visit team reports were presented to the PAH I meeting on 4 February 2000. The reports made clear that the public was unaware of the amendment of the 1945 Constitution that the October 1999

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10 For instance, PAH II prepared an MPR decree, which was then ratified as MPR Decree no. III/2000, which asserted in Article 5 that the MPR has the authority to review the law's constitutionality, while PAH I was preparing an independent judicial state institution, the Constitutional Court, with authority to conduct constitutional review. Later, MPR Decree no. III/2000 was annulled by MPR Decree no. I/2003.

11 PAH I sent nine teams to 21 countries: I. Iran and Russia; II. Malaysia, Philippines, and South Africa; III. People's Republic of China, Japan, and South Korea; IV. United States of America and Canada; V. Egypt and United Kingdom; VI. Greece and Germany; VII. Italy and the Netherlands; VIII. Spain and France; IX. Denmark, Hungary, and Sweden. PAH I did not draw conclusions on the findings during the comparative study but expected each faction to absorb and reflect on their findings based on their respective views.

12 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 309.

13 The seminar on politics was held in Banjarmasin (19 to 20 March 2000), on education and socio-cultural matters in Semarang (22 to 23 March 2000), on religion and socio-cultural matters in Mataram, Lombok (22 to 23 March 2000), on regional autonomy in Pekanbaru (24 to 25 March 2000), on constitutional law in Bandar Lampung (25 to 26 March 2000), and on economics in Yogyakarta (25 to 26 March 2000).

MPR session had conducted. Apparently, the outcomes had not been disseminated to the public.[14]

Besides the above, PAH I also invited scholars and prominent figures to public hearings with PAH I. To obtain comparative perspectives, a member argued that PAH I needed reliable sources which could explain from a historical, philosophical, and cultural perspective why – for example – there are unitary and federal states, why countries such as (Federal) Germany are strong, why Yugoslavia was split during the reform process, and why France adopted the form of a unitary state.[15] PAH I also received in-person and written input from various societal interest groups, including religious organizations, farmers' associations, and universities. PAH I also formed teams to receive public input, both verbally and in writing.[16]

To improve public awareness around the amendment process, the MPR Secretariat General, in cooperation with the United Nations Development Programme (UNDP), set up a television station in the MPR compound to broadcast PAH I meetings in real-time. Meanwhile, there had been an overlap of PAH I and PAH II activities. PAH II believed they were tasked with carrying out political reforms and thus with organizing activities to absorb the aspirations of the people. In that regard, in the coordination meeting between PAH I and PAH II, secretary of PAH I Ali Masykur Musa reminded that every MPR decision must be in accordance with the constitution. Further, Musa urged closer coordination between PAH II and PAH I. F-PG had previously argued that the prevailing MPR decrees, which contain fundamental substances, should be revoked and its substances accommodated in the Constitution.[17]

During the second stage, PAH I managed to finalize the drafts of a considerable number of constitutional provisions.[18] Some of them had been debated during the first stage: the law-making process and the DPR's provisions. Others were introduced and would be finalized during this second stage: provisions on regional government (Chapter VI, 1945 Constitution) and human rights (Chapter XA, 1945 Constitution). In July 2000, PAH I reported the results to the MPR Working Body for further process. At this stage, the MPR, following its rule of procedure, formed MPR Commissions.

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14 As reported by Andi Mattalatta and Hamdan Zoelva.Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 421.

15 As stated by Soedijarto (F-UG). Ibid., p. 55.

16 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 36.

17 As expressed by Agun Gunandjar Sudarsa (F-PG). Ibid., p. 83.

18 They consisted of Articles 18, 18A, and 18B on decentralization and autonomy, Article 19 on the DPR (*Dewan Perwakilan Rakyat*), Article 20(5) to resolve the pending part of the process on law-making, Article 20A, 22A, and 22B on functions and other provisions of the DPR, Chapter IXA Article 25E on State Territory, Chapter X on the Citizen and Resident, Chapter XA Articles 28A to 28J on Human Rights, Chapter XII Article 30 on Defense and State Security, and Chapter XV Articles 36A, 36B, and 36C on the National Flag, the State Emblem, and the National Anthem.

After the PAH I's works were concluded by the MPR Working Body, the drafts were submitted to MPR Commission A. Subsequently, Commission A discussed the work of PAH I along with the Introductory Views of the factions. These were presented at the beginning of the Commission A meeting. The outcome was then reported to the MPR plenary session for a decision.

As regulated by the MPR standing order, no new topic can be raised at the commission meeting unless all factions agree to discuss the topic. To expedite the process, factions agreed to conduct informal consultations between the Commission meetings, if necessary.

The PAH I factions also invited three constitutional law experts to attend the Commission A meetings as associate experts. However, they could not participate in the discussions. These experts were Bagir Manan (University of Pajajaran), Soewoto Moeljo Soedarmo (University of Airlangga), and Mahfud MD (University of Gajah Mada).[19] They assisted PAH I in editing the draft revisions that the factions had agreed on.

The second stage finalized certain issues while further discussing others, including the law-making process and the rule of law. Here, the process began to touch on sensitive Indonesian political history, including the Jakarta Charter[20] and the federal state.[21]

Meanwhile, in the community there were criticisms over the amendments' substance and creation process. On 5 July 2000, a delegation from the Communication Forum of the Retired Military and Police (*Forum Komunikasi Purnawirawan TNI dan Polri*) met with the F-KKI. They stated their objection to PAH I amending the 1945 Constitution. The Forum's Secretary General, Syaiful Sulun,stated that the changes should be made through a tight procedure, using in-depth studies and involving the public.[22] Constitutional law experts Mohammad Mahfud MD and Thalib Puspokusumo considered that the amendment process was not transparent.[23] Various other parties who were also critical of the process urged the MPR not to ratify the amendment.[24] Meanwhile, Harun Al Rasid asserted that the MPR should accomplish the 1945 Constitution's reform.[25]

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19 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 108. The experts had attended the previous meetings.

20 See II.3. The making of the 1945 Constitution.

21 On 17 August 1945, Indonesia was proclaimed a unitary republic. On 27 December 1949, Indonesia became a federal republic. On 17 August 1950, it became a unitary republic again. Amidst discussions regarding the centre-regional and interregional relations, questions about the federal state were raised again.

22 *Kompas Daily*, 5 July 2000, p. 8.

23 *Kompas Daily*, 26 July 2000, p. 8. Amien Rais, the chairman of the MPR was also the Chairman of the National Mandate Party (*Partai Amanat Nasional* – PAN).

24 As stated by Bara Hasibuan, deputy secretary general of PAN. Suara Pembaruan, newspaper, 8 August 2000, p. 1.

25 *Kompas Daily*, 15 July 2000, p. 6. Harun Al Rasid is a professor of constitutional law at the University of Indonesia, Jakarta.

Eventually, from 7 to 18 August 2000, the MPR convened an Annual Session to finalize the second amendment stage outcomes.

The MPR finally approved and promulgated the second amendment on 18 August 2000.

*VI.2.2.1 The discussions*

At this stage, PAH I had more opportunities to fully discuss the topics that were evolving in the public, in seminars, and in public hearings (see above VI.2.2).[26] The debates covered decentralization, human rights, people's sovereignty, the MPR's position and authority, rule of law, education, presidential elections, and the representation of the regions' aspirations in national level policymaking.

At the second stage's beginning, PAH I's newly elected chairman attempted to review certain outcomes of the previous amendment process, which he deemed were not properly established. These outcomes included the clause that the President shall have regard for the consideration of the DPR before accrediting foreign envoys, which is not common in the diplomatic world.[27] However, all other PAH I members firmly stated that what had been agreed as an amendment to the 1945 Constitution should not be changed again, except for technical editing (e.g., adjusting the numbering of paragraphs). PAH I members argued that once an already ratified amendment could be questioned, other decisions could also be withdrawn. Consequently, the PAH I chairman frequently reminded the factions that they had agreed not to change the Preamble and the unitary form of state during the first amendment stage.[28] Ultimately, the Constitutional amendment could not be completed during the August 2000 MPR Annual Session as planned. The MPR decided to postpone finalizing pending topics to the following MPR annual session.

Looking at the broader society, the openness that flourished during the process of *reformasi* brought to surface latent feelings of discontent and various other aspirations. It encouraged people to associate their aspirations and grievances with the reform process. In provinces such as Riau,

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26 The second stage lasted from November 1999 to August 2000, while the first stage lasted only for two weeks. During this period, PAH I received input from over 200 sources, i.e., 7 state institutions, 27 regional and local governments, 10 universities, 20 experts, 25 NGOs, 4 professional organizations, 7 religious organizations and 100 individual sources.

27 The new stipulation in the Constitution was triggered by certain Australian Parliament members rejecting the new Indonesian ambassador to Australia, Lt. Gen. Herman Leopold Mantiri in 1995. See Media Indonesia Minggu, newspaper, 9 July 1995.

28 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 562. By contrast, Denny Indrayana writes that Tobing's reaffirmation of the agreement to maintain the Preamble of the 1945 Constitution and the unitary form of the state was unsubstantiated. See Denny Indrayana, *op. cit.*, p. 192.

East Kalimantan, and Papua, people directed their anger toward the central government. They felt that they had been treated unfairly. Natural resources from their regions (e.g., oil and gas) were exploited, with only a tiny fraction of the revenue and no significant infrastructure developed in return. Important regional positions, such as governorships and district head positions, were dominated by officials appointed by the central government. Thus, the regions generally condemned the highly centralized government system. For instance, the East Kalimantan Province DPR demanded the establishment of a federal state in East Kalimantan.[29] Likewise, the participants in the seminar on regional autonomy in Pekanbaru in March 2000 demanded broad autonomy, a federal state, or even separation.[30] A public hearing in North Maluku revealed the opinion that the MPR should draft a totally new Constitution.[31]

In the meantime, armed separatist movements in Aceh and Papua, as well as in East Timor, escalated their activities, fighting for independence. These were the circumstances in which discourses and demands to strengthen regional authority or to change the unitary state form into a federal state were escalating.

There were also those who argued that the 1945 Constitution should be maintained as it was. A delegation from PGI (the Indonesian Council of Churches),[32] a constitutional law expert, and an expert on the Armed Forces dual-function theory[33] separately stated before a PAH I public hearing that the original 1945 Constitution was theoretically sound and did not need alteration. It was the people, especially the MPR as the holder of people's sovereignty, who did not implement it purely and consistently. What must be improved, they stated, were the lesser laws, such as MPR decrees and governance practices. Likewise, some public hearing participants in East Nusa Tenggara asserted that the MPR should maintain the 1945 Constitution to avoid national disintegration.[34]

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29 *Kompas Daily*, 2 December 1999.

30 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 9. A delegation of the Free Riau movement, including their presidential candidate, also attended the seminar.

31 As reported by Baharuddin Aritonang (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 18.

32 PGI stands for *Persekutuan Gereja-Gereja di Indonesia*. As stated by J.M. Pattiasina from PGI. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 542-544

33 As stated by BG (ret.) A.S.S. Tambunan before a PAH I public hearing on 8 March 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 254.

34 However, as reported by Hamdan Zoelva (F-PBB), who led the PAH I team to Kupang, East Nusa Tenggara, the public hearings did not object to the amendments to the 1945 Constitution if the Preamble, the form of a unitary state and presidential system were maintained. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 435.

PAH I began its activities by delivering and discussing the Introductory Views presented by the factions. On that occasion, all factions affirmed their respective intention to reform the 1945 Constitution while maintaining the Preamble, the form of unitary state, and the presidential system. Factions proposed that the Constitution should affirm supremacy of law, human rights, checks and balances, independent judicial power, judicial review, direct presidential election, improvement of regional autonomy, the existence of the political parties, and elections.[35]

In that meeting, the F-PDI-P reminded the members that PAH I should discuss the *negara hukum* or *democratische rechtsstaat* (democratic state based on the rule of law) and its very important components such as *grondrechten* (fundamental rights) and *scheiding van machten* (the separation of powers).[36] However, the attitude towards maintaining the MPR as the highest state institution still existed.[37]

After a series of public hearings, seminars, workshops, and comparative studies, conducted during the period from December 1999 to April 2000, PAH I made a tabulation and matrix of the issues related to the Constitution's amendment. Subsequently, PAH I conducted discussions to find solutions to the various opinions and ideas regarding the amendment. For that purpose, factions prepared in advance the list of issues to be deliberated, which were conveyed ahead of the PAH I plenary discussion.

Eventually, based on the extent they were agreed in PAH I, the MPR Working Body grouped the materials into the following categories:[38]

Group A consisted of chapters on:
1. Flag, Language, National Emblem, and National Anthem
2. Citizen and Resident
3. Defense and Security

Group B consisted of chapters on:
1. DPR (*Dewan Perwakilan Rakyat* – DPR)
2. Regional Government
3. State Territory

Group C consisted of chapters on:
1. Human Rights
2. Judiciary Authority and Law Enforcement

35 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 74–139.

36 Ibid, p. 56. As stated by Sutjipno (F-PDI-P).

37 Ibid, pp. 109, 170.

38 Group A consisted of materials that had been fully agreed upon while Group D consisted of materials that had not yet found any agreement. Groups B and C consisted of materials that had basically been agreed on, but with multiple draft changes. Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 625-626.

3. Council for Representation of the Regions[39] (*Dewan Perwakilan Daerah* – DPD)
4. Election
5. Public Finances
6. General Auditor

Group D consisted of chapters on:
1. Form, Basis, and Sovereignty
2. Authority of State Government
3. MPR (*Majelis Permusyawaratan Rakyat*)
4. National Economy and Social Welfare
5. Education and Culture
6. Religion
7. Amendment of the Constitution, including regulation of transitional provisions
8. Supreme Advisory Board or DPA (*Dewan Pertimbangan Agung*)

The following section sets out the debate on Constitutional provisions regarding education, which focused on the difference between teaching and education, a national versus decentralized standards framework, and the role of education in preserving culture and upholding morality. While a national system of free education was preliminarily agreed on, due to time constraints, the ratification of the amendments was further postponed.

On the third PAH I meeting on 6 December 1999, in the factions' introductory deliberations, a F-PDIP member conveyed that PAH I should affirm the relationship between the Constitution's articles and Pancasila's principles. For example, Article 31 states: "Every citizen shall be entitled to acquire education", while the fifth principle of Pancasila states "social justice for all the people of Indonesia." A F-Reformasi member stated that Article 31 should be improved. A F-PDKB member stated that it should be maintained.[40] Subsequently, in a public hearing with experts on 13 December 1999, a F-UG member underlined that Article 31 and Article 32 on advancing Indonesian national culture were intended to realize the ideal of building a nation state. Unfortunately, these two things had never been taken seriously. In Germany and Japan, the state supervises education. In Taiwan, the Constitution states that the central government provides 15% of the education budget while provinces provide 35%. In Indonesia, there are no such provisions at all.[41]

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39 The English translation used by the Constitutional Court is the Regional Representative Council, which sounds more like the Representative Councils of the Province or the District.

40 Stated by Hobbes Sinaga (F-PDIP), A.M. Luthfi (F-Reformasi), Gregorius Seto Harianto (F-PDKB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 80, 109, 125.

41 Stated by Soedijarto (F-UG). Ibid., p. 215.

Regarding the ideal of building a nation state, an expert asserted that it was not the ethnicity, race, religion, or region, but the values of independence and justice that unite the nation.[42]

*VI.2.2.2 Public Hearing Views on Education*

In a public hearing on 24 February 2000, a delegation from Universitas Jember proposed that the term "education" should replace the term "teaching" in Article 31 (1) and (2).[43]

In a public hearing on 28 February 2000 with IAIN (*Institut Agama Islam Negeri* – State Institute for Islamic Studies), Syarif Hidayatullah, and ITB (*Institut Teknologi Bandung* – Bandung Institute of Technology), an IAIN speaker stated that the formulation of Article 31 on Education was too general. A new formulation was necessary to end the injustice, discrimination, and inequality in education. The state's treatment of all education institutions should be equal. Further, the state should also pay attention to those who attend private schools, as they are also citizens. [44] Basically, the ITB delegation underlined human equality as the main factor for the nation's progress and dignity, the need to build an intelligent society, that education is a determining factor in progress and prosperity, and the importance of fostering the spirit of nationalism. A delegation stated that education should be prioritized over other fields. Another delegation noted that culture's role in the post-industrial and post-modern period is very important. Further, the delegation argued that Article 32 is still considered very general. The complexity brought about by the internet over culture is quite serious and this must be considered. In future global interactions, mastery of science and technology are important to both participating and competing in progress.[45]

In a public hearing on 29 February 2000 with PGI (*Persekutuan Gereja-Gereja di Indonesia* – Council of Churches in Indonesia) and KWI (*Konferensi Wali Gereja Indonesia* – Bishops' Conference of Indonesia), a KWI delegate argued that the Constitution should not allow a centralized education system. Further, education would have to be interpreted as the development of science and technology, character, national awareness, and culture. The PGI delegation discussed Article 32, stating that the government should develop Indonesian national culture.[46]

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42 As stated by Pranarka. Ibid., p. 228.

43 Article 31 (1) stated "Every citizen shall be entitled to acquire teaching". Article 31 (2) stated "The government shall undertake and shall conduct one national teaching system, which shall be regulated by law". As stated by Samsi Husairi (University of Jember). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 399.

44 As stated by Azyumardi Azra (IAIN Syarif Hidayatullah). Ibid., pp. 453-456, 477.

45 As argued by delegation of ITB, Imam Buchori, I Dewa Gde Raka, Rizal Zaenuddin Tamin, Filino Harahap, Bana Kartasasmita. Ibid., pp. 483-502.

46 As stated by A. Djoko Wiyono (KWI) and Pattiasina (PGI). Ibid, pp. 540, 552.

On the same day, in the subsequent public hearing with MUI (*Majelis Ulama Indonesia* – Indonesia Ulema Council), NU (*Nahdlatul Ulama* – Association of Muslim Scholars) and Muhammadiyah, a MUI speaker, agreed that the term "education" should replace "teaching" in Article 31 (1). Section (2) should be changed to read, "The government shall undertake and shall conduct one national educational system that aims to create a generation of believers and devotion to God Almighty and mastering science and technology, which is regulated by law".[47] A NU speaker argued that the Constitution should clearly state that every citizen should acquire proper and just education and guarantee the eradication of discrimination either culturally, structurally or in budget appropriations.[48] Regarding the education gap between public and private institutions and between men and women, a member noted that there are no existing gaps in education's implementation. She stressed that in the future, every citizen should have the same opportunity.[49]

A delegation from Parisadha Hindu stated in a public hearing on 1 March 2000 that Article 31 could be maintained. After completing the above public hearings, PAH I planned to complete the discussion on Articles 31 and 32 on 21 and 22 June 2000.

In the beginning of the PAH I meeting on 21 June 2000, the chairman of PAH I underlined that education and culture are very important and central to nation building. The chairman recalled a proverb that says that "if we want to live one day, cook rice and eat. If we want to live one year, plant rice. But if a nation wants to develop and prosper, educate the people."[50]

In that meeting, PAH I members proposed a new formulation of Articles 31 and 32. All factions agreed that the constitutional provisions regarding education must be strengthened to include culture. The factions agreed that each citizen has the same right to obtain education and receive basic education for free. It was also stated that education is a nation's investment in the future, not just for survival, but to carry out cultural transformation. The Constitution needs to emphasize a high minimum state budget allocation for the education sector. Correspondingly, it was proposed that Article 32 be refined so that culture should be perceived from the aesthetic, cognitive, and normative dimensions.[51]

A F-UG member reminded that Soekarno, the first president of Indonesia, always reminded the nation that we were facing *"many revolutions in one generation"*, requiring a revolution in the way of thinking, working, and so on. Based on that, he proposed that the chapter on education should consist of two articles, one on education and the other on culture. Further,

47 As stated by K.H. Ismail Hasan (MUI). Ibid., p. 578

48 As stated by Ahmad Bagja (NU). Ibid., p. 590.

49 As stated by Rosnaniar (F-PG). Ibid., pp. 559, 609.

50 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Enam, Edisi Revisi, Sekretariat Jenderal, 2010, p. 64.

51 Ibid., pp. 65 - 81.

he proposed that every citizen has the right to free basic education, and the government should strive for one national education system to develop national culture and build national civilization. Furthermore, the member proposed that for that purpose, the central and regional governments are obliged to allocate sufficient education budgets. He also proposed that those governments should be obliged to protect and nurture national and local cultures and to advance the sciences.[52]

One F-PDIP member emphasized that the right of citizens to education is firmly stated in the Universal Declaration of Human Rights. For that purpose, he proposed that the state should allocate at least 15% of the state budget towards education. The member underlined that education is a transmission process of culture from one generation to the next. Further, he proposed changing the title of Chapter 31 from 'Education' to 'Education and Culture'. However, the member also believed that the chapter on education and culture should consist only of one paragraph.[53]

One member emphasized the importance of education's goal. It is not merely about the transfer of science and technology, but also about shaping attitude and virtuous behaviour.[54] Another member suggested that Article 31 should include that the education system also aim to improve and develop faith and piety.[55] Another member added that the government should guarantee the people's right to preserve and develop their cultures.[56] Then, the PAH I chairman underlined that the development of national culture is a dynamic process that should maintain its roots. Its development must nurture its heritage, preventing the culture from being uprooted.[57]

An informal meeting was held to bring together various proposals for amendments to Articles 31 and 32. This continued with the formulation team meeting on 22 June 2000. The team summarized the 'proposal of changes' draft to Articles 31 and 32 for further discussion at the upcoming Commission A meeting. The draft contains proposals for change that still contain alternatives. For example, the proposal for Article 31 (3) had three alternatives.[58] Article 31 (5) had two alternatives.[59]

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52 Stated by Soedijarto (F-UG). Ibid., pp. 65 – 66.

53 Proposed by Muhammad Ali (F-PDIP). Ibid., pp. 68 - 69.

54 Stated by Rosnaniar (F-PG). Ibid., p. 69.

55 Proposed by Lukman Hakim Saifuddin (F-PPP). Ibid., p. 71.

56 Proposed by Yusuf Muhammad (F-KB). Ibid., p. 73.

57 Ibid., p. 117.

58 These alternatives included (1) "The government shall organize and shall execute one national education system, which is regulated by law", (2) "The government shall organize and shall execute one national education system, to develop the intellectual life of the nation, which is regulated by law", and (3) "The government shall organize and shall execute one national education system, to enhance faith and piety, the noble characters and to educate the nation's life, which is regulated by law".

59 These alternatives were (1) "The state advances science and technology for the advancement of civilization and unity" and (2) "The state advances science and technology which are not in contradiction with religious values for the advancement of civilization and the prosperity of human kind". See Enclosures of MPR Decree no. IX/MPR/2000.

While a national system of free education was preliminarily agreed on, due to time constraints, Commission A did not have time to discuss the education draft reported by PAH I.[60] However, the MPR plenary session agreed to accept the PAH I report as material for amending the Constitution, to be discussed at a later stage.[61]

A document summarizing the materials on the above issues was submitted to Commission A on 11 August 2000 for further process.[62] Commission A agreed to prioritize materials that had been fully agreed by the factions before discussing other materials.[63]

Discussions in the commission were preceded by the factions' Introductory Views. To finalize the work, an informal consultation group was formed, also functioning as a drafting team. It consisted of the Commission A leadership and Commission A faction leaders.

To enhance the formulation of the outcomes, experts on Indonesian language, constitutional law, and international law assisted the drafting team before the draft was submitted to the Commission A plenary.[64]

Eventually, Commission A agreed on seven chapters, consisting of 23 articles and 57 verses:
- Chapter VI on Regional Government
- Chapter VII on DPR (*Dewan Perwakilan Rakyat*)
- Chapter IXA on State Territory
- Chapter X on Citizen and Resident
- Chapter XA on Human Rights
- Chapter XII on State Defence and Security
- Chapter XV on the Flag, Language, National Emblem, and National Anthem

However, Commission A did not finalize discussions on the following chapters:
A. Judicial Authority
B. The Council for Representation of the Regions
C. Election
D. Public Finances
E. Education and Culture

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60 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 615 – 627.

61 See MPR Decree no. IX/MPR/2000.

62 The sixth MPR plenary session on 11 August 2000 formed three commissions, which were Commission A (to finalize the drafts of the second stage of amendment of the 1945 Constitution), Commission B (to finalize the drafts of the new MPR decrees), and Commission C (to finalize the MPR's opinion regarding the annual reports of the President, DPA, DPR, and MA on the implementation of the GBHN). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 73-75.

63 Ibid., p. 108.

64 Ibid., p. 625.

Finally, due to time constraints, Commission A did not discuss the following:
- Chapter on the Form, Basis, and Sovereignty
- Chapter on the Government Authority
- Chapter on the MPR (*Majelis Permusyawaratan Rakyat*)
- Chapter on the National Economy and Social Welfare
- Chapter on the Religion
- Chapter on the Amendment of the Constitution
- Chapter on the Supreme Advisory Board

Eventually, on 18 August 2000, the MPR Plenary Session passed the second amendment of the 1945 Constitution. Significant changes included the devolution of government power to the regions and the incorporation of human rights in the Constitution. Then, the plenary asked the MPR Working Body to continue the amendment process and to complete the amendment by the 2002 MPR annual session at the latest. Unlike in the first amendment, the MPR issued MPR Decree No. IX/ 2000, to which a list of pending amendment issues was attached.[65]

### VI.2.3 The content

#### *VI.2.3.1 Rule of law state (negara hukum) and judicial review*

From the beginning, all factions in the MPR had emphasized that the rule of law ought to be asserted in the Constitution. They wanted to affirm that Indonesia is a *negara hukum* (state based on law) in the Constitution's first article.[66] The factions, alternating between the terms *negara hukum*, *rechtsstaat*, and 'rule of law', deplored that this had not been included in the 1945 Constitution since its inception.[67] Similarly, NGOs and the public wanted *negara hukum* to be affirmed in the Constitution.[68]

During the first phase, these discussions had remained rather general (see V.4.7.4).

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65 See Attachment VI.4.

66 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 77-81.

67 In the original 1945 Constitution, Indonesia as a state based on law (*rechtsstaat*) and not just on power (*machtsstaat*) was stated in the Elucidation (Government System, I.1), but not in an article of the Constitution. The Constitution also did not state that the judiciary is an independent authority.

68 As stated among others by Bambang Widjojanto from the Indonesia Legal Aid Institute and Luhut Pangaribuan from the Indonesia Legal Aid and Human Rights Association. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 235. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 422-439.

At the second phase's start, the factions urgently wanted to discuss the *democratische rechtsstaat* or *negara hukum* and its relation with important concepts such as *grondrechten* (fundamental rights) and *scheiding van machten* (the separation of powers).[69] Factions argued that the rule of law has a strong capacity to prevent the recurrence of authoritarian power[70] and that supremacy of law is a fundamental element of democracy.[71] Concurrently, factions also perceived the rule of law as the main principle of human rights.[72] Thus, according to PAH I, to uphold legal certainty, the amended Constitution should be placed as the land's supreme law, the legal system's highest law.[73] Subsequently, statements were made that the whole judiciary should culminate in the Supreme Court and that the Constitution should ensure Supreme Court independence.[74] Like in the first stage, members argued that to set up supremacy of law, the Supreme Court should be attributed with the authority to conduct judicial review.[75] Alongside judicial independence, factions stated that the judiciary should be controlled by a newly-established independent commission.[76] This was due to the factions'

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69 As stated among others by Sutjipno (F-PDI-P). Ibid. In the initial part of the discussions, Dutch terms were often used. Later, English terms such as 'rule of law' were frequently referred to.

70 As emphasized by Asnawi Latief (F-PDU). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 84.

71 As stated by Valina Subekti Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 133, 137, 172.
As stated by Pataniari Siahaan (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 127.
As emphasized by, among others, Agun Gunandjar Sudarsa (F-PG), Lukman Hakim Saifuddin (F-PPP), Asnawi Latief (F-PDU) and Hamdan Zoelva (F-PBB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 90, 99, 102.
As stated by Zain Bajeber (F-PPP) and Anthonius Rahail (F-KKI). See Ibid., p. 153.
As argued by, among others, Gregorius Seto Harianto (F-PDKB), Gunandjar Sunandar (F-PG), and Asnawi Latief (F-PDU). See Ibid. pp. 83-85, 124, 167. Academics, such as Philipus M. Hadjon from Airlangga University agreed with the position. See Ibid., p. 337.
As stated by Hamdan Zoelva (F-PBB). See Ibid. p. 99. (F-UG) and Ali Masykur Musa (F-KB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 133, 137, 172.

72 As stated by Pataniari Siahaan (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 127.

73 As emphasized by, among others, Agun Gunandjar Sudarsa (F-PG), Lukman Hakim Saifuddin (F-PPP), Asnawi Latief (F-PDU) and Hamdan Zoelva (F-PBB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 90, 99, 102.

74 As stated by Zain Bajeber (F-PPP) and Anthonius Rahail (F-KKI). See Ibid., p. 153.

75 As argued by, among others, Gregorius Seto Harianto (F-PDKB), Gunandjar Sunandar (F-PG), and Asnawi Latief (F-PDU). See Ibid. pp. 83-85, 124, 167. Academics, such as Philipus M. Hadjon from Airlangga University agreed with the position. See Ibid., p. 337.

76 As stated by Hamdan Zoelva (F-PBB). See Ibid. p. 99.

awareness of past judicial weaknesses. Considering the judiciary's importance, factions also expressed the need to enhance the judge's credibility and restore a proper legal culture within the courts.[77]

However, during this stage, the notion that the MPR is the highest holder of popular sovereignty was still influential. For example, some held that to ensure the judiciary's independence, it needed to be directly under and accountable to the MPR.[78] Correspondingly, not everyone agreed that the Supreme Court should have the power of judicial review. Factions, academics, and certain groups in society voiced this opinion.[79] Those against argued that the Supreme Court stands on the same level as state institutions that promulgate laws. Thus, the highest authority should rest with the supreme institution, i.e., the MPR. In contrast, others argued that the Constitution could establish a judicial institution with the authority to undertake judicial review (such as Germany's Constitutional Court). If the review was conducted by a political institution such as the MPR, it would be a political rather than a judicial review.[80] All factions agreed that the Supreme Court should keep its authority to conduct judicial review on legislative products below the level of a law. However, they differed in attributing the power of reviewing a law against the Constitution.

As the discussion continued, factions agreed that there should be an authority to conduct judicial review. However, they disagreed on who should have the authority: the Supreme Court,[81] the MPR, or a Constitutional Court within the Supreme Court. There were two further opinions regarding the Constitutional Court. First, the MPR should form the Constitutional Court as an Ad-Hoc court.[82] Second, an independent and permanent Constitutional Court should exist within the judicial branch.[83]

In accordance with the procedural PAH I rules for consensus through deliberation, the deliberations were often interspersed by informal meetings. Through such meetings, factions developed an understanding that

77 As noted by Yusuf Muhammad (F-KB), see Ibid. pp. 159, and J.E. Sahetapy (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 264.

78 Yusuf Muhammad (F-KB) argued that to guarantee the judiciary's independence, it should be responsible directly to the MPR. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 159.

79 As argued among others by Dahlan Ranuwiharjo from the University of Jember, I Dewa Gede Atmaja from the University of Udayana, and Pattiasina from the Indonesian Communion of Churches. See Ibid., pp. 231, 365-366, 551.

80 As stated by Bagir Manan. Ibid., p. 319.

81 As proposed by Slamet Effendy Yusuf (F-PG) and Anthonius Rahail (F-KKI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 180.

82 As proposed by Agun Gunandjar Sunarsa (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 170.

83 As proposed by I Dewa Gede Palguna (F-PDI-P). See Ibid, p. 200.

the judicial power may also consist of several institutions, for example, a Supreme Court, a Constitutional Court, and a Judicial Commission.[84] Eventually, the factions agreed that the rule of law should be incorporated in the Constitution's first Article.[85] However, they could not yet agree on an exact formulation.

In general, factions accepted that rule of law is infused with human rights.[86] Therefore, the Constitution should affirm that Indonesia is a *negara hukum*, i.e., a rule of law state. However, it was also stated that any government action should be based on the law.[87] In response to the latter, others argued that the term *negara berdasar hukum* (rule by law) should be differentiated from *negara hukum* (rule of law). The term *negara hukum*, it was argued, contains all the good paradigms (e.g., respecting human rights, checks and balances, and limitation of power). However, *negara berdasar hukum* seems to mean that all the state's actions are based on the law, irrespective of whether such law upholds human rights or is totalitarian.[88] With that understanding, the PAH I chairman eventually concluded to use the term *negara hukum* (rule of law) instead of *negara berdasar hukum*, which seemed closer to the 'rule by law' concept.[89]

During the second phase, PAH I could not complete a draft amendment of the Constitution regarding the rule of law. It just managed to compile a variety of alternative amendments to be discussed in the following session. However, it managed to agree that the Constitution should establish an independent and permanent Constitutional Court. In the meantime, PAH II drafted a decree stating that the MPR could review the constitutionality of laws and their compatibility with MPR decrees. PAH II had been assigned with reviewing the existing MPR decrees and drafting new decrees. At the end of the MPR session, this draft was ratified as MPR Decree No. III/2000 on Sources of Law and the Hierarchy of Legislations.[90]

Surprisingly, the same MPR plenary meeting agreed that one of the PAH I's next assignments was to continue preparing the establishment of an

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84 In an informal consultation, the chairman of PAH I persuaded the factions to comprehend that the discussions were not merely about the Supreme Court, but rather on the judicial branch in a state that implemented the separation of powers principle, whereby the Supreme Court is the court of cassation. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 193.

85 Ibid., p. 108.

86 As asserted by Hamdan Zoelva (F-PBB), the essence of the rule of law should be limited by upholding and respecting human rights. See Ibid, pp. 127–128.

87 Patrialis Akbar (F-Reformasi) argued that what was important is that every government action should be based on law, therefore, the Constitution should affirm that Indonesia is a *negara berdasar hukum* (a state based on law). See Ibid, p. 133.

88 As emphasized by Andi Mattalatta (F-PG). See Ibid.

89 Ibid., p. 135.

90 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 220. The formulation was drafted by PAH II and signed by all factions.

independent and permanent Constitutional Court.[91] This incident showed that in PAH I, which consisted of various factions, there had been a unification of opinion that led to the opinions of their respective factions.

### *VI.2.3.2 Human rights*

One can read a strong message on human rights in the 1945 Constitution's Preamble, which was not properly elaborated in the Constitution's articles. The third *sila* (principle) of the foundational state ideology Pancasila, which is embedded in the Preamble (see III.2.1.2), affirms that the state of Indonesia should be based on Just and Civilized Humanity (*Kemanusiaan yang adil dan beradab*).[92] The PAH I factions realized that the provisions on human rights in the original 1945 Constitution were insufficient. In its Special Session in October 1998, the MPR ratified MPR Decree No. XVII/1998 on Human Rights.[93]

All PAH I factions argued that the decree's content should be in a separate chapter of the Constitution.[94] To confirm their endorsement, the military and police faction (F-TNI/POLRI) submitted a full draft of the new Article 28A on human rights.[95] Likewise, various communities, such as NGOs, academics, and the public wanted human rights provisions in the Constitution.[96] Various stakeholders reminded PAH I that the provisions

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91 See Article 25 of the Attachment of MPR Decree No. IX/2000 on the Assignment of the Working Body of the People's Consultative Assembly to prepare draft amendments to the 1945 Constitution.

92 As reaffirmed by the chairman of PAH I. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 350. The 1945 Constitution was written three years before the United Nations Universal Declaration on Human Rights was ratified in 1948.

93 On 21 May 1998, under public pressure for reformation, President Suharto resigned, and Vice President Habibie replaced him. To respond to the demand for reform, the MPR conducted a special session on 10-13 November 1998, which promulgated MPR Decree No. XVII on Human Rights and MPR Decree No. XIV on the Amendment and Supplement to MPR Decree No. III of 1998 on General Election that expedited the general election from 2002 to 1999.

94 As stated by among others, Hobbes Sinaga (F-PDI-P), Agun Gunandjar Sudarsa (F-PG), Abdul Khaliq Ahmad (F-KB), Lukman Hakim Saifuddin (F-PPP)<sub>,<xsub> Hamdan Zoelva (F-PBB), Anthonius Rahail (F-KKI), Gregorius Seto Harianto (F-PDKB), Hendi Tjaswadi (F-TNI/Polri)<sub>,<xsub><sub> <xsub>Valina Singka Subekti (F-UG) and Sutjipno (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 80-146.

95 Ibid., p. 177.

96 As recorded in various public hearings in Jakarta and the regions. See Ibid., pp. 80, 349, 366, 430, 433, and 436. In a public hearing on 29 February 2000, Ahmad Watik Pratiknya from Muhammadiyah argued that the provision on human rights should be included explicitly in the Constitution. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 586. Nurcholis Madjid stated in Den Haag that the defect of the old regime was in ethics and social morality, as well as in ignoring values of humanity for decades. See Kompas Daily, 5 May 2000.

on human rights should also include women's rights, environmental rights, and traditional communal rights (*hak ulayat*).[97] Later, in a public hearing on 25 February 2000, the Commander of the Armed Forces affirmed that ABRI (the military and the police) endorsed including human rights provisions in the 1945 Constitution.[98] An academic delegation stated that since the original 1945 Constitution embraced integralism (i.e., the state is above all), human rights is not an essential part of such conception of the state. Under such a system, the delegation argued, a security approach aimed at unity is more important than democracy and human rights. Therefore, besides the national identity's core values, a new value system must also be adopted in the Constitution. The new value system would contain human rights, democracy, supremacy of law, environmental preservation, social solidarity, intellectual property, increasing the role of women, transparency, and openness.[99]

Some NGOs, considering the broadness of human rights provisions and their relation to other constitutional principles, doubted whether the constitution could accommodate them merely through an amendment.[100] They argued that the original Constitution's integralist concept had to be replaced with constitutionalism, outlining the limitation of powers, government accountability to the people, as well as the protection of human rights.[101] They insisted on replacing the 1945 Constitution with a new one.[102] However, regional groups argued that Indonesian culture differs from the basic principles of universal human rights and that it would be an exaggeration if all principles of universal human rights would be included in the Constitution.[103]

One aspect of human rights which came up in the discussions was

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97 As stated by Valina Singka Subekti (F-UG), Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 345, and Saafruddin Bahar of the Indonesian Association of Political Sciences (AIPI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 285.

98 Asserted by Admiral Widodo,the Commander of the Armed Forces. See Ibid., p. 424.

99 As stated by ITB lecturers, Rizal Zaenuddin Tamin, Filino Harahap, Guswin Agus, Bana Kartasasmita, Yasraf Amir Piliang, Imam Buchori, Dimitri and ITB student's representatives, Ari Wicaksono and Ferdiman. Stated in PAH I public hearing on 28 February 2000. Ibid., pp. 488-533.

100 As stated by Hendardi of the Legal Aid Foundation (PBHI). See Ibid, pp. 232, 233. In the subsequent stage of the amendment process, this argument became one of the impeding factors. With this argument, many human rights activists did not believe that the amendment could produce a reliable constitution, so they called for a new constitution.

101 As stated by Ifdhal Kasim of the Institute for Policy Research and Advocacy (ELSAM). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 104–105.

102 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 232, 233.

103 As reported by Lukman Hakim Saifuddin (F-PPP) from public hearings in the regions. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 430.

non-discrimination, i.e., that the Constitution should guarantee non-discriminatory treatments of citizens.[104] In discussing the topic, factions always referred to the underlying principles of human rights. All factions agreed on the principle of non-discrimination.[105] Factions underlined that equality and justice cannot be achieved if the constitution is discriminative.[106] More important than the constitutional protection against, for instance, racism, was a guarantee to be treated equally.[107] In that context, factions pointed to Article 27(1) of the original UUD 1945. It confirmed that every citizen shall be equal before the law and in government and shall respect the law and government without exception.[108] Further, factions agreed that the terminologies of *warga negara asli* (native citizen) and *warga negara non-pribumi* (non-native citizen) should be interpreted only as information on where the citizen originated from.[109]

Then, in the following consultation meeting, factions stipulated that the final draft of Chapter X on citizens would be adjusted based on the final discussion's conclusions on human rights, because their contents are associated.[110] At this stage, nearing the MPR Working Body session in July 2000, the factions in PAH I discussed whether the concept of human rights is universal or particular and if universal, whether there could be any consideration for particularistic aspects. Some argued that particularistic views had been a manipulation by the authoritarian ruler to protect the regime while ignoring the protection of human rights. Thus, in their opinion, as Indonesia is part of a global society, the views which emphasize particularism should be abandoned, although some aspects of particularism may be taken into consideration. Correspondingly, the view that human rights is a Western concept must be abandoned. However, there must be respect for non-derogable or unalienable rights, which are the rights the state cannot violate under any circumstance.[111]

On the other hand, others reminded the committee that an individual person exists in a variety of communities, such as *rechtsgemeenschappen* (legal communities) and *volksgemeenschappen* (folk communities). This indicates that a person may be living in an environment with a diversity of norms. Thus, the discussion continued, the fundamental rights of a person should be protected from possible violations by state authorities. On the

104 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 153.
105 As stated by A.M. Luthfie (F-Reformasi), Soedijarto (F-UG), Lukman Hakim Saifuddin (F-PPP), and Hendi Tjaswadi (F-TNI/Polri). Ibid, pp. 157-160.
106 As stated by Agun Gunandjar Sudarsa (F-PG). Ibid, p. 153.
107 As reiterated by the author as the chairman of PAH I. See Ibid, 166.
108 Article 27(1) of the original 1945 Constitution. This article has been maintained.
109 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 320-322. Non-native citizen is citizen whose ethnicity is not of the archipelago's.
110 Ibid., pp. 330-331.
111 As stated by Slamet Effendy Yusuf (F-PG). Ibid, p. 316.

other hand, one needs state institutions to protect a person's fundamental rights from infringements by fellow citizens.[112] Others argued that to avoid anarchy, the Constitution should affirm that human rights must be in accordance with the norms of ethics, religions, decency, and law. Further, it was reminded that since the state, according to the Pancasila, is based on the belief in the Almighty God, religious teachings must be obeyed. Therefore, the right to not embrace religion as a fundamental right, needs to be questioned.[113] Similarly, not every faction could accept that freedom of *kepercayaan*[114] (the local set of beliefs) should be included in the Constitution.

Meanwhile, a member from an Islamic faction argued that Indonesia should combine the Universal Declaration of Human Rights, which is universal, with the 1990 Cairo Declaration, which asserts that rights and freedoms should be subject to *syariah* (Islamic teachings).[115] Responding to these opinions, some argued that this would lead to problems. Regarding religious norms, it would raise questions as to which religious norms would be applicable in a pluralistic society like Indonesia.[116] Others argued that the Constitution should not emphasize rights more than obligations, but that it should be balanced.[117]

To ease concerns, other members elucidated that inherent in human rights is the obligation to respect others, which limits individual rights.[118] Others added that human beings hold the fundamental rights in accordance with their nature, value, and dignity as being the noblest creature. The human being is created as an individual as well as a social being. Rights should therefore be regulated so that one person's fundamental rights shall not ignore another's.[119] Another member cited the 1993 Vienna Convention, which states "every person shall be subject to the laws and regulations, created solely to provide the rights and freedoms of others." Others quoted Article 36 of MPR Decree No. XVII/1998 on Human Rights, which states "every person shall have the duty to accept the restrictions established by the law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, security and public order in a democratic

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112 As stated by Sutjipno (F-PDI-P). Ibid, p. 362.

113 As argued by A.M. Luthfie (F-Reformasi). Ibid, pp. 328, 336.

114 *Kepercayaan* is a generic term for a local set of beliefs, such as mysticism, *kejawen* (traditional Javanese mysticism), and paganism. *Kepercayaan* existed in the archipelago of Indonesia before the arrival of religions.

115 Proposed by Ali Hardi Kiaidemak (F-PPP) by quoting Article 25 of the Declaration of the 1990 Cairo Organisation of Islamic Conference. See Ibid., pp. 369-370.

116 As stated by Slamet Effendy Yusuf (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 328.

117 As stated by Harun Kamil. See Ibid., p. 333.

118 As stated by Valina Singka Subekti (F-UG) and Hendi Tjaswadi (F-TNI/POLRI). Ibid., pp. 334-335.

119 As stated by Gregorius Seto Harianto (F-PDKB). Ibid, p. 358.

society."[120] Another issue was different perceptions regarding the scope of non-retrospectivity as a non-derogable right.

Thus, PAH I members made various proposals regarding human rights, from a complete article on human rights to individual principles for consideration. Eventually, a collection of scattered opinions on human rights needed compilation and synchronization before they could be reported in the following stage. To organize the different ideas, PAH I tasked a select team with systematizing the material and reporting their work to the drafting team.[121]

Prior to forming the team, the PAH I chairman reiterated that a human right is not a gift from the state, but inherent in human beings. The constitution does not grant or create it, but rather recognizes and guarantees it.[122] The Constitution's stipulation of human rights should be sufficiently detailed, to avoid fundamental topics becoming daily political issues subject to judicial review.[123] At last, the team managed to conclude almost all issues on human rights, except the issue of *kepercayaan* (local set of beliefs) and the scope of non-derogable non-retrospectivity.

Discussion on the draft was resumed in the MPR Working Body meeting on 2 August 2000. Despite the differences on the above two issues, there was no substantive debate. At the end, the MPR Working Body approved the PAH I report and agreed on the human rights provisions, except on the above two issues. After the draft was reported to Commission A, most of the subsequent Commission A debates centred on the first issue. Impatient with the impasse, some proposed removing the article on freedom of religion from the chapter on human rights. They argued it was stipulated in the original Article 29(2) of the 1945 Constitution and so did not need to be included in the new chapter.[124] However, the Commission A chairman reminded members that it would be strange if a chapter on human rights did not contain freedom of religion, a basic human right.[125] Other members supported the chairman's argument and affirmed that freedom of religion and freedom of *kepercayaan* are both basic rights.[126]

Nevertheless, those opposed to including freedom of *kepercayaan* stated that they had no objection to the substance of that freedom. They were only

120 Cited by Lukman Hakim Saifuddin (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Risalah Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 366.

121 Consisted of Slamet Effendy Yusuf (F-PG), Harjono (F-PDI-P), Lukman Hakim Saifuddin (F-PPP), Asnawi Latief (F-PDU), and Valina Singka Subekti (F-UG). Ibid., p. 382.

122 Ibid., p. 371.

123 Ibid., p. 373.

124 Proposed by Lukman Hakim Saifuddin (F-PPP), Happy Bone Zulkarnain and Slamet Effendy Yusuf, both from F-PG. Article 29(2) of Chapter XI on Religion of the initial UUD 1945 states that *'The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.'* See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 422.

125 See Ibid., p. 424.

126 As stated by Amidhan (F-PG), an Islamic scholar. Ibid., p. 425.

concerned with including it in the Constitution. They suggested the issue should be settled by voting.[127] The Chairman encouraged a consensual solution.[128] The objection is more a matter of sensibility rather than substance. They do not want religion to be conflated with belief, which they argue to be heresy that needs repentance or that those who have not embraced religion must be enlightened.

In the end, Commission A agreed that freedom of belief should be included in the human rights chapter together with freedom of religion, but in different words.[129]

The discussions on the non-derogability of non-retrospectivity also took time. Commission A wanted to clearly outline when the non-retrospective principle did not apply. It also included the affirmation that universally, the non-retrospective principle does not apply to war crimes and crimes against humanity.[130] Commission A agreed as non-derogable the right against trial under a retrospective law, excluding war crimes and crimes against humanity. The definition is consistent with the legal restriction of human rights, to ensure respect for the rights themselves. It also reflects the Universal Convention to which Indonesia is a signatory.[131]

Further, an informal consultation between the Commission A leadership and the MPR faction representatives on 13 August 2000 agreed on the human rights chapter's final draft. The final amendment changed 'the protection, advancement, upholding and fulfilment of human rights are the responsibility of the government' to 'the protection, advancement, upholding and fulfilment of human rights are the responsibility of the state, especially the government'.[132]

However, in the last Commission A meeting, some new changes were made. In the preceding informal meetings between factions, the formulation of human rights had been fully agreed upon and had been reported to the factions. However, disregarding that agreement, Dimyati Hartono (F-PDI-P) questioned the agreement and made a new proposal regarding consumer rights. This opportunity had been used by some members to re-submit proposals that had been rejected before, such as adding 'religious values' alongside moral consideration, security and public order as factors restricting human rights.[133]

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127 Ibid., p. 428. Quite a number of Indonesians adhere to local set-of-beliefs that do not belong to Hinduism, Confucianism, Buddhism, Muslim or Christian. Some are from pre-Hindu times or later. In general, religious followers consider the belief not on par with religions and want them to repent and embrace religion. Until now, the Ministry of Education and Culture has invested 190 organizations of groups of followers of the local set-of-belief in God Almighty. The presence of the organization is now recognized before the law.

128 Ibid., p. 431.

129 Proposed by Hamdan Zoelva (F-PBB). See Article 28E (1) and (2), Chapter XA on Human Rights, the 1945 Constitution.

130 Stated by Hendi Tjaswadi (F-TNI/Polri). Ibid., p. 462.

131 Ibid., pp. 461-478.

132 Based on a proposal by Lukman Hakim Saifuddin (F-PPP). See Ibid., p. 515.

133 See Ibid., pp. 518-519.

Ultimately, the eighth People's Consultative Assembly plenary meeting on 15 August 2000 accepted fully the works of Commission A. Then, in the 9th MPR plenary meeting on 18 August 2000, the MPR ratified the new Chapter XA on Human Rights in the 1945 Constitution.[134]

*VI.2.3.3 Limitation of powers*

During the amendment process' first stage, factions pointed out that the concentration of power in the president's hands and the vagueness of its limitation were the main causes of past abuses of power. In the PAH I meeting on 6 December 1999, the meeting's first speaker, a F-PDI-P member reiterated that to limit the president's authority, several provisions had been incorporated into the 1945 Constitution.[135]

In its introductory view, a F-UG speaker stated that various distortions occurred during the previous regimes because constitutionalist principles were not strongly enough embedded in the 1945 Constitution. She argued that a constitution should limit the government's power to prevent an arbitrary application of power. Therefore, a constitution should become the manifestation of the highest law, which should be obeyed by both the people and the government. Thus, the constitution should specify constitutionalist principles.[136] Furthermore, the members stated that the amended 1945 Constitution must set stricter limits regarding the president's power and further empower the DPR and MPR to hold the president accountable.[137]

In a public hearing in Balikpapan, East Kalimantan, the participants urged that the Constitution should limit the president's power and establish checks and balances.[138] Yet, the idea of limiting the president's power was often taken very far. In subsequent meetings, PAH I members proposed limiting presidential authority to such an extent that it would take on the form of a parliamentary system. For example, many proposed that the president should have the DPR's approval when appointing ministers. During the MPR 2000 Annual Session, the MPR determined Decree No. VII/MPR/2000 (drafted by PAH II), which requires the president to gain the DPR's approval (rather than consideration) in appointing the armed forces commander and police chief. By contrast, the Constitution affirms that the president holds the highest authority over the military.

134 Ibid., pp. 651-697.

135 As stated by Hobbes Sinaga (F-PDI-P). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 73.

136 As stated by Valina Singka Subekti (F-UG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 133.

137 Ibid., p. 181.

138 Ibid., p. 432. As reported by Asnawi Latief (F-PDU).

The Indonesia Legal Aid Foundation's delegation (*Yayasan Lembaga Bantuan Hukum Indonesia*) stated that the state authorities, MPR, DPR, the president and others should be equipped with the authority to undertake their tasks, with a clear and rigid limit to avoid abuses of power.[139] In that regard, a F-PDI-P speaker affirmed that the history of constitutions is the history of limiting power, intended to protect people from its abuse. However, the limitation of power is not an end, but rather a legal certainty. Regarding this matter, F-UG agreed that checks and balances do not occur only between the branches in the *trias politica*, but also between the parliament and institutions outside the parliament, so that checks and balances also occur in political communication.[140]

An IKADIN delegation[141] in that same public hearing emphasized that the Constitution should limit the state's power, adhering to human rights. The delegation argued that, so far, power had been concentrated in the president's hands, causing totalitarianism and authoritarianism.[142] Further, an AIPI delegation[143] argued that the president is too powerful. AIPI assumed that Soepomo was too idealistic and utopian, so that if Soepomo's opinion was followed, only a super-human could become president. Furthermore, the delegation said that the founding fathers (despite a Western education) opposed the parliamentary system implemented in Western countries. It seemed they had chosen the presidential system due to the parliamentary system's weaknesses without seriously examining the presidential system.[144] Stating that "power tends to corrupt,"[145] another AIPI delegation asserted that the 1945 Constitution's system does not control power, which allowed President Suharto to become authoritarian.[146] A PWI delegation[147] argued that the 1945 Constitution's Elucidation clause, which states that the concentration of power and responsibility lies with the President, had strengthened the authoritarian tendency, becoming *l'etat c'est moi* – the state is me.[148]

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139 As stated by Bambang Widjojanto of the Indonesia Legal Aid Institute or LBHI (*Lembaga Bantuan Hukum Indonesia*). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 235. Stated in a public hearing on 21 February 2000.

140 As asserted by Valina Singka Subekti (F-UG). Ibid., p. 242.

141 Also known as *Ikatan Advokat Indonesia* or the Association of Indonesian Advocates.

142 As emphasized by Frans Hendra Winarta from IKADIN. Ibid., pp. 258 – 259.

143 Also known as *Asosiasi Ilmu Politik Indonesia* or the Association Indonesian Political Science.

144 As stated by Saafruddin Bahar from AIPI. Ibid., p. 281. Soepomo was the chairman of the small team of BPU-PK for drafting the Constitution in 1945. Stated in a PAH I public hearing on 22 February 2000.

145 Quoting Lord Acton.

146 As stated by Isbodroini Soejanto (AIPI). Ibid., p. 287.

147 Also known as the *Persatuan Wartawan Indonesia* or the Indonesian Journalists Association.

148 As expressed by Syamsul Basri (PWI). Ibid., p. 328.

In that regard, a F-PDU speaker argued that the 1945 Constitution's main weakness lay in its implementation, depending on the leader's mood and ignoring the system. At the same time, it failed to clearly limit the president's authority, plunging the country into authoritarianism.[149] A Muhammadiyah delegation stated that the checks and balances arrangement should not only debate whether to follow *trias politica.* What mattered was the need to balance and empower the three groups of state governance.[150] An ELSAM delegation[151] asserted that the changes to the Constitution should not focus just on adding new articles but on constitutionalism.[152] A WALHI delegation[153] stated that the people should have the right to obtain information about the exercise of state power, so that its control would not be limited to the DPR representatives.[154]

Regarding the limitation of powers, an Armed Forces political officer expressed his views. Referring to the words of Bung Karno, he argued that the 1945 Constitution does not copy any other constitutional system. Instead of dividing the authority into the executive, legislative, and judicial, the 1945 Constitution knows eight powers: the power to make the Constitution, the power to make broad outlines of state policy, the executive power, the state finance power, the diplomatic power, the military power, the power to bestow honours and the judiciary power. Further, the officer explained that the president holds four positions: the MPR's mandate holder, the head of state, the head of government and the co-authority on law-making (alongside the DPR). The 1945 Constitution organizes the state based on modern management, emphasizing control. Since the president holds the four positions, the president is powerful. In that regard, the control consists of political control (conducted by the DPR and the people) and technical control (conducted by the Supreme Council, the Audit Board, and the Supreme Court). With such control, the president is less likely to abuse their power.[155]

149 As argued by Asnawi Latief (F-PDU). Ibid., p. 431.

150 As stated by Ahmad Watik Pratiknya from Muhammadiyah. Ibid., p. 585. Stated in a PAH I public hearing on 29 February 2000.

151 Also known as *Lembaga Studi dan Advokasi Masyarakat* or the Institute for Policy Research and Advocacy.

152 Constitutionalism meaning that the Constitution should contain provisions on the limitation of powers, accountability of the government to the people, and the protection of human rights. As stated by Ifdhal Kasim. Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 104. Stated in a PAH I public hearing on 2 March 2000.

153 Also known as the *Wahana Lingkungan Hidup Indonesia* or the Indonesian Forum for Environment.

154 As conveyed by Emy Hafild of WALHI (*Wahana Lingkungan Hidup Indonesia*). Ibid., p. 105.

155 As stated by Brig. Gen. A.S.S. Tambunan, a political officer of the Armed Forces. Ibid., p. 253. Stated before a PAH I public hearing on 8 March 2000.

In that context, F-PDI-P asserted that the essence of a *democratische rechtsstaat* (democratic constitutional state) is democracy as *staatsvorm* (state form), a state which is limited and framed by the principles of *negara hukum*, in the form of *rechtsstaatgedachte* (rule of law idea), thus avoiding anarchy. Further, a *democratische rechtsstaat* is based on a *scheiding van machten* (separation of powers), which creates the checks and balances needed to prevent human rights violations.[156]

In an MPR plenary meeting on 15 August 2000, a F-KKI member argued for reconsidering a draft MPR decree on the armed forces and police roles, especially the appointment of the armed forces commander and police chief. The F-KKI questioned whether the DPR must approve the appointment, or whether an earnest consideration and recommendation by the DPR would suffice. Further, the speaker proposed further studying how to build the new system, reviewing issues such as the division and separation of the executive and legislative powers.[157]

The experience during the New Order era, where the President's power was unlimited, had caused all factions to talk about the importance of building and understanding mechanisms to properly limit the president's powers.

#### *VI.2.3.4 Sovereignty and the MPR (the People's Consultative Assembly)*

Article 1 (2) of the original 1945 Constitution states that sovereignty is in the hands of the people and exercised in full by the MPR. Thus, the original 1945 Constitution made the people's and MPR's sovereignty united and inseparable, adopting the MPR's supremacy. What this provision is supposed to mean in the context of democracy, how the MPR should be reformed, and who should join the MPR became topics of lengthy discussions in the amendment process.

In the beginning of the second phase, the PAH I Chairman reminded the committee that the 1945 Constitution's Preamble firmly embraces the values of people's sovereignty, social justice, and human rights.[158] In general, factions agreed that in the past, people's sovereignty had been neglected and so should be improved in conformity with the Preamble.[159] A member stated that if the people directly elect the president, the MPR's position should be reconsidered. Accordingly, another member added, the system that

156 As stated by Sutjipno (F-PDI-P). Ibid., p. 264. Sutjipno always used the Dutch terms.

157 As expressed by FX Soemitro (F-KKI). Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Ketiga, Jilid 17, *Risalah Rapat Paripurna ke-7 s/d ke-10 (Sidang Tahunan 2000),* Sekretariat Jenderal MPR-RI, 2000, p. 119. Later, the draft was ratified as MPR Decree No. VII/2000 on the Role of the Indonesian National Military and the Role of the Indonesian National Police. This part does not appear in the minutes of the 2010 Revised Edition.

158 As stated by the author in a public hearing with experts on 13 December 1999. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 191.

159 As stated by Hobbes Sinaga (F-PDI-P) and Agun Gunandjar Sudarsa. See Ibid., p. 78, 81.

places the MPR as the sole implementer of people's sovereignty should be reviewed.[160] Factions proposed various ideas on how to improve the MPR's position. There were also factions who wished to maintain the MPR as it was.[161] Civil society and academic experts were similarly divided.[162] Indeed, during the second stage, there were still different opinions about how people's sovereignty was comprehended in connection with the MPR's existence.

In the public hearings, there were those who defended the system by arguing that the existing system matched the integralist familial system adopted by Indonesia. They argued that this system adheres to an integrated sovereignty principle, where there is political, economic, and social democracy and the morality of believing in God the Almighty. Therefore, Indonesia did not implement *trias politica*. Indonesia is a new and familial state. It is not a synthesis of the individualist liberal state and the proletariat dictatorship. One speaker emphasized that Indonesia exists in-between.[163]

Starting his response by saying *de waarheid is hard* (the truth is painful), a PAH I member from PDI-P disagreed, stating that the integralist concept is Hegelian and fascist and there was no *apologia* needed for saying that.[164] Others doubted the conformity of integralism with modern democratic principles that recognize fundamental rights and the separation of powers.[165] Furthermore, a member added that if the 1945 Constitution's system synthesizes liberal and authoritarian systems (based on familial and mutual cooperation), then checks and balances depend on the awareness of system actors. In such circumstances, self-restraint is important, without which the whole system fails. Therefore, it is doubtful whether this system should be maintained.[166] Another member added that with checks and balances, the MPR cannot become the highest state institution. Checks and balances should exist where the powers automatically control each other. Therefore, the MPR cannot be the highest institution which distributes power and oversees other institutions.[167]

Other members argued that the MPR should be maintained as the highest state institution and executor of people's sovereignty, but that its

160 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 94.

161 As stated by A.M. Luthfie (F-Reformasi) and Yusuf Muhammad (F-KB). See Ibid., pp. 109, 159.

162 As stated by Pranarka, Dahlan Ranuwihardjo, Sri Soemantri, and Pattiasina. Ibid., pp. 201, 231-232, 241 and Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit*., Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 542-543. In that regard, Pattiasina argued that the appointed representatives of the functional groups should be replaced by the representatives of the isolated and backward people.

163 As stated by Dardji Darmodihardjo of the *Paguyuban Manggala* (Association of National Level Instructors of State's Ideology Training) and Brig. Gen. A.S.S. Tambunan, a political officer of the Armed Forces. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 69, 253-254.

164 As stated by J.E. Sahetapy (F-PDI-P). Ibid., pp. 72-73.

165 As argued by Sutjipno (F-PDI-P). Ibid., p. 74.

166 As argued by Andi Mattalatta (F-PG). Ibid., p. 78.

167 As argued by Pataniari Siahaan (F-PDI-P). Ibid., p. 92.

authority should be reviewed[168] or limited to the powers stipulated in the Constitution.[169] Some proposed limiting the MPR's power by omitting the last word "*sepenuhnya*" in Article 1(2) of the 1945 Constitution.[170] Checks and balances could come from strengthening both the MPR (as the highest state institution) and all subordinate state institutions.[171] However, empowering the MPR as the supreme institution would instil a parliamentary characteristic, rendering the political system unstable.[172]

Others argued that if the people elect a president directly, the MPR should be abolished.[173] Others believed that despite direct elections, the president must remain accountable to the MPR.[174] Another suggestion was to regard the MPR as a Constituent Assembly in another form, dealing with constitutional issues.[175]

Factions and society at large also differed about the MPR's membership. Within the factions in the PAH I, there were members who argued that those who do not exercise their voting rights and who keeps the same distance with each contestant should have their representatives be appointed members of the MPR.[176] Likewise, the functional groups who are accommodated in the house of representatives and regional representatives should be represented in the MPR.[177] In society there was also the opinion

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168 As argued by Hamdan Zoelva (F-PBB), Valina Singka Subekti (F-UG) and Seto Harianto (F-PDKB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 121, 130.

169 As proposed by Asnawi Latief (F-PDU) and Taufiqurrahman Ruki (F-TNI/POLRI), see Ibid., pp. 103, 175.

170 Article 1(2) of the original 1945 Constitution states that the "Sovereignty shall be vested in the hands of the people and shall be executed by the People's Consultative Assembly in full" (emphasis added). As proposed by Samsi Husairi and Suharsono from the University of Jember and Ahmad Bagdja from the Board of Nahdlatul Ulama (NU). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 398, 590.

171 As proposed by Agun Gunandjar Sudarsa (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 84.

172 As argued by Harjono (F-PDI-P). See Ibid., pp. 304-305.

173 As argued by Lukman Hakim Saifuddin (F-PPP), Hatta Mustafa (F-PG), and Bagir Manan from the University of Pajajaran Bandung. See Ibid., pp. 92, 273, 355.

174 As stated by A.M. Luthfie (F-Reformasi), Gregorius Seto Harianto (F-PDKB) and Hendi Tjaswady (F-TNI/POLRI). See Ibid., pp. 121, 130.

175 As argued by Bagir Manan of University of Pajajaran. See Ibid., p. 353.

176 As argued by Anthonius Rahail (F-KKI). See Ibid., p. 116.

177 As argued by Hendi Tjaswady (F-TNI/POLRI). See Ibid., p. 130. The membership of the existing MPR (700 members) consisted of 462 members of the DPR elected in the election and 38 President's appointed members of DPR from the Armed Forces and the Police, 135 delegates of the provinces elected by the Provincial House of Representatives (5 members from each of the 27 provinces) and 65 representatives of the functional groups proposed by their respective organization to and selected by the KPU (Komisi Pemilihan Umum – General Election Commission). See Law no. 4/1999 on the Composition and the Status of the People's Consultative Assembly, the House of Representatives, and the Regional Houses of Representatives.

that the existing composition of the members of the MPR, which included members of the DPR, the regional delegations who were elected by the provincial Houses of Representatives and the appointed delegates of the functional groups and the Armed Forces (the military and the police), could be maintained.[178]

Alternatively, there was suggestion that the MPR should only comprise of members of the House of Representatives (DPR) and members of the Council for Representation of the Regions (DPD) who are elected in elections.[179] In addition, there were those who argued that the MPR should comprise of the elected members of the DPR and members of the DPD and augmented only with appointed delegates of the Armed Forces.[180]

Previously, the Armed Forces commander asserted that as the highest state institution holding the people's sovereignty, the MPR should consist of DPR members: directly elected political party representatives and regional delegates. The Armed Forces had decided to abandon its involvement in practical politics since its neutrality in the 1999 election and by ending its presence in the DPR. However, he added that the Armed Forces' personnel are citizens with equal political rights, namely the right to vote and to stand in elections. Nevertheless, the Armed Forces would not employ that right to vote and to stand in elections for the sake of unity and cohesiveness in carrying out its duty. By contrast, the commander emphasized that the Armed Forces wished to contribute to determining the nation's future direction. Against that backdrop, he affirmed that whether having an Armed Forces faction in the MPR was necessary or not depended entirely on PAH

178 As reported from PAH I public hearings in Palangka Raya, Central Kalimantan. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 24. In that regard, Pattiasina from the Indonesian Churches Communion (PGI) proposed to replace the delegates of the functional groups with representatives of the isolated and backward communities. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 545.

179 As among others argued by Valina Singka Subekti, an appointed MPR member from Functional Group (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 257, and A. Djoko Wiyono from Bishop's Conference of Indonesia (KWI), Ahmad Watik Pratiknya of Muhammadiyah, Ahmad Bagdja of Nahdlatul Ulama (NU). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 517, 585, 590, and by Ida Bagus Gunada from Parisadha Hindu, Affan Gaffar from University of Indonesia and others. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 5-6, 287.

180 As argued by Yusuf Muhammad (F-KB) and Anthonius Rahail (F-KKI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 116, 159, and such as reported from a public hearing in Palangka Raya, Central Kalimantan. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 24.

I's deliberations. The Armed Forces did support the MPR's position as the highest political institution that determined national policy.[181]

Another topic regarding the MPR was its future form. In the future, the MPR could be retained as a bicameral institution which consists of two chambers: the DPR and the DPD. Proponents of the DPD's formation explained that the it was not a representation of states, such as in a federal country (e.g., the United States or the Federal Republic of Germany), but as a forum to channel the distinctiveness of each province's interests at a national level policy making process from a unitary state Republic of Indonesia.[182] Others argued that if the MPR is no longer the supreme institution, the MPR should become a non-permanent body which consists of the House of Representatives (DPR) and the Council for Representation of the Regions (DPD).[183] Thus, after obtaining various ideas regarding people's sovereignty and the MPR, PAH I began to discuss the topic during the internal meeting on 20 May 2000.

PAH I could not complete this topic during the amendment process' second stage and postponed it to the next stage.[184]

#### *VI.2.3.5 Elections and political parties as constitutional instruments for the circulation of power*

Continuing the discussions from the amendment's first stage, all PAH I factions contended that the Constitution should contain election provisions. One PAH I member stated that the 1945 Constitution is unique because it affirms that the Unitary State of the Republic of Indonesia is a democratic state that adheres to people's sovereignty and has people's representative institutions, but it has no election provisions (See III.2.2.2).[185]

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181 As asserted by Admiral Widodo, the Commander of the Armed Forces before a PAH I public hearing on 25 February 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, Ibid., pp. 424, 445.

182 As argued by Ichlasul Amal of Gajah Mada University, see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 378, and Isbodroini of Indonesian Academy of Sciences (AIPI) and John Pieris of Christian University of Indonesia (UKI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 290, 390.

183 As stated by Lukman Hakim Saifuddin (F-PPP), Hamdan Zoelva (F-PBB), Asnawi Latief (F-PDU), Gregorius Seto Harianto (F-PDKB) and Yusuf Muhammad (F-KB). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 212.

184 The topic of the composition of the MPR was finally agreed upon in the fourth phase of the amendment process in 2002.

185 Stated by Hobbes Sinaga (F-PDI-P). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 25. Until then, the provisions on elections were regulated by ordinary laws. Deliberately, provisions on elections were not incorporated in the original 1945 Constitution. See Sekretariat Negara Republik Indonesia, *op. cit.*, p. 42.

At the start of the 6 December 1999 PAH I meeting, factions argued the Constitution should stipulate those elections are the process for realizing people's sovereignty and political parties are essential in a democratic country.[186] This opinion was widely shared by the public. Public regional hearings reported that the Constitution should stipulate that an election is to be conducted simultaneously, periodically, generally, secretly, and fairly.[187] Factions endorsed this. Discussions focused on whether elections for members of the Houses of Representatives should be different from the elections for executive positions (e.g., president, governor, regent, and mayor). A small PAH I team was assigned to explore the ideas. It concluded that political parties should nominate the candidates for the Houses of Representatives and that DPD candidates should be individuals.[188] The factions also concluded that elections should be managed by a national, permanent, and independent commission.[189] Lastly, factions concluded that different articles should regulate the election of the president and members of the Houses of Representatives.

Subsequently, considering conclusions regarding regional autonomy and human rights, the factions agreed that heads of regions (i.e., governors, regents, and mayors) should be elected democratically. These elections could be adjusted to the local context, especially its history, customary law, and traditions, as long as they were still democratic.[190]

Factions agreed that not every political party could stand in the elections, but that they would need to meet certain requirements. The Constitution also needed provisions regarding political parties. It had to affirm that a political party is the manifestation of people's political aspirations and should be managed openly and democratically. It was noted that in some countries like Germany and South Korea, the government financially supports political parties.[191] Others underlined that political party provi-

186 Stated among others by Hamdan Zoelva (F-PBB) and Anthonius Rahail (F-KKI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 96, 116.

187 Reported in the PAH I meeting on 6 June 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 5.

188 DPD stands for *Dewan Perwakilan Daerah* or the Council for Representation of the Regions.

189 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit*., Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 13.

190 Factions agreed that the state should recognize and respect units of regional government of a specific or special nature and that the state should recognize and respect entities of *adat* (customary) law along with their traditional rights, which were later stipulated in Article 18B of the 1945 Constitution. Similarly, factions agreed that the state should respect the cultural identity and rights of traditional communities in harmony with civilization, which later became one of the human rights stipulated in Article 28I (3) of the 1945 Constitution. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit*., Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 515-521.

191 As elucidated by Soedijarto (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 17.

sions should not merely complement election provisions. The Constitution should also determine the threshold and other requirements for a political party to participate in the elections. While the Constitution should guarantee the rights to establish and join a political party, a plan to adjust the political party system to the presidential system would also be necessary.[192]

Regarding the threshold, the discussion considered Germany as an example. A political party that obtains less than 5% of the votes should hand the votes to the political party or parties who won more than 5%.[193] A political party has an important role in educating the nation and raising the rationality level in the political process.[194] However, as reported to the MPR Working Body on 2 August 2000, although PAH I agreed on election principles, it did not reach an overall agreement, especially regarding the presidential election.[195] Thus, election topics were included in the attachment of MPR Decree No. IX/2000 for further deliberation.[196]

### *VI.2.3.6 Presidential election*

At the beginning of the amendment process' second stage, factions reiterated their respective opinions regarding the presidential election. There were factions who argued that the people should directly elect the president and vice president.[197] Public hearings and regional working visits revealed that this opinion had also evolved among the public at large.[198] A delegation at a PAH I public hearing emphasized that a direct presidential election is the hallmark of democracy and is more legitimate. The MPR electing the president is prone to manipulation.[199] Likewise, another delegation stated that a direct presidential election is more legitimate. An academic noted that if the president is elected directly by the people, she or he is not accountable

192 As argued by Pataniari Siahaan (F-PDI-P). Ibid. p. 46.

193 As elucidated by Soedijarto (F-UG). Ibid. p. 47.

194 As emphasized by Sutjipno (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Enam, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 385-386.

195 Ibid. p. 454.

196 See Attachment VI.4.

197 As stated by Lukman Hakim Saifuddin (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 42.

198 As reported by teams of PAH I who undertook working visits to North Sumatera, Aceh, West Sumatera and South Sumatera. Ibid. pp. 421, 423. Also stated in a PAH I public hearing by Ida Bagus Gunadha from Parisadha Hindu and Suhadi Sanjaya from the Indonesian Buddhist Council (WALUBI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, Ibid., pp. 6, 35.

199 As argued by Saafruddin Bahar from the Association of Indonesia Political Sciences (AIPI) and Azyumardi Azra from the Indonesian State Institute of Islamic Studies (IAIN) Ciputat. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, Ibid., pp. 282, 454. A similar opinion was also stated by Guswin Agus from Bandung Institute of Technology (ITB) in a PAH I public hearing. See Ibid. p. 489.

to the MPR.[200] However, in a direct election, people will have a sense of ownership, they will feel more responsible and more represented.[201] There was also a regional report supporting a direct election, but it added that the candidates should be nominated by the political party that had won the election for the House of Representatives.[202]

However, other factions, and some of the people consulted, also argued that the MPR should continue to elect the president and the vice president. They argued that the people were not ready for a direct election and that it would not conform to the fourth principle (*sila*) of *Pancasila*, which requires deliberation among representatives.[203] Likewise, an academic argued that conducting a direct presidential election is difficult and that it could endanger national integration. Further, the argument that an indirect presidential election is less legitimate than a direct presidential election is without an academic basis.[204] In the meantime, the PDI-P Central Board's meeting on 11 April 2000 decided[205] that the MPR should conduct the presidential and vice-presidential election, as stipulated in the 1959 version of the 1945 Constitution.[206]

Another matter regarded the issue of ethnic (minority) groups: Javanese versus non-Javanese. One speaker stated that if the candidate won the elections with a simple majority, then the Javanese would dominate the election. Therefore, a presidential candidate should win the election if they win 50% of votes in half of the provinces, plus one.[207] In response, other member said that the above formulation would result in non-Javanese domination. It is a paradox, moving from one extreme to the other. Therefore, the member stated that what is important is that the Constitution should limit the powers of the president.[208]

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200 As argued by John Pieris from the Indonesian Christian University (UKI). Ibid. p. 391.

201 As emphasized by Theo Sambuaga (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 261.

202 As reported from South Kalimantan. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 24.

203 As proposed by Hendi Tjaswady (F-TNI/POLRI) (F-KB) and Syarief Muhammad Alaydrus. Hendi Tjaswady stated further that direct election by the people was not in accordance with the desire of some factions to strengthen the MPR. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 467, 468.

204 As asserted by Affan Gafar from the University of Indonesia (UI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 259-260.

205 According to the PDI-P secretary general. PDI-P is also known as the Indonesian Democratic Party of Struggle.

206 As stated by Sutjipto, the Secretary General of PDI-P. See *Kompas Daily*, 12 April 2000, p. 6.

207 As stated by Saafruddin Bahar from AIPI. Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 282.

208 As stated by Isbodroini Soejanto (AIPI). Ibid. p. 316.

Regarding the requirement that the president and the vice president should be a native Indonesian (according to Article 6(1) of the initial Constitution), some wanted to change it and others proposed maintaining it.[209] One academic argued that, although it contradicts reform ideas, the requirement should remain because of its social sensitivity.[210] Another asserted that the requirement was discriminatory and incompatible with democracy. It would be sufficient if the Constitution required the candidate to be an Indonesian citizen.[211] Similarly, delegations from various society groups argued that the president and vice president should be non-naturalized[212] Indonesian citizens[213] who were at least 35 years old.[214]

Later, in an informal meeting on 3 July 2000, PAH I noted two alternatives on how to organize a presidential election with MPR involvement. First, as proposed by F-Reformasi, the election would consist of two stages. Firstly, the MPR would elect two presidential candidates. Then the people would vote by choosing between these two candidates. Alternatively, as proposed by F-PDI-P, the two presidential candidates will be nominated by the political parties finishing first and second in the general election, after which the MPR would elect the president from among the two candidates. Other factions were still in favour of a direct election by the people.[215]

Eventually, PAH I did not manage to conclude this topic and agreed to discuss it further at the next opportunity.[216]

### *VI.2.3.7 Decentralization*

Feelings of dissatisfaction, of being ignored or treated unfairly by the central government, had been circulating in the regions for quite some time. Many felt they did not get a fair share of the proceeds of their region's natural resources or did not have sufficient authority to manage the regions. Political societies often heard critics say that the realization of Indonesian national unity (*bhinneka tunggal ika* – unity in diversity) had apparently only emphasized unity (*tunggal*) while ignoring diversity (*bhinneka*).

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209 As reported by Valina Singka Subekti (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 427.

210 As argued by Nazaruddin Syamsuddin from AIPI. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 277, 310.

211 As asserted by Isbodroini Soejanto from AIPI. Ibid. p. 287.

212 As stated by Teddy Yusuf from PSMTI. See Ibid. p. 148.

213 As argued by Ida Bagus Gunadha from Parisadha Hindu and Suhadi Sanjaya from the Indonesia Buddhist Association (WALUBI) and Teddy Yusuf from the Indonesian Chinese Clan Social Association (PSMTI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 6, 35, 148. Teddy Yusuf is a retired Brigadier General of the Indonesian Military.

214 As proposed by Ida Bagus Gunadha from Parisadha Hindu. Ibid. p. 6.

215 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Enam, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 281, 284.

216 See Attachment VI.4.

The New Order's end and the reform era's beginning had paved the way for the people's various aspirations and disappointments to surface. Movements appeared openly demanding the establishment of a federal state or a separation from Indonesia in various regions (e.g., Aceh, Papua, Riau, and East Kalimantan).

This was not a formal topic at the October 1999 amendment meeting. Nevertheless, the public and MPR members frequently discussed central and regional government tensions, such as the lack of delegation of regional authority and unfair financial relations between the central and local governments.

Amin Rais, the MPR's chairman, speaking to the delegation of the Communication Forum of Eastern Indonesia,[217] asserted that one should fight for the idea of a federal state.[218] In a television interview, Rais warned that the regional upheavals could not be considered simple or trivial. Assuming that Indonesia was in a similar stage of reform, Rais reminded the committee that the rigid centralized government system practiced in the Soviet Union and Yugoslavia had broken these countries. To avoid the danger of balkanization, Rais offered the establishment of a Republic of United States of Indonesia with a federal system.[219] The suggestion immediately drew protests[220] and sparked societal debates between supporters and opponents.[221] Responding to the critics, the speaker explained that he had tried to trigger a discussion which eventually agree on an appropriate solution.[222] In the meantime, on 1 December 1999, independent activists in Jayapura, Papua, hoisted *Bintang Kejora* (the Morning Star), the flag of independent Papua that had been raised in 1961.[223]

Initiated by the Forum of Regional Representatives, a "Unitarianism versus Federalism" seminar was planned in the MPR compound on 7 December 1999. The MPR chairman was to be the keynote speaker. Instantly, factions

217 Also known as the *Forum Komunikasi Indonesia Bagian Timur*.

218 Media Indonesia Daily, 26 October 1999, p. 13.

219 Television interview with Amien Rais, MPR speaker, 25 November 1999.

220 As stated in the Working Body meeting on 25 November 1999 by Pramono Anung (F-PDI-P). See Majelis Permusyawaratan Rakyat Republic of Indonesia, Buku Kesatu, Jilid 1, *Risalah Rapat ke-4 sampai dengan ke-7, Badan Pekerja MPR (Sidang Tahunan 2000)*, Sekretariat Jenderal MPR-RI, 2000, p.38. This minute is an old version before it was revised in 2010. The 2010 version does not include this information.

221 Arbi Sanit from the University of Indonesia (UI) supported the idea while Ichlasul Amal of Gajah Mada University (GAMA) disagreed. See *Kompas Daily*, 2 December 1999. Amal warned not to get stuck in terminology which juxtaposes a unitary state with a federal state; what matters is the substance.

222 See Majelis Permusyawaratan Rakyat Republic of Indonesia, Buku Kesatu, Jilid 1, *op. cit.*, Sekretariat Jenderal MPR-RI, 2000, p. 40.

223 1 December 1961 is assumed by the Organization of Free Papua as West Papua's Independence Day. Based on the New York Agreement of 15 August 1962, the Dutch Government handed over the regional administration to UNTEA (United Nations Temporary Executive Authority). On 1 May 1963, UNTEA handed over the region to Indonesia.

protested the event, asserting that the initiative violated the preliminary agreement to the amendment process, which included maintaining the republic's unitary state.[224] The MPR's chairman could discuss the issue at a university campus as a professor, but it could be considered a political move if discussed in the MPR.[225] Another member argued that PAH I was not in the position to protest the event.[226]

Accordingly, one member's faction was ready to discuss the issue but the faction was firm in upholding the unitary state.[227] Another member underlined that the MPR should listen carefully to the regions' aspirations with a problem-solving approach.[228] Another member warned that any attempt to change the unitary state would be unconstitutional and should be revoked.[229] However, argued others, the MPR could facilitate discussions regarding the possibilities of implementing a federal state system.[230] Then, PAH I chairman reminded everyone that there was an agreement to maintain the unitary state based on the rule of law. Accordingly, there should be space for a responsive national discourse so that it could be socialized, understood, and eventually shared by the whole nation.[231]

A member argued that the slogans of unity and oneness were overly imposed, leading to a more authoritarian and centralistic government. This was against the idea of *bhinneka tunggal ika* (unity in diversity), upheld by the founding fathers. Thus, he continued, the issue should be discussed, keeping in mind that the federal state is frightening to many due to its negative historical connotation. However, discussions should not be considered taboo, since it was Mohammad Hatta, the first vice president, who sparked the idea. In the future, the provincial government should at least have complete autonomy.[232] Another member argued that problems would not necessarily be overcome by changing the unitary state to a federal state. In a federal state, the chance that a state separates from the Republic increases and political and economic infiltrations from the outside become easier. Furthermore, the unitary state should protect the whole nation. The

224 As stated by Soewarno (F-PDI-P), Rully Chairul Azwar (F-PG), Ali Masykur Musa (F-KB), Soedijarto (F-UG), Hamdan Zoelva (F-PBB), and Happy Bone Zulkarnain (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 40, 70.

225 As stated by Sutjipno (F-PDI-P). See Ibid., p. 66.

226 As argued by Theo Sambuaga (F-PG). Ibid., p. 67.

227 As asserted by Agun Gunandjar Sudarsa (F-PG). Ibid., p. 83.

228 As argued by Hamdan Zoelva (F-PBB). See Ibid., p. 94.

229 As stated by Asnawi Latief (F-PDU). Ibid., p. 102.

230 As stated by Hamdan Zoelva (F-PBB) and Patrialis Akbar (F-Reformasi). Ibid., pp., 161, 164.

231 As stated by the chairman of PAH I before a public hearing on 13 December 1999. See Ibid., p. 191.

232 As stated by A.M. Luthfie (F-Reformasi). Ibid., p. 110.

nation consists of hundreds of tribes with different religions, languages, and various customs and traditions, inhabiting thousands of islands. For that reason, he continued, sufficiently funded development programs would be needed to develop a broad level of regional autonomy.[233]

In the meantime, the same discourses also evolved in society. There were those in favour of maintaining the state's unitary form,[234] those who wanted a federal republic, and even those who wanted to separate from Indonesia.[235] Some argued that changing the form of the state was beyond the MPR's authority, because the authority belonged to the people as the owners of sovereignty.[236] A member reminded the committee that the unrests in Aceh, South Sulawesi, Maluku, and Papua were not trivial. They endangered the reform process. Gorbachev had brought down the Soviet Union with his *Glasnost* and *Perestroika*. This was a serious issue that needed a constitutional amendment. Therefore, PAH I should thoroughly discuss the central government's domination of economics, politics, and social-cultural affairs, alongside the demands for a federal state and secession. She noted that broad autonomy remained the best solution.[237] In that regard, another member argued that those problems did not originate in the state's form, but from mistakes in state governance.[238] Likewise, another member underlined that the real problem was not the state's unitary form but rather how authority was distributed and how regions were respected.[239]

Responding to the deliberations, the PAH I chairman asserted that there was no intention to change the unitary state or contradict it with the ideas of decentralization. The unitary state without decentralization, he continued, was authoritarian. The unitary state system recognizes autonomy as a sub-system for decentralization.[240]

233 As stated by Anthony Rahail (F-KKI), Ibid., p. 114.

234 As asserted by Ruslan Abdulgani and Pranarka. See Ibid., pp., 196, 203. Abdulgani is one of the prominent figures of the 1945's revolution, Minister of Information under President Soekarno, and former Indonesian Permanent Representative to the United Nations.

235 A report from a public hearing in Jayapura, Papua, on 4 February 2000, recorded a "suggestion" from the audience to delete paragraph I of the Preamble, which states, "Whereas independence is the alienable right of all nations, therefore, all colonialism must be abolished in this world as it is not in conformity with humanity and justice", because it was not appreciated in accordance with the wishes of the majority of the Papuan people who wanted to be independent. Further, the public hearing reported that a federal form of the state should be considered. See Ibid., p. 438.

236 As stated by Hendi Tjaswady (F-TNI/POLRI). Ibid., p. 129.

237 As stated by Valina Singka Subekti (F-UG). Ibid., p. 182.

238 As stated by Taufiqurrahman Ruki (F-TNI/POLRI). Ibid., p. 175.

239 As stated by Yusuf Muhammad (F-KB). Ibid., p. 158.

240 As asserted by the chairman of PAH I in a PAH I meeting on 16 December 1999. See Ibid., p. 347.

The issue also evolved among academics. The unitary state should be maintained[241] and autonomy should be delegated to the provincial government. According to Van Vollenhoven's theory,[242] the provincial level conditions reflected the country's real conditions.[243] Others argued that autonomy should be delegated to the district level, because as Mohammad Hatta once said, autonomy should be as close as possible to the community and district-level autonomy would minimize chances of separation.[244] Some emphasized that autonomy should be delegated as broadly as possible. Others underlined that the level of authority delegated to the regions is the most important.[245] There was also an argument that the third principle of *Pancasila*, the unity of Indonesia (*Persatuan Indonesia*), was understood as unity and practically implemented as a unitary state, but that it should be implemented as a united or federal state.[246]

Responding to these discourses, an academic reminded the committee that Indonesia is a young country with a pluralistic society, with a strong ethnic, racial, and religious orientation, with diversity at the village level. This diverse society is prone to conflict. Handling it incorrectly will cause disintegration. Therefore, multiculturalism should be promoted. Conflicts should not be eliminated. The resolution of conflict by force should be avoided. The process of becoming Indonesia should continue as a transformation instead of an engineering process.[247] Responding to the argument, a PAH I member stated that Indonesia should learn from the Dutch who colonized the country and maintained a level of pluralism for two reasons, namely for their colonial interests and scientific purposes. Those drafting amendments should learn from history that they need a concrete historical foundation and should avoid myths.[248] Another academic stated firmly that federalism should be completely rejected. The diverse Indonesian society is not assembled and united based on certain religious, ethnic, racial and class

241 As stated by Samsi Husairi of the University of Jember and Azyumardi Azra of the Indonesian State Institute of Islamic Studies (IAIN) Ciputat, Jakarta. See Ibid., pp. 397, 455.

242 Cornelis van Vollenhoven was a Dutch anthropologist, famous for his work "*Hukum Adat*" (Customary Law) in the Netherlands East Indies and respected as "*Bapak Hukum Adat*" (The Father of the Customary Law). At the age of 27, he was appointed Professor of Constitutional Law and Administration of the Dutch Overseas Regions and Customary Law of the Netherlands East Indies at Leiden University.

243 As stated by Ismail Suny of the University of Indonesia (UI) in a PAH I public hearing on 13 December 1999. Ibid., p. 252.

244 As argued by Ichlasul Amal (Gajah Mada University – GAMA). Ibid., p. 387.

245 As argued by Isbodroini and Diana Fauziah of the Academies of Sciences Indonesia (AIPI). Ibid., p. 316.

246 As stated by Nazaruddin Syamsuddin of AIPI. Ibid., pp. 236, 318.

247 As stated by Sardjono Yatiman of the University of Indonesia (UI) in a PAH I public hearing on 7 March 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 219-222.

248 As stated by Sutjipno (F-PDI-P). Ibid., p. 227.

identities, and does not support federalism.[249] The public at large voiced similarly diverse opinions. Either maintain the unitary state with a broad level of provincial or district autonomy,[250] change it into a federal state, or demand a separation from Indonesia.[251] There was also the view that the unitary state form is final and that a broad level of autonomy should be implemented within it.[252]

There was also an economic side to these debates. A PAH I seminar on the economy in Yogyakarta recommended that the allocation and utilization of economic regional resources should be regulated by laws respecting regional interests, the national economy's integrity, and equitable sharing, following sustainable development principles. The seminar recommended that disadvantaged regions be prioritized to reduce regional disparities.[253]

Eventually, the factions agreed to uphold the unitary form of the Republic of Indonesia, including those that had previously raised the issue of federalism (F-PBB and F-Reformasi).[254]

From then on, the factions focused on how to devolve sufficient authorities and develop fair financial relationships between the governments to develop the regions. Eventually, Commission A tasked a drafting team to formulate the conclusions regarding decentralization as an amendment to the articles on Regional Government. To formulate the articles, Commission A invited a team of associate experts. The Commission A chairman asked Bagir Manan to draft the articles using the "mathematical derivative-integral relationship". The formulation should affirm that the province is

249 As stated by Affan Gaffar (UI). Ibid., p. 257.

250 As stated by among others Pattiasina from the Indonesian Council of Churches (PGI), Achmad Bagdja from Nahdlatul Ulama (NU), Ahmad Watik Pratiknya (Muhammadiyah), see Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 541, 549, 586, and Ida Bagus Gunadha (Parisadha Hindu), see Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 7.

251 As reported among others from Banda Aceh, Medan and Ujung Pandang. See Ibid., pp. 421, 437. Public hearings in Jayapura and Pekanbaru also reported the demand for independence, separation from Indonesia. See Ibid., p. 439 and Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945,* Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 9, 22, 23.

252 As stated by, among others, Tarman Azam of the Journalists Association of Indonesia (PWI). Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 321.

253 Seminar on economy in Yogyakarta, 25 March 2000. Conducted by PAH I in collaboration with the Association of Indonesian Economists (ISEI) and GAMA. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945,* Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 13-14.

254 Among others, A.M. Luthfie (F-Reformasi) explicitly asserted that F-Reformasi agreed that the unitary state is the final form of state. See Ibid., p. 523.

derived from the unitary state and the district is derived from the province, so that there is hierarchical relationship.[255] Further, Commission A concluded that all regions are granted a broad level of autonomy, which is stipulated by law and adjusted to each region's peculiarities.

In that regard, the Constitution ensured that the state shall recognize and respect the traditional regional communities along with their customary rights. This would occur in-line with social development and while respecting the unitary state principles. Regarding the financial relationship between the central and regional governments, each shall be determined according to the region's actual conditions. Therefore, the level of regional autonomy is tiered and asymmetrical. Further, it was concluded that the central government would control matters regarding religion, education, finance, defence, and foreign relations.

Regarding regional leader elections, a faction in the PAH I meeting suggested that they should be democratically elected under laws that would recognize each region's distinctiveness and historical background.[256] The elections would not be uniform but would recognize the regions as subsystems of the unitary state. The PAH I Chairman concluded that either the regional leaders would be elected by the local House of Representatives (DPRD) or directly by the people.[257] Later, another member suggested the governor should be elected by the provincial House of Representatives and then submitted to the central government for approval, considering the governor's two functions (i.e., being both the central government's representative and provincial leader).[258] Eventually, considering each region's distinctiveness and historical background, it was concluded that the regional leaders (i.e., the governor, *bupati* (district head), and *walikota* (city mayor) would be elected in various democratic ways, to be regulated further by law.[259]

On 18 August 2000, the MPR ratified the amendment of Article 18 of the 1945 Constitution, which provides for a broad level of regional autonomy.

#### *VI.2.3.8 Social welfare (kesejahteraan sosial)*

At this stage, PAH I also discussed the economy and social justice. The fifth *sila* (principle) of *Pancasila* states that the people's sovereignty in Indonesia is based on "realizing social justice for all the people of Indonesia." At

255 The derivative-integral relationship in mathematics can be described as the relationship between parts or fractions of a whole which, when merged again, will reshape the original integrity.

256 As proposed by Hobbes Sinaga (F-PDI-P). See Ibid., p. 517.

257 As concluded by the chairman of PAH I on 29 May 2000. Ibid., p. 544.

258 As proposed by Harjono (F-PDI-P). Ibid., p. 565.

259 As proposed by Lukman Hakim Saifuddin (F-PPP) in an informal consultation of Commission A on 13 August 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945,* Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 399.

the PAH I plenary meeting on 6 December 1999, the first faction speaker asserted the urgency of strengthening the consistency of certain articles with the fifth principle of *Pancasila*: Articles 31 and 32 of Chapter XIII on Education and Articles 33 and 34 of Chapter XIV on Social Welfare.[260] Likewise, others emphasized that the national economic system should realize prosperity and social justice.[261] Others proposed clarifying Article 33 on Social Welfare.[262]

In a PAH I public hearing, a scholar stated that a market economy is a technical device that is indispensable for realizing social welfare (*kesejahteraan sosial*), which is an ideological concept.[263] Further, an economist argued that the Indonesian economy should be organized as a managed market economy, which is based on efficiency and equity. A managed market economy relates to human rights and democracy and should include a social safety net scheme.[264] However, another economist reminded the committee that while the convergence of a market economy and social welfare is a global trend, one should be realistic. A welfare state is expensive and inefficient if the state is fully responsible for the citizens' welfare, so a social safety net scheme is necessary and should be incorporated into the Constitution.[265] Furthermore, considering the increasingly integrated global economy, the national economy requires increasing competitiveness and efficiency that should be sustained by law and order based on the supremacy of law.[266]

PAH I members raised various concerns. One member argued that the ideas mentioned above did not reflect the essence of Article 33 because they did not specify the role of cooperatives and overly emphasized the role of the free market.[267] Another member sought clarity on the differences between the proposed managed market economy and the previous regime's developmentalism, which pursued growth and emphasized stability at the expense of democracy.[268]

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260 Stated by Hobbes Sinaga (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 80.

261 As stated by Agun Gunandjar Sudarsa (F-PG), Abdul Khaliq Ahmad (F-KB), and Valina Singka Subekti (F-UG) Ibid., p. 86, 89, 137.

262 As stated by Sutjipno (F-PDI-P). Ibid., p. 146. Stated in a PAH I public hearing on 13 December 1999.

263 As stated by Pranarka from the Centre for International and Strategic Studies (CSIS) in a PAH I public hearing on 13 December 1999. Ibid. p. 225.

264 As stated by Irzan Tanjung from the Indonesian Economists Association (ISEI) in a PAH I public hearing on 21 February 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 194, 197.

265 As stated by Sri Adiningsih (ISEI). Ibid. pp. 199, 201.

266 As stated by Prasetiono (ISEI). Ibid. pp. 204-205.

267 As argued by Frans Matrutty (F-PDI-P). Ibid. p. 207.

268 As stated by I Gusti Dewa Palguna (F-PDI-P). Ibid. p. 211.

The original Article 33 contains the following sentence: "The land and water and the natural wealth contained in it shall be controlled by the state and utilized for the optimal welfare of the people." This was one of the issues discussed at length. In relation to this statement, an academic at a PAH I public hearing mentioned that the third paragraph of Article 33, which states "*dikuasai oleh Negara*" (shall be controlled by the state), had been interpreted as removing native legal rights, especially traditional communal rights (*hak ulayat*). The suggestion was to re-center the interpretation back on the people's economy.[269]

The same aspiration also evolved in public regional hearings, such as in West Sumatera, South Sumatera, and Papua. They reported a demand to change the phrase "shall be controlled by the state" (*dikuasai Negara*) to "shall be managed by the state" (*dikelola negara*) or "shall be protected and managed by the state" (*dilindungi dan dikelola Negara*).[270] Therefore, economists and constitutional experts had to define the operational meaning of "shall be controlled by the state and shall be utilized for the greatest benefit of the people." One member of PAH I held that this phrase is not obsolete and must be implemented. Under the control of the state should be understood as 'regulated' (rather than 'owned') by the state.[271]

On the same topic, another PAH I member argued that "*dikuasai Negara*" (controlled by the State) and "*ekonomi kekeluargaan*" (familial economy system) were obscure terms in the original Article 33 and needed clarification.[272] Similarly, "*dikuasai Negara*" (controlled by the state) in Article 33(2) should be replaced by "*diatur oleh Negara*" (regulated by the state). This change would imply that the state regulates based on people's aspirations and economic principles of natural resource management, which should follow ecological insights.[273]

A related issue was the term "familial economy". One academic questioned this term. It was a justification of state corporatism, where the state is the big brother and cooperative arm of the government. The familial economy should be replaced by an equal partnership.[274]

In the ensuing public hearing, a delegation proposed clarifying and strengthening the familial economy's implementation, moving beyond capital ownership. It argued that Article 33 should affirm an anti-monopoly stance. Further, achieving prosperity should happen democratically while

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269 As stated by I Dewa Gede Atmadja from Udayana University. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 366.

270 Ibid. pp. 424, 425, 438.

271 As asserted by Hobbes Sinaga (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 218.

272 As stated by Ahmad Hafiz Zawawi (F-PG). Ibid. p. 509.

273 As underlined by Asnawi Latief (F-PDU). Ibid. p. 510.

274 As stated by Yasraf Amir Piliang of Bandung Institute of Technology (ITB). Ibid. p. 494.

respecting human rights and the principles of people's sovereignty.[275] Another delegation asserted that the economy should be based on economic democracy, which envisages prosperity for everyone. The Constitution should reiterate that the state controls the country's essential economic sectors that affect people's lives.[276]

In another public hearing, a delegation proposed changing Article 33(1) from "the economy shall be organized as a common venture based upon the principles of a familial system" to "the economy shall be organized as a common venture based upon the principles of a familial system and democracy (*kerakyatan*), which gives priority to the sharing of proceeds." The delegation argued that Article 33 should stipulate that the government (under the people's supervision) controls and manages the land, water, and natural resources, regulated further by laws.[277] Another delegation asserted that the Constitution must ensure that the state is responsible for and should always take the side of low-income people to eliminate social disparities.[278]

During a PAH I public hearing on 9 March 2000, which involved several prominent economists, the PAH I chairman reiterated that the amendment was dealing with people's sovereignty, i.e., how this concept should be translated into the state's role in the economy. There was a strong call for the concerned articles to elaborate on welfare, justice, and prosperity, including Article 33.[279] Widjoyo Nitisastro stated that the MPR and Broad Outlines of State Policy are beneficial, providing the opportunity to re-assess the country's development every five years. Nitisastro asserted the importance of Article 33. It contains the foundation of economic democracy, which asserts the people's welfare (rather than individual prosperity) as a priority. Therefore, replacing Article 33's provisions would be difficult.[280]

In response, a member argued that in the last 50 years, the implementation of policies and programs (e.g., deregulation, de-bureaucratization, or privatization) had conflicted with the essence of Article 33. Another member urged the economists to clarify which economic concept would support the Constitution rather than just saying *"bukan ini"* or *"bukan itu"* ("not this" or "not that"). The same member argued that the "principles of a familial economy" should be changed to the "principles of justice" or "principles of economic democracy."[281] In that discussion, a member argued that he could not

275 As proposed by A. Djoko Wiyono from the Bishop Conference of Indonesia (KWI). Ibid. pp. 539-540.

276 As argued by Pattiasina from the Indonesian Communion of Churches (PGI). Ibid. p. 552.

277 As proposed by Nazri Adlani from the Indonesia Ulema Council (MUI). Ibid. pp. 578-579.

278 As proposed by Ahmad Bagja from Nahdlatul Ulama (NU). Ibid. p. 590.

279 As stated by the chairman of PAH I. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 290.

280 Ibid., pp. 295-296. Prof. Dr. Widjoyo Nitisastro was one of the prominent architects of economic policy during the previous regime.

281 As stated by Rully Chairul Azwar (F-PG). Ibid. p. 303.

agree with including an economic system in the Constitution. He thought it would hinder the government's initiatives. He stated that the economic system will always be dynamic and changing. He questioned whether prosperity and social justice for all people could only be achieved through an economic system based on familial principles. Likewise, he questioned whether it would be possible to achieve prosperity for all without placing natural resources under the state's control (*dikuasai Negara*). Any government, he asserted, without compromising on the principles of economic democracy and the rules of the market economy, holds the authority and is required to intervene in the market to achieve prosperity and welfare.[282] Another member argued against this, that although Indonesia recognizes an integrated economic system, in practice, it combines a traditional economy, the global economy, and a cooperative system. It should, the member proposed, change to a social market economy, such as that implemented in Germany, in which there are interdependencies between all the actors, small and large, and between the regions.[283]

One member, returning to the concept of familial economy, argued that the economy should be structured as a joint effort based on the principle of family. It is the prosperity of the people that takes precedence, not the prosperity of a person, he stated. However, to regard the cooperative as the only appropriate actor in the economy would be excessive. At least the Constitution should confirm that there are several economic actors, such as state enterprises, private ventures, and cooperatives.[284] Another member argued that establishing the Preamble's depicted welfare state is difficult. She stated that "even the developed welfare states such as Germany and Scandinavian countries are struggling to uphold the welfare state system."[285] To this, Nitisastro added that neither market forces nor government interventions are perfect. He argued that there should be checks and balances in which the government checks how these two systems interact and the House of Representatives controls the government.[286]

In the ensuing public hearing, another economist proposed changing the formulation in Article 33 from "the economy shall be organized as a common venture based on the principles of the familial system" into "the economy shall be organized as a common venture based on popular principles and social justice." The economist argued that in the context of the national economy, familial principles are irrelevant because the familial system is a mechanical form of solidarity that does not support individual productivity. Besides, familial principles are likely to lead to nepotism, collusion, and corruption. Hence, the familial system's mechanical solidarity should be replaced by organic solidarity, which has a clear division of work

282 As stated by Theo Sambuaga (F-PG). Ibid. p. 307.
283 As stated by Soedijarto (F-UG). Ibid., p. 308.
284 As argued by Ahmad Hafidz Zawawi (F-PG). Ibid. p. 309.
285 As argued by Valina Singka Subekti (F-UG). Ibid. p. 313.
286 Ibid. p. 320-321.

and is oriented towards productivity, which in turn will stimulate competition of productivity and bring progress. Within this competition, the economist elucidated, which involves the weak and the strong, the social justice principle will guarantee that each will get a share of the economic benefit in accordance with their respective rights.[287] In that regard, another economist reminded them, whether one likes it or not, the Indonesian economy will integrate with the global economy. Hence, he warned against dwelling on populism and justice, reminding that efficiency is also important. Therefore, he argued, Article 33 should be amended and stipulate a managed economy based on efficiency and justice. When necessary, the state should intervene to influence the market because the market cannot always increase efficiency and justice.[288]

From 25 to 26 March 2000, a seminar on economy which was organized by ISEI (the Indonesian Economist Association)[289] and the Faculty of Economy, Gajah Mada University in Yogyakarta[290] suggested the following amendments to Article 33:

(1) The economy shall be organized based on the principles of humanity, justice, competitiveness and efficiency, the freedom and protection of the consumers, the sustainable advantages, and the equality among the economic actors, aimed for the welfare of all the people.
(2) All natural resources, which are on state territory shall be regulated by the state and its utilization shall be regulated for the prosperity of the maximum number of people with regard to the property rights of the people.
(3) The branches of the ventures which are important to the state and are the basic needs of the people are under the authority of the state, regulated and managed based on the principles of efficiency and justice.

Further, the seminar also proposed amending Article 34 to the following:

(1) The poor as well as abandoned children shall be assisted by the state.[291]
(2) Every citizen has the right to decent public facilities.
(3) The government is obliged to provide public facilities.
(4) In case the provision of a public facility is related to more than one region, the central government will act as the coordinator.

287 Proposed by Bungaran Saragih from Bogor Agricultural University (IPB). Ibid. p. 328-329.
288 As argued by Sri Adiningsih from Gajah Mada University (GAMA). Ibid. p. 338.
289 ISEI stands for *Ikatan Sarjana Ekonomi Indonesia*.
290 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 15.
291 The original Article 34(1) stated that such children should be taken care of by the state.

As stated above, at the beginning of the second stage, a member argued that Chapter XIII on Education and Chapter XIV on Social Welfare should be made more consistent with the Pancasila, which affirms social justice for all Indonesian people.[292] In this regard, regional public hearings proposed that the Constitution stipulate the percentage of the education budget.[293] Another academic proposed that Article 31 on Education should affirm just education for every citizen. Injustice, discrimination, and inequalities should be ended.[294] Similarly, another academic added that the discrimination against the *pesantren* (Islamic boarding schools) should stop.[295]

Discussing education, a university delegation argued that education and mastering sciences and technologies are the main factors that determine the welfare and development of a nation and thus, education should be prioritized. In that regard, they stated, the national economy should be developed based on the culture of the nation and human resources instead of on natural resources.[296] Another delegation also emphasized that education is the determinant factor of economic development.[297] In response to these comments, a PAH I member agreed that the budget for education should increase. In Taiwan, the member said, the Constitution stipulates that 15% of the national budget, 20% of the provincial budget, and 25% of the district budget should go towards education.[298]

Reiterating an earlier point, another PAH I member stated that countries which allocate 4% of their GDP to education enjoy the benefits, such as people's increased productivity. These countries include the USA, Germany, the Netherlands, Japan, South Korea, Taiwan, and Malaysia. Countries that do not follow this standard, such as those in Latin America, are still developing, even 100 years after independence and with academic institutions older than Harvard University.[299]

In a public hearing, a delegation representing the Catholic church argued that Article 31 on Education needed substantive revision. The Constitution should prevent the centralization of education. Education must be construed as advancing science and technology, morality, national consciousness, and culture.[300] Another religious (Islamic) delegation emphasized the

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292 As stated by Hobbes Sinaga (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 80.

293 Reported by Hatta Mustafa (F-PG). Ibid. p. 425.

294 As stated by Azyumardi Azra from the State Islamic Institute (IAIN). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 456.

295 As reminded by Nazaruddin Umar (IAIN). Ibid. p. 458.

296 As argued by Rizal Zaenuddin Jamin from the Bandung Institute of Technology (ITB). Ibid. p. 486.

297 As emphasized by Bana Kartasasmita (ITB). Ibid. p. 491.

298 As stated by Soedijarto (F-UG). Ibid. p. 514.

299 As stated by Soedijarto (F-UG). Ibid. p. 307.

300 As proposed by A. Djoko Wiyono from Bishops Conference of Indonesia (KWI). Ibid. p. 540.

importance of character building. Intelligent persons with a good character will form a civil society that is able to protect people from excessive or unnecessary penetration of state power, while they support and complement the state's functions.[301] Correspondingly, another Islamic delegation argued that the Constitution should guarantee that every citizen has a decent and just education and, therefore, any discrimination in education (cultural, structural, or financial) should be eliminated.[302] The Indonesian Muslim Cleric Council delegation proposed changing the term *pengajaran* (teaching) in Article 31 to *pendidikan* (educating). Teaching is more material in nature. It is about science and technology but says little about norms and morality. Article 31(2) should read "the government shall manage and organize one system of national education which leads to faith in and fear of God the Almighty and the mastering of sciences and technologies which is regulated by law."[303] However, another academic argued that the percentage of the budget allocated for education is a technical matter, which should not be included in the Constitution, as the Constitution should only contain principal matters.[304]

By the end of the second stage, PAH I could not agree on finalized versions of Chapters XIII and XIV and agreed to proceed to the next stage.

### *VI.2.3.9 Article 29 and the obligation to implement Islamic Sharia*

The initial Article 29 drafted by the Investigating Commission from June to August 1945 stated, "The State shall be based on Divinity with the obligation to implement Islamic Sharia for the adherents" (*Negara berdasar atas Ketuhanan dengan kewajiban menjalankan syariat Islam bagi pemeluk-pemeluknya*).[305] The last seven words of that sentence were and still are the most contested words in Indonesian politics. This phrase was part of the draft first principle of the state's foundation, embedded in the draft *Mukadimah* (the Preamble) of the Constitution. It was drafted by the Team of Nine, led by Soekarno and embedded in the draft Article 29. When the manuscript of the *Mukadimah* was reported to the Investigating Commission's plenary session, it was rejected. Subsequently, the Investigating Commission (BPUPK) replaced it with a declaration of independence, referring to the idea of the Greater East Asia Co-Prosperity Sphere and followed by a short Preamble. The short new Preamble also contained those seven words.

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301 As stated by Ahmad Watik Pratiknya from Muhammadiyah. Ibid. p. 586.

302 As stated by Ahmad Bagdja of Nahdlatul Ulama (NU). Ibid. p. 590.

303 As proposed by Nazri Adlani from the Indonesian Ulema Council (Majelis Ulama Indonesia - MUI). Ibid. pp. 578, 579.

304 As argued by Affan Gaffar from the University of Indonesia (UI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 286.

305 There is no official English translation of *Ketuhanan Yang Maha Esa*. In this thesis, I use the term "One and only God" which emphasises the Oneness character of God without explicitly pointing to a certain God of a certain religion.

Then, after the *Mukadimah* was rejected and replaced with the new Preamble, the BPUPK finalized the draft constitution, approving it on 16 July 1945 and reporting it to the Japanese authorities for approval. However, due to World War II, the Japanese authorities did not respond. It was this constitution's draft that was reported and discussed in the Indonesian Independence Preparatory Committee (PPKI) session on 18 August 1945, one day after the proclamation of Indonesia's independence.[306]

In that PPKI meeting, the rejected *Mukadimah* manuscript was restored again.[307] However, delegations from North Sulawesi heavily protested the stipulation authorizing the state to require Muslim citizens to implement Islamic Sharia. Regions in eastern Indonesia, for instance, vowed to secede from Indonesia if the provision was not repealed. To prevent the disintegration of the one-day old republic, Mohammad Hatta initiated a reform process with approval from prominent Islamic scholars. The Preparatory Committee plenary meeting agreed to omit the seven words from the *Mukadimah* and from the draft Article 29(1).[308] (See II.3).

Thus, Article 29 of the 1945 Constitution states that:

(1) The State shall be based upon the belief in the One and only God.
(2) The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.

While most people accepted this decision, certain societal groups were disappointed. Immediately, the 'seven words' (*tujuh kata*) became a symbol of the struggle in favour of state authority deciding whether Muslim citizens would be required to implement Islamic law. Most people and the government assumed that the stipulation is final. However, groups that support the restoration of the seven words into the constitution remain active, especially when the Constituent Assembly (*Konstituante*) was drafting a new constitution.[309] The seven words have become a slogan of struggle for those who fight for the establishment of an Islamic state in Indonesia (see V.4.6). The third PAH I meeting on 6 December 1999 was meant to discuss the Introductory Views of the Factions. During this meeting, F-PBB (an Islamic faction) proposed that the Constitution should affirm that Indonesia is not a secular state and that the Constitution's provision on religion should be strengthened. The state should be based on the principles of the One and Only God as believed by each religion. Therefore, the faction proposed

306 See Risalah Sidang BPUPKI, PPKI, 28 May 1945 – 22 August 1945, *op.cit.*, p.p. 361, 386 – 388.
307 See Sekretariat Negara, *op. cit.*, p. 248.
308 Ibid. p. 414.
309 The democratic 1955 general election established the *Konstituante*, the Constituent Assembly, with the task of making a new constitution. Despite the *Konstituante* almost finishing the draft, it failed to agree on the state's foundation, whether it would be Islam or *Pancasila*. Eventually, the *Konstituante* was dissolved on 5 July 1959 by a presidential decree.

revising Article 29(1) to "The State shall be based upon the belief in the One and Only God, with the obligation for the adherents of the religions to implement the teachings and the Sharia of their respective religions."

The faction proposed deleting "belief" (*kepercayaannya itu*) at the end of Article 29(2), arguing that *kepercayaan* obscured the article's understanding of religion. However, the speaker asserted that F-PBB did not want to change the Preamble of the 1945 Constitution, because the Preamble is a noble agreement of the nation and the state of Indonesia that should be maintained. Moreover, F-PBB affirmed that human rights should be incorporated into the Constitution just as in other modern democratic constitutions.[310] F-PBB was the only faction to propose this during the preliminary deliberation.[311]

It was the first time since the 1956-1959 *Konstituante* (the Constituent Assembly) session that the topic was raised and discussed openly in a state institution.[312] In response to the Introductory Views, other factions argued that proposals to revise Constitutional articles, such as Article 29, should adhere to the principles of the 1945 Constitution as stated in its Preamble, which is the basis for the founding of the Indonesia nation and state. The factions emphasized that the changes to the Constitution should also be based on human rights principles.[313] Then, a faction proposed that the Constitution should adopt MPR Decree No. XVII/1998 on Human Rights.[314] However, another PAH I member asserted that to regard religions as subordinate to human rights and to implement Islam according to state laws would be a problem.[315]

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310 Proposed by Hamdan Zoelva (F-PBB). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 93, 100, 161.

311 F-PBB is the faction of PBB (*Partai Bulan Bintang*–The Crescent Moon and Star Party), a political party that was established in 1998 which declared itself as the heir and the successor of *Masyumi*, a prominent Islamic political party during the old era. *Masyumi* based its vision and mission on Islam and aimed to establish an Islamic state in Indonesia.

312 During the *Konstituante* session in 1959, Saifuddin Zuhri (NU) demanded to include *Piagam Jakarta* (Jakarta Charter) into the 1945 Constitution as a condition to accept the re-enactment of the 1945 Constitution. Zuhri and other Islamic parties' representations, among others Tahir Abubakar (PSII) and Kahar Muzakkir (Masyumi), rejected Soekarno's proposal that *Piagam Jakarta* is (only) a historical document that inspires the Preamble and Article 29 of the 1945 Constitution. See Adnan Buyung Nasution, *Aspirasi Pemerintahan Konstitusional di Indonesia, Studi Sosio-Legal Atas Konstituante 1956 – 1959,* Sylvia Tiwon (transl.), Pustaka Utama Grafiti, in cooperation with Eka Tjipta Foundation, Jakarta 1995, pp. 361-364.

313 As stated by Sutjipno (F-PDI-P), Hatta Mustafa (F-PG), Zain Bajeber (F-PPP), Yusuf Muhammad (F-KB), Asnawi Latief (F-PDU), and Taufiqurrahman Ruqi (F-TNI/Polri). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 142, 146,148, 154, 157, 167.

314 As proposed by Asnawi Latief (F-PDU). Ibid., p. 167.

315 As argued by Ali Hardi Kiaidemak (F-PPP). Ibid. p. 471.

Thus, the factions were divided between those who wanted to change and maintain Article 29. Certain pro-reformists argued that the obligation to abide by religious law was for all religions, while others argued that it was only for adherents of Islam. Some pro-reformists fluctuated between these two positions,[316] while others maintained their stance throughout.[317]

Similar positions existed among academics and the public at large. An academic stated that it would be better to abolish 'the seven words' (*tujuh kata)* from the Jakarta Charter (*Piagam Jakarta*) manuscript, including for Muslims. Based on *Pancasila*, the state can provide worship facilities, but the state has no authority to oblige someone to worship or prohibit splinter groups from worshipping.[318] Other academics asserted that the Constitution's provision to guarantee freedom to adhere to one's religion is highly relevant[319] and religious freedom should be given the widest possible scope, so that religious scholars can carry out the teachings of their respective religions.[320] The state should not intervene unless there are matters that cause conflict which interfere with national interests.[321]

On the other hand, a delegation from the Indonesian Ulema Council at a public hearing argued that since the state is based on the belief in the One and Almighty God, God is not only the centre of beliefs but also provides teachings and guidance as a value system, as the basis of norms and laws for all believers. Hence, the delegation stated, state operations could not violate the teaching of religions.[322] Another delegation from Parisadha Hindu argued that Article 29 should be maintained but a new paragraph should be added saying that "The state guarantees every religion's followers to carry out their respective teachings and religious activities all over the country with due respect to the community and the environment."[323] In that regard, another delegation from Indonesian Chinese Clan Social Association added that the state is not in a position to ratify what is and is not a religion.[324]

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316 In the introduction to the deliberations, F-PBB proposed that the obligation was for all religions, see Ibid. p. 100, but later affirmed that the obligation was only for the adherents of Islam. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 411-412.

317 As asserted by A.M. Luthfie (F-Reformasi). Ibid. p. 411.

318 As stated by Dahlan Ranuwihardjo. Ibid. pp. 207-208.

319 As argued by Azyumardi Azra from The State Institute for Islamic Studies (IAIN). Ibid. p. 455.

320 As stated by M. Amin Suma (IAIN). Ibid. p. 461.

321 Ibid.

322 As stated by Nazri Adlani from the Indonesian Ulema Council (MUI) on 27 February 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 577.

323 As proposed by Ida Bagus Gunadha from Parisadha Hindu. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 8.

324 As underlined by *Teddy Rusli* from the Indonesian Chinese Clan Social Association (PSMTI). Ibid. p. 171.

Reports from provinces of Aceh and North Sumatera stated that *Pancasila* and Islamic *Sharia* should be incorporated into the Preamble,[325] that Article 29 should be maintained,[326] and that Article 29 could be maintained if the word *kepercayaan* (set of beliefs) was omitted.[327] From Maluku, it was reported that the religious and human rights provisions should be combined.[328] Reports from Jambi and Bengkulu wanted the state to oblige every citizen to implement their respective religion's teachings to enhance the nation's morality.[329]

In his foreword to the PAH I meeting on 14 June 2000, the meeting's chair reiterated that based on *Pancasila*, the Republic of Indonesia respected religions and should maintain a good relationship with them, but that the state should not interfere too much in religions' internal affairs. Religious diversity should be accepted and respected as a fact.[330] F-Reformasi asserted that the original Article 29 should remain but proposed to adding a third verse, stipulating that:

(3) Every follower of a religion is obliged to implement the teachings of their respective religion.[331]

The F-PBB's speaker stated that the 1959 version of the 1945 Constitution makes the state passive towards religions, only guaranteeing its citizens the freedom to implement their respective religions. The state should not only issue prohibitions and restrictions for people to practice their faith; it should also provide the widest space for every person to implement the teachings of their respective religions. The relationship between the state and religions should be set out in this Constitution. The citizen should be active in implementing their religion's teachings because the teaching of a religion is only meaningful if its followers fully implement it. Therefore, the Constitution should stipulate its implementation. The F-PBB proposed revising Article 29 as follows:

325 Reported at public hearings in Aceh and North Sumatera. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 421.

326 Reported at public hearings in Nusa Tenggara Timur and Papua. From Papua a proposal was also reported to add a new paragraph saying: "the state should respect the places of worship." Ibid. pp. 436, 438.

327 Reported at a seminar on Religion and Culture conducted in Mataram, West Nusa Tenggara Barat. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 8.

328 Reported in Maluku. Ibid. p. 17.

329 Reported in Jambi and Bengkulu. Ibid. p. 22.

330 The meeting was presided by Harun Kamil, the Vice-Chairman of PAH I. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 410.

331 As asserted by A.M. Luthfie (F-Reformasi). Ibid., p. 411.

(1) The State shall be based upon the belief in the One and Only God, with the obligation to implement Islamic Sharia for the adherents.
(2) The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion.[332]

F-PDU asserted that religion is essential to human life and is a fundamental right that the state ought to guarantee, as stated in the Universal Declaration of Human Rights, which they also wanted to incorporate into the Constitution. F-PDU supported maintaining the original Article 29(1), proposing only a small change in the second paragraph, so that it would read:

(1) The State shall be based upon the belief in the One and Only God.
(2) The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion.[333]

F-KKI proposed changing Chapter XI's title from "*Agama*" (Religions) to "*Ketuhanan Yang Maha Esa*" (The One and Only God) and to revise Article 29 to state:

(1) The State shall be based upon the belief in the One and Only God, Just and Civilized Humanity, Unity of Indonesia, Democratic Life guided by Wisdom in Deliberation/Representation, and Social Justice for the whole of the people of Indonesia.
(2) The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion and belief and to build their respective houses of worship.
(3) The State shall guarantee just and equal services to all religious followers.[334]

F-PDKB expressed their wish to maintain the initial Article 29 and invited the meeting to reconsider the terminology of religion. They reminded members that 'religion' excluded certain beliefs that could not be categorized into mainstream religions. In that regard, *kepercayaan* (local set of beliefs) is a term that accommodates such people.[335]

F-TNI/Polri proposed maintaining the original Article 29(1) and (2) so that the amendment would not deviate from its objectives.[336] Likewise, F-UG affirmed it wanted to retain the original Article 29(1) and proposed revising paragraph (2), so that it would read:

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332 As stated by Hamdan Zoelva (F-PBB). Ibid., pp. 411-412.
333 As argued by Asnawi Latief (F-PDU). Ibid., p. 413.
334 As proposed by Anthonius Rahail (F-KKI). Ibid., p. 414.
335 As asserted by Gregorius Seto Harianto (F-PDKB). Ibid., p. 415.
336 As stated by Taufiqurrahman Ruki (F-TNI/Polri). Ibid., p. 416.

(1) The State shall be based upon the belief in the One and Only God.
(2) The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion.[337]

However, F-PPP proposed revising Article 29 to restrain the distribution of views which may disturb religious followers, so that it would read:

(1) The State shall be based upon the belief in the One and Only God, with the obligation to implement Islamic Sharia for the adherents.
(2) The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion.
(3) The State shall prohibit the spread of ideologies contrary to the belief in the One and Only God.[338]

F-PDI-P wanted to maintain the original Article 29 because the original formulation "contains the principles and wisdom, which so far have managed to maintain the unity of Indonesia."[339] However, F-PG proposed changing Article 29(2) and adding a third paragraph, stating that:

(1) The State shall be based upon the belief in the One and Only God.
(2) The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion.
(3) The State's operations shall not be in contradiction with the values, norms, and laws of the religions.[340]

Similarly, F-KB proposed changing Article 29 to read:

(1) The State shall be based upon the belief in the One and Only God, with the obligation to implement the teachings of the religion, each according to his/her religion.
(2) The State upholds ethical values and morals of humanity which are taught by every religion.
(3) The State guarantees all persons the freedom to believe in his/her religion and to worship, each according to the belief of his/her religion.[341]

Eventually, out of 11 factions in PAH I, only 3 factions (i.e., F-PDI-P, F-TNI/Polri, and F-PDKB) wanted to maintain the original Article 29. The other 8 proposed minor or major changes. Regarding Article 29(1), 7 factions (i.e., F-Reformasi, F-PDU, F-PDKB, F-TNI/Polri, F-UG, F-PDI-P, and F-PG)

337 As affirmed by Sutjipto (F-UG). Ibid., p. 417.
338 As conveyed by Zain Bajeber (F-PPP). Ibid., pp. 418-419.
339 As affirmed by Soewarno (F-PDI-P). Ibid., p. 420.
340 As proposed by Rosnaniar (F-PG). Ibid., p. 422.
341 As stated by Yusuf Muhammad (F-KB). Ibid., p. 423.

wanted to maintain the original, while F-PBB and F-PPP proposed inserting the "*tujuh kata*" (the 'seven words'). F-KKI proposed adding the principles of "Just and civilized humanity, Unity of Indonesia, Democratic Life guided by Wisdom in Deliberation/Representation, and Social justice for the whole of the people of Indonesia", so that paragraph (1) would contain the complete principles of *Pancasila*. F-KB proposed adding "with the obligation to implement the teachings of the religion, each according to his/her religion". F-Reformasi, F-KKI, F-PG, and F-KB proposed adding one new paragraph to Article 29.

In the ensuing informal meeting on 14 June 2000, factions attempted to reach a consensus.[342] Those who wanted to maintain the original Article 29 (e.g., F-TNI/POLRI) argued that if the state required followers to implement religious teachings, then anyone who would not implement the teaching would be violating the law and should be punished.[343] Further, F-PDI-P reiterated that the state is a national state and that the removal of the "*tujuh kata*" with the consent of the prominent Islamic figures had been hitherto safeguarding the existence of the state.[344]

On the other hand, F-PBB and F-PPP stated that adding the "*tujuh kata*" perfected the 1945 Constitution. F-PBB stated that the President's Decree of 5 July 1959 (which re-enacted the 1945 Constitution) confirmed that the *Piagam Jakarta* (Jakarta Charter) is the soul of and has an inseparable connection with the 1945 Constitution. A religion is useful if it is implemented. However, the stipulation was intended only for Muslims, not as a privilege, because it was expected that followers of other religions would also implement their respective religion's teachings. He then stated that F-PBB could accept the "*tujuh kata*" being incorporated into another part of Article 29, keeping the initial paragraph (1) intact.[345] F-PPP added that the stipulation would enhance the participation of most people in overcoming national challenges.[346]

By contrast, F-PDKB warned that the issue would bring the nation back to dissension.[347] In reply, F-Reformasi argued that the obligation should apply to all religions. If the state recognizes a religion, the state should require followers to implement that religion's teachings.[348] F-KB agreed that the obligation should apply to all religions.[349] Commenting on the discussions, F-KB reminded members that Indonesia is a nation state. The relationship between the state and religion is neither secular (as in Western

342 Ibid., p. 427.
343 As argued by Taufiqurrahman Ruki (F-TNI/POLRI). Ibid., p. 428.
344 As argued by Frans Matrutty (F-PDI-P). Ibid., p. 430.
345 As argued by Hamdan Zoelva (F-PBB) and Lukman Hakim Saifuddin (F-PPP). Ibid., pp. 432, 433.
346 Ibid., p. 434.
347 As expressed by Gregorius Seto Harianto (F-PDKB). Ibid., p. 435.
348 As argued by Patrialis Akbar (F-Reformasi). Ibid., p. 435.
349 As stated by Yusuf Muhammad (F-KB). Ibid., p. 437.

countries) nor integrative (such as in the Middle East), where religion is included in the state system. Instead, it is symbiotic, where the state needs the values and norms of the religions and the religions need the enforcement power of the state. The same member emphasized that the "space" of Pancasila and the "space" of Islam in state affairs are different.[350]

Finding the debate too lengthy, a F-PPP speaker urged the committee to forward the issue to the plenary session so that it could be decided through voting. The speaker disagreed that the proposal would open old wounds or cause the nation's disintegration. Further, the speaker stated that, though the stipulation is in the Constitution, it does not mean that it can be enforced automatically.[351]

Trying to avoid misunderstanding and prejudice, a F-KB speaker stated that there was agreement on two substantial issues: First, that the state is based on the One and Only God and second, that it should guarantee to all religious followers that they are free to implement the teachings of their respective religions.[352] However, a F-KKI speaker warned that the public perceived these PAH I discussions as opening old wounds and that they were concerned about the future consequences.[353] Then, in response to F-PPP's argument, the F-TNI/POLRI speaker reminded members that if the plenary would vote on this matter, the proposal would surely be defeated and that one should be aware of the implications.[354] Meanwhile, F-PG emphasized it did not agree with omitting the term *kepercayaan*. They questioned how people who believe in *kepercayaan* and thus do not belong to a mainstream religion would be accommodated.[355]

In the subsequent informal consultation meeting on 20 June 2000, the factions maintained similar stances. The F-Reformasi representative questioned the understanding of the "obligation to implement religious law" in other religions. They believed such an obligation was correct in Islam but questioned whether other faiths would find this excessive.[356]

In response, the PAH I chairman stated that religion is about salvation, which is a grace of God rather than the fruit of human effort. When it is transformed into the relationship with the state, God does not need anyone to help one's relationship with their God, including the state. Therefore, borrowing the state's hand to oblige people to implement God's teachings

350 As asserted by Ali Masykur Musa (F-KB). Ibid., p. 443. The speaker used the word "*kamar*" (room) to illustrate the difference entity of state and religions.
351 As stated by Lukman Hakim Saifuddin (F-PPP). Ibid., pp. 444-445.
352 As stated by Yusuf Muhammad (F-KB). Ibid., p. 446.
353 As stated by Anthony Rahail (F-KKI). Ibid., p. 447. See the composition of members of MPR.
354 As reminded by Taufiqurrahman Ruki (F-TNI/POLRI). Ibid., p. 448. He recalled various bloody conflicts caused by certain parties attempt to establish an Islamic state in Indonesia.
355 As elucidated by Amidhan (F-PG). Ibid., p. 452.
356 As stated by A.M. Lutfi (F-Reformasi). Ibid., p. 561.

becomes irrelevant.[357] Previously, the Chairman had reminded them that a basic right is not a gift from the state or any group, but *fitriyah*, a gift from God. Therefore, the state should guarantee, rather than give or boost, a basic right. So, he pointed out, the original Article 29 is an excellent and genius formulation, as it stands subtly between the secular and theocratic state. A tiny shift would be enough to push the state to either side.[358]

Then, a F-PG representative elucidated that in Islam there are two groupings of laws: *diyanih* (normative) and *kodoi'* (instrumental). For example, embracing religion is free (*diyanih)*, but there are government regulations to enforce harmony that must be obeyed (kodoi'). In that regard, what is needed is to obey the rules (kodoi') and respect and encourage, not force, the implementation of religious teachings.[359] The informal meeting failed to agree on this contentious issue.

In the subsequent MPR plenary meeting on 10 August 2000, most of the factions merely repeated their respective positions, except F-UG, who expressed a change in their position. The F-UG speaker asserted that Article 29 is the heart of the Constitution and that the Article should therefore be maintained.[360]

During that same meeting, F-PPP strongly refuted the allegation that asking to oblige the implementation of Islamic *shari'a* for its followers is a threat to the nation. The proposal was not intended to establish an Islamic state, but rather to deny the notion that the state, religions, and democracy are contradictory. The proposal meant to strengthen Indonesian nationalism and reaffirm Islamic nationalism as well as reject the accusation that the universality of Islam does not recognize nationalism.[361] F-PBB reasserted that including 'the seven words' would help overcome moral decadence. People would be free to worship other religions, a guarantee that comes from Islamic *sharia* itself.[362]

In the same session, the F-KB speaker clarified and reaffirmed maintaining the original Article 29. Religion and the state are two different entities, which must be distinguished but not juxtaposed.[363]

The F-PDKB speaker proposed deleting Article 29(1) because its content was inherent in the Preamble. The freedom of religion is a human right. Therefore, the state has no authority to require people to implement their religions' teachings or to intervene their religious lives.[364]

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357 Ibid., p. 561.
358 Ibid., p. 560.
359 As stated by Amidhan (F-PG). Ibid., p. 562.
360 As confirmed by Valina Singka Subekti (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 27.
361 As asserted by Zainuddin Isman (F-PPP). See Ibid., p. 36-37.
362 Ibid., p. 55.
363 As confirmed by Ali Masykur Musa (F-KB). Ibid. p. 44.
364 As stated by K. Tunggul Sirait (F-PDKB). Ibid., p. 68.

Meanwhile, societal responses were mixed. Several orthodox Islamic organizations[365] supported inserting the seven words.[366] Eggi Sudjana, chairman of the Indonesian Muslim Workers Brotherhood (*Persaudaraan Pekerja Muslim Indonesia*), stated that prejudice against Jakarta Charter supporters and the stigma that they are Islamic state supporters were baseless, stemming from fearful hypocrites or anti-Islamic infidels.[367]

However, most of the Islamic community rejected including *tujuh kata* ('the seven words') in the Constitution. Azyumardi Azra, the Rector of the State Islamic Institute Jakarta, stated that the proposed inclusion was not urgent and came only from a small group in the Islamic community. The factions who proposed the topic were just looking for political publicity, positioning themselves as Muslim defenders. He warned that adding the *tujuh kata* would cause conflict among Muslims due to the Muslim community's plurality.[368] Other Islamic leaders also rejected the idea.[369] Madjid stated that reinserting the seven words would confirm a formalistic and exclusive Islam. Similarly, Mas'udi reminded the Muslim community that the state could then interfere in religion, which would eventually bring *kemudaratan* (disadvantages) to the religion itself. Further, the inclusion would revive the old prejudice about the desire to establish an Islamic state in Indonesia, contrary to the vision of a national state which treats all people equally.[370]

During the Commission A meeting on 11 August 2000, factions mostly repeated their previous stances. Most factions suggested that the MPR should ratify the fully agreed on materials. F-PDI-P suggested that the discussions on the other issues should resume in the next MPR session. Further, F-PDI-P appealed that the crucial issues, which could endanger the existence of the Unitary State of the Republic of Indonesia should be

365 These organisations included the Indonesian Islamic Dakwah Council or DDII (*Dewan Dakwah Islamiyah Indonesia*), the Islam Defender Front or FPI (*Front Pembela Islam*), the Islamic Student Association or HMI (*Himpunan Mahasiswa Islam*), the Islamic Student Front or FMI (*Front Mahasiswa Islam*), the Indonesian Islamic Student or PII (*Pelajar Islam Indonesia*), the Indonesian Islamic Youth Movement or GPII (*Gerakan Pemuda Islam Indonesia*), and *Hizbuth Tahrir*.

366 Umar Basalim, *Pro-Kontra Piagam Jakarta di Era Reformasi*, Rofiqul-Umam Ahmad and Janedjri M. Gaffar (eds.), Pustaka Indonesia Satu, Jakarta, 2002, p. 151.

367 Ibid., p. 144.

368 *Media Indonesia*, newspaper, 7 August 2000.

369 These included Nurcholish Madjid, the Rector of the University of Paramadina, K.H. Hasyim Muzadi, the Chairman of Nahdlatul Ulama, Ahmad Syafii Maarif, the Chairman Muhammadiyah, and Masdar S. Mas'udi, the Chairman of the Centre for Empowerment of *Pesantren* (Islamic Boarding School).

370 *Suara Pembaruan*, newspaper, 10 August 2000. NU and Muhammadiyah are the two largest Islamic organizations in Indonesia, with a total of more than 60 million members. See also Muhammadiyah Studies, 1 January 2013.

discussed in a consultation meeting among the factions, not in the commission, so they would not be recorded in a document of the nation's history.[371]

The F-PPP speaker once again urged for the inclusion of the *"tujuh kata"* in Article 29 of the 1945 Constitution. Citing the speech of the late K.H. Wahid Hasyim, a charismatic leader of *Nahdlatul Ulama* (NU), the speaker stressed that the provision does not mean the enforced implementation of Islamic law, because by holding on to the principle of deliberation, coercion would not occur. Further, the speaker asserted that F-PPP was responsible for saving the nation from the dangers of secularism and de-humanism and restoring "the gentlemen's agreement"[372] between the two major communities in the country on the proper proportion. He also emphasized that F-PPP does not recognize the separation between religion and state.[373] Likewise, the F-Reformasi speaker emphasized that the state should be pro-active in its efforts so that the adherents, regardless of their religion, become more devout.[374] The F-PBB speaker asserted that the *tujuh kata* ought to be inserted into the Constitution as an effort to bring Muslims closer to their religion.[375]

Responding to these statements, the F-TNI/Polri speaker stated that they disapproved of discussing the topic altogether, warning that it could cause conflict and lead to national disintegration.[376] Similarly, the F-PDKB speaker reminded the other members that it was the *tujuh kata* that had led to a failing *Konstituante* and had resulted in the issuance of the presidential decree to return to UUD 1945. For more than twenty years, during which time the *tujuh kata* were not included in the Constitution, Christians had had serious difficulties with building places of worship. Thousands of churches had been destroyed or burned. The fundamental question is whether the proposal is a strategic step to gradually establish an Islamic state.[377]

This statement was met with a fierce response. F-Reformasi and F-PPP members expressed that the accusation offended Muslims and appealed not to raise such sensitive topics. The facts showed, the F-PPP member stated, that many churches in Java were burned in retaliation for the burning of mosques in eastern Indonesia.[378] Aware of the issue's sensitivity, the meeting's chairman urged calm and cooperation, cancelling the meeting, and

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371 As stated by Hobbes Sinaga (F-PDI-P). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 111.

372 The speaker seems to refer to the decision-making process of the 1945 Constitution on 18 August 1945. See Sekneg, *op. cit.*, pp. 412 – 420.

373 As stated by Lukman Hakim Saifuddin (F-PPP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 113-114.

374 As stated by A.M. Luthfie (F-Reformasi). Ibid., p. 120.

375 As asserted by Nadjih Ahmad (F-PBB). Ibid., p. 121.

376 As reminded by INT Aryasa (F-TNI/Polri). Ibid., p. 125.

377 As conveyed by Seto Harianto (F-PDKB). Ibid., p. 127.

378 As stated by Muchtar Adam (F-Reformasi) and Abdul Kadir Aklis (F-PPP). Ibid., p. 130.

inviting the factions to an informal gathering. During that gathering he appealed to them to keep a peaceful atmosphere and prevent their followers from becoming provocative.[379] The next day, following a F-PPP member's suggestion, the meeting was opened with a prayer following each member's religion, which pleaded for a peaceful atmosphere. [380] Then, the F-PDKB speaker who raised the issue apologized for any misunderstandings and retracted his remarks.

Eventually, Commission A postponed the discussion on Article 29 and agreed to resume it in the next MPR annual session in 2001. The commission reported this conclusion to the MPR plenary meeting on 15 August 2000.[381] Nevertheless, in the final F-PBB statement during this meeting, the speaker confirmed that the obligation to apply Islamic sharia inherent in the Jakarta Charter was not intended for individual Muslims, but addressed to the state, requiring the implementation of Islamic sharia for its adherents. Further, the speaker argued that there are *sharia* implementations that require state authority. He told others not to worry, since the obligation applies only to Muslims.[382] Then, a F-PPP speaker asserted that adjusting Article 29 would be a top priority for F-PPP in the MPR until the end of the amendment process.[383]

In short, until the very end of the session, the factions had different attitudes regarding Article 29.[384] Ultimately, the MPR decided to postpone the discussion on Article 29 until the next MPR annual session in 2001.

#### *VI.2.3.10 Pancasila as the foundation of the state*

PAH I also discussed the issue of the state's foundation. F-PDI-P proposed adding a paragraph (2) to Article 1 of the 1945 Constitution, affirming that the foundation of the state is *Pancasila* which is Belief in the Oneness of God (*Ketuhanan Yang Maha Esa*), Just and Civilized Humanity (*Kemanusiaan Yang Adil dan Beradab*), the Unity of Indonesia (*Persatuan Indonesia*), Democratic Life guided by Wisdom in Deliberation/Representation *(Kerakyatan Yang Dipimpin oleh Hikmat Kebijaksanaan, Dalam Permusyawaratan Perwakilan*)

379 The meeting was chaired by Jakob Tobing (F-PDI-P), the chairman of PAH I and Commission A. Ibid., p. 131.

380 As proposed by Sukardi Harun (F-PPP). Ibid., pp. 134, 137.

381 Ibid., pp. 631, 646.

382 As stated by M.S. Kaban (F-PBB). Ibid., p. 657. Kaban argued that Christiaan Snouck Hurgronje and other orientalists had been working systematically to marginalize Islamic sharia in Indonesia since colonial times. Hurgronje, Kaban argued, had replaced Van den Berg's *Theory Receptio in Complexu*, which imposes Islamic law on the entire indigenous population who are Muslim, with a reception theory which states that Islamic law is applicable if accepted by customary law.

383 As asserted by Lukman Hakim Saifuddin (F-PPP). Ibid., p. 674.

384 See Attachment VI.5.

and for all the People of Indonesia (*Keadilan Sosial bagi seluruh Rakyat Indonesia*)."[385] F-PG, F-PDKB, F-TNI/POLRI and F-UG agreed.[386]

F-KB endorsed the idea but proposed not mentioning the term *Pancasila* explicitly. Instead, it proposed, "The State of Indonesia is based on Belief in the Oneness of God, Just and civilized humanity, the Unity of Indonesia, Democratic Life guided by Wisdom in Deliberation/Representation and Social Justice for all the People of Indonesia".[387] F-Reformasi agreed and stated that mentioning the five principles in the article as the basic guidance of the state clearly would give a clear future guideline and leave minimal room for deviation. The member added that F-Reformasi did not want to include the term *Pancasila* out of fear it would be misunderstood, without elaborating further.[388]

By contrast, F-PDU and F-PBB argued that it was not necessary to mention *Pancasila* or its five principles as the foundation of the state in the Constitution's articles. The principles are included in the Preamble, which had been agreed and would not be amended. Further, F-PBB reiterated that the factions had agreed that the Preamble animates the articles of the Constitution.[389] However, F-KB responded that it was necessary to include the Preamble's substance, i.e., the principles of *Pancasila* in Article 1 as a confirmation of the starting point for the future.[390] To clarify his previous proposal, the F-PDI-P speaker affirmed that a state requires a *staat fundamentele normen* (state philosophical foundation) which should be clearly formulated. There is no need to worry that by placing Pancasila in the articles of the Constitution, its position will weaken and become the object of change following the provisions of Article 37. It does not make sense that if Pancasila is placed in Article 1, it can be changed using Article 37. Not all provisions in the articles of the Constitution are subject to Article 37, such as a statement on people's sovereignty.[391]

In the subsequent informal consultation meeting on 17 May 2000, the PAH I chairman concluded that all factions agreed that *Pancasila* is the foundation of the state. The problem was its position. The first issue was whether it was sufficient for it to be mentioned only in the Preamble or whether it should also be included in the Constitution. The second issue was whether the name of the state's foundation, *Pancasila*, should be mentioned in the Constitution or whether it was sufficiently stored in the nation's collective

385 As conveyed by Harjono (F-PDI-P). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 77.

386 As stated by Hatta Mustafa (F-PG), Gregorius Seto Harianto (F-PDKB), Hendi Tjaswadi (F-TNI/Polri) and Valina Singka Subekti (F-UG), Ibid., pp. 78 – 89.

387 As stated by Abdul Khaliq Ahmad (F-KB). Ibid., p. 81.

388 As stated by Patrialis Akbar (F-Reformasi). Ibid., pp. 82, 99.

389 As stated by Asnawi Latief (F-PDU) and Hamdan Zoelva (F-PBB). Ibid., pp. 94–95.

390 As proposed by Yusuf Muhammad (F-KB). Ibid., p. 101.

391 As stated by Harjono (F-PDI-P). Ibid., p. 106. Article 37 of the 1945 Constitution concerns the procedure of amending the Constitution.

memory.[392] Then, a F-PPP member invited his PAH I colleagues to reflect on why the forefathers who had drafted the three Constitutions known to Indonesia[393] did not explicitly mention *Pancasila* in an article and had kept it in the Preamble. Following their example, the member argued, let us keep the term in the Preamble and not lower it to the level of ordinary norms in the Constitution's chapters, as this would mean that the *Pancasila* can be changed.[394]

Still defending a different view, the F-TNI/POLRI speaker reiterated that maintaining the Preamble does not mean merely maintaining its text, but that the Constitution's articles should refer to it. Hence, F-TNI/POLRI stressed that the fear that *Pancasila* could be changed was baseless. Further, the speaker argued that what should be included in the article is just the term *Pancasila*, without detailing its principles. It would be sufficient if the articles refer to *Pancasila* as the principles embodied in the Preamble.[395] Likewise, F-UG and F-KB argued that the Constitution should affirm *Pancasila* as the foundation of the state.[396]

F-PBB, F-PDU, and F-Reformasi agreed with F-PPP. They argued that since everybody regarded Pancasila as the foundation of the state, it should be maintained in the Preamble. F-PBB questioned why we should debate something that was not a problem.[397] F-PDI-P opined that now, after the indoctrination program for state awareness of the old government has passed, we need to include Pancasila in the articles of the Constitution with reference to the Preamble. As a pluralistic but united nation, *bhinneka tunggal ika*, it is important for the people to understand the precepts of Pancasila as one indivisible organic entity.[398]

In this context, a F-PG member asserted that the correct version of Pancasila was among the versions in the Preamble promulgated on 18 August 1945 or mentioned by Soekarno in his famous speech on 1 June 1945. Referring to Pancasila in the Preamble would end the debate about which version is correct.[399] Then, F-PPP reminded the committee that since no one rejects Pancasila, this was not a problem.[400] Another F-PPP member stated that the issue was not about agreeing on whether *Pancasila* was the foundation of the state, because this was already included in the Preamble.[401]

Eventually, the debate on the foundation of the state was postponed.

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392 Ibid., p. 108.
393 These were the 1945 Constitution, the Constitution of the Federal Republic of Indonesia, and the Provisional Constitution of 1950.
394 As argued by Ali Hardi Kiaidemak (F-PPP). Ibid., pp. 114 – 115.
395 As emphasized by Hendi Tjaswadi (F-TNI/Polri). Ibid., p. 115.
396 As asserted by Sutjipto (F-UG) and Abdul Khaliq Ahmad (F-KB). Ibid., pp. 117, 118.
397 As asserted by Hamdan Zoelva (F-PBB), Asnawi Latief (F-PDU), and A.M. Luthfi (F-Reformasi). Ibid.
398 As asserted by Pataniari Siahaan (F-PDI-P). Ibid., p. 119.
399 As argued by Slamet Effendy Yusuf (F-PG). Ibid., p. 120.
400 As asserted by Zain Bajeber, (F-PPP). Ibid., p. 122.
401 As stated by Ali Hardi Kiaidemak (F-PPP). Ibid., p. 127.

*VI.2.3.11 Law-making process*

The law-making process had been discussed but not completely finalized in the first amendment stage (See V.4.7.8). PAH I had not agreed on how to react to a bill that was approved jointly by parliament and the president, which the president later refused to promulgate. In that case, a delegation at a public hearing argued that the bill should be submitted to the MPR for a decision. If the MPR approved the bill, the president should promulgate the bill as law.[402]

A F-PPP member proposed that if the jointly approved bill was not promulgated by the president within 30 days of approval, the bill would automatically become law.[403] Considering the DPR and president's equal positions, PAH I accepted the idea and concluded that the Constitution would declare a bill that had been jointly agreed by the DPR and the president valid as statute, if the President did not promulgate it within 30 days after the bill had been agreed.

*VI.2.3.12 Other topics*

At the end of the PAH I session in March 2000, the PAH I chairman reported to the Working Body that PAH I still needed to discuss the following:[404]

- Composition of the MPR's membership,
- Presidential election,
- Implementation of regional autonomy,
- The status of the Elucidation of the 1945 Constitution,
- The economic system regarding Article 33.

Further, PAH I reported that it had agreed on the following topics that needed to be included in the 1945 Constitution:

- Human rights,
- National police,
- Independence of the judiciary (Supreme Court, judges, general attorney),

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402 As conveyed by Ida Bagus Gunadha from Parisadha Hindu in a PAH I public hearing on 1 March 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 7. During the New Order era, there was no provision for settlement procedures if the President did not promulgate a law that had been jointly approved by the DPR.

403 As proposed by Ali Hardi Kiai Demak (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 593. Stated in a PAH I meeting on 30 May 2000.

404 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 201-202.

- Gender equality,
- Education budget,
- Foundation of the state (ideology),
- Position and working relationship of the highest state institution with or between the high state institutions,
- General election,
- Relationship between the central government and the regions,
- Council of Regional Delegates.

## VI.3 The outcomes of the second amendment

During the Commission A session, only a few amendment proposals were agreed. The MPR agreed to continue the amendment process during the next annual session. The MPR plenary agreed to assign the further preparation of changes to the MPR Working Body. The amendment materials that had not been finalized and which had not been discussed in the MPR 2000 session would be added to the assignment as preparatory material for the upcoming amendment stage. Eventually, in the MPR plenary meeting on 18 August 2000, all factions, after delivering their respective Final Notes, agreed with the second amendment to the 1945 Constitution.[405] In their notes, factions expressed their disappointment that the MPR annual session could not accomplish the amendment and hoped that it would be finalized in the subsequent MPR annual session.

To finalize the remaining amendment topics, the MPR passed MPR Decree No. IX/2000, which stipulates that the process was to be continued in the MPR 2001 annual session and that the whole amendment should be completed during the MPR 2002 annual session at the latest. A list of the unfinished amendment topics was attached to that decree.[406]

### VI.3.1 The second amendment

Below are the amended articles of the 1945 Constitution agreed on during the second stage of the amendment process, compared with the original articles from the 1959 version of the 1945 Constitution.

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405 Hartono Mardjono from F-PBB submitted his *minderheidsnota* (minority note) against MPR Decree No. VII/MPR/2000 that stipulates that TNI will still have their representatives in the MPR until 2009 at the latest and Ghazali from FPP declared his personal rejection of the decree. See above.

406 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 694. MPR Decree no. IX/MPR/2000 tasks BP-MPR to continue amendment process and attaches the materials. See Attachment VI.4.

| Article | Original | Second Amendment[407] |
|---|---|---|
| *CHAPTER VI* | *CHAPTER VI*<br>*REGIONAL GOVERNMENT* | *CHAPTER VI*<br>*REGIONAL AUTHORITIES* |
| 18 | The division of the territory of Indonesia into large and small regions shall be prescribed by law in consideration of and with due regard to the principles of deliberation in the government system and the hereditary rights of special territories. | (1) The Unitary State of the Republic of Indonesia is divided into provincial regions and those provincial regions are divided into regencies (*kabupaten*) and municipalities (*kota*), whereby every one of those provinces, regencies, and municipalities has its regional government, which shall be regulated by laws.<br>(2) The regional governments of the province, the regency and the municipality shall regulate and manage their own government affairs according to the principles of autonomy and the duty of assistance.<br>(3) The regional governments of the province, the regency, and the municipality have Regional People's Councils (*Dewan Perwakilan Rakyat Daerah*) whose members are elected through a general election.<br>(4) Every Governor, Regent (*Bupati*) and Mayor (*Walikota*) respectively head of regional government of the provinces, regencies, and municipalities, shall be elected democratically.<br>(5) The regional governments exercise the widest autonomy, save to government affairs determined by law as the affairs of the central government.<br>(6) The regional governments are entitled to determine regional regulations and other regulations for the execution of the autonomy and the duty of assistance.<br>(7) The structure and procedures for the conduct of regional government shall be regulated by laws. |

407 The texts are from the English version of the 1945 Constitution of the Republic of Indonesia, published by the Office of the Registrar and the Secretariat General of the Constitutional Court of the Republic of Indonesia, 2015.

408 Customary.

| | | |
|---|---|---|
| 18A | (none) | (1) The authority relations between the central government and the regional government of the provinces, the regencies, and the municipalities, or among provinces and regencies and municipalities, shall be regulated by law by having regard to regional specificity and diversity.<br>(2) The financial relations, public services, the utilization of natural resources and other resources between the central government and the regional governments shall be regulated and be executed justly and harmoniously by virtue of laws. |
| 18B | (none) | (1) The state shall recognize and respect units of regional governments of specific or special nature which shall be regulated by laws.<br>(2) The state shall recognize and respect entities of the *adat*[408] law societies along with their traditional rights to the extent they still exist and are in accordance with the development of the society and the principles of the Unitary State of the Republic of Indonesia, which shall be regulated by laws. |
| 19 | (1) The composition of the People's Representative Council shall be further regulated by law.<br>(2) The People's Representative Council shall convene a session at least once a year. | (1) The members of the People's Representative Council are elected through general election.<br>(2) The structure of the People's Representative Council shall be regulated by laws.<br>(3) The People's Representative Council shall convene at least once a year. |
| 20 | (*Article 20 has been amended in first amendment. The second amendment added the fifth verse).* | (5) In the event a bill having been jointly approved as such has failed validation by the President within a period of thirty days as of such bill having been approved, the bill as such shall lawfully become a law and shall be promulgated. |

| | | |
|---|---|---|
| 20A | (none) | (1) The People's Representative Council shall have legislative, budget, and supervisory functions.<br>(2) In the execution of its functions, besides the rights regulated by the other articles of this Constitution, the People's Representative Council holds the right of interpellation, the right of enquette, and the right of expression.<br>(3) Besides the rights regulated by the other articles of this Constitution, every member of the People's Representative Council has the right to submit queries, to convey proposals and opinions as well as the right of immunity.<br>(4) Further provisions regarding the rights of the People's Representative Council and the right of the members the People's Representative Council shall be regulated by laws. |
| 22A | (none) | Further provisions regarding the procedures for the enactment of laws shall be regulated by laws. |
| 22B | (none) | A member of the People's Representative Council can be discharged from his/her office, the conditions and procedures of which shall be regulated by laws. |
| *CHAPTER IXA* | (none) | *CHAPTER IXA*<br>*THE STATE TERRITORY* |
| 25A | (none) | The Unitary State of the Republic of Indonesia is an archipelagic state having an Archipelagic (*Nusantara*) character with a territory, the borders and rights of which shall be stipulated by laws. |
| *CHAPTER X* | *CHAPTER X*<br>*CITIZENS* | *CHAPTER X*<br>*CITIZENS AND INHABITANTS* |
| 26 | | (2) The inhabitants are Indonesian citizens and foreigners residing in Indonesia.<br>(3) Matters regarding citizens and inhabitants shall be regulated by laws. |
| 27 | | (3) Every citizen shall be entitled and be obliged to participate in efforts to defend the state. |

| | | |
|---|---|---|
| *CHAPTER XA* | (none) | *CHAPTER XA*<br>*HUMAN RIGHTS* |
| 28A | (none) | Every person shall be entitled to live and be entitled to defend his/her life and living. |
| 28B | (none) | (1) Every person shall be entitled to establish a family and to further descendants through legal marriage.<br>(2) Every child shall be entitled to viability, to grow up, and to develop as well as be entitled to protection against violence and discrimination. |
| 28C | (none) | (1) Every person shall be entitled to self-development through the fulfilment of his/her basic needs, be entitled to acquire education and to obtain the benefit of science and technology, arts and culture, for the sake of enhancing his/her quality of life and for the sake of the welfare of mankind.<br>(2) Every person shall be entitled to self-advancement in the struggle of his/her rights collectively in order to develop the society, the nation and his/her country. |
| 28D | (none) | (1) Every person shall be entitled to recognition, guaranty, protection, and equitable legal certainty as well as equal treatment before the law.<br>(2) Every person shall be entitled to work as well as to obtain reward and just and decent treatment in work relationships.<br>(3) Every citizen shall be entitled to obtain equal opportunity in government.<br>(4) Every person shall be entitled to citizenship status. |
| 28E | (none) | (1) Every person shall be free to embrace a religion and to worship according to his/her religion, to choose education and teaching, to choose work, to choose citizenship, to choose a place to reside in the territory of the state and to leave it, as well as be entitled to return. |

| | | |
|---|---|---|
| | | (2) Every person shall be entitled to freedom to be convinced of a belief, to express thought and to do so in accordance with his/her conscience.<br>(3) Every person shall be entitled to the freedom of association, to assemble and to expression. |
| 28F | (none) | Every person is entitled to communicate and to obtain information for the development of his/her personality and social environment, as well as be entitled to seek, to obtain, to own, to store, to process and to convey information by means of all kinds of available channels. |
| 28G | (none) | (1) Every person shall be entitled to protection of his/her own person, family, honour, dignity, and property under his/her control, as well as be entitled to protection against threat or fear to do or omit to do something being his/her fundamental human right.<br>(2) Every person shall be entitled to be free from torture or treatment that humiliates human dignity and be entitled to the right to obtain political asylum from another country. |
| 28H | (none) | (1) Every person is entitled to live prosperously physically and spiritually, to have a place to reside, and to acquire a good and healthy living environment as well as be entitled to obtain health care.<br>(2) Every person is entitled to receive ease and special treatment in order to obtain the same opportunity and benefit in order to achieve equality and justice.<br>(3) Every person is entitled to social security that enables his/her integral self-development as a dignified human being.<br>(4) Every person shall be entitled to personal property and such property rights shall not be taken over arbitrarily by whomsoever. |

| | | |
|---|---|---|
| 28I | (none) | (1) The rights to live, the right not to be tortured, the right of freedom of thought and conscience, the right of religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under a retroactive law are all human rights that cannot be reduced under any circumstance whatsoever.<br>(2) Every person is entitled to be free from discriminative treatment on whatsoever basis and is entitled to acquire protection against such discriminative treatment.<br>(3) The cultural identity and right of traditional societies shall be respected in harmony with the development of the age and civilizations.<br>(4) The protection, advancement, enforcement, and fulfilment of human rights shall be the responsibility of the state, particularly the government.<br>(5) For the enforcement and protection of human rights in accordance with the principle of a democratic state based on law, the execution of human rights shall be guaranteed, regulated, and set out in statutory rules and regulations. |
| 28J | (none) | (1) Every person shall respect human rights of the others in the order of life of the society, nation, and the state.<br>(2) In the exercise of his/her rights and freedoms, every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations for morality, religious values, security, and public order in a democratic society. |

| *CHAPTER XII* | *CHAPTER XII*<br>*NATIONAL DEFENCE* | *CHAPTER XII*<br>*DEFENCE AND SECURITY OF THE STATE* |
|---|---|---|
| 30 | (1) Every citizen shall have the right and duty to participate in the defence of the country.<br>(2) The rules governing defence shall be further regulated by law. | (1) Every citizen shall be entitled and shall participate in the efforts towards the defence and security of the state.<br>(2) The efforts toward the defence and security of the state shall be executed through a system of defence and security of the entire people by the Indonesian National Military (*Tentara Nasional Indonesia*) and the State Police of the Republic of Indonesia (*Kepolisian Negara Republik Indonesia*) as the main force, and the people as the supporting force.<br>(3) The Indonesian National Military consists of the Army, the Navy, and the Air Force as the state apparatus with the duty of defending, protecting, and maintaining the integrity and sovereignty of the state.<br>(4) The State Police of the Republic of Indonesia as a state apparatus which safeguards the security and order of the society has the duty to protect, to nurture, to serve the society, as well as to enforce the law.<br>(5) The structure and position of the Indonesian National Military, the State Police of the Republic of Indonesia, the authority relationships of the Indonesian National Military and the State Police of the Republic of Indonesia in the performance of their duties, the conditions for participation of the citizens in the effort of defence and security of the state, as well as matters related to defence and security shall be regulated by laws. |

| *CHAPTER XV* | *CHAPTER XV*<br>*FLAG AND LANGUAGE* | *CHAPTER XV*<br>*THE NATIONAL FLAG, LANGUAGE AND COAT OF ARMS AS WELL AS THE NATIONAL ANTHEM* |
|---|---|---|
| 35 | The national flag of Indonesia shall be *Sang Merah Putih* (the Red-and-White). | The Flag of the State of Indonesia is the Red and White (*Sang Merah Putih*). |
| 36 | The state language shall be *Bahasa Indonesia.* | The Language of the State is the Indonesian Language (*Bahasa Indonesia).* |
| 36A | (none) | The Coat of Arms of the State of Indonesia is the *Pancasila Eagle (Garuda Pancasila)* with the watchword Unity in Diversity (*Bhinneka Tunggal Ika).* |
| 36B | (none) | The National Anthem is Great Indonesia (*Indonesia Raya).* |
| 36C | (none) | Further provisions regarding the Flag, the Language, the Coat of Arms, and the National Anthem shall be regulated by laws. |

## VI.4 Analysis and comments

### VI.4.1 The process

Initially, assuming the 1945 Constitution was President Soekarno's legacy, PDI-P was hesitant to amend UUD 1945 and tended to take a defensive and reactive position against amendment ideas. Yet, occasionally, some F-PDI-P members were active in proposing ideas for change.[409]

In November 1999, several PAH I members were replaced. Among others, F-PDI-P replaced Amin Aryoso[410] with the author, who was then elected as the PAH I chairman. From then on, the F-PDI-P, the MPR's largest faction, became proactive in amendment process.

Few of the proposals submitted during the previous phase were agreed on. In accordance with MPR Decree No. IX/1999, the MPR resumed the amendment process in November 1999. For this purpose, the MPR formed the MPR Working Body which subsequently formed PAH I[411] and PAH II to prepare any new necessary MPR decree(s) and to review the existing ones. The factions resumed the process after a comprehensive discussion

409 See VI. 6.1.

410 Later, Amin Aryoso would become active in the movement to stop the amendment process and to restore the 1959 version 1945 Constitution. See VIII.2.7. Constitutional Commission.

411 During the first amendment, the drafts were prepared by PAH III.

of the related issues and continued discussing the issues in order of each Constitutional chapter. Factions agreed to use the previous MPR session's minutes as the base material.

The MPR scheduled the MPR Working Body to begin its work on 1 November 1999 and to give a progress update at the MPR plenary meeting on 8 August 2000. The plenary meeting occurred during the MPR 2000 Annual Session, which was scheduled from 7 to 18 August 2000. The MPR plenary meeting then formed Commission A to discuss the reported draft and update the MPR plenary meeting on 9 August 2000. The MPR plenary decision-making meeting was scheduled for 18 August 2000.

Similar to the previous phase, the amendment process was conducted at four levels, which emphasized deliberation and consensus. Unlike the previous phase, which lasted for only 12 days, this phase was scheduled to last from November 1999 to August 2000. The process had become much more thorough and aimed at participation and knowledge development. PAH I could seek broad participation throughout the amendment process. Public hearings were conducted both in Jakarta and the regions, and PAH I invited public figures, experts, civic organizations, NGOs, and activists to the hearings. In collaboration with universities and academic institutions, several seminars and workshops on topics relevant to the constitution were also conducted in Jakarta and the regions. To supplement these sessions, PAH I members were provided with constitutions from other countries and additional information. PAH I also dispatched teams abroad to conduct comparative studies on issues related to the constitution, in which the members could compare and absorb the associated information without having to draw a common conclusion on these issues. PAH I invited speakers to deliver special lectures, including prominent Indonesian figures, national figures in the struggle for independence, and leading Indonesian and international thinkers in the fields of constitutional law, socio-politics, and economics.

To further communicate PAH I activities to the public, regular meetings with the media were arranged. All PAH I meetings would be open to the public. The public were encouraged to submit their ideas and aspirations. In collaboration with the UNDP (United Nations Development Programme), the MPR's Secretariat General set up a television station to broadcast MPR meetings in real time. PAH I members also participated in various seminars and workshops on constitutional reform organized by the public. The side effect of the openness, the foreign observers, the international scholarly lectures, and PAH I members attending public events was that certain parties accused the MPR of manipulating the process, with the Constitutional amendment process supposedly being controlled by foreign interests.[412]

412 See RM. A.B. Kusuma, *op. cit.*, p. xv.

Public involvement was extensive enough to represent different societal views. With nearly eight months of consultation time, the internal deliberations in PAH I, the MPR Working Body, Commission A, and the MPR plenary meeting were intensive and extensive. The factions had ample opportunity to discuss a wide range of topics regarding the constitutional reform. However, there were critiques as well. Certain parties wanted to replicate the process conducted in Thailand in 1997, which involved soliciting input from every individual citizen. However, this would have prolonged the process even more in a country the size of and with such a heterogeneous society as Indonesia.

As discussed in the previous chapter, having the MPR factions feel a sense of ownership and responsibility for completing the amendment process encouraged the factions to learn more about the issues evolving in the community and to communicate them to their respective supporters. Various latent political issues were expressed openly at the PAH I forums. This was quite remarkable, given that they had been silenced for so many years. These issues included aspirations for decentralization and autonomy, support for creating a federal state, and the desire to secede from Indonesia. These issues were associated with certain regions feeling disappointed and angry with the central government because of a sense of injustice, discrepancy of development and negligence over the years. Similarly, the aspiration to make the implementation of Islamic sharia obligatory for its followers was openly proposed and discussed at various PAH I forums. Lastly, people expressed their aspirations for the rule of law, democracy, social justice, and democratic elections. Considering the broad changes they desired, certain individuals insisted that the 1945 Constitution should be replaced by an entirely new Constitution.

On the other hand, the process raised concerns in certain circles that the amendment process would open a Pandora's box of classical Indonesian politics, which could be uncontrollable and endanger the existence of the Indonesian nation and state. This led to opposition against amending the Constitution. Those against the amendment, who thought the lower-level statutes and the Constitution's implementation that required improvement, also had a fair chance to express their stance in the PAH I meetings.[413] There were three different attitudes toward changing the 1945 Constitution: those who supported the amendment process, those who wanted to revoke the 1945 Constitution and replace it with a new constitution, and those wanted to maintain the original 1945 Constitution.

Among the factions, especially in PAH I, there was an overwhelming majority in favour of reforming the 1945 Constitution. Elements in F-PDI-P and F-UG were hesitant about the changes, with a F-PDI-P minority regarding the 1945 Constitution as the legacy of President Soekarno. F-ABRI had always supported the reform but strove to maintain the MPR as the highest

413 As expressed by, among others, A.S.S. Tambunan. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Revised Edition, p. 252.

state institution which would compose the country's major policies (e.g., the Broad Outlines of State Policy) and involve ABRI's delegates. However, various military retirees began to criticize and reject amendments openly and strongly. There were attempts to revise agreed on changes. [414] However, since the beginning of the second amendment stage, PAH I had confirmed that ratified amendments could not be changed at a later stage.

During the Commission A meetings, constitutional law experts were invited as associate experts of the Commission, including Bagir Manan, Soewoto Moeljo Soedarmo, and Mahfud MD. They helped consolidate ideas but were not involved in decision-making. For example, the author, as Commission A's chairman, asked Bagir Manan to draft the conclusion on Commission A discussions on decentralization based on the "mathematical principle" of the "derivative-integral" relationship.[415] The Commission accepted the draft, which eventually became Article 18A (1) of the Second Amendment.

Considering the public discourse, the amendment process interacted directly with real political problems and Indonesia's challenges. It was solution oriented. The process became a communication channel between the people and the state. Nevertheless, presumptions and allegations persisted that the process was closed and elitist. Thus, the process of amending the 1945 Constitution reflected Simon Chesterman's description of process, that it must answer the question of 'for whom' the constitution was made. Constitutions are for citizens who have their own history, culture, and political aspirations, because the state cannot be built from the outside. It should not be sterile from, but in conversation with, the country's direct political challenges.[416]

Given the escalating armed conflicts in Aceh and Papua and the regions' profound disappointment with the central government associated with unequal levels of development, the amendment process could be perceived as part of an attempt to prevent conflict and as a reconciliation promotion process.[417]

One problem was that with PAH II composing new MPR decrees and reviewing the existing ones, the political reform process followed a dual track with two incompatible strands. As happened during the previous phase, mismatches and contradictory issues occurred. For instance, while PAH I discussed making the state institutions equal to establish checks and balances, PAH II continued to view the MPR was the highest state institu-

414 Personal notes.

415 Derivative-integral is a calculus theorem which states that differentiation is the reverse process to integration.

416 Simon Chesterman, *State-Building, the Social Contract, and the Death of God*, paper presented at *The Future of State building: Ethics, Power and Responsibility in International Relations*, University of Westminster, London, October 2009.

417 See Gregoire C N Webber, *op. cit.*, Department of Law, London School of Economics and Political Sciences, in 2010 WG Hart Legal Workshop: *Comparative Aspects on Constitutions: Theory and Practice.*

tion, which should be strengthened. While PAH I discussed a mechanism for an independent judiciary to review the law's constitutionality and ensure the constitution's supremacy, PAH II drafted a decree stipulating that the MPR held this authority, maintaining the MPR's supremacy.[418] PAH II also worked on issues which were more relevant to the content of the Constitution and therefore should have been discussed in PAH I, such as the relationship with other high state institutions, and the hierarchy of legal status. PAH II also prepared MPR decrees on the accountability procedures of the president to the MPR, on the political role of the Indonesian Armed Forces or ABRI (*Angkatan Bersenjata Republik Indonesia*), and on decentralization. The evidence shows a lack of synchronization between PAH I and PAH II, as well as among the factions' and the MPR's leaders.[419]

In the meantime, the public found it difficult to follow the discussions. Many issues were discussed and there was no comprehensive preliminary draft of changes. The deliberation and consensus approach and the specific interests of the political parties involved made the process slow. Certain societal groups became increasingly dissatisfied with the amendment process.

Further complicating matters, NGOs tried to impose their ideas on the Constitution and to take over the process from the MPR. They accused the MPR of being dominated by short-sighted political interests, and of being closed and monopolizing the process. They continued to call for the establishment of an independent and expertise-based constitutional commission, which they expected would carry out their ideas. They demanded a complete overhaul of the 1945 Constitution. They argued that the presumption that the Preamble may not be changed was mystical.[420] Furthermore, they insisted that Indonesia should emulate Thailand's constitution-making process, which was conducted by an independent commission set up by the DPR and, as claimed by the NGOs, involved ordinary people directly in the process.[421]

Eventually, PAH I, as reported to Commission A, was unable to agree on the draft amendment issues enclosed to MPR Decree No. IX/1999 within the allocated time and reported the results to the MPR plenary session. As a solution, Commission A proposed approving the agreed-on sections as the second amendment to the 1945 Constitution, scheduling the unfinished sections to be completed at the 2002 MPR annual session at the latest.

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418 MPR Decree No. III/2000 on Sources of Law and the hierarchy of legislation.

419 See also Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kesatu, Jilid 1, *Risalah Rapat ke-4 sampai ke-7 BP-MPR (Sidang Tahunan 2000),* Sekretariat Jenderal MPR-RI, 2000, p. 70.

420 As stated by Bambang Wijayanto from Yayasan Lembaga Bantuan Hukum Indonesia (YLBHI). See Majelis Permusyawaratan Rakyat Republik Indonesia, op. cit., Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 257.

421 Ibid., pp. 234-236. The 1997 Constitution was the first Thailand constitution to be drafted by a popularly-elected Constitutional Drafting Assembly, hence was popularly called the *"People's Constitution"*. It was widely hailed as a landmark in Thai democratic constitutional reform. However, in September 2006, the military launched a coup and abrogated the People's Constitution.

Managing the meeting debates was decisive for the amendment process' success. Since the topics were quite sensitive, such as the relationship between the regions and the central government and the proposal that the Constitution should oblige the implementation of religious teaching, the meeting atmospheres were often heated and emotional.[422] However, the MPR procedure stipulates that in most forums,[423] a decision can only be made by consensus.[424] Therefore, the leadership and members reminded each other continuously to keep the meeting friendly and peaceful, so that a rational process could be maintained.[425]

Since the decision-making process emphasized deliberation and compromise, there was intensive lobbying between the factions and compromised results. Factions tried to align their respective opinions, making it a more sustainable amendment process. However, some in the public perceived the MPR as delaying the process, giving rise to suspicion regarding the MPR's intention and sincerity towards amending the Constitution.[426]

The largest part of the proposed amendment was not completed and had to be postponed. Ultimately, the MPR plenary session on 18 August 2000 ratified the agreed draft as the second amendment of the 1945 Constitution. Further, the MPR decided that the amendment should be continued and finalized at the 2002 MPR annual session at the latest, as stated in MPR Decree No. IX/2000.

Without the strong commitment of political parties and the armed forces (i.e., the military and police) to complete the amendment and maintain security and order, there would have been a volatile situation. There could have been chaos where parts of the amended constitution were already in effect, their contents different or contradictory to unamended parts of the constitution still in effect.

### VI.4.2 The substance

In the previous stage, factions delivered many proposals associated with the *negara hukum* or the rule of law state.[427] However, this debate was complicated by the notion that many members held of the MPR being the highest

422 See Majelis Permusyawaratan Rakyat Republik Indonesia, op. cit., Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 125 – 132.

423 The exceptions are the final decision-making in the MPR plenary meeting and the preceding Commission meeting.

424 MPR Decree No. II/MPR/1999, Article 79.

425 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 131.

426 *Op. cit.*, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 234 – 235.

427 These included proposals on the supremacy of law, an independent judiciary, human rights, the freedom of religion and Article 29, people's sovereignty and the MPR, the elections and the political parties as the constitutional instruments for power circulation, the presidential election, decentralization, social welfare, *Pancasila* as the foundation of the state and the law-making process.

political body. This stemmed from the intensive political indoctrination during the previous regime and from MPR Decree No. I/1999[428] asserting that the October 1999 MPR session was conducted to strengthen the MPR's role, as the highest institution, being the sole executor of the people's sovereignty in full.[429]

During the second amendment process, factions were more assertive in proposing the rule of law and the supremacy of law.[430] Although they could not finalize an agreement, they affirmed their desire to stipulate the rule of law state in the Constitution. They also acknowledged its links to the principles of human rights, separation of powers, an independent judiciary system,[431] and as expressed by the public,[432] it being the basis of a democracy.[433] However, the MPR and the public still thought that to guarantee its supremacy the judiciary should be directly accountable to the MPR.[434] Another problem was that many still understood the rule of law more as rule by law. [435]

During the deliberations, PAH I concluded that the 1945 Constitution is the supreme law of the land. Thus, most members argued that there should be a way to test the law's constitutionality.[436] The only exception was Fuad Bawazir (F-Reformasi).[437] However, members differed on how constitutional review should be performed. PAH I concluded that the Supreme Court or MA (*Mahkamah Agung*) should be the cassation court for all judicatures. All factions agreed that the Supreme Court should have the authority to perform judicial review of secondary legislation. However, the factions and the public differed on reviewing the constitutionality of acts of parliament. Some argued that it should be conducted by the MPR,[438] whereas

428 The full title being MPR Decree No. I/1999 on the fifth change to MPR Decree No. I/MPR/1983 on the Standing Order of the MPR (which paved the way for convening the 1999 MPR general session).

429 MPR Decree No. II/MPR/1999 on Rule and Order, Chapter II Article 2.

430 Sutjipno (F-PDI-P), for instance, at the beginning of the second amendment, on 3 December 1999, was the first who resolutely proposed that PAH I should discuss a democratic state based on the rule of law (*negara hukum* or *democratische rechtsstaat*) and its components such as *grondrechten* (fundamental rights) and *scheiding van machten* (separation of powers). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 56.

431 See Ibid., pp. 83 – 128.

432 See i.e., Ibid., pp. 422, 439.

433 Ibid., p. 861, 863.

434 See Ibid., pp. 159, 552.

435 Ibid., pp. 133-134.

436 At the outset, the speakers in the discussions did not seem to distinguish between the review of the law in respect of the Constitution or the constitutional review and the review of the lesser legislation in respect of the law or the judicial review. However, later the factions distinguished between the two different types of reviews.

437 Fuad Bawazir (F-Reformasi) argued that constitutional review is not useful because it will lead to political uncertainty. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 322.

438 Such as stated by Lukman Hakim Saifuddin (F-PPP), Patrialis Akbar (F-Reformasi), Hendi Tjaswady (F-TNI/Polri), and Yusuf Muhammad (F-KB), See Ibid., pp. 255–258.

others argued that this should be done by an independent judiciary body or by the Constitutional Court.[439] Experts, activists, and participants at PAH I public hearings were similarly divided. [440]

In general, there were three opinions regarding who would hold the authority to perform constitutional review: The Supreme Court, the Constitutional Court, or the MPR.[441] Although all factions in PAH I had agreed that Chapter I of the Constitution should affirm that Indonesia is a *negara hukum* (the rule of law state),[442] PAH I could not agree on the details of constitutional review, so it limited itself to compiling ideas raised in previous meetings.

Regarding the law-making process, PAH I agreed that a bill that had been jointly agreed by the DPR and the president, but not promulgated by the president within 30 days, should automatically come into force and the president should promulgate the law. This clause ensures that a law is a product of a democratic process that is subject to the provisions of the Constitution.

All factions agreed that the Constitution should guarantee the independence of the judiciary. By function, the Supreme Court should be the highest in the court system. All judicial bodies should be subordinate to it, including ordinary courts, religious courts, administrative courts, military tribunals, and tax courts.[443] However, PAH I could not agree on the establishment of the Constitutional Court and judicial review. [444] In the meantime, while PAH I was discussing judicial review and whether the power should be bestowed on the Supreme Court, PAH II drafted an MPR decree stipulating that the MPR can review laws against the Constitution and MPR decrees passed by the MPR plenary.[445] It also stipulated that the Supreme Court could test secondary legislations against the primary legislation. Finally, the MPR decree assigned PAH I to conduct constitutional reviews based on

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439 Such as asserted by Hobbes Sinaga (F-PDI-P), Hamdan Zoelva (F-PBB), Sutjipto (F-UG), and Agun Gunandjar Sudarsa (F-PG), Ibid., p. 324. Saifuddin and Akbar argued that if the case is purely legal, judicial review should be conducted by the Supreme Court, but if political, by the MPR. See Ibid., pp. 255-258.

440 See i.e., Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 231, 319, 365-366.

441 Ibid., p. 170. Agun Gunandjar Sudarsa (F-PG) argued that the Constitutional Court should be an ad-hoc court which is formed by the MPR based on a proposal of the Supreme Court.

442 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 108, 131.

443 Ibid., pp. 211-214. The conclusion to place the Supreme Court as the court of cassation for all courts, including the religious courts (Islam), contains problems regarding law enforcement in a society which has diverse norms and traditions that are valid as legal rules.

444 In a PAH I informal consultation meeting on 4 July 2000, Fuad Bawazir (F-Reformasi) argued that he could not accept a Constitutional Court with the authority to conduct constitutional review because it would lead to political uncertainty. See Ibid., p. 322.

445 MPR Decree No. III/2000 on Law Resources and Hierarchy of Legislations.

existing laws. However, PAH I decided to postpone the assignment and to continue discussing the establishment of an independent judicial process to test the constitutionality of the law.[446]

Another controversial issue was the basis and form of the state. F-PDI-P proposed revising Article 1(1) to "Indonesia shall be a unitary state in the form of Republic and based on the Rule of Law." It also proposed rewriting Article 1(2) from "Sovereignty shall be vested in the hands of the people and be executed in full by the MPR" to "Sovereignty shall be vested in the hands of the people and be executed according to the Constitution."[447] This proposal demonstrates how the rule of law began to gain traction in the amendment process. While it did not fully accept the proposal at this stage, PAH I began to appreciate the idea of the law's supremacy over the MPR's supremacy.

Regarding the Constitution stipulating adherence to human rights, there was no significant obstacle to achieving an agreement. The previous Special MPR Session in 1998 had determined MPR Decree No. XVII/1998 on Human Rights. All factions agreed to incorporate the substance of this MPR decree into the Constitution.[448] The same opinion was also voiced at various public hearings by NGOs,[449] religious organizations,[450] interest groups, and the public.[451] Regarding this topic, PAH I members could be categorized into two groups.

The first group acknowledged that human rights are inherent in human beings in the form of *fitriyah* (inherent natural disposition) or as *imago Dei*,[452]

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446 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 220. Despite the fact that the leadership of PAH I had informed the factions and the leadership of the MPR, PAH II continued to draft the decree which eventually, with the approval of the factions and the leaderships in the MPR, passed by the MPR plenary as MPR Decree No. III/MPR/2000 on Law Resources and Hierarchy of Legislation, Article 5 (1) and (2).

447 As conveyed by Harjono (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 77-78. The proposal to affirm that Indonesia is a rule of law state, *"Indonesia is a unitary state in the form of a Republic and based on the Rule of Law"* was determined in an internal F-PDI-P meeting on 5 April 2000, along with a proposal to revise paragraph (2) of Article 1 to become *"the sovereignty is in the hands of the people and is exercised according to this Constitution"*. See F-PDI-P document dated 5 April 2000.

448 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 301-378.

449 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 101. See also, Ibid.

450 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 586. Such as stated by Ahmad Watik Pratiknya from Muhammadiyah before a PAH I public hearing on 29 February 2000.

451 Ibid., p. 176, 177. See also *Kompas Daily*, 5 May 2000.

452 Ibid., p. 358. Such as stated by Gregorius Seto Harianto (F-PDKB). Imago Dei ("image of God"): A theological term, applied uniquely to humans, which denotes the symbolical relation between God and humanity. The term has its roots in Genesis 1:27, wherein "God created man in his own image. . ."

and not as a gift of the state.[453] The state must recognize human rights to further uphold them.[454] This group contended that human rights are not a Western concept,[455] and although some particularistic consideration may be necessary in their implementation, human rights should be comprehended as universal,[456] corresponding well with Islamic teachings.[457] This group also argued that limiting rights is inherent in the concept, as it includes the obligation to respect other rights.[458] According to this interpretation, the basic rights of a person should be protected from possible violations by the state, while having state institutions protect the fundamental rights from infringements by fellow members.[459] Any elaboration and regulation regarding human rights should be intended only to protect and interpret the articles, and not to eliminate any substance of human rights.[460] Also, in a pluralistic society such as Indonesia, it is difficult to implement religious norms, which are applicable to everyone.[461]

The second group argued that human rights should be limited. Since the state is based on One Almighty God, the human rights provisions in the constitution should also confirm that, besides having rights,[462] there is an obligation to obey religious teachings.[463] The substance of the Universal Declaration of Human Rights should be combined with the 1990 Cairo Declaration of Human Rights, which asserts that rights and freedoms should subject to *syariah* (Islamic teachings).[464] Furthermore, the rights should not contradict the culture of Indonesia.[465]

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453 Ibid., p. 371. Such as reiterated among others by Slamet Effendy Yusuf (F-PG), Asnawie Latief (F-PDU), and Hamdan Zoelva (F-PBB).

454 As stated by the author as the chairman of PAH I. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 329.

455 Ibid., p. 368. As stated by Slamet Effendy Yusuf (F-PG).

456 Ibid., p. 316.

457 Ibid., p. 355. As stated by Asnawie Latief from F-PDU. F-PDU is a merger of members of the MPR from small Islamic political parties, e.g., Nahdlatul Ummah Party (PNU), Indonesian Islamic Association Party (PSII), Indonesian Majelis Syuro Muslimin (Masyumi), and People Sovereign Party (PDR).

458 Ibid., p. 334. As stated by Valina Singka Subekti (F-UG) and Hendi Tjaswadi (F-TNI/Polri).

459 Ibid, p. 362. As emphasized by Sutjipno (F-PDI-P).

460 Ibid., p. 351. As stated by Syarief Muhammad Alaydrus from an Islamic political party faction, the F-KB.

461 Ibid., p. 325.

462 Ibid., p. 406.

463 Ibid., p. 336.

464 Ibid., pp. 369-370. Quoted by Ali Hardi Kiaidemak as the content of Article 25 of the Declaration of the 1990 Cairo Organisation of the Islamic Conference.

465 Ibid., p. 352.

Eventually, PAH I and the MPR Working Body managed to conclude a new draft of the human rights provision. It stipulated that the limitation in carrying out the rights and freedoms of each person shall be subject to the restrictions set forth by law with a view solely towards ensuring recognition and respect for the rights and freedoms of others and to meet the fair demands following the considerations of morality, security, and public order in a democratic society, as set forth in Article 36 of MPR Decree No. XVII/1998.

However, although the limitations had been concluded, Commission A accepted adding 'religious values' alongside moral considerations, security and public order as the factors restricting human rights.[466] This addition was approved at the MPR plenary meeting. The addition of religious values rather than religious teachings as the boundary of implementing human rights creates room for discussing which religious values matched the environment and were generally accepted. However, because of the difficulty in translating religious values into provisions of general application, this addition can also give rise to difficulties in upholding human rights.

Other differences of opinions included whether the freedom of religion only concerns religions or also traditional beliefs (*kepercayaan*),[467] and whether the right not to be tried under the non-retrospective law, such as for a past act of genocide, was understood as a non-derogable right.[468] Ultimately, in the Commission A meeting in August 2000, the MPR agreed to confirm the freedom of religion and *kepercayaan* (traditional beliefs) in the Constitution, though the confirmation is not stipulated in the same paragraph, denoting that religion is not at the same level as *kepercayaan*. Likewise, Commission A agreed on the right not to be tried under the non-retrospective law.

Another contentious issue was the F-PBB and F-PPP proposal to insert the *tujuh kata* (the seven words), which obliges Muslims to implement Islamic *sharia*. They proposed re-inserting it into Article 29, as it was originally in the draft Constitution prepared by the Investigating Commission in July 1945, before it was dropped during the PPKI's ratification of the 1945 Constitution on 18 August 1945. They argued that there are Islamic *sharia* that require state authority for their implementation.[469] They also asserted

466 Ibid., p. 519. As proposed by A.M. Luthfie (F-Reformasi) in the Commission A meeting in August 2000.

467 These alternatives are related to certain convictions that religion should not be equated with *kepercayaan*. *Kepercayaan* is a generic term for a local set of beliefs, such as mysticism, *kejawen* (traditional Javanese mysticism), and paganism.

468 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 455.

469 As expressed by M.S. Kaban (F-PBB) See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 657.

that they wanted to maintain the Preamble and incorporate the full human rights chapter into the Constitution.[470]

Several observations can be made based on this debate. It demonstrates that the aspiration that the state should oblige followers of Islam to implement Islamic *sharia* (Islamic laws) still exists in certain communities.[471] Therefore, certain political parties use the issue to gain or maintain support. It was the first time the issue was deliberated formally in a state institution after it was discussed and contested by the Investigating Commission and the *Konstituante*. During the 1959-1966 Old Order (*Orde Lama*) and 1966-1998 New Order (*Orde Baru*), the government prohibited public discussions of the issue.

The debate is no longer focused on the issue of the foundation of the state, i.e., whether Indonesia should be based on *Pancasila* or on Islam. Every faction accepts *Pancasila* as the foundation of the state. Instead, the discourses had shifted to an instrumental level, namely the relationship of the state and the religious life of the citizen. For some, in a state based on *Pancasila*, in which "belief in the One and Only God" is the first principle, the state should oblige every citizen to implement their respective religious teachings.[472] Therefore, the Constitution should stipulate that no state operation may contradict religious values, norms, and laws.[473] This points to the existence of a diversity of norms in a society, contradicting the perception that the constitution is the highest law.

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470 As stated by Hamdan Zoelva (F-PBB) See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 93, 100, 161.

471 As reported among others in from Aceh and North Sumatera in a PAH I meeting on 4 February 2000. Ibid., p. 421.

472 At a PAH I public hearing on 29 February 2000, Nazri Adlani from the Indonesian Ulema Council or MUI (*Majelis Ulama Indonesia*) proposed to revise paragraph (2) of Article 29 to become "Every follower of a religion is obliged to implement the teachings of their respective religion." Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 577. The same was heard at public hearings in, among others, Jambi and Bengkulu. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 22. Likewise, Patrialis Akbar (F-Reformasi) and Yusuf Muhammad (F-KB) argued that the obligation should not be limited to Muslims only, but should apply to all religions. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 457, 458.

473 As proposed by Rosnaniar (F-PG), see Ibid., p. 422. Nazri Adlani of the Majelis Ulama Indonesia or MUI (Majelis Ulama Indonesia) argued that there should be no laws that contradict religious values, norms and laws. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 577.

Thus, the issue raised suspicion among certain communities that the proposal was an effort to establish an Islamic state.[474] Those who opposed the proposal, both in the MPR and in the public, expressed their opinions openly.[475]

Eventually, out of 11 factions, only 3 factions in PAH I insisted on maintaining the original Article 29.[476] All other factions proposed either minor or major changes to Article 29.[477] With regard to Article 29(1), seven factions agreed to maintain the original version,[478] while only F-PBB and F-PPP proposed inserting the *tujuh kata* ('the seven words').[479]

Likewise, PAH I could not reach agreement on inserting a provision in the articles of the Constitution which affirms that the philosophical foundation of the state is *Pancasila*, which principles are detailed in the fourth paragraph of the Preamble.[480] Despite the fact that all factions agreed that the state is based on *Pancasila*, deliberations about the proposal show that F-KB, F-PPP, F-PBB, F-Reformasi and F-PDU were concerned that inserting a provision in the Constitution could create unnecessary political problems

474 As stated by Seto Harianto (F-PDKB). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 127.

475 Dahlan Ranuwihardjo argued that the state has no authority to instruct or to force someone to worship. Azyumardi Azra, the president of IAIN, emphasized that the provision in the Constitution which guarantees the freedom to adhere to one's religion is still relevant. Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 455. Taufiqurrochman Ruki (F-TNI/Polri) emphasized that if the state requires the followers to implement religious teaching, then anyone who does not implement such teaching violates the law and should be punished. See, Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 430. Likewise, Ali Masykur Musa (F-KB) reminded the committee that Indonesia is a nation state, so that "the room of Pancasila" and "the room of Islam" is different. Ibid., p. 459. The author stated that God does not need anyone to help one's relationship with his/her God, including the state. Therefore, borrowing the state's hand to oblige the people to implement God's teachings, becomes irrelevant. Ibid., p. 561. Nurcholish Madjid, the Rector of the University of Paramadina, K.H. Hasyim Muzadi, the Chairman of Nahdlatul Ulama, Ahmad Syafii Maarif, the Chairman of Muhammadiyah, and Masdar S. Mas'udi, the Chairman of the Centre for Empowerment of *Pesantren* (The Islamic Boarding School), rejected the idea of reinserting the *tujuh kata*. As stated by Madjid, to reinsert 'the seven words' in the Jakarta Charter means confirming a formalistic and exclusive Islam. *Suara Pembaruan*, newspaper, 10 August 2000.

476 These were F-PDI-P, F-TNI/Polri and F-PDKB.

477 Later, as affirmed by Ali Masykur Musa, F-KB agreed to maintain the original Article 29. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 44.

478 These were F-Reformasi, F-PDU, F-PDKB, F-TNI/Polri, F-UG, F-PDI-P, and F-PG.

479 See Attachment VI.5., Positions of Factions regarding Article 29.

480 As proposed by, among others, Harjono (F-PDI-P), Hatta Mustafa (F-PG), Gregorius Seto Harianto (F-PDKB), Hendi Tjaswadi (F-TNI/Polri) and Valina Singka Subekti (F-UG), See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 77-79.

associated with the history of *Pancasila*.[481] The debates show that Indonesian society is marked by three separate normative systems, namely indigenous customary law (*adat* law), Islamic law, and civil law. These coexist and do not always align,[482] with customary law and Islamic law also consisting of diverse legal environments.[483]

The MPR could not resolve the debates during the second amendment phase, but that did not hinder it from agreeing and ratifying the new Chapter XA on human rights. The debates demonstrate that the relation between human rights and religion is a complicated issue that will continue to be debated in Indonesia.

At the beginning of the second amendment process, as the first speaker in the PAH I preliminary discussion, F-PDI-P emphasized strengthening the consistency of Article 31 on Education, Article 32 on Culture, Article 33 on National Economy, and Article 34 on Social Welfare in realizing social justice.[484]

The discussions repeated that education is essential for improving the quality of human resources as a requirement for economic development.[485] In that regard, the Constitution should emphasize efforts to empower every individual and social group to enhance people's participation in and contribution to development.[486] Therefore, the factions agreed that the article on education should confirm equal education for every citizen, an end to injustice and discrimination in education,[487] and guarantee the right to a decent and just education for every citizen.[488] The discussion also pointed out that education contributes to the development of intelligent people with good character who help form a civil society that can protect itself from

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481 See Ibid, pp. 117, 118, 122. The draft of the foundation of the state proposed by Soekarno in his speech on 1 June 1945 is also called *Pancasila*. On the other hand, the draft of the first principle of the *Pancasila* approved by BPUPK contains the *tujuh kata*, the obligation to implement Islamic Sharia for its followers, while the 1949 Constitution and the provisional 1950 Constitution contain a version of *Pancasila* with a different set of principles.

482 See Jan Michiel Otto, *Sharia and National Law in Indonesia*, in *Sharia incorporated, A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, Jan Michiel Otto (ed.), Leiden University Press, 2010, pp. 440-441.

483 KH. Abdurrahman Wahid (ed.), *Ilusi Negara Islam, Ekspansi Gerakan Islam Transnasional di Indonesia* (Illusion of Islamic State, The Expansion of Transnational Islamic Movements in Indonesia), LibForAll Foundation, 2009, p. 133.

484 Stated by Hobbes Sinaga (F-PDI-P) in the first PAH I meeting on 6 December 1999. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 80.

485 As argued by, among others Soedijarto (F-PDI-P), see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 210 and Bana Kartasasmita from Bandung Institute of Technology (*Institut Teknologi Bandung* – ITB), Ibid., p. 491.

486 As argued by Rizal Zaenuddin Jamin (ITB). Ibid., p. 502.

487 As stated by Azyumardi Azra from the State Islamic Institute or IAIN (*Institut Agama Islam Negeri*). See Ibid., p. 456.

488 Stated by Ahmad Bagja from Nahdlatul Ulama (NU). Ibid., p. 590.

excessive and unnecessary intervention of state power, while fulfilling aspects of social life that are beyond the state's reach.[489] To reinforce this argument, a proposal was submitted that the Constitution should stipulate a state budget of between 15% and 25% of GDP for education.[490]

The PAH I forum also realized that the Indonesian economy will increasingly integrate with the global economy. Hence, as a developing country, Indonesia should not only organize its economy based on populism and justice but should also pay attention to efficiency and, accordingly, Article 33 must be amended. However, it was concluded that the market cannot always increase efficiency and justice while marginal groups often suffer in a market mechanism. Thus, the state should intervene to influence the market,[491] in which the market should be perceived as a technical concept that cannot be avoided by anyone.[492] The discussants also reminded each other that interventions must comply with the supremacy of law.[493]

Further, it was emphasized that prosperity should be achieved through a democratic process or people's sovereignty.[494] In that regard, a F-PDI-P speaker asserted that economic development should not follow developmentalism that pursues growth and emphasizes stability at the expense of democracy.[495]

The factions agreed that the Indonesian economy should be organized as a managed market economy, based on efficiency and equity. However, since the economy is related to human rights and democracy, a social safety net scheme should also be introduced to prevent untenable conditions.[496] Most members preferred a social market economy,[497] in which the state sides with low-income communities.[498] In this context, Widjojo Nitisastro asserted that the original Article 33 should be maintained since the article is

489 Stated by Ahmad Watik Pratiknya from Muhammadiyah. Ibid., p. 586.

490 Proposed by Soedijarto (F-PDI-P). See Ibid., p. 514.

491 As argued by Adiningsih from the Indonesian Economist Association or ISEI (*Ikatan Sarjana Ekonomi Indonesia)*. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 226.

492 As stated by Pranarka of the Centre for Strategic and International Studies (CSIS). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 225.

493 As asserted by Prasetiono (ISEI) and Harun Kamil (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 204-205, 219.

494 As stated by Djoko Wiyono from the Bishop Conference of Indonesia or KWI (*Konperensi Waligereja Indonesia*). Ibid., p. 540.

495 As asserted by I Dewa Gede Palguna (F-PDI-P). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 211.

496 As asserted by Irzan Tanjung (ISEI). Ibid., pp. 194, 197.

497 As stated by Soedijarto (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 308.

498 As stated by Ahmad Bagja (NU–Nahdlatul Ulama), see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 590.

the foundation of economic democracy which holds that the priority is the welfare of the people, not the prosperity of individuals.[499]

PAH I also discussed the state's role in the economy. Some argued that the principle of kinship hinders individual productivity because the system refers to mechanical solidarity without compensatory obligations. It also discussed the global trend of market liberalization and social welfare convergence. However, the discussion noted that Indonesia must be realistic because the welfare state is an expensive concept and can damage the people's work spirit.[500] Most members agreed that the state should manage and regulate important economic sectors but does not need to own them. In the end, PAH I did not complete the amendments to Articles 31, 32, 33, and 34. The issue was postponed to the next stage. During the discussions at this stage, although all factions agreed that according to the Preamble the state should be based on people's sovereignty,[501] there was still a level of ambiguity on the notion of people's sovereignty and the MPR's position as the holder and the implementer of the sovereignty.

At the outset, almost all factions still placed the MPR above all other state institutions. However, gradually, nearly all PAH I factions began challenging the MPR's omnipotence. PAH I member opinions ranged from abolishing the MPR[502] to maintaining it as the highest body, albeit with limited authority, as explicitly stipulated in the Constitution, which implies that the MPR is no longer the sole implementer of people's sovereignty.[503]

There was the argument in a PAH I meeting that the existence of a state institution which holds sovereignty in full conforms to the theory of state sovereignty, which contradicts the theory of people's sovereignty. The theory of state sovereignty will always produce a totalitarian state, whereas people's sovereignty will lead to democracy.[504] Thus, F-PDI-P proposed changing Article 1(2) from "Sovereignty shall be vested in the hands of the people and be executed in full by the MPR" to "Sovereignty

499 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 295, 296. Widjojo Nitisastro was the chief economist during the previous regime.

500 As stated by Adiningsih (ISEI), see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 199, 201, and Valina Singka Subekti (F-UG), see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 313.

501 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 78, 81.

502 The argument was that if the president is elected directly by the people, the MPR is no longer necessary. See Ibid., pp. 273, 355, Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 56.

503 Ibid., p. 365.

504 As reiterated by Bagir Manan. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 333.

shall be vested in the hands of the people and be executed according to the Constitution."[505]

This proposal demonstrates how the rule of law began to emerge resolutely in the amendment process. However, though most of the factions agreed that the MPR was no longer the supreme authority with unlimited power,[506] some still argued that the MPR was the highest state institution that should control all other state institutions.[507]

Eventually, PAH I concluded that it had abandoned the notion that the MPR is the reincarnation of the people, which holds and distributes unlimited power.[508] Thus, although the formal proposal was not accepted at this stage, PAH I started to abandon the concept of the supremacy of the MPR and accept the concept of the supremacy of law.

The original 1945 Constitution is unique regarding elections. Whereas it asserts that the sovereignty is in the hands of the people and there are people's representative institutions, there is no stipulation on elections or political parties.[509] Thus, the public and all factions agreed that the amendment should include stipulations about elections and political parties as the instrument of and process for realizing people's sovereignty in this democratic country.[510] Accordingly, all factions agreed that the Constitution should stipulate that elections should be conducted periodically in a direct, free, and general manner and undertaken by a non-partisan, national, and independent election commission.[511]

Further, PAH I concluded that the Constitution should guarantee the existence of political parties and that a political party should satisfy certain requirements to be eligible to participate in an election.[512] Regarding presi-

505 As proposed by Harjono (F-PDI-P). See above p. 299. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 77-78.

506 See Ibid., p. 212.

507 As stated by Patrialis Akbar (F-Reformasi), see Ibid., pp. 216-218, 225.

508 As concluded by the Chairman of PAH I. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 322.

509 As stated by Hobbes Sinaga (F-PDI-P), see Ibid., p. 25.

510 As stated by, among others, Hamdan Zoelva (F-PBB), Anthonius Rahail (F-KKI), Yusuf Muhammad (F-KB), at a public hearing in Maluku, see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 96, 116, 159, 437 or by Ida Bagus Gunadha of Parisadha Hindu, see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 437.

511 As stated, among others, by T.M. Nurliff (F-PG) and Ali Masykur Musa (F-KB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Enam, Edisi Revisi, Sekretariat Jenderal, 2010, p. 391.

512 As proposed by Pataniari Siahaan (F-PDI-P), a political party should satisfy a certain parliamentary threshold to contest in the election. See, Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 46. At the time, there were more than 100 political parties, and 48 of them were eligible to participate in the 1999 election.

dential elections, however, factions and the public at large were divided. Most preferred a direct election of the president by the people,[513] though a small group argued that the president should be elected by the MPR.[514] Those who preferred elections by the MPR argued that the people were not ready for a direct election.[515]

Eventually, PAH I could not agree on elections and political parties. These topics were carried over to the subsequent phase.

Demand for a devolution of government authority to the regions was another significant issue in public discourse, which became a topic during the second amendment process. Driven by frustration and anger against the sense of injustice and unequal regional development, the regions demanded fair treatment and adequate authority from the central government to manage their respective regions. Certain provinces, such as Riau and East Kalimantan, demanded the establishment of a federal state. In Aceh and Papua, armed insurrections fighting for independence continued to rise. The MPR considered this issue dangerous because countries like the Soviet Union, Yugoslavia, and Czechoslovakia, which maintained rigid centralized systems of government, underwent "balkanization" and after splitting up during the reform process, disappeared in world history.

The public was divided into those who supported the idea of establishing a federal state and those who supported the unitary republic,[516] whereas the factions argued that the unitary state should be maintained.[517] One of the preliminary agreements among the factions was maintaining the unitary

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513 As proposed by, among others, Lukman Hakim Saifuddin (F-PPP), and at public hearings by Isbroidini Soejanto (AIPI), Bambang Widjojanto (LBHI), John Pieris (UKI), Azyumardi Azra (IAIN) and Guswin Agus (ITB), see Ibid., p. 92, 423, and Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 254, 391, 454, 489.

514 As asserted by Sutjipto, the Secretary General of PDI-P. *Kompas Daily*, 12 April 2000, p. 6.

515 As stated by, among others Syarif Muhammad Alaydrus (F-KB) see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 468, and Soedijarto (F-UG), see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 267.

516 Among others, Amien Rais, the MPR speaker, in a television interview on 25 November 1999 and Arbi Sanit, a university lecturer, as quoted in *Kompas Daily*, 2 December 1999, argued that Indonesia should become a federal republic. Later, Rais elucidated that it was his personal view as an attempt to lure the issue into the amendment process in order to obtain an appropriate solution. See Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kesatu, Jilid 1, *Risalah Rapat ke-4 sampai dengan ke-7, Badan Pekerja MPR (Sidang Tahunan 2000),* Sekretariat Jenderal MPR-RI, 2000, p. 40. This record does not appear in the Revised Edition (2010) of the minutes of the amendment process.

517 Asnawi Latief (F-PDU) for instance, asserted that any attempt to change the unitary state is unconstitutional and must be revoked. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 102. Admiral Widodo, the commander of the Indonesian National Armed Forces, reiterated that an amendment to the 1945 Constitution should be conducted in reference to the unitary state of Indonesia. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 422.

state of the Republic of Indonesia, but to guarantee justice the chairman of PAH I asserted that PAH I should discuss the issue[518] to ensure that the unitary state is based on the rule of law.[519] Thus, during the seminars, public hearings and other PAH I forums, the issue was discussed.

Eventually, PAH I concluded that the unitary form of the state is the most suitable for a heterogeneous people in an archipelago country such as Indonesia to grow together as a nation. However, they agreed that what matters is not the form of the state but how much autonomy is given to the regions,[520] to enable a region to administer itself under its respective characteristics. The discussions show that PAH I perceived autonomy as a sub-system or a derivative of a system of the unitary state. Thus, by definition, autonomy cannot contradict the existing national government system in which the central government delegates certain authorities to the autonomous regions through democratically made laws.

In that regard, the MPR determined that the amended Constitution should ensure the recognition and respect of units of regional authority that are special and distinct. Further, it was concluded that the provisions regarding regional autonomy should be included in the Constitution.[521] Thus, from this point onwards, the debate no longer focused on the question of whether Indonesia should be a federal or unitary state. Factions agreed to maintain the unitary state and the debate shifted to decentralization and autonomy.

## VI.5 Finalizing the pending issues

The MPR plenary session on 18 August 2000 determined to finalize the amendments to the 1945 Constitution. To this end, it approved MPR Decree No. IX/2000, which instructed the MPR Working Body to prepare the draft changes to the 1945 Constitution and stipulated that the material for the changes consisted of the 1999-2000 MPR Working Body's pending issues, attached to MPR Decree No. IX/2000.[522]

518 The author as the chairman of PAH I asserted that there should be a responsive national discourse regarding the issue. See Ibid., p. 191.
519 Ibid., p. 362.
520 As argued by, among others Diana Fauziah Arifin (AIPI) and Tarman Azam (PWI), see Ibid., pp. 316, 421.
521 As among others concluded by Ahmad Watik from Muhammadiyah. Ibid., p. 586.
522 See Attachment VI.6.4.

# VII The Third Stage of the Process of Amendment of the 1945 Constitution, 5 September 2000 – 9 November 2001

## VII.1 The acting institution and the process

This section outlines the four stages of the amendment process, the working schedule, the faction compositions, and the list of PAH I members.

The MPR plenary session on 18 August 2000 determined to finalize the amendments to the 1945 Constitution. Further, in Decree No. IX/2000, the MPR affirmed that it should complete the 1945 Constitution amendment during the 2002 MPR Annual Session at the latest.

The assignment came with the provision that the amendments, which had been approved and ratified in the first and second amendment stages, could not be changed. Thus, the 1945 Constitution's third amendment continued from the first and second amendments.

On the other hand, as the previous chapter discusses, during the MPR 2000 annual session, PAH I discussed how to conduct an independent constitutional review of laws. However, based on the draft prepared by PAH II, the MPR's plenary stipulated MPR Decree No. III/2000, stating that it was the MPR that had the authority to conduct such constitutional reviews. Based on this decree, the MPR plenary session assigned PAH I to prepare the constitutional review of the laws.[1]

The third amendment process began with the MPR Working Body's first meeting on 5 September 2000. It formed PAH I to prepare the draft amendment following the provisions of MPR Decree No. IX/2000 and the basic agreement in place since the first amendment, i.e., to maintain:

- The Preamble of the 1945 Constitution,
- Pancasila as the state ideology,
- The unitary form of the Republic of Indonesia,
- The presidential system, and
- To conduct the changes in form of addendum to the existing 1945 Constitution.

In accordance with Article 92 of MPR Decree No. II/1999 on the Assembly Standing Procedure, the amendment process consisted of the following four stages:

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1 Members of the MPR used the term 'judicial review of law' as the term for testing the constitutionality of law.

- First stage: The MPR Working Body deliberations on the materials. The outcomes would form the main materials for the second stage. The MPR Working Body set forth PAH I to prepare the materials for the amendment.[2]
- Second stage: The MPR plenary meeting deliberates, beginning with the elucidation of the materials by the MPR leadership and followed by factions' general views.
- Third stage: MPR Commission A deliberates, formed by the MPR plenary.[3] The outcomes of Commission A form the draft MPR decision.
- Fourth stage: The factions make final remarks and the MPR proceeds with decision making.

Article 37(3) of the prevailing Constitution stipulated that the decision to revise the 1945 Constitution required that at least two-thirds of MPR members are present at the meeting and a decision must be approved by at least two-thirds of the members who attend the meeting.

### VII.1.1 The third stage's working schedule

During the 2001 annual session, the MPR allocated the Working Committee the period of 5 September 2000 to 9 November 2001 to prepare the subsequent changes to the 1945 Constitution.[4]

### VII.1.2 Composition of PAH I factions, 2000 – 2001

In the period of 2000-2001, the MPR Working Body consisted of 90 members, who proportionally represented the MPR's 11 factions.[5]

### VII.1.3 Members of PAH I BP-MPR, 2000 – 2001

Approaching the MPR 2001 Annual Session, the proportionality of PAH I faction members changed. PDIP faction members increased from 12 to 13 members. F-UG increased from 4 to 5 members. F-PG increased from 11 to 12 members. Overall, PAH I membership increased from 44 to 47 members.[6]

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2 The MPR Working Body also formed PAH II in charge of reviewing the existing MPR decrees and preparing the new MPR decrees which were deemed necessary.

3 The MPR also formed Commission B in charge of finalizing the works of the previous PAH II.

4 See Attachment VII.1. The working schedule of the third stage of amendment process, 2000-2001.

5 See Attachment VII.2. The composition of the Factions in PAH I, 2000-2001.

6 See Attachment VII.3. List of PAH I members, 2000-2001.

## VII.2 Political situation in the 3rd stage

This section discusses the 2001 Assembly leadership change, the Team of Experts' formation, and their ideas on the amendment process. After certain debates, it was decided that the third stage was indeed an amendment process (rather than the drafting of a new Constitution) and that PAH I should continue the process (rather than a proposed Constitutional Commission).

During the third stage, the political situation became increasingly volatile. Abdurrahman Wahid, who was elected by the MPR as President in the Assembly's general session in October 1999, engaged in a political conflict with the MPR. On 22 July 2001, he issued a presidential decree to freeze the Assembly, to hold elections within one year, and to dissolve the GOLKAR party.[7] However, the decree was barren. All political parties, including the military and the police, refused the decree.

On 23 July 2001, the MPR dismissed President Abdurrahman Wahid[8] and replaced him with Vice President Megawati Soekarnoputri.[9]

On 16 August 2001, President Megawati Soekarnoputri said in her state address that a constitutional commission should be formed to prepare a comprehensive text of amendments to the 1945 Constitution. This commission should compile the materials systematically and be based on expertise, to be reviewed and determined by the MPR's general session.[10] But then, after reconsidering the complications that could arise from the formation of

7 Because of various measures taken by President Abdurrahman Wahid, the MPR decide to depose him. For example, in respect of the President's instruction to the Coordinator Minister for Politics, Social and Security Agum Gumelar to arrest the Chief of the National Police on 13 July 2001, the MPR required the president to provide accountability in the special session of the MPR in August 2001. In response, the president demanded the MPR to revoke the decision and if the MPR did not cancel the decision, the President stated he would issue a decree on the state of emergency and freeze the MPR/DPR, expedite the election and decommission the cabinet. Responding to the threat, MPR speaker Amien Rais asserted that the President has no authority to dissolve the MPR and DPR, and that the MPR would accelerate the implementation of the MPR special session. See *Media Indonesia* daily, 14 July 2001. Subsequently, the MPR expedited the start of the special session from August 1, 2001 as scheduled, to July 21, 2001.

8 MPR Decree No. II/2001, 23 July 2001.

9 MPR Decree No. III/2001, 23 July 2001, on Attestation of the Vice President of the Republic of Indonesia Megawati Soekarnoputri as the President of the Republic of Indonesia.

10 The Address of State by President Megawati Soekarnoputri, 16 August 2001. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, p. 9. It seems that President Megawati Soekarnoputri continued her predecessor's, President Abdurrahman Wahid, policy. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, p. 185.

such a commission, President Megawati agreed to continue the amendment process as before[11] and PAH I did so.[12]

In the meantime, political turbulence continued. In various areas, such as Aceh, Riau, Kalimantan, Maluku and West Irian, dissatisfaction with the central government continued to grow. The Aceh region in particular continued to be restive. On 6 September 2001, separatists shot and killed Dayan Daud, President of Syah Kuala University in Aceh, on his way home from campus.[13]

During this situation, in October 2001, Commission A completed the draft Constitutional amendments.

### VII.2.1 Forming the Team of Experts (TA – Tim Ahli)

On 5 September 2000, during the first MPR Working Body meeting, factions proposed forming a team of experts to assist PAH I in amending the 1945 Constitution.[14] PAH I asked members with an academic background in constitutional law to share their knowledge with other members.[15]

Only on 7 December 2000, PAH I began discussing forming the expert group. PAH I expected that the experts would be non-partisan and have doctoral or master's degrees with experience in constitutional law, criminal law, civil law, customary law, politics, economics, finance, education, socio-cultural issues, comparative religion, environment, decentralization, public administration, and other required areas of expertise.[16] However, members argued that PAH I should not fixate on experts' formal educational backgrounds but rather consider their academic authority.[17] The experts would have to understand the relevance of their disciplines to politics and statehood.[18]

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11 Immediately after the speech, in a meeting with President Megawati, the author explained that the formation of the independent commission was not in accordance with the initial agreement on making amendments following the provisions of Article 37 of the UUD 1945. This would hinder the further process. President Megawati understood the complications and agreed to continue the amendment process as before.

12 Led by the PAH I chairman, several members of PAH I from FPDI-P went before President Megawati/ Chairperson of PDI-P. In the meeting, Megawati agreed that the amendments should continue as usual. Her previous speech was prepared by the staff of the former president.

13 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 212.

14 As proposed among others by Muhammad Iqbal (F-UG), Vincent T. Radja (F-KKI) and Soewarno (F-PDIP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 14, 25, 27.

15 This included such as J.E. Sahetapy, professor of Constitutional Law at Airlangga University, Surabaya. Ibid. p. 90.

16 Ibid. pp. 157-158.

17 As stated by Zain Bajeber (F-PPP), Sutjipno (F-PDIP), A.M. Luthfi (F-Reformasi), J.E. Sahetapy (F-PDIP) and Abdul Khaliq Ahmad (F-KB). Ibid. pp. 160-162, 168.

18 As stated by Pataniari Siahaan (F-PDIP). Ibid. p. 172.

One member asserted that the group should be ad-hoc and temporary, assisting with certain articles,[19] while another member argued that PAH I members were elected to represent their faction's aspirations and, therefore, these experts should function only as assistants or advisory academics. Besides, the member continued, social sciences are not value neutral. Faction proposals always contain their constituents' political interests.[20] Another member asserted that the expert input was not binding. If it were binding, then PAH I would be *zogenaamd*, the constituted MPR committee for amending the Constitution in name only.[21]

Another member assumed that the Team of Experts would serve as a sparring partner to PAH I, testing the draft amendments' validity and applicability.[22] Similarly, another member emphasized that although the experts were expected to help solve certain difficult issues, decision-making was in the hands of PAH I.[23] And finally, yet another one reminded the committee that a constitution is a fundamental law, so the input from experts should not make the constitution very technical.[24]

In response to the reminders, the PAH I chairman reiterated that it was important to encourage public discourse on constitutional matters to raise awareness and encourage public participation in the amendment process. While affirming that the political decisions and political responsibility are in the hands of PAH I, the chairman reiterated that it should involve the public in the process from the beginning, without creating the impression that it was not capable of performing its task.[25]

On 16 January 2001, PAH I began to realize the idea of establishing a team of experts. On 23 January 2001, PAH I listed 90 names of expert group candidates nominated by PAH I members. Then, PAH I formed a small team to scrutinize and select the candidates. The team considered the candidates' respective insights on national and state issues, their solid academic credentials, and the financial costs. It was explained to the experts that, based on their expertise, they were being asked to help formulate the draft amendment to the 1945 Constitution which was being discussed by the ad-hoc committee. It was also explained that they were the ad hoc committee's internal group and the formulations they proposed were non-binding.

On 6 February 2001, the small team selected 30 candidates by consensus and reported them to PAH I. On 20 February 2001, in a meeting attended by the leaders of the MPR Working Body, PAH I, PAH II, and the Special PAH, the MPR further discussed the expert group's establishment, media

19 As stated among others by Zain Bajeber (F-PPP), Hatta Mustafa (F-PG). Ibid. pp. 160, 163.
20 As stated by A.M. Luthfie (F-Reformasi). Ibid. p. 161.
21 As argued by Frans Matrutty and Happy Bone Zulkarnain (F-PG) bid. p. 164.
22 As argued by Harjono (F-PDIP) and Baharuddin Aritonang (F-PG). Ibid. pp. 167, 171.
23 As stated by Theo Sambuaga (F-PG) and Patrialis Akbar (F-Reformasi). Ibid. p. 175, 176.
24 As stated by Ahmad Hafiz Zawawi (F-PG). Ibid.
25 As stated by the PAH I chairman (F-PDIP). Ibid., pp. 165-177.

coverage, the socialization of PAH I's activities, and the UNDP's offer of support to cover the amendment process.[26]

Regarding the UNDP's support, because it concerned technical matters, PAH I decided that the UNDP should cooperate with the MPR's Secretariat General rather than directly with PAH I.[27]

On 27 February 2001, at the third amendment stage's beginning, PAH I formed a Team of Experts or TA (*Tenaga Ahli*), consisting of experts from various academic backgrounds.[28]

With expert input, the amendment could produce a constitution that is a comprehensive system and help build Indonesia as a modern, strong, and democratic nation amongst the nations of the world.[29]

*VII.2.1.1 The Team of Experts: Goals*

The Team of Experts would work from 1 March 2001 to 31 August 2001. PAH I outlined the following term of references:

1) To provide input to PAH I of the MPR Working Body.
2) To develop a study on the inter-relationship of all draft changes to the 1945 Constitution.
3) To make reviews, commentaries, and opinions to, and to discuss with PAH I the drafts of the revisions to the 1945 Constitution which are in the enclosures of MPR Decree No. IX/2000.[30]
4) To describe the relationship between the Preamble of the 1945 Constitution and the Articles of the 1945 Constitution.

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26 The small team was led by Ali Masykur Musa (F-KB). Ibid., p. 270. UNDP offered the MPR to establish a television coverage system to help build transparency of the amendment process.

27 As reminded by Soedijarto (F-UG). Ibid., p. 282.

28 See Attachment VII.4. These experts included Afan Gafar, Bachtiar Effendy, Maswadi Rauf, Nazaruddin Syamsuddin, Ramlan Surbakti, and Riswanda Himawan as experts on political sciences; Dahlan Thayeb, Hasyim Jalal, Ismail Suny, Suwoto Moeljo Soedarmo, Jimly Asshiddiqie, Maria Sumarjono, Muhsan, Satya Arinanto, and Sri Sumantri Mulyosuwignyo as experts in law; Bambang Sudibyo, Dawam Rahardjo, Didik Rachbini, Mubiyarto, Sri Adiningsih, Sri Mulyani and Syahrir as the economic team; Azyumardi Azra, Eka Darmaputera, Komaruddin Hidayat, Nazaruddin Umar and Sardjono Yatiman as experts on religion and socio-cultural issues; and Willy Toysuta, Wuryadi, and Yahya Umar as experts on education.PAH I also listed several prominent figures and experts who would be asked as resource persons to PAH I. See, Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 252, 253.

29 As emphasized later by the PAH I chairman at the end of the PAH I session on 17 July 2001. Ibid., p. 796.

30 Pataniari Siahaan (F-PDIP) reiterated that the drafts in the enclosure of MPR Decree No. IX/2000 are a compilation of compromises on various ideas from the 11 factions which are built on the different strands of philosophy. See Ibid, p. 626.

5) To submit the reviews, the commentaries, and the opinions to PAH I. The academic review should be the work of the experts as a team, not an individual opinion. In drawing conclusions, the team should avoid taking decisions by voting but should aim for consensus instead. If there are unsettled differences among the team, the alternative views should be presented.
6) To be entitled to attend the formal and the informal meetings of PAH I, including the informal consultations.
7) To closely assist the process of preparing the draft changes to the 1945 Constitution during the MPR 2001 annual session.[31]

*VII.2.1.2 Engaging the Public*

After the experts' groups were formed, the PAH I chairman stated that the experts could help encourage public discussions on constitutional matters to raise awareness and public participation in the amendment process.[32] However, a member argued that absorbing and formulating public aspirations was the MPR's responsibility, not that of the experts. The experts could, however, help PAH I formulate aspirations in a comprehensive way.[33] Another member stressed that the Team of Experts should be allowed to criticize the works of PAH I because what PAH I produced should not just be a political product, but also an ethical, moral, and intellectual product.

Subsequently, PAH I planned to:
– Assisted by the Team of Experts, review the topics in the enclosure of MPR Decree No. IX/2000 and other topics proposed by the Team of Experts, followed by informal consultation to seek preliminary agreements.
– Form a small team consisting of representatives of PAH I and the Team of Experts to process the preliminary agreements to become draft amendments of the constitution.
– After the small team has reported the drafts to PAH I, to disseminate and to conduct *uji shahih* (assessment) on the drafts.
– Synchronize and finalize the draft documents and report these to the MPR Working Body.[34]

31 Ibid, pp. 252, 253, 384.
32 Ibid., p. 158.
33 As argued by Theo Sambuaga (F-PG). Ibid., p. 260.
34 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 7-8. Assessment was conducted in a forum to test the appropriateness of a draft. However, the results or conclusions of the forum were not binding.

To optimize the outcomes, besides the PAH I plenary meetings, discussions also occurred elsewhere, such as in selected small teams, drafting teams, synchronization meetings, informal consultation meetings, and finalization meetings. All meetings were open to the public.[35]

Subsequently, the MPR Working Body further processed the drafts and transferred them to the MPR for finalization through deliberations in the plenary meetings and in the subsequent Commission A meetings. Finally, the MPR would decide on the amendments in a plenary meeting. Factions could question the results at any stage, even when a draft had been discussed and concluded.

However, based on regional visits and various other sources, PAH I learned that the public at large did not know much about the first and second amendment outcomes. Therefore, to encourage public participation in the amendment process, PAH I decided to dispatch teams to the regions to publicize the amendment outcomes and conduct public hearings.

Nevertheless, either because the amendment results were considered inadequate, as insufficiently absorbing the people's aspirations, or because there was a desire to create a new constitution, some political observers, NGOs, and activists increased their pressure on the MPR to establish an independent commission to prepare the draft amendments or to draft a new constitution.

### *VII.2.1.3 Debate: State Commission and Redrafting the Constitution*

On 16 January 2001, a member reported to PAH I that President Abdurrahman Wahid was preparing a state commission for drafting a complete amendment to the 1945 Constitution, which would be submitted to the MPR.[36] One member immediately expressed his support of President Wahid's idea. However, most others were doubtful or disagreed. Several issues were raised: whether the MPR had the sole authority to amend the constitution, the status of the first and second amendments if the state commission was to write a complete draft for amending the 1945 Constitution,[37] and whether the idea came from the assumption that the MPR member quality was below the academic standard and that the amendment should

35 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, p. 388. The working teams consisted of proportional representations of the factions, in which the smallest factions were represented by one member and the largest had three to four representatives. According to the MPR standing procedures, at this stage, a decision or conclusion was drawn by deliberation and consensus. Decision by voting could be conducted only at the Commission and MPR plenary meeting levels.

36 Reported by Andi Mattalatta (F-PG). Ibid., p. 185.

37 As stated by, among others, Gregorius Seto Harianto (F-PDKB) and A.M. Luthfie (F-Reformasi). Hobbes Sinaga questioned the status of the first and second amendments. Ibid., p. 191.

not be conducted by the MPR alone.[38] Some members refused a state commission, although PAH I welcomed any input.[39]

The PAH I chairman stated that the president's initiative should be considered as an effort to link public aspirations with the MPR. Likewise, another member reminded PAH I to disclose itself and establish a link with the public. The public distrust in the MPR was not a matter of credibility or legitimacy but rather a side-effect of a state in transition. The MPR should respond to the public distrust by getting closer to the public.[40]

One member reminded the committee that even though PAH I might be constitutionally authoritative, the state commission could override the MPR in the public eye. PAH I members then proposed that the MPR should communicate with the president, suggesting an internal commission subordinate to the MPR.[41] Towards the meeting's end, the PAH I chairman asked PAH I members to show a positive attitude and not to overreact to the president's initiative, the expert group's role, and public criticism. He reiterated that the sole authority to amend the constitution was indeed in the MPR's hands and precisely because of that, PAH I should take steps so that the people would have a strong sense of ownership in the MPR's work.

Later, the chairman reminded the committee members that most people have a special feeling towards the 1945 Constitution, with its exalted position in Indonesia's history. People perceive and comprehend the 1945 Constitution not only in a rational way. There are emotional factors that need to be considered in the amendment process. Thus, the chairman reiterated, it was not only the outcomes that mattered. The process was also very important, and here public involvement had been lacking in the previous stages. Furthermore, the chairman explained that after consulting with President Megawati, she agreed to cancel the plan to form a state commission because it was not in accordance with the initial agreement, whereby the MPR would make amendments in accordance with Article 37 of the Constitution. She then agreed that the MPR should continue the amendment process. [42]

### *VII.2.1.4 Debate: Amending versus Rewriting Constitution*

On 7 March 2001, the Team of Experts or TA (*Tenaga Ahli*) attended their first PAH I meeting. The PAH I chairman underlined that each TA member could have their opinion on a matter, but a group opinion required mutual consent. Furthermore, an agreement ought to be reached by consensus and if consensus could not be reached, the opinions should be delivered as a set of alternatives rather than voting on a set conclusion.[43]

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38 As stated by Pataniari Siahaan and Soewarno, both from F-PDIP. Ibid., pp. 188, 205.
39 As stated by Agun Gunandjar Sudarsa (F-PG) and Soedijarto (F-UG). Ibid. p. 186.
40 As argued by Valina Singka Subekti (F-UG). Ibid., pp. 198, 199.
41 As suggested by Andi Mattalatta (F-PG) and Sutjipno (F-PDIP). Ibid., pp. 202, 203.
42 As stated by the PAH I chairman. Ibid., pp. 209, 295-297. See above.
43 Ibid., p. 295.

On 20 March 2001, the Team of Experts conveyed their reviews on the amendment's draft.[44] The Team of Experts speaker stated that by making new articles, adding new ideas, reconstructing chapters, and creating new chapters in the first and second amendment stages, PAH I had conducted more than a simple addendum and instead had attempted to rewrite the constitution. Therefore, the Team of Experts proposed writing a new constitution instead, retaining the Preamble and the form of a unitary state.[45] In addition, the Team of Experts reported their work on the topics of law, economy, education, religion and socio-cultural matters.[46] Furthermore, they made a statement that they would work to establish an integrated system in the Constitution to prevent executive-heavy practices from repeating themselves and to institute checks and balances between state institutions to build a democracy.[47]

Appreciating the Team of Experts' work, PAH I members reminded them of the challenges in integrating the initiated ideas in the system.[48] To the various statements, the chairman responded that PAH I and the team of Experts should develop frequent and in-depth interactions to prevent two separate, independent, and contradictory concepts being drafted.[49] The Team of Experts on Law coordinator proposed re-writing the entire manuscript, the original 1945 Constitution and its amendments, into one compact constitution after the amendments had been completed.[50] However, the economic experts found it difficult to agree because of the principal differences between them.[51] Indeed, among the Team of Experts, there were often differences of opinion and even disputes.[52]

In the end, the Team of Experts did not convince PAH I that the first and second stages had effectively rewritten the constitution and that PAH I should approach the amendment process as if rewriting the constitution in its entirety.

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44 Ibid., pp. 293—775.

45 As reported by Ismail Suny. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 303.

46 Preceded by Maswadi Rauf, Sri Soemantri reported about studies on law aspects, Mubyarto, Sudibyo and Sri Mulyani reported on studies in economics, Willy Toisuta on education and Komaruddin Hidayat on religion and socio-cultural aspects. Ibid., pp. 304-319. At this stage, the principal differences of opinion among the economists between those who emphasized the role of the state versus the role of the market, were already noticeable. Sometime later, Mubyarto,who believed that the original Article 33 should be maintained, resigned from the Team of Experts.

47 As stated by Ismail Suny. Ibid., p. 331.

48 As reminded by Pataniari Siahaan (F-PDIP). Ibid., p. 329.

49 Ibid., p. 335.

50 Proposed by Jimly Asshidiqie. Ibid., p. 348.

51 Ibid., p. 309.

52 As revealed by Mubiyarto.Ibid., p. 612.

### *VII.2.1.5 Debate: PAH I versus Constitutional Commission*

In March 2001, an NGO coalition argued that the Team of Experts was useless[53] and demanded that the MPR should establish a constitutional commission to draft a new constitution. Likewise, among the Team of Experts, some opposed the staged approach that produced the first and the second amendments, preferring to restructure the entire Constitution at once.[54] One expert even asserted that the Team of Experts on Law strongly supported establishing a constitutional commission.[55]

In response, a PAH I member asserted that such a committee's work is not clearly defined, while the MPR is a real representation of the people.[56] Likewise, another member warned against getting caught up in an attempt to rewrite the constitution simply because this was the wish of certain groups that wanted a new constitution.[57] Another member stated that PAH I must aim for the amendments to create a constitution, which also functioned as social engineering tool.[58] Likewise, the PAH I chairman affirmed that PAH I members assumed that a constitution is not just a compilation of fundamental laws, but also serves as a social engineering instrument in building the nation of Indonesia. Therefore, PAH I and the Expert Group should consider each other's opinions. It seemed that the presidential system's supporting systems had not been understood properly.

However, this was not the end of the discussion, which went into all kinds of directives. One expert underlined the need to rewrite or reorganize the entire manuscript of the Constitution, without changing its meaning.[59] Another expert stated that the entire constitution required rearranging rather than just grammatical improvements.[60] Another expert argued in favour of renewing the constitution so that new articles could be added.[61] One expert noted that the Team of Experts' work should not be perceived as a final and ready-to-use formulation.[62]

In response, a PAH I member stated that the amendment process should be realistic. If the systematic proposal by the Team of Experts was used as a reference, the changes would not merely consist of an amendment, but take the form of alterations in structure, systems, and substances that would require longer discussions, more thoughts, and more time.[63] Other members

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53 *Kompas Daily*, 24 March 2001.
54 As disclosed by Ismail Suny.See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 780.
55 As asserted by Jimly Asshidiqie.Ibid., p. 353.
56 As stated by Soedijarto (F-UG). Ibid., p. 359.
57 Asserted by Frans Matrutty (F-PDIP). Ibid., p. 372.
58 As stated by I Dewa Gede Palguna (F-PDIP). Ibid., p. 370.
59 As stated by Afan Gaffar. Ibid., p. 399.
60 As stated by Jimly Asshidiqie. Ibid., pp. 401, 402.
61 As stated by Suwoto Moeljo Soedarmo. Ibid., p. 410.
62 As argued by Maswadi Rauf. Ibid., p. 466.
63 Responded by Hamdan Zoelva (F-PBB). Ibid., p. 734.

described the amendment process as the renovation of an old house. "It seems a mess for a while, but after it is completed it will look good", one member pointed out.[64] Another member added that the amended constitution should be politically, sociologically, and culturally sound, with a solid philosophical and legal foundation.[65] Finally, a PAH I member cut the discussion short by arguing that the political scientists are indeed experts in political science, but that the political parties and politicians better comprehend state and political matters.[66] In the end, the idea of forming a constitutional commission did not materialize.

After this discussion, the Expert Group discussed and criticized the amendment drafts attached to MPR Decree No. IX/2000, discussed them with PAH I, and eventually PAH I decided the final outcomes.[67] As stated previously, these internal discussions did not always lead to consensus. During the 18th PAH I meeting on 23 May 2001, Mubiyarto from the Economic Team of Experts declared his resignation from the Team of Experts because he felt that the working atmosphere within the economics sub-team was not conducive.[68]

## VII.3 Discussions on the 1945 Constitution's Articles

During the third amendment stage, PAH I discussed at least 14 amendment topics, relying on three sets of materials. The materials included the previous MPR Working Body's reports,[69] the Team of Experts recommendations in response to the MPR Working Body reports, and new materials (e.g., public hearing insights, new ideas, and faction submissions).

64 As stated by Amidhan (F-PG) and Slamet Effendy Yusuf (F-PG). Ibid., pp. 513, 514.

65 As stated by Harjono (F-PDIP). Ibid., p. 516.

66 As stated by Pataniari Siahaan (F-PDIP). Ibid., p. 627.

67 PAH I conducted 12 dialogues with the Team of Experts: 1) the coordination meeting on 7 March 2001; 2) presentation of the study of the Team of Experts to PAH I on the enclosure of MPR Decree No. IX/2000 on 29 March 2001; 3) discussion on religions, socio-cultural matters and education on 24 April 2001; 4) discussion on politics and law on 10 May 2001; 5) discussion on politics and law on 15 May 2001; 6) discussion on the economy on 16 May 2001; 7) discussion on politics and law on 17 May 2001; 8) discussion on the economy on 23 May 2001; 9) discussion on politics and law and a general review of the report of the Team of Experts on 29 May 2001; 10) the review of the factions of the opinions of the Team of Experts on 5 July 2001; 11) the responses of the Team of Experts on the opinions of the factions on 10 July 2001; 12) the meeting of PAH I and the Team of Experts on Chapter I on 17 July 2001.

68 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 649, 656. Mubyarto particularly protested against the leadership under Ismail Suny in dealing with the differences of opinions among the experts. Mubiyarto felt he had to suppress his opinion whenever it was supported by only a minority.

69 These reports were attached to MPR Decree No. IX/2000.

## VII.3.1 Sovereignty and the MPR

### *VII.3.1.1 Previous Stage Discussions*

During the first amendment, almost all factions and academics thought that the MPR should be maintained as the supreme institution which holds the people's sovereignty. PAH I members dissented only on the degree of MPR power, with some ascribing absolute and others only partial power to the MPR. However, all placed the MPR at the top of the system, in a kind of "*trias politica* system" in which the MPR distributes power to the executive, legislative, and judicial branches.[70] However, it was also discernible that notions of democracy had begun to take effect. Factions had begun to question the MPR's omnipotence.

During the second stage, the way in which people's sovereignty was comprehended in connection with the MPR's existence was still ambiguous. While most of the factions were still of the opinion that the MPR is the highest institution to whom all other state institutions are responsible, the arguments against that conception became more apparent.

### *VII.3.1.2 Third Amendment: Exercising Sovereignty Based on the Constitution*

This section outlines the debate on whether state institutions should be accountable to the MPR, the MPR's legislative and accountability roles, and which institution would exercise sovereignty. It concludes with the final decision that sovereignty is vested in the people and exercised according to the Constitution.

In the first MPR Working Body meeting on 5 September 2000, factions were still divided between those who argued that the obligation for the high state institutions to submit an accountability report to the MPR plenary meeting during the MPR annual session should be reconsidered and those who argued that this obligation should be maintained to prevent mistakes and uphold checks and balances.[71]

Subsequently, in a PAH I meeting on 29 March 2001, the Team of Experts detailed their recommendations on various alternatives in the Enclosures of MPR Decree No. IX/2000. The Group recommended that the MPR should comprise of DPR and Regional Representative Council members. Since both groups are elected, this would put an end to appointed members in

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70 At the outset, some MPR members comprehended the distribution of powers by MPR as a kind of *trias politica* which is actually based on distribution of powers not on separation of power.

71 For instance, Agun Gunandjar Sudarsa (F-PG) and Ali Hardi Kiaidemak (F-PPP) argued that the obligation should be reconsidered whereas A.M. Luthfi (F-Reformasi) argued to maintain the obligation. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 13, 16, 19.

the MPR.[72] Furthermore, the sub-group of law experts reported that they supported the idea of forming a bicameral parliamentary system, in which the DPR and the Regional Representative Council would hold legislative power. The MPR would become a joint session between the DPR and the Regional Representative Council with the authority to determine the Constitution and to inaugurate and dismiss the president and vice president.[73] Therefore, the MPR should be an incidental forum of the DPR and the Regional Representative Council[74] within a strong bicameral system.[75] Some PAH I members argued that in such a bicameral system, the MPR is a joint session and not a permanent institution.[76] However, another member observed that this proposition contradicted the MPR being the implementer of people's sovereignty,[77] which holds the authority to determine the Broad Outlines of State Policy (*Garis-Garis Besar Haluan Negara*).[78]

The political experts sub-group insisted that the MPR should be merely a joint session between the DPR and the Regional Representative Council. It should not be a legislative institution that exercises legislative and other functions of a people's representative institution. It should also not be a permanent institution and thus not have supporting elements. However, they also contended that the MPR's existence should be maintained, since the MPR is embedded in the people's minds. It can function to represent and accommodate the regions' aspirations.[79] Then, a member questioned how the MPR can be both a DPR and Regional Representative Council joint session and summon a session (as an institution) if the positions of the president and vice president become vacant.[80]

Elaborating further on the recommendation, a sub-group expert stated that the MPR's existence depends on the changes of other state institutions. If the president is elected directly by the people, the president is not accountable to the MPR but to the people. The MPR has no authority to elect the president and the vice president or to set the Basic Outlines of State Policy. Further, the sub-group argued that the public is keen on creating a bicameral system, because it helps establish checks and balances and increases representativeness, especially considering the population's uneven distribution. A bicameral system, the expert continued, is more suitable for a country with a society that is marked by sharp social cleavages caused by multiple and overlapping senses of ethnicity, religion, and

72 As conveyed by Nazaruddin Syamsuddin of the Team of Experts. Ibid., p. 344.
73 As stated by Jimly Asshidiqie of the law experts' sub-group. Ibid., pp. 350, 352.
74 As stated by Suwoto Moeljo Soedarmo. Ibid., p. 409.
75 As stated by Maswadi Rauf. Ibid., p. 467.
76 As underlined by Hamdan Zoelva (F-PBB) and Andi Mattalatta (F-PG). Ibid., pp. 360, 361.
77 As argued by Pataniari Siahaan (F-PDIP). Ibid., p. 364.
78 As questioned by Ali Masykur Musa (F-KB). Ibid., p. 509.
79 As elucidated by Afan Gaffar and Maswadi Rauf.Ibid., p. 468.
80 As argued by Asnawi Latief (F-PDU). Ibid., p. 476.

regionalism, such as Indonesia. In that regard, the draft made by PAH I that gives legislative power only to the DPR did not follow the prevalent bicameral system. Therefore, the Team of Experts did not agree with the draft formulated by PAH I.[81]

On sovereignty, the Team of Experts proposed changing the MPR as the embodiment of people's sovereignty to sovereignty being in the people's hands and exercised according to the Constitution's provisions. This would accommodate other possibilities, such as a direct presidential election and the establishment of a representative democracy.[82] Further, the Team of Experts argued that the people's sovereignty should be delegated directly to the DPR, Regional Representative Council, president and so forth, instead of to the MPR and from there, to the president, DPR, and so forth.[83]

In a PAH I meeting on 5 July 2001, F-PDIP suggested – similar to the enclosures of MPR Decree No. IX/2000 – to omit the word *"sepenuhnya"* (in full) from Article 1 (2) to become "sovereignty is in the hands of the people and exercised by the MPR."[84] Hence, the MPR's authorities and functions would be limited to:[85]

1) Amending and ratifying the Constitution.
2) Determining the Broad Outlines of State Policy.
3) Electing, deciding, and installing the president and the vice president.
4) Dismissing the president or the vice president during his/her tenure, if he/she is proven to violate the Constitution, treason, to violate the Broad Outlines of State Policy, to commit a criminal offense, to commit a criminal offense of bribery, or to commit a disgraceful act, based on the decision of the Constitutional Court.
5) Assessing the accountability of the president at the end of the tenure.
6) Forming the MPR Working Body to prepare the MPR's programmes.

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81 As elaborated by Afan Gaffar.Ibid., pp. 391-393.

82 As argued by Jimly Asshidiqie. Previously, Harjono (F-PDIP) had proposed the similar idea that "the sovereignty is in the hand of the people and exercised according to the provisions in the Constitution" in PAH I meeting on 17 May 2000, during the 2nd amendment. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 77-78.

83 As stated by Ramlan Surbakti.Ibid., p. 688. Later Jimly Asshidiqie stated that the Team of Experts concluded that MPR as a forum of joint session should be retained.

84 The original Article 1 (2) UUD 1945 states *"Kedaulatan adalah di tangan rakyat, dan dilakukan ~~sepenuhnya~~ oleh Majelis Permusyawaratan Rakyat"* (Sovereignty is in the people's hands and is exercised in full by the People's Consultative Assembly). The proposed new Article 1 (2) states that *"Kedaulatan adalah di tangan rakyat, dan dilakukan sepenuhnya oleh Majelis permusyawaratan Rakyat"* (Sovereignty is in the people's hands and is exercised ~~in full by~~ the People's Consultative Assembly). This suggestion unveils the internal dynamics of PDI-P. There is the sentiment amongst PDI-P that the MPR system is a legacy of Soekarno, the founder of the country and the spiritual leader of PDI-P.

85 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 724.

However, F-PDIP stated that there should be strong checks and balances, in which the legislative, executive, and judicial powers are equal institutions that stem from the implementation of people's sovereignty.[86] Likewise, F-TNI/Polri stated that the MPR should be retained, its authorities and functions adjusted, and MPR membership should accommodate the provisions in MPR Decree No. VII/2000.[87] In response, the Team of Experts stated that if F-PDIP and others would like to maintain the presidential system, the proposal to authorize the MPR to determine the Broad Outlines of State Policy and to evaluate the president's accountability at the end of his/her tenure should be removed.[88] Another expert added that in the future, the DPR and the Regional Representative Council would take over the MPR's important position. The MPR is merely a joint session of the DPR and the Regional Representative Council, and therefore, the expert continued, the DPR and the Regional Representative Council should be equal and each should hold the right to veto.[89] Conversely, F-PG contended that the MPR is a legislative body equal to the executive and judicial institutions. It should have the power to amend the constitution and impeach the president.[90]

F-UG argued that the MPR was designed by the republic's founders to support the political system's stability through its role as mediating state institution between the DPR and the government. Therefore, the MPR should remain the highest state institution, consisting of DPR and Regional Representative Council members, elected democratically and augmented by the appointed delegations of interest groups in society.[91]

In response, F-PBB stated that the MPR is not a supreme institution and merely a joint session. Therefore, the phrase stating that the people's sovereignty is exercised by the MPR should be omitted. Furthermore, F-PBB confirmed that the presence of a supreme state institution would nullify the mechanism of checks and balances.[92]

A F-PDIP member disagreed, arguing that the highest authority cannot be divided and therefore should be vested in a body which is the embodiment of all the people of Indonesia. He found support with another who said that without such power, the MPR could not have dismissed President

86 As proposed by Katin Subiyantoro (F-PDIP). Ibid., p. 727.

87 As stated by Affandi (F-TNI/Polri). Ibid. MPR Decree No. VII/2000 stipulates that members of the Indonesian Armed Forces and Indonesian National Police do not use their right to vote in the election. The participation of the Indonesian Armed Forces and the Indonesian National Police in determining the direction of national policy will be through the People's Consultative Assembly until 2009 at the latest.

88 As emphasized by Suwoto Moeljo Soedarmo. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 783.

89 As stated by Maswadi Rauf. Ibid., p. 786.

90 As stated by Happy Bone Zulkarnain (F-PG). Ibid., p. 736.

91 As conveyed by Soedijarto (F-UG). Ibid., p. 747.

92 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 806.

Abdurrahman Wahid.[93] However, another member reminded him that F-PDIP had previously proposed that sovereignty is in the people's hands and is exercised following the Constitution.[94] Thus, it was fine to maintain the MPR as the highest institution, but its supremacy should be subordinate to the supremacy of the constitution.[95]

F-TNI/Polri also affirmed that sovereignty is in the people's hands, but that it should be exercised following the process regulated in the Constitution.[96] Other factions agreed with F-TNI/Polri's position, which reflected the Team of Experts' recommendation.[97] On 6 September 2001, F-PG, F-PPP, and F-PDKB agreed that the MPR does not have the authority to elect the president and the president should be elected directly by the people.[98]

Commenting on the debates, the PAH I chairman reminded the members that the MPR is the central body of the system, therefore, the discussions should be contextual and interrelated. Further, he underlined that all agreed that sovereignty is in the people's hands, whether exercised according to the Constitution or by the MPR. Therefore, there is no other sovereignty except the one in the people's hands. The legislation should conform to that notion. The legislative process should be conducted by the representative of the people, who hold the sovereignty. Further, the chairman stated that the MPR does exist, whether its members comprise of the DPR and the Regional Representative Council only or are augmented by the delegations of interest groups. He posited that naming it was an academic problem best left to the experts. PAH I should focus on the substance of the concept, rather than the term itself.[99]

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93 As stated by Soedijarto (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 104, 149.

94 As stated by Soewarno (F-PDIP). Ibid., p. 96. F-PDIP had proposed the formulation previously. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2000, Buku Empat, pp. 77-78. Previously, in an internal memo of policy dated 5 April 2000, sent to F-PDIP members in PAH I, with a copy sent to the Chairperson of PDI-P Megawati Soekarnoputri, the author, as the Chairman of the F-PDIP group in PAH I, asserted the stance of F-PDIP that 'sovereignty is in the people's hands and is exercised according to the Constitution' and that 'Indonesia is a unitary state in the form of a Republic and based on the Rule of Law'. The document is with the author.

95 As reiterated by Katin Subiyantoro (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 151.

96 As asserted by Affandi (F-TNI/Polri). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 814.

97 As confirmed by, among others, Lukman Hakim Saifudin (F-PPP), Happy Bone Zulkarnaen (F-PG), Asnawi Latief (F-PDU), A.M. Luthfi (F-Reformasi) and Gregorius Seto Harianto (F-PDKB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 95, 99, 102, 104, 127.

98 As stated by Theo Sambuaga (F-PG), Zain Bajeber (F-PPP) and Seto Harianto (F-PDKB). Ibid., pp. 165, 166, 168.

99 Ibid., pp. 172 – 173.

F-TNI/Polri reconfirmed that the MPR should remain as the embodiment of the unity of Indonesia, guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives.[100] A F-PDIP member added that referring to the MPR as just a legislature was demeaning to its position. If the MPR is simply a forum of a joint session, it would not have the sovereignty to determine the Constitution.[101] In that regard, F-Reformasi insisted that the MPR belongs to the legislative power in a broader meaning, since it could produce legal products and other political decisions that could serve as an umbrella for other legislations.[102] Then, a F-PPP speaker reiterated that the Constitution separates the legislative, executive, and judicative powers. Therefore, in the future, there is no longer a supreme state institution that distributes the power. F-PPP was in favour of people's sovereignty being exercised according to the Constitution. The MPR still has the right to make decisions but is limited to *penetapan* (decisions) and can no longer issue *pengaturan* (regulations), the member asserted.[103] On the other hand, F-UG insisted that to ensure sustainable national policies that bind all state institutions, the MPR's authority to determine the Broad Outlines of State Policy should remain.[104] F-PPP and F-PG disagreed.[105]

### *VII.3.1.3 Outstanding Disagreements*

On 10 September 2001, at the beginning of the 26th PAH I meeting, the PAH I chairman reminded all that PAH I had not agreed on several things. Some factions wanted the MPR to take the form of a joint session between the DPR and the Regional Representative Council. Others wanted to maintain the MPR as a separate state institution. Although all factions agreed that the president should be elected directly by the people, there were factions who wanted the MPR to have a role in the process, whether in the initial or in the final part. Others argued that the MPR should not be involved in the process. The chairman reminded that there was also a suggestion that the existing MPR should pre-select the presidential candidates, which would subsequently be elected by the people.[106]

In response, F-UG and F-TNI/Polri reiterated that the MPR should remain the highest institution, the embodiment of all the people, and a permanent institution that distributes the authorities, directly or indirectly, to other high state institutions, regardless of whether the president would

100 As stated by Affandi (F-TNI/Polri). Ibid., p. 173.
101 As stated by Hobbes Sinaga (F-PDIP). Ibid., p. 178.
102 As stated by Patrialis Akbar (F-Reformasi). Ibid., p. 181.
103 As conveyed by Lukman Hakim Saifuddin (F-PPP). Ibid., p. 186.
104 As argued by Soedijarto (F-UG). Ibid., p. 196.
105 As asserted by Lukman Hakim Saifuddin (F-PPP) and Rully Chairul Azwar (F-PG). Ibid., pp. 197, 225.
106 Ibid., pp. 216-217.

be elected directly or indirectly. The MPR, the speakers argued, holds ultimate powers, including determining the Constitution, determining and ratifying the Broad Outlines of State Policy and installing or impeaching the president. [107] However, F-KB and F-PPP argued again that the MPR's permanent existence should end. The MPR should be a joint session. Since the president is elected directly by the people, it is not necessary for the MPR to determine the Broad Outlines of State Policy.[108] Conversely, F-Reformasi argued that the MPR should remain a permanent institution that implements people's sovereignty. This would follow the fourth section of the Preamble, which states that "democracy is guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives." As the MPR accommodates all national components and holds the authority to amend and determine the Constitution, it should remain the highest state institution, according to F-Reformasi. To prevent the president from becoming authoritarian, the member continued, the MPR should hold the power to determine the Broad Outlines of State Policy, which will be an instrument to control the president. For example, the violation of the Broad Outlines of State Policy can be a reason to impeach the president. Later, F-Reformasi added that the MPR as a permanent institution does not mean that the MPR can confiscate people's sovereignty.[109]

On 5 September 2001, a F-PPP member stated that the F-PPP agreed that sovereignty is exercised by the MPR, though not "in full", so as to provide space for other forms of sovereignty, such as a referendum.[110] Other factions, as well as the F-PPP, insisted that sovereignty should be exercised following the Constitution, opening the opportunity for a more flexible future arrangement.[111] In contrast, F-UG asserted that the MPR does indeed represent the people and it is only the term "*sepenuhnya*" or "in full" that should be deleted,[112] and that the MPR, as the highest and permanent institution should continue to distribute the authority to other institutions.[113] By the end of 10 September 2001, deliberations on the MPR's authority were still not concluded. Thus, at the beginning of the PAH I small team meetings that began on 12 September 2001, the factions' stances still varied as before. Opinions even differed within factions.

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107 As affirmed by Harun Kamil (F-UG) and Affandi (F-TNI/Polri). Ibid., p. 218.

108 As argued by Andi Najmi Fuady (F-KB) and Ali Hardi Kiaidemak (F-PPP). Ibid., p. 222.

109 As stated by Patrialis Akbar (F-Reformasi). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. p. 149.

110 As conveyed by Zain Bajeber (F-PPP). Ibid., p. 124.

111 As asserted by Asnawi Latief (F-PDU), Gregorius Seto Harianto (F-PDKB), Lukman Hakim Saifuddin (F-PPP) and Katin Subiyantoro (F-PDIP). Ibid., pp. 125, 127, 147, 149.

112 As argued by Soedijarto (F-UG). Ibid., p. 149.

113 As emphasized by Harun Kamil (F-UG). Ibid.

*VII.3.1.4 Report to MPR Working Body – Disagreements Persist*

In the report to the MPR Working Body on 23 October 2001, the PAH I chairman conveyed that the members still had different opinions on sovereignty. The first group supported the notion that sovereignty is in the people's hands and is exercised by the MPR. The second group holds that sovereignty is in the people's hands and is exercised according to the Constitution.[114]

Subsequently, in the first Commission A meeting on 5 November 2001,[115] the F-KKI and F-Reformasi speakers asserted that the MPR is the embodiment of all the people and therefore should remain the highest state institution which exercises sovereignty in full.[116] Similarly, several Commission A members from F-PPP, F-Reformasi, F-PDIP, and F-UG affirmed that the MPR should remain the highest state institution, which implements the sovereignty of the people, although not in full.[117] On the other hand, F-KB, F-TNI/Polri, F-PDIP, F-PG, F-PDU, F-PBB, F-PPP and F-PDKB confirmed that people's sovereignty should be implemented according to the Constitution.[118] At that opportunity, a F-PDIP member reiterated that the concentration of power in the MPR is actually authoritarianism, a concept of etatism.[119] Another member argued that since the word *"sepenuhnya"* (in full) had been omitted, it is proper to say that the sovereignty of the people is rightfully exercised by the MPR.[120]

However, in an informal consultation meeting of the Commission A drafting team on 7 November 2001, the factions managed to agree that sovereignty is in the people's hands and exercised according to the Constitution.[121] They reported the agreement to Commission A on 8 November 2001.[122] Yet, F.X. Soemitro (F-KKI) and Bambang Pranoto (F-PDIP) insisted

114 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 547.

115 Commission A was established and began its activities on 5 November 2001. See Attachment VII.1.

116 As stated by F.X. Sumitro (F-KKI) and Imam Addaruqutni (F-Reformasi). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 87, 95, 130.

117 As stated by Syahruddin Kadir (F-PPP), Patrialis Akbar (F-Reformasi), Achmad Aries Munandar (F-PDIP), and Soedijarto (F-UG). See Ibid., pp. 93, 99, 112, 124.

118 As confirmed by Amru Al Mu'tashim (F-KB), Ishak Latuconsina (F-TNI/Polri), I Dewa Gede Palguna (F-PDIP), Laden Mering (F-PG), Asnawi Latief (F-PDU), Hamdan Zoelva (F-PBB), Lukman Hakim Saifuddin (F-PPP), and Gregorius Seto Harianto (F-PDKB). Ibid., pp. 88, 89, 97, 104, 109, 110, 114, 133. There were differences in opinion within F-PDIP and F-PPP.

119 As stated by I Dewa Palguna (F-PDIP). Majelis Permusyawaratan Rakyat Republic Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 97.

120 As argued by Patrialis Akbar (F-Reformasi). Ibid., p. 112.

121 Ibid., pp. 447, 559.

122 Ibid., p. 553.

that the result of the lobby meeting should be first reported to the floor for further deliberation. Pranoto argued that all this time, the floor only had the opportunity to express their aspirations, and that they could merely hope that their wishes would be met by the leadership. The leadership, through informal consultation, would draw the conclusion. The member complained that members who hold the authority were not represented in that forum. Therefore, the member urged that the draft formulated in the informal consultation should be reported to the floor for further deliberation, so that the report which Commission A would submit to the subsequent MPR plenary meeting would be a democratically and fully agreed-on draft.[123]

In response, the Commission A chairman pointed out that each faction, with all factions represented in the lobby meeting, should manage their respective internal processes. Hereby, according to the MPR standing procedure, factions were intended to raise the MPR's effectivity and efficiency.[124] However, F-KKI demanded delaying the changes of Chapters I, II, and III, since they were strategic chapters on the form and system of state governance power. The MPR should first ask the people through a referendum, the F-KKI speaker insisted.[125] At the meeting's end, the chairman invited the faction representatives and Commission A leadership for a lobby meeting, to prepare the report for the MPR plenary meeting. In that meeting, all the faction representatives agreed on the formulation that the people's sovereignty should be implemented according to the Constitution.[126]

#### *VII.3.1.5 Ratified Agreement*

Eventually, in MPR plenary meetings on 8 and 9 November 2001, all factions endorsed the third change to the 1945 Constitution. In the MPR plenary meeting on 9 November 2001, the MPR ratified the third amendment to the 1945 Constitution. Article 1(2) previously stated, *"Sovereignty shall be vested in the hands of the people and be exercised in full by the MPR."* It now read, *"Sovereignty shall be vested in the hands of the people and be exercised according to the Constitution."*[127]

### VII.3.2 The MPR's composition

This section details the debates as to whether MPR members should be elected or appointed, concluding that this issue was further postponed until the MPR 2002 annual session.

123 Ibid., p. 555.
124 Ibid., p. 556.
125 As demanded by F.X. Soemitro (F-KKI). Ibid., p. 573.
126 Ibid., p. 608.
127 Ibid., p. 682.

From the beginning of the amendment process, factions had argued about the MPR's membership. Some factions argued that all MPR members should be elected. Others argued that the MPR's elected members should be augmented by appointed delegations of interest groups in society, either because they could not use their voting rights because of their duties or because they were difficult to be represented by the existing political groupings.

In March 2001, the Team of Experts (TA) recommended that the MPR should comprise of DPR and Regional Representative Council members, who are both elected, thus ending appointments to the MPR.[128] In response, a F-UG member argued that Indonesia should develop its model of democracy through a state institution that represents all of Indonesia's people, including those whose interests are not accommodated in the programmes of the political parties. This conception is in line with Lijphart's recommendation that a democracy needs an institution to express conflict and disagreement as well as to support legitimation and consensus. On that ground, the member proposed that the MPR should comprise of the DPR and the Regional Representative Council, which are elected and augmented with delegations of interest groups, as stipulated by law.[129]

Another member suggested that members could be added to the MPR from the delegations of certain societal groups, who due to their duties and functions could not use their right to vote in the elections. Regarding interest groups, they should form their own political party to voice their interests if these were not accommodated by political parties.[130] Likewise, another member argued that the MPR should consist of the elected DPR and the Regional Representative Council. Regarding the representation of interest groups, this member contended that the representation of interest groups should not have to take the form of representing regions, tribes, gender, and so forth, but could be idea-based.[131] However, a F-UG member reiterated that, as the reincarnation of all the people, all interest groups and all people should be represented in the MPR, embodying the spirit of deliberation. Further, F-UG stated that the inclusion of non-directly elected

128 As explained by Nazaruddin Syamsuddin in the 12th PAH I meeting on 29 March 2001. See Majelis Permusyawaratan Rakyat Republic Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 344.

129 As stated by Soedijarto (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 167. Soedijarto further maintained that the MPR consists of the DPR, DPD and delegations of interest groups and holds the authority to amend and to determine the Constitution, to determine *Garis-Garis Besar Haluan Negara* (Broad Outlines of State Policy), and to elect, to determine, and to install the president and the vice president. See Ibid., p. 196.

130 As stated by Patrialis Akbar (F-Reformasi). Ibid., p. 181.

131 As argued by Lukman Hakim Saifuddin (F-PPP). Ibid., p. 187. Previously, Ramlan Surbakti (TA) argued that the representation is not only in form of representation in ideas, but many desires for representation in presence. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 611.

members in non-executive institutions does not mean that the system is not democratic. Examples include members of senates in France and Canada, or the members of the *Bundesrat* in Germany who are elected by the States. Therefore, appointed MPR members are necessary alongside members of the DPR and the Regional Representative Council who are elected by the people. The delegations of the interest groups, F-UG affirmed, do not want to be in the DPR or the Regional Representative Council, but in the MPR, which has the authority to amend and to determine the Constitution, to determine the Broad Outlines of State Policy, and to elect, to determine and to inaugurate the president and the vice president.[132]

Likewise, F-KKI affirmed that the MPR should remain a permanent body that accommodates the delegations of components of society who cannot participate in the election and holds the authority to determine the Broad Outlines of State Policy.[133] Against this argument, a F-PDIP member held that all elements in society (e.g., workers, peasants, fishermen, religious groups, and so forth) have been accommodated in the political parties. Therefore, the appointed members in the MPR should not be an issue. Meanwhile, the president (as the supreme executive authority) could involve them in the administration of the state.[134] On 4 November 2001, a F-PDIP speaker in the MPR plenary meeting reiterated that by including political leaders, community leaders and regional leaders, MPR members are political, local, and interest group representatives. Further, the speaker reiterated that the military and police's DPR representation and MPR representation will end in 2004 and 2009, respectively, at the latest.[135]

During the Commission A meeting on 5 November 2001, which discussed the formulation of the third set of changes of the 1945 Constitution, the factions' positions towards the MPR's membership remained unchanged. The speakers of F-KB, F-PG, F-PDU, F-PBB, F-PPP and F-PDKB asserted that the MPR should consist of DPR and Regional Representative Council members.[136] On the other hand, the speakers of F-UG, F-Reformasi, F-PDIP, F-TNI/Polri and F-KKI affirmed that the MPR should also include appointed delegations of interest groups further regulated by law.[137] In addition, F-KKI reiterated that the MPR should remain the highest political

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132 As stated by Soedijarto (F-UG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 247.

133 As stated by Anthonius Rahail (F-KKI). Ibid., p. 250.

134 As stated by Frans Matrutty (F-PDIP). Ibid., p. 251.

135 As conveyed by Pataniari Siahaan (F-PDIP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 60.

136 As stated respectively by Amru Al Mu'tashim (F-KB), Laden Mering (F-PG), Asnawi Latief (F-PDU), Hamdan Zoelva (F-PBB), Lukman Hakim Saifuddin (F-PPP) and Gregorius Seto Harianto (F-PDKB). See Ibid., pp. 88. 104, 109, 111, 115, 133.

137 As stated by Sutjipto (F-UG), Patrialis Akbar (F-Reformasi), Soewarno (F-PDIP), Affandi (F-TNI/Polri), and F.X. Sumitro (F-KKI). Ibid., pp. 102, 113, 122, 128. F-PDIP was divided into those who support and reject the appointed MPR members from the group's delegations.

institution. Interest group delegations in the MPR should be regulated by the Constitution instead of by law.[138]

*VII.3.2.1 MPR Membership – Disagreements Persist*

Until the end of the session, Commission A could not agree on the MPR's membership. If the MPR postponed the topic, a member warned, it would be impossible to determine the election of the president, to conclude the concept of the Regional Representative Council, and for the Election Commission to prepare the next election that was only one and a half years away. Therefore, the decision about the two alternatives on MPR membership should be made following the MPR standing procedure.[139]

On 7 November 20021, a Commission A lobby meeting did not manage to resolve the differences. On 8 November 2001, during the Commission A plenary meeting, factions agreed to submit the matter to the MPR plenary meeting for a further decision.[140]

On 9 November 2001, in the MPR plenary meeting, factions conveyed their final statements on the matter. F-PDIP reiterated that MPR members should be elected, maintaining "representation on the basis of election," through which the aspirations of the interest groups and regions could be accommodated. The representation of the Armed Forces and Police should be stipulated in the Transitional Provisions of the Constitution.[141] Similarly, F-PG, F-PPP, F-KB, F-Reformasi, F-PBB, and F-PDKB affirmed that sovereignty materializes through elected members in the DPR and the Regional Representative Council.[142] However, F-TNI/Polri affirmed that besides elected members, delegations of interest groups should also be included in the MPR as the embodiment of all the people. However, they added that it is not in the interest of the Armed Forces and Police to remain in the MPR, which would last until 2009 in any case, following MPR Decree No. VII/2000.[143]

A strong proponent of elected-only membership noted his regret that agreement could not be reached. He said he expected that this could be decided in the next MPR annual session so there would still be time to complete the reform of legislation necessary for the implementation of the 2004 elections.[144]

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138 As stated by F.X. Sumitro (F-KKI). Ibid., pp. 87, 131.

139 As stated by Asnawi Latief (F-PDU). Ibid., p. 598. However, Latief later pointed out that voting or postponing the issue would bear similar consequences. See Ibid., p. 657.

140 Ibid., pp. 608, 616.

141 As stated by I Dewa Gede Palguna (F-PDIP). Ibid., p. 633. MPR Decree No. VII/2000.

142 As stated by T.M. Nurliff (F-PG), Muhammad Thahir Saimima (F-PPP), Erman Suparno (F-KB), Umirza Abidin (F-Reformasi), Hamdan Zoelva (F-PBB), and Gregorius Seto Harianto (F-PDKB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 637, 641, 646, 648, 652, 669.

143 As stated by Ishak Latuconsina (F-TNI/Polri). Ibid., p. 649.

144 As stated by Asnawi Latief (F-PDU). Ibid., p. 657.

On the other hand, F-KKI contended that the overall design of the political system's renewal remained incomplete. Many things were still unclear, such as whether the MPR is a permanent body or a joint session, and if permanent, whether it consists of two, two-and-a-half, or three chambers. F-KKI was not convinced of the draft changes. However, if a majority wanted an immediate decision, F-KKI hoped to compete honourably in the decision by ballot.[145] Interestingly, F-UG, whose members were appointed to the MPR, did not state their stance towards MPR membership.[146]

#### *VII.3.2.2 Ratifying Agreements and Postponing MPR Membership*

To overcome the stalemate, the MPR chairman invited the Commission A and faction leadership to a consultation meeting. Ultimately, the factions agreed to ratify the drafts that had been agreed and postpone the remainder, such as MPR membership and the second round of the presidential elections.[147]

The third amendment was ratified in the MPR plenary meeting on 9 November 2001. The topics lacking consensus would be postponed. This became the MPR Working Body's task which needed to be completed during the MPR 2002 annual session.[148]

### VII.3.3 Negara Hukum (The State based on the Rule of Law)

This section details the debates regarding whether the Constitution should read that Indonesia is a state based on a democratic rule of law versus the rule of law. While the PAH I chairman emphasised throughout that most factions agreed on the substance and differed on the wording, the ratified amendment eventually read that Indonesia is a state based on the rule of law.

All factions had agreed that Indonesia is a *negara hukum*, a state based on the rule of law. However, some were hesitant to include these in the Constitution before all the constitutional provisions were agreed. Members pointed out that the rule of law is not a simple term. It relates to several other principles, such as human rights, separation of powers, an independent judiciary, and so forth. The decision must be made while taking these aspects into account.[149] At the beginning of the third amendment stage,

145 As stated by K.H. Hamid Mappa (F-KKI). Ibid., pp. 662, 667.
146 Ibid., p. 639.
147 Ibid., p. 674.
148 This decision was confirmed by MPR Decree No. XI/2001 on the Revision of MPR Decree No. IX/2000 on the Assignment of the MPR Working Body to Prepare the Changes to the 1945 Constitution, 9 November 2001.
149 As underlined by among others Harjono (F-PDIP) and Slamet Effendy Yusuf (F-PG). Ibid., p. 401.

F-PDI-P argued that the 1945 Constitution should be the basic law that contains the legal norms that all legislations must follow under the constitutionality principle.[150]

Discussions continued with the Team of Experts on 20 March 2001.[151] An expert stated that *negara hukum* is not stated in the original 1945 Constitution but in its Elucidation. Therefore, following the MPR's initial agreement, it could be directly transferred into the amended articles. However, the rule of law concept in the constitution should be understood alongside democracy and people's sovereignty. The Team of Experts, therefore, recommended a new formulation: "*Negara Indonesia adalah negara hukum yang berkedaulatan rakyat*" (the State of Indonesia is a state based on the rule of law which is based on people's sovereignty).[152] They proposed that the rule of law and democracy should be included in the fourth section of Article 1, which states *"Indonesia adalah negara hukum yang demokratis"* (Indonesia is a state based on the rule of law which is democratic).[153]

In response, F-PDIP suggested that if what was intended is a *democratische rechtsstaat* (democratic state based on the rule of law), the following was not the correct formulation: *"Indonesia adalah negara hukum yang demokratis"* (Indonesia is a state based on the rule of law which is democratic). It is democracy that is limited by the rule of law, so democracy does not turn into anarchy.[154] On the other hand, F-UG and F-PBB argued that *negara hukum* rather than 'democratic' should be emphasized, since this was already inherent in the Constitution's articles.[155] *Negara hukum* contains the ideas of a constitutional system, the rule of law, and the adherence to human rights. Therefore, it is unnecessary to add 'democratic'.[156] However, F-PDU argued that 'democratic' should be included since regimes like *Orde Baru* and the *Hitler* regime claimed to be based on the rule of law, while being authoritarian.[157]

Likewise, F-PPP and F-Reformasi argued that, to avoid an authoritarian rule of law, the formulation should affirm that Indonesia is a state based on the rule of law which is democratic (*Indonesia adalah negara hukum yang demokratis*).[158] A F-PDIP member argued that the formulation '*Indonesia adalah*

150 As asserted by Pataniari Siahaan (F-PDIP). Ibid., p. 59.
151 The Team of Experts was established on 27 February 2001.
152 As stated by Jimly Asshidiqie. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 349.
153 Ibid., p. 459.
154 As argued by Sutjipno (F-PDIP). Ibid., p. 502. The discussion to conclude the acceptable Indonesian term for (democratic) *rechtsstaat* or "state based on the rule of law" continued for some time until eventually it was agreed that *negara hukum* captures this term best.
155 As argued by Sutjipto (F-UG) and Hamdan Zoelva (F-PBB). Ibid., pp. 804, 805.
156 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 805.
157 As argued by Asnawi Latief (F-PDU). Ibid., p. 808.
158 As stated by Lukman Hakim Saifuddin (F-PPP) and A. M. Luthfi (F-Reformasi). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 95, 102, 104.

*Negara Hukum*' is sufficient, since a *negara hukum* is a democratic state. Another member underlined that *negara hukum* is sufficient since it contains *grondrechten* (fundamental rights), *scheiding van machten* (separation of powers), *wetmatigheid van het bestuur* (legality of the administration), and *administratieve rechtspraak* (administrative jurisdiction). By comparison, the United Nation's defined democracy as including *grondrechten* (fundamental rights), namely *burgerlijke rechten* (civil rights), *politieke* (political), *economische* (economic), *sociale* (social), and *culturele rechten* (cultural rights).[159] F-UG agreed that *negara hukum* is sufficient.[160]

Against this position, a F-PG member argued that a state based on the rule of law is merely an instrument of politically and economically strong social actors, and an alternative to liberalism and individualism. Therefore, the right term is *"Indonesia adalah negara hukum demokratis"* (Indonesia is a democratic *negara hukum*).[161] F-TNI/Polri noted that the 1945 Constitution's Elucidation states that Indonesia should be based on law (not only on power) and on a constitution or fundamental law (not on absolutism). Thus, the state's authority is not unlimited since it is restricted by fundamental law. Therefore, the constitutional system should be clarified by the constitution and there should be a clear hierarchy of laws, where laws are elaborations of the constitution.[162]

Commenting on the discussions, the PAH I chairman asserted that *negara hukum* (rule of law) is different from *negara berdasar hukum* (rule by law). The latter is based on formal legality, such as in the case of *Hitler*'s regime, while *negara hukum* adheres to human rights, democracy, accountability of the authority, and so forth. However, the encouraging news was that all factions have the same idea. In that regard, the chairman recommended that the state being based on the rule of law and being a democratic state should not be separated. Therefore, though the rule of law needs *macht* (power), Indonesia should not be a state based on the legalistic rule of law, since this is not based on the principle of justice.[163]

Still, the debate was not finished, as a member stated that the democratic *rechtsstaat* is a radical response to the liberal law, because the rule of law is not automatically democratic.[164] Then, F-PDU warned that the democratic rule of law does not depend on mentioning 'democratic', but on the mechanism implemented in the constitution.[165] Further, another member underlined that the term *negara hukum* is sufficiently comprehensive,

159 As asserted by Soewarno (F-PDIP) and Sutjipno (F-PDIP). Ibid., p. 97. The equivalent term for *negara hukum* is rule of law, to distinguish it from rule by law.
160 As stated by Soedijarto (F-UG). Ibid., p. 104.
161 As stated by Happy Bone Zulkarnaen (F-PG). Ibid., pp. 99-100.
162 As elaborated by Affandi (F-TNI/Polri). Ibid., p. 101.
163 As elucidated by the author, who was presiding the meeting. Ibid., pp. 103, 105.
164 As stated by Happy Bone Zulkarnaen (F-PG). Ibid., p. 155.
165 As stated by Asnawi Latief (F-PDU). Ibid., p. 157.

given that the four aforementioned elements are adopted.[166] The chair of the meeting then concluded that the Constitution's articles should define *negara hukum*.[167]

Until the end of the PAH I session, factions remained divided into two camps. The first camp supported inserting "The State of Indonesia shall be a *negara hukum*". The second camp preferred "The State of Indonesia shall be a *negara hukum yang demokratis*". PAH I reported the two alternatives to the MPR Working Body meeting on 23 October 2001.[168]

In the subsequent Commission A meeting on 5 November 2001, a F-PG member stated that regarding the latest paradigm, the rule of law is impossible in a non-democratic state. Therefore, F-PG should change its position and support the first alternative.[169] However, another F-PG member responded that since only a democratic society can produce responsive laws, the term "*negara hukum yang demokratis*" should be included.[170] The first member still asserted that F-PG opt for the first alternative.[171]

Then, F-PDIP, F-KKI and F-KB members proposed adopting the original phrase from the 1945 Constitution's Elucidation: "Indonesia shall be a *negara hukum (rechtsstaat)*, and is not founded on power alone *(machtsstaat)*".[172] However, another F-PDIP member asserted that *negara hukum* (state based on the rule of law) is sufficient, because what is important is that the state's governance is democratic.[173] F-TNI/Polri contended that because Indonesia is a democratic state, it is a state based on the rule of law, even without including the term.[174] F-PDU, F-Reformasi, F-PBB, F-PPP, F-PDIP, F-KB, and F-TNI/Polri and F-UG agreed to accept the term *negara hukum*.[175] Conversely, F-UG and F-Reformasi continued to prefer the second alternative (*negara hukum yang demokratis*, democratic state based on the rule of law).[176]

Trying to reach a conclusion, the Commission A chairman emphasized that all agreed on the substance. *Negara hukum* is not only democratic, but

166 As asserted by Sutjipno (F-PDIP). Ibid., p. 159.
167 The meeting was led by Slamet Effendy Yusuf (F-PG), the Vice PAH I chairman. Ibid., p. 160.
168 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 546.
169 As conveyed by Agun Gunandjar Sudarsa (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 86.
170 As argued by Bambang Sadono (F-PG). Ibid., p. 93.
171 Ibid., p. 118.
172 As proposed by Dimyati Hartono (F-PDIP), F.X. Sumitro (F-KKI) and Amru Al Mu'tashim (F-KB). Ibid., pp. 86, 87.
173 As stated by Laden Mering (F-PDIP). Ibid., p. 104.
174 As stated by Ishak Latuconsina (F-TNI/Polri). Ibid., p. 89.
175 As affirmed by Hartono Mardjono (F-PDU), Imam Addaruqutni (F-Reformasi), Hamdan Zoelva (F-PBB), Lukman Hakim Saifuddin (F-PPP), Soewarno (F-PDIP), Soedijarto (F-UG), Yusuf Muhammad (F-KB) and Affandi (F-TNI/Polri). See Ibid., pp. 95, 96, 110, 114, 120, 124, 126, 128.
176 As asserted by Nursyahbani Katjasungkana (F-UG) and Patrialis Akbar (F-Reformasi). Ibid., pp. 101, 112.

also a state with supremacy of law and adherence to human rights, where the government authority is limited by law, with equality before the law, due process of law, and so forth. Therefore, the task is to apply the proper legal terminologies.[177] At the end of the meeting, the chairman invited faction delegations and the Commission A leadership for a consultation meeting to resolve differences.[178] The consultation meeting was successful and reported the outcomes to Commission A on 8 November 2001. All agreed on the phrase *Negara Indonesia adalah negara hukum*.[179] Nonetheless, in the subsequent Commission A meeting, a F-KKI member insisted that the changes that concern Chapter I should be postponed.[180] None of the other factions disputed the conclusions. F-KB underlined that the Constitution should reflect the people's sovereignty, *negara hukum*, and checks and balances, and affirmed that the agreed formulations reflected these principles.[181]

In the MPR Plenary Meeting on 8 November 2001, Commission A reported its work, which asserted *Negara Indonesia adalah negara hukum*.[182] All factions endorsed Commission A's work, with F-PDIP underlining the importance of Indonesia being *negara hukum*, which contains the principles of supremacy of law, democracy, adherence to human rights and limitation to the power of the government by law.[183] F-PBB stated that the formulation *negara hukum* is a step forward in amending the Constitution, reflected in the democratic law-making process and the Constitution's human rights provisions.[184] Finally, after a short interruption among the MPR leaders for an informal consultation meeting, the factions and Commission A, in the MPR plenary meeting on 9 November 2001, approved the provision in Article 1(3) of the 1945 Constitution that stipulates, *"Negara Indonesia adalah negara hukum"* (The state of Indonesia is a state based on the rule of law).

### VII.3.4 The independent judicial power and law enforcement

This section details the debates about Supreme Court membership procedures, the judiciary's independence, and the separation of powers – focusing on enforcement powers and the delegation of judicial review. Ultimately, PAH I did not agree on most of these topics, but rather focused its attention on the Constitutional Court and the Judicial Commission, which sections VII.3.5 and VII.3.6 discuss.

The judiciary's independence was also debated from the amendment process' start. Certain PAH I members believed that establishing an inde-

177 Ibid., p. 105.
178 Ibid., p. 135.
179 Ibid., p. 558.
180 As insisted by F.X. Soemitro (F-KKI). Ibid., p. 573.
181 As asserted by Ali Masykur Musa (F-KB). Ibid., p. 605.
182 Ibid., p. 616.
183 As stated by I Dewa Gede Palguna (F-PDIP). Ibid., p. 633.
184 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 652.

pendent judicial authority should be the main amendment issue. During previous discussions, factions had asserted that the Supreme Court should be the only highest court and the ultimate institution of judicial power, functioning as the cassation court. The Supreme Court would organize all courts under itself and be equal to other branches of power, as part of the checks and balances. The independent judicial power should be explicitly affirmed in the Constitution to ensure the realization of the law's supremacy.

However, factions were also divided. Some contended that the judicial power should be accountable to the MPR as the highest state institution. Others argued that the MPR could not interfere in judicial matters. Some understood the judicial power as embodied in the Supreme Court. Others thought the judicial power could be divided across several institutions such as the Supreme Court, the Constitutional Court, and so forth. Some thought that the Supreme Court should hold the authority to conduct judicial review. Others argued that the authority to conduct judicial review should lie with the MPR. Still others suggested establishing a constitutional court for this task.

During the previous period, factions thought that the judicial authority provision should also include other law enforcement agencies such as the prosecutor, police, and the penitentiary, to ensure the realization of the supremacy of law.[185] As included in MPR Decree No. IX/2000, the MPR Working Body concluded that the chapter on judicial power should also include law enforcement.

Further, all factions had recognized the importance of judicial quality, which determines the independent judicial power's credibility. Therefore, a supervisory system should be adopted without infringing on judicial independence.

In the MPR Working Body meeting on 5 September 2000, a PAH I member mentioned that at the start of the reform, supremacy of law had been one of the demands of the students that so far had not been touched.[186] To meet that demand, others proposed prioritizing judicial power, which could immediately be used to measure the government's performance.[187]

On 24 April 2001, PAH I met with the Team of Experts to discuss establishing a mechanism of checks and balances to produce good governance. An expert recommended that the president should propose the Supreme Court's members, vice chairman and chairman to the DPR for approval. The Supreme Court should also serve to resolve political conflicts, such as between the DPR and the president, or between the people and the state.[188]

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185 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 169 - 190.

186 As stated by A.M. Luthfi (F-Reformasi). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 19, 20.

187 As proposed by Soedijarto and Harun Kamil, both of F-UG. Ibid., pp. 46, 78.

188 As conveyed by Afan Gaffar. Ibid., p. 395.

In the subsequent meeting on 10 May 2001, the experts also recommended inserting a new clause into Article 24, stating that the judicial power is independent and free from the influence of other state institutions and political parties. The judicial power should be exercised by the Constitutional Court and the Supreme Court. The Supreme Court's authority to try a case at the cassation level and other authorities should be established by law. A constitutional law expert advised that the Supreme Court should have 45 justices who meet certain requirements.[189] However, to avoid the impression that law enforcement is under the judiciary's control, law enforcement should be under neither judicial nor state governance authorities. The public prosecution and police's functions are described in separate chapters.[190]

Later, this expert reaffirmed that the public prosecution's position should be in a separate chapter. It should be an independent institution that implements the prosecution's authority in criminal cases, with no authority in civil cases. Hitherto, criminal cases were subject to decisions based on the opportunity and legality principles, which created the possibility of delaying a case on political grounds. Therefore, the constitution should assert that prosecution of criminal cases should be based on the legality and justice principles. Previously, the public prosecutor's position was a government instrument. Now the constitution should regulate this authority. Further, only the police can and must investigate criminal cases. Thus, the public prosecutor prosecutes while the police investigate. Through such professional separation, an integrated judicial system can be developed to support the state-building efforts based on the rule of law.[191]

One member added that it is the navy's duty to investigate fisheries at sea, the rangers in the forests, and so forth, to build an integrated justice system.[192] In that regard, another member believed that the judicial authority should merge with law enforcement. Enforcement should not only be conducted by the public prosecution and police. Further, the judge should also enforce the law, which is based on justice.[193] Another member argued that the legality principle should also apply to the trial process. Therefore, only the judge decides when to apply the legality principle.[194] In that regard, another member pointed out that in the theory of law, besides the legality and justice principles, there are legal certainty, utility, and human rights principles. Therefore, it is better not to mention these principles in the constitution but develop them in the relevant laws.[195] Regarding the legality principle, an expert emphasized that only a judge can determine

189 As conveyed by Jimly Asshidiqie. Ibid., p. 482.
190 Ibid., p. 526.
191 As elaborated by Jimly Asshidiqie. Ibid., pp. 601-603.
192 As elucidated by Zain Bajeber (F-PPP). Ibid., p. 615.
193 As stated by Slamet Effendy Yusuf (F-PG). Ibid., p. 616.
194 As argued by Harjono (F-PDIP). Ibid., pp. 619-620.
195 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 626.

the application of legal principles, put aside the positive law or legality principle, and base a decision on the values of justice. Further, the public prosecution should base an indictment on the sense of justice so that the prosecution can deal with past cases that could not be reached through the legality principle.[196]

Subsequently, in a PAH I meeting on 5 July 2001, when factions responded to the reviews of the Team of Experts, F-PG, F-PPP, F-PDU and F-TNI/Polri stated that separating law enforcement and the judicial authority can avoid the impression that law enforcement is part of the judicial authority.[197] Yet, a member argued that the constitution should assert that law enforcement should be implemented based on the supremacy of law, be free and independent, and be oriented towards the principle of justice.[198] Further, another member argued for clarifying the definition of law enforcement.[199] At the end of the meeting, all factions, as stated by the vice PAH I chairman who chaired the meeting, contended that PAH I needed to further formulate the judicial power's provisions. For this purpose, a drafting team should be formed.[200] In response, members agreed that the formulation still needed further deliberation, in which the Team of Experts should be involved.[201] Another member urged that the formulation should be finalised before the next Annual Session. The drafting team should comprise only of PAH I members.[202]

Discussions about the judicial power were resumed on 25 September 2001. In that meeting, the vice chairman reminded all that the original title of the chapter was simply Judicial Power.[203] Previously, the vice chairman said, the MPR Working Body had extended it to become Judicial Power and Law Enforcement, as it also included the police prosecutors. Meanwhile, the Team of Experts recommended separate chapters on the judicial power, law enforcement, and human rights, based on the *trias politica* separation of powers principle. In response, F-PDIP insisted that the title of the chapter should cover both the judicial power and law enforcement. Further, it should assert that the judicial power is an independent authority, free from the influence of other state institutions and political parties. Further, F-PDIP affirmed that the Supreme Court is a cassation court, with the authority to

196 As argued by Soewoto Moeljo Soedarmo. Ibid., p. 665.

197 As stated by Happy Bone Zulkarnaen (F-PG), Zain Bajeber (F-PPP), Asnawi Latief (F-PDU), and Affandi (F-TNI/Polri). Ibid., pp. 737, 741, 745, 760. Actually, all factions accepted the reviews of the Team of Experts, but due to time restraints factions did not read all written views and assumed they had been read.

198 As stated by Happy Bone Zulkarnaen (F-PG). Ibid., p. 737.

199 As argued by Bajeber (F-PPP). Ibid., p. 745.

200 The meeting was chaired Slamet Effendy Yusuf (F-PG), the Vice PAH I chairman. Ibid., p. 770.

201 As responded by Hobbes Sinaga (F-PDIP) and Theo Sambuaga (F-PG). Ibid., pp. 768, 769.

202 As stated by Harun Kamil and Soedijarto, both from F-UG. Ibid., pp. 771, 773.

203 The meeting was chaired by Harun Kamil,the Vice PAH I chairman. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 263, 264.

review all legislation. The Supreme Court justices, F-PDIP affirmed, should be appointed and dismissed by the People's Consultative Assembly based on the Judicial Commission's proposal.[204] F-PDU agreed with F-PDIP, but argued that if the Supreme Court still holds the judicial review authority, the Constitutional Court is unnecessary.[205] Likewise, F-Reformasi agreed with the title, but questioned introducing the Constitutional Court and Judicial Commission.[206] Referring to the enclosures of MPR Decree No. IX/2000, F-PG affirmed that the Supreme Court justices should be appointed and dismissed by the People's Consultative Assembly based on the Judicial Commission's proposal.[207]

F-PPP reiterated that the articles in this section should regulate law enforcement, not the law enforcers, which include more than the judges, public prosecution, and police. Moreover, an integrated criminal justice system begins with a police investigation and then proceeds with a public prosecution, trial by judges, imprisonment, supervision by judges for conditional punishment, and so forth. F-PPP questioned whether the provisions of the constitution should be so detailed, as this could disrupt the judicial process in the future. Further, considering the existing Supreme Court's workload, F-PPP insisted that the judicial review authority should be given to another institution.[208]

F-PBB also disagreed with combining the titles and proposed separating the judicial power from law enforcement. Further, F-PBB appreciated the stance of the Expert Group that the Supreme Court and the Constitutional Court should take a passive role. This means that, without a claim, the Supreme Court or the Constitutional Court cannot conduct a judicial review of the legislation.[209] Regarding Supreme Court justice recruitment, F-PDIP concurred with F-TNI/Polri and F-UG that the DPR should do this based on a Judicial Commission's proposal. Their ceremonial appointment should then be conducted by the President.[210] F-PDIP proposed that ordinary court justices shall also be recruited by the Judicial Commission.[211]

Previously, F-PG argued that the DPR should appoint and dismiss Supreme Court justices, while the MPR should appoint and dismiss the chairman and the vice chairman. An honorary council of justices is needed to uphold discipline and the justices' code of ethics.[212] Since the judicial power is not only the Supreme Court's power, F-PPP urged further elaboration. The judicial power is the authority to adjudicate, which is done by

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204 As stated by Soewarno (F-PDIP). Ibid., pp. 266, 267. See also VI.2.3.1.
205 As stated by Asnawi Latief (F-PDU). Ibid., p. 268.
206 As stated by A.M. Lutfi (F-Reformasi). Ibid., p. 269.
207 As stated by Agun Gunandjar Sudarsa (F-PG). Ibid., p. 270.
208 As stated by Zain Bajeber (F-PPP). Ibid., pp. 279-281.
209 As argued by Hamdan Zoelva (F-PBB). Ibid., p. 282.
210 As stated by I Ketut Astawa (F-TNI/Polri), Sutjipto (F-UG) and I Dewa Gede Palguna (F-PDIP) Ibid., pp. 305, 306, 310.
211 As proposed by Harjono (F-PDIP). Ibid., p. 318.
212 As argued by Agun Gunandjar Sudarsa (F-PG). Ibid., pp. 298, 299.

the institutions that uphold justice, the Supreme Court, and other judicial bodies, which are in four spheres. While the Supreme Court adjudicates the application of law (*judex juris*), lower judicatures adjudicate the facts (*judex facti*).

Further, F-PPP asserted that all judicial bodies are integrated in the judicial authority. However, in upholding justice, they are not subordinate to the Supreme Court. There are special courts, e.g., the court for corruption crimes and the tax court. There are quasi-judicial bodies, e.g., the Maritime Court and Tax Dispute Settlement Agency. These decisions can be contested in a state administrative court. Therefore, F-PPP reminded all not to be hasty in formulating the judicial power.[213]

In the end, while many aspects of judicial power remained undecided in this third stage, the discussions became focused on two issues. The first one concerned constitutional review and a constitutional court. The second issue related to the Judicial Commission.

### VII.3.5 Constitutional review and the Constitutional Court

This section details the extensive debate about the meaning of judicial review and the institutions responsible for it.

From the beginning, judicial review had been discussed by MPR members. Factions agreed that laws should be tested against the Constitution but differed on which institution should hold the authority to conduct the review. Some argued for the MPR to conduct it, while others proposed the judiciary, either the Supreme Court or a Constitutional Court. Yet, while PAH I was working on this topic, PAH II drafted an MPR decree that asserted that the MPR holds the constitutional review authority. The decree was subsequently approved by the MPR plenary meeting as MPR Decree No. III/2000.[214]

Thus, in the first MPR Working Body meeting on 5 September 2000, there was a proposal to assign the constitutional review authority to the MPR Working Body, as stipulated by Assembly Decree No. III/2000.[215] In response, a member argued that the authority should be in the hands of the MPR, not the MPR Working Body.[216] Another member argued that

213 As stated by Zain Bajeber (F-PPP). Ibid., pp. 301-303.

214 Initially, members of the MPR did not distinguish between a judicial review and a constitutional review.

215 Proposed by Ali Hardi Kiaidemak (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 16. On 18 August 2000, the MPR ratified MPR Decree No. III/2000 on the Source of Law and the Hierarchy of Legislations, which was prepared by PAH II. The decree stipulates among others the hierarchy of legislations, the authority of the MPR to conduct a judicial review, and the authority of the Supreme Court to conduct a judicial review of legislations below the law.

216 As argued by Hamdan Zoelva (F-PBB). Ibid., p. 24.

constitutional review should be the authority of a Constitutional Court, which was being discussed by PAH I. He argued that if this authority was mandated to a political institution such as the MPR, it would be a "political accident".[217] However, it turned out that besides preparing the 1945 Constitution amendment, the MPR Working Body indeed decided to assign PAH I to conduct judicial review.[218] Thus, during the MPR Working Body meeting on 6 September 2000, the PAH I chairman conveyed that besides preparing the 1945 Constitution's draft amendment, PAH I was also tasked with conducting judicial review of the law against the 1945 Constitution and the MPR decrees.[219]

In response,a member argued that the MPR Working Body could conduct judicial review before the Constitutional Court was established.[220] However, because judicial review forms part of the checks and balances in which the judiciary holds legal control over a product produced jointly by the DPR and the president, the MPR would not comply with the separation of power if it held this authority. The member continued by asking why PAH II drafted MPR Decree No. III/2000 and why the MPR plenary approved it, since it was in contradiction with the separation of powers principle.[221] In response, another member suggested that the MPR should cancel MPR Decree No. III/2000.[222]

### *VII.3.5.1 Debate: People's Sovereignty and Judicial Review*

Since the ideas on judicial review and the constitutional court were not sufficiently clear among the committee's members, the PAH I chairman suggested a thorough discussion to clarify the terms and reach a comprehensive understanding of judicial review principles.[223] For the purpose, the chairman proposed inviting PAH II to explain the idea behind MPR Decree No. III/2000 and J. E. Sahetapy, among others, to explain the concept of judicial review.[224] In a PAH I meeting on 18 September 2000, Sahetapy explained among others that judicial review presupposes the adoption of the *trias politica* principle of the functional separation of powers. Judicial review needs an independent highest court. In the United States of America, this is the Supreme Court, while in European civil law countries, it is the Constitutional Court.[225]

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217 As asserted by Asnawi Latief (F-PDU). Ibid., pp. 26, 50.
218 As disclosed by Amien Rais, MPR Speaker and MPR Working Body Chairman. Ibid., p. 28.
219 As conveyed by the PAH I chairman. Ibid., p. 39.
220 As stated by Valina Singka Subekti (F-UG). Ibid., p. 54.
221 As stated by Valina Singka Subekti (F-UG). Ibid., p. 71.
222 As asserted by Soedijarto (F-UG). Ibid., p. 73.
223 Ibid., p. 85.
224 Ibid., p. 91. J.E. Sahetapy is (emeritus) professor of law at the University of Airlangga in Surabaya and at the time was a PAH I member for F-PDIP.
225 Ibid., p. 102.

In a comment, a member stated that there are objections against judicial review, arguing that it violates people's sovereignty. Judicial review should only review the legislation below a parliamentary statute, such as a president's or governor's decision. However, a law that is created by representatives who are elected by the people should not be reviewed by individual judges, such as those adopted in a constitutional court concept. The legislative body reflects people's sovereignty and should be supreme over other powers and cannot be subject to a judicial decision. MPR Decree No. III/2000 was derived from that understanding, confirming the MPR as the supreme institution holding authority to review the law's constitutionality. Therefore, it should be the MPR who holds judicial review authority.[226]

Another member argued that the MPR should embrace a clear philosophy. The parliamentary supremacy principle in the European continental system does not recognize judicial review. Alternatively, the civil law system in the USA recognizes the judicial review authority that is exercised by the Supreme Court. Further, judicial review is solely for maintaining the purity of the constitution's implementation and ensuring the law's constitutionality. It is a legal action. One should understand judicial review in the context of checks and balances, and so hand it to a judicial institution, rather than a political body such as the MPR.[227] Another member explained that the *toetsingsrecht* (judicial review authority) in the USA is assigned to the Supreme Court, while in the European continental system, such as in Germany, it is assigned to the *Bundesverfassunggericht* (The Federal Constitutional Court), which consists of independent statesmen.[228]

Responding to these comments, the meeting's chairman reminded members that PAH I could only revise the stipulation in MPR Decree No. III/2000 if it finalized the formulation of a Constitutional Court.[229] A F-Reformasi member reacted by stating that since the MPR holds the authority to "review" the constitution, it should also have authority to conduct judicial review. Therefore, the MPR Decree No. III/2000 stipulation was correct and would not further increase public scepticism over the MPR's existence.[230] Alternatively, another member contended that judicial review should be conducted by an independent Constitutional Court, which exists outside of the Supreme Court. Its judges should be appointed by the MPR, as the state supreme institution which distributes its power to the Constitutional Court.[231] Another member reminded PAH I not to confront the MPR's decisions and complained about the lack of coordination between PAH I and PAH II which led to MPR Decree No. III/2000.[232]

226 As argued by Happy Bone Zulkarnaen (F-PG). Ibid., pp. 104-105.
227 As argued by I Dewa Gede Palguna (F-PDIP). Ibid., p. 107.
228 As stated by Sutjipno (F-PDIP). Ibid., p. 109.
229 The meeting was led by Slamet Effendy Yusuf (F-PG), the Vice PAH I chairman. Ibid., p. 110.
230 As argued by Patrialis Akbar (F-Reformasi). Ibid., p. 110.
231 As stated by Harun Kamil (F-UG). Ibid., p. 112.
232 As reminded by Agun Gunandjar Sudarsa (F-PG). Ibid., p. 114.

The meeting's chairman asserted that, despite the MPR decree being ratified, PAH I could still include provisions on constitutional review in the Constitution.[233] Another member warned that PAH I should not give up on a *fait accompli* and comply with the MPR decision that is not consistent with PAH I's opinion. Therefore, PAH I should suspend the assignment and discuss it later.[234] Looking for a way out, another member argued that the discussion seemed to be more about semantics. The MPR could conduct a constitutional or political review without intervening in the legal arena, while the Supreme Court could conduct a judicial review without intervening in politics. The member submitted a paper to PAH I, which included citations of Mauro Capelletti.[235]

On 16 January 2001, PAH I decided to address judicial review as tasked by MPR Decree No. III/2000 as an additional assignment after finalizing the drafts of the third amendment as specified in the MPR Decree No. IX/2000 enclosure.[236]

On 29 March 2001, in a MPR Working Body's plenary meeting, the PAH I chairman reported that PAH I would discuss legislative review and judicial review as assigned by MPR Decree No. III/2000 while discussing the judicial branch. PAH I would possibly assign the task to the Constitutional Court.[237] Further, in a PAH I meeting on 24 April 2001, the Team of Experts contended that the authority to conduct judicial review should be given to the Supreme Court, following the Supreme Court's political function of resolving conflicts.[238] In that regard, an expert reiterated that the Supreme Court cannot conduct judicial review if the 1945 Constitution still adopts the principle of the distribution of powers instead of the separation of powers. As long as the MPR is still the highest institution, the judicial review authority could not be delegated to another institution.[239] The fact that the 1945 Constitution does not embrace the principle of the separation of powers, the expert continued, also explains why Soepomo flatly refused Muhammad Yamin's idea to give authority to the Supreme Court to conduct judicial review on the substances of law (See II.3).[240]

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233 The meeting was led by Slamet Effendy Yusuf, the Vice PAH I chairman. Ibid., pp. 114-115.

234 As asserted by Pataniari Siahaan (F-PDIP). Ibid., p. 115.

235 As argued by Happy Bone Zulkarnaen (F-PG). Ibid., pp. 117, 118. Previously Zulkarnaen asserted that judicial review undertaken by the Supreme Court concerns legislation below the law. Mauro Capelletti was professor of law at the University of Florence, Italy and Stanford University, USA.

236 MPR Decree No. IX/2000 attaches a list of materials for the third amendment. See Attachment VI.4.

237 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 384.

238 As stated by Afan Gaffar of the Team of Experts. Ibid, p. 395. On 27 February 2001 PAH I formed a Team of Experts, which consisted of 30 experts.

239 As stated by Jimly Asshidiqie of the Team of Experts. Ibid, p. 401.

240 Soepomo and Mohammad Yamin were members of *Dokuritsu Zyunbi Tjoosakai*, BPUPK (*Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan* - Body for Investigation of Efforts for Preparation of Independence) from 29 April 1945 – 7 August 1945. See also Sekretariat Negara Republik Indonesia, *op.cit.*, pp. 183, 295, 299, 305 – 306.

Further, in the 14th PAH I meeting on 10 May 2001, the same expert proposed forming a Constitutional Court, different from the one proposed by PAH I. The Constitutional Court must be outside but at the same level as the Supreme Court, since there is the possibility that the Supreme Court becomes engaged in a dispute involving other state institutions. Therefore, the Team of Experts proposed that the Constitutional Court should hold the authority to perform a final review of law and lower legislation to resolve a contradiction or dispute between state institutions. This could involve disputes between the central and regional governments or between regional governments in implementing the laws. Furthermore, the expert affirmed that the judicial review authority is passive. [241]

Regarding the recruitment of the nine Constitutional Court judges, the Team of Experts proposed that the DPR selects the judges from among the Supreme Court's nominations. Regarding the Supreme Court, the Team of Experts supported the PAH I draft, which stated that the *Mahkamah Agung* (the Supreme Court) is a cassation court.

Then, the PAH I chairman asserted that PAH I wanted the amended constitution to become a strong anchor for an integrated judiciary system. Further, the chairman affirmed that the Constitutional Court should be within the judicial domain but not subordinate to other bodies, "although what matters most is that the Constitution should assert its authority."[242] However, based on the perception that state power should comprise of three bodies (i.e., the executive, legislature, and the judiciary), a member argued that judicial power should be embodied in the Supreme Court and that the Constitutional Court should form part of the Supreme Court. It is difficult to comprehend a Constitutional Court that is outside of the Supreme Court and higher than the Supreme Court.[243]

Another member suggested that a "domain" approach could be applied. There would be constitutional, regulatory, and corrective powers. In that way, the Constitutional Court would be in the Supreme Court community, although not subordinate to, but alongside the Supreme Court.[244]

In the PAH I meeting on 15 May 2001, the Team of Experts stated that it concurred with this "domain" approach.[245] Further, the Supreme Court should be relieved from the function of conducting judicial review. It should give the authority to conduct judicial review of law and all lesser legislations to the Constitutional Court.[246] On the purview of the judicial

241 As stated by Jimly Asshidiqie. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 462-464. Later, Sri Soemantri Martosoewignjo (Team of Experts) proposed that the Constitutional Court should also hold the authority to resolve any dispute over election results and dissolve political parties. See Ibid, p. 684.

242 As asserted by the PAH I chairman. Ibid., pp. 473-474.

243 As argued by Agun Gunandjar Sudarsa (F-PG). Ibid., p. 499.

244 As elucidated by Sutjipno (F-PDIP). Ibid., p. 501.

245 As conveyed by Jimly Asshidiqie. Ibid., p. 525.

246 As conveyed by Maria S.W. Sumarjono.Ibid., p. 544.

review, the Team of Experts agreed that the object of judicial review was all legislations below the Constitution, assuming that there would be no new MPR decrees and that the existing MPR decrees would be categorized as statutes.[247] On the other hand, the experts proposed that a bill could be judicially reviewed before being ratified as a statute.[248] Further, the experts proposed that the Constitutional Court should also hold the authority to resolve a dispute over an election result.[249]

Then, in a PAH I meeting on 29 May 2001, an expert stated that the difference between the Supreme Court and the Constitutional Court lies in its core purpose. The Supreme Court is the court of cassation for cases relating to justice for citizens. The Constitutional Court is made to uphold the law, ranging from the constitution to all laws and regulations below it. Therefore, the hierarchy of legislation needs to be determined. The first level forms the Constitution and the amendments to the Constitution. The second level consists of the laws or statutes and the government regulations as substitution for the laws and statutes. The third level consists of all legislation underneath.[250]

Subsequently, in the PAH I meeting on 5 July 2001, F-PDIP and F-UG asserted that a Constitutional Court is important for upholding the constitutionality of laws.[251] Further, F-TNI/Polri affirmed that the judicial power should be exercised by the Supreme Court and the Constitutional Court. In that regard, the Constitutional Court has the authority to try the case at the first and last level and to test the substance of the laws and lower legislations. It can also adjudicate on conflicts or disputes between state agencies, between central and local governments, and between local governments in implementing legislations and in exercising other authorities granted by the law.[252]

Regarding presidential impeachment, on 5 September 2001, factions, including F-PG, F-PDIP, F-TNI/Polri, F-KB, and later F-UG and F-KKI, argued that the decision should be preceded by a judicial process conducted by the Constitutional Court to decide whether the president violated the provisions of the law as indicted.[253] Likewise, F-PPP would confirm later in a Commission A meeting on 5 November 2001 that the MPR cannot impeach

247 Ibid., p. 545. Zain Bajeber (F-PPP) argued that the object of the judicial review is all legislations below the Constitution.

248 As stated by Ramlan Surbakti. Ibid., p. 610.

249 As conveyed by Sri Soemantri Martosoewignjo. Ibid., P. 684.

250 As stated by Jimly Asshidiqie. Ibid., pp. 706-707.

251 As stated by Katin Subiyantoro (F-PDIP) and Soedijarto (F-UG). Ibid., p. 730.

252 As conveyed by Affandi (F-TNI/Polri). Ibid., p. 760.

253 As affirmed by Theo Sambuaga (F-PG), I Dewa Gede Palguna (F-PDIP), Affandi (F-TNI/Polri), Yusuf Muhammad (F-KB), and later by Soedijarto (F-UG) and Anthonius Rahail (F-KKI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 193, 198, 200, 208, 248, 250.

a president without the DPR's prior indictment being approved by the Constitutional Court.[254]

In a PAH I meeting on 25 September 2001, the Vice Chairman who led the meeting reminded the committee that regarding judicial review's purview, the Expert Group recommended that the Constitutional Court judicially review all legislation, from the statute down to lower legislations, while PAH I wanted to limit this to statutes. Further, the Expert Group recommended that the Constitutional Court should be outside the Supreme Court, while some PAH I members thought it should be within the Supreme Court.[255]

Several factions contested the recommendation. Considering the powerful authority of the Constitutional Court, being able to determine whether the MPR can or cannot impeach the president, F-Reformasi expressed suspicion and stated that it is *overbodig*, superfluous, since the MPR is a legitimate body, elected by the people.[256]

On the other hand, F-UG stated that they accepted the recommendation of the Expert Group to establish a Constitutional Court as an institution outside the Supreme Court but within the domain of the judiciary.[257] F-UG proposed that the Constitution should explicitly stipulate the existence of the Constitutional Court besides the Supreme Court, because the jurisdiction of the Constitutional Court is to ensure that the provisions of the Constitution not be violated.[258] Further, F-PBB argued that the purview of judicial review of the Constitutional Court should be limited to statutes only.[259] In that regard, F-PDIP endorsed the formulation proposed by the Team of Experts that the Constitutional Court hold the authority to judge a case in the first and final stage in reviewing the substances of the law and the legislation.[260] Then, another F-PDIP member added that the Constitutional Court should hold the competence over problems that the Supreme Court is not able to handle. Such problems would include judicial review, a dispute of competence between state institutions, the dissolution of a political party, and a conflict related to election(s). Regarding the Constitutional Court judges, the member confirmed that the court should have nine justices, and that the Supreme Court, the DPR and the President appoint three justices each.[261]

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254 As affirmed by Lukman Hakim Saifuddin (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 116.

255 The meeting was led by Harun Kamil (F-UG), who was the Vice PAH I chairman. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 264.

256 As stated by A.M. Luthfi (F-Reformasi). Ibid., p. 269.

257 As affirmed by Sutjipto (F-UG). Ibid., p. 278.

258 As argued by Soedijarto (F-UG). Ibid., p. 290.

259 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 282.

260 As affirmed by Hobbes Sinaga (F-PDIP). Ibid., p. 292.

261 As stated by Frans Matrutty (F-PDIP). Ibid., pp. 295, 296.

F-PG argued that the Constitutional Court does not need to conduct judicial review on legislation below the law, because this could be handled by a panel of the Supreme Court. The member also proposed that the Constitutional Court judges should be nominated by the Supreme Court and appointed and dismissed by the MPR, which should be regulated further by law. Furthermore, the member proposed that the Constitutional Court should be established by and within the Supreme Court, as a special court which conducts judicial review, resolves disputes, and judges the DPR's indictment to impeach a president.[262]

F-PPP disagreed, asserting that the judicial power is not the authority of the Supreme Court alone. Further, F-PPP emphasized that those courts are one entity and of the same level in the sense that the other court is not subordinate to the Supreme Court. One should carefully consider the benefit of having a Constitutional Court inside or outside the Supreme Court. Thailand for instance, the member said, is one of the countries, which has a Constitutional Court outside the Supreme Court.[263]

F-TNI/Polri contended that it is better if the authority to perform judicial review includes the review of lower legislation. For this purpose, a separate entity which serves to conduct the judicial review of the law could be formed.[264] F-PDIP and F-UG asserted that, due to its special functions, it would be more appropriate if the Constitutional Court was formed as a separate institution.[265] In contrast, F-Reformasi insisted that the Constitution should state explicitly the existence of a Constitutional Court within the Supreme Court's realm.[266]

In the subsequent PAH I meeting on 26 September 2001, addressing how a Constitutional Court should be organised, a F-PDIP member elucidated that in a country which adopts *trias politica* principles consistently, such as the United States of America, the articles of the constitution ascribe powers to the executive, judicial, and legislative; there the power to review the law lies with the peak of the judicial power, which is the Supreme Court. However, following another model, such as employed in Italy and France, judicial review is in the hand of the ordinary judicial authority. For Indonesia, which does not implement the *trias politica* strictly, because of the presence of the BPK (Audit Board) and MPR, it is not befitting to place the authority of judicial review with the ultimate institution of judicial power. The Constitutional Court is a special court because it does not execute the ordinary law but upholds the constitutionality of laws. The object in this regard is a *regeling*, a regulation of general application, not a *beslissing*, a decision in an individual case. The court for decisions is the State Administrative Court, which in France is the *Conseil d'Etat*, whereas the *Conseil Constitutionnel* regards the

262 As stated by Agun Gunandjar Sudarsa (F-PG). Ibid., p. 298.
263 As argued by Zain Bajeber (F-PPP). Ibid., pp. 301, 304.
264 As argued by I Ketut Astawa (F-TNI/Polri). Ibid., p. 305.
265 As stated by I Dewa Gede Palguna (F-PDIP) and Sutjipto (F-UG). Ibid., pp. 308, 309.
266 As stated by Patrialis Akbar (F-Reformasi). Ibid., p. 310.

*regeling*. Therefore, F-PDIP argued that the position of the Constitutional Court should be within the judiciary, but not in a functional relationship, let alone in a hierarchical relationship with the Supreme Court. Further, F-PDIP argued that a Constitutional Court justice needs different qualities. Wisdom, political knowledge, and experience with state affairs and not just legal affairs in general are required. Regarding the number of justices, F-PDIP argued that it should be an odd number, nine for instance, whereby the DPR, the Supreme Court, and the President each appoint three.[267]

Then F-PDU repeated the functions of the Constitutional Court that hitherto had been discussed, which were (1) to decide a dispute between state institutions in implementing the laws, (2) to test the constitutionality of the law and the subordinate legislation, (3) to resolve disputes about elections, and (4) regarding impeachment, and (5) to decide on the dissolution of a political party.[268]

However, once again F-PG argued that the Constitutional Court should be attached to the position, the function, and the authority of the Supreme Court, in such a way that the Constitutional Court is a function of the Supreme Court, either as an ad-hoc or a permanent entity within the Supreme Court. Because they are in one building, the chairman of the Supreme Court is also the chairman of the Constitutional Court. Further, F-PG asserted that the judicial review conducted by the Constitutional Court is limited by the law. Therefore, F-PG argued that the Supreme Court does not merely implement judicial functions. The Supreme Court, as an independent institution, F-PG argued, should hold five functions, which are (1) an ideological function, to guard the Constitution, (2) a political function, to provide legal considerations to other state institutions, (3) a judicial function, to perform judicial review, (4) a sociological function, as the apex of the legal process, so that the process will end in the Supreme Court, as opposed to somewhere else, and (5) an administrative function to manage the administration, finances, and so forth of the Supreme Court.[269]

Likewise, F-Reformasi contended that the Constitutional Court should be within the Supreme Court so that the judicial power is conducted by the Supreme Court and by other courts in its realm. These would include the Constitutional Court, the ordinary court, the religious court, the military court, and the state administrative court.[270]

F-PDIP, considering the special responsibilities of the court, reminded the committee that the Constitutional Court justices require special qualities. He or she does not have to be a lawyer, the speaker stated, but he or she must be a wise person, one with integrity. From *pewayangan*[271] (shadow puppet) shows, the speaker reminded the committee, one should learn that it is

267 As conveyed by Harjono (F-PDIP). Ibid., pp. 317, 318.
268 As underlined by Asnawi Latief (F-PDU). Ibid., p. 319.
269 As emphasized by Agun Gunandjar Sudarsa (F-PG). Ibid., p. 321.
270 As stated by Patrialis Akbar (F-Reformasi). Ibid., p. 325.
271 Traditional Javanese, Sundanese and Bali puppet drama, which usually performs Hindu epics.

very difficult to find a noble character like *Abiyasa*, a person without any mundane self-interest, while there are many deceitful *Sengkuni* and *Durna*.[272] Regarding recruiting justices, the member proposed that the DPR, the Supreme Court and the President respectively appoint three justices to be endorsed either by the MPR or by the President. Further, the member underlined that the Constitutional Court should hold the authority to perform judicial review on the law and the subordinate legislation.[273]

Then, the PAH I chairman asserted that the topic about forming a Constitutional Court was something monumental in regard of building Indonesia's legal system. It had been confirmed that Indonesia's political system is a system of the supremacy of law, a system based on the constitution's authority. It is the constitution that distributes the authority, so that the constitution takes on a central position, and thus the constitutionality of everything else becomes central as well. Previously, he continued, the MPR tasked the MPR Working Body with conducting the judicial review, assuming that the MPR holds the authority to carry out judicial review. However, PAH I should consider that, although a law is a product of a political process, judicial review of a law should not be conducted in a political process. Overseas comparative studies showed that many countries have that judicial review function, although unique and in different appearances. In regard of the scope of the judicial review, the PAH I chairman argued that the purview of the judicial review should also cover the legislation below the law. Further, he contended, as a developing country, development of the legal system is urgent and large in scale; the regional autonomy system which Indonesia is adopting will bring forward issues that are related to the integrity the Unitary State of the Republic of Indonesia, such as that regional legislation should not deviate from higher legislation, and so forth. Therefore, the magnitude of the problems and the tasks is enormous, not to mention the responsibility to establish a rule of the game, such as conducting impeachment of a president, resolving the dispute of competences between state institutions, deciding on disputes regarding election results, and dissolving political parties. Regarding impeachment, the PAH I chairman reminded the committee that, even though it is the Constitutional Court that decides about the indictment of the DPR, it is the MPR which, based on the decision of the Constitutional Court, should determine whether to dismiss the charged president or not. Thus, one should be aware, the chairman emphasized, that the auxiliaries, the supplemental constructions, should not deviate from the main structure of the system. Further,

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272 *Abiyasa*, a figure in *Mahabharata* Hindu's epic, is by nature and disposition clever, very intelligent, wise, pious, devout, authoritative, and prophetic. He has various other extraordinary qualities, among others being an ascetic expert, astrologer, healer, possessing supernatural power, and being long-lived. *Sengkuni* and *Durna* are the characters in *Mahabharata* epic which symbolize the sneaky, cunning, foul-minded and trouble-making figures.

273 As described by Soewarno (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 330.

the chairman stated that the composition of the judges of the Constitutional Court should reflect an equilibrium, the balanced of *jagad cilik* – the micro cosmos – of the state system, which is the atmosphere of the environment of the state powers. Regarding the qualifications of the Constitutional Court justices, he accentuated the statesmanship of the judges.[274]

Whether the Constitutional Court should be separated from or should sit inside the Supreme Court, F-PPP asserted, depends on the need of the state. However, by staying outside the Supreme Court, it can be expected that the Constitutional Court is not contaminated by other authorities of the Supreme Court.[275] Likewise, F-KB affirmed that the Constitutional Court should be independent, particularly because the court holds both legal and political authorities.[276]

Then, in the following small team meeting on 26 September 2001 to formulate the conclusions, F-PDIP and F-PG underlined that formulating the provision on the judicial power should cover the Supreme Court and the Constitutional Court.[277] F-PDIP proposed that the formulation should state that the judicial power shall be implemented by a Supreme Court, the judicial bodies underneath it, and a Constitutional Court.[278] This was supported by F-PDU, F-UG, F-Reformasi, F-KB, F-TNI/Polri, F-PG,[279] F-PPP,[280] and F-PDKB.[281]

In the subsequent discussions about the Constitutional Court's authorities, F-PG proposed applying a clearly defined approach to avoid the Supreme and Constitutional Courts' authorities overlapping. The proposal asserted the principle that the Constitutional Court uphold the Constitution and the Supreme Court uphold the law and lower legislation.[282] In this regard, F-PPP questioned the status of the existing MPR Decree, which was now classified as a rule higher than the law.[283] On the other hand, F-PBB reaffirmed that the Constitutional Court's judicial review authority should be limited only to laws and that the Supreme Court conduct judicial review

274 As stated by the PAH I chairman. The state system is likened to *jagad cilik* (microcosmos) as a subsystem of the *jagad raya* or the universe (macro-cosmos) which is a balanced system. Ibid., pp. 332-335. See also MPR Decree No. III/2000, which declares that the MPR holds the authority to conduct constitutional review.

275 As stated by Zain Bajeber (F-PPP). Ibid., p. 338.

276 As stated by Yusuf Muhammad (F-KB). Ibid., p. 341.

277 As emphasized by Katin Subiyantoro and Pataniari Siahaan, both from F-PDIP and Agun Gunandjar Sudarsa (F-PG). Ibid., pp. 357, 369, 371. Small team, chaired by the Secretary of PAH I, if needed, formed to prepare the draft of the conclusion(s) of the meeting of PAH I. See VI.2.1.

278 As stated by Harjono (F-PDIP). Ibid., p. 385.

279 As confirmed by Asnawi Latief (F-PDU), Soedijarto (F-UG), A.M. Luthfi (F-Reformasi), Erman Suparno (F-KB), Affandi (F-TNI/Polri), Amidhan (F-PG). Ibid., pp. 386, 389, 390, 392, 394, 395.

280 As stated by Ali Hardi Kiaidemak (F-PPP). Ibid., p. 391.

281 As stated by Gregorius Seto Harianto (F-PDKB). Ibid., p. 404.

282 As proposed by Andi Mattalatta (F-PG). Ibid., p. 406.

283 As asked by Ali Hardi Kiademak (F-PPP). Ibid., p. 408.

of all other legislation. Otherwise, an alleged violation of legislation being processed in the Supreme Court could be postponed on the grounds that the legislation is being tested by the Constitutional Court.[284] F-PDIP held a different view and affirmed that the Constitutional Court should hold the authority to judicially review law and all subordinate legislation. They reminded the committee that the Supreme Court can halt a trial through injunction on the grounds that the charged legislation belongs to the Constitutional Court's jurisdiction. Further, under the *coute que coute* principles, the Constitutional Court should try alleged constitutional violations. However, under the Bill of Rights,[285] human rights violations should be prosecuted in an Ad-Hoc court for human rights, even though they also violate the Constitution. Therefore, the Constitutional Court's authority applies if the violation is in the form of a law or regulation that the Constitutional Court can nullify. If the violation is an action, then it becomes a crime.[286] F-PBB flagged the implications of the Constitutional Court judicially reviewing all levels of legislation. A case would not end at the Supreme Court or in the courts within its realm but rely entirely on the Constitutional Court.[287]

### *VII.3.5.2 Preliminary Agreement*

Hitherto, PAH I failed to achieve a conclusion about the Constitutional Court. For that reason, in a meeting on 1 October 2001, PAH I decided to hold further consultations. Then, in a consultation meeting between the leadership of PAH I and the leaders of the factions in PAH I, PAH I managed to reach a preliminary agreement on the Constitutional Court's core substances, including proposed alternatives.[288] The following was reported to the MPR Working Body plenary meeting on 2 October 2001:

1) The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of general courts, religious affairs courts, military courts, and administrative courts, and by a Constitutional Court.
2) The Constitutional Court shall possess the authority to try a case as final and binding and shall have the final power of decision in reviewing laws (and the legislations below the law) against the Constitution, determining disputes over the authorities/competences of the (state) institutions, deciding over the dissolution of a political party (which is based on legitimate indictment), and deciding over disputes on the results of a general election.

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284 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 410.
285 Law No. 39/1999 on Human Rights.
286 As asked by Harjono (F-PDIP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 411, 412.
287 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 432.
288 Ibid., p. 465.

3) The Constitutional Court is obliged to give a legal opinion upon request from the DPR (and/or the Regional Representative Council) regarding the alleged violations of law by the President and/or the Vice President as stipulated in the Constitution.[289]

Then, in the subsequent PAH I meeting on 10 October 2001, F-PBB, F-PPP and F-UG added that the membership of the Constitutional Court should be clearly regulated in the Constitution, because the law governing the Constitutional Court could review its own membership rules.[290] A F-UG speaker then argued that the Constitutional Court should have nine judges: three justices from the executive, three from the DPR, and three from the Regional Representative Council.[291] Further, F-UG and F-PG proposed that the Constitutional Court's chair should be filled by the Supreme Court chairman, but without voting rights.[292] F-PG suggested the Supreme Court propose Constitutional Court justices to the MPR, which would appoint them.[293]

According to F-PDIP, the President, the DPR, and the Supreme Court should each publicly recruit three Constitutional Court justices. The President would decide and inaugurate the nine judges. The judges would then elect the Court's chairman and the vice chairman from among themselves. Furthermore, the Constitutional Court should be separate from the Supreme Court.[294]

On the other hand, F-TNI/Polri argued that Constitutional Court justices should be selected in the same way as selecting Supreme Court justices, i.e., the Judicial Commission recruits, the DPR selects, and the President confirms.[295] A F-PDIP member explained that the recruitment's intentions must be balanced and objective decision-making.[296] Another member added that judicial review's purview covers not only the law, but all legislations below the law.[297] A F-KB member affirmed that the courts' leadership should be separated.[298]

F-PDU agreed that the Constitutional Court is separate from the Supreme Court, although part of the same community. Therefore, it was surprising that F-PG still ranked the Supreme Court as more powerful than the Constitutional Court.

289 Ibid., p. 484.
290 As stated by Hamdan Zoelva (F-PBB), Zain Bajeber (F-PPP) and Soedijarto (F-UG). Ibid., pp. 503, 504, 505.
291 As stated by Soedijarto (F-UG). Ibid., p. 505.
292 As proposed by Soedijarto (F-UG) and Agun Gunandjar Sudarsa (F-PG). Ibid.
293 As proposed by Agun Gunandjar Sudarsa (F-PG). Ibid., p. 509.
294 As proposed by Harjono (F-PDIP). Ibid., p. 510.
295 As stated by Affandi (F-TNI/Polri). Ibid., p. 516.
296 As stated by Pataniari Siahaan (F-PDIP). Ibid., p. 520.
297 As argued by Soewarno (F-PDIP). Ibid., p. 524.
298 As asserted by Yusuf Muhammad (F-KB). Ibid., p. 538.

### *VII.3.5.3 Establishing a Constitutional Court*

Subsequently, PAH I systematized the opinions regarding the Constitutional Court and reported the outcome to the MPR Working Body meeting on 23 October 2001. PAH I reported that:

(1) The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of general courts, religious courts, military courts, and administrative courts, and by a Constitutional Court.
(2) The Constitutional Court shall possess the authority to try a case as final and binding and shall have the final power of decision in reviewing laws (and the legislations below the law) against the Constitution, determining disputes over the authorities/competences of the (state) institutions, deciding over the dissolution of a political party (which is based on legitimate indictment), and deciding over disputes on the results of a general election.
(3) The Constitutional Court is obliged to give its legal opinion upon a request from the DPR (and/or the Regional Representative Council) regarding the alleged violations of law by the President and/or the Vice President as stipulated in the Constitution.
(4) *Alternative (1):*
The Constitutional Court has nine justices, comprising of three justices nominated by the President, three by the Supreme Court and three by the DPR.
*Alternative (2):*
The Constitutional Court justices are appointed and dismissed by the MPR based on the proposal of the Supreme Court, whereby its composition and number of justices should be further regulated by law.
(5) *Alternative (1):*
To become a Constitutional Court justice, one should be a person with statesmanship who has a command of the Constitution and state affairs, is a person with integrity and a personality beyond reproach and does not concurrently function as a state official.
*Alternative (2):*
A Constitutional Court justice is a person with statesmanship who has a command of the Constitution and constitutional law, be a person with integrity and a personality beyond reproach and should not concurrently function as a state official.
(6) *Alternative (1):*
The appointment and the dismissal of and other requirements for the justices of the Constitutional Court shall be further regulated by law.
*Alternative (2):*
(This clause is not necessary).[299]

299 Ibid., pp. 558-560.

Additionally, PAH I reported that:

(1) Any proposal for the removal of the President and/or the Vice President may be submitted by the DPR to the MPR only by first submitting a request to the Constitutional Court to investigate, bring to trial, and issue a decision on the petition of the DPR either that the President and/or the Vice President has violated the law through an act of treason, corruption, bribery, or other serious criminal offence, or through moral turpitude, and/or that the President and/or the Vice President no longer meets the qualifications to serve as President and/or Vice President.
(2) The Constitutional Court has the obligation to investigate, bring to trial, and reach the most just decision on the petition of the DPR at the latest 90 (ninety) days after the request of the DPR has been received by the Constitutional Court.
(3) If the Constitutional Court decides that the President and/or the Vice President is proved to have violated the law through an act of treason, corruption, bribery, or other serious criminal offence, or through moral turpitude, and/or that the President and/or the Vice President no longer meets the qualifications to serve as President and/or Vice President, the DPR shall hold a plenary session to submit the proposal to remove the President and/or the Vice President to the MPR.[300]

The MPR Working Body approved the suggested alternatives and reported them to the MPR plenary meeting on 4 November 2001. In the plenary meeting, factions agreed to establish the Constitutional Court.

F-PDKB and F-PBB urged that the Constitutional Court provisions could be accomplished during the MPR 2001 annual session.[301] Other factions were also keen that the provisions be concluded during the session.[302]

Subsequently, the MPR Working Body's works were discussed by Commission A, which was formed to finalize the draft amendment. Eventually, in a Commission A plenary meeting on 6 November 2001, all factions affirmed their agreement to establish a Constitutional Court.[303] F-PDIP reiterated that forming a Constitutional Court supports establishing a state governance system based on the Constitution. This objective could only be achieved with a substantive Constitution and an institution to check the

300 Ibid., pp. 549-550.
301 As conveyed by K. Tunggul Sirait (F-PDKB) and Muchtar Naim (F-PBB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 27, 33.
302 As stated by Paiman (F-TNI/Polri), TB. Soenmandjaja (F-Reformasi), Syarif M. Alaydrus (F-KB), Nurdahri Ibrahim Naim (F-PPP), Sulasmi Bobon Tabroni (F-UG), Baiq Isvie Rufaeda (F-PG) and Pataniari Siahaan (F-PDIP). See Ibid., pp. 34, 42, 47, 52, 55, 58, 62.
303 Ibid., p. 337. All factions, except F-PDKB were present at the MPR Working Body meeting on 6 November 2001.

constitutionality of governance practices and the provision of adequate process.[304]

However, factions differed about the Constitutional Court's position in relation to other state institutions. Almost all factions thought the Constitutional Court should be separate from the Supreme Court, but within the realm of judicial power. However, a F-PDIP member argued that as a quasi-judicial institution, the Constitutional Court should function as a separate body and not fall within the Supreme Court's remit, being publicly accountable to the MPR.[305] Another F-PDIP member stated that the Constitutional Court should be part of the MPR, not the judiciary, because there is a basic difference between the *Mahkamah Agung* (Supreme Court) and *Mahkamah Konstitusi* (Constitutional Court). The Supreme Court is *rechtspraak* (an adjudication body), while the Constitutional Court is *quasi-rechtspraak* (a quasi-adjudication body).[306]

Subsequently, all factions agreed that the Constitutional Court could judicially review the law, but some contended that this authority should cover all legislations, from statutes to all lower legislation. They argued that the Constitutional Court should actively exercise its authority.[307] Other members argued that reviewing the lower legislation belonged to the Supreme Court's jurisdiction.[308] F-Reformasi still even argued that the Constitutional Court should focus on state governance matters and should not have the authority to review the constitutionality of laws and other legislation.[309] To reach a conclusion, a consultation meeting followed.[310] However, that also failed to resolve the outstanding issues.[311]

### *VII.3.5.4 Agreement*

In the subsequent Commission A meeting on 7 November 2001, a F-PDIP member insisted that with its extraordinary power, the Constitutional Court should be placed under the MPR, but he found no support.[312] Hereafter, no more was said about the Constitutional Court. A drafting team was formed to summarise the results.[313]

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304 As stated by Harjono (F-PDIP). Ibid., p. 317.
305 As stated by Amin Aryoso (F-PDIP). Ibid., p. 303.
306 As argued by Dimyati Hartono (F-PDIP). Ibid., p. 307.
307 As argued by Nursyahbani Katjasungkana (F-UG) and I Ketut Astawa (F-TNI/Polri). Ibid., pp. 305, 338.
308 As stated by Ali Hardi Kiaidemak (F-PPP) and Nadjih Ahjad (F-PBB). Ibid., pp. 324, 332.
309 As asserted by Patrialis Akbar (F-Reformasi). Ibid., p. 329.
310 Ibid., p. 548.
311 As reported by Slamet Effendy Yusuf, the Vice Chairman of Commission A. Ibid., p. 550.
312 As argued by Dimyati Hartono (F-PDIP). Ibid., p. 571.
313 Ibid., p. 608.

Finally, Commission A reached an agreement and reported the outcomes to the MPR plenary meeting on 8 November 2001, which were as follows:

(1) The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of general courts, religious courts, military courts, and administrative courts, and by a Constitutional Court.
(2) The Constitutional Court shall possess the authority to try a case as final and binding and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities/competences of state institutions which authority is given by the Constitution, deciding over the dissolution of a political party, and deciding over disputes on the results of a general election.
(3) The Constitutional Court is obliged to give legal opinion upon request from the DPR regarding the alleged violations of law by the President and/or Vice President as stipulated in the Constitution.
(4) The Constitutional Court has nine justices who are endorsed by the President, which comprise of three justices nominated by the President, three by the Supreme Court and three by the DPR.
(5) The Constitutional Court's chairman and the vice chairman are elected from and by the Constitutional Court justices.
(6) To become a Constitutional Court justice, one should be a person with statesmanship who has a command of the Constitution and state affairs, be a person with integrity and personality beyond reproach, and not concurrently function as a state official.
(7) The appointment and the dismissal of and other requirements for the Constitutional Court's justices shall be further regulated by law.

Finally, all factions approved the draft. F-PBB stated that the Constitutional Court's formation may well solve disputes over the Constitution's interpretation that had inspired exhausting debates.[314] In the plenary meeting on 8 November 2001, the MPR decided to incorporate the Constitutional Court provisions into the Constitution.[315]

### VII.3.6 The Judicial Commission

This section details the debates regarding the Judicial Commission, concluding with the ratified amendment that the Judicial Commission is responsible for proposing and dismissing Supreme Court justices.

During the previous session, PAH I had agreed that the Constitution should form a Judicial Commission. According to the MPR draft, the MPR would appoint and dismiss Supreme Court justices, while reviewing the

314 As underlined by Hamdan Zoelva (F-PBB). Ibid., p. 654.
315 Ibid., p. 682.

Judicial Commission's considerations.[316] The draft stated that the Judicial Commission is independent, but provides few other details, except that "its composition, status, and membership shall be further regulated by law." Commenting on the draft, in a PAH I meeting on 24 April 2001, the Team of Experts recommended that the President should propose the Supreme Court members, vice chairman, and chairman to the DPR for approval. Such a procedure establishes checks and balances, with the Supreme Court resolving conflicts between the DPR and the President and between the people and the state. That is the basis for delegating the judicial review authority to the Supreme Court.[317]

The Team of Experts endorsed PAH I's idea to form a Judicial Commission. One expert stated that it was important for future law reform and warranted serious attention from the mass media. To complete the PAH I draft, the expert agreed that the Judicial Commission would propose, the DPR would elect, and the President would appoint and dismiss the Supreme Court justices. The Team of Experts also described the Judicial Commission as an independent commission, comprising nine members with sufficient legal experience, integrity, and a flawless personality. In the PAH I meeting on 10 May 2001, the expert proposed that the Judicial Commission should accommodate and gather information about the judges and prospective candidates and propose their appointment or dismissal to the President.[318]

The PAH I members agreed that the Constitution should detail the Judicial Commission's formation procedure and membership requirements.[319] A member proposed that the Judicial Commission supervise the Supreme Court and the Constitutional Court.[320] Another member noted that the Judicial Commission should be independent from the DPR and the President.[321]

The Team of Experts argued that the Supreme Court should recruit other judges. One expert admitted that although the idea of a Judicial Commission was captivating, the Team of Experts had not fully discussed its membership recruitment and tended to assign the process to the DPR.[322]

In the 25 September 2001 meeting, a F-PDIP member argued that the MPR should appoint and dismiss Supreme Court justices based on a Judicial Commission proposal.[323] On 26 September 2001, a member argued that the Judicial Commission should also recruit the ordinary court justices.[324]

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316 See the draft of Article 24B in the enclosure of MPR Decree no. IX/2000. See also Attachment VI.4.

317 As argued by Affan Gaffar. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 395.

318 As proposed by Jimly Asshidiqie. Ibid., p. 465.

319 As endorsed by Lukman Hakim Saifuddin (F-PPP) and the author. Ibid., pp. 479, 482.

320 As proposed by Agun Gunandjar Sudarsa (F-PG). Ibid., p. 500.

321 As reminded by Harjono (F-PDIP). Ibid., p. 518.

322 As argued by Maria S.W. Sumarjono. Ibid., p. 543.

323 As stated by Soewarno (F-PDIP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 266, 267.

324 As argued by Harjono (F-PDIP). Ibid., p. 318.

F-PDU expressed its support for establishing an independent Judicial Commission with all the functions and responsibilities.[325]

However, F-Reformasi disagreed with the Judicial Commission recruiting the Supreme Court and Constitutional Court judges, which would complicate the recruitment process. Such recruitment would be problematic while the Judicial Commission's formation itself was still in question. Instead, the DPR should recruit Supreme Court justices.[326]

The PAH I chairman, considering the judiciary's decisive role in realizing the law's supremacy, emphasized that a judge should not only hold professional capabilities, but also be accountable to their integrity. A judge is a state official, including the judge of a *Pengadilan Negeri* (district court), issuing judgments on behalf of their conscience. Therefore, recruitment crucially ensures judicial reliability. Thus, the Judicial Commission should recruit all judges and conduct fit-and-proper tests for positions at all levels. It should be a permanent body populated by legal seniors, such as retired judges, lawyers, prominent legal scholars, and prominent regional figures. Further, the political process should not interfere in judicial recruitment or in any aspect of law enforcement.[327]

Members argued that the DPR should recruit Supreme Court justices on the Judicial Commission's recommendations, who the President would then inaugurate.[328]

Another member argued that the DPR should appoint and dismiss Supreme Court justices, while the MPR would appoint and dismiss the chairman and the vice-chairman. Instead of the Judicial Commission, an honorary council of justices should uphold discipline and the justices' code of ethics.[329]

Another member added that an independent commission needed to scrutinize the Supreme Court and ordinary court justices' behaviour. Internal bodies, such as an honorary council of judges or a Supreme Court, would be insufficient.[330]

PAH I did not discuss a Judicial Commission until the subsequent MPR Working Body meeting on 2 October 2001, in which PAH I reported its works.[331]

The Judicial Commission was next discussed during a PAH I meeting on 10 October 2001. A member reiterated that the Judicial Commission should be incorporated in the Constitution, being crucial to ensuring judicial competency and professionalism. However, the MPR should appoint

325 As endorsed by Asnawi Latief (F-PDU). Ibid., p. 320.
326 As argued by Patrialis Akbar (F-Reformasi). Ibid., p. 326.
327 As emphasized by the PAH I chairman. Ibid., pp. 334, 335.
328 As stated by I Ketut Astawa (F-TNI/Polri), Sutjipto (F-UG) and Palguna.See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 305, 306, 310.
329 As argued by Agun Gunandjar Sudarsa (F-PG). Ibid., pp. 298, 299.
330 As responded by Hamdan Zoelva (F-PBB). Ibid., p. 344.
331 Ibid., pp. 470-485.

Constitutional Court justices proposed by the Supreme Court, rather than the Commission.[332]

A member argued that the DPR should determine Supreme Court justices.[333] Another member proposed that the President appoint and dismiss Supreme Court justices with the DPR's approval, based on a Judicial Commission proposal.[334]

Another member even supported the Judicial Commission recruiting judges and the President simply endorsing them.[335]

F-PDIP proposed that the Judicial Commission should comprise of 11 members: 2 active lawyers, 2 active prosecutors, 2 professors of law, 3 DPR members, and 2 elected regional representatives.[336]

### *VII.3.6.1 President Appoints Supreme Court Justices*

Eventually, PAH I conducted an informal meeting to formulate the conclusion about the Judicial Commission. Subsequently, it reported to the MPR Working Body meeting on 23 October 2001 that: [337]

(1) The Supreme Court justices are appointed and dismissed by the President based on a proposal by the Judicial Commission and by considering the DPR's considerations.
(2) The Judicial Commission is independent and holds the authority to propose the appointment or the dismissal of the Supreme Court justices and other justices (paying regard to the input from society).
(3) *Alternative 1:*
Judicial Commission members are selected from former Supreme Court justices, legal practitioners, public figures, religious figures, and academics.
*Alternative 2:*
Judicial Commission members are selected from lawyers, prosecutors, professors of law, and members of the DPR.
*Alternative 3:*
Judicial Commission members should have experience in a legal profession, should be a person with integrity and a flawless personality.
(4) The Judicial Commission's composition and membership shall be further regulated by law.
(5) [Upholding the honour and maintaining the judge's dignity and behaviour is the Judicial Commission's responsibility.][338]

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332 As reiterated by Agun Gunandjar Sudarsa (F-PG). Ibid., pp. 508, 527.
333 As argued by Fuad Bawazier (F-Reformasi). Ibid., p. 515.
334 As proposed by Affandi (F-TNI/Polri). Ibid., p. 516.
335 As asserted by Harjono (F-PDIP). Ibid., p. 510.
336 As conveyed by Pataniari Siahaan (F-PDIP). Ibid., p. 521.
337 Ibid., pp. 558-559.
338 Brackets mean that factions agreed with the idea but had not fully agreed on the formulation.

The Working Body approved the report.[339] In the subsequent MPR plenary meeting on 4 November 2001, all factions underlined that the Judicial Commission was necessary.[340] In a Commission A meeting on 6 November 2001, F-PDIP, F-PPP, F-PBB, F-TNI/Polri and F-UG endorsed this draft.[341] Certain members asserted that the DPR should approve (rather than merely consider) Supreme Court judicial candidates that the Judicial Commission proposes to the President.[342] Another member stated that consideration would be sufficient.[343] Conversely, certain members contended that since the Constitution requires the Judicial Commission, the DPR's involvement is unnecessary.[344] Another member argued that the Judicial Commission should also propose Constitutional Court justice candidates.[345] One member proposed delaying the topic since opinions still differed.[346]

*VII.3.6.2 Third Amendment Ratified: Judicial Commission*

The discussion resumed during the Commission A meeting on 8 November 2001. It was intended to help prepare the report for the subsequent MPR plenary meeting. The Commission A chairman noted that the MPR Working Body had discussed the Judicial Commission recruiting judges and being the honorary council of judges.[347] Factions did not discuss the topic further. In the subsequent informal meeting, Commission A drafted the final report about the Judicial Commission and submitted it to the MPR plenary meeting.[348]

In the report to the MPR plenary meeting on the same day, Commission A stated that:

(1) Candidates for the position of Supreme Court justice shall be proposed by the Judicial Commission to the DPR for approval and shall subsequently be formally appointed to office by the President.
(2) The Judicial Commission is independent and holds authority to propose the appointment or the dismissal of the Supreme Court justices and other authorities to maintain and to uphold the justices' honour, dignity, and good conduct.

339 See Ibid, p. 572.
340 As stated by, among others, K. Tunggul Sirait (F-PDKB) and Pataniari Siahaan (F-PDIP). Majelis Per-musyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 27, 62.
341 As stated by I Dewa Gede Palguna (F-PDIP), Ali Hardi Kiaidemak (F-PPP), Nadjih Ahjad (F-PBB), I Ketut Astawa (F-TNI/Polri) and Sutjipto (F-UG). Ibid., pp. 303, 325, 332, 338.
342 As argued by I Dewa Palguna (F-PDIP), Nadjih Ahjad (F-PBB) and I Ketut Astawa (F-TNI/Polri). See Ibid., pp. 303, 332, 338.
343 As argued by Sutjipto (F-UG). Ibid., p. 341.
344 As argued by Markus Daniel Wakkary (F-UG) and Agun Gunandjar Sudarsa (F-PG). Ibid., pp. 308, 322.
345 As proposed by L.T. Sutanto (F-TNI/Polri). Ibid., p. 317.
346 As proposed by Mashadi (F-Reformasi). Ibid., p. 314.
347 Ibid., p. 564.
348 Ibid., p. 608.

(3) Judicial Commission members should have knowledge of and experience in the legal profession and be persons with integrity and a flawless personality.
(4) Judicial Commission members are appointed and dismissed by the President with the DPR's approval.
(5) The Judicial Commission's composition and membership shall be further regulated by law.[349]

Finally, in the MPR plenary meeting on 9 November 2001, the MPR approved the draft as the third amendment of the 1945 Constitution.[350]

### VII.3.7 Presidential election

This section sets out the debate leading to the presidential election provision's ratification on 9 November 2001, postponing discussions of second-round presidential elections to the MPR 2002 annual session. The debate concerned who would nominate candidates (individuals, political parties, or the MPR), who could vote for candidates (the people or the MPR), and when voting would occur (alongside or after DPR elections). The ratified provisions stated that the President and Vice President would be jointly elected by the people, nominated by political parties that had participated in the previous election, winning by a simple majority of 50% plus 1 of total votes, garnering at least 20% of the votes in more than 50% of Indonesia's provinces.

From the amendment process' beginning in October 1999, factions had expressed their desire for direct presidential elections. Although members differed on the election procedures, all factions agreed that people should have a decisive role in the presidential election.

#### *VII.3.7.1 Previous Discussions*

Until this point, several issues regarding the presidential election had been discussed (See VI.2.3.6). F-Reformasi had proposed that the people should elect the president from two pairs of candidates, selected by the existing MPR before the election. F-KB, F-PG and F-PPP affirmed that the president should be elected directly by the people. F-PDIP and F-PBB argued that the people should directly elect the candidates in the first round. If no candidate won, the MPR would elect the president and the vice president from the first round's top two choices. Following this approach, the second round would reduce the financial burden and avoid prolonged political tension in society.

349 Ibid., p. 626.
350 Ibid., p. 682.

### *VII.3.7.2 Team of Experts and PAH I Debate*

In a discussion with the Team of Experts on 20 March 2001, the Law Sub-Team disagreed with the Politics Sub-Group. A Politics Sub-Group expert stated that the Team of Experts prefers a direct presidential election, an option mentioned in MPR Decree IX/2000.[351] However, a Law Sub-Group expert reminded the committee that this form will not be easy, especially if no candidate wins more than half of the votes.[352] In response, a PAH I member stated that the legal and the political systems seemed to depend on how the president is elected. If the president is elected directly by the people, it would automatically change the functions of the MPR and other representative institutions.[353]

Subsequently, in a PAH I meeting on 29 March 2001, a Politics Sub-Group expert stated that the Team of Experts recommended the alternative in the attachments of MPR Decree No. IX/2000, which states that the president and the vice president should be elected on one ticket directly by the people.[354] Further, the winner is the candidate who obtains an absolute majority of votes and wins in at least 2/3 of all provinces with at least 20% of the votes in those respective provinces. If no candidate satisfies this requirement, the top two choices run again and the pair who gains the majority or popular vote wins. If the president is elected directly by the people, the MPR does not need to assess the president's accountability. Furthermore, if the MPR could not agree with the popular vote, it could consider an alternative, stating that the president and vice president shall be elected by a *Dewan Pemilih* (electoral college).

A PAH I member noted the consequences of two presidential election rounds, as this would be time consuming and can cause prolonged political instability.[355] Another member noted the discrepancy between the June 1999 general election outcome and the October 1999 MPR-led presidential election outcome.[356] However, the Team of Experts argued that since this would

351 As argued by Maswadi Rauf.See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 306. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *Putusan MPR-RI, Sidang Tahunan MPR-RI, 7 – 18 Augustus 2000*, Sekretariat Jenderal, 2000, p. 116.

352 As argued by Sri Soemantri Martosuwignyo. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 307.

353 As stated by Andi Mattalatta (F-PG). Ibid., p. 336.

354 As argued by Nazaruddin Syamsuddin. Ibid., pp. 345, 346.

355 As reminded by Andi Mattalatta (F-PG). Ibid., p. 361.

356 As reminded by Pataniari Siahaan (F-PDIP). Ibid., p. 365. Megawati Soekarnoputri, the Chairwoman of PDI-P, the first winner of the 1999 elections (33.74% of the vote) was defeated in the presidential election in the MPR by Abdurrahman Wahid from PKB, the fourth winner (12.61% vote), who was supported by a coalition of political parties known as *poros tengah* (the central axis).

be a procedural democracy, as legitimate as a normative democracy, such a mechanism was not a problem.[357]

One member pointed out a PAH I deliberation principle that the presidential election system should not significantly diverge from society's political configuration.[358] Another PAH I member, considering that Indonesian society is parochial and primordial, urged the Team of Experts to consider whether a direct presidential election is concurrent with the political culture. Direct presidential elections could result in totalitarian leadership.[359] Quoting Raden Mas S. Soeriokoesoemo's article in Herbert Feith's "Indonesian Political Thinking", this is why there should be a council of wise persons who elect the wisest person as president. According to Soeriokoesoemo, the people do not know who is the most qualified to become a president.[360] Although the American, French, and German systems already existed, the Indonesian Founding Fathers placed a council system in the Constitution.[361]

Furthermore, an expert suggested that the presidential election should be preceded by DPR, provincial DPRs, and district DPR member elections. The presidential candidates could be limited to two pairs, nominated by the political parties (or a coalition) who have won the most DPR and Regional Representative Council seats. The outcomes will then be congruent with the people's aspirations, minimizing the chances of needing a second election round.[362] That the people are unable to elect a wise president is inconsistent with their right to elect DPR and Regional Representative Council members.[363] The expert further reiterated that a constitution does not merely reflect the ongoing situation but also serve as a social and political instrument to spread certain norms and values. Implementing a direct presidential election is a matter of timing and should begin in 2009.[364] Another expert added that maintaining the presidential system should involve a direct election to maintain consistency.[365]

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357 As stated by Afan Gaffar. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 396.

358 As stated by Jakob Tobing (F-PDIP). Ibid., p. 480.

359 As stated by Soedijarto (F-UG). Ibid., p. 506.

360 Herbert Feith and Lance Castels (eds.), *Indonesian Political Thinking 1945-1965*, Cornell University Press, 1970, p. 187.

361 As elaborated by Soedijarto (F-UG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 685. Later, Soedijarto referred to several Latin American countries which adopted direct president elections which saw the rise of tyrants such as Peron and Pinochet. Citing Giovanni Sartori, Soedijarto further stated that in a society in which the majority is poor and destitute, democracy will bring forward oligarchy which eventually gives birth to tyranny. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 180.

362 As elucidated by Ramlan Surbakti. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 541.

363 Ibid., p. 688.

364 Ibid., p. 542. The first direct presidential election was conducted in 2004.

365 As stated by Suwoto Moeljo Soedarmo. Ibid., p. 693.

Regarding the presidential election's timing, one member argued that if it took place after the DPR elections, it could distort the political configuration in the eyes of the public.[366] Another member stated that the presidential candidates should be nominated before the legislature's elections, so that it is already clear which presidential candidate one is supporting when choosing a political party.[367] Alternatively, the MPR should elect the President and Vice President from the two candidate pairs with the winning general election vote.[368]

One member insisted that direct presidential elections are incompatible with Indonesia's democratic politics culture.[369] However, he found little support, as others dismissed concerns surrounding socio-cultural hindrances. They held that the president should be elected directly, under the Team of Experts' conditions.[370] An expert asserted that the people should directly elect the president through a presidential (rather than overall) election. If the president's or vice president's position became vacant, the MPR could refill the positions until the end of the respective tenures.[371]

Next, a PAH I member insisted that the direct presidential elections and the MPR's status, should be determined in the 2001 MPR annual session.[372] However, another member added that in a presidential system, the president does not have to be directly elected by the people. Instead, the election system must be compatible with the entire political system.[373] F-UG suggested that, accordingly, the MPR should elect the president from two pairs of candidates nominated by the political parties that placed first and second in the preceding general election.[374] A F-PDIP member offered an alternative proposal. He pointed out that the issue of democracy and democratization in the 1945 Constitution's reform context should not be reduced to the election's form. Previously, PAH I had agreed to uphold the presidential system, but this does not mean that this system is more democratic than an indirect presidential election. What is pertinent is whether a presidential system's requirements are satisfied. Therefore, compatibility between each

366 As stated by Jakob Tobing (F-PDIP). Ibid., p. 481. Given the number of contesting political parties, a coalition of small parties, with a broad range of different political platforms, may defeat the larger political entity.

367 As argued by Pataniari Siahaan (F-PDIP). Ibid., p. 628.

368 As suggested by Katin Subiyantoro (F-PDIP) and Soedijarto (F-UG). Ibid., pp. 725-726, 747.

369 As argued by Soedijarto. Ibid., p. 748.

370 As stated by Happy Bone Zulkarnain (F-PG), Zain Bajeber (F-PPP), Asnawi Latief (F-PDU), Andi Najmi Fuady (F-KB) and Affandi (F-TNI/Polri). See Ibid., pp. 737, 741, 743, 754, 759. The Team of Experts proposed that a pair of candidates wins the presidency if they win an absolute majority and at least 20% of the votes in at least 2/3 of the provinces. See, Ibid., p. 346.

371 As asserted by Maswadi Rauf. Ibid., p. 788.

372 As urged by Asnawi Latief (F-PDU). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 17.

373 As stated by Hobbes Sinaga (F-PDIP). Ibid., p. 178.

374 As stated by Soedijarto (F-UG). Ibid., p. 180.

part of the system is important. Further, the member questioned whether the MPR as a joint session could dismiss a directly elected president.[375]

In the same context, another member proposed that the political parties should nominate the pairs of president and vice president before the election. This would encourage the political parties' systems merging and simplifying in a reasonable and natural way.[376] As an alternative, a F-KB member suggested that the people should first choose their candidates, and that the MPR should finalize the remainder of the process. Regarding the people's capacity to elect their president, since they were born in different eras, one should 'teach your children according to their era' (*fainnahum khuliquu fii zamaanen ghaira zamaanikum*). Give the people their sovereignty now and let them elect the president. Then, if a candidate obtains more than 50% of the nationwide vote in the first round, distributed as required in the regions, the president should then be directly determined as the winner.[377] F-Reformasi proposed yet another alternative. The MPR should first choose two pairs of candidates and then let the people choose between these two pairs. In that way, it is the people who decide. Besides, this procedure is faster and more efficient since the election can be conducted alongside the DPR member elections. For that purpose, the existing MPR could choose the two pairs of presidential candidates to be elected by the people.[378]

The PAH I chairman concluded that all factions agreed that the president should be elected directly by the people. The difference lay in whether to give a role to the MPR.[379] F-TNI/Polri reaffirmed their stance that the presidential election should be conducted directly by the people from the two pairs of MPR-selected candidates.[380] One F-PG member reminded the committee that a direct presidential election without the MPR's involvement would bear a huge financial cost. Also, implementing the popular vote – one-person-one-vote – would cause discrepancy between Java and out-of-Java (*Jawa dan luar Jawa*). Therefore, these problems could be overcome if the people elect the president from the two pairs of MPR-selected candidates. However, unlike what F-Reformasi proposes, the MPR should be the newly elected MPR.[381]

At this point, F-KB expressed doubt about the MPR's composition, saying that he was not sure it would consist of society's wise men. Therefore, the faction argued in favour of a system without any MPR involvement, where one is elected by the people as directly as possible (*langsung selangsung-langsungnya*).[382] However, a F-PDIP member warned the other

375 As argued by I Dewa Gede Palguna (F-PDIP). Ibid., p. 200.
376 As stated by Soewarno (F-PDIP). Ibid., pp., 204-205.
377 As stated by Yusuf Muhammad (F-KB). Ibid., p. 207. The candidate should win at least certain percentage of votes in, for instance, more than half of the provinces.
378 As argued by Fuad Bawazier (F-Reformasi). Ibid., pp. 209-210.
379 As stated by the PAH I chairman. Ibid., pp. 210-211.
380 As reaffirmed by Affandi (F-TNI/Polri). Ibid., p. 220.
381 As stated by Rully Chairul Azwar (F-PG). Ibid., p. 225.
382 As argued by Ali Masykur Musa (F-KB). Ibid., p. 235.

members against the same drastic political leap as the Khmer Rouge. The change should not happen too quickly, because social change is transformative. The political parties and the representative institutions play significant roles in a democracy, so the national leadership's selection process could be undertaken in a forum such as the MPR. In case of a conflict from, e.g., population imbalances (i.e., most people live on Java), the MPR could function as a conflict management and conflict resolution forum. Thus, it is the MPR that should undertake the presidential election.[383]

*VII.3.7.3 No Agreement – Small Team Formed*

Following the MPR's working schedule, PAH I was allocated time until mid-September 2001 to prepare the draft amendments (See Attachment VII.1). However, until 10 September 2001, PAH I could not agree on how to elect the president and vice president.[384] PAH I formed a small team where the debates continued. Here, factions also discussed whether only one or several political parties, or individuals, should be eligible to nominate the presidential candidates. A F-PDIP member stated that a democratic presidential election should also improve the political system and reform the political parties. Therefore, the president and vice president should be nominated by a political party, but the political party should not only be able to nominate a member, but also a capable and popular non-member.[385] Other members agreed.[386] In this context, F-PDKB argued that an independent candidate should be allowed if he or she receives at least 5% of the total vote.[387]

Factions contended that the DPR, local DPR, Regional Representative Council, and presidential elections should occur simultaneously. In that regard, F-PG proposed that the pairs of candidates for the presidential election should be nominated by the political party or the combination of political parties, before the parliamentary election.[388] Commenting on this idea, a member pointed out that not all political parties are eligible to participate in the election. Hence, only eligible parties should be able to nominate candidates for president and vice president.[389] Eventually, a F-PDIP member proposed a new idea that differed from their previous stance. Political parties should nominate presidential candidates *before* the election, and the

383 As stated by Pataniari Siahaan (F-PDIP). Ibid., p. 253.
384 At the end of PAH I meeting on 11 September 2001, PAH I formed a small team that consisted of one representative from each faction, to sharpen the substances discussed in that meeting. See Ibid., p. 301.
385 As stated by Pataniari Siahaan (F-PDIP). Ibid., pp. 340, 341.
386 As stated by Happy Bone Zulkarnaen (F-PG), Soedijarto (F-UG) and I Dewa Gede Palguna (F-PDIP). Ibid., pp. 341-343.
387 As argued by Gregorius Seto Harianto (F-PDKB). Ibid., p. 344.
388 As stated by Slamet Effendy Yusuf (F-PG). Ibid., pp. 346, 349.
389 As asserted by Pataniari Siahaan (F-PDIP). Ibid., p. 352.

elections for the five different positions should occur simultaneously.[390] The candidates with more than 50% of the national vote with at least 20% in at least 50% of the provinces should be declared and inaugurated by the MPR as the elected president and vice president.[391] Eventually, most factions accepted this idea.[392]

Next, the small team discussed what should happen if no presidential candidate won a first-round majority. Several members proposed that the MPR should conduct the second round.[393] However, others insisted that it should also be a popular vote.[394] Yet, F-Reformasi insisted that the MPR should conduct the first election stage before a direct people's election. If the MPR's candidates failed to satisfy the requirements in the people's direct election, then candidate pairs should compete again before the MPR, who would elect the winner.[395]

At the end of the small team meeting, two options were clear. First, as proposed by F-Reformasi, the MPR chooses the presidential candidates before they compete in a direct election. Second, adopted by all other factions, the political parties participating in the election nominate the candidates.

In the second alternative, all agreed that the first round should be conducted directly by the people and simultaneously alongside the DPR, provincial DPR, district DPR, and Regional Representative Council elections. The candidate with more than 50% of the national vote with at least 20% in at least 50% of the provinces would be declared elected and inaugurated by the MPR. If no candidate met the requirements, a second round would be conducted.

There were two alternatives for the second-round elections. First, the MPR would conduct the second round and declare and inaugurate the winner. Alternatively, the top two election winners should compete again in a direct election by the people. The pair of candidates with the majority vote would be determined and inaugurated by the MPR as the new President and Vice President.[396]

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390 The Central Board of PDI-P decided that the presidential election should be undertaken directly by the people and does not have to involve the MPR.

391 As conveyed by Soewarno (F-PDIP). Ibid., p. 353. Later this principle was reiterated by Hamdan Zoelva (F-PBB) and Affandi (F-TNI/Polri) as an important principle to ensure the national legitimacy of the elected president. See also Ibid., pp. 363, 365, 393.

392 As affirmed by Happy Bone Zulkarnaen (F-PG), Soedijarto (F-UG), Asnawi Latief (F-PDU), Lukman Hakim Saifuddin (F-PPP), Hamdan Zoelva (F-PBB), A.M. Luthfie (F-Reformasi), Yusuf Muhammad (F-KB), Affandi (F-TNI/Polri) and later Gregorius Seto Harianto (F-PDKB). Ibid., pp. 354-365, 371.

393 As argued by Soedijarto (F-UG), Katin Subiyantoro (F-PDIP) and Hamdan Zoelva (F-PBB). Ibid., pp. 356, 362, 385. Pataniari Siahaan (F-PDIP) asserted that the second-round election is not the objective of the process, but merely a back-up option, in case no candidate would win the first round of elections.

394 As insisted by Asnawi Latief (F-PDU), Gregorius Seto Harianto (F-PDKB), Fuad Bawazier (F-Reformasi) and Happy Bone Zulkarnaen (F-PG). Ibid., pp. 372, 375, 387.

395 As stated by A.M. Luthfi (F-Reformasi). Ibid., p. 367. Therefore, this method will consist of three rounds.

396 Ibid., pp. 399-400.

*VII.3.7.4 Progress – No MPR Election Power*

In the PAH I plenary meeting on 12 September 2001, the meeting chairman affirmed that PAH I had abandoned the idea of the MPR electing the president. However, discussions about the MPR's role in the direct presidential election would continue.[397]

In that regard, F-PDIP emphasized that in a democracy, the president's election should meet the principles of accountability, representation, and acceptability. Therefore, there should be a fair and open competition, and any censorship of candidates should be eliminated. Let the candidates emerge freely from the people through the political party mechanism. The MPR's involvement is merely an emergency exit, a safety valve, in case no candidate meets the requirements in the first round. A second direct election is quite costly, both economically and socio-politically.[398]

F-PPP disagreed. It stated that the second-round election by the MPR would reduce the people's aspirations. It is possible that the MPR elects a pair of candidates who did not win the popular vote.[399] However, F-PBB and F-UG reiterated that seeing the vastness of Indonesia's territory and the cost and energy that must be spent, a second round of elections organised by the MPR would be proper, since the people's MPR representatives are elected themselves.[400]

However, F-TNI/Polri concurred with F-PDIP that the people should nominate the candidates and elect the president. Further, the presidential candidate nominations should be conducted alongside the DPR and Regional Representative Council elections, whereby the political parties (or coalition) introduce and campaign for their respective candidates. The candidates presented by a political party or coalition that has won the first- and second-most DPR seats will compete in the presidential election. The pair that wins the highest number of votes should be declared as the President and the Vice President. In that way, there is no need to consider the distribution of votes in the provinces, since its principle and objective are inherent in the number of DPR seats won by the political parties who put forward the candidate.[401]

In that regard, a F-PDIP member reiterated the importance of a simpler political party system to ensure the direct presidential election would meet the people's aspirations and interests, while not being too complicated and expensive, both financially and socio-politically.[402] Further, the PAH I chair-

397 The meeting was chaired by Harun Kamil (F-UG), the vice PAH I chairman. Ibid., p. 403.
398 As emphasized by Harjono (F-PDIP). Ibid., pp. 407-408.
399 As stated by Lukman Hakim Saifuddin (F-PPP). Ibid., p. 414.
400 As argued by Hamdan Zoelva (F-PBB) and Zacky Siradj (F-UG). Ibid., p. 417.
401 As asserted by Affandi (F-TNI/Polri). Ibid., p. 419.
402 As reiterated by Soewarno (F-PDIP). Ibid., p. 422. Previously, Anthonius Rahail (F-KKI) and A.M. Luthfie (F-Reformasi) also stated the need for a simplification of the political party system, in which Luthfie referred to the bi-party system introduced by General H.R. Darsono in 1966. See Ibid., p. 410.

man emphasized that the establishment of political parties is a fundamental right. Therefore, there may be hundreds of political parties. However, only a few political parties become substantively effective, as in the USA, UK, or Australia. In that regard, the development of a democratic mechanism should also be directed towards the system's maturity.[403]

Subsequently, PAH I reported the outcomes to the MPR Working Body's fifth plenary meeting on 23 October 2001. At this stage, the factions had reached a basic agreement to revoke one of the MPR's important authorities as the highest state institution: the absolute authority to elect the president and the vice president, regardless of how the election procedure should be further regulated.

*VII.3.7.5 Agreement – Direct Election by the People*

Regarding the presidential election, factions agreed to report to the MPR Working Body that:

(1) The President and the Vice President shall be elected jointly directly by the people.
(2) The pairs of candidates for President and Vice President shall be nominated by the political party or combination of political parties, which had contested in the previous election.
(3) The pair of candidates for President and Vice President which obtains more than 50% of the votes with at least 20% votes in each of more than 50% of the provinces in Indonesia, will be determined and inaugurated as the President and the Vice President.
(4) *Alternative 1:*
If no pair of candidates for President and Vice President is elected as mentioned above, then the two pairs which obtain the first and the second largest number of votes in the election shall compete against each other in the MPR and the pair which obtains most votes from MPR is declared and inaugurated as the President and the Vice President.
*Alternative 2:*
*Variant 1:*
If no pair of candidates for President and Vice President is elected as mentioned above, then the two pairs which obtain the first and the second largest number of votes in the election shall compete in a direct election by the people and the pair which obtains the most votes shall be declared and inaugurated as the President and the Vice President.
*Variant 2:*
If no pair of candidates for President and Vice President is elected as mentioned above, then the two pairs which obtain the first and the second largest number of votes in the election shall compete in a direct

403 Ibid., p. 432.

election by the people and the pair which obtains the most *electoral* votes shall be declared and inaugurated as the President and the Vice President.

(5) The provisions implementing the President and Vice President's election shall be further regulated by law. [404]

Factions expressed their respective opinions on the report in the subsequent MPR plenary meeting on 4 November 2001. All factions reiterated their agreement on the presidential election's first round. However, if a second round was necessary, several members asserted that this should also be a direct election, determined based on the number of votes.[405] However, others reaffirmed that the second round should be conducted by the MPR.[406] In this regard, a F-TNI/Polri member questioned whether the people are ready for a direct presidential election. The member noted the state's condition, characterized by primordialism, as an archipelago with an uneven distribution of people and level of education, which does not support objective and rational political participation. The member stated further that F-TNI/Polri had carefully noted the political and social risks of a direct presidential election, which should be considered in formulating the Constitution's articles.[407]

In that MPR plenary meeting, F-PDU did not explicitly state their stance, while F-Reformasi stated that they were ready to finalize the topic during this session.[408]

*VII.3.7.6 First Round Procedures Agreed – Second Round Disagreements Persist*

During the subsequent Commission A meeting, formed to finalize the MPR Working Body's works, the factions maintained their positions, which was reported to the MPR plenary meeting on 8 November 2001. In their respective final views on the presidential election, factions agreed to ratify the presidential election provisions and postpone the second-round provisions to the MPR 2002 annual session. F-KB and F-PDU called the introduction of a direct presidential election a historic and monumental political decision in reforming the political system.[409] F-TNI/Polri added once again that the

404 Majelis Permusyawaratan Rakyat republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 544-561.

405 As stated by K. Tunggul Sirait (F-PDKB), S. Massardy Kaphat (F-KKI), Mochtar Naim (F-PBB), Syarif M. Alaydrus (F-KB), Nurdahri Ibrahim Naim (F-PPP), Baiq Isvie Rufaeda (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat., Edisi Revisi, Sekretariat Jenderal, 2010, pp. 29, 31, 33, 44, 48.

406 As argued by Sulasmi Bobon Tabroni (F-UG) and Pataniari Siahaan (F-PDIP). Ibid., pp. 54, 60.

407 As conveyed by Paiman (F-TNI/Polri). Ibid., p. 36.

408 As conveyed by Hartono Mardjono (F-PDU) and TB. Soenmandjaja (F-Reformasi). Ibid., pp. 28, 40.

409 As expressed by Erman Suparno (F-KB) and Asnawi Latief (F-PDU). Ibid., p. 646.

second round should be conducted by the MPR, because a second direct election would be too costly and create too long a transitional period.[410] F-PBB agreed with this suggestion. Further, the faction appealed for the committee not to rejoice excessively in welcoming democracy and reform, because it would make them oblivious to the severity of the people's economic and welfare problems that must also be addressed.[411]

The MPR ratified the Constitutional amendment on the presidential election in the plenary meeting on 9 November 2001. It postponed the provisions on the presidential election's second round and early presidential elections until the MPR 2002 annual session.[412]

### VII.3.8 The requirements for the presidential candidate

This section sets out the debate regarding a presidential candidate's requirements, including whether they should be a native Indonesian.

Along with the discussion on the procedure of the presidential election, PAH I also debated the requirements to become a president. The original text of the 1945 Constitution states that the President should be a native Indonesian (*Presiden ialah orang Indonesia asli*).[413] In the enclosures of MPR Decree No. IX/2000, the term *asli* (native) from the original text had been omitted and replaced by a phrase, stating: "Indonesian citizen from his/her birth and never having accepted another citizenship out of his/her own will."

Several members asserted that the term *asli* is discriminative and violates several human rights whilst Indonesia is developing a modern nation state. There should be no more debates on the term *asli*.[414] Instead, the Constitution should stipulate other presidential requirements, such as the minimum age, clean criminal record (except for political crimes), and mental and physical health.[415] Another member asserted that in principle all factions agreed that the term *asli* causes problems. Thus, the MPR Working Body's draft requirements were accepted, as they were, moreover, similar to the Team of Experts' recommendations.[416]

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410 As asserted by Ishak Latuconsina (F-TNI/Polri). Ibid., pp. 650, 658.

411 As stated by Hamdan Zoelva (F-PBB). Ibid., pp. 653-654.

412 In the event that both the positions of president and vice president would be vacant simultaneously, the MPR did not manage to come up with a solution, and left the options as described in the enclosures of MPR Decree No. XI/2001 to be resolved in the next MPR 2002 annual session. See Attachment VII.6.

413 Article 6, section (1) UUD 1945 before amendment.

414 As asserted by I Dewa Gede Palguna (F-PDIP), Asnawi Latief (F-PDU) and Sutjipto (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 279, 281. As also asserted by Frans F. H. Matrutty (F-PDIP). Ibid., p. 289.

415 As stated by Sutjipto (F-UG). Ibid. p. 281.

416 As argued by Lukman Hakim Saifuddin (F-PPP). Ibid., p. 282.

In the discussion, several committee members argued that the Founding Fathers used the term *asli* to prevent a foreigner from suddenly becoming president at a time when Indonesia was still under foreign rule. Nevertheless, the discriminatory connotation should be eliminated.[417] Another member reiterated that the term *asli* is not relevant and discriminative, as even Gus Dur had admitted he is of Chinese descent. Regarding the health requirement, the member reminded that Roosevelt ran for president while in a wheelchair. Hence, one should be careful in determining the requirements.[418] Correspondingly, other members proposed that it be sufficient if the Constitution require citizenship, whereas other requirements may be governed by law.[419]

In the small team meeting on 11 September 2001, one member proposed that other presidential requirements could be better stipulated by law, since they are abstract and lack a clear delineation.[420] However, another disagreed, since the requirements of age, mental and physical health, a clean criminal record, and no acts of treason should be included in the Constitution. The committee should not give too much space to the law, because it could easily be manipulated, as had happened in the past.[421] Likewise, another member emphasized that the presidency is a high state institution, but also a position that the Constitution should regulate as clearly as possible.[422]

In accordance with the agreement in the previous amendment stage,[423] the factions agreed to amend Article 6 to become "Presidential candidates and vice-presidential candidates shall be an Indonesian citizen as of his/her birth and shall have never accepted another citizenship due to his/her own accord". Furthermore, they added the requirement that the candidate should have never committed an act of treason against the state and be mentally and physically capable of executing the duties and obligations as President and Vice President.[424]

On 9 November 2001, new constitutional provisions regarding the criteria for presidential candidate were ratified as the Constitution's Article 6.

417 As explained by Andi Najmi Fuady (F-KB). Ibid., p. 283.

418 As stated by J.E. Sahetapy (F-PDIP). Ibid., p. 285. Gus Dur (Abdurrahman Wahid) claimed that he is the descendant of a Chinese. Sahetapy also said that Franklin D. Roosevelt contracted the paralytic illness since 1921 at the age of 39. Ibid.

419 As proposed by Affandi (F-TNI/POLRI) and Lukman Hakim Saifuddin (F-PPP). Ibid., p. 291.

420 As reiterated by Lukman Hakim Saifuddin (F-PPP). Ibid., p. 317.

421 As argued by Soedijarto (F-UG). Ibid., pp. 319, 323.

422 As emphasized by Sutjipno (F-PDIP). Ibid., p. 325.

423 See Enclosures of MPR Decree no. IX/2000, 18 August 2000.

424 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 560, 617.

### VII.3.9 Elections and political parties as constitutional instruments for the circulation of power

During the second amendment stage, factions discussed the role of political parties in presidential and general elections. Factions agreed that political parties are the participants of the elections for members of the People's Representative Council and Regional People's Representative Council. Regarding presidential election, in general, factions agreed that the presidential candidates should be proposed by political parties. They also agreed that the elections should be held every five years in a direct, general, free, confidential, honest, and fair manner.[425]

Then, at the beginning of the 3rd amendment stage, PAH I asked the opinion of the Team of Experts. On 10 May 2001, the Team of Experts recommended simplifying the draft enclosed to MPR Decree no. IX/2000 (see Attachment VI.4) and affirming that the elections are held every five years in a direct, general, free, confidential, honest, and fair manner. Further, an expert proposed that regional heads should also be elected directly by the people to prevent fraudulent politics in the regional DPR.

Further, the Team of Experts proposed that individual candidates should also be allowed to compete for the legislative institutions at the national and regional levels besides political party candidates.[426] An expert, who chaired the drafting team for the Ministry of Home Affairs election laws, stated that it was feasible.

However, the proposal was not accepted well by F-TNI/Polri, which stated that individual candidates do not correspond with the principles of representation and reduce the function of political parties.[427]

Subsequently, the Team of Experts stated in a PAH I meeting on 22 May 2001 that it had changed its position on individual candidates and affirmed that individual candidates could only run for the Regional Representative Council, whereas the election of members of the DPR and the Regional DPRs would be for political parties only.[428]

In the PAH I Small Team meeting on 12 September 2001, PAH I confirmed that the candidates for president and vice president are nominated by political parties or coalitions of political parties participating in the elections before the election.[429] Subsequently, the Commission A meeting on

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425 See Attachment VI.4. Enclosures of MPR Decree no. IX/2000, 18 August 2000.

426 As conveyed by Maswadi Rauf. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 472. The Ministry of Home Affairs formed a team to draft the new law for elections which was chaired by Ramlan Surbakti, a member of PAH I's Team of Experts.

427 As stated by Affandi (F-TNI/POLRI). Ibid., p. 496.

428 As stated by Maswadi Rauf. Ibid., p. 606.

429 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p.p. 337 – 400.

5 November 2001 agreed. Besides, no one objected that the participants of DPR and DPRD members' elections are political parties and participants in DPD members' election are individuals.[430]

Subsequently, Commission A's meeting on 7 November 2001 agreed that political parties can be participants in the elections for members of the People's Representative Council and the Regional People's Representative Council. Regarding the presidential election, all factions contended that the presidential candidates should be proposed by political parties. They also agreed that the elections be held every five years in a direct, general, free, confidential, honest, and fair manner.

The agreement was then reported to People's Consultative Assembly's plenary meeting on 8 November 2001.[431] On 9 November 2001, MPR plenary meeting agreed and ratified it as amendment to the Constitution.[432]

### VII.3.10 Checks and balances

This section sets out the debate concerning checks and balances, focusing on the Executive Branch, the Supreme Advisory Board, the Audit Board, and cabinet ministers. Most of the members of the Team of Experts argued that the establishment of checks and balances between the Supreme Court, DPR, and President was necessary to create a more democratic and credible system with a higher level of public accountability. For that reason, most experts preferred the first alternative MPR draft, which abolishes the Supreme Advisory Board (DPA – *Dewan Pertimbangan Agung*),since its existence violates the concept of branches of government and is useless.[433] Only one expert argued that the Supreme Advisory Council should be retained.[434] Further, the Team of Experts recommended the Audit Board (BPK – *Badan Pemeriksa Keuangan*) become a DPR instrument instead of an independent body. To create good governance and prevent nepotism, the President should have the DPR's approval to recruit cabinet ministers, ambassadors, the military commander, the military chief of staff, and the national police chief.[435] Regarding appointing cabinet ministers, the Constitution should stipulate that the President should take the DPR's

430 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 229 – 255.
431 Ibid, pp. 617 – 618; 624.
432 Ibid, p. 682.
433 As stated by Afan Gaffar of the Team of Experts. Likewise, Asnawi Latief (F-PDU) reiterated that even in France, the country which had the council that is cited in the Elucidation of UUD 1945, *Conseil d'État* had been abolished. See, Ibid., p. 475. Factually, the Council d'Etat is alive and kicking.
434 As argued by Ismail Suny of the Team of Experts. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, pp. 547-548
435 As conveyed by Afan Gaffar. Ibid., p. 394.

considerations into account. Previously, an expert had stated that if people elect the president, it will change the concept of presidential accountability. It would abolish the elements of the parliamentary system and introduce the presidential system. Further, it would strengthen the implementation of the separation of powers principle since state institutions are in an equal position and will offset each other.[436]

Commenting on this idea, several PAH I members asserted that requiring the DPR's consideration when appointing ministers is pointless, would complicate matters, and does not follow the presidential system.[437] Another member reminded the committee that a president in a presidential system has *freies ermessen* (discretionary power) and that the stipulation could lead to a legislative tyranny.[438] In response, the expert explained that what he proposed was a mechanism for recruiting ministers, not implementing their duties as in a presidential system, where the responsibility for carrying out tasks rests entirely with the President.[439] However, a member argued that the proposed procedure was too binding and inhibiting.[440] Another expert clarified that the initial proposal (that the President should have the DPR's approval when recruiting cabinet members) had been changed to taking into account the DPR's considerations, so that the President retains authority but its use is transparent.[441]

Previously, PAH I had drafted that the President exercises state governance under the Constitution as the head of state and government.[442] The Team of Experts, however, recommended that the chapter title be changed to "Executive Power". Within a presidential system there should be no division of authority between the President as the head of state and the head of government.[443] However, under the original Article 4, the president's government authority should be implemented according to the Constitution, which means that the President's authority is limited by the Constitution.[444] One PAH I member expressed his agreement with the Team of Experts' recommended phrase, arguing that separating the president's authorities as the head of state and government only occurs in a parliamentary system.

Further, he proposed that the Constitution's authority classification should follow the common terms introduced by Montesquieu (i.e., the exec-

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436 As conveyed by Jimly Asshidiqie. Ibid., pp. 462 and 405.

437 As argued by Lukman Hakim Saifuddin (F-PPP), Affandi (F-TNI/Polri) and Ali Masykur Musa (F-KB). Ibid., pp. 479, 496, 507.

438 As emphasized by Sutjipno (F-PDIP). Ibid., p. 500.

439 As argued by Riswanda Imawan of the Team of Experts. Ibid., p. 554.

440 As emphasized by Yusuf Muhammad (F-KB). Ibid., p. 622

441 As elaborated by Suwoto Moeljo Soedarmo of the Team of Experts. Ibid., p. 694.

442 As attached to MPR Decree No. IX/2000, in Chapter III on *Kekuasaan Pemerintahan Negara* (The Governing Powers of the State). See Attachment VI.4.

443 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 258.

444 As argued by Hobbes Sinaga (F-PDIP). Ibid., p. 29.

utive, the judicial, and the legislative powers).[445] Other members asserted that the separation of powers is not as strict as envisaged by Montesquieu, because the president also has a role in the legislative and judicial branches, such as the granting of clemency, amnesty, rehabilitation, and abolition of certain laws.[446] Further, one of them reminded the committee to listen critically to the expert opinions because these contained political overtones.[447] In that regard, another member assumed that the Team of Experts followed the paradigm of the three branches of government, contending that the MPR should be categorized as a bicameral legislative institution.[448] In response, the PAH I chairman affirmed that the original phrase, *Kekuasaan Pemerintahan Negara* (The Governing Powers of the State) has a deeper meaning than the proposed changes, because the president also holds the right to grant clemency and propose a bill (especially a bill on the state budget), but that the Constitution regulated and restricted these rights.[449]

Eventually, PAH I agreed to keep the original title, *Kekuasaan Pemerintahan Negara* (The Governing Powers of the State), for Chapter III and the original Article 4.[450]

In a meeting on 5 November 2001, Commission A continued discussing the existence of the Supreme Advisory Board, but there remained differences of opinion whether to abolish the Supreme Advisory Board or maintain the Board with some revisions. [451] The meeting also discussed whether the formation or conversion of state ministries shall be regulated by law.[452] In the end, the Commission A meeting on 8 November 2001 agreed that the regulation is necessary and reported this on 9 November 2001 to the MPR Plenary meeting. Then, the MPR plenary meeting ratified the paragraph as an amendment to the Constitution.[453]

As for the Financial Audit Board, it was agreed and reported to People's Consultative Assembly plenary meeting on 8 November 2001 that the Audit Board should be an independent institution and the only state financial supervisory and audit agency.[454]

445 As proposed by Asnawi Latief (F-PDU). Ibid., p. 260.
446 As stated by Baharuddin Aritonang (F-PG) and J.E. Sahetapy (F-PDIP). Ibid., pp. 269, 270.
447 As reminded by J.E. Sahetapy (F-PDIP). Ibid., pp. 269,270.
448 As stated by Harjono (F-PDIP). Ibid., p. 271.
449 Ibid., pp. 309, 311.
450 Ibid., pp. 313, 314.
451 In the enclosures of MPR Decree no. IX/MPR/2000 there were 2 alternatives on the Supreme Advisory Board. First was to abolish it and the second was to maintain it with revisions. See enclosures of MPR Decree no. IX/MPR/2000
452 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 144 – 177.
453 Ibid, p. 688.
454 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 625.

### VII.3.11 The Regional Representative Council or DPD (Dewan Perwakilan Daerah)

This section sets out the debate on the role and powers of the Regional Representative Council (DPD), which were eventually ratified as including the following actions within the House of Representatives (DPR): proposing bills relevant to regional matters, discussing financial bills relevant to regional matters, and supervising and implementing laws regarding regions.

The Team of Experts differed on the draft detailing the provisions for The Regional Representative Council (DPD), which had been prepared by PAH I and was attached to MPR Decree No. IX/2000. The Group considered that it suggested a weak bicameral system. As shown in the Team of Experts proposals from 7 March 2001, the group regarded The Regional Representative Council as part of the bicameral legislative institution, a system that must be viewed critically because of the history of regional upheavals (see VII.3.1). Thus, in a PAH I meeting on 29 March 2001, the Team of Experts again detailed their recommendations on various alternatives in the Enclosures of MPR Decree No. IX/2000. The Team recommended that the MPR should be an incidental forum of the DPR and the Regional Representative Council within a strong bicameral system.[455]

In this context, one PAH I member stated that, although the Regional Representative Council might be understood as a weak bicameral system, a Regional Representative Council member is part of the MPR, which holds high authorities. Further, he questioned why the Expert Group highly recommended a Regional Representative Council with power equal to that of Parliament in a strong bicameral system. The fact that strong bicameralism is adopted by federal states is not a coincidence.[456] Another argued that a strong bicameral system would lead to a federal system.[457] Further, a strong Regional Representative Council seemed to imitate the system of the United States of America and it seemed that the Team of Experts wanted to change the state's form.[458]

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455 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 393.

456 As argued by the PAH I chairman as a F-PDIP member. Ibid., p. 480. The weak bicameral system is defined as a two-chamber representative system, in which the power of the second chamber, the Regional Representative Council, is less than the power of the House of Representatives. The term 'bicameral system' does not apply to Indonesia in the strictest sense, being a dissection country with a unitary system, whereby there is need for representation of regionally specific interests at the national level. A monocameral system is probably more appropriate with the people's representation in the hands of the DPR. In this context, members of the Committee as well as the Team of Experts referring to weak or strong bicameral system or 'pure' to 'revised' monocameral system show the variety of opinions on this issue.

457 As stated by Hobbes Sinaga (F-PDIP). Ibid., p. 489.

458 As stated by Ali Hardi Kiaidemak (F-PPP). Ibid., p. 491.

By contrast, a F-PG member argued in support of the Team of Experts that a bicameral system could empower the regions, given that the unitary state is necessary for a highly heterogeneous society. The Regional Representative Council would then serve as a national institution to absorb regional aspirations. Indeed, the DPR holds legislative power and the Regional Representative Council holds certain limited authorities,[459] so the positions of the DPR representing the people and the Regional Representative Council representing the regions are unequal.[460]

One member of the Team of Experts clarified that the Regional Representative Council in a strong bicameral system is a representation-in-presence of the regional aspirations when making operational policies.[461] Another expert stated that during their regional visits, a strong Regional Representative Council was often demanded. Indonesia is a highly heterogeneous country, the expert continued, which led the Dutch colonial government to conclude that the right government system for the Netherlands Indies was a federal system. Since the federal system was used by the Dutch to divide the country, this system is still perceived as weakening the nation. However, the more heterogeneous a country, the more important it is to have a strong Regional Representative Council to accommodate regional interests.[462] Yet, another expert stated that 'weak bicameralism' belongs to a monocameral system, since it refers to two bodies with different tasks, while a bicameral system simply relates to two different chambers that undertake the same task.[463]

In response, the PAH I chairman reminded the Team of Experts to consider the original intent of establishing the Regional Representative Council. The Regional Representative Council, as discussed in PAH I, is not based on the academic concept of bicameralism. Instead, it is based on the comprehension that Indonesia is a nation-in-building, whereby the form of a unitary state creates and provides a *lebensraum* (common living space) for the heterogeneous nation. However, the chairman further asserted, the unitary form needs checks and balances and a mechanism to project the diverse aspirations of the regions, space, mountains, and lakes into the decision-making process at the national level. That is a political approach, and it differs from the theoretical approach in academic literature. However, if it is academically categorized as a weak bicameral system, the system must be adjusted to the theoretical bicameral system's requirements.[464]

459 As argued by Agun Gunandjar Sudarsa (F-PG). Ibid., p. 498. For example, the appointment of members of the Audit Board of Indonesia and to propose a bill on regional matters

460 As stated by Katin Subiyantoro (F-PDIP) and Yusuf Muhammad (F-KB). Ibid., pp. 511, 621.

461 As argued by Ramlan Surbakti of the Team of Experts. Ibid., p. 687.

462 As conveyed by Maswadi Rauf. Ibid., p. 690.

463 As stated by Suwoto Moeljo Soedarmo.Ibid., p. 696.

464 As stated by the PAH I chairman. Ibid., p. 697.

One member added that the Regional Representative Council members are elected by the people, an enhancement of the Regional Delegations in the previous MPR who were elected by the provincial DPR. Previously, diversity was suppressed in the name of national unity. As a result, the sense of togetherness was violated. The unitary state has been associated with suppression and injustice. The amendment should lead to improvement based on the unitary state concept, providing one living space that is shared by the pluralistic Indonesian people. In that respect, the Regional Representative Council would strengthen regional autonomy and build checks and balances between the executive, legislative, and judiciary, the central and regional government, and the people and state. The Regional Representative Council would also confirm the unitary state and people's sovereignty principles, in which the source and the holder of the sovereignty are the people, not the territory.[465] Likewise, another member asserted that the Team of Experts wanting to change the second amendment outcomes was irrelevant. The priority was developing good governance for supporting regional autonomy and democratization in the context of the Unitary State of the Republic of Indonesia.[466]

The Team of Experts, however, preferred to implement a strong bicameral system because of Indonesia's heterogenous society. A strong bicameral system is not identical to a federal state. The Netherlands and the United Kingdom are two unitary states with a strong bicameral system.[467] The Regional Representative Council should represent local interests and politics, while the DPR represents national insights and politics. Therefore, the DPR's and Regional Representative Council's law-making functions should not be differentiated.[468] Strong bicameralism could be perceived as an attempt to strengthen the unitary state. Experiences during *Orde Baru* (New Order) show that the central government's domination led to serious regional turbulences, the consequences of which persist to this day.[469] There are two philosophies behind the promotion of strong bicameralism: a checks and balances philosophy to control the law-making process and the degree of representativeness philosophy to absorb the aspirations of a highly fragmented society. In this system, each institution can veto each other.[470]

Likewise, another expert argued that to ensure the just and effective representation of the people and regions in political decision-making, a people's representation system should be implemented in a bicameral

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465 As stated by Katin Subiyantoro (F-PDIP). Ibid., p. 729.

466 As asserted by Happy Bone Zulkarnain (F-PG). Ibid., p. 738.

467 As stated previously by, among others, Soewoto Moeljo Soedarmo and Maswadi Rauf that a unitary state can apply strong bicameralism. Ibid., pp. 529, 530-531.

468 As stated by Soewoto Moeljo Soedarmo. However, Maswadi Rauf admitted that the national council is still an idea that has not been agreed. See Ibid., pp. 529-532.

469 As stated by Maswadi Rauf. Ibid., p. 531.

470 As argued by Afan Gaffar. Ibid., p. 534.

system, with both chambers holding an equal position. Further, according to the latest trends, its empirical (not formal) form is relevant in viewing a federal or unitary state. The formal form could be a unitary state with a spirit of federalism with broad autonomy. What is important is the need for representing regional interests. Geopolitically, Indonesia needs a unitary state. Socio-culturally, Indonesia needs federalism, i.e., broad autonomy.[471]

During the 25th PAH I meeting on 6 September 2001, a member reiterated that no unitary state in the world, whether Japan, the United Kingdom, or Canada, applies a strong bicameral system. A political system should be congruent with the political culture, another member emphasized.[472] Another member argued that the term 'representatives' is associated with a bicameral system.[473]

In the following PAH I meeting on 7 September 2001, a member reminded the committee that the basic idea of the Regional Representative Council reflects the agreement that the People's Consultative Assembly consists of elected DPR and Regional Representative Council members. The representation system is based on bicameralism principles, where the bicameral system provides clear assurances of existing checks and balances between the institution representing the people's interests and the institution representing the regional interests. On those grounds, the Team of Experts' recommendations were acceptable. For example, the Regional Representative Council should also be entitled to propose bills to be processed to become law and not only to propose the draft of bills to the DPR. However, the Regional Representative Council's legislative authority is limited to the areas explicitly mentioned in the MPR Working Body's draft.[474] Regarding the Regional Representative Council's role in the law-making process, the Regional Representative Council should not only hold the right to extend considerations to the DPR relative to the bills, but also participate in the debates. Thus, the Regional Representative Council's role should expand, e.g., it should have the right to propose the dismissal of the MPR's president. In the current drafts, the Regional Representative Council's law-making authority was limited.[475]

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471 As argued by Ramlan Surbakti. Ibid., pp. 539-540.

472 As stated by Soedijarto (F-UG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 179.

473 Ibid., p. 251. As proposed by Frans Matrutty (F-PDIP), the DPD (*Dewan Perwakilan Daerah* – The Regional Representative Council) should be replaced by the DUD (*Dewan Utusan Daerah* – Regional Delegations Council). However, most PAH I members refused the abbreviation of 'DUD', because it sounds like 'dude' (dandy). What is important, the members asserted, are the contents and meaning, not the name.

474 These limited areas included regional autonomy, the relationship between the central government and the regions, the formation, division, and merging of a region, the management of natural and other economic resources, and the financial balance between the central government and the regions.

475 As stated by Theo L. Sambuaga (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 83-85.

Another member reminded the committee that although the Regional Representative Council's authority is not equal to the DPR's, the differences are not too obvious.[476] A F-PPP member stated that the DPR and Regional Representative Council have essentially the same function, with the Regional Representative Council also holding legislative, budgeting, and controlling functions. Therefore, it should have the right to propose bills. However, the Regional Representative Council should not be able to submit a petition to dismiss the president.[477]

A F-KB speaker stated that the MPR Working Body draft was adequate.[478] In addition, a F-PDIP member asserted that the question was not whether Indonesia has a bicameral representation system, whereby the Regional Representative Council is like a Senate. A senator holds broad authorities because the state is the source of sovereignty, a small portion of which is delegated to the federal government. The amendment is based on the agreement to uphold the unitary state. In previous MPR Working Body discussions, the term bicameral was never raised until it appeared in the Team of Experts manuscript.[479] Furthermore, F-TNI/Polri contended that the formulation, drafted by the MPR Working Body, had considered the balance between the unitary state and regional interests, in which the DPR forms the system's core. From its birth, Indonesia has been a unitary state where the Regional Representative Council balances the regional interests for the sake of the unitary state.[480]

Likewise, a F-PDIP speaker pointed out that forming a Regional Representative Council starts from DPR and Regional Delegations members in the MPR, since the delegations of functional groups and the Armed Forces and Police would cease to exist. To prevent the regional delegations from becoming idle and to give them weight,[481] the delegation is transformed into a state institution that holds specific tasks, whereby its members also become MPR members. PAH I never talked about a bicameral system. Whereas the Regional Representative Council's name is misleading, the Team of Experts indeed started from the bicameral idea. PAH I should keep up the idea that had been developed. In the first amendment stage, PAH III had positioned the DPR as the cornerstone in the law-making process. For that reason, the Regional Representative Council could submit bills to the DPR, but its role should be limited to consultation.[482] Likewise, a F-PDU

476 As stated by Sutjipto (F-UG). Ibid., p. 86.
477 As stated by Lukman Hakim Saifuddin (F-PPP). Ibid., p. 91. According to the first amendment, Article 20 section (1) of UUD 1945 stipulates that DPR shall hold the authority to establish laws and section (2) stipulates that each bill shall be discussed by DPR and the President to reach joint approval.
478 As stated by Erman Suparno (F-KB). Ibid. p. 88.
479 As argued by I Dewa Gede Palguna (F-PDIP). Ibid.
480 As stated by Affandy (F-TNI/Polri). Ibid., p. 92.
481 Originally, they only worked when there was an MPR session.
482 As argued by Harjono (F-PDIP). Ibid., pp. 97-99.

member stated that, in law-making, the Regional Representative Council may give its opinion but has no voting right.[483]

However, another member denied that the bicameral topic was never raised before. F-PG had proposed that the MPR's structural basis consist of the DPR and Regional Representative Council, based on bicameralism. That members disagreed with or contradicted the notion does not mean that the idea was never discussed. Furthermore, it does not have to be labelled a 'bicameral' system. It is wrong to assume that the bicameral concept must reflect the system in the United States, the UK, or the Netherlands. Therefore, when discussing a bicameral system, one should not immediately associate it with particular group interests (the "Trojan horse") and especially not with the idea of a federal state.[484]

In that regard, another member argued that the idea indeed reflected bicameralism, so the next question was whether a strong or weak bicameral system was intended.[485] However, a F-PDIP member urged reference to the original intention to empower the MPR's Regional Delegations and to accommodate regional aspirations properly at the national level. In that respect, the MPR Working Body draft was adequate and had shown significant progress.[486] Another F-PDIP member pointed out that, under the first amendment, the president and the DPR can initiate bills. With that in mind, the Regional Representative Council could also propose a bill.[487] Eventually, it became clear that all factions rejected strong bicameralism but differed on the Regional Representative Council's authority.

#### *VII.3.11.1 Disagreement Persists – Small Team Discussions*

At that point, the meeting's chairman suggested to PAH I to continue the discussion in a small team to try and formulate a conclusion.[488] In the small team meeting, F-PBB argued that the Regional Representative Council should be given the right to submit bills and participate with voting rights in the law-making process. However, F-PDU and F-PDIP disagreed because the Regional Representative Council would then be equal with the DPR, which holds legislative authority.[489] By contrast, F-KB and F-PPP argued that the Regional Representative Council should hold the right to submit bills (on natural and other economic resources) since the DPR is not a superior body and both the Regional Representative Council and DPR are elected by the people.

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483 As stated by Asnawi Latief (F-PDU). Ibid., p. 101.
484 As stated by Theo Sambuaga (F-PG). Ibid., pp. 102-103.
485 As stated by Patrialis Akbar (F-Reformasi). Ibid., p. 105.
486 As stated by Katin Subiyantoro (F-PDIP). Ibid., p. 107.
487 As stated by Harjono (F-PDIP). Ibid., p. 108.
488 The meeting was chaired by Slamet Effendy Yusuf, vice PAH I chairman. Ibid., p. 109.
489 As argued by Hamdan Zoelva (F-PBB), Asnawi Latief (F-PDU) and Katin Subiyantoro (F-PDIP). Ibid., pp. 112, 113.

F-PG wondered what the Regional Representative Council could do if they disagreed on certain issues, and whether appealing to the MPR as a joint session between the DPR and the Regional Representative Council would be a solution. Another member asserted that this limited Regional Representative Council authority should include the rights related to the discussion of that legislation.[490] Likewise, F-TNI/Polri and F-PDU argued that the Regional Representative Council should have the right to vote on draft legislation, although this should be stipulated in law, not in the Constitution.[491] However, F-PDIP disagreed, since the DPR holds law-making authority and this would change its foundation.[492]

Regarding concerns that the Regional Representative Council could gain special autonomy (e.g., as in Nanggroe Aceh) or in the more extreme case, ask for secession, a member guaranteed that this is unlikely to happen because the people's regional representatives would fight for local interests within the national political framework. Furthermore, the political parties would not propose Regional Representative Council candidates who do not defend the unitary state.[493] However, another member warned that Regional Representative Council elections are on an individual basis, so a non-political party candidate with relatively more funding could win a seat.[494] Nevertheless, worries should be assuaged, since the total Regional Representative Council membership should not exceed 1/3 of the MPR membership, and every province will have MPR representation through the DPR and Regional Representative Council.[495] However, if aspirations became uncontrollable, PAH I must return to the Regional Representative Council's original intention, namely to substitute the Regional Delegations in the old-style People's Consultative Assembly.[496]

### *VII.3.11.2 Article 22D – Initially Not Approved*

It soon became clear that PAH I members had not agreed on whether the Regional Representative Council should have voting rights in the law-making process.[497] Factions in PAH I preferred broad autonomy and the regional devolution of effective authorities coupled with a weak type of bicameralism rather than a strong bicameral system.

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490 As stated by Theo Sambuaga (F-PG) and Amidhan (F-PG). Ibid., pp. 119, 121.

491 As stated by Affandi (F-TNI/Polri) and Asnawi Latief (F-PDU). Ibid., p. 122.

492 As stated by I Dewa Gede Palguna (F-PDIP). Ibid., pp. 115, 120.

493 As stated by Theo Sambuaga (F-PG). Ibid., pp. 128-129. Later, following the Peace Agreement signed in Oslo on August 15, 2005, Nangroe Aceh was granted special autonomy status and ended the long rebellion in Aceh that had taken lots of casualties.

494 As reminded by Soedijarto (F-UG). Ibid., p. 131.

495 As stated by Lukman Hakim Saifuddin (F-PPP). Ibid., p. 130. The MPR is assumed to hold the authority with regard to the changes of the Constitution.

496 As stated by Katin Subiyantoro (F-PDIP). Ibid., p. 131.

497 Soedijarto (F-UG) for instance affirmed that the Regional Representative Council has no voting rights, but on the contrary Lukman Hakim Saifuddin (F-PPP) asserted that the Regional Representative Council should have voting rights. Ibid., p. 134.

Eventually, in the MPR Working Body meeting on 23 October 2001, PAH I reported that the following article regarding The Regional Representative Council was not yet confirmed.[498]

On Article 22D:

(1) The Regional Representative Council may propose bills to the DPR which are related to regional autonomy, the relationship between central and local governments, formation, expansion and merging of regions, management of natural resources and other economic resources, and which are related to the financial balance between the centre and the regions.
(2) *Alternative 1:*
The Regional Representative Council gives its considerations to the DPR on the bills which are related to regional autonomy, the relationship between central and local governments, formation, expansion and merging of regions, management of natural resources and other economic resources, and the financial balance between the centre and the regions.
*Alternative 2:*
The Regional Representative Council participates in discussions on the bill of the State Budget, and the bill related to taxation, education, religion, regional autonomy, relationship between central and local governments, formation, expansion and merging of regions, management of natural resources and other economic resources, and the financial balance between the centre and the regions and to give considerations to the DPR on the bills on the State Budget and the bills related to taxation, education and religion.
(3) *Alternative 1:*
The Regional Representative Council may conduct supervision of the implementation of laws regarding regional autonomy, formation, expansion and merging of regions, the relationship between central and local governments, management of natural resources and other economic resources, the State Budget, taxation, education, and religion and to convey the result of the supervision to the DPR for consideration and follow-up.
*Alternative 2:*
The Regional Representative Council may conduct supervision of the implementation of laws regarding regional autonomy, formation, expansion and merging of regions, the relationship between central and local governments, management of natural resources and other economic resources, the State Budget, taxation, education, and religion.
(4) –

498 Ibid., pp. 555-556.

(5) *Alternative 1:*
The Regional Representative Council may submit a proposal on the dismissal of the President and the Vice President to the People's Consultative Assembly based on the violation of laws, treason, corruption, bribery, moral turpitude, or if he/she no longer qualifies as the President and the Vice President.
*Alternative 2:*
(This section is not necessary).

(6) *Alternative 1:*
The petition for dismissal of the President and the Vice President requires the approval from at least 2/3 of the members attending the meeting, which requires a quorum of at least 2/3 of the members.
*Alternative 2:*
(This section is not necessary).

The MPR Working Body approved the report and submitted it to the MPR's plenary meeting. In the MPR plenary meeting of 4 November 2001, factions stated their respective views on the report. F-KKI suggested that the change from a unicameral to bicameral system should be studied further. F-KKI thought that if people directly elected the DPR and Regional Representative Council members, then the Regional Representative Council is not only a complementary part to the DPR.[499] F-TNI/POLRI reminded the committee that changes should be examined seriously, to avoid confusion in the governance system. [500] F-PDU and F-UG did not have any further comments on this topic.[501]

In a Commission A meeting on 5 November 2001, F-KKI defended the old MPR concept by reiterating that including regional delegations and functional groups in the People's Consultative Assembly means that all people and interest groups are represented.[502] On the other hand, some factions affirmed that the Regional Representative Council should only present its views but not participate in the discussions of bills. Accordingly, it should not have the right to propose an impeachment of the president and vice president.[503] However, other factions again argued that the Regional Representative Council should participate in law-making discus-

499 As conveyed by S. Massardy Kaphat (F-KKI). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat., Edisi Revisi, Sekretariat Jenderal, 2010, p. 31.

500 As stated by K. Tunggul Sirait (F-PDKB), Mochtar Naim (F-PBB), Paiman (F-TNI/Polri), Soenmandjaja (F-Reformasi), Syarif M. Alaydrus (F-KB), Nurdahri Ibrahim (F-PPP), Baiq Isvie Rufaeda (F-PG) and Pataniari Siahaan (F-PDIP). Ibid., pp. 32, 52, 56, 61.

501 Ibid., pp. 27-29, 53-56. However, F-UG stated that the MPR should not consist only of people's representatives which are elected by the people such as the DPR, but should also include the delegations of interest groups. See Ibid, p. 54.

502 As asserted by F.X. Soemitro (F-KKI). Ibid., p. 191.

503 Soedijarto (F-UG), Rodjil Gufron (F-KB), Ishak Latuconsina (F-TNI/Polri), L.T. Soetanto (F-KKI). Ibid., pp. 191, 192.

sions, while F-TNI/Polri questioned the Regional Representative Council's formation's impact on the MPR's form.[504] F-PDIP added that the Regional Representative Council's job descriptions should be clear.[505] A F-PG member from Papua expressed appreciation for the Regional Representative Council as a new strategy to reorganize the nation and state with all its heterogeneity.[506] Further, one F-PDIP member[507] stated that the Regional Representative Council could try to solve the problem's symptoms and actual root, supporting the devolution of governance authorities. However, the committee should consider the problems holistically, recognizing all implications.[508] On the other hand, F-PDIP reiterated that the Regional Representative Council represents regions and should strive for regional (not political) interests, since it is the DPR that is the manifestation of people's sovereignty.[509]

A F-PG member reminded the committee that the draft amendment, including the presence of the Regional Representative Council, had been discussed and agreed by the MPR Working Body, where all factions were represented. Introducing the Regional Representative Council and DPR members as MPR members could balance the political system's proportional representation. The past imbalance had led to a sense of injustice and frustration, with some regions trying to secede from the Unitary State of the Republic of Indonesia. This was an attempt to overcome the challenges that had also been addressed through efforts of autonomy and decentralization. Therefore, the member asserted, the Regional Representative Council should participate in the discussions of bills.[510]

After this meeting concluded, factions were still divided over the establishment of the Regional Representative Council. To resolve the differences, Commission A agreed to hold an informal meeting.[511]

### *VII.3.11.3 Agreeing to form the Regional Representative Council*

As reported to the ensuing Commission A meeting on 8 November 2001, the informal meeting managed to agree on introducing the Regional Representative Council. The Commission A chairman asserted that the Regional Representative Council's existence does not represent a territory as a sovereign

504 As stated by Ahmad Sanoesi Tambunan (F-Reformasi), Amidhan (F-PG) and Suwitno Hadi (F-TNI/Polri). Ibid., p. 193.
505 As stated by Harjono (F-PDIP). Ibid., p. 211.
506 As stated by Ruben Gobay (F-PG). Ibid., p. 206.
507 This member was from Papua and the former faction of Regional Delegations (F-UD).
508 As stated by Rodman Waba (F-PDIP). In the MPR 2000 annual session, F-UD was dissolved and its members were free to join other factions. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 207-208.
509 As stated by Hobbes Sinaga (F-PDIP). Ibid., p. 213.
510 As insisted by Theo Sambuaga (F-PG). Ibid., p. 215.
511 Ibid., p. 226.

entity, but rather that sovereignty is in the people's hands. The Regional Representative Council will help absorb the diversities, heterogeneities, and local wisdoms in the national political process through a collectively owned national (rather than regional) institution. Further, the chairman reported that Commission A concluded that the Regional Representative Council may propose and participate in the discussions on bills related to the relationship between the central and local governments, the financial balance between the centre and the regions, and so forth. It would also be entitled to give its views on other bills, such as on the State Budget and taxation. This arrangement fits in the DPR's law-making authority context, so that the Regional Representative Council's participation should be perceived as a complement to the main structure.[512]

Subsequently, a small team was formed to conclude the Commission A meeting. Eventually, most of the factions accepted the draft produced by the small team, but questions remained. In the end, the process could not be brought to a rapid conclusion. F-TNI/Polri proposed that it should be clarified whether individuals or political party nominees are elected in the Regional Representative Council's election.[513] Then, a F-PDIP member noted that the new Regional Representative Council was confusing. It was neither weak, nor strong, nor quasi-bicameral. Therefore, the Regional Representative Council should be excluded from the draft. Instead, the Indonesian Armed Forces should again participate in the MPR.[514] Likewise, other members from F-KKI and F-PDIP urged to postpone the change and wait for the people's consent through a referendum, considering that Chapters I, II, and III contain the fundamental topics of the state's form and governance system.[515] A senior F-PDIP member explained that the 1945 Constitution's government system was a monocameral system through the MPR, one thoroughly considered by the Founding Fathers. The suggested changes altered the state governance system, while an amendment is intended to merely revise the articles.[516] Similarly, a F-UG member proposed that only fully agreed topics should be resolved, while topics still under discussion should be postponed until the grand design of systemic changes was completed.[517]

### *VII.3.11.4 Agreement*

The remainder of the Commission A session saw continued debates on several topics. Eventually, the chairman called an informal meeting to find a solution.[518] The informal meeting was attended by Commission A's

512 Ibid., p. 562.
513 As stated by Suwignyo Adi (F-TNI/Polri). Ibid., p. 572.
514 As stated by Dimyati Hartono (F-PDIP). Ibid., p. 569.
515 As stated by F.X. Soemitro (F-KKI) and Amin Aryoso (F-PDIP). Ibid., pp. 573, 575.
516 As stated by Abdul Madjid (F-PDIP). Ibid., p. 579.
517 As proposed by Santoso Kismodihardjo. (F-UG) Ibid., p. 587.
518 Ibid., p. 608.

leadership and the factions' representatives, who successfully agreed on the following articles:[519]

(1) The Regional Representative Council may propose bills to the DPR which are related to regional autonomy, the relationship between central and local governments, formation, expansion and merging of regions, management of natural resources and other economic resources, and which are related to the financial balance between the centre and the regions.
(2) The Regional Representative Council participates in discussions on bills on the State Budget, and the bills related to taxation, education, religions, regional autonomy, relationship between central and local governments, formation, expansion and merging of regions, management of natural resources and other economic resources, and the financial balance between the centre and the regions and to give its views to the DPR on bills on the State Budget and bills related to taxation, education and religion.
(3) The Regional Representative Council may conduct supervision of the implementation of laws regarding regional autonomy, formation, expansion and merging of regions, the relationship between central and local governments, management of natural resources and other economic resources, the State Budget, taxation, education, and religion and to convey the result of the supervision to the DPR for consideration and further actions.

Commission A reported the draft to the MPR plenary meeting on 9 November 2001. In the final statements, factions accepted the draft on the grounds that, as expressed by F-TNI/Polri, the Regional Representative Council represents the regions and strives for regional interests at the national level. Further, since the related provisions firmly and clearly distinguish the assignments of the DPR and the Regional Representative Council, addressing matters of legislation and the State Budget, the Regional Representative Council's presence will strengthen the Unitary State of the Republic of Indonesia.[520]

Ultimately, the MPR approved the draft as part of the third amendment of the 1945 Constitution.[521]

519 Ibid., p. 623. Other parts of Chapter VIIA on the Regional Representative Council had been agreed earlier in the meetings of the Working Body of the MPR and the Commission A.
520 As conveyed by Ishak Latuconsina (F-TNI/Polri). Ibid., p. 650.
521 Ibid., p. 682. Later, in May 2002, a former member of the Politics Sub-Group of the Team of Experts, Nazaruddin Sjamsuddin, published a booklet *Mengapa Indonesia Harus Menjadi Negera Federasi* (Why Indonesia Ought To Be A Federal State), Penerbit Universitas Indonesia (UI-Press), May 2002. In this book, Sjamsuddin states that in general the form of a federal state may well fit Indonesia. Although some regions are satisfied with the unitary form, there are regions which desire to become a state. Therefore, the academic asserted, options should be open to the regions to choose unitarianism or federalism for the welfare of the people.

### VII.3.12 On Article 29 and the obligation to implement Islamic Sharia

This section sets out the debate on Article 29, which focused on the meaning of *kepercayaan*, whether the Constitution should affirm beliefs systems 'outside' mainstream religions, and whether there should be an obligation to implement Islamic Sharia on Indonesian Muslims through 'the seven words'. It concludes that the third amendment stage could not agree on this topic, postponing it to the 2002 MPR annual session.

PAH I's discussions on Article 29 were no different from the previous process. However, it is worth noting the idea of including a new section in Article 29: "The operation of the state must not be contradictory to the values, norms, and religious law".[522] This idea implies that there is a level of obscurity, if not a conception, among the elites and political circles, where religion is positioned as part of the state's formal-legal system.[523]

In that regard, K.H. Sahal Mahfudh, then the *Rois Am* (the Supreme Advisor) of the *Nahdlatul Ulama*, rejected formalizing Islamic law (*sharia*) and asserted that *sharia* should not be perceived as positive law.[524] For Kiai Sahal, Islamic law was not a standardized package, implemented from above in any situation and at any time. Kiai Sahal perceived Islamic Sharia as *fiqh*, comprehension that is always the result of *ijtihad*, independent reasoning,which is not rigid and sacred, but rather flexible and contextual.[525]

Similarly, prominent Islamic figures asserted their rejection of a formalistic and exclusive Islam during the 2000 amendment process. These included Abdurrahman Wahid, former chairman of *Nahdlatul Ulama* (NU) and the fourth president of Indonesia, Hasyim Muzadi, chairman of NU, Ahmad Syafii Maarif, chairman of Muhammadiyah, and Nurcholish Madjid. Further, they affirmed that Pancasila follows Muslim aspirations and is final.[526]

However, although the number of people in favour of inserting the *tujuh kata* ('seven words') in Article 29 was smaller than those against, and although the proposition was ready for balloting, the majority did not force the decision and opted for solution by deliberation.[527]

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522 As proposed by Komaruddin Hidayat from the Team of Experts and Rosnaniar (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2001, Buku Satu, p. 792.

523 This denotes that for some, the diversity of norms and laws exists in society.

524 See *Iftitah* speech of Rois Am KH. MA. Sahal Mahfudh at the opening of the National Conference of *Nahdlatul Ulama*, Surabaya, 27 July 2006.

525 See also, Akhmad Sahal, *Kiai Sahal dan Realisme Fikih*, *TEMPO Magazine*, edition of 24/2/2014.

526 *Suara Pembaruan*, newspaper, 7 August 2000. See also T.B. Simatupang, *Harapan, Keprihatinan, dan Tekad. Angkatan '45 Merampungkan Tugas Sejarahnya.* Inti Idayu Press, Jakarta, 1985, p. 114. T.B. Simatupang, a prominent Christian figure, former Chief of Staff of the Indonesian Armed Forces, stated that in a Pancasila-based country, religions are the source of the moral, spiritual, and ethical values of state operations.

527 As asserted by, among others, Lukman Hakim Saifuddin (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2000, Buku Lima, pp. 444-445.

PAH I resumed discussions on Article 29 on 29 March 2001 with the Team of Experts. On this topic, the experts proposed maintaining section (1) and deleting the term *kepercayaan* (the belief) from section (2). They argued that the term *kepercayaan* is often misinterpreted and confusing.[528] On that proposal, none of the factions moved from their respective positions as expressed during the second amendment stage (see VI.2.3.9). F-PDIP, for example, appealed to maintain the term *kepercayaan* because of its historical value. F-PDIP reminded the committee not to neglect the millions of people who adhere to some sort of belief that cannot be classified as a certain religion.[529] However, F-KB believed that *kepercayaan* should be understood as beliefs held in religion, not as beliefs that are outside of religion.[530] A F-PG member argued that the debate on *kepercayaan* was not about language ambiguity, but about controversial content. He argued that *kepercayaan* is a splinter group of a religion, which is not equal to and should not be recognized as a religion, but rather as a cultural phenomenon. Accordingly, the government should facilitate a return for these splinter groups to their respective original religions.[531]

Responding to these views, an expert stated that omitting the term *kepercayaan* from Article 29 (2) was not intended to eliminate these groups. The new Article 28E (2) would serve as an umbrella to their existence as well as Articles 28J (1) and (2). The change in Article 29 (2) was solely intended to clarify the formulation.[532] Yet, a F-PDIP member asserted that the original Article 29 should be maintained. The member warned that any change to Article 29 would bear serious and direct consequences to the cohesiveness of the nation and nation-state.[533] However, F-PG, F-PPP, F-PDU, and F-UG argued that the term *kepercayaan* should be removed from the second section of Article 29, so that section (2) becomes "The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to

528 As stated by Azyumardi Azra. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 342.

529 As reminded by I Dewa Gede Palguna (F-PDIP). Ibid., p. 428.

530 As stated by Andi Najmi Fuady (F-KB). Ibid., p. 427.

531 As argued by Amidhan (F-PG). Ibid., pp. 434-435.

532 As conveyed by Nasaruddin Umar. Ibid., p. 443. Article 28E (2) states "Every person shall have the right to be free to adhere his/her faith (*kepercayaan*), and to express his/her views and thoughts, in accordance with his/her conscience." Article 28J (1) states "Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state." Article 28J (2) states "In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society."

533 As asserted by Katin Subiyantoro (F-PDIP). Ibid., p. 731.

his/her religion."[534] Conversely, F-KB proposed that Article 29 (2) should state "The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to the belief (*kepercayaan*) of his/her religion."[535]

An expert then pointed out that Indonesia was not established as a theocratic state. The state's role is to protect and facilitate, rather than regulate individual religious behaviour. The Team of Experts agreed with that formulation of the state's role. Further, it proposed adding a third clause, stating "State operations must not contradict the values, norms, and religious laws."[536]

This issue attracted serious public attention during the second amendment stage.[537] There were communities who supported including the "*tujuh kata*" (the 'seven words') in the Constitution,[538] while others rejected this.[539] As stated by Madjid, to return to the 'seven words' in the Jakarta Charter meant confirm a formalistic and exclusive Islam.[540] Meanwhile, certain regions stated that they would secede from Indonesia if the 'seven words' were included in the Constitution.[541]

This situation was exploited by those who are anti-amendment. They blamed the amendments for reopening the sensitive 'seven words' issue that could divide the nation. Under these circumstances, the pressure strengthened to cease the amendment efforts and reactivate the original 1945 Constitution.

However, although the number of people in favour of inserting the *tujuh kata* ('seven words') in Article 29 was smaller than those against, and

534 As stated by Happy Bone Zulkarnain (F-PG), Zain Bajeber (F-PPP), Asnawi Latief (F-PDU) and Soedijarto (F-UG). Ibid., pp. 738, 742. The original text of Article 29 (2) is "The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion or belief."

535 As stated by Andi Najmi Fuady (F-KB). Ibid., p. 755.

536 As conveyed by Komaruddin Hidayat.Ibid., p. 792.

537 In the society, there are still those who want to put back the "*tujuh kata* ('seven words') – the obligation to implement Islamic law for its adherents", as stated in the Jakarta Charter and written in the draft Article 29 of the Constitution which was discussed at the PPKI meeting on 18 August 1945. As discussed at the beginning of the PPKI meeting, PPKI agreed to replace "*tujuh kata* – the seven words", with "Belief in One and Only God (*Ke-Tuhanan yang Maha Esa*)" (see II.2. above).

538 This included DDI (*Dewan Dakwah Indonesia* - Indonesian Da'wah Council), HMI (*Himpunan Mahasiswa Islam* – The Islamic Student Association), FMI (*Front Mahasiswa Islam* – Islamic Students Front), FPI (*Front Pembela Islam* – Islam Defender Front), PII (*Pelajar Islam Indonesia* - Indonesian Islamic Students), GPII (*Gerakan Pemuda Islam Indonesia* – The Indonesian Islamic Youth Movement), *Hizbuth Tahrir* (Liberation Party) and others.

539 This included Nurcholish Madjid, the Rector of the University of Paramadina, K.H. Hasyim Muzadi, the Chairman of *Nahdlatul Ulama*, Ahmad Syafii Maarif, the Chairman of *Muhammadiyah*, and Gunawan Muhammad, a prominent cultural figure.

540 See above p. 182. See also *Media Indonesia*, newspaper, 7 August 2000.

541 *Suara Pembaruan*, newspaper, 10 August 2010.

although the proposition was ready for balloting, the majority did not force the decision and opted for solution by deliberation.[542]

Until the end of the 2001 annual session, PAH I did not force drawing any conclusions regarding Article 29. Accordingly, in the report to the MPR Working Body meeting on 23 October 2001, PAH I did not include any proposals on Article 29. Thus, Article 29 was not discussed in the subsequent Commission A meetings or in the MPR plenary meeting at the end of the MPR 2001 annual session. Eventually, the MPR postponed Article 29 discussions until the MPR 2002 annual session through MPR Decree No. XI/2001, stipulating that the amendment process will be continued and completed during the 2002 session.

### VII.3.13 Education – the discussion on Article 31

On 27 February 2001, the Team of Experts was formed.[543] Then, from March to July 2001, PAH I discussed the draft amendments with the Groups of Experts, including Chapter XIII on Education.[544] An expert stated that, in defining the goals of national education, we should adhere to the foundation of a national state and a welfare state. It should also be clear the difference between teaching and education. Further, this chapter needs to contain the rights of citizens to obtain education and government's obligation to organize a national education system regulated by law. Furthermore, the implementation of the education system must be based on the principles of plurality, non-discrimination, democracy, and national unity.[545]

In response, a member of PAH I from F-UG underlined that it is the government who is fully responsible for organizing and financing education.[546] Another member from F-UG added that the budget allocation for education should be pegged at 20% of the state budget.[547]

Responding to the opinion, an Expert stated that he agreed with F-UG, that there should be no dichotomy between education and teaching. The two are complementary to each other. The Expert also agreed with F-UG regarding the government's responsibility towards the education budget. The Expert also understood F-UG's opinion on uniting culture and education, but with the understanding that culture is the umbrella for education and the basis for implementing education.[548]

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542 As asserted by, among others, Lukman Hakim Saifuddin (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2000, Buku Lima, pp. 444-445.

543 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 272.

544 See VI.2.2.1.

545 Stated by Dr. Willy Toisuta. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p.p. 315, 343.

546 Stated by Soedijarto (F-UG). Ibid., p. 358.

547 Stated by Sutjipto (F-UG). Ibid., p. 367.

548 Stated by Prof. Dr. Wuryadi of Team of Experts. Ibid. p. 791.

Due to time constraints, PAH I had not had time to discuss this topic further and reported it as it was at the Commission A meeting on 8 November 2001.[549]

However, Commission A also did not have time to discuss further the education draft reported by PAH I.[550]

### VII.3.14 Pancasila as the foundation of the state

This section sets out the debate on whether to include Pancasila in the Constitution, with no agreement being reached during the third amendment stage.

The Team of Experts stated that after in-depth discussions, they supported incorporating Pancasila in the Constitution's articles without detailing its principles, particularly because the term Pancasila is not used in the Preamble. However, they acknowledged that if it would be included in the articles, Pancasila could become an object of alteration.[551]

In response, a F-PBB member reminded the committee that the topic had been debated at length in PAH I (see VI.2.3.10). If Pancasila should not be an object of change, it should remain in the Preamble.[552] However, a member of the Team of Experts reiterated in the PAH I meeting on 24 April 2001 that since the term Pancasila is never mentioned in the Constitution, it must be incorporated in the body of the Constitution.[553] To prevent alterations, the Team of Experts suggested that amending the term Pancasila could be made more difficult by requiring a referendum. However, because the issue involves a complex ideology and philosophy, people who do not understand the term Pancasila might not be in favour of it. Therefore, it is up to PAH I to make the political decision on this issue.[554]

Accordingly, a F-PDU member affirmed that incorporating the state's foundation in a Constitutional article would be a setback, since it would make Pancasila an object for future revision.[555] However, F-UG argued that one should not worry about inserting the foundation of the state in the articles. It would not become an object of change because it is embedded in the unchangeable Preamble.[556] Likewise, F-PDIP confirmed that Pancasila should be included in a Constitutional article with the assertion that the state's foundation cannot be changed.[557]

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549 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 553.
550 Ibid., pp. 615 – 627.
551 As conveyed by Jimly Asshidiqie. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 348.
552 As argued by Hamdan Zoelva (F-PBB). Ibid., p. 360.
553 As stated by Afan Gaffar. Ibid., p. 390.
554 As stated by Jimly Asshidiqie. Ibid., p. 459.
555 As stated by Asnawi Latief (F-PDU). Ibid., p. 476.
556 As argued by Sutjipto (F-UG). Ibid., p. 510.
557 As stated by Soewarno (F-PDIP). Ibid., p. 503.

Subsequently, in the PAH I meeting on 5 July 2001, the factions expressed their respective stances towards the opinion of the Team of Experts. F-PDIP and F-UG maintained that Article 1 (2) of UUD 1945 should contain a stipulation that the foundation of the state is *Pancasila*.[558] Conversely, F-PG, F-PDU, and F-TNI/Polri stated that Pancasila should not be in a Constitutional article, so that it remains a value inherent in the Preamble that cannot be changed.[559]

An expert then stated that F-PDIP's stance on including Pancasila in the articles contradicted its initial stance on maintaining the Preamble. The expert stated that incorporating the principles of Pancasila in the articles would mean revising the Preamble. The expert stated on that, on second thought, the Team of Experts agreed not to include Pancasila in the articles, so that the arrangement of the state's foundation is not subject to the Constitution's amendment rules.[560]

However, F-PDIP was not so easily convinced. One F-PDIP member reiterated that Pancasila as the state's foundation should be incorporated in the Constitution's articles.[561] Another F-PDIP member proposed preventing Pancasila from becoming an object of future change by categorizing it as a non-amendable article.[562] F-TNI/Polri changed its position by proposing a new clause in Chapter I, which states "The foundation of the state that is embodied in the fourth section of the Preamble of UUD 1945 is called Pancasila, the foundation of the state of the Republic of Indonesia."[563] Likewise, F-UG and F-PDKB insisted that the term Pancasila should be incorporated in a Constitutional article.[564]

Hereafter, the PAH I chairman remarked that the debate was neither about determining the state's foundation because all accepted that as inherent in the Constitution's Preamble. It was also not about incorporating the state's foundation in the Constitution's article, but about the desire of those who consider it important that Pancasila be not only ratified by history and the revolution, but also by incorporating it in an article of the Constitution.[565]

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558 As expressed by Katin Subiyantoro (F-PDIP) and Soedijarto (F-UG). Ibid., pp. 723-724, 746. Pancasila includes *Ketuhanan Yang Maha Esa* (Belief in One and only God), *Kemanusiaan Yang Adil dan Beradab* (Just and civilized humanity), *Persatuan Indonesia* (The unity of Indonesia), *Kerakyatan Yang Dipimpin oleh Hikmat Kebijaksanaan, dalam Permusyawaratan Perwakilan* (Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives), and *Keadilan sosial bagi seluruh Rakyat Indonesia* (Social justice for all of the people of Indonesia).

559 As conveyed by Happy Bone Zulkarnain (F-PG), Asnawi Latief (F-PDU) and Affandi (F-TNI/Polri). Ibid., p. 736, 743, 758.

560 As stated by Suwoto Moeljo Soedarmo. Ibid., p. 782.

561 As asserted by Frans Matrutty (F-PDIP). Ibid., p. 807.

562 As proposed by Soewarno (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 96.

563 As conveyed by Affandi (F-TNI/Polri). Ibid., p. 101.

564 As stated by Soedijarto (F-UG). Ibid., p. 115.

565 Ibid., p. 116.

PAH I did not manage to conclude this discussion and no further discussions on this topic took place during the third amendment stage.

## VII.4 The Constitutional Commission

This section sets out the debate regarding establishing a Constitutional Commission, whose suggested roles ranged from assisting the MPR, taking over from the MPR and writing a new Constitution, and reverting to the original 1945 Constitution. Ultimately, Commission A deferred the decision for further discussion to the MPR Working Body.

As discussed previously, after the New Order's collapse, the debate heated up between those who wanted to replace the 1945 Constitution with a new constitution and those who wanted to reform the 1945 Constitution through amendment. The first group was mainly composed of students, university activists, and NGOs. The second group generally consisted of political parties, the military, and police as well as various mass organizations and students.

There was a third group who wanted to maintain the original 1945 Constitution. They consisted of conservative nationalists, certain retired military and police officers, and those who embraced totalitarian ideas or who were enchanted by the myth of the 1945 Constitution. They assumed that the 1945 Constitution was President Soekarno's most important legacy.[566] In their view, revising the 1945 Constitution should be limited only to editorial aspects, while its substance should be maintained (See VI.4.1).

Various NGOs and individuals, proponents of replacing the constitution, demanded that the MPR's ongoing amendment process be suspended.[567] They argued that MPR members could not make a democratic constitution, that they were not earnest and were concerned only with their respective short-term political interests. They noted that the two-year amendment process had not led to any significant changes. Therefore, an independent constitutional expert commission should draft a new constitution and submit it to the MPR for ratification. The MPR could only approve or reject the draft, and if rejected, a referendum should seek the people's opinion.

The third group found the opposite. They assumed that the amendment process had crossed a line. Moreover, F-PPP and F-PBB's proposal to insert *tujuh kata* ('the seven words')[568] in Article 29 convinced them that the amendment process should stop. The constitutional commission should

566 *Tempo Online*, 3 November 1998.

567 See V.2.1.1.

568 The *tujuh kata* ('the seven words') come from the phrase *"dengan kewajiban menjalankan syariat Islam bagi pemeluk-pemeluknya"* (with the obligation to implement Islamic Sharia for its adherents).

undo the agreed-on changes, slow the process, and eventually stop the amendment. Notably, several members of F-PDIP, F-UG, F-KB, and other factions belonged to this group.[569] There were also factions that maneuvered around the issue for practical political purposes. Their support of establishing an independent commission was aimed at gaining sympathy from certain circles of society.

However, establishing a constitutional commission could have completely disrupted the amendment process.

Meanwhile, against the backdrop of the dispute between Gus Dur and several political parties, early on 23 July 2001, President Gus Dur issued a Presidential Decree declaring the dissolution of the MPR, DPR, and the Golkar Party.[570] However, the MPR opposed the decree and continued to convene on 23 July 2001. The MPR declared President Abdurrahman Wahid's Decree invalid. Further, the MPR dismissed President Abdurrahman Wahid and appointed vice-president Megawati Soekarnoputri as the new President.[571]

In her State of the Nation Address on 16 August 2001, President Megawati Soekarnoputri announced that a constitutional commission should be formed to prepare a comprehensive amendment draft to the 1945 Constitution, arranged systematically and based on expertise, to be reviewed and decided on by the MPR's general session. However, then President Megawati changed her position and agreed that the amendment process should continue as before.[572]

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569 Later on, a large number of Assembly members from F-PDIP, F-UG and F-KB, but none from F-TNI/Polri, voted against abolishing of appointed members of the MPR. See, Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 735.

570 The special committee (Panitia Khusus – PAHSUS) of the DPR, on 21 July 2001, reported to the MPR that President Abdurrahman Wahid had violated the Outlines of the State Policy (GBHN) for embezzled welfare funds for employees of the Logistics Affairs Agency, known for the Bulog-gate issue, and funds donated by the Sultan of Brunei. This was a serious report that could lead to the dismissal of the President. Based on the report, the MPR planned to convene on 23 July 2001. It was very likely that the MPR would dismiss President Abdurrahman Wahid. Immediately, early on 23 July 2001, at 01.00 a.m., President Abdurrahman Wahid issued a presidential decree, declaring the dissolution of the MPR, DPR, and the GOLKAR party. But the MPR continued to convene on that same day. On 23 July 2001, MPR dismissed President Abdurrahman Wahid and appointed Vice President Megawati as the new president.

571 See MPR Decree no. I/2001, MPR Decree no. II/2001 and MPR Decree no. III/2001.

572 The State of the Nation Address of President Megawati Soekarnoputri, 16 August 2001. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 9. The state speech was written by her staff who were previously also the staff persons of President Abdurrahman Wahid (Gus Dur). It seems that President Megawati was directed to continue the policies of her predecessor, Gus Dur, who did want to form a constitutional commission. However, after consulting with the chairman of PAH I, President Megawati changed her stance and agreed to continue with the amendments as before. See VII.4.

In relation to these developments, PAH I reported to the MPR Working Body on 29 August 2001 that if the constitutional commission intended to enhance the public's involvement, PAH I was already working on this. PAH I was absorbing public aspirations at the provincial, district and municipal levels and conducting public hearings with experts, universities, and non-governmental organizations, both in Jakarta and in the regions. Furthermore, PAH I explained that it had organized seminars and conducted comparative studies on constitutions with academic associations, either through literature studies or by visiting other countries. No matter how the 1945 Constitution was amended, the process should occur within the Constitution's framework, which asserts that the MPR holds amendment authority, as per Article 37.[573] Still, one member added separately that one should not diametrically oppose a constitutional commission.[574]

Then, in the following weeks, the amendment process continued as before.[575] Meanwhile, the Team of Experts had come to the end of its assignment. During the PAH I meeting on 3 September 2001, F-PDIP proposed establishing a constitutional commission, so that PAH I could focus on finalizing the drafts in the enclosures of MPR Decree No. IX/2000. F-PDIP also suggested that the president propose the commission's candidates to the MPR.[576] Other factions immediately called for the proposal's clarification. A F-PG member assumed that the commission's role would be similar to that of the Team of Experts.[577] Further, F-KB stated that the MPR (not the president) could form a constitutional commission, noting that the amendment should be completed in 2002.[578]

In addition, F-UG disagreed with F-PDIP's stance, which was perceived as deviating from the Constitution. F-UG noted that the spirit of establishing a constitutional commission resembled wanting a new constitution. In short, it did not want the constitutional commission.[579] Another PAH I member asked for clarity, stating that the president can propose an idea but that F-PDIP's proposal interrupted the agreed-upon ongoing working mechanism. PAH I should complete the amendment as scheduled.[580]

Responding to the reactions, F-PDIP affirmed that it maintained the MPR factions' five fundamental agreements. Everything should follow the Constitution, which affirms that the MPR hold amendment authority and

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573 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 9. Reported by Slamet Effendy Yusuf, the vice PAH I chairman.

574 As asserted by Andi Mattalatta (F-PG). Ibid., p. 22.

575 *Kompas Daily*, 30 August 2001.

576 As stated by Hobbes Sinaga (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 24.

577 As stated by Happy Bone Zulkarnaen, Agun Gunandjar Sudarsa and Amidhan (F-PG). Ibid., pp. 25-27.

578 As conveyed by Ali Masykur Musa (F-KB). Ibid., p. 28.

579 As stated by Soedijarto (F-UG). Ibid., pp. 29-30.

580 As urged by Theo Sambuaga and Agun Gunandjar Sudarsa, both from F-PG. Ibid., p. 34.

outsider may only submit input and assist.[581] A PAH I member urged the committee to continue its duty as instructed by MPR Decree No. IX/2000.[582] Likewise, another PAH I member stated that F-PDIP could propose an MPR decree to establish a constitutional commission or an amendment to Article 37 in the subsequent MPR 2001 annual session. However, the ongoing amendment process had to continue, otherwise the MPR 2001 annual session would not finalize the Constitution's amendment.[583]

Previously, the PAH I chairman had already noted the urgency of completing the amendments as scheduled as several laws (e.g., election laws) depended on the amendment's completion.[584]

Another member reminded the committee that PAH I was tasked with conducting the amendment and should prioritize the assignment.[585]

In response, F-PDIP affirmed that any constitutional commission should begin work after the MPR 2001 annual session and should refer to MPR Decree No. IX/2000. Further, it should not disrupt what PAH I had agreed on.[586] Another member reiterated that a constitution is not an academic work that should be perfectly systematic, but rather a product of history and a political work.[587] The debate was sharp. Only F-PDIP agreed to form the commission, while other factions rejected the suggestion.

### VII.4.1 Proposing the Commission while Continuing Amendments

Eventually, the PAH I chairman continued the meeting by discussing the amendment's substance with reference to MPR Decree No. IX/2000's enclosures, proposing that the constitutional commission topic be postponed until the MPR Working Body started to prepare the MPR 2001 annual session.[588] In the meantime, pressure on the MPR to stop the amendment process increased. A well-known human rights defender and activist Todung Mulya Lubis denounced PAH I as deceiving the people and urged them to hand over the process to an independent constitutional commission.[589] After a lengthy discussion, PAH I agreed to a PDIP proposal to report to the MPR Working Body meeting on 2 October 2001 that:

581 As stated by Soewarno (F-PDIP). Ibid., p. 36.
582 As insisted by Andi Mattalatta (F-PG) and Lukman Hakim Saifuddin (F-PPP). Ibid., pp. 48, 50.
583 As proposed by Lukman Hakim Saifuddin (F-PPP) and Soedijarto (F-UG). Ibid., p. 51.
584 Ibid., p. 16.
585 As emphasized by I Ketut Astawa (F-TNI/Polri). Ibid., p. 52.
586 As stated by Hobbes Sinaga (F-PDIP). Ibid., p. 90.
587 As stated by Soedijarto (F-UG). Ibid., p. 85.
588 Ibid., pp. 93-94, 164.
589 As stated by Todung Mulya Lubis.*Merdeka Daily*, 5 September 2001.

1) The proposal to form a constitutional commission is to accelerate the process and maintain the integrity of the changes to the 1945 Constitution.
2) The proposal should be submitted in the MPR Working Body meeting as, if so agreed, an item on the agenda for the MPR 2001 Annual Session.
3) While waiting for the decision of the MPR Working Body on the formation of a constitutional commission, PAH I will proceed preparing the draft of the amendment to the 1945 Constitution.[590]

Surprisingly, F-PPP also submitted a draft MPR decree on forming a constitutional commission,[591] signalling a change in its position.[592] The draft suggested that:

2) The MPR should form a constitutional commission to exercise the authority of the MPR as stipulated in Article 37 of the 1945 Constitution.
3) Members of the MPR Working Body will function as the resource persons in the constitutional commission without voting rights.
4) The constitutional commission functions to change the 1945 Constitution and should report its work to the MPR's leadership on 1 October 2002 at the latest.
5) The Assembly will then ratify or reject the results of the constitutional commission.
6) In case the MPR rejects the draft, people will decide to approve or to reject the draft through a referendum.[593]

In response, F-PDIP asked PAH I to draft an MPR decree on establishing a constitutional commission, stipulating that such a commission assists the MPR Working Body in amending the 1945 Constitution, since the MPR holds amendment and enactment authority.[594] F-PDIP's submitted draft stated that:

590 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 471. Reported by the PAH I chairman.

591 As conveyed by Lukman Hakim Saifuddin (F-PPP). Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kesatu, Jilid 1, Sekretariat Jenderal MPR-RI, Tahun 2001, p. 193. This part is not included in the 2010 revised version of the minutes in the Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010.

592 According to Zain Bajeber, the Vice Chairman of Commission A representing F-PPP, although realizing that the idea could not be accepted by others, F-PPP changed its position as a political move to accommodate the aspiration of the NGOs and to maintain communication with the public. Interview, 17 April 2014.

593 Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kesatu, Jilid 2, Sekretariat Jenderal MPR-RI, Tahun 2001, pp. 123 - 125. Ditto.

594 As stated by Pataniari Siahaan (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 485.

1) The MPR should form a constitutional commission, which is under the MPR Working Body to assist the MPR Working Body in improving the drafts of amendments to the 1945 Constitution.
2) The constitutional commission is accountable to the MPR Working Body.[595]

Just as F-PPP had done, F-KB changed its position and proposed forming a constitutional commission.[596] F-KB regretted that many draft amendments agreed in PAH I were questioned by the same factions represented at PAH I at a later stage. Hence, it worried about the constitutional reform's fate if left entirely to the MPR. Therefore, a constitutional commission had to reform or, if necessary, draft a new constitution. Further, F-KP suggested that 75% of the constitutional commission should comprise of experts, professional organizations, and regional representatives, and 25% should consist of MPR members. Finally, the MPR should decide if the commission's work is final and if so, ratify it.[597]

In response, a F-PG member considered that it was more important that the MPR should recognize the desire to reform the constitution and commit to accomplishing this in 2002. The debate should not switch from substantial issues to the amendment mechanism.[598] F-UG proposed reactivating the Team of Experts and including them in the process until the end of the 2001 Annual Session.[599] Another F-UG member asserted that a constitutional commission is usually established if the constitution does not have a revision or redrafting mechanism. However, the 1945 Constitution has Article 37, which affirms that the MPR holds the authority to conduct changes. Therefore, a constitutional commission has no significance.[600]

The MPR Working Body's chairman offered a middle way. The constitutional commission could be formed if it was subject to the MPR and the amendment would be completed in 2002 at the latest.[601] However, the PAH I chairman asserted that whether there was a commission or committee, they were both subject to the MPR, as stipulated by the 1945 Constitution.

595 See Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kesatu, Jilid 2, Sekretariat Jenderal MPR-RI, Tahun 2001, p. 131. This part is not included in the 2010 revised version of the minutes in the Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010.

596 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 487.

597 As proposed by Yusuf Muhammad (F-KB). Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kesatu, Jilid 2, Sekretariat Jenderal MPR-RI, Tahun 2001, pp. 135-141.

598 As asserted by Slamet Effendy Yusuf (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 488.

599 As proposed by Sutjipto (F-UG). Ibid., p. 489.

600 As conveyed by Soedijarto (F-UG). Ibid., pp. 490, 491.

601 As stated by Amien Rais, the Chairman of the MPR Working Body. Ibid., p. 491.

It was already agreed that the amendment must be finalized in 2002, so that was not an issue.[602]

Subsequently, several members proposed postponing a decision on a constitutional commission.[603] One member reminded the committee that 90% of the amendment had been completed and that only three chapters were left. It was unclear whether a new mechanism would complete the three remaining chapters or reshape what had already been completed.[604] Another member proposed delegating the commission decision to PAH I. To not deviate from the Constitution, changes to Article 37 of the Constitution should be made.[605] In the end, PAH I did not discuss the constitutional commission any further. It did not include it in the working report to the MPR Working Body meeting on 23 October 2001. Instead, it was PAH II which reported its discussions about the constitutional commission.[606]

Subsequently, in Commission A's first meeting on 5 November 2001, during which it discussed its work schedule, members again debated the urgency of establishing a constitutional commission. According to the draft working schedule, that discussion was the last agenda item, but a F-PDIP member urged prioritizing this discussion before continuing the amendment process. Such a commission should not be delayed by the MPR Working Body's work on the draft constitutional amendments.[607]

Other factions disagreed with the proposal and reiterated that Commission A's assignment was to pursue amendments before forming a constitutional commission.[608] However, another member argued it would be a constitutional commission's responsibility to finalize the amendment in the best possible way.[609] Finally, the Commission A chairman noted that prioritising this discussion could disrupt or derail the amendment process. Commission A would work according to the schedule.[610] The topic would be discussed last.

In the subsequent meeting on 7 November 2001, a F-PPP member reminded that F-PPP had submitted a draft MPR decree on forming a constitutional commission. It would have 50 members, with 1 representative

602 Ibid., p. 491.
603 As proposed by Patrialis Akbar (F-Reformasi), I Gde Sudibya (F-PDIP) and Theo Sambuaga (F-PG). Ibid., pp. 491, 492.
604 As stated by A.M. Luthfi (F-Reformasi). Ibid., p. 493.
605 As argued by Yusuf Muhammad (F-KB). Ibid., p. 495.
606 Ibid., pp. 544-561. See also Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kesatu, Jilid 1, Sekretariat Jenderal MPR-RI, Tahun 2001, pp. 269-270. This again shows the mismatches between PAH I and PAH II in the amendment process.
607 As stated by Bambang Pranoto (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 74.
608 As argued by Agun Gunandjar Sudarsa (F-PG), Patrialis Akbar (F-Reformasi) and Hartono Mardjono (F-PDU). See Ibid. pp. 75, 76, 83.
609 As stated by F.X. Soemitro (F-KKI). Ibid.
610 Ibid., pp. 84-85.

per province, proposed by the MPR Working Body and elected by the province's DPR and experts.

A F-PDIP member reiterated that the amendment process needed broad public participation. However, the people's aspirations should be accommodated in a constitutional way, without contradicting Article 37. Therefore, the constitutional commission would assist the MPR Working Body with the amendments, being part of and accountable to the MPR Working Body.[611]

F-KB proposed a constitutional commission of 99 members: 25 MPR members, 20 university experts, 20 interest group members, and 34 provincial members. The commission would be part of and responsible to the MPR. The commission should complete its work before the MPR 2002 annual session and submit its work to the MPR for enactment.[612]

F-PG argued that the commission should be named the National Committee for Amendment of the 1945 Constitution, because the assignment was not to make a new constitution. It should comprise of 55 members: 15 experts, 10 NGO members, and 30 provincial members. Further, Article 37 meant that the MPR could reject the national committee's work.[613]

Another member questioned whether the commission could nullify the previous amendment if the MPR held amendment authority and an amendment had almost been completed.[614] A F-PDIP member added that since the final decision is in the MPR's hands, it should be clear that the commission should be independent and populated by non-partisan experts.[615] F-PDKB suggested that a constitutional commission could be a legal drafting group of 15 experts, drafting and reporting comprehensive changes to the MPR.[616]

However, some factions continued to reject the establishment of a constitution commission altogether. F-PDU reiterated that the MPR held amendment authority, with its Working Committee already having received input from experts and the public and having conducted comparative studies. If the MPR agreed to form a constitutional commission, it would imply that MPR members doubted their own capabilities. Thus, the proposal was misleading.[617] Likewise, F-TNI/Polri asserted that the constitutional commission should be constitutional, with a clear legal foundation. It should not be an extra-constitutional or extra-parliamentary body. It was not easy for political parties to reach a coherent and complete agreement. Hence, the commission should not hamper the process since it could eliminate the MPR Working Body's comprehensive work.[618]

611 As argued by I Dewa Gede Palguna (F-PDIP). Ibid., p. 496.
612 As proposed by Andi Najmi Fuady (F-KB). Ibid., p. 497.
613 As stated by Agun Gunandjar Sudarsa (F-PG). Ibid., p. 500.
614 As questioned by Abdullah Ali (F-Reformasi). Ibid., p. 501.
615 As argued by Dimjati Hartono (F-PDIP). Ibid.
616 As stated by Gregorius Seto Harianto (F-PDKB). Ibid., p. 507.
617 As asserted by Sayuti Rahawarin (F-PDU). Ibid., p. 504.
618 As emphasized by Affandi (F-TNI/Polri). Ibid., p. 505.

### VII.4.2 No Agreement – Delegating to the MPR Working Body

The discussion about the constitutional commission continued until 8 November 2001 without a conclusion. Commission A was still divided into factions who agreed with forming a constitutional commission or a national committee and factions who did not. At the meeting's end, factions agreed to conduct an informal consultation to resolve the differences, but the meeting failed. In the MPR plenary meeting on 8 November 2001, Commission A reported the following, based on the F-PDIP, F-PPP, and F-KB proposals to form a constitutional commission and a F-PG proposal to form a national commission on changes of the 1945 Constitution:

(1) Commission A has not fully agreed about the idea of forming a constitutional commission or state commission, notably about its status and authority, its establishment and membership, the duration of works, and the time limit for the completion of the task of conducting the amendment.
(2) In that regard, Commission A is of the opinion that it should hand over the matter to the MPR Working Body for further deliberation, including to find out the possibilities of establishing commissions to finalize the changes to the 1945 Constitution.

To the above conclusions, F-PPP and F-KB objected that the conclusion was not firm enough, because "the MPR should definitely form a constitutional commission to improve the changes to the 1945 Constitution."[619] At the plenary meeting's end, the MPR's chairman stated that if the constitutional commission was established, it would be subject to, assist, and enlighten the MPR Working Body's constitutional functions.

At this stage, proposals to form a constitutional commission served three different objectives: 1) to assist the MPR in accomplishing the amendments as proposed by most factions; 2) to take over the process from the MPR and make a new constitution as proposed by NGOs; and 3) to stop the process and return to the original 1945 Constitution, as proposed by some members of F-PDIP and F-UG, and endorsed by certain retired military officers and societal groups. Eventually, discussions on this topic were postponed.

619 Ibid., p. 628.

## VII.5 Publicizing the 1st and 2nd amendment stage outcomes

During the visits to regions and in the meetings with State Secretariat officials, PAH I members discovered that the public at large, including the State Secretariat,[620] was unaware that the last amendment had been effective since its ratification on 18 August 2000.[621] Thus, PAH I decided to send 10 teams to the provinces and districts to publicize the amendment's outcomes. However, most of the people they met were more interested in practical matters, such as forestry and irrigation problems, rather than constitutional matters.[622] A member proposed starting with informing DPR and DPRD members. In response, another member pointed out that amendment misinformation regarding the issues discussed, such as regional autonomy, could lead to extreme regional egoism, the emergence of small regional kings or warlords, and ensuing corruption, collusion, and nepotism.[623] However, it is very unfortunate that the MPR did not make programs that could disseminate the Constitutional changes. As the PAH I chairman stated, since there was no longer a Ministry of Information or special agency to publicize the constitution, it was unclear who was responsible for this task.[624] A member proposed arranging specific programmes to disseminate the amendment outcomes through mass-media, special discussions with the political elite, real-time media coverage, and publishing decisions in the state gazette, in addition to the regional socialization programmes.[625]

## VII.6 Synchronization of PAH I and PAH II in the MPR and between the amendments and the law-making process in the DPR

Since PAH I and PAH II's work often overlapped and sometimes contradicted (see VII.3.5), a PAH I member stressed the importance of PAH I and PAH II coordination. Both PAH I and PAH II had expert groups, with some overlaps. Nonetheless, PAH I and PAH II came to different conclusions following expert recommendations on certain issues, which complicated the amendment process.[626]

620 State Secretariat (Sekretariat Negara) of the Republic of Indonesia is a government ministry responsible for providing technical, administrative, and analytical support to the President and Vice President in the exercise of their state powers.

621 As disclosed by Slamet Effendy Yusuf (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 93.

622 As reported by among others, Soedijarto (F-UG) and Zainal Arifin (F-PDIP). Ibid., p. 133.

623 As reminded by Sutjipno (F-PDIP). Ibid., p. 152.

624 As stated by the PAH I chairman. Ibid., p. 180. BP-7 was a state agency of the previous regime which was tasked with publicizing the state ideology *Pancasila* and UUD 1945 to the government officials and the public in general.

625 As proposed by Baharuddin Aritonang (F-PG). Ibid., p. 181. The proposals were agreed and carried out.

626 As stated among others by Soewarno (F-PDIP). Ibid., p. 263.

Another member highlighted the importance of synchronizing the MPR's amendment and the law-making process. The new law on local government (Law No. 22/1999), enacted before amending the Constitution, was not compatible with the amended Constitutional article on local government (Article 18), completed during the second amendment in 2000. Further, the DPR was to reform various political laws regarding the 2004 elections, while the related Constitutional amendment changes had not yet been completed.[627] In that regard, another member contended that since 500 of the 695 MPR members were also DPR members, synchronization between the two institutions should not be a problem. Regarding political laws, the amendment should be completed in 2002, with enough time for adjustments before the 2004 elections.[628] However, there were new MPR Decrees that were immediately enforced, which also required legislation for their implementation, leading to further complications.[629]

PAH I and PAH II eventually agreed to synchronize their respective terms of reference before their implementation.[630]

## VII.7 The outcomes

### VII.7.1 Significant outcomes

Eventually, during the MPR 2001 annual session's plenary meetings, the MPR significantly, democratically, and fundamentally changed the 1945 Constitution by adopting the third amendment. The MPR's supremacy ended, replaced by the Constitution's supremacy. The factions agreed that sovereignty, in the people's hands, would be implemented according to the Constitution. Further, the MPR agreed that Indonesia is a state based on the rule of law. The authority of the once omnipotent MPR became limited to amending and enacting the Constitution, inaugurating the elected president and vice president, and dismissing the president or vice president under the Constitution's stipulations. The amendment also stipulated that the president and the vice president should be elected as a pair directly by the people.

A new Regional Representative Council (DPD – *Dewan Perwakilan Daerah*) was established. Alongside the DPR, this created a *sui generis* (unique) representative system of the unitary state of Indonesia and implemented the devolution and autonomy principles to ensure equitable development in all regions.

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627 As stated by Valina Singka Subekti (F-UG). Ibid., p. 275.

628 As conveyed by Zain Bajeber (F-PPP). Ibid., p. 277.

629 Ibid., p. 278.

630 In a coordination meeting on 20 February 2001 between the leaderships of the MPR Working Body, PAH I, PAH II and Special PAH, it was decided that activities related to legislative review were the task of PAH I. See Ibid., p. 271.

The amendment also confirmed that a general election commission should conduct general, free, confidential, honest, fair, direct, and periodic elections of the DPR, Regional Representative Council, and president and vice president. The commission would be national, permanent, and independent. Moreover, the MPR revoked the requirement that a president/vice president be a native Indonesian (*orang Indonesia asli*), this being incompatible with the concept of Indonesian nationhood and the human rights defined in the Constitution. The MPR replaced this requirement with a stipulation that he or she should be Indonesian from birth and shall never have acquired another citizenship by his or her will. Furthermore, the MPR determined that judicial power should be independent, with a Supreme Court as the cassation court, organizing the judicial bodies beneath it and conducting judicial review of legislation below the law. The amendment also established a Constitutional Court that could undertake constitutional review, and a Judicial Commission to maintain and ensure the honour, dignity, and behaviour of judges.

Deliberations on several topics were either cancelled or postponed. These topics included the MPR's status in the political system, MPR membership, the existence of the Supreme Advisory Board (DPA – *Dewan Pertimbangan Agung*), amendments to articles on culture and the economy, and the establishment of a constitutional commission. Factions agreed to carry over the unfinished topics and to resolve them in the subsequent MPR 2002 annual session. Subsequently, the MPR updated Decree No. IX/2000 with MPR Decree No. XI/2001[631], which instructs the MPR Working Body to finalize the amendment by using the unfinished materials in the enclosures of MPR Decree No. IX/2000. From the beginning of the amendment process in October 1999, the draft changes continued to expand until they reached their final form in the MPR's plenary session.

Eventually, the third amendment was ratified by the MPR plenary meeting on 9 November 2001.[632]

631 See Attachment VII.6. Enclosures of MPR Decree No. XI/2001, 9 November 2001.

632 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 679.

## VII.7.2 The third amendment

| *Article* | *Original (After the 1st and 2nd Amendment)* | *Third Amendment* |
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| *CHAPTER I* | | |
| | (1) The State of Indonesia is a unitary state in the form of a republic.<br>(2) Sovereignty is in the hands of the people and is exercised in full by the People Consultative Assembly. | (1) (Remained).<br>(2) Sovereignty shall be vested in the hands of the people and be executed according to the Constitution.<br>(3) The state of Indonesia is a state based on law. |
| 3 | The People Consultative Assembly shall determine the constitution and the guidelines of the policy of the State. | (1) The People Consultative Assembly has the authority to amend and to stipulate the Constitution.<br>(2) The People Consultative Assembly inaugurates the President and/or the Vice President.<br>(3) The People Consultative Assembly can only discharge the President and/or the Vice President during his/her term of office according to the Constitution. |
| 6 | (1) The President shall be a native Indonesian.<br>(2) The President and the Vice-President shall be elected by the People Consultative Assembly by a majority vote. | (1) The Candidate President or the Candidate Vice President shall be respectively an Indonesian citizen as of his/her birth and shall have never accepted another citizenship due to his/her own accord, shall have never committed an act of treason against the state, and shall be mentally and physically capable to execute the duties and obligations as President and Vice President.<br>(2) The requirements to become President or Vice-President shall be further regulated by laws. |
| 6A | (none) | (1) The President and the Vice-President shall be elected in one pair directly by the people.<br>(2) The candidate President and Vice-President shall be proposed by political parties or combination of political parties' participants to a general election prior to the execution of such general election. |

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| | | (3) The candidate President and Vice President pairs acquiring votes more than fifty percent of the ballots cast at a general election with a minimum of at least twenty percent of the votes in a minimum more than one half of the provinces scattered in more than one half of the total of provinces in Indonesia, shall be inaugurated to become the President and the Vice President.<br>(5) The procedure for the execution of the election of the President and the Vice President shall be further regu-lated by laws. |
| 7A | (none) | The President and/or the Vice President can be discharged during his/her term of office by the People's Consultative Assembly at the proposal of the People's Representative Council, either if proven to have committed a violation of law in the form of treason against the state, corruption, bribery, other felonies, or disgraceful acts or if proven that he/she no longer qualifies as President and/or Vice-President. |
| 7B | (none) | (1) A proposal for the discharge of a President and/or a Vice President may be submitted by the People's Representative Council to the People's Consultative Assembly only by first submitting a request to the Constitutional Court to examine, to adjudicate, and to judge on the petition of the People's Representative Council that the President and/or the Vice President has committed a violation of law by an act of treason against the state, corruption, bribery, or other felonies, or disgraceful acts, and/or the petition that the President and/or the Vice President no longer meets the qualifications as President and/or Vice President. |

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| | | (2) The petition of the People's Representative Council that the President and/or the Vice President has committed the said violation of law or has no longer met the qualifications as President and/or Vice President shall be in the exe-cution of the supervisory function of the People's Representative Council.<br>(3) The submission of the petition of the People's Consultative Assembly to the Constitutional Court can only be conducted by the support of at least 2/3 of members of the sum of the People's Consultative Assembly present at a plenary session attended by at least 2/3 of the sum of members of the People's Representative Council.<br>(4) The Constitutional Court shall examine, adjudicate, and judge on the said petition of the People's Representative Council ninety days at the longest as of the said petition of the People's Representative Council is received by the Cons-titutional Court.<br>(5) If the Constitutional Court judges that the President and/or the Vice President is proven to have com-mitted a violation of law in the form of treason against the state, cor-ruption, bribery, or other felonies, or disgraceful acts; and/or is proven to have committed that the President and/or the Vice President no longer meets the qualifications as President and/or Vice President, the People's Representative Council shall convene a plenary session to for-ward the proposal to dismiss the President and/or the Vice President to the People's Consultative Assem-bly.<br>(6) The People's Consultative Assembly shall convene a session to resolve on the said proposal of the People's Representative Council at thirty days at the latest as of the People's Consultative Assembly has received the said proposal. |

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| | | (7) The resolution of the People's Consultative Assembly on the proposal to dismiss the President and/or the Vice President shall be drawn up in a plenary meeting of the People's Consultative Assembly attended by at least ¾ of the sum of the members and approved by at least 2/3 of the sum of the members present, subsequent to the Presi-dent and/or the Vice President is given the opportunity to convey an explanation in a plenary meeting of the People's Consultative Assembly. |
| 7C | (none) | The President cannot freeze and/or dissolve the People's Represent-ative Council. |
| 8 | If the President passes away, resigns or is unable to perform his duties during his term of office, he shall be replaced by the Vice-President until the expiry of that term of office | (1) If the President passes away, resigns, is discharged, or is not able to conduct his/her obligations during his/her term of office, he/she shall be replaced by the Vice President up to the expiry of his/her term of office.<br>(2) In the event of vacancy of the Vice President, within a period of sixty days at the latest, the People's Consultative Assembly shall con-vene a session to elect a Vice President from the two candidates proposed by the President. |
| 11 | The President, with the agreement of the DPR, may declare war, make peace and treaties with other countries. | (1) (Remain)<br>(2) The President when concluding other international treaties that give rise to extensive and fundamental consequences to the life of the people related to the financial burden of the state, and/or compelling amendment or enactment of laws shall be with the approval of the People's Representative Council.<br>(3) Further provisions regarding international treaties shall be regulated by law. |
| *CHAPTER V* | *CHAPTER V*<br>*STATE MINISTERS* | *CHAPTER V*<br>*STATE MINISTERS* |
| 17 | (none) | (4) The formation, conversion, and dissolution ministries of state shall be regulated by laws. |

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| *CHAPTER VIIA* | *(none)* | *CHAPTER VIIA*<br>*THE REGIONAL REPRESENTATIVE COUNCIL*<br>*(DEWAN PERWAKILAN DAERAH)* |
| 22C | (none) | (1) The members of the Regional Representative Council are elected from every province through gene-ral election.<br>(2) The sum of the members of the Regional Representative Council from every province shall be the same and the sum of the Regional Representative Council shall not exceed one-third of the sum of the members of the People's Repre-sentative Council.<br>(3) The Regional Representative Council shall convene at least once a year.<br>(4) The structure and position of the Regional Representative Council shall be regulated by laws. |
| 22D | (none) | (1) The Regional Representative Council may submit bills to the People's Representative Council related to regional autonomy, relations between the central and the regional governments, formation and expansion as well as merger of regions, management of natural resources and other economic resources, as well as those related to financial balance between the central and the regional governments.<br>(2) The Regional Representative Coun-cil participates in the discussion on bills related to regional autonomy, relations between the central and the regional governments, format-ion, expansion, and merger of regions; management of natural resources and other economic resources, as well as financial balance between the central and the regional governments; and rendering consideration to the People's Representative Council on bills regarding the state budget of income and expenditure and bills related to taxation, education, and religion. |

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| | | (3) The Regional Representative Council may conduct supervision over the execution of laws regarding regional autonomy, formation, expansion and merger of regions, relations between the central and the regional governments, manage-ment of natural resources and other economic resources, execution of the state budget of income and expenditure, taxation, education, and religion as well as to convey the result of its supervision as such to the People's Representative Council as consideration materials for follow-up.<br>(4) A member of the Regional Repre-sentative Council can be discharged from his/her office, the conditions and procedures of which shall be regulated by laws. |
| *CHAPTER VIIB* | (none) | *CHAPTER VIIB*<br>*GENERAL ELECTIONS* |
| 22E | (none) | (1) General elections shall be executed in a direct, public, free, confidential, honest, and just manner once every five years.<br>(2) General elections are conducted to elect the members of the People's Representative Council, the Region-al Representative Council, the Presi-dent and the Vice President, and the Regional People's Representative Council.<br>(3) Participants to the general elections to elect the members of the People's Representative Council and the members of the Regional People's Representative Council shall be political parties.<br>(4) Participants to the general elections to elect the members of The Regio-nal Representative Council shall be individuals.<br>(5) General elections are conducted by a commission of general elections having a national, permanent, and autonomous character.<br>(6) Further provisions regarding gene-ral elections shall be regulated by laws. |

| | *CHAPTER VIII*<br>*FINANCIAL MATTERS* | *CHAPTER VIII*<br>*FINCANCIAL MATTERS* |
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| 23 | (1) The revenues and expenditures budget shall be stipulated every year by law. If the DPR does not approve to the budget proposed by the Government, the Government shall apply the budget of the previous year.<br>(2) Types and values of the currency shall be prescribed by law.<br>(3) Further matters regarding State finance shall be regulated by law.<br>(4) In order to audit the accountability for state Finances, the State Audit Board shall be established, the regulations of which shall be prescribed by law. The result of such audit shall be notified to the People's Representative Council | (1) The state budget of income and expenditure as a form the management of state finances shall be stipulated every year by a law and shall be executed transparently and responsibly for the optimal welfare of the people.<br>(2) The bill on the State Budget shall be submitted by the President for joint consideration to the People's Representative Council, whose consideration shall consider the opinions of The Regional Representative Council.<br>(3) In the event that the People's Representative Council fails to approve the proposed bill on the State Budget submitted by the President, the Government shall implement the State Budget of the preceding year. |
| 23A | (none) | Taxes and other levies of compelling character for purposes of the state shall be regulated by laws. |
| 23B | (none) | The denomination and value of currency shall be stipulated by laws. |
| 23C | (none) | Other matters regarding state finances shall be regulated by laws. |
| *CHAPTER VIIIA* | (none) | *CHAPTER VIIIA*<br>*THE FINANCIAL AUDIT BOARD*<br>(*BADAN PEMERIKSA KEUANGAN*) |
| 23E | (none) | (1) In order to examine the management and responsibility regarding state finance, a free and autonomous Financial Audit Board shall be established.<br>(2) The result of examination of the state finance shall be submitted to the People's Representative Council, the Regional Representative Council, and the Regional People's Repre-sentative Council in accordance with their authority.<br>(3) The result of examination shall be followed up by the representative institution and/or board in accordance with the laws. |

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| 23F | (none) | (1) The members of the Financial Audit Board shall be chosen by the People's Representative Council, by having regard to the consideration of The Regional Representative Council and formalized by the President.<br>(2) The leadership of the Financial Audit Board shall be elected from and by its members. |
| 23G | (none) | (1) The Audit Board shall be domiciled in the capital city of the state and shall have representation in every province.<br>(2) Further provisions regarding the Financial Audit Board shall be regulated by laws. |
| *CHAPTER IX* | *CHAPTER IX*<br>*JUDICIAL POWER* | *CHAPTER IX*<br>*JUDICIAL POWER* |
| 24 | (1) The judicial authorities shall be exercised by a Supreme Court and other judiciary bodies in accordance with the law.<br>(2) The structure and authorities of those judiciary bodies shall be regulated by law. | (1) The judicial power shall be an independent power in order to perform the judiciary to enforce law and justice.<br>(2) The judicial power shall be conducted by a Supreme Court and the subordinated judicial bodies in the realm of general judiciary, the realm of religious judiciary, the realm of military judiciary, the realm of state administrative judiciary, and by a Constitutional Court. |
| 24A | (none) | (1) The Supreme Court shall have the authority to adjudicate at the level of cassation, to review statutory rules and regulations below the laws against the laws, and shall have other authorities granted by the laws.<br>(2) A Supreme Court justice shall have integrity and shall be of impeccable personality, just, professional, and be experienced in the field of law.<br>(3) A candidate supreme court justice shall be proposed by the Judicial Commission to the People's Representative Council in order to acquire approval and furthermore to be designated as supreme court justice by the President. |

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| | | (4) The chief justice and the deputy chief justice of the Supreme Court shall be elected from and by the Supreme Court justices.<br>(5) The structure, position, membership, and procedural law of the Supreme Court and their subor-dinated judicial bodies shall be regulated by laws. |
| 24B | (none) | (1) The Judicial Commission is auto-nomous and has the authority to propose the appointment of Supre-me Court justices and shall have other authorities for the sake of safeguarding and upholding the honour, dignity, and behaviour of judges.<br>(2) A member of the Judicial Commission shall have the knowledge and experience in the field of law and shall have integrity with an impeccable personality.<br>(3) A member of the Judicial Com-mission is appointed and discharged by the President with the approval of the People's Representative Council.<br>(4) The structure, position and membership of the Judicial Commission shall be regulated by laws. |
| 24C | (none) | (1) The Constitutional Court has authority to adjudicate at the first and final instance, the judgement of which is final, to review laws against the Constitution, to judge on authority disputes of state insti-tutions whose authorities are granted by the Constitution, to judge on the dissolution of a political party, and to judge on disputes regarding the result of a general election.<br>(2) The Constitutional Court shall ren-der a judgement on the petition of the People's Representative Council regarding an alleged violation by the President and/or the Vice President according to the Constitution. |

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| | | (3) The Constitutional Court shall have nine members of constitutional court justices to be designated by the President, respectively three people to be promoted by the Supreme Court, three people by the People's Representative Council, and three people by the President.<br>(4) The Chief Justice and the Deputy Chief Justice of the Constitutional Court shall be elected from and by the constitutional court justices.<br>(5) A constitutional court justice shall have integrity and impeccable personality, be just, be a states-man/stateswoman mastering the Constitution and constitutionalism, and does not concurrently hold a public office.<br>(6) The appointment and discharge of a constitutional court justice, the procedural law as well as other provisions regarding the Constitutional Court shall be regulated by laws. |

### VII.7.3 Enclosures of MPR Decree No. XI/2001

At the end of the 2001 annual session, the MPR issued MPR Decree No. XI/2001 as a provision to finalize the amendments to the 1945 Constitution. A draft amendment that was not completed during the third amendment was attached to the Decree.[633]

## VII.8 Analysis and comments

### VII.8.1 The process

This section summarises the third amendment stage's process and compares it to the prior stages. It describes increased public engagement, an increased consensus-oriented approach, ongoing criticisms of delays and insufficient outcomes, an overarching debate on whether the process should be diverted or reversed through a constitutional commission, successful decentralization of regional involvement, and postponement of discussing Islamic sharia. Overall, it shows how PAH I solicited increased external input while finding internal compromises to move forward.

633 See Attachment VII.6.

Unlike the second phase, the third stage's amendment process began with a formal agreement from all MPR factions in the form of MPR Decree No. IX/2000, to continue and accomplish the Constitutional amendment during the MPR 2002 annual session. Moreover, despite the discernible differences between factions' stances towards various issues, the Decree's Enclosure reveals that all factions agreed the amended Constitution should be a democratic constitution based on the rule of law.[634] Similarly, the previous Constitutional changes from the MPR 1999 and 2000 annual sessions show that the amendments increasingly provided the Constitution with *negara hukum* characteristics (a state based on the rule of law).[635] By 2001, almost all Constitutional amendment topics had been discussed, although many were not (yet) resolved.

Publicizing the first and the second amendment outcomes was also a concern. Publicity efforts had been kept to a minimum, so the public's responses to constitutional issues were minimal as well. For that reason, PAH I tried to expand public participation, conducting more public hearings, seminars, and comparative studies. It set up a Team of Experts to assist and continued to employ a deliberative and consensus approach. To obtain more information about the Constitution and its problems, PAH I also sent teams abroad to conduct comparative studies and received guests from abroad (see VI.2.2).

Ultimately, PAH I's managed to attract the public's attention on and participation in the amendment process, with MPR discussion topics increasingly reflecting those discussed in public. Thus, various latent and hidden political aspirations came to the fore.

The third stage discussions also showed that factions did not merely accept or reject the ideas in question, but instead discussed proposals and often attempted to find consensus aimed at building compromises. It appeared that the MPR's code of conduct, which does not allow conclusions by voting at this stage, alongside the desire for constitutional reform urged the factions to seek compromises.[636]

Regarding the process, the PAH I chairman reminded the committee that the 1945 Constitution is a respected and mythical constitution, with the amendment process being as important as the actual outcome.[637]

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634 See MPR Decree No. IX/2000 on Assignment of the MPR Working Body to prepare the draft of the changes to the 1945 Constitution.

635 These changes included the limitation of presidential tenure to two consecutive terms, and the adherence to the fundamental rights of the people and the democratic law-making process. See the second amendment to the 1945 Constitution.

636 MPR Decree No. I/1999 on the Code of Conduct and Standing Procedure of the MPR.

637 As stated by the PAH I chairman. See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 295-297.

However, the process was perceived by many as piecemeal and too slow. Groups of student activists, scholars, and NGOs were not satisfied with the MPR's work. They blamed the MPR for achieving too little, working too slowly and without a clear direction, and allowing the process to become subject to short-term political interests. They argued that the process should be restarted, with a comprehensive draft being prepared and completed in one go, instead of through amendment stages.[638] Many campaigned actively, demanding that the MPR halt the process and hand it over to an independent constitutional expert commission.[639]

In January 2001, President Abdurrahman Wahid proposed establishing such an independent and expertise-based state commission to prepare a complete amendment draft of the 1945 Constitution.[640] This proposal was ignored due to political turmoil, which eventually led to his dismissal on 23 July 2001. However, his successor, President Megawati Soekarnoputri, adopted the idea in her State of the Nation Address on 16 August 2001. Law experts from the Team of Experts also strongly recommended forming an independent constitutional commission.[641]

There were also political elements, including political groupings in F-PDIP, F-UG, and F-KB, who argued that the discussion outcomes and direction of further changes did not meet their expectations. For them, attempts to revoke the MPR's power and the MPR's appointed delegates, and to insert the *tujuh kata* ('the seven words') are betrayals of the struggle of the country's founding fathers. These groups regarded the constitutional commission as a potential instrument to reconsider the results and the amendment process. Some of them even aimed at using it to stop and eventually reverse the process.

There were elements in F-PDIP who argued that proposed amendments had deviated from the Constitution's original foundations, who insisted first discussing the establishment of a constitutional commission before resuming the amendment process. The MPR should not be trapped by a draft amendment that PAH I had prepared.[642]

Thus, various political interests converged when debating a constitutional commission. Some hoped to use the commission to fully renew the 1945 Constitution. Others wanted to stop the process and revive the original

638 As, among others, stated by Ismail Suny. See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 780.

639 *Merdeka Daily*, 5 September 2001.

640 See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 185. As reported by Andi Mattalatta (F-PG).

641 As stated by Jimly Asshiddiqie. See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 353.

642 As argued by, among others Bambang Pranoto (F-PDIP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 74.

1945 Constitution. Still others expected that the commission would help the MPR in improving the Constitutional amendments. Since a commission seemed to have popular support, certain political parties kept manoeuvring around the idea.[643] The constitutional commission thus became a potential disruption to the amendment process. Even prioritizing the discussion on its establishment impacted the process.[644]

Despite such pressure, PAH I managed to push back the issue to the end of its agenda, so as to not further hamper the amendment process. Eventually, PAH I factions contended that Article 3 resolutely affirms that the MPR is the constitutional body for changing the Constitution, while Article 37 provides the reform procedure.[645] Besides, factions argued that after three years of work, with almost every topic having been discussed, it was not worth starting all over again.[646] Thus, at the end of the third amendment process, PAH I did not report on this topic to the MPR Working Body. Subsequently, the MPR postponed further discussions on this topic.[647]

However, meanwhile, PAH II also discussed establishing a constitutional commission and reported on this matter to the MPR Working Body,[648] which once again showed a lack of synchronization between PAH I and PAH II. Both committees had formed a team of experts, with certain experts overlapping. Nonetheless, PAH I rejected certain expert ideas that PAH II accepted.[649] Eventually, PAH I and PAH II agreed to synchronize their respective terms of references, including the proceedings, prior to their implementation.[650]

The amendment process was not free from short-term or strategic interests of the parties involved. For instance, although previously all factions in PAH I had agreed that the MPR is no longer the highest political institution,

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643 As revealed by Zain Bajeber in an interview on 14 April 2014. Bajeber argued that F-PPP supported the idea because it wanted to bridge the concern of certain NGOs and other groups in society and the process in the MPR, although F-PPP was aware that the then political constellation in the MPR was against the idea.

644 See e.g., Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 74.

645 Articles 3 and 7 of the original 1945 Constitution.

646 As stated by, among others A.M. Luthfie (F-Reformasi). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 493.

647 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 628.

648 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 544-561. See also Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kesatu, Jilid 1, Sekretariat Jenderal MPR-RI, Tahun 2001, pp. 269-270. This again showed the mismatches between PAH I and PAH II regarding the amendment process.

649 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 263.

650 Ibid., p. 280.

F-Reformasi still attempted to maintain that this was the case.[651] Likewise, elements in F-UG and F-TNI/Polri assumed that their existence in the MPR would only be meaningful if the MPR remained the supreme political body that determined the Broad Outlines of State Policy.[652]

These developments also demonstrate the relationship between the MPR amendment process and society's political dynamics, which contributed to the amendment's acceptance. The achieved changes that underwent an actual political process faced less resentment and more opportunity to become instrumental legislations and policies. The amendment process that was open and involved the community is expected to have built a link between the dynamics of the community and the future process of making laws and regulations that refer to the Constitution. Thus, the process formed a symbiotic relationship between the Constitution's text and how it would be practiced in the future.[653]

On the other hand, since the amendment process was constitutional and peaceful, many existing political terms remained the same. This made the difference between the original and post-reform institutions, such as the MPR, not immediately understandable.[654]

As mentioned before, discussion on improving the relationship between the central government and regions, and the insertion of the "*tujuh kata*" into Article 29, show that the amendment process corresponded with society's latent and hidden aspirations. On the first issue, PAH I managed to emphasize the matter's substance and subsequently reached a resolution through decentralization, regional autonomy, and forming The Regional Representative Council. It managed to resolve a debate on concepts such as strong bicameralism or federalism, which would have brought broader political consequences.

Unlike in the previous stage, PAH I did not extensively discuss Article 29 during the third amendment. Therefore, it did not report these discussions, stating that this would be revisited in the MPR 2002 session. Although the proponents of the *tujuh kata* ('the seven words') were in the MPR's minority, factions did not push for an immediate solution through voting. This was to prevent the impression that the majority had oppressed

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651 The strategic position of Amien Rais, the Chairman of the National Mandate Party or PAN (Partai Amanat Nasional), a member of F-Reformasi, as the People's Consultative Assembly Speaker seemed, for some time, to form the stance of F-Reformasi to maintain the position of the MPR as the highest state institution which holds people's sovereignty in full, as argued by Imam Addaruqutni (F-Reformasi), see Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 87, 95, 130. F-Reformasi comprised of members of the MPR from the National Mandate Party (Partai Amanat Nasional – PAN) and the Justice Party (Partai Keadilan – PK).

652 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 149, 222.

653 Edward Schneier, *op.cit.*, p. 2.

654 Many still perceive the MPR as the highest state institution with unlimited power.

or humiliated 'the seven words' supporters, which could have been interpreted as tyranny to those who struggle to establish Islam. This impression can foster radicalization in society. Thus, this matter was brought to the next annual MPR session. The discussions show that it was important to consciously prevent overheated and emotional clashes, seeking and maintaining a peaceful situation so that the participants could express their opinions, pursuing mutual understanding. Likewise, it was useful to refrain from fully deciding a controversial topic. Rather, PAH I postponed such topics while looking for ones that were easier to agree on.[655]

Ultimately, this inclusive approach and the prioritization of open discussions enabled members to overcome impasses while maintaining togetherness in completing the amendment process. These were the pillars in this amendment process, avoiding an "all-or-nothing" approach. In this respect, consistency, perseverance, patience, and mutual respect were the defining factors.

### VII.8.2 The substance

The MPR's plenary meeting on 9 November 2001 passed new amendments to the Constitution. Most fundamental concepts associated with the rule of law were agreed during this stage,[656] thereby fundamentally changing the 1945 Constitution.

Along with the amendments agreed during previous stages,[657] the changes signalled a further move toward constitutionalism, where the constitution constitutes government, defines its institutions and constraints, and restricts the scope of its powers.[658]

In total, during the third stage, 68 sections in 23 articles were amended or added. This included the addition of 3 new chapters, namely Chapter VIIA on The Regional Representative Council or DPD (*Dewan Perwakilan Daerah*), Chapter VIIB on General Elections (*Pemilihan Umum*), and Chapter VIIIA on the Financial Audit Board (*Badan Pemeriksa Keuangan*).[659]

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655 The similar approach was also used for other issues such as the completion of Article 31 on education.

656 These included concepts such as the Constitution's supremacy, an independent judiciary power, and democratic and periodic circulation of powers.

657 The previously agreed on amendments included the limitation of the presidential term, the adherence to human rights, the separation of powers, and the democratic law-making process.

658 See Edward Schneier, *op. cit.*, p. 2.

659 The second amendment altered or added 59 paragraphs in 25 articles. Two new chapters, namely Chapter IXA on State Territory, Chapter XA on Human Rights were added.

Amending Article 1(2) revoked the MPR's supremacy, replacing it with the Constitution's supremacy. Article 1(2) originally read, "*Kedaulatan adalah di tangan rakyat, dan dilakukan sepenuhnya oleh Majelis Permusyawaratan Rakyat*" (The sovereignty shall be vested in the people's hands and be exercised by the MPR in full). The amendment read, "*Kedaulatan berada di tangan rakyat dan dilaksanakan menurut Undang-Undang Dasar*" (The sovereignty shall be vested in the hands of the people and be executed according to the Constitution).[660]

This change affirmed that people's sovereignty and the people's elected representatives must respect certain substantive limitations on their authority. In other words, the stipulation asserts the subjugation of state power to the Constitution.[661] Thus, the amended Constitution adopts a democracy that complies with the provisions of the Constitution, resulting in a constitutional democracy that has similarities as well as differences with a majority democracy. Similar to a majoritarian democracy, decisions are made by elected representatives of the people, either by majority vote or by acclamation. But in a constitutional democracy, the decision must be in accordance with the provisions of the Constitution, including the country's fundamentals, such as the state's basis and form. To this end, the amended 1945 Constitution establishes a Constitutional Court which is equipped with the authority to conduct constitutional reviews of laws. During previous stages, factions started to shift from supporting the MPR's supremacy to supporting the Constitution's supremacy. Some argued that the MPR's hold on people's sovereignty in full should be revised and limited to accommodate certain democratic ideas, such as the separation of powers, checks and balances, and a direct presidential election.[662] At the same time, this group wanted to maintain the MPR as a permanent body.[663] Another side argued that if the presidential system would be maintained, the proposal to grant authority to the MPR to determine the Broad Outlines of State Policy and to evaluate the accountability of the president at the end of his/her tenure was discordant and should be removed.[664]

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660 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 558.

661 See Walter F. Murphy, *Constitutional Democracy, Creating and Maintaining a Just Political Order,* John Hopkins University Press, Baltimore, 2007, p. 10. It is noteworthy that ultimately PAH I came to this conclusion and gave up the supreme power of the MPR voluntarily, while PAH II still worked on the assumption that the MPR was the highest state institution with unlimited power.

662 As recommended by Jimly Asshiddiqie of the Team of Experts. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 401.

663 Among others, Katin Subiyantoro (F-PDIP) and Affandi (F-TNI/Polri) stated that the MPR should be retained, whereas its authorities and functions should be adjusted. See Ibid, p. 724.

664 As argued by Soewoto Mulyo Soedarmo of the Team of Experts. See Ibid., p. 783.

Gradually, factions started to change their positions.[665] Eventually, factions accepted F-PDIP's formulation from the previous stage:[666] "Sovereignty shall be vested in the hands of the people and be executed according to the Constitution."[667] The conclusion affirms that the 1945 Constitution is the supreme law of the land and that all subordinate legislation falls under the Constitution.

With the Constitution having been asserted as the state's highest law, the factions deliberated how to guarantee the law's constitutionality and the legislation's hierarchy.[668] One of the issues involved was MPR Decree No. III/2000, which stipulates that the MPR holds the authority to conduct constitutional review.[669] Thus, while PAH I was discussing how to build a constitutional review mechanism People's Representative Council, the MPR Working Body allocated constitutional review of the existing laws to PAH I.[670]

This was justified by certain members who argued that constitutional review does not reflect the 1945 Constitution. The legislative body reflects people's sovereignty, which holds supremacy over other powers, so it should not be subject to a judicial decision. In that regard, the MPR should conduct judicial review as the holder of people's sovereignty.[671] However, another member argued that judicial review needs to be established by a Constitutional Court, similar to the Supreme Court in the United States of America or constitutional courts in European civil law countries.[672]

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665 Frans Matrutty (F-PDIP) asserted that even though the MPR is the highest institution, the supremacy of the MPR should be subject to the supremacy of the Constitution. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 151.

666 Reiterated by Soewarno (F-PDIP), see Ibid., p. 96.

667 As stated by, among others, Lukman Hakim Saifudin (F-PPP), Happy Bone Zulkarnaen (F-PG), Asnawi Latief (F-PDU), A.M. Luthfi (F-Reformasi) and Gregorius Seto Harianto (F-PDKB). Ibid., pp. 95-127. Previously, Affandi (F-TNI/Polri) had asserted that sovereignty is in the people's hands but it should be exercised following the process regulated in the Constitution. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 814.

668 As argued by Jimly Asshiddiqie of the Team of Experts. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 706. See also Hans Kelsen, *op.cit.,* p. 221-224.

669 On 18 August 2000, the MPR ratified MPR Decree No. III/2000 on The Sources of Law and The Hierarchy of Legislations, which was prepared by PAH II. The decree stipulates among others the hierarchy of legislations, the authority of the MPR to conduct judicial review of law, and the authority of the Supreme Court to conduct judicial review of legislations below law. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 16, 28.

670 As stated by Amien Rais, the chairman of MPR. See Ibid., p. 28.

671 As argued by Happy Bone Zulkarnain (F-PG), who further said that a law that is created by representatives who are elected by the people may not reviewed by individual judges such as adopted in a constitutional court concept. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 104-105.

672 As elucidated by J.E. Sahetapy (F-PDIP), speaking as a resource person. Ibid., p. 102.

Eventually, PAH I concluded that constitutional review would be solely a legal action for maintaining the "purity" of the Constitution's implementation, to ensure the law's constitutionality. The law should be created by a political process and reviewed by a judicial institution.[673] Regarding the precise assignment for conducting constitutional reviews, PAH I concluded that it would carry out the task after completing the discussion about the future constitutional review mechanism.[674]

Another constitutional review issue was the relation between a Constitutional Court and the Supreme Court.[675] Eventually, PAH I concluded that judicial power would be exercised by a Supreme Court and the judicial bodies beneath it, and by a permanent and independent Constitutional Court.[676] Thus, in the Commission A plenary meeting on 6 November 2001, despite certain faction members objecting,[677] all factions eventually agreed with establishing a Constitutional Court.[678] Based on the PAH I draft, Commission A also concluded that the Constitutional Court could render judgment on the DPR's petition alleging a violation of the law by the president and/or the vice president according to the Constitution.[679]

The above provisions further confirm the characteristics of *negara hukum* (a state based on the rule of law), where the Constitution sets limits that must be followed in applying democracy's rules. As such, the President and/or the Vice President could not be impeached without the Constitutional Court judicially determining his or her indictment of Constitutional

673 As emphasized by the PAH I chairman. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 334.

674 As stated by, among others, Pataniari Siahaan (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 102. Eventually, in a plenary meeting of the MPR Working Body on 29 March 2001, the author, as the PAH I chairman reported that PAH I would discuss the legislative review and judicial review as assigned by MPR Decree No. III/2000 together with the discussion on the judiciary and possibly would assign the task to the Constitutional Court. See Ibid., p. 384.

675 As argued by Sutjipno (F-PDIP), the Constitutional Court should be in the realm of the Supreme Court although not *untergeordnet* (subordinate) but *neben ein ander* (next to each other). Ibid., p. 501.

676 As proposed by Harjono (F-PDIP) and endorsed by Asnawi Latief (F-PDU), Soedijarto (F-UG), A.M. Luthfi (F-Reformasi), Erman Suparno (F-KB), Affandi (F-TNI/Polri), and Amidhan (F-PG); see Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 385.

677 Amin Aryoso and Dimyati Hartono, both from F-PDIP insisted that with its extraordinary power, the Constitutional Court should become part of the MPR. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 303, 571. On the other hand, Patrialis Akbar (P-Reformasi) insisted that the Constitutional Court should not have the authority to conduct constitutional review. See Ibid., p. 329.

678 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 337.

679 Article 24C, paragraphs (1) and (2) of the 1945 Constitution after amendments.

violations.[680] Accordingly, the MPR decided to add Article 1(3), which stated that "*Negara Indonesia adalah Negara Hukum*" (Indonesia shall be a state based on the rule of law).

Since all factions agreed that the Constitution should confirm Indonesia as a *negara hukum*, deliberation was focused on the concept's substance. Notably, the question was raised whether "*negara hukum*" guaranteed the principles of democracy. If not, the term "democratic" should be added. It was concluded that the phrase *"Indonesia adalah negara hukum"* (Indonesia is a state based on the rule of law) was sufficient, since the term *negara hukum* contains a constitutional system's principles, such as people's sovereignty, the supremacy of law, and adherence to human rights.[681]

Since the rule of law had been adopted, the Constitution now distributed and limited authority, becoming central, with the law's constitutionality becoming central as well.[682] Law became a reference for all things. With that, judicialization was to occur in all areas, including politics and economics. Accordingly, independent judicial power gradually turned into a great and decisive power. However, the law's application cannot be separated from human involvement. With that involvement, certain judicial motives or individual interests may undermine judicial independence.[683] Therefore, following the idea of democracy, judicial power that goes deep into every sphere of life requires accountability.

In this context, PAH I concluded that the Constitution should establish an independent Judicial Commission with the duty and authority to safeguard and uphold the honour, dignity, and behaviour of judges[684] without interfering in their independence.

The Constitution also included a direct election system for the President and Vice President, the DPR's National and Local members, and The Regional Representative Council's members. It stipulates that, except for candidates for the Regional Representative Council, all candidates shall be nominated by political parties. In this way, democratic and periodic circulation of powers was embedded in the Constitution. Elections and political

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680 While the draft of the provision was being discussed in PAH I, on 23 July 2001 President Abdurrahman Wahid was impeached by the MPR based on political considerations. The initial 1945 Constitution rules that the MPR holds the people's sovereignty in full and that the president and vice president are elected by and accountable to the MPR. See paragraph (2) Article 1 of the initial 1945 Constitution and its Elucidation.

681 As argued by, among others Sutjipno (F-PDIP), Soewarno (F-PDIP), Sutjipto (F-UG), Hamdan Zoelva (F-PBB), and Ishak Latuconsina (F-TNI/Polri). See Ibid., pp. 502, 804, 805, and Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 89.

682 As stated by the PAH I chairman. See Ibid., p. 334.

683 See Brian Z. Tamanaha, *op. cit.*, pp. 123-125.

684 During the discussion, PAH I members emphasized that the stipulations applied to all kinds of *hakim* (judge) except *hakim garis* (linesman in football game). This means it includes the Constitutional Court justice as well.

parties became the constitutional instruments of the new multi-party political system.[685]

To ensure the national character of the elected president and to eliminate the possibility that the presidential election would be dominated by the densely populated areas, the factions agreed that a pair of candidates for president and vice president must win in an absolute ballot, obtaining at least 20% of the vote in at least half of the provinces.[686]

Further, PAH I argued that to avoid political deception and encourage political parties to build political cooperation from the outset, the presidential candidate should be determined before the legislative elections.[687] Furthermore, factions concluded that elections of the president and vice president, the DPR, regional DPRs, and members of The Regional Representative Council should happen simultaneously.[688] However, the Team of Experts contended that the president should be elected directly by the people in an election conducted especially for this purpose.[689] Eventually, factions agreed that in the first round, the presidential candidate should be elected directly by the people. PAH I could not resolve disagreements on whether a second-round election should be conducted by the MPR or again directly by the people, proposing to postpone this topic to the MPR's next annual session.[690]

685 The original 1945 Constitution does not contain any stipulation regarding general elections and political parties.

686 As proposed by Soewarno (F-PDIP), Hamdan Zoelva (F-PBB) and Affandi (F-TNI/Polri) as a mechanism to ensure the national legitimacy of the elected president. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 353, 363, 365, 393. At first, this idea, with a slightly different formula, was proposed by Ramlan Surbakti of the Team of Experts. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 541.

687 The author, as a F-PDIP member, argued that the presidential election after the election of DPR members may distort the political configuration in society and tended to be a public deception. See Majelis Permusyawaratan Rakyat Republic Indonesia, op.cit., Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 541. See also the arguments of Soewarno (F-PDIP) and Slamet Effendy Yusuf (F-PG) that this rule would naturally simplify the political party system. See Majelis Permusyawaratan Rakyat Republic Indonesia, op.cit., Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 204-205, 346, 349.

688 As proposed by, among others Soewarno (F-PDIP). See Ibid., p. 353. However, the laws regarding legislative elections separate the general elections from the election of the president and vice president. See Law No. 8/2012 on General Election of Members of the DPR, Regional Representative Council and Regional DPR and Law No. 42/2008 on the General Election of President and Vice President.

689 As proposed by Maswadi Rauf.See Majelis Permusyawaratan Rakyat Republic Indonesia, op.cit., Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 788.

690 Majelis Permusyawaratan Rakyat Republic Indonesia, op.cit., Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 399-400.

Regarding requirements for presidential candidacy, the amendment substituted "the President shall be a native Indonesian" with "The Presidential candidate and the Vice Presidential candidate shall be Indonesian citizens as of his/her birth and shall have never accepted another citizenship on his/her own accord".[691] Since a political party is the constitutional instrument of a democratic system, political parties should be entitled to nominate and determine the candidates in the elections for both presidency and the DPR.[692]

Regarding the heads of regions, the Constitution states that the governor, district head (*bupati*), and the mayor (*walikota*) should be elected democratically. Yet, considering the peculiarities of certain regions whose existence is recognized by the Constitution (e.g., Yogyakarta and Papua), the Constitution does not require that local elections should be conducted directly by the people.[693]

Regarding Article 29, as discussed above, although the number of people in favour of inserting the *tujuh kata* ('seven words') in Article 29 was smaller than those against, and although the proposition was ready for balloting, the majority did not force the decision and opted for solution by deliberation.[694]

PAH I also failed to conclude the discussion on the proposal to include the name of Pancasila as the foundation of the state in the Constitution, and this topic was no longer discussed.

Following the devolution of power to regional governments enacted during the previous stage, a *sui generis* Regional Representative Council was established.[695] This was to ensure that the multiple diversities of Indonesia and the unity of Indonesian nationality could support each other in bringing development across the entire country. Although the proposal to

691 I Dewa Gede Palguna (F-PDIP) asserted that the term *asli* (native) injures the principles of human rights. Likewise, Lukman Hakim Saifuddin (F-PPP), Andi Najmi Fuady (F-KB), Asnawi Latief (F-PDU), Sutjipto (F-UG) and others agreed to eliminate the discriminatory provision. See Majelis Permusyawaratan Rakyat Republic Indonesia, op.cit., Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 279 - 283.

692 A political party should have the authority to rank the candidates and to determine the winners in a closed list system. However, Law No. 8/2012 on General Election stipulates that a political party is entitled to draw up a list of candidates, but that the electability of a candidate is determined by the majority of votes obtained by the candidates in an open list system.

693 Article 18A of the 1945 Constitution stipulates that the state shall recognize and respect the units of local government that are special or unique in nature as regulated by law; (2) The State recognizes and respects units of customary law and their traditional rights, all still alive and in accordance with the development of society and the principle of the unitary Republic of Indonesia, which is regulated by law. Further, Article 28I (3) on human rights states that the cultural identity and the rights of traditional communities be respected in line with the times and civilization.

694 See VII.3.12.

695 Chapter VIIA of the 1945 Constitution.

establish a strong bicameral system was discussed,[696] this council was based on and within the unitary state concept.[697] In this system, the autonomous region derives from the unitary state, so all regulations regarding autonomy should be consistent with and subject to the unitary state's fundamentals.[698] Hence, all factions rejected strong bicameralism. In fact, the original intention of establishing the Regional Representative Council was to replace the Regional Delegates of the old-style MPR.[699]

In a unitary state, only the people (and not the regions) are the source of sovereignty. In that sense, as in any unitary state, regional authority is derived from the state's authority, which is managed by the national government and devolved to the regions through legislation.

However, there is a gap between the desire to achieve fair and equitable progress and the fact that not all people and not all regions have similar access and potential. Due to demographic reasons – 58% of 238 million Indonesians live in 6 provinces in Java, a mere 7.7% of the total Indonesian land area[700] – the democratic principle of a one-person-one-vote representation creates an unequal distribution that must be levelled out.

Therefore, an additional instrument was deemed necessary to ensure that distinct interests of people in poor and marginalized regions could be guaranteed without violating the basic principles of the unitary state's representation system. Appointing MPR representatives from among these people, as during the old era, had been proven ineffective and unjustifiable.

PAH I agreed that there should be four Regional Representative Council members from each province, elected by the people on an individual basis.[701] As Regional Representative Council members, they can propose and participate in the discussion of certain bills with the DPR. This includes bills related to regional autonomy, the relationship between central and local governments, formation, expansion and merging of regions, management of natural resources and other economic resources. It also includes bills related to the financial balance between the centre and the regions. Moreover, the Regional Representative Council may oversee the implementation of the above matters and submit the result of the oversight to the

696 As, among others, proposed by the Team of Experts, see Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 467. Hobbes Sinaga (F-PDIP) and Ali Hardi Kiaidemak (F-PPP) pointed out that strong bicameralism would lead to federalism and noticed that the Expert Group seemed to want to change the form of the state. See Ibid., pp. 489, 491.

697 I Dewa Gede Palguna (F-PDIP) pointed out that amendment is based upon the agreement to uphold the unitary state and that in the MPR Working Body's previous discussions, the term of bicameralism was never raised, until it appeared in the manuscript of the Expert Group. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 88.

698 See K.C. Wheare, *op.cit.*, pp. 14-19.

699 As reminded by Katin Subiyantoro (F-PDIP). See Ibid., p. 131.

700 2010 National Census.

701 Despite of their misfortune, all eligible people hold the right to vote.

DPR for further action.[702] By having four Regional Representative Council members from each province in the MPR, which can amend the constitution and impeach the president, the number of members from Java island and from the outer islands would be better balanced.[703] In other words, regional aspirations and interests, including grievances, would have a rapid channel into the national political process.

The third amendment stage also empowered checks and balances by enlarging the role of the independent Financial Audit Board or BPK (*Badan Pemeriksa Keuangan*) and granting it the authority to check the management of state finances.[704]

Reviewing the compiled amendments, it can be concluded that the amended Constitution increasingly demonstrated the characteristics of an effective normative constitution to control and govern the country's political process, rather than containing just nominal or semantic statements (see IV.1).

At this point, it seemed that a system of institutional arrangements to both empower and limit the government was established, renowned as constitutionalism and an institutional foundation for the rule of law.[705]

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702 Articles 22C and 22D of UUD 1945 after the third amendment.

703 The DPR has 560 members and since there were 33 provinces, the DPD has 132 members. It makes up 692 members of the MPR. In the 2014 elections, 306 DPR members and 24 DPD members were elected in Java. This means that 330 members of the MPR are from Java and 372 members are from other parts of Indonesia.

704 Chapter VIIIA of the 1945 Constitution.

705 See Bo Li, *op.cit*.

# VIII The Fourth Amendment Stage of the 1945 Constitution: 9 January 2002 – 11 August 2002

## VIII.1 The acting institutions and the amendment process

The MPR plenary session on 8 November 2001 determined how to finish the amendment of the 1945 Constitution. Its Decree No. XI/2001 assigned preparing draft changes to the MPR Working Body. This had to be completed by the 2002 MPR Annual Session's end at the latest, according to the Decree. It further provided that the amendments that had been approved and ratified during the first, second and third amendment stages could not be changed. Thus, the fourth amendment stage of the 1945 Constitution continued and completed the previous amendment stages.

The first Working Body meeting took place on 10 January 2002. The chairman, Amien Rais, reminded the government to immediately start preparing for establishing several new state institutions, mandated by the previous amendments, such as the Regional Representative Council, the Constitutional Court, and the Judicial Commission.[1]

The MPR Working Body factions reconfirmed their commitment to continue the amendment process and accomplish the amendment in due time.

During their first meeting, the MPR Working Body decided to have PAH I[2] prepare the draft constitutional amendment and PAH II prepare the draft MPR decrees as mandated by the MPR 2001 Annual Session and as proposed by the factions.[3]

Further, as in the beginning of the previous stages, in the first PAH I plenary meeting on 11 January 2002, the PAH I leadership was rearranged. There was no change in leadership: the Chairman was Jakob Tobing (F-PDIP); the Vice Chairmen were Harun Kamil (F-UG) and Slamet Effendy Yusuf (F-PG); and the Secretary was Ali Masykur Musa (F-KB).[4] PAH I formed a small team to organize the working schedule, which it reported to PAH I on 22 January 2002, including a program to intensify public commu-

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1 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 34.

2 In the meantime, the Faction of Regional Delegations (F-UD – *Fraksi Utusan Daerah*), which was revoked during the MPR 2000 Annual Session, was re-established during the MPR 2001 Annual Session. As a result, during the fourth amendment process PAH I once again counted twelve factions.

3 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 75.

4 Ibid., p. 82.

nication and seminars.[5] Further, PAH I agreed to conduct the amendment process by 1) discovering public aspirations, 2) discussing and formulating the draft changes to the 1945 Constitution, 3) validating the draft amendments, and 4) synchronizing and finalizing the draft constitutional amendments.[6]

As during the previous stages, PAH I conducted public hearings in several provinces by working with universities and other institutions. These hearings were attended by participants from all nearby provinces. The meeting records were meant as input for the PAH I discussions. In May 2002, PAH I conducted similar validation meetings in various cities with several universities. In Jakarta, this took place from 16 to 17 May 2002. From 20 to 23 May 2002, 12 universities outside Jakarta held such meetings.[7]

Previously, on 1 May 2002, PAH I received a visit from a European Union delegation, which expressed the need for the constitution to respect human rights and for Constitutional changes made through a referendum.[8]

During this stage, which was clearly meant to be the last, PAH I would have to finalize all draft changes. MPR Decree No. XI/2001 stipulated that the material for the changes would be the reported pending the previous session's work (2000 – 2001). The outstanding matters included the MPR's composition (i.e., the existence of appointed MPR members); the second presidential election round (i.e., whether the people or the MPR should conduct the second round); what occurred if the President and the Vice President became incapable simultaneously; the proposals related to Article 29 on Religion; and the constitutional commission's formation.

5 Ibid., pp. 99 – 101.

6 Ibid., p. 523.

7 Universitas Sumatera Utara (USU – University of North Sumatera) in Medan, Universitas Sriwijaya (UNSRI – Sriwijaya University) in Palembang, Universitas Pajajaran (UNPAD – Pajajaran University) in Bandung, Universitas Diponegoro (UNDIP – Diponegoro State University) in Semarang, Universitas Gajah Mada (GAMA – Gajah Mada State University) Jogyakarta, Universitas Brawijaya (UNIBRAW – Brawijaya University) in Malang, Universitas Lambung Mangkurat (UNLAM – Lambung Mangkurat University) in Banjarmasin, Universitas Tanjung Pura (UNTAN – Tanjung Pura University) in Pontianak, Universitas Hasanuddin (UNHAS – Hasanuddin University) in Makassar, Universitas Sam Ratulangi (UNSRAT – Sam Ratulangi University) in Manado, Universitas Udayana (UNUD – Udayana University) in Denpasar, and Universitas Mataram (UNRAM – Mataram University) in Mataram.

8 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 533 – 541. PAH I explained to the delegation that the provisions on human rights had been incorporated in the 1945 Constitution in the second amendment phase in 2001. While the procedures for making decisions on the promulgation of or constitutional amendment had been regulated in Article 3 and Article 37 of the 1945 Constitution.

In June 2002, whilst finalizing the pending matters, PAH I began to synchronize all amendment process outcomes.[9] Eventually, the MPR plenary meeting on 10 August 2002 would ratify the fourth amendment,[10] thereby concluding the whole amendment process to the 1945 Constitution.

### VIII.1.1 The factions' composition in PAH I, 2001-2002

With the reestablishment of the Faction of the Regional Delegations, there were 12 factions in PAH I,[11] with F-PDIP and F-PG the largest ones.

### VIII.1.2 The list of PAH I members, 2001-2002

Adjusting to the proportionality of the 12 MPR factions, the number of PAH I members increased from 44 to 48.

### VIII.1.3 The fourth amendment's working schedule

The MPR plenary session on 10 January 2002 approved the draft working schedule of 2002 MPR annual session, which the MPR Working Body prepared.[12]

## VIII.2 Discussing the Constitution's Articles

During this final amendment stage, public attention increased. In the public debate, there were those who wanted to alter or cancel various outcomes of the first, second, or third amendments, as well as those who demanded the immediate establishment of a constitutional commission. Deliberations and informal consultations at various levels, such as with PAH I, MPR, faction, and political party leaders intensified to overcome the stalemate.

Almost all issues would be resolved by deliberation, apart from the MPR's composition. Deciding whether the MPR should comprise only of DPR and Regional Representative Council members or be augmented by appointed delegates from functional groups would be the only decision during the entire four-year amendment process that was taken through voting.[13]

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9 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 13.

10 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 747-751.

11 See Attachment VIII.1.

12 See Attachment VIII.3.

13 See Attachment VIII.2.

### VIII.2.1 The MPR's composition

This section summarizes the chronological debate on the MPR's composition, including numerous insights from public hearings chronicling the factional gridlock that delayed an agreement. This was the only amendment decision throughout the 1999-2002 process decided by vote. Ultimately, the ratified amendment stated the MPR would consist of elected DPR and Regional Representative Council representatives, excluding appointed delegates from functional groups (i.e., profession-based organizations).

In the previous stages, constitutional amendments concluded that the MPR shall hold certain authorities, such as to amend and determine the Constitution and conduct impeachment. However, the MPR's actual existence remained unclear. Apart from the above composition disagreement, certain factions had argued that the MPR is a permanent state institution, while others thought that the MPR is a bicameral joint session of the DPR and the Regional Representative Council.

These positions were still reflected in the beginning of the fourth amendment process. In the MPR Working Body meeting, F-PDIP, F-PPP, F-UD, and F-PG reiterated that the MPR shall comprise of elected DPR and Regional Representative Council members, so that the MPR reflects the aspirations of both the people and the regions.[14] However, F-KB stated that, to improve the people's MPR representation, appointing MPR members should be discussed.[15] Then, a F-UG member stated that the MPR's composition in the original Article 2 (1) was the appropriate implementation of the Preamble. Therefore, the MPR's appointed functional group delegations should be maintained.[16] On the other hand, F-UD and F-KB contended that the MPR is a bicameral joint session between the DPR and the Regional Representative Council.[17]

#### *VIII.2.1.1 Public Insight on MPR Membership*

In a PAH I public hearing with *Koalisi Ornop*[18] (NGO coalition), *Ikatan Advokat Indonesia* (Indonesian Bar Association), *Asosiasi Hukum* (Law Association) and *Ikatan Notaris Indonesia* (Indonesian Public Notary Association) on 27 February 2002, an NGO coalition speaker regretted that the MPR did not dare abandon the old Constitution's original framework and values and still regarded the MPR as a *supra* institution. The MPR should adopt

14 As stated by Zainal Arifin (F-PDIP), Abdul Azis Imron Pattisahusiwa (F-PPP), Hatta Mustafa (F-UD), and Agun Gunandjar Sudarsa (F-PG). Majelis Permusyawaratan Ralyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 49, 53, 60, 135.

15 As stated by Ida Fauziah (F-KB). Ibid., p. 64.

16 As asserted by Soedijarto (F-UG). PAH I meeting, 28 January 2002. See, Ibid., p. 146.

17 As stated by Januar Muin (F-UD) and Erman Suparno (F-KB). Ibid., pp. 142, 154.

18 Ornop refers to Organisasi Non Pemerintah, a non-governmental organization.

a pure bicameral system, which ensures checks and balances between the DPR and Regional Representative Council. Therefore, the MPR should be a joint session of the DPR and the Regional Representative Council. The speaker also deplored that the MPR was still open to appointing functional group, military, and police representatives.[19] Likewise, another NGO coalition delegation asserted that the Constitution should strictly rule out any political role of the military.[20] However, a Law Association delegation stated that the MPR is the embodiment of all the people. Since not all aspirations could be absorbed through political parties, representing functional groups would still be necessary.[21]

Agreeing, a F-UG member refuted the notion that having appointed MPR members would mean the system was undemocratic. In Canada, 172 Senate members are proposed by the Prime Minister and inaugurated by the Governor General. In Germany, *Bundesrat* (Federal Council) members are the prime minister and individuals from executive councils of state, not elected by the people for that *Bundesrat* position. In Turkey, 15 of the Congress members are appointed from the military in honour of Kemal Ataturk. Those countries are regarded as democratic. Further, with capitalism's expansion, the *bourgeoisie* dominates political parties. To ensure that workers and cooperatives are represented, their delegates must be appointed. He also referred to Arend Lijphart,[22] who found that two-thirds of the world's states implement a unicameral system, while only one-third implement a bicameral system. Meanwhile, nine out of ten federal countries implement a bicameral system and 84% of unitary states use a unicameral system.[23] Thailand had 16 constitutions, 8 unicameral systems, and 8 bicameral systems between 1932 and 1997. In 1953, all Scandinavian countries (Sweden, Denmark, Norway, and Finland), along with New Zealand and Iceland, changed to a unicameral system. Therefore, there is no theoretical basis to support a bicameral system for Indonesia. In addition, when the DPR could make special autonomy laws and fight for the region's interests, suddenly there was desire for a bicameral system. This raised questions.[24]

On the other hand, in a PAH I public hearing on 28 February 2002, a CSIS (Centre for Strategic and International Studies) delegation argued that the MPR's post-amendment existence seemed too imposed, that its tasks could be taken over by other institutions, and they questioned whether the MPR should continue to exist.[25] Likewise, Roeslan Abdulgani asserted in

19 As stated by Bambang Widjajanto. Ibid., pp. 317, 319.
20 As stated by Munir. Ibid., p. 329.
21 As argued by Arry Supratno. Ibid., p. 334.
22 As argued by Soedijarto (F-UG). Ibid., p. 337. Soediyarto said that Lijphart is from Yale University. Arend Lijphart is from Leiden University, the Netherlands and University of California, San Diego, USA.
23 Ibid., p. 337.
24 As expressed by Soedijarto (F-UG). Ibid., p. 338.
25 As conveyed by Tommy Legowo. Ibid., pp. 406-407.

a PAH I public hearing on 4 March 2002, that the MPR's nature is ambiguous.[26] Seeking balance and harmony, our elders mixed up the systems, synthesizing a mono and bicameral system with group and regional elements in the MPR. Abdulgani proposed removing the MPR, rendering the bicameral discussion irrelevant.[27]

In the ensuing public hearing on 5 March 2002, delegations from *Universitas Kristen Indonesia* (UKI – Indonesian Christian University) and *Universitas Nasional* (UNAS -National University) stated that the MPR's functional group delegates should be removed, including the military and police,[28] and that all MPR members should be elected.[29] On the other hand, a *Universitas Bung Karno* (UBK – University of Bung Karno) delegation asserted that it resolutely did not agree with amending the 1945 Constitution from the beginning. The laws required amending, not the constitution.[30]

Similarly, a *Universitas Pancasila* (Pancasila University) delegation argued that the Article 1(2)[31] amendment eliminated the current MPR's constitutional basis. Therefore, after the amendments, none of the current MPR's decisions were legitimate.[32] The delegation further stated that the MPR's original position as the embodiment of all the people should be maintained. As the "reincarnation" of all people, it could not be created by a one-person-one-vote election. Instead, the selection procedure of functional group and regional delegates needed to be improved.[33] In response, a F-PBB member stated that by intention, deciding the MPR's composition was postponed to the final stage to acquire a complete patterned and systematic change in the constitutional framework. Furthermore, he asserted that the MPR does not disappear because of the new formulation of Article 1(2).

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26 Roeslan Abdulgani was a prominent figure from the 1945 generation.

27 Ibid., pp. 426-427. Previously, Roeslan Abdulgani stated before a PAH I meeting on 13 December 1999, that the MPR is a patchwork concept, like *gado-gado* (Indonesian mixed-vegetable salad).

28 As stated by Anton Reinhart from *Universitas Kristen Indonesia* (UKI – Indonesian Christian University) and Ramlan Siregar from *Universitas Nasional* (National University). Ibid., p. 463.

29 As asserted by Ramlan Siregar. Ibid., p. 465.

30 As expressed by Jemmy Palapa from *Universitas Bung Karno* (UBK- University of Bung Karno). Ibid., p. 470.

31 Article 1(2) states that "sovereignty is in the hands of the people and is exercised according to the Constitution".

32 Further, the delegation argued, in comparison with the United States Constitution Article 1, section 1 which states "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and the House of Representatives", the original Article 1(2) of the 1945 Constitution, which says "sovereignty is in the hands of the people and is exercised in full by the MPR", provides the MPR with a legal status to implement the people's sovereignty. Therefore, the new Article 1(2) eliminated the MPR as a legal subject that carries out sovereignty, thereby eliminating the MPR's existence. As stated by Abdul Kadir Besar of the *Universitas Pancasila* Ibid., p. 478.

33 Ibid., p. 496. BG. Abdul Kadir Besar served as Secretary General of the Provisional People's Consultative Assembly during the period when General Abdul Haris Nasution was the MPR Speaker in 1966-1972.

Indeed, the MPR would no longer exercise the people's sovereignty in full. However, the Constitution gives the MPR certain authorities, including the authority to amend and determine the Constitution.[34]

Meanwhile, the pressure mounted to reject changes to the MPR's composition and cancel the amendment process. As disclosed in a PAH I meeting on 11 March 2002, several MPR members held a meeting in Central Java, demanding that the original 1945 Constitution should not be changed.[35] Similarly, a member reported that he was asked to sign a petition to reject and cancel all constitutional amendments. However, he refused to sign the petition that had been signed by 199 MPR members.[36] In response, the PAH I chairman stated that these were political dynamics in a democratic state. There were others who demanded a totally new constitution. However, he asserted that "we are bound to our assignment."[37]

At a subsequent public hearing on 12 March 2002, a *Universitas 17 Agustus* (University of 17 August) delegation, Semarang read a university brainstorming session's conclusion, which stated that the MPR should review the changes of Article 1(2) and that there was no need to amend the 1945 Constitution. Further, the Article 1(2) amendment had damaged the state's democratic principles because it turned the MPR into a constitutional amendment institution. Therefore, the 2002 MPR annual session no longer needed to discuss any constitutional amendment.[38]

In response, the PAH I chairman reminded all that aborting the ongoing amendment process would be dangerous. Lacking a completed constitution would be a national calamity. The shortcomings of the original 1945 Constitution should be addressed, such as the MPR being a supreme political institution with unlimited power, jeopardizing the checks and balances and the rule of law. It would be unimaginable to have a political institution that acts as both the prosecutor and judge in the impeachment of a president. This would substantially weaken the presidential system. The same applied to the MPR conducting judicial review through a political process. Implementing the constitution and rule of law were at stake if they depended on the MPR's political interests.[39]

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34 As argued by Hamdan Zoelva (F-PBB). Ibid., p. 489.

35 Such as, among others, Abdul Majid (F-PDIP). As reported by Hatta Mustafa (F-UD) and confirmed by Slamet Effendy Yusuf (F-PG). Ibid., p. 648.

36 As stated by Asnawi Latief (F-PDU). Ibid., p. 518. It was initiated by Abdul Madjid and Dimyati Hartono, both from F-PDIP and Hartati Murdaya from F-UG. The 1999-2004 MPR comprises of 695 members.

37 Ibid., p. 519.

38 As conveyed by Hendro Sukmono of *Universitas 17 Agustus* (University of 17 August), Semarang. Ibid., p. 530. The event was attended by Abdul Madjid (F-PDIP), Bambang Pranoto (F-PDIP), and Stefanus Sukirno, the rector of the university, as resource persons.

39 Ibid., pp. 536 – 539.

Subsequently, between 6 and 8 March 2002, PAH I conducted several public hearings, centralized in eight cities: Bandung, Semarang, Banjarmasin, Denpasar, Palembang, Surabaya, Makassar, and Medan. The public hearing participants came from all adjacent provinces, so all Indonesian provinces were represented. Participants included government officials from provincial and district levels, governors, city mayors, heads of districts, local DPR members, political party delegations, NGOs, civic organizations, teachers, students, *civitas academica* (society of academicians) from public and private universities, professional associations, women's organizations, and other public figures.

In a PAH I meeting on 19 March 2002, a member reported the notes of a public hearing conducted at *Universitas Pendidikan Indonesia* (UPI – Indonesia University of Education), Bandung, held on 6-7 March 2002. The hearing recorded that most participants proposed that the MPR should comprise of DPR members and the Regional Representative Council. Regarding the presence of functional group delegates, this should be investigated by using the historical interpretation method.[40] Another member reported on a similar public hearing held at the *Universitas Lambung Mangkurat* (UNLAM – University of Lambung Mangkurat), Banjarmasin, South Kalimantan. At this forum, also attended by East Kalimantan and Central Kalimantan participants, certain people argued that the future MPR should consist of DPR and Regional Representative Council members, whereas others thought that functional group delegates should be added.[41] The Bali forum, held at the *Universitas Udayana* (University of Udayana), was also attended by participants from West Nusatenggara and East Nusatenggara provinces. It noted that there were those who wanted to maintain the MPR as before and those who wanted the MPR to consist of elected DPR and Regional Representative Council members.[42] In the provinces of Central Java and the Special Region of Yogyakarta, the meetings were held in Semarang, at the University of Diponegoro, and in Solo, at the *Universitas Sebelas Maret* (University of Eleventh March). Most participants in Semarang argued that all MPR members of the MPR should be elected. However, certain participants argued that the functional group, military, and police delegates should be appointed to the MPR.[43]

From the *Universitas Sriwijaya* (UNSRI – University of Sriwijaya), Palembang, the forum was attended by participants from all provinces in Southern Sumatera, i.e., South Sumatera, Jambi, Bengkulu, and Lampung. They argued that all MPR members should be elected.[44] The East Java public hearing, held at the University of Airlangga, Surabaya, recorded that all MPR members should be elected or that elected members be augmented by

40 As reported by Abdul Azis Imran Pattisahusiwa (F-PPP). Ibid., p. 623.
41 As reported by Soedijarto (F-UG). Ibid., p. 626.
42 As reported by Sutjipno (F-PDIP). Ibid., p. 627.
43 As reported by Hatta Mustafa (F-PG). Ibid., p. 630.
44 As reported by Rully Chairul Azwar (F-PG). Ibid., p. 634.

appointed functional group members.[45] The hearing in *University of Hasanuddin*, Makassar, was also attended by participants from Maluku, Papua, and West Papua. They argued that the MPR should consist of elected members.[46]

In almost all those public hearings, the opinions were as divided as in PAH I. The exceptions were Sriwijaya University, Palembang, and University of Hasanuddin, Makassar, which did not agree with the appointed MPR members. Besides the public hearings, PAH I also conducted interactive discussions through the radio, such as in Medan, Bandung, and Banjarmasin, and through a television talk-show in Denpasar. In general, the topics discussed and positions were similar. However, in an interactive dialogue in Banjarmasin, there were those who argued that the Constitution and Pancasila were unnecessary. For Muslims, the Koran and Hadith of the Prophet are the only scripts that mattered.[47]

The above reports show that the constitutional amendment process went on openly amid the dynamic and quite turbulent political environment. The reports and the discussions in the MPR demonstrate that the stances toward the MPR's composition were still grouped into those who wanted the MPR to comprise of DPR and Regional Representative Council members and those who proposed including appointed members from functional groups, the military, and the police. Besides, there were those who proposed retaining the old MPR's composition as described in the original 1945 Constitution.

### *VIII.2.1.2 Resource Persons Insight: Kamil, Haysom, and Schneier*

On 16 May 2002, PAH I conducted a meeting to test the validity of the fourth amendment draft on the presidential election and the new composition of the MPR's membership.[48] It was arranged in two parts. The first part was on the second round of the presidential election. The second part focused on the MPR's composition. For that purpose, PAH I agreed to invite three speakers as resource persons, namely Harun Kamil from F-UG, the faction of appointed MPR members, Nicholas Haysom[49] from South Africa, and Edward Schneier[50] from the United States of America. NGO and university representatives were also invited to participate.

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45 As reported by Retno Triani Johan (F-UG). Ibid., p. 638.

46 As reported by Ali Hardi Kiaidemak (F-PPP). Ibid., p. 640.

47 As reported by Soedijarto (F-UG). Ibid., p. 645.

48 Validity test was to discuss whether the new formula on the new composition of the MPR's members and the second round of the president's election were in accordance with the intended changes.

49 Nicholas Roland Haysom, Trustee: Nelson Mandela Foundation, Johannesburg; Advisor, South Africa Constituent Assembly, 1994 – 1997; Legal Advisor, President of South Africa, Cape Town, 1994 – 1999.

50 Edward ("Ned") Schneier, Emeritus Professor of Political Sciences at City College, City University, New York, and at John Hopkins University, Princeton, Columbia, and Colgate, USA.

On that occasion, Kamil reiterated that including functional groups in the MPR would enhance political with economic, social, and cultural justice. Furthermore, Kamil stated that excluding functional groups from the MPR would reduce its existence as a forum of deliberation. The reduction, inconsistent with the founders' wisdom, would mean viewing the state as a political unity, rather than a political, economic, and cultural unity. The founding fathers introduced the functional groups to prevent the bias of political parties, which emphasize political interests and put aside the economic, social, and cultural interests of the constituents. Further, including functional groups in the representative body meets the law of insufficient representation, implemented in Germany, France, New Zealand, and Canada.

However, Kamil admitted that among F-UG members, opinions differed regarding the existence of functional groups in the Assembly. First, certain F-UG members contended that in a real democracy, people should elect every representative. Second, previously, the ruling regime had manipulated functional groups to strengthen the regime. Third, the undemocratic selection process of the functional group delegates in the MPR was the largest distortion factor on democracy. Against that background, F-UG proposed maintaining the idea of the founding fathers, with several improvements. First, by defining the functional group and determining how many representatives were appropriate. Second, candidates from functional groups would be democratically elected by the group itself before being proposed to the DPR. Third, the DPR would select MPR members from F-UG from the nominees proposed by functional groups.[51]

Regarding non-elected MPR members, Nicholas Haysom conveyed that the diversity in Indonesia indeed raised the question of whether additional forms of representation could enrich the political system and provide proper gratification to groups that otherwise might not find a place in the system. Further, in his opinion, the authority and legitimacy of the second House of Representatives was often directly connected to whether they were elected on a specific basis. Non-elected members contradicting elected members could lead to legitimacy problems and conflict.[52]

On the other hand, Edward Schneier argued that the more democratic and representative the body, the greater its power. The more democratic the election process, the more likely that a country is democratic. Having a second House of Representatives is inefficient. It is like having two people do the work of one. It costs more, it slows down the process and stops things from getting done. In the United States, it was deliberate: the founding fathers wanted a government that could not govern, which is what the US now has. Furthermore, Schneier stated that the more democratic the second

51 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 621-623.

52 Ibid., p. 626.

House of Representatives, the less necessary its existence. Recently, several countries that once had a bicameral system where both chambers were popularly elected, abolished them, including Sweden and New Zealand. Furthermore, it was better for functional groups to be outside the MPR to fight for their interests. Within the MPR, the functional groups are forced to compromise and sacrifice their interests, while outside, they can maintain and fight for their original aspirations.[53]

Regarding bicameralism, although Schneier had a strong point, Indonesia's diversity and imbalanced demography are important. Implementing the principle of one-person-one-vote and following the principles of democracy would mean that the Java seats would weigh more than non-Java seats. With four Regional MPR members elected from each province, the seats from outside Java would weigh more than the Java members. In a bicameral system, there are checks and balances between the two chambers.[54]

Commenting on the issue of appointing versus electing, a participant stated that the appointed MPR members should have been abolished from the beginning. The spirit of reform was to abolish all seats that were not obtained through elections. There was no clear argument why certain functional groups should be represented, while others are not.Many arguments were in favour of retaining the appointed seat, similar to how *demokrasi Pancasila* (Pancasila democracy) or Guided Democracy were seen as unique and suited system for Indonesia, whereas, in reality, they distorted the principles of democracy itself. Another participant contended that all MPR members should be elected. The representation proposed by Harun Kamil was for a situation in 1945, which had now passed.[55]

Then, a F-UG member, also objecting to Kamil, asserted that all members of parliament should be elected. The functional group delegates, confirming what Edward Schneier had said,would be better off outside parliament, where they would have more power to pressure parliament, the executive, and the judiciary.[56]

Other participants had differing opinions, partly accepting and rejecting appointing MPR members. Delegations from Nashiatul Aisiyah, the women's sister organization of Muhammadiyah, IPB (*Institut Pertanian Bogor* – Bogor Agricultural University), the National University, and the Association of Indonesian Political Scientists, argued that appointing members should be abolished.[57] On the other hand, Awaluddin Djamin (former

53 Ibid., pp. 626-628.

54 As argued by Andi Malarangeng. Ibid., p. 630. Andi Malarangeng is an expert on political science and in 1998 and was a government team member drafting political laws.

55 As stated by Hasyim Djalal. Ibid., p. 632.

56 As argued by Valina Subekti (F-UG). Ibid., p. 633. Harun Kamil was a F-UG member.

57 As stated by Istiana from *Nashiatul Aisiyah*, the sister organization of Muhammadiyah, Yusuf Hadi from IPB (*Institut Pertanian Bogor* – Bogor Agricultural University), and Diana Fauziah from the National University and Association of Indonesian Political Scientists. Ibid., pp. 636, 640, 641.

Head of the National Police), delegations from IPPNU (*Ikatan Putera-Puteri NU* – Association of Sons and Daughters of NU) and *Perhimpunan Pemuda Hindu Indonesia* (Association of Indonesian Hindu Youth), argued that the functional group delegates in the MPR should be accommodated. In that regard, a Hindu Youth delegation stated that the small groups in Indonesia, such as Hindus, should be represented in the MPR, not because they were seeking power, but to contribute to the historical and cultural aspects of state life.[58]

In a meeting at the University of Tanjung Pura, Pontianak, on 21 May 2002, differences regarding the functional group delegates once again came to the fore. Certain people endorsed the functional groups' appointed delegates, while others argued that they were redundant.[59] Reports from assessment forums in Manado, Mataram, Makassar, Denpasar, Banjarmasin and Semarang stated that all MPR members should be elected by the people.[60] In Medan, Palembang, Bandung, Pontianak, Malang, Jogyakarta, and Solo, certain participants argued that all MPR members should be elected, while others argued that the functional groups' appointed delegates were still necessary.[61]

Thus, on 4 June 2002, the PAH I chairman reported to the MPR Working Body plenary meeting that there were still two alternative views on the MPR's composition.[62]

### *VIII.2.1.3 Differences Persist: Synchronization Meetings*

Later, in a PAH I synchronization meeting on 6 June 2002, F-UG reiterated that the functional groups should be represented in the MPR. Changing Article 2(1) would contradict the Preamble.[63] Therefore, the original Article 2(1) should be maintained and establishing the Regional Representative Council should be reviewed, affirmed F-UG.[64] In response, a F-UD member

58 As conveyed by Ratu Dian from IPPNU (*Ikatan Putera-Puteri NU* – Association of Sons and Daughters of NU), Ngurah Wirawan from *Perhimpunan Pemuda Hindu Indonesia* (Association of Indonesian Hindu Youth). Ibid., p. 642.

59 Imam Subekti, former member of the local DPR and Sugeng from SMK-2 (*Sekolah Menengah Kejuruan* – Vocational School) endorsed the appointed MPR members, whereas Candra Hasan from the Muhammadiyah's regional leadership in West Kalimantan, Budi Rahman from HMI (Himpunan Mahasiswa Islam – Islamic Students Association) argued that appointing members should be abolished. Ibid., pp. 710, 714, 731.

60 As reported by Ali Hardi Kiaidemak, Pataniari Siahaan, Hamdan Zoelva, I Dewa Gede Palguna, Erman Suparno, and Aris Munandar. Ibid., pp. 830, 832, 834, 836, 841, 843.

61 As reported by Lukman Hakim Saifuddin, Amidhan, A.M. Luthfi, Baharuddin Aritonang, Zain Bajeber, and Soedijarto. Ibid., pp. 831, 833, 835, 838, 840, 844.

62 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 6.

63 In synchronization meetings, participants' opinions should be the official opinions of each faction.

64 As stated by Soedijarto (F-UG). Ibid., pp. 45, 47. Forming the Regional Consultative Council was agreed in the previous third amendment.

argued that the *Pancasila's* fourth principle of the *Pancasila* does not refer to certain institutions but to the spirit and the decision-making process.[65] Then, a F-UG speaker stated that abolishing the MPR's functional group delegates would not solve the problem. The previous regimes' mistakes were not the fault of functional group representatives. There was also no guarantee that without appointed functional groups in the MPR, Indonesia would be a democratic country.[66]

In response, a F-PDIP member reiterated that since, according to the Preamble, sovereignty is in the people's hands, all MPR members should be elected by the people.[67] Further, a F-PG member reiterated that the fourth principle of Pancasila should be understood as the process consisting of deliberations within the representatives' institution. Therefore, there should be no appointed members in the representative institution because they will represent those who appointed them, not the people.[68]

Another F-PDIP member argued that establishing the Regional Representative Council did not have many tangible benefits, as it created double representation. Moreover, "the new MPR composition was not in accordance with the democracy practiced for centuries by our ancestors." However, he would comply with F-PDIP's stance.[69] F-TNI/Polri asserted that general elections were the most appropriate way to determine the representation. There should be no privilege in that regard.[70] On the other hand, F-UG argued that all the people should be represented in the MPR, including those who do not use their voting rights (e.g., those in remote areas who are unable to exercise their rights) and intellectuals who are not interested in being politically active.[71] Eventually, the PAH I vice chairman, chairing the synchronization meeting, concluded that the alternative Article 2 drafts should remain as before, expecting that further informal consultations could solve the matter.[72]

In the meantime, regarding the MPR's composition, in a PAH I plenary meeting on 24 June 2002, F-TNI/Polri reminded all that in the draft Additional Provisions, it was agreed that "the MPR members as referred to in Article 2 section (1) of this Constitution are augmented with the delegates of TNI/Polri until 2009 at the latest." F-TNI/Polri proposed omitting this phrase from the Additional Provision because the Constitution reached much further into the future, certainly beyond 2009. However, a similar provision

65 As stated by Hatta Mustafa (F-UD). Ibid., p. 52. F-UD was revived in the process. The fourth principle is embedded in the Preamble and states 'Democracy led by the wisdom of deliberations among representatives.'
66 As stated by Sutjipto (F-UG). Ibid., p. 53.
67 As expressed by Katin Subiyantoro (F-PDIP). Ibid., p. 54.
68 As conveyed by Andi Mattalatta (F-PG). Ibid., pp. 58, 59.
69 As argued by Frans Matrutty (F-PDIP). Ibid., pp. 64, 65.
70 As asserted by Kohirin Suganda (F-TNI/Polri). Ibid., p. 82.
71 As argued by Harun Kamil (F-UG). Ibid., p. 90.
72 Slamet Effendy Yusuf (F-PG) was the vice PAH I chairman. Ibid., p. 92.

in MPR Decree No. VII/2000 should not be changed.[73] Other factions, such as F-UG, F-Reformasi, F-KB, F-PDIP, and F-PG endorsed the proposal. F-PG stated that MPR Decree No. VII/2000 should be discussed later.[74]

In the ensuing meeting to synchronize the draft amendments on 28 June 2002, F-Reformasi proposed a compromise. The MPR's composition should also include functional group delegates. However, instead of being appointed, they could be elected in a staged way.[75] In what followed, the same arguments were formulated once again. F-PDU reiterated that the MPR should comprise only of elected DPR and Regional Representative Council members. If the factions could not agree, they must vote on the issue. F-Reformasi's compromise would create complications.[76]

In response, F-UG argued that a direct election was not the only democratic way. People outside of political parties with good ideas who wanted to help shape national policy should have a chance to be included. The MPR should form an incarnation of all the people.In that regard, a phrase could be added to Article 2(1), stating "augmented with the functional group delegates who are elected according to the law."[77] Further, F-UG cited Bung Karno and reiterated that in Western democratic history, parliament was dominated by political party members, who were dominated by capital owners. Therefore, there were marginal groups of people who had no access to parliament, namely workers, cooperatives, and other collective groups, but also teachers, intellectuals, scholars, and clerics. In Canada, Senate members are appointed and have the right to vote, as are members in Malaysia's *Dewan Negara* (State Council), France's Senate, and Germany's *Bundesrat*.[78]

In response, F-PG argued that representing people in the MPR who do not want to campaign and are allergic to politics was undemocratic. In school, one should follow a school regulation. To achieve a doctorate, one should follow the relevant regulation. In a democracy, there should be no *privilegiatum*, or exclusive rights, since such rights had been abolished in Indonesia since the proclamation of independence on 17 August 1945.[79] For that reason, F-Reformasi proposed that functional group delegates be elected by the DPR rather than appointed by the President. However, F-PDIP disagreed, since the DPR electing functional groups would disrupt

73 As reminded by I Ketut Astawa (F-TNI/Polri). The provision is derived from MPR decree No. VII/2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 331.

74 As stated by Sutjipto (F-UG), A.M. Luthfi (F-Reformasi), Yusuf Muhammad (F-KB), Frans Matrutty (F-PDIP), and Theo Sambuaga (F-PG). Ibid., pp. 332, 342, 350, 374, 378.

75 As proposed by A.M. Luthfi (F-Reformasi). Ibid., p. 496.

76 As argued by Asnawi Latief (F-PDU). Ibid., p. 497.

77 As argued by Harun Kamil (F-UG). Ibid., p. 499.

78 As stated by Soedijarto (F-UG). Ibid., p. 501. Bung Karno is the *nom de guerre* of the first Indonesian President Soekarno.

79 As stated by Andi Mattalatta (F-PG). Ibid., p. 503.

the concept of representation. By contrast, F-UG accepted the idea because it seemed that other factions were allergic to the term 'appointed'.[80]

Thus, the debates continued. The meeting chair, Slamet Effendy Yusuf (F-PG), reminded members that the debate was "about choosing alternative 1 or alternative 2 of the draft."[81] After the debates, Yusuf concluded that the alternatives remained unchanged, with no agreement.[82]

*VIII.2.1.4 Differences Persist: Consultation Meetings*

Subsequently, the MPR Working Body chairman, in a consultation meeting between the MPR leadership Working Body and the MPR Ad-Hoc Committees on 12 July 2002, reminded members that the deadline for finalizing the amendment was nearing, while many important issues were far from concluded, including the MPR's composition.[83] In response, F-PDIP and F-PG proposed intensifying inter-faction informal consultations.[84] F-Reformasi expected that consultations could also be conducted between the political party's leaders. For the sake of the nation, every party should strive to lower their respective targets to the best optimum level to achieve agreement.[85] However, in the PAH I finalization meeting on 19 July 2002, factions still held onto their initial stances. While all other factions agreed that the MPR should be composed of elected DPR and Regional Representative Council members, F-UG still argued that the MPR's composition should be augmented with delegates from professional groups. In this situation, F-TNI/Polri stated that because factions could not agree by consensus, the alternatives should remain.[86] Thus, in the MPR Working Body meeting on 25 July 2002, the PAH I chairman reported the two alternatives of Article 2(1) on the MPR's composition.[87] Then, after a final review by the factions, the MPR Working Body decided to submit the report as it was to the MPR plenary meeting for a further decision.[88]

On 29 July 2002, a consultation meeting between the MPR, faction, and Ad-Hoc Committee leaders discussed the decision-making mechanism on matters that had not been resolved. On that occasion, F-PG, F-PDKB and F-PDIP suggested continuing deliberations, while F-PDU emphasized that if a compromise could not be reached, then in accordance with the MPR

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80 As proposed by A.M. Luthfi (F-Reformasi) and Harun Kamil (F-UG) and contested by Zainal Arifin (F-PDIP). Ibid., p. 507.

81 Ibid., p. 514.

82 Ibid., p. 517.

83 Amien Rais,the MPR Speaker was also the MPR Working Body chairman. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 100.

84 As proposed Arifin Panigoro (F-PDIP), the F-PDIP Chairman and Fahmi Idris (F-PG). Ibid., pp. 105, 106.

85 As stated by A. M. Luthfi (F-Reformasi). Ibid., p. 108.

86 As argued by I Ketut Astawa (F-TNI/Polri). Ibid., pp. 111-118.

87 Ibid., p. 345.

88 Ibid., p. 351. See also Attachment VIII.4

standing order, a decision should be made by voting.[89] As a way out, F-PPP suggested finding a solution in the next Commission A meeting.[90]

*VIII.2.1.5 Differences Persist: Commission A Meetings*

Subsequently, the MPR plenary meeting on 4 August 2002 formed Commission A to finalize the fourth amendment draft. At the start of the Commission A plenary meeting on 4 August 2002, F-PDIP reiterated its hope that solutions to the unresolved matters would be sought through deliberation and consultation.[91] However, during the next day's Commission A meeting on 5 August 2002, impatient with the excessive deliberations, F-PPP urged that a decision should be taken and reminded that voting was not prohibited.[92] In response, a F-PDIP member pointed out that the factions had agreed to avoid voting if facing a deadlock. Time should not impede the deliberations, since it was about the Constitution's amendment, which could by necessity be delayed by one or two years.[93]

Then F-PG, F-PPP, F-KB, F-PBB, F-KKI, F-PDU, F-PDKB, F-TNI/Polri, and F-UD reiterated their respective opinions in the Commission A plenary meeting, namely that the MPR should comprise only of elected DPR and Regional Representative Council members.[94] By contrast, F-UG argued that the MPR system, which includes all essential elements of Indonesian democracy, is more advanced than the representative system, which is limited to only elected members.[95] Thus, at the start of the 2002 MPR Annual Session, the last MPR session to finalize the amendment, the differences on the MPR's composition remained.

F-UG was the only full faction supportive of the MPR comprising of elected members augmented by functional groups' appointed delegates. However, certain members of F-PDIP and F-KB agreed with F-UG. They insisted on maintaining the old MPR's composition, as written in Article 2(1) of the 1945 Constitution.[96] For instance, a F-PDIP member asserted that both

89 As stated by Fahmi Idris (F-PG), Gregorius Seto Harianto (F-PDKB), Arifin Panigoro (F-PDIP) and Asnawi Latief (F-PDU). Ibid., pp. 424, 428.

90 As suggested by Aisyah Amini (F-PPP). Ibid., p. 427.

91 As conveyed by Didi Supriyanto (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 38.

92 As demanded by M. Abduh Paddare (F-PPP). Ibid., p. 65.

93 As argued by Bambang Pranoto (F-PDIP). Ibid., p. 66.

94 Andi Mattalatta (F-PG), Lukman Hakim Saifuddin (F-PPP), Ali Masykur Musa (F-KB), Bondan Abdul Madjid (F-PBB), Birinus Joseph Rahawadan (F-KKI), Hartono Mardjono (F-PDU), Gregorius Seto Hariyanto (F-PDKB), R. Sulistyadi (F-TNI/Polri), Retno Triani Djohan (F-UD). Ibid., pp. 40, 41, 67, 73, 75, 78, 79, 80, 82. Certain factions did not mention their opinion on this occasion but referred to earlier statements.

95 As reiterated by Sumyaryo Sumiskum (F-UG). Ibid., p. 85.

96 Article 2 paragraph 1 of the original 1945 Constitution states that the People's Consultative Assembly shall consist of the DPR members augmented by the delegates from the regional territories and groups as provided for by statutory regulations.

changes to the MPR's composition, with or without appointed members, denoted new state structure elements that required the people's approval. 200 MPR member signatures demanded such approval.[97] Likewise, a F-UG member emphasized that the Elucidation of the 1945 Constitution was still valid, stating that the whole people from all groups and all territories should have representatives in the MPR to become the incarnation of all people.[98] In response, a F-PG member reiterated that the situation had changed. The range of political party affiliations had reached all of society. Therefore, the parties could aggregate societal interests. Even if a political party was not trusted, there were still NGOs. In addition, appointing group representatives would lead to double representativeness.[99] On the other hand, F-PDIP and (later) F-UG members urged finalizing an agreement during the MPR plenary meeting, rather than in Commission A.[100]

Regarding double representativeness, a F-UG speaker stated that the UK's House of Lords, Canada's Senate, and Germany's *Bundesrat* members are all appointed and can still vote in elections within democratic countries.[101] Responding to the functional groups' desire to be well-represented in the MPR, other factions argued that they could establish functional group political parties, such as a labour party, fishermen party, or lawyers' party.[102] However, a F-UG member claimed that in 9 out of 13 validity sessions conducted by PAH I in various cities in Indonesia, there were participants who wanted to have appointed functional group delegates in the MPR.[103]

The subsequent informal consultation meeting and the small team did not manage to agree on the MPR's composition. They eventually noted the two alternatives, which were reported to the MPR plenary meeting on 9 August 2002.[104]

### *VIII.2.1.6 Deciding By Vote – MPR Plenary Meetings*

Subsequently, in the factions' final remarks during the MPR plenary meeting on 9 August 2002, factions did not change their stances. In its final remark, F-TNI/Polri emphasized that representation through a general

97 As expressed by Amin Aryoso (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 107.

98 As stated by *A.* Djoko Wiyono (F-UG). Ibid., p. 110.

99 As stated by Immanuel Ekadianus Blegur (F-PG). Ibid., p. 113.

100 As stated by Haryanto Taslam (F-PDIP) and later by Aziddin (F-UG). Ibid., pp. 115, 127.

101 As stated by Soedijarto (F-UG). Ibid., p. 123.

102 As stated by Hartono Mardjono (F-PDU). Ibid., p. 125.

103 As stated by Usep Fathudin (F-UG). Ibid., p. 130.

104 Ibid., p. 609. The first alternative states that the MPR shall consist of the DPR members and the Regional Representative Council members who have been elected through a general election, augmented by the functional group delegates who shall be chosen by the DPR and shall be further regulated by law. The second alternative states that the MPR shall consist of the DPR members and the Regional Representative Council members who have been elected through a general election and shall be further regulated by law.

election is an ideal norm in a developing democracy. Regarding the military and police's MPR membership, TNI/Polri stated its agreement with the people's will, to return to its natural character (*fitrah*) as an instrument of defence and state security. It was determined not to get involved in practical politics and that it had no intention to be included in the MPR's functional group delegates.[105] On the other hand, F-UG stated that for the sake and in honour of the country's founding fathers, although 11 factions did not want functional group delegates in the MPR, it would be a severe moral burden for F-UG to give up so easily. However, "F-UG will accept and support honestly and sincerely any MPR decision," the speaker affirmed.[106]

The F-PDIP chairman then asserted that his faction agreed that the MPR should comprise only of elected members, which shall be further regulated by law.[107] In the subsequent informal consultation meeting between the MPR and faction leaders, this issue was not discussed. Eventually, in the MPR plenary meeting on 10 August 2002, the factions agreed to decide by voting.[108]

Presided by Amien Rais, the MPR Speaker, the voting was conducted openly. 614 MPR members attended the plenary meeting. 475 voted for the second alternative, 122 members voted for the first alternative, and 3 members abstained. The first alternative was that the MPR shall comprise of elected members augmented by appointed delegates from functional groups. The second alternative was that the MPR shall consist of elected DPR and Regional Representative Council members.

Looking at their factions, 80 out of 144 F-PDIP members and 1 out of 51 F-UG members voted for the second alternative. Meanwhile, all members of the F-TNI/Polri voted for the second alternative. [109] This new MPR composition was ratified in the MPR plenary meeting on 10 August 2002, as the new Article 2(1) of the amended 1945 Constitution.

It is worth noting that this decision was the only one taken by vote throughout the entire constitutional amendment process between 1999-2002. The way in which the debate and voting were conducted illustrates the incredible attempts from various parties in the final stages to block the reform process of the 1945 Constitution.

### VIII.2.2 Presidential election: the second round

This section details the debate on whether a second presidential election round should occur, and, if so, whether it should be conducted by the people (i.e., be people-led) or the MPR (i.e., be MPR-led). It summarizes

105 As stated by E. Tatang Kurniadi (F-TNI/Polri). Ibid., p. 655.
106 As conveyed by Rais Abin (F-UG). Ibid., pp. 673-674.
107 As affirmed by Arifin Panigoro, the F-PDIP Chairman. Ibid., p. 681. In the meantime, around 60 F-PDIP members opposed the new MPR's composition.
108 Ibid, p. 733.
109 Ibid., pp. 734-735.

the insights from public hearings and the debates from validity meetings. It concludes with the ratified amendment that a second presidential election round, if necessary, should be conducted directly by the people.

During the 2001 Annual Session, the MPR had decided that the candidate pair who won more than 50 percent of the total national votes, obtaining at least 20 percent of the votes in each province in more than half the provinces in Indonesia would be elected President and Vice President (See VII.3.7).[110] However, until then, the MPR had been unable to agree on how to determine the winner if there was no candidate who qualified as the winner in the first round.

In general, the factions were divided into two camps. The first wanted the second round to be conducted directly by the people and the second camp preferred the MPR to conduct the second round.

Only F-PDIP and F-UG elements argued that the second round should be conducted by the MPR. All other factions contended that the second presidential election round should be conducted directly by the people. F-PDIP argued that a direct second round makes an election very expensive, both financially and politically. Prolonged political tensions during the two rounds of elections would be detrimental for society, the member stated. Further, if the MPR members were elected in democratic ways, the MPR's second round of elections would also be legitimate and democratic.[111] In this regard, choosing a presidential election system through the MPR did not mean that the choice was not reformist or undemocratic.[112] However, other factions argued that an MPR-led second round was less democratic and could diverge from the people's preferences.[113]

During the first MPR Working Body meeting on 10 January 2002, a F-PG member urged the MPR to consider that the presidential election should be conducted in just one round. The double ticket that won the most votes would be declared the president and vice president. He argued that it would be difficult for any candidate to meet the above requirements and a people-directed second round election would be inefficient. Moreover, if the second round was conducted by the MPR, its choice would likely confer with the people's choice in the election.[114]

Other members argued that by assuming that all MPR members, elected individuals, realized the representation of communities and regions with all their diversities and distinctiveness, then it followed that an MPR-led

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110 See VII.3.7. Article 6A paragraph (3) of the amended 1945 Constitution.

111 As argued by Zainal Arifin (F-PDIP) and Soedijarto (F-UG). See Ibid., pp. 46, 50.

112 See Valina Singka Subekti, *Menyusun Konstitusi Transisi, Pergulatan Kepentingan dan Pemikiran dalam Proses Perubahan UUD 1945, PT Raja Grafindo Persada, 2008,* p. 284.

113 As stated by, among others Ida Fauziah (F-KB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 151.

114 As stated by Hajrianto Y Thohari (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 46.

second round maintained the real essence of direct elections. Moreover, it would prevent a prolonged presidential election that would create a power vacuum and lead to social tension, or even social conflict, and a financial cost to both the state budget and political parties.[115]

Others disagreed, arguing that the second round should be undertaken directly by the people. The social-political cost would be high if the MPR-led second round outcome differed from what most people want.[116]

*VIII.2.2.1 Public Hearings: Second Presidential Election Rounds*

At this stage, PAH I scheduled programs to absorb the people's aspirations regarding the fourth amendment topics. In the public hearings, NGO Coalition and UKI (*Universitas Kristen Indonesia* – Indonesian Christian University) delegates asserted that the second round should be people-led.[117] By contrast, Law Association and UNAS (*Universitas Nasional* – National University) delegations argued that the second round should be MPR-led, considering the consequences.[118] Another delegation stated that the people were not ready for a direct presidential election, so the first round should also be conducted by the MPR.[119] A UBK (*Universitas Bung Karno* – Bung Karno University) delegation argued that the presidential election should be conducted in one round.[120] On the other hand, a University of Pancasila delegation argued that the original 1945 Constitution's system should be revived, with the president elected by the MPR.[121]

In early March 2002, PAH I also organized public hearings in the regions.[122] A Bandung report stated that certain participants preferred the second round to be people-led, while others preferred a one round presidential election.[123] The Banjarmasin report stated that the participants were divided into those who proposed a direct second round election, those who preferred a MPR-led second round, and those who preferred an overall MPR-led presidential election.[124] Denpasar public hearing participants pro-

115 As stated by Zainal Arifin (F-PDIP) and Soedijarto (F-UHG). Ibid., pp. 50, 144.
116 As emphasized by Ida Fauziah (F-KB). Ibid., p. 151.
117 As conveyed by Bambang Widjajanto on 27 February 2002 and by Anton Reinhart (UKI – Indonesian Christian University) on 5 March 2002. See Ibid., pp. 318, 463.
118 As argued by Arry Supratno and Ramlan Surbakti. Ibid., p. 334.
119 As stated by Ramlan Surbakti. Ibid., p. 466.
120 As stated by Jemmy Palapa (UBK – Bung Karno University). Ibid., p. 472.
121 As argued by Abdul Kadir Besar (University Pancasila). Ibid., pp. 496, 497.
122 The public hearings were held in Bandung, Banjarmasin, Denpasar, Semarang, Solo, Palembang, Surabaya, Makassar, and Medan. The participants in the hearings were elements from the regional governments, factions in the regional DPRDs, civic organizations, MPR members from the regions, professional organizations, universities, public figures, non-governmental organizations, high school teachers, and so forth. They came from various cities, so that the meetings covered all provinces in Indonesia. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 623 – 647.
123 As reported by Abdul Azis Imran Pattisahusiwa (F-PPP). Ibid., p. 623.
124 As reported by Soedijarto (F-UG). Ibid., p. 625.

posed a candidate be elected if their ticket won a majority of votes in ¾ of the provinces.[125] In Semarang and Solo, the participants preferred a people-led second round.[126] Palembang and Surabaya participants preferred a people-led second round. In Surabaya, East Java Governor, Muhammad Noor argued that people should elect candidates, with candidates explaining their programs to the public.[127] In Makassar, most participants wanted a people-led second round, although some argued for an MPR-led second round.[128] In Medan, participants wanted a people-led second round.[129]

### *VIII.2.2.2 Validity Sessions: Both Public and Faction Differences Persist*

Subsequently, on 16 May 2002, PAH I conducted a validity meeting on the second round of the presidential election. There were two presenters: Jakob Tobing, the PAH I chairman, and Andrew Ellis from NDI (National Democratic Institute, USA).[130]

Until then, the factions had already agreed that the presidential election should be a direct presidential election. However, if the election did not produce a winner, a second round would be needed. Until the end, members either thought the second round should be people or MPR-led.

In the validity meeting, the chairman underlined the presumption that the presidential election should be completed in one round. The second round is a back-up, an emergency system in case the first round did not produce a new president. Further, Indonesia is a plural society, so the election system must be compatible with the principle of *Bhinneka Tunggal Ika*, unity in diversity. Whether the second round was people or MPR-led, the presidential system should remain valid. The presidential tenure is fixed, and the President is not accountable to the MPR.

While proponents of people-led second round elections argued they were more legitimate, especially if there were non-elected MPR members, MPR-led supporters argued their method was better and legitimate, since all MPR members would be elected. The MPR will function as an electoral college, able to be implemented more quickly. Therefore, it is less costly, with no long timespan between the first and second rounds, so that political tensions and horizontal conflicts in the very diverse community could be avoided.

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125 As reported by Sutjipno (F-PDIP). Ibid., p. 628.

126 As reported by Hatta Mustafa (F-UD). Ibid., pp. 630, 632.

127 As reported by Rully Chairul Azwar (F-PG) and Retno Triani Djohan (F-UD). Ibid., pp. 634, 637.

128 As reported by Ali Hardi Kiaidemak (F-PPP). Ibid., p. 640.

129 As reported by Aries Munandar (F-PDIP). Ibid., p. 642.

130 The meeting was attended by among others Ramlan Surbakti from KPU (General Election Commission), Hadar Gumay from CETRO (Center for Electoral Reform), and Hasyim Djalal, a scholar, Taufikurrahman from KOSGORO (*Kesatuan Organisasi Serba Guna Gotong Royong* – The Unity Organization of Multipurpose Mutual Cooperation), Tarman Azzam from *Harian Terbit* (Terbit daily newspaper), and Chusnul Mariyah, a woman activist. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010.

Ellis stated that there was no ideal solution. A people-led second round election is costly. Given the country's size and spread, preparation takes time, which should be considered in relation to political and security dynamics. For an MPR-led second round, since the MPR is a smaller body than the electorate, a legitimacy problem may arise. If the ticket that comes second in the first round is then chosen by the MPR, that could be particularly damaging if linked to money politics. The issue revolved around commitment, culture, and atmosphere. It may take time to overcome it.[131] The MPR would need to assess the political implications of each option.

Both speakers acknowledged that there would be specific disadvantages in each option. Each option's advantages should be capitalized so that the new presidential election system could be implemented in 2004 and the country could continue to move forward. [132]

Surbakti stated that an MPR-led second round is no longer a direct election, but rather a back-up system.[133] Likewise, Gumay reiterated that if sovereignty is in the people's hands, there is no other choice and the second round should be people-led.[134]In contrast, Djalal argued that an MPR-led second round would be better, considering the economic and political costs, if all MPR members are elected. Due to the existing criticisms of the MPR and DPR, money politics will not be more prominent in an MPR-led election compared to a people-led election.[135] Taufikurrahman, Tarman Azzam, and Chusnul Mariyah asserted that a people-led election has more legitimacy than an MPR-led election. The MPR should no longer have a role in electing the President, Azzam stressed. Money politics will be even worse in the MPR than in society, stated Mariyah.[136]

In an ensuing validity meeting at the University of Tanjung Pura, Pontianak, on 21 May 2002, participants argued for a people-led second round. The University of Muhammadiyah participants stated that an MPR-led second round would be a half-hearted reform.[137]

On 27 May 2002, PAH I conducted a meeting to review the fourth amendment draft, also attended by the Expert Group. On that occasion, an expert reiterated his preference of an MPR-led second round. It would not reduce the round's democratic value, since the MPR will choose from the first and second winners according to the people's preference. With Indonesia's peculiar social cultural condition, the political cost of national stability is what matters.[138] On the other hand, another expert questioned whether the president is accountable to the MPR and whether the presiden-

131 Ibid., p. 616.
132 Ibid., pp. 586 – 594.
133 Ibid., p. 599.
134 Ibid., p. 603.
135 Ibid., p. 606.
136 Taufikurrahman Ibid., pp. 607, 609, 610.
137 As stated by Candra Hasan from Muhammadiyah in West Kalimantan and Nasirwan from Muhammadiyah University. Ibid., pp. 711, 739.
138 As argued by Hasyim Djalal. Ibid., p. 753.

tial system is still valid if the MPR conducts the second-round election.[139] In response, a F-PPP member reminded all that there are various types of presidential systems, such as in the USA, France, and Egypt. Those countries all acknowledged that their system follows their needs.[140]

In a meeting on 27 May 2002, PAH I members reported from the validity meetings from several cities. Reports from Manado, Medan, Mataram, Makassar, Bandung, Denpasar, Banjarmasin, and Semarang stated that the participants opted for a people-led second round.[141] On the other hand, reports from Palembang, Pontianak, Malang, Jogyakarta, and Solo stated that the participants were divided into people and MPR-led second rounds.[142]

Subsequently, PAH I met to finalize the deliberated topics on 19 July 2002. In that meeting, factions reiterated their respective positions. F-PDIP and F-PG argued for a people-led second round, while F-UG supported an MPR-led second round.[143] Regarding the alternative, the F-PDU speaker jokingly confirmed that F-PDU had chosen a direct presidential election since the *Majapahit* era.[144] When the PAH I chairman attempted to conclude the stances, F-UG urged that the alternatives be maintained as they were, as suggested by F-TNI/Polri.[145]

In the Small Team's meeting to finalize the fourth amendment draft on 24 July 2002, chaired by the PAH I secretary, the team concluded that stances on the presidential election's second round remained divided.[146]

### *VIII.2.2.3 Ratification: People-Led Second Round*

The draft was then reported to the MPR Working Body plenary meeting on 25 July 2002. In that meeting, most F-UG members endorsed a people-led second round.[147] All other factions reiterated their agreement with a people-

139 As questioned by Sri Soemantri. Ibid., p. 759.
140 As stated by Zain Bajeber (F-PPP). Ibid., p. 764.
141 As reported by Ali Hardi Kiaidemak, Lukman Hakim Saifuddin, Pataniari Siahaan, Hamdan Zoelva, A.M. Luthfi, I Dewa Gede Palguna, Erman Suparno and Aris Munandar. Ibid., pp. 830, 831, 832, 834, 835, 836, 841, 843.
142 As reported by Amidhan, Baharuddin Aritonang, Zain Bajeber and Soedijarto. Ibid., pp. 833, 838, 840, 845.
143 As argued by Pataniari Siahaan (F-PDIP), Andi Mattalatta (F-PG) and Soedijarto (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2002, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 117-118.
144 As stated by Asnawi Latief (F-PDU). Ibid., p. 119. Majapahit was a vast archipelagic empire based on the island of Java (modern-day Indonesia) from 1293 to around 1500. According to the Nagarakretagama (Desawarñana) written in 1365, Majapahit was an empire of 98 tributaries, stretching from Sumatra to New Guinea, and consisted of the present day Indonesia, Singapore, Malaysia, Brunei, Southern Thailand, Sulu Archipelago, Manila, and East Timor.
145 As demanded by Sutjipto (F-UG). Ibid., p. 121.
146 Ibid., p. 334.
147 As conveyed by Soedijarto (F-UG). Ibid., p. 371.

led second round. However, the F-TNI/Polri speaker contended that it was better to keep the two alternatives and seek the best decision in the coming MPR plenary meeting.[148] Thus, the two alternatives were reported to the MPR plenary meeting on 2 August 2002.

F-PDIP expressed that the election of the president and vice president should strengthen national unity and accommodate the people's aspirations, especially those outside Java. Thus, returning the election's second stage to the people is an important decision. This procedure, F-PDIP confirmed, does not contradict the Constitution's ideology, which affirms the people's sovereignty, as embedded in the 1945 Constitution's Preamble.[149] Likewise, F-UG reiterated its endorsement of a people-led presidential election, in both the first and second rounds.[150] Subsequently, in the ensuing MPR plenary meeting on 3 August 2002, F-KKI, F-PDU, and F-PDKB endorsed a people-led second round of the presidential election.[151]

The discussion on the issue was resumed in the Commission A meeting on 4 August 2002. On that occasion, F-PG reiterated that the second round should be people-led.[152] Then, in the next Commission A meeting on 5 August 2002, F-KB asserted the same opinion.[153]

Eventually, F-PDIP, with firm directives from the political party leadership,[154] alongside F-UG, agreed that the second round of presidential elections should be conducted directly by the people.

Then, in the Commission A meeting on 6 August 2002, all factions confirmed that the second round should be conducted directly by the people.[155] Thus, the MPR plenary meeting on 10 August 2002 ratified this amendment. This decision completed the provision on direct presidential elections. Ultimately, on 10 August 2002, the plenary MPR meeting ratified that the second round of the presidential election should be conducted directly by the people as further stipulated in Article 6A of the 1945 Constitution.[156]

148 As stated by Kohirin Suganda Saputra (F-TNI/Polri). Ibid., p. 383.
149 As conveyed by Agustin Teras Narang (F-PDIP). Ibid., p. 461.
150 As stated by Said Agil Siradj (F-UG). Ibid., p. 469.
151 As stated by Sutradara Ginting (F-KKI), Achmad Sjatari (F-PDU) and Manasse Malo (F-PDKB). Ibid., pp. 493, 496, 497.
152 As expressed by Andi Mattalatta (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 40.
153 As confirmed by Ali Masykur Musa (F-KB). Ibid., p. 68.
154 As instructed by Megawati Soekarnoputri in an expanded national executive party meeting in Novotel Hotel on the outskirts of Bogor in early August 2002. PDI-P believed that a direct presidential election would manifest the people's aspiration without bias. Personal notes.
155 As confirmed by Mutammimul Ula (F-Reformasi), Hartono Mardjono (F-PDU), Hamdan Zoelva (F-PBB), Tjetje Hidayat Padmadinata (F-KKI), Kohirin Suganda (F-TNI/Polri), Pataniari Siahaan (F-PDIP), Lukman Hakim Saifuddin (F-PPP), Gregorius Seto Harianto (F-PDKB), Januar Muin (F-UD) and Achmad Zacky Siradj (F-UG). Ibid., pp. 195 – 214.
156 Ibid., p. 766.

### VIII.2.3 Article 29 and obligation to implement Islamic Sharia

This section chronicles the debate surrounding the proposed amendment to Article 29, including insights from the Ministry of Religious Affairs, public hearings, factions, resource persons, and the President and Vice President at the time. It summarizes how the factions avoided a decision by vote and compromised by amending Article 31 while retaining the original Article 29, excluding the obligation to implement Islamic Sharia from this section of the Constitution.

The debate started in a PAH I meeting on 28 January 2002. The F-UD speaker reiterated that the original Article 29 should be maintained. F-UD affirmed that changes would certainly cause national upheaval and social conflict. Further, F-UD warned that the North Sulawesi DPRD, as well as MPR delegates from East Nusa Tenggara, Central Kalimantan, Maluku, and Papua had declared to secede from the Republic of Indonesia if the Jakarta Charter (*Piagam Jakarta*), in which the *tujuh kata* were embedded, was incorporated into the 1945 Constitution.[157] A F-Reformasi speaker reminded that the people's moral decadence was plunging to its nadir. Overcoming it by implementing harsh punishments as in the *jahiliyah* (pagan) times would be absurd. The only answer was to increase the people's piety, whatever their religions were. In olden days, in the event of moral decadence, the prophet and holy texts would be sent to halt the decadence. However, since there would be no new prophets, the MPR should now take care of the problems.[158]

#### *VIII.2.3.1 Insight from the Ministry of Religious Affairs*

In a PAH I meeting on 26 February 2002, Faisal Ismail,the Secretary General of the Ministry of Religious Affairs stated that the Ministry did not recommend any changes to Article 29 and stressed maintaining the original Article 29(1) and (2). In 1945, the people of eastern Indonesia had declared their objection to the *tujuh kata* ('the seven words'), determined to exit the Republic if the clause were included. As a result, the original Article 29 had become the meeting point of various theological views of pluralistic Indonesian society. Therefore, it should be preserved and maintained. Further, the mainstream philosophies in society wanted to keep Article 29, reflected in the views of the Indonesia Ulema Council (MUI), Muhammadiyah, Nahdlatul Ulama (NU), Communion of Churches in Indonesia (PGI), Bishop's Conference of Indonesia (KWI), Council of Buddhist Communities (Walubi), and Parisadha Hindu Dharma Indonesia. Ismail reiterated that keeping Article 29 was a mainstream view, representing all walks of life of

157 As stated by Januar Muin (F-UD). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 143. See II.3.

158 As stated by A.M. Luthfi (F-Reformasi). Ibid., p. 152.

the Indonesian people. Furthermore, Article 29 governs sensitive matters. Therefore, to avoid undesirable outcomes that could lead to the nation's disintegration, it is better to maintain Article 29 as is. Instead, the Article should be elaborated into statutes to regulate the inter-religion relationships at a practical level so that interfaith life takes place in harmony.[159]

Regarding *kepercayaan*, the Secretary General stated that according to Mohammad Hatta, the first Vice President of Indonesia, the term *kepercayaan* refers to religions, and does not represent a separate entity. Later in 1980, it became an issue when the followers of *kepercayaan* claimed that the term refers to a specific set of beliefs.

Regarding the idea that state officials should not act in a way that contradicts a religion's teachings, the Secretary General supported the idea, since every official pledges in their oath of office to act in accordance with their religion's teachings. However, the Secretary General disagreed with explicitly stating that religious believers should be obliged to implement religious teachings. If someone believes in one religion, implicitly it already means that he/she agrees that the religion obliges him/her to implement the teachings.[160]

### *VIII.2.3.2 Insights from Public Hearings and Delegations*

Likewise, in the next day's PAH I meeting, the Indonesian Notary Association delegation stated that, to prevent the nation from disintegrating, the initial Article 29 should be maintained.[161] In the next public hearing on 4 March 2002, elder statesman Roeslan Abdulgani also agreed that Article 29 should be maintained.[162] On that occasion, Abdulgani revealed the background of including the Jakarta Charter (Piagam Jakarta) in the consideration of Presidential Decree 5 July 1959, which re-enacted the 1945 Constitution. According to Abdulgani, this was a way to gain support for the re-enactment of the 1945 Constitution, especially from the Muslim community. In the consideration of the Decree, it is written that "We believe that the Jakarta Charter, dated 22 June 1945 animates the 1945 Constitution and forms a continuum with the Constitution."[163] Although the statement was included in the consideration of the Decree and thus not law, it still gained the support of prominent Islamic figures, such as Idham Chalid, NU Chairman and Deputy Prime Minister, Zainul Arifin, vice DPR chairman of the Nahdlatul Ulama, and of other communities, such as J. Leimena, then

159 As stated by Faisal Ismail, Secretary General of the Ministry of Religious Affairs. Ibid., pp. 274-275.
160 Ibid., pp. 304-305.
161 As stated by Arry Supratno.Ibid., p. 335.
162 Ibid., p. 427.
163 In Indonesian, it states: "*Bahwa kami berkeyakinan bahwa Piagam Jakarta tertanggal 22 Juni 1945 menjiwai Undang-Undang Dasar 1945 dan adalah merupakan suatu rangkaian kesatuan dengan konstitusi tersebut.*"

the Deputy Prime Minister and Indonesian Christian Party Chairman, and I.J. Kasimo, former Minister and Indonesian Catholic Party Chairman.[164]

Accordingly, delegations from the Indonesia Christian University and the University of Bung Karno stated in a PAH I public hearing on 5 March 2002 that Article 29 should not be changed.[165] On the other hand, a public hearing conducted by PAH I in Bandung from 6 to 7 March 2002, reported that most participants contended that Article 29 should be changed. They proposed that the first clause should say that the state should oblige people to implement their respective religions and the second clause should state that the people should worship in accordance with their religious teachings (*beribadah menurut kepercayaan agamanya*).[166]

In a similar Banjarmasin public hearing, the audience had intensely debated the issue. Three different stances regarding Article 29 were discernible: to maintain the original formulation, to insert the *tujuh kata*, or to apply the obligation upon every religions' followers.[167] In Semarang and Solo, most participants wanted to maintain the original Article 29.[168] In Palembang, although participants preferred maintaining the original Article 29, if it were to be changed, they held that the obligation should apply to all other religions.[169] A similar Surabaya forum asserted that the original Article 29 should be final.[170] Likewise, Makassar's general audience favoured maintaining the original Article 29, although certain people argued to revise it.[171]

In the subsequent PAH I plenary meeting on 21 March 2002, the F-UD speaker stated that Article 29 is the main pillar of national integration. Therefore, the Article should not be changed. Further, F-UD warned that in North Sulawesi, a "great people's council" had been convened and the Province's DPRD had met. Both events declared that if Article 29 would be changed and 'the seven words' from the *Piagam Jakarta* (the Jakarta Charter) inserted, North Sulawesi would secede from the Republic of Indonesia. F-UD members from Central Kalimantan, East Nusa Tenggara, and Papua confirmed a similar attitude in these provinces.[172]

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164 Presidential Decree, 5 July 1959. This is the reason why factions such as F-PPP and F-PDU insisted that the object of the amendment is the 1945 Constitution which was re-enacted by the Presidential Decree of 5 July 1959, not the 1945 Constitution which was promulgated on 18 August 1945. This confirmation adds to the reasons for certain factions to reinclude 'the seven words' (*tujuh kata*) in the 1945 Constitution. See Ibid., pp. 454-455. Ruslan Abdulgani was one of the prominent figures of the Indonesian revolution of 1945 – 1950.

165 As stated by Anton Reinhart from the Indonesia Christian University and Jemmy Palapa from the University of Bung Karno. Ibid., pp. 464, 473.

166 As reported by Abdul Azis Imran Pattisahusiwa (F-PPP). Ibid., p. 624. The formulation of the 2nd clause means that *kepercayaan* (the belief) is not acknowledged as a separate set of beliefs outside of religions.

167 As reported by Soedijarto (F-UG). Ibid., p. 628.

168 As reported by Hatta Mustafa (F-UD). Ibid., p. 632.

169 As reported by Rully Chairul Azwar (F-PG). Ibid., p. 635.

170 As reported by Retno Triani Johan (F-UD). Ibid., p. 638.

171 As reported by Ali Hardi Kiaidemak (F-PPP). Ibid., p. 641.

172 As asserted by Hatta Mustafa (F-UD). Ibid., p. 683.

### *VIII.2.3.3 Faction Debates in PAH I Meetings*

On 29 March 2002, the PAH I meeting began to formulate the conclusion on Article 29. F-Reformasi argued religions should increase the piety of their followers and proposed adopting an alternative: "The State is based on the One and Only God, with the obligation to implement the religion's teachings of their respective followers." Further, the term *kepercayaan* should be removed from Article 29, because it does not belong to religion. The term was already described in Article 28 regarding human rights.[173] However, F-PDIP asserted that the original formulation, "The State is based on the One and Only God", is quite appropriate to assure people embracing their religions.[174]

F-PBB put forward that the most important thing for a state based on the Almighty God was the recognition of religions and the assurance that followers implement their religions' teachings. Regarding Islam, there is something specific that is not present in other religions, especially regarding the public sector and society. Sharia regulates worship, which is the relation between the human being and God. Sharia also regulates the relationship between the human being and their surroundings, including human relationships. Indeed, in one's relationship with God, an authority's intervention is unnecessary; it is up to the individual. However, relationships with other people, including the issues of inheritance and murder, are *qot'i* (fixed), and require an authority's intervention. Therefore, Islamic Sharia cannot be implemented properly without state intervention. This is a principled view that religion and the state, especially in Islam, are inseparable. This framework reflects the aspirations and beliefs of certain community groups. Nonetheless, the public should learn to engage in mature politics that respect political mechanisms. Whatever decision is made after a democratic process, it must be accepted. If people threaten each other from the beginning, they do not learn about democracy. F-PBB agreed with the people's aspiration to add the *tujuh kata* into Article 29(1). To them, this was something normal. However, whatever decision was made at the end, they would respect it. Further, regarding Article 28E (2), which confirms that "every person shall have the right of the freedom to adhere to their beliefs (*kepercayaan*),and to express their thoughts and attitudes, in accordance with their conscience", F-PBB reiterated that the proposal to remove *kepercayaan* from Article 29 (2) does not mean abolishing *kepercayaan* (belief) itself.[175]

In response, a F-TNI/Polri speaker underlined that the original Article 29 should be retained. No other formulations regarding the substance of certain religions or religions in general should be inserted, such as the obligation to implement Sharia and religious teachings. There were four reasons for this argument. First, the Republic of Indonesia is not a theocratic

173 As stated by A.M. Luthfie (F-Reformasi). Ibid., pp. 685-686.
174 As stated by Zainal Arifin (F-PDIP). Ibid., p. 688.
175 As stated by Hamdan Zoelva (F-PBB). Ibid., pp. 689-690.

state. Second, the state is not capable of controlling the physical, let alone spiritual, implementation of religious teachings thoroughly and comprehensively. Third, implementing religious teachings is the responsibility of the individual and the community, which is driven by conscience, not the state or through coercion. Fourth, in the nation's overall life, the moral messages of universal religious values could be expressed. Furthermore,the original clause "*agama dan kepercayaannya itu*" (religion and belief) in Article 29(2) must be maintained, because it accommodates the understanding of religions at the macro level, and the reality of a heterogeneous society.[176]

Likewise, the F-PDKB speaker argued that the state may not compel anyone to exercise a religion's teachings, though religion may become the basic framework of a man's behaviour. Indonesia is neither a theocratic state nor a secular state. Indonesia is a religious nation. It is well understood how believers, such as Muslims, materialize the values of religion into daily life. However, the answer is not in the fundamental law which comprises everyone without exception. Religious specificities may be embodied in various forms of legislation. In the realm of the court system, there are religious courts, and everyone knows that this means Islamic courts. In essence, they are discriminatory. However, they constitute the acceptable specificity to accommodate cases such as those involving inheritance law. There are noble religious values in Islam, i.e., Sharia, that could be accepted by other religions, which can be embodied in various forms of legislation without negating the fundamental law that covers the entire nation without exception. *Kepercayaan* presumes recognition of a religion is a private matter, that people should be free to assume their *kepercayaan* as their religion. Thus, the original Article 29 should be maintained.[177]

Subsequently, a F-UG member representing a heterogeneous faction, including delegates from various religions and *kepercayaan*, argued that the original Article 29 should be maintained. However, as a country based upon God Almighty, moral decadence such as corruption should not worsen. God Almighty has become just a symbol and does not enlighten the nation. There should be enlightenment by one's faith in being ashamed of doing immoral things.[178]

Similarly, the F-PG speaker emphasized that the original Article 29(1) should be maintained. Article 29 was the agreement of the founding fathers and a national consensus. Changes to the consensus could bring severe societal upheaval. Further, religion or faith is an intact entity. The state should not intervene in religion, and vice-versa. The state cannot oblige people to follow a religion. However, regarding the term *kepercayaan* in Article 29(2), this can be changed. Here, *kepercayaan* should mean religious belief, not an independent set of beliefs. To equate religion with *kepercayaan*, which is the sets of traditional beliefs rooted in the pre-"modern religions" era, is sensi-

176 As underlined by Affandi (F-TNI/Polri). Ibid., p. 692.
177 As stated by Gregorius Seto Harianto (F-PDKB). Ibid., pp. 694-695.
178 As stated by Ahmad Zacky Siradj (F-UG). Ibid., p. 696.

tive and unacceptable to the people. This is the stance of mainstream Islam in Indonesia, i.e., of NU and Muhammadiyah. Moreover, the formulation may stimulate the emerging of new religions or cults, such as Watch Tower, Children of God, or David Koresh in the United States. F-PG proposed adding a third section to Article 29, stating: "The State policy should not be in conflict with values, norms and religious laws". This new section intended to assure that the state will not intervene and contradict the values, norms, and laws of religions. Muhammadiyah argued that the additional section does not need to be included in the Constitution, it being sufficiently guaranteed by the law. *Dewan Dakwah* (The Islamic Missionary Council) and *Majelis Ulama Indonesia* (Council of Indonesia's Ulema) argued that it should be regulated in the Constitution.[179]

F-PDIP invited others to discuss the topic from a historical perspective. One of the crucial topics that threatened and disturbed the declaration of independence regarded the formulation of religion (see II.3). There was deliberation to seek a common platform where a peaceful and tranquil life of the heterogeneous nation could be built. Considering all aspirations surrounding the proclamation of independence, the founding fathers produced Article 29. The formulation was the fruit of a difficult process under hard circumstances that had enabled the birth of a new nation. The formulation had been tested during half a century, providing space and tolerance for everyone to worship peacefully. As a Muslim, the F-PDIP speaker continued, under this formulation people can worship as perfectly as the Prophet did. We can also live life as set by the Prophet. Thus, the original Article 29 should be maintained.[180]

Another F-PDIP member reiterated that the original formulation could unite heterogeneous groups and communities. It should be understood in its *historische bepaaldheid* (historical determination). It is not only the legal logic, but also the *geistlicher Hintergrund* (the spiritual background) and the *historische wording van het recht* (historical development of the law).[181]

A F-PPP member explained why F-PPP had proposed changes to Article 29 (see VI.2.3.9 and VII.3.12). First, *kepercayaan* (belief) is different and separate from religion. Moreover, *kepercayaan* had been stipulated in Article 28 on human rights. Supposedly, Article 29 should talk only about religion and nothing more. Therefore, anything about *kepercayaan* should be removed from Article 29. Article 29(1) is about the relationship between religion and the state, which are both distinguishable and inseparable. The state has no obligation to advance religions. However, the state is obliged to develop the "people of religions". Thereby, the state's objective is to realize the people's welfare, both physically and spiritually. In that regard, the state can control the manifestation of religious teachings by the society it helps shape. Religious teachings are about the relationship between people and

179 As stated by Amidhan (F-PG). Ibid., pp. 697-699.
180 As stated by Soewarno (F-PDIP). Ibid., p. 700.
181 As conveyed by Sutjipno (F-PDIP). Ibid., pp. 702-703.

God, or *mandho*, and about the relationship between people, other creatures and nature. Similarly, through the ten commandments, the state can control people so that God's instruction will not be breached. Thus, a state based on One Almighty God should be obliged to implement Islamic Sharia to its followers, to prevent moral decadence and the decline of humanity. In terms of history, many mysteries surround the change, which occurred at the last moment (see II.3). Furthermore, the proposal should be addressed proportionately, not by presuming that it was a factor of disintegration and countered with the threat of secession. This proposal should be seen similarly to the MPR's composition or the second presidential election round. The MPR will see which alternatives receive a majority support, in which case, everyone should be subject to the democratic process.[182]

During the meeting on the morning of 21 March 2002, a F-KB member underlined that every religion teaches and has an interest in taking care of its believers and its advancement. How it is manifested depends on how the religion has developed. Historically, the advancement of Islam to the North and South of the Arabian Peninsula resulted in different characteristics. In the North, it has a strong formal-structural and power-based approach, as manifested by the section stating: "*umirtu an uqotilannas*, I am instructed to fight others until they confess *syahadat*." To the South, the Prophet clearly told Muaz, disciples of the Prophet, that "you will come to varying communities, then educate." This instruction to educate is a cultural and substantive approach. Both approaches will never cease since both have a basic foundation. In Indonesia, both the formal-structural and cultural-substantive approach developed and entered the political realm. Regarding the formulation of Article 29, whether it was a substantial or situational agreement among the founding fathers, it was situational and developing thereafter. Therefore, the amendment depends on agreement and need. F-KB expected an amendment to answer the same question, whether it is substantial or situational, stated the member.[183]

F-PDU argued that by recognizing that the *Piagam Jakarta* (Jakarta Charter) animates the 1945 Constitution, several laws regarding Islamic interests are then made, such as the laws on pilgrimage, *zakat* (tithe), marriage, the Islamic court, and the compilation of Islamic laws.[184] Therefore, from the beginning, F-PDU did not want any changes to Article 29(1). Moreover, the Nahdlatul Ulama national conference (*muktamar*) confirmed in 1984 that *Pancasila* is final. Therefore, as a Nahdlatul Ulama member, the speaker

182 As conveyed by Lukman Hakim Saifuddin (F-PPP). Ibid., pp. 704-706.

183 As stated by Yusuf Muhammad (F-KB). Ibid., p. 710. *Syahadat* is the confession of faith in Islam.

184 The Presidential Decree of 5 July 1959 which re-enacted the 1945 Constitution, in its consideration stated, among other things, that the Jakarta Charter animates the 1945 Constitution. At the beginning of the amendment process, the factions in the MPR agreed that the 1945 Constitution to be amended was the 1945 Constitution which was re-enacted through the presidential decree of 5 July 1959. See V.2.1.

should conform with the confirmation.[185] Regarding the first principle of Pancasila, the existence of God is asserted as *Yang Maha Esa* (The One and Only God), which is not present in the Jakarta Charter.[186] Hence, the founding fathers' agreement is not situational, but rather substantial, since the first principle's new formulation affirms the One and Only God which is *tauhid*, the acknowledgement of the One and Only God (*qul huwallahu ahad*),and the essence of the confession. Therefore, without changes, the original Article 29(1) is sufficient. However, F-PDU would accept if the formulation were expanded so that all religions should be obliged to implement their respective religion's teachings. Further, F-PDU agreed to remove the term *kepercayaan* from Article 29(2).[187]

Likewise, F-Reformasi emphasized that there should be a statement in the Constitution to remind all people that implementing religion's teachings is an obligation. Regarding the religious courts, they should not be considered discriminatory. Such courts respond to people's needs regarding implementing Islamic teachings on civil matters, such as *nikah* (marriage), *talak* (divorce), *rujuk* (reconciliation), and *wasiat* (wills). No recognized religious teachings contradict state constitutional practices.[188] Regarding *kepercayaan*, F-Reformasi argued that it has been stipulated in Article 28 on human rights. Article 29(2) should be interpreted as the *kepercayaan* (faith) in religious teachings.

Anticipating the impact of this sensitivity issue, the Chairman of PAH I reminded members of the importance of maintaining a comfortable atmosphere of togetherness, *bhinneka tunggal ika*, different but still one. Some of us are large, some are small, some are on the yonder island, some are on this island, but we are all in a very comfortable shared living-space. In connection with that, the chairman emphasized, everyone has the right to freedom to believe in *kepercayaan* (beliefs), to express thoughts and attitudes according to his conscience. These are the very fundamental things when we talk about Article 29.[189]

At that meeting's end on 21 March 2002, F-PBB proposed that the conclusion on Article 29 could be made in a PAH I plenary meeting. PAH I did not need to form a small team to resume the discussion.[190] The PAH I chairman then decided to convene an informal consultation meeting with the faction leaders. The meeting agreed to form a formulation team to complete all pending materials, including discussions on Article 29.[191]

185 As stated by Asnawi Latief (F-PDU). Ibid.
186 The first principle in the Piagam Jakarta (Jakarta Charter) is "the belief in God, with the obligation to implement Islamic Sharia to its followers." The first principle in *Pancasila* is 'the belief in One and only God."
187 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 710-711.
188 As stated by Patrialis Akbar (F-Reformasi). Ibid., pp. 713-714.
189 Ibid, p. 715-716.
190 As argued by Hamdan Zoelva (F-PBB). Ibid., p. 716
191 Ibid, p. 727.

### *VIII.2.3.4 Further Meetings: Disagreements Persist*

As scheduled, a formulation team was formed, and the topic was resumed in a team meeting on 4 April 2002. F-KB offered a new formulation, namely "the State upholds ethical values and human morality taught by every religion", as the middle way.[192] However, the meeting failed to choose from the various alternatives previously proposed. Thus, the PAH I chairman postponed the discussion until the synchronization stage in June 2002.[193]

Then, in an assessment forum in Pontianak, West Kalimantan, on 21 May 2002, responding to the draft amendment, a participant argued that the term *kepercayaan* (belief) should be removed because it caused obscurity. By contrast, another participant argued that the original Article 29 should be maintained, but it would be acceptable if the changes obliged all people to implement their respective religion's teachings. Further, the term *kepercayaan* should be removed and replaced with the term *keyakinan agama* (religious convictions). Furthermore, to ward off communism and atheism, the state should protect people from teachings that are contrary to the Belief in God Almighty.[194] However, a SMP I (Junior High School) Pontianak participant asserted that to believe in a religion is a fundamental human right. Therefore, it is contradictory for the state to oblige people to exercise their belief. If it was an obligation, we would have to report neighbors to the police if they did not practice their religion.[195]

In the same vein, a Law Faculty participant from the University of Tanjungpura reminded the audience that in the articles on human rights, the Constitution includes the freedom of conscience. It is a reality that there are people who believe in God and do not embrace a specific religion. Thus, removing the word *kepercayaan* from Article 29(1) would cause the Constitution to contain two contradictory mindsets.[196]

### *VIII.2.3.5 Insights from Resource Persons: Djalal and Soemantri*

To gain more insights to the matter, on 27 May 2002, PAH I invited Hasyim Djalal and Sri Soemantri as resource persons. Both were former PAH I Team of Experts members.[197]

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192 As proposed by Yusuf Muhammad (F-KB). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 233.

193 Ibid., p. 240.

194 As expressed by Firdaus Mian, a participant from KNPI (*Komite Nasional Pemuda Indonesia* – National Committee of Indonesian Youth) and Candra Hasan from the Muhammadiyah's leadership in West Kalimantan. Ibid., p. 712.

195 As stated by Tanrizal from SMP I (Junior High School) Pontianak. Ibid., p. 728.

196 As stated by Ibrahim Sago from the Law Faculty, University of Tanjungpura. Ibid., p. 730.

197 Both Hasyim Djalal and Sri Soemantri are experts in law and were members of Team of Experts. See VII.2.1.

Hasyim Djalal argued that changes to Article 29 would have complicated consequences. Obliging people to carry out their religion would require law enforcement, in this case undertaken by the police. It would be unrealistic to educate hundreds of thousands of police officers to master every religious teaching. Further, there was a problem with determining who had the authority to interpret religious norms. Differences in interpretation would inevitably lead to conflicts within the religion. Stability will be more at risk if norms must be interpreted by the government since religious followers may challenge the government. In that situation, vigilante groups may emerge, as was happening in Jakarta, to implement the obligations.[198] Sri Soemantri endorsed Djalal's opinion regarding changing Article 29.[199]

In response, F-PPP argued that implementing the obligation should not be a problem, as long as the related instrumental legislation is made through a democratic mechanism.[200] F-Reformasi added that the term *'kewajiban'* (obligation) in that article does not mean *'mewajibkan'* (to oblige). It is inherent, so it does not require state intervention.[201]

The discussions regarding Article 29 were resumed in the PAH I meeting on 13 June 2002. The meeting chair recalled the alternatives recorded in previous meetings.[202] An F-PPP member stated that the proposal to insert the *tujuh kata* was not an attempt to adopt the scattered remnants of the *Piagam Jakarta*. Instead, the psychological factor of 'the seven words' was necessary to bridge the psychological barriers within society.[203]

A F-UD member asserted that the original Article 29 reflected the people's will to live harmoniously in a unitary Republic of Indonesia. Therefore, it must be maintained, so that the change does not cause the state to be broken.[204] Likewise, F-PG reiterated that Article 29(1) should be maintained. Only the term *kepercayaan* (belief) in Article 29(2) should be clarified to mean a religious belief. Additionally, it was no problem if the limitation that "the state should not contradict the values, norms, and religious laws" were not accepted.[205]

On the other hand, the F-TNI/Polri speaker emphasized that the formulation in the original Article 29 had been moulded comprehensively and brilliantly by the founding fathers in the spirit of togetherness. It can embrace the nation's heterogeneity, so there is no differentiation and discrimination. From a transcendental perspective, this article is not contrary

198 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 754.
199 Ibid., p. 758.
200 As argued by Lukman Hakim Saifuddin (F-PPP). Ibid., p. 769.
201 As argued by Patrialis Akbar (F-Reformasi. Ibid., p. 777.
202 The meeting was chaired by Harun Kamil (F-UG), the vice PAH I chairman.
203 As stated by Ali Hardi Kiaidemak (F-PPP). Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 168.
204 As stated by Hatta Mustafa (F-UD). Ibid., p. 170.
205 As expressed by Amidhan (F-PG). Ibid., p. 171.

to religious norms. From a horizontal perspective, it can foster harmony. Therefore, Article 29 does not need to change and there should be no additional section.[206]

F-PDIP also reminded the committee of the circumstances surrounding the ratification of the original Article 29 on 18 August 1945. This nation only had the fighting spirit and the text of the proclamation of independence. All others were under the rule of the Japanese. At that critical moment, the agreement to approve the formulation of Article 29 must have come from a truly holy and pure conscience.[207]

Then, F-KB proposed modifying Article 29(1) as follows: "The state is based on the belief in the One and Only God with a sincerity to implement the teachings of each religion for its adherents." The term "obligation" was replaced by "sincerity" (*kesungguhan*). For Article 29(2), F-KB suggested omitting the word *kepercayaan*.[208] Yet, another F-KB member asserted that if no agreement would be achieved, F-KB preferred to maintain the original Article 29(1).[209]

Regarding the proposal, a F-UG member commented that the term "obligation" requires a law to enforce the stipulation, while the term "sincerity" highlights the moral side. Further, the proposal could become the starting point for further development.[210] Another F-UG member stated that it seemed the committee only talked about words, not about meaning. They questioned what would happen to the state of Indonesia, especially for Muslims, if one of those alternatives was chosen.[211]

In response, the PAH I chairman emphasized that, although the debate was ostensibly about words, on the dots and the commas, it manifested philosophical and conceptual arguments. If not by ratio, the underlying concepts could be understood by intuition, as everyone involved was a longstanding politician. If necessary, one could elaborate one's respective arguments. However, considering that the discussion had lasted quite some time, the focus should remain on the formulation and the arrangement of the words.[212]

However, the debate continued without the positions of the factions changing, let alone agreeing. Finally, the chairman concluded that the alternatives remained as they were, and the ideas presented in the discussion would be noted for further discussion.[213]

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206 As stated by Kohirin Suganda (F-TNI/Polri). Ibid., p. 172.
207 As stated by Soewarno (F-PDIP). Ibid., p. 177.
208 As proposed by Ida Fauziah (F-KB). Ibid., p. 202.
209 As stated by Ali Masykur Musa (F-KB). Ibid., p. 204.
210 As stated by Harun Kamil (F-UG). Ibid., p. 205.
211 As stated by Soedijarto (F-UG). Ibid., p. 206.
212 Ibid.
213 Ibid., p. 219.

### *VIII.2.3.6 Synchronization Meeting: Attempting to Overcome Differences*

In a meeting on 28 June 2002, PAH I convened a synchronization meeting to overcome the differences regarding Article 29. At the meeting's outset, the meeting chair conveyed certain notes from the previous meetings.[214] The factions immediately reiterated their respective previous stances. F-PG appealed for consideration of proposing changes to the Article. Article 29 contained sensitive issues, whose changes would render misunderstandings among the people if not handled carefully. In proposing changes, one should consider the *manfaat* (benefit) that might be acquired relative to the *mudharat* (disadvantage) that might occur because of the issue's sensitivity. Taking the *manfaat* should be put aside if by putting it aside, *mudharat* could then be prevented.[215]

In response, a F-PDIP member cited Article 27 section (1) of the 1945 Constitution: "All citizens shall be equal before the law and the government and shall be required to respect the law and the government without exceptions". Hence, the gravels that could lead to the nation's disintegration should be removed. Mohammad Hatta, whose Islamic faith and intellectuality no one doubted, was the key figure who had managed previously to overcome this crisis (see II.3). Further, in South Sulawesi and Nanggroe Aceh, there were attempts to impose Islamic law, which would cause trouble that would spread throughout the body of the nation.[216]

In response, a F-PBB speaker hoped the state's seeming volatility did not stem from the proposed changes. "Personally, there is no doubt about Mohammad Hatta, but Hatta's comprehension about Islam does not represent my view about Islam." There was no intention to disturb other people.But both mosques and churches were being burnt. If a Muslim obeys Islam's teachings, they will not burn churches. If a Muslim understands Islamic Sharia, even in war, they will not burn a church. Further, F-PBB had agreed to maintain Article 29(1) and to insert the *tujuh kata* into Article 29(2). However, he continued, if we are suspicious from the beginning, it is impossible for us to solve the problem wisely. Furthermore, he stated that they had no objection if this matter would be decided by voting in the plenary session. He added that if so, F-PBB would return to its original proposal.[217]

A F-PDU member reiterated that from the beginning, F-PDU wanted to maintain the original manuscripts, although the aspirations to insert the obligation to implement Islamic Sharia were legitimate. However, inserting it into Article 29(1), which is about the state's foundation, would mean

214 The meeting was chaired by Harun Kamil (F-UG), the vice PAH I chairman.

215 As conveyed by Slamet Effendy Yusuf (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 579.

216 As conveyed by Frans Matrutty (F-PDIP). Ibid., p. 582.

217 As conveyed by Hamdan Zoelva (F-PBB). Ibid., p. 584.

changing the state's foundation. Factions may consider obliging Muslims to implement Islamic Sharia in another section.[218]

Then, a F-PDIP member noted that the MPR had committed to maintaining the Preamble and to regard it as a reference. Indonesia is neither a theocratic state nor a secular state. The state is based on *Pancasila*, which provides a condition for every religion to be free without state interference. That is a precious and particular value of Indonesia that should be maintained and developed.[219]

A F-KB member emphasized that in formulating the sections, one should maintain the harmony of the state's and religions' relationship. The best choice is to put the position of the state and religions as mutually supportive and strengthening. In that regard, Article 29(1) could be maintained, and Article 29(2) can be amended to emphasize the harmonious relationship between the state and the religions. That relationship is not institutional, but rather cultural, and provides religions with the opportunity to develop their respective teachings, along with the nation's life into the future. In that connection, the state's guarantee is not institutional. In terms of *pengayoman* (protection), it is to encourage the people of Islam, Christianity, and others to have an awareness and increase their role in the state and the nation.[220]

The F-Reformasi speaker reiterated supporting the third alternative proposal of Article 29(1): "the State is based on the One and only God Almighty with the obligation to carry out their respective religious teachings."[221] In response, F-TNI/Polri recalled the magnitude of the possible risks. The regional autonomy problem alone has shaken the country hard enough, even more so if coupled with religious issues. Therefore, the original text of Article 29(1) and (2) still needs to be maintained.[222]

The synchronization meeting chair offered to conclude the proposals as Article 29(1), "the State shall be based upon the belief in the One and Only God," and as Article 29(2), "the State guarantees all persons the freedom to embrace and implement their respective religion's obligations and to worship according to their religion."[223]

In response, F-Reformasi and F-PPP withdrew their respective proposals and endorsed the formulation.[224] However, the F-TNI/Polri speaker insisted that, even though the existence of *kepercayaan* (set of beliefs) was accommodated in Article 28 on Human Rights, from a historical perspec-

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218 As asserted by Asnawi Latief (F-PDU). Ibid., p. 585. Article 29 paragraph (1) states that, the State shall be based upon the belief in the One and only God.

219 As reminded by Katin Subiyantoro (F-PDIP). Ibid., p. 586.

220 As stated by Yusuf Muhammad (F-KB). Ibid., p. 587.

221 As conveyed by A.M. Luthfi (F-Reformasi). Ibid., p. 589.

222 As asserted by Kohirin Suganda (F-TNI/Polri). Ibid., p. 590.

223 The meeting was presided by Harun Kamil (F-UG), the vice PAH I chairman. Ibid., p. 594.

224 As stated by A.M. Luthfi (F-Reformasi) and Ali Hardi Kiaidemak (F-PPP). Ibid., p. 595. Paragraph (2) was proposed by Yusuf Muhammad (F-KB).

tive, it was necessary to accommodate *kepercayaan* in Article 29(2). The linkage of Article 29(1) and Article 29(2) had become the recorder of harmony among religious people and adherents to beliefs. Therefore, the original Article 29 should be retained.[225] Eventually the synchronization meeting did not manage to conclude the debates regarding Article 29.

### *VIII.2.3.7 Further Attempts at Agreement: PAH I Meetings*

In a PAH I meeting on 19 July 2002, to finalize the fourth amendment draft, factions once again reiterated their respective stances.[226] A F-PDU speaker stated that the proponents of the *tujuh kata* retained their position.[227] In the ensuing PAH I meeting on 25 July 2002, factions conveyed their respective opinions regarding the fourth amendment draft, including on Article 29. Again, they reiterated their initial stances, as represented by the following statements.

F-PDIP viewed the original Article 29 as a proper sociological portrait of Indonesia's diverse community, proven as a pillar of national unity that should be maintained.[228] A F-PPP member reiterated that the Islamic Sharia does not only regulate the vertical relationship between people and God. Islamic Sharia is more concerned with the horizontal relationships between humans.[229] A F-UG member stated that most of its members wanted to maintain the original Article 29(1) and accept alternative 2 of Article 29(2).[230] F-TNI/Polri reaffirmed that, since the original Article 29 had become a national consensus and changes risked disturbing religious harmony, the unity of the nation, and even break down the territorial integrity of the unitary state, they wanted to maintain the original Article 29.[231]

In that regard, F-PBB emphasized that there were no concerns while the issue was discussed in the corridors of democracy, respecting the law and the agreed decision-making mechanism. As the 1945 Constitution was reinstated by the 5 July 1959 Presidential Decree, framing the Jakarta Charter as an inseparable part of the 1945 Constitution, changes to Article 29 are the logical consequence.[232]

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225 As asserted by Kohirin Suganda (F-TNI/Polri). Ibid., p. 599.

226 Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2002, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 127- 135. In the meantime, President Abdurrahman Wahid was dismissed, and Vice President Megawati Soekarnoputri was inaugurated as the President. As the new Vice President, Soekarnoputri proposed Hamzah Haz, the PPP chairman (*Partai Persatuan Pembangunan* – United Development Party), an Islamic party, which was then endorsed by the MPR.

227 As stated by Asnawi Latief (F-PDU). Ibid., p. 273.

228 As stated by I Dewa Gede Palguna (F-PDIP). Ibid., p. 360.

229 As stated by Abdul Azzis Imran Pattisahusiwa (F-PPP). Ibid., p. 368.

230 As conveyed by Soedijarto (F-UG). Ibid., p. 383.

231 As confirmed by Kohirin Suganda (F-TNI/Polri). Ibid.

232 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 389.

### *VIII.2.3.8 PAH I Reporting Alternatives to the MPR Working Body*

On 25 July 2002, PAH I reported the following versions of Article 29 to the MPR Working Body plenary meeting:

- Article 29(1):
  *Alternative 1:*
  The State is based on belief in the One and Only God (Ketuhanan Yang Maha Esa) (original).
  *Alternative 2:*
  The State is based on belief in the One and Only God (*Ketuhanan Yang Maha Esa*) with the obligation to implement Islamic Sharia for its followers.
  *Alternative 3:*
  The State is based on belief in the One and Only God (Ketuhanan Yang Maha Esa) with the obligation to implement the teachings of the religions by its respective followers.
- Article 29(2):
  *Alternative 1:*
  The State guarantees all persons the freedom of worship, each according to their own religion or belief (original).
  *Alternative 2:*

The State guarantees all persons the freedom of religious conviction and to worship in accordance with their religion.

### *VIII.2.3.9 Further Discussions: Commission A Meetings*

On 4 August 2002, in his introductory remarks to the Commission A plenary meeting, a F-PG speaker reiterated that Article 29(1) should be maintained and the term *kepercayaan* (belief) in Article 29(2) should be understood as belief of the religion.[233]

On 5 August 2002, F-KB said it accepted the original Article 29 as a universal formulation that acknowledges the One and Only God (*tauhid*), which has proven to be the adhesive of this diverse society.[234] F-TNI/Polri and F-UD affirmed that Article 29 should be maintained as it is.[235] By contrast, the F-Reformasi speaker reiterated that Article 29(1) should become 'The State is based on belief in the One and Only God (*Ketuhanan Yang Maha Esa*) with the obligation to implement the teachings of the religions by its respective followers', with the word *kepercayaan* in Article 29(2) referring to religion.[236]

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233 As stated by Andi Mattalatta (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 40.
234 As affirmed by Ali Masykur Musa (F-KB). Ibid., p. 68.
235 As affirmed by R. Sulistyadi (F-TNI/Polri) and Retno Triani Djohan (F-UD). Ibid., pp. 82, 83.
236 As stated by Patrialis Akbar (F-Reformasi). Ibid., p. 71.

On 6 August 2002, a F-Reformasi member reminded those present that the original Article 29(1) is the middle way proposed by Ki Bagus Hadikusumo, the then Muhammadiyah chairman, which enabled the 1945 Constitution to be ratified on 18 August 1945. Although F-Reformasi is not opposed a priori to adding the 'seven words' (*tujuh kata*) to Article 29(1), implementing Islamic Sharia will be more appropriate through a legislative process, rather than a constitutional one.[237] However, F-PPP asserted that they agreed with alternative 2, which states that 'The State is based on belief in the One and Only God (*Ketuhanan Yang Maha Esa*) with the obligation to implement Islamic Sharia for its followers.' The additional 'seven-words' are clearly only aimed at Muslims; therefore, other religious followers should not be afraid. There would be no coercion to embrace Islam.[238]

On the other hand, F-PG reiterated that the original Article 29(1) is a wisdom that had saved the newly born Republic of Indonesia. Therefore, the original article should be maintained. As for the term '*kepercayaan*' in Article 29(2), it should be understood as belief of the religions. *Kepercayaan* as a system of beliefs has been accommodated in the Chapter on Human Rights, Article 28E.[239]

A F-PDIP speaker noted that incorporating the obligation to implement Islamic Sharia in the Constitution would have broad implications. Islamic Sharia, relative to the concept of the state, is a vast subject with various interpretations that can lead to clashes. Therefore, Article 29 should not be changed.[240] Another F-PDIP member argued that the original Article 29 is a noble agreement of the nation, which had been proven able to unite the diverse nation and maintain the unitary republic. Furthermore, the original Article 29 has guaranteed religious freedom for all Indonesians.[241] Another F-PDIP member, from Bali, reminded the commission that the discussions about Article 29 could not be regarded as merely intellectual discourses. Others may have different perceptions on this issue. Article 29 was a pillar of national unity for minorities. Each time it was disputed, there were disturbing psycho-politics, with rhetorical questions arising about where the minorities would go.[242]

F-TNI/Polri reiterated their wish to maintain the original Article 29 and warned that changes could become entry points of disharmony and

237 As stated by A.M. Fatwa (F-Reformasi). Ibid., pp. 222, 223.
238 As asserted by Khodijah H.M. Saleh (F-PPP). Ibid., p. 228.
239 As stated by Amidhan (F-PG). Ibid., pp. 229, 230.
240 As stated by Zulvan Lindan (F-PDIP). Ibid., p. 234.
241 As stated by Frans Matrutty (F-PDIP). Ibid., p. 236.
242 As expressed by I Dewa Gede Palguna (F-PDIP). Ibid., p. 238. I Dewa Gede Palguna is a Balinese, whereas most of the people embrace Hinduism (Hindu-Bali). Palguna was reminding the historical memories that exist within the community regarding the efforts of certain parties, such as the armed rebellion of DI/TII (Darul Islam/Tentara Islam Indonesia – House of Islam/Indonesian Islamic Army), where minority religions such as Hinduism, Christianity and others would experience discrimination and pressure.

instability.[243] A F-UD speaker emphasized that Islamic Sharia has very great, noble, and broad meanings. It covers all Islamic teachings, be it *aqidah* (spiritual arrangement, *imaniah*), worship (ritual arrangement, *ubudiyah*), *muamalah* (social arrangement), or morals (moral arrangement). On that basis, a Muslim can certainly implement Sharia without it being sustained by the state in a formal constitution. Further, there is no obligation in the Qur'an to establish an Islamic state or to incorporate Islamic Sharia into the Constitution. The Qur'an includes the basic principles of social ethics, including the ethics of a nation and state life. Thus, Islamic teachings could be implemented in any space and time without being restricted by territorial demarcation or state borders.[244]

F-UG was split into two stances. One member affirmed that there was no coercion to become a Muslim. However, once a person becomes a Muslim, he or she is obliged to implement Islamic Sharia. Therefore, the state's involvement in this matter is not an intervention, but instead part of the state's responsibility to protect the basic rights of Muslim citizens. Hence, F-UG should accept adding 'the seven words' into Article 29(1) and the term *kepercayaan* should be omitted from Article 29(2).[245] On the contrary, another F-UG member asserted that Article 29(1) should be maintained, but Article 29(2) should omit the word *kepercayaan*.[246]

F-PDKB and F-KKI confirmed their wish to maintain the original Article 29.[247] Then, F-PDU, in contrast with their previous stance, stated that the *tujuh kata* should be added to Article 29(1). There were no concerns, as the implementing Hinduism law in Bali was not perceived as discriminatory by the followers of other religions. Further, F-PDU argued that the word *kepercayaa*n should be omitted from Article 29(2).[248] Regarding the alternatives, the F-PBB speaker confirmed that the *tujuh kata* should be added to Article 29(1) and the word *kepercayaan* should be omitted from Article 29(2). It is the state's, the DPR's, and the government's obligation to make legislation based on Islamic Sharia, which is valid for the followers of Islam. As for the followers of *aliran kepercayaan* (set of belief or cults), their right is guaranteed in Article 28E on Human Rights.[249] On the other hand, F-KB confirmed maintaining the original Article 29, based on the messages of the ulema in the National Conference of Ulema of Nahdlatul Ulama.[250]

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243 As emphasized by Abdul Rahman Gaffar (F-TNI/Polri). Ibid., pp. 238, 239.

244 As expressed by Harifuddin Cawidu (F-UD). Ibid., pp. 239 – 240.

245 As stated by Shidiq Aminullah (F-UG). Ibid., p. 243. Later, A. Djoko Wiyono, F-UG member from KWI (*Konferensi Waligereja Indonesia* – Indonesian Bishop's Conference), elucidated that F-UG has 65 members, in which 20 members are elements of religious groups, i.e., 15 Muslims, 2 Protestants, 1 Hindu, 1 Buddhist, and 1 Catholic. See Ibid., p. 258.

246 As stated by Sulasmi Bobon Tabroni (F-UG). Ibid., p. 244.

247 As affirmed by Gregorius Seto Harianto (F-PDKB) and Tjetje Hidayat Padmadinata (F-KKI). Ibid., pp. 246, 248.

248 As affirmed by Asnawi Latief (F-PDU). Ibid., p. 247.

249 As confirmed by Hamdan Zoelva (F-PBB). Ibid., p. 248.

250 As confirmed by Yusuf Muhammad (F-KB). Ibid., p. 250.

Eventually, at the Commission A meeting's end, it was concluded that alternatives of the draft of Article 29 remained as before.[251]

*VIII.2.3.10 Suggested Compromise: Amending Article 31 and 29 Together*

On 7 August 2002, in an ensuing informal Commission A consultation meeting, the Commission A chairman who presided the meeting concluded that he would allocate two further opportunities for the factions to discuss the unsettled topics, including Article 29.[252]

In that regard, a F-PDIP speaker admitted they needed more time because of different opinions within the faction.[253] In response, a F-TNI/Polri speaker suggested that after the consultation meeting, a formulation team with a full mandate from the factions should be assigned to conclude the items. The formulation team's work would be final, so the plenary meeting would be only for ratification.[254] F-UD endorsed F-TNI/Polri's suggestion and stated that if the deliberation could not solve the differences, voting at the Commission level should be allowed.[255]

In that regard, the Commission A chairman appealed against hastily voting on a decision. There were still opportunities for informal consultations, whilst the result of voting at this stage could be revoked in the plenary meeting.[256] Eventually, the consultation meeting agreed to resume the discussion in the formulation team.[257]

Simultaneously, on 7 August 2002, an informal consultation meeting was held between the faction leaders from the MPR and Commission A. Arifin Panigoro, the F-PDIP Chairman in the MPR who chaired the meeting, said that the leaders of all MPR factions had met Vice President Hamzah Haz. Vice President Haz, who was also the Chairman of PPP, advised solving the issue regarding Article 29 elegantly and simultaneously with alternatives in Article 31 on education. The proposed Article 31 amendment could be accepted by all factions, and it was agreed that the original Article 29 be maintained as it is.[258] Further, Panigoro disclosed that he had also met President Megawati Soekarnoputri, the PDI-P chairperson, who encouraged

251 The meeting was presided by Zain Bajeber (F-PPP), the Vice Commission A chairman. Ibid., p. 256.
252 Ibid., p. 376.
253 As conveyed by Zainal Arifin (F-PDIP). Ibid., p. 379. At that time, in F-PDIP, contention regarding the existence of delegates of functional groups in the MPR and the demand to revive the MPR as the highest state institution was at its peak.
254 As stated by Slamet Supriyadi (F-TNI/Polri). Ibid., p. 383.
255 As stated by Harun Kamil (F-UD). Ibid., p. 385.
256 Ibid., p. 390. As stated by Jakob Tobing, the Commission A chairman.
257 Ibid., p. 392.
258 Ibid., p. 399. The proposal for a third paragraph of Article 31 states that *'The government shall manage and organize one system of national education which shall enhance faith and piety and noble character in the frame of educating the life of the nation and shall be regulated by law(s).*

a similar solution.[259] Accordingly, the F-TNI/Polri representative revealed that Vice President Hamzah Haz expected that the solutions to Article 29 and Article 31 were linked. The original Article 29 could be maintained as long as the new Article 31 would be adopted.[260]

In response, a F-PPP speaker confirmed that F-PPP was not unanimous and needed some time.[261] Likewise the F-PBB speaker, while admitting that the issue was quite difficult, confirmed it strove to unite its internal positions. For that purpose, F-PBB asked for time to resolve internal disagreements.[262] Accordingly, the F-PDU speaker disclosed that in a consultation with President Megawati Soekarnoputri, the President had also appealed against deciding by voting. Therefore, F-PDU urged that, if possible, Article 29 should not be solved by voting. They stated that, *Insya Allah* (by God's will), they would do their best.[263] Likewise, the rainbow faction F-UG speaker stated that with those signs from F-PPP, F-PBB, and F-PDU, F-UG would follow.[264] F-PG proposed that the consultation should conclude that all factions agreed that they would not withdraw their proposal and maintain the original Article 29.[265]

However, a F-Reformasi member insisted that the third alternative should not just be eliminated. For F-Reformasi, the third alternative was considered a solution to the long and endless debate.[266] To that end, another member asserted that the hotspot of the issue had been solved, therefore a different solution was no longer needed.[267] However, factions agreed not to publicly disclose that Article 29 and Article 31 would be agreed on in one package.[268]

### *VIII.2.3.11 Avoiding Deciding by Voting*

Subsequently, with that understanding in the background, the Commission A chairman reported the alternative amendments of Article 29 to the plenary of Commission A on 8 August 2002, along with other materials, including alternatives to Article 31.[269] Regarding Article 29, the highest faction leaders were seeking the wisest solution for the unity of the nation and the country. The process was still ongoing, and since everyone was of good

259 Ibid.
260 As disclosed by Slamet Supriyadi (F-TNI/Polri). Ibid.
261 As stated by Ali Hardi Kiaidemak (F-PPP). Ibid.
262 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 400.
263 As stated by Sayuti Rahawarin (F-PDU). Ibid.
264 As confirmed by Zacky Siradj (F-UG). Ibid., p. 401.
265 As conveyed by Fahmi Idris (F-PG). Ibid.
266 As stated by A.M. Fatwa (F-Reformasi). Ibid. The third alternative states that *'The State shall be based upon the belief in the One and only God with the obligation for the followers to implement their respective religious teachings.'*
267 As asserted by Fahmi Idris (F-PG). Ibid.
268 See Ibid., pp. 402-403.
269 Ibid., p. 529.

intentions and working in a close and friendly atmosphere, the best solution could be expected.[270]

Then, in a MPR plenary meeting on 9 August 2002, the chairman reported Commission A's work, including the complete alternatives of Article 29 and Article 31.[271]

In the subsequent MPR plenary meeting, factions stated their respective final opinions. Despite the mutual understanding achieved in the previous informal consultation, factions still adhered to their initial positions. In that meeting, the F-PDU speaker asserted that the proposal and hope of the Islamic parties to ratify inserting the *tujuh kata* into the Constitution was valid and fair. It was so naïve that the aspiration of a "small tribe" reverberated in the MPR, allergic towards (or even rejecting) the aspiration of 88% of Indonesian people who are Muslim. The MPR should not be allergic to the word 'Islamic Sharia'. Islam is not what the Zionists campaign for, which continuously describes Islam as identical with terrorism, tragedy, suspicion, ignorance, and backwardness.[272]

Likewise, the F-PBB speaker stated that the proposal to add the *tujuh kata* into the Constitution was unproblematic, if it was pursued within the corridor of democracy, respected the law, and followed the agreed upon decision-making mechanism. The efforts were not intended to set aside pluralism from national life. It is not possible to enforce Islamic law on individuals without the state's involvement, and Islamic law cannot only be followed by the freedom to worship. Therefore, the enforcement of Islamic law should be stipulated at the constitutional level.[273] Regarding the proposed changes to Article 29, a F-Reformasi member, in the continuation of the MPR plenary meeting on 10 August 2002, reiterated that the proposal was intended to implement the values of religions into daily life, which will encourage mutual respect among religious followers, which subsequently would prevent discrimination and disintegration.[274]

By contrast, F-UD emphasized that the founding fathers had a profound understanding of multiculturalism, as reflected in Article 29(1) and Article 29(2). Therefore, F-UD did not intend to disturb it.[275] Likewise, F-KB confirmed the wish to maintain the original Article 29, convinced it had contributed to an atmosphere of togetherness, freshness, and peacefulness, since Islam exists in the world to bring happiness and peace. That is the meaning of *darussalam*, a country of peace.[276]

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270 Ibid., 539. In a meeting with the Chairperson of PDI-P, Megawati Soekarnoputri on 1 August 2002, F-PDIP decided that, although there were fewer people in favor of revising Article 29, the decision should be taken by consensus considering the sensitivity of the matter and in order not to hurt anyone.

271 Ibid., p. 610. See VIII.2.5.

272 As expressed by Hartono Mardjono (F-PDU). Ibid., p. 640.

273 As stated by M.S. Kaban (F-PBB). Ibid., p. 648.

274 As stated by Irwan Prayitno (F-Reformasi). Ibid., p. 661.

275 As stated by M. Iskandar Mandji (F-UD). Ibid., p. 663.

276 As confirmed by Yusuf Muhammad (F-KB). Ibid., p. 665.

In response, F-PPP believed that by improving Article 29, the unity and the integrity of the nation would be more secure. F-PPP is convinced that the improvement of Article 29 is a sacred mission worth fighting for, but F-PPP would never think of conducting a political struggle beyond the democratic system's limits or beyond the corridor of the Constitution.[277]

F-PG asserted that the original Article 29 had guaranteed broad and deep comprehension, implementing religious teachings. Further, with the article, the development of religion is good and the harmony among religious followers is safeguarded. Therefore, F-PG appealed to all factions to maintain the original Article 29.[278] Likewise, F-PDIP confirmed their wish to maintain the original Article 29. F-PDIP appealed to factions to take the important decision together, as a large, united family that puts wisdom first, as the founding fathers did.[279]

### *VIII.2.3.12 Compromising to Retain the Original Article 29*

In the second phase of the plenary meeting on 10 August 2002, F-UG reminded the plenary that alternatives still circulated of the two "sacred" articles, namely Article 2(1) on the MPR's composition and Article 29. F-UG urged the leaders of the political parties and factions to deliberate to achieve consensus.[280] Likewise, a F-PDIP member urged the leaders to do their utmost to reach a unanimous decision and to avoid decisions that could further damage wounded hearts. The member proposed adjourning the meeting.[281]

The MPR Speaker who chaired the meeting obliged and adjourned the meeting.[282] After the meeting was resumed, the F-PPP speaker conveyed the party's final remarks and asserted that PPP, from the beginning until now, supported Islamic Sharia and would always strive democratically through constituted institutions, based on politics, devotion, and *amar ma'ruf nahi mungkar* (commanding the good and forbidding the evil) to reinstate the obligation to implement Islamic Sharia for its followers in the 1945 Constitution. Further, F-PPP trusted the MPR completely to take the best decision following the dynamics of the current political conditions. F-PPP apologized to all Muslims in Indonesia because the struggle to meet their aspirations and the demands of their conscience was still hampered.[283]

Similarly, F-PBB was determined to choose the option of amending Article 29(1) to "The State is based on One and Only God with the obligation to implement Islamic Sharia to its followers." It did not have the slight-

277 As stated by Chozin Chumaidy (F-PPP). Ibid., p. 669.
278 As stated by Fahmi Idris (F-PG). Ibid., p. 677.
279 As confirmed by Arifin Panigoro, the F-PDIP Chairman. Ibid., p. 681.
280 As stated by Sutjipto (F-UG). Ibid., p. 686. See VIII.2.1.
281 As expressed by Jakob Tobing (F-PDIP). Ibid. p. 687.
282 Ibid., p. 688.
283 As conveyed by Syahfriansyah (F-PPP). Ibid., p. 690.

est intention to recede from that conviction, waiting until the time came to continue the journey, since nothing is impossible with God's will. Therefore, if the MPR rejected the proposal and reinstated the original Article 29, F-PBB asked that it be recorded that F-PBB did not participate in making that decision.[284]

The F-PDU speaker submitted a written position statement that although the proposal to insert the *tujuh kata* into Article 29 was rejected, the position of the Jakarta Charter was still animating and being a continuum of the Constitution, philosophically, judicially, and sociologically. F-UD stated that it would allow the MPR to take a decision.[285]

A F-UG member asked to be recorded as not joining the agreement. However, he was aware that if the deliberations had concluded, as a citizen, he should follow the decision.[286]

F-Reformasi would accept the MPR's decision to maintain the original Article 29, as both a political and theological statement.[287] However, a F-Reformasi member from Partai Keadilan (the Justice Party) asserted that while 7 F-Reformasi members from the Justice Party did not agree with maintaining the original Article 29, they would not hamper the decision. Therefore, he would not participate in the decision-making.[288] Another F-Reformasi member also affirmed that she would not participate in the decision-making.[289]

Ultimately, the MPR plenary meeting on 10 August 2002 decided not to amend Article 29, with a record that several members did not agree with the decision, although they attended the plenary and allowed the MPR to take the decision.[290] Accordingly, the MPR plenary also decided on amending Article 31 on Education as agreed (see VIII.2.5).

Thus, when the fourth amendment was ratified in the MPR plenary meeting, late in the evening of 10 August 2002, confirming the original Article 29 would be unchanged, the MPR Speaker, Amien Rais, expressed appreciation. Gratitude was especially expressed to the factions who were proponents of 'the seven words,' as they had shown great commitment in fighting for the aspirations of their constituents. They did not vote against Article 29(1) and Article 29(2) so that an agreement could be reached. The Speaker stated that the moment was very touching.[291]

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284 As conveyed by Nadjih Ahjad (F-PBB). Ibid., p. 691.
285 As stated by Asnawi Latief (F-PDU). Ibid., p. 692.
286 As stated by Shiddiq Aminullah (F-UG). Ibid., p. 693.
287 As stated by A.M. Fatwa (F-Reformasi). Ibid.
288 As asserted by Muttammimul'Ula (F-Reformasi). Ibid., pp. 694, 695. F-Reformasi comprises of members from PAN and PK. The 7 members from PK are Muttammimul'Ula, Mashadi, Syamsul Balda, Irwan Prayitno, Zirlyrosa Jamil, Abdul Roqib, and Tb. Soenmandjaja.
289 As expressed by Nurdiati Akma (F-Reformasi). Ibid.
290 Ibid., 696.
291 Ibid., pp. 758, 759.

Proponents of the Article 29 amendment recognized that they were outnumbered and would surely lose if the decision was made by vote. That would put them in an inflexible posture in front of other factions, while they were still trying to advance ideas in other areas, such as in education and economics. By allowing decisions to be made by deliberation and consensus, while they did not take a stand, they could hope to maintain flexibility in discussing other topics. On the other hand, this attitude was accompanied by a statement that they would continue to fight for the inclusion of 'the seven words' in Article 29 in a democratic and constitutional manner. This allowed them to maintain support from their traditional followers.

On the other hand, those who wanted to maintain Article 29 did not want a decision by voting because it could reduce the sacred historical value of the article in the memory of the nation's history, while also possibly increasing the militancy of supporters who wanted to enforce Islamic law in Indonesia.

### VIII.2.4 Discussing Article 31 on Education

This section details the debates on Article 31 on Education, including concerns on setting the education budget in the constitution, whether 'education' should refer to morality, and whether state-funded 'education' should extend to the family and private sectors. It concludes with the ratification of the new Article 31, which guarantees every citizen the right to education, obliges citizens to enrol in basic education, and obliges the government to fund this education.

In the MPR Working Body plenary meeting on 10 January 2002, F-PDIP's preliminary view was that it was determined to finalize the pending issues, such as Article 31 on Education, as one of the pillars of Indonesia as a nation state.[292] F-UD asserted that the government should manage and prioritize education by setting aside a large budget at the national and regional levels. To confirm that education is a basic right and that every citizen is required to get primary education requires a fundamental constitutional change.[293]

In the next PAH I meeting on 28 January 2002, a F-PG member proposed that the Constitution should stipulate that 20% of the national budget shall go to education.[294] An F-TNI/Polri member stated that efforts to develop the nation's intellectual life, as addressed in the Preamble, should be elaborated in the related articles. Therefore, education requires prioritization in the state budget. Further, F-TNI/Polri argued that the participation of

292 As conveyed by Zainal Arifin (F-PDIP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 51.

293 As conveyed by Hatta Mustafa (F-UD). Ibid., p. 65.

294 As expressed by Agun Gunandjar (F-PG). Ibid., p. 136.

other economic actors in developing education needed to be considered.[295] Then, a F-UG member argued that education and culture should remain in one chapter, to confirm that education and culture are the instruments to achieve a nation state that is intellectually developed and civilized. It is the provision that serves as the basis for implementing a national education system to achieve national development, an intelligent nation, and an advanced national culture.[296]

#### *VIII.2.4.1 Minister of Finance and Including Flexibility*

In a hearing on 25 February 2002, PAH I invited the Minister of Finance, the Governor of the Central Bank, the Coordinating Minister for Small and Medium Enterprises, and the staff of the Coordinating Minister of Economy and Finance. Responding to the PAH I draft that stipulated a 20% budget allocation to education, Minister of Finance Boediono argued that the constitution should not include figures, because it would limit flexibility.[297]

In the subsequent hearing on 26 February 2002, Minister of Education Abdul Malik Fadjar stated that Article 31(1) and Article 31(2), as the foundation of ideals, political will, and policy in education, although brief, were solid, concise, and clear. The Minister argued that the objective of national education should not be too detailed because the objective is always dynamic and, therefore, legal regulation is sufficient. The Minister promised to contemplate the proposed amendments to Articles 31 and 32. Amendments to the articles would continue to rely on the ideals set forth in the Preamble, which were not to be modified.[298]

#### *VIII.2.4.2 Insight on Education from Public Hearings*

In a subsequent public hearing on 4 March 2002, Sapardi Djoko Darmono, an intellectual and humanist, stated that the government was obliged to organize and manage education. However, uniformity in higher education should be avoided. The uniqueness of an education institution should be recognized.[299] Frans Magnis Suseno, a scholar and humanist, endorsed that schooling is compulsory. There is no more valuable investment for the future than a high-quality basic education, affirmed the scholar.[300]

On the other hand, in a public hearing on 5 March 2002, a Christian University of Indonesia delegation suggested omitting the proposed Article 31(5) (see VII.3.13) and regulating this matter through lower legislation.[301]

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295 As stated by I Ketut Astawa (F-TNI/Polri). Ibid., p. 139.
296 As stated by Soedijarto (F-UG). Ibid., p. 145.
297 Ibid., p. 229.
298 Ibid., pp. 277 – 278.
299 Ibid., p. 444.
300 Ibid., p. 446.
301 As stated by Anton Reinhart from Christian University of Indonesia (UKI). Ibid., p. 464.

A University Bung Karno delegation stated that the figure of the budget for education should not be specified but should be prioritized. Further, the delegation argued that the article was sufficient to stipulate that the government should advance science and technology to increase human resources without any further elaboration.[302]

In the meantime, PAH I teams visited the regions to get input from public hearings. In almost all public hearings, the participants agreed that primary education should be compulsory, and that the Constitution should specify a 20% budget allocation or more to education. The exception was Makassar, where most participants did not agree to specify the educational budget figure in the Constitution.[303]

*VIII.2.4.3 Faction Debates on Education*

In the PAH I discussion on 3-7 April 2002, three alternatives to Article 31 paragraph (1) were agreed.

1) The government shall undertake and shall conduct one national education system to enhance intellectual life which is regulated by law.
2) The government shall undertake and shall conduct one National Education System to enhance the nation's life and to form human beings with noble character which is regulated by law.
3) The government shall undertake and shall conduct one National Education System which enhances faith and piety, as well as noble character in the frame of educating the life of the nation, which shall be regulated by law.[304]

The discussion on education was continued in a PAH I meeting on 25 March 2002. In that meeting, the meeting chair reminded everyone that PAH I had concluded the draft of a new section to Article 31 on Education, which stated that "every citizen has the obligation to enrol in basic education and the government has the obligation to fund this." The previous meeting, reiterated the chairperson, had also agreed to replace the term *pengajaran* (teaching), which was used in the old Constitution, with the term *pendidikan* (education).[305]A F-KKI member reiterated his endorsement of the draft made in the previous meeting and emphasized the importance of using

302 As stated by Jemmy Palapa of University Bung Karno. Ibid., p. 473.
303 Ibid., pp. 622 – 643.
304 See Rancangan Perubahan Keempat Undang-Undang Dasar 1945, Hasil Perumusan Panitia Ad Hoc I Badan Pekerja MPR, tanggal 3-7 April 2002, Sekretariat Jenderal MPR-RI, 2002.
305 The meeting was led by Harun Kamil (F-UG), vice PAH I chairman. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 2.

the word *wajib* (compulsory, obliged to) in the article.[306] Similarly, F-KB, F-PPP, F-PDIP, F-PG, F-TNI/Polri, F-PDU, F-PDKB, F-UG, F-Reformasi and F-UD speakers reiterated their respective endorsements to the draft as the reference for further discussion.[307] The F-KB speaker added that providing education for the people is not only the government's obligation, but also the state's.[308] Then, F-PPP, F-PG, F-PDU and F-Reformasi speakers reiterated that their preferred choice remained alternative (3) of Article 31(3) and alternative (2) of Article 31(5).[309] The F-PDKB speaker responded that his faction was ready to discuss the matter,[310] while F-KKI, F-TNI/Polri and F-PDIP stated that they preferred alternative (1).[311]

On the budget allocation, most factions agreed that the Constitution should stipulate a minimum of 20% of the state budget as well as regional budgets to meet the needs of national education.[312] Only F-TNI/Polri and F-PDIP speakers argued that it should be flexible. However, the F-TNI/Polri speaker admitted that prioritizing the budget for education purposes required the government to allocate a sufficient budget for education.[313]

The PAH I chairman advocated using the term 'education' with care. The Preamble clearly referred to the whole of humanity, intelligence, and national life. Education is comprehensive and thorough, consisting of various processes, including processes at home, in religious education, at school, social spaces, and so forth. For each process, it should be questioned whether the government should intervene. It would be undesirable to *menegarakan* everything (to make everything a state affair). At the time the articles regarding human rights were discussed, consciously, the position and balance between the people's, community's, and state's interests were carefully noted.[314]

In the subsequent PAH I meeting on 26 March 2002, a F-PDIP member emphasized that education should apply the values inherent in the Preamble, which is an education system that pays attention to diversity. Education is not only concerned with one group, guarding against the values of one religion characterizing and dominating education in Indonesia.[315]

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306 As expressed by Vincent T. Radja (F-KKI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 3. Radja said that in East Nusa Tenggara, the ratio of educated to non-educated people was 1 to 10.

307 As stated by Erman Suparno (F-KB), Ali Hardi Kiaidemak (F-PPP), Zainal Arifin (F-PDIP), Baharuddin Aritonang (F-PG), I Ketut Astawa (F-TNI/Polri), Asnawi Latief (F-PDU), Gregorius Seto Harianto (F-PDKB), Soedijarto (F-UG), A.M. Luthfi (F-Reformasi), and Retno Triani Djohan (F-UD). Ibid., pp. 5 – 23, 39.

308 Ibid., p. 4.

309 As stated by Ali Hardi Kiaidemak (F-PPP). Baharuddin Aritonang (F-PG), Asnawi Latief (F-PDU) and A.M. Luthfi (F-Reformasi). Ibid., pp. 5, 9.

310 As stated by Gregorius Seto Harianto (F-PDKB). Ibid., p. 15.

311 As stated by Antonius Rahail (F-KKI), I Ketut Astawa (F-TNI/Polri) and Pataniari Siahaan (F-PDIP). Ibid., pp. 17, 29.

312 Ibid., pp. 4 – 28, 38.

313 Ibid., pp. 11, 30.

314 Ibid., p.31.

315 As expressed by Frans Matrutty (F-PDIP). Ibid., p. 41.

In response, a F-PPP speaker argued that what was lacking in national human resources was not knowledge, but a lack of morality, faith, and piety. Therefore, religious and moral education were very important. Hence, alternative (3) should be chosen for Article 31 section (3).[316]

Agreeing with the previous speaker, a F-PG member argued that alternative (3) of Article 31(3) is the proper choice, because it is consistent with Article 29(1), which states that the State is based on the belief in the One and Only God. Regarding the budget, this was related with societal class structures. Without having to be a Marxist, one can see that the layers in society have produced a certain class which is powerless to do anything or acquire education. Therefore, education should be prioritized by confirming 20% in the state budget.[317]

Similarly, a F-UG speaker endorsed alternative (3) of Article 31(3).[318] A F-PDIP speaker contended that the Preamble's message, *mencerdaskan kehidupan bangsa* (to develop the nation's intellectual life) has a very broad meaning, including intellectuality, morality, and culture. Hence, the articles' formulations should not be too detailed and could be elaborated in lesser laws.[319] Then, a F-KB speaker stated that education's purview covers three areas: spirituality or morality, *ta'zib*, which is the internalization process of developing a personality and *ta'lim*, the teaching. Further, F-KB endorsed alternative (3) Article 31(3). If the nation accepts *iman* (faith) and *taqwa* (piety) as common terms, there is no problem if those terms are used.[320]

Subsequently, the education discussion was continued in a PAH I formulation team meeting on 4 April 2002. In that meeting, the F-PBB speaker questioned whether Article 31 should stipulate the right to obtain an education because it was already stated in Article 28 on Human Rights.[321] In response, the PAH I chairman elucidated that Article 31(2) asserts that it is mandatory for every citizen to participate in primary education, which is education in schools or schooling. A welfare state is one where the state should educate the people.[322]

Commenting on state building, a F-UG member emphasized that Indonesia is also building a nation state. In that regard, every state that builds a nation state, such as Germany, the United States of America, the United Kingdom, and France, adopts a national education system, i.e., the schooling system that is called education. In the United States, they use schooling as a process to Americanize heterogenous students and to abolish the barriers of ethnicity.[323] However, it should be clear from the beginning, lest the

316 As argued by Abdul Azis Imran Pattisahusiwa (F-PPP). Ibid., p. 43.
317 As argued by Slamet Effendy Yusuf (F-PG). Ibid., p. 46.
318 As expressed by Sutjipto (F-UG). Ibid., p. 47.
319 As stated by Katin Subiyantoro (F-PDIP). Ibid.
320 As conveyed by Yusuf Muhammad (F-KB). Ibid., p. 61.
321 As conveyed by Hamdan Zoelva (F-PBB). Ibid., p. 244.
322 Ibid.
323 As emphasized by Soedijarto (F-UG). Ibid., pp.245, 246.

education process be taken over totally by the state, emphasized the PAH I chairman.Under Kim Il-sung, the state even taught pupils a uniform way to greet their parents, he added.[324] The chairman concluded that education is conducted by the state in the school, by the family, and by society. The article refers to education by the school, not by the family or society. The question remained whether state-funded education is limited to education in school and excludes education in the family and society.

In response, a F-KB speaker stated that the state should also support education organized by the private sector, by society. Compulsory basic education could be conducted either by the state or by society and the state should fund it.[325] Likewise, a F-PPP speaker argued that without differentiating between education managed by the government and by the private sector, the government is obliged to fund education, which is the right of every citizen.[326] A F-PDIP speaker added that the right to education had been set out in Article 28. Further regulation was required on how the government facilitates education, so that the people's rights can be realized.[327]

Regarding Article 31(3), another F-PDIP member argued that all alternatives began with the same phrase, "the State organizes and manages one national education system." Only the following phrases differed, hence the three alternatives could be condensed to one.[328] Accordingly, a F-TNI/Polri speaker argued that developing the nation's intellectual life, embodied in the Preamble, has a broad meaning, including intellectual intelligence, faith, morality, and piety. Therefore, if Article 31(3) states that the system shall be further regulated by law, then the phrase *mencerdaskan kehidupan bangsa* (to develop the nation's intellectual life) could be sufficient, because it contains all those meanings.[329] Likewise, the F-UG speaker confirmed that alternative (1) of Article 31(3) was sufficient.[330]

Further, a F-PDIP speaker emphasized that developing the nation's intellectual life is related to the Preamble, especially *Pancasila*'s second principle, a just and civilized humanity. Therefore, Article 31(3) should state, "The state shall organize one national education system in the frame of educating the life of the nation."[331] A F-PG member reiterated that, as a logical consequence of Article 29(1), which states that the State shall be based upon belief in the One and Only God, F-PG endorsed alternative (3).[332]

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324 As stated by Jakob Tobing, the PAH I chairman. Ibid., pp. 244, 245. Kim Il-sung was the leader and the founder of the People's Democratic Republic of Korea.

325 As stated by Yusuf Muhammad (F-KB). Ibid., pp. 249, 250.

326 As stated by Lukman Hakim Saifuddin (F-PPP). Ibid., p. 252. Saifuddin cited the concept of the Bill on National Education System which was being prepared by the DPR.

327 As stated by Pataniari Siahaan (F-PDIP). Ibid., p. 254. Articles 28C and 28E stipulate the people's rights to develop him/herself and to choose one's education.

328 As stated by Soewarno (F-PDIP). Ibid., p. 259.

329 As stated by I Ketut Astawa (F-TNI/Polri). Ibid., pp. 259, 262.

330 As stated by Retno Triani Djohan (F-UG). Ibid., p. 260.

331 As stated by Pataniari Siahaan (F-PDIP). Ibid., pp. 262, 263.

332 As proposed by Happy Bone Zulkarnain (F-PG). Ibid., p. 263.

F-KB underlined that education is indeed holistic, concerning the mind and the character. Therefore, the education system should be organized to develop both aspects, as formulated in alternative (2) of Article 31(2). One formulation covered all the imaginable considerations, embodying the topic's essence: *Prophet Muhammad s.a.w.* said *innama bu'itsu liutammima makarimal akhlaq* (that I was sent to enhance human morality).[333] Further, a F-UG member asserted that developing the nation's intellectual life is not the responsibility of and cannot rely on the education system alone, but also involves the political and economic system. Therefore, the article should state that the education system is organized "in order" to develop the nation's intellectual life, not "to" educate the life of the nation.[334] In that regard, the PAH I chairman underlined that there should be many efforts to develop the nation's intellectual life, including education. Therefore, the nation's quality of life is not only the result of the education system, but also of political life, culture, and art.[335]

Regarding the relationship between religion and science in the draft Article 31(5), a F-UG speaker stated that they seemed to contradict each other. As if religion is the police watching the science's development. Basically, science and religions are oriented towards the dignity of human beings. Therefore, the section's formulation should put science and religion in a positive relationship.[336] Quoting the chairman of PAH I, a F-Reformasi speaker asserted that science and technology's development should adhere to the religious values. The member argued that, according to the chairman,it was easier to measure adherence than to judge the "contradiction" formulated in "advances science and technology which is not contradictory to religious values", in the draft Article 31(4) attached to MPR Decree No. XI/2001.[337] In the end, all factions accepted the change to the draft Article 31(4).[338]

### *VIII.2.4.4 Validity Meeting Insights on Education*

In the subsequent validity meetings, Article 31's draft changes obtained various responses. In Pontianak, the participants argued that it was not right to stipulate the 20% budget allocation in the Constitution.[339] In a crisis, the government would potentially be unable to allocate that percentage.[340] It is better to specify a certain percentage in the laws. Stating that the government

333 As stated by Yusuf Muhammad (F-KB). Ibid., p. 263.
334 As asserted by Soedijarto (F-UG). Ibid., p. 265.
335 Ibid.
336 As stated by Zacky Siradj (F-UG). Ibid., p. 53.
337 As stated by A.M. Luthfi (F-Reformasi). Ibid., p. 268. See Attachment VIII. 5.
338 Ibid., p. 271.
339 As argued by Chandra Hasan of Muhammadiyah, chapter of West Kalimantan, Urain Kusna Asmara from University of Tanjungpura, Ibrahim Sago from the Law Faculty, University of Tanjungpura and Syarifah Mardiana from ICMI (Association of Indonesia Muslim Intellectuals). Ibid., pp. 712, 718, 730, 741.
340 As stated by Ibrahim Sago. Ibid., p. 712.

should prioritize the education budget is sufficient.[341] However, another participant disagreed. The provision of a tangible allocation for education spending is necessary to secure the lives of teachers.[342] A Muhammadiyah University participant made a comparison. In the United States, for example, the state is prohibited from interfering in religious education. It becomes a private matter, with prayer in public classrooms not allowed because it is the public domain. It is different in Indonesia. This country is based on God Almighty and there is religious education. Therefore, it is necessary to allocate the state budget for education, he stated.[343]

From the other regions, most meetings reported that participants warmly welcomed allocating a minimum of 20% of state and regional budgets to education. In Mataram, the participants even urged increasing the budget allocation to 30%.[344] In Bandung, the participants proposed that the state should also advance art, alongside science and technology.[345] In Bali, the participants contended that if education is a right, it should not be stated as an obligation, since it is then up to a person to use it.[346]

Regarding technology's advancement in relation to religions, in a PAH I review meeting on 27 May 2014, the scholar Hasyim Djalal reminded everyone to be careful. There are certain religious teachings that are based on beliefs that can hinder the advancement of science and technology, such as biotechnology and anthropology. Djalal questioned how one can determine that a certain technology is not in conformity with a religion and where Indonesia will be in 20, 30, or 40 years from now.[347]

#### *VIII.2.4.5 PAH I Agreeing on Article 31(1), (2), (4), and (5)*

In the ensuing meeting, PAH I agreed on Article 31(4) and Article 31(5) and reported the draft to the MPR Working Body plenary meeting on 4 June 2002.[348] In the subsequent PAH I plenary meeting on 18 June 2002, a F-PDIP speaker stressed that in Article 31 verses (1) and (2), the term 'education' is intended to develop the nation's intellectual life, as embodied in the Preamble. Therefore, the term also contains values. Hence, it is not necessary to elaborate those elements again in Article 31(3). The formulation in alternative 1 was therefore sufficient.[349]

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341 Ibid., p. 718.
342 As stated by Mailan Panggabean from the Economic Faculty, University of Tanjungpura. Ibid., p. 726.
343 As stated by Nasirwan from University of Muhammadiyah. Ibid., p. 739.
344 As reported by Pataniari Siahaan (F-PDIP). Ibid., p. 832.
345 As reported by A.M. Luthfi (F-Reformasi). Ibid., p. 836.
346 As reported by I Dewa Gede Palguna (F-PDIP). Ibid., p. 837.
347 Ibid., pp. 818-819.
348 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 8. See also Attachment VIII.6.
349 As stated by Katin Subiyantoro (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 224, 242.

A F-PDU speaker reiterated that, in consistency with Article 29, "the State shall be based upon the One and Only God", the 3rd alternative should be chosen since it absorbed the 1st and 2nd alternatives.[350] However, to develop the nation's intellectual life should take precedence over other objectives.[351] Then, F-PG asserted that education in alternative (3) should not only achieve intellectuality, morality, faith, and piety, but also nationalism and patriotism.[352] To that end, a F-TNI/Polri speaker argued that alternative (1) has a very broad purview and relates to developing the nation's intellectual life as mandated by the Preamble. Therefore, alternative (1) was preferable.[353]

A F-PPP speaker disagreed, arguing that alternative (1) of Article 31(3) states only the national education system's orientation, to educate the nation's life. In alternative (2), 'improving the noble characters' is added as a goal, and alternative (3) adds 'increasing faith and piety.' Further, F-PPP contended that the three alternatives do not duplicate each other and the longer alternatives are not merely elaborations of the shorter ones. The longest, alternative (3), is the more complete formulation and so it was F-PPP's chosen option. F-PPP rejected that society should be obliged to be involved in the education system alongside the government. Society should be involved, but it is the government's obligation.[354]

Likewise, the F-Reformasi speaker reiterated that alternative (3) was more complete. That provision treated subjects as diverse as religion, character, morality, and ethics, in addition to exact sciences, national awareness, and civic education. Thus, quoting the F-PG speaker, pupils will not just be intelligent, but also patriotic.[355] Then, the F-KB speaker remarked that alternative (2) adopts both alternative (1) and alternative (3). Yet, F-KB said it had no objection to alternative (3), it being better to have more rather than less.[356] Similarly, F-PDKB stated that the faction had no objection to alternative (3). One can have a noble character without believing in God. Indonesia should emphasize the uniqueness of its nation's vision. Although Indonesia is not a theocratic state, it still believes in God as manifested by various religions.[357]

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350 See VII.3.12 and VIII.2.4., discussions on Article 29 on religion.

351 As argued by Asnawi Latief (F-PDU). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 227.

352 As asserted by Andi Mattalatta (F-PG). Ibid., p. 228. See also MPR Decree no. IX/MPR/2000.

353 As stated by Kohirin Suganda (F-TNI/Polri). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 231.

354 As stated by Lukman Hakim Saifuddin (F-PPP). Ibid., p. 231.

355 As reiterated by Fuad Bawazier (F-Reformasi). Ibid., p. 233.

356 As stated by Yusuf Muhammad (F-KB). Ibid., p. 234.

357 As stated by Gregorius Seto Harianto (F-PDKB). Ibid., p. 235.

In response to these statements, a F-PDIP member reminded '*not to mix oil with water*' by including all the elements.[358] He then suggested the following alternative, "the State organizes and manages one national education system that is based on *Pancasila*". Another F-PDIP member argued that if education is also about improving faith and piety, then it has entered a theological domain. In that regard, it will create the problem of how to elaborate the provisions into laws and what theological interpretation should be used as guidance.[359]

Eventually, PAH I agreed on Article 31(1), Article 31(2), Article 31(4), and Article 31(5). However, Article 31(3) remained unresolved.

### *VIII.2.4.6 Debating Article 31(3)*

In the PAH I synchronization meeting on 28 June 2002, the meeting chair reminded everyone that there were still 2 alternatives of Article 31(3). Alternative (1) states that the Government organizes and manages a national education system to develop the nation's intellectual life, that shall be further regulated by law. Alternative (2) states that the Government organizes and manages a national education system to increase faith and piety, the noble character, and to develop the nation's intellectual life, which shall be further regulated by law.[360]

The discussion continued in a PAH I finalization meeting on 19 July 2002, in which F-PDIP and F-TNI/Polri reiterated they preferred alternative (1), while F-PPP, F-KB, F-Reformasi, and F-KKI chose alternative (2), and F-UG stated it remained undecided. Other factions did not state their respective positions.[361]

In the subsequent PAH I meeting on 25 July 2002, F-UG confirmed it would endorse alternative (2) of Article 31(3). In the meantime, F-KB attempted to overcome the differences by proposing a new Article 31(3), which states that the government organizes and manages a national education system in the frame of educating the life of the nation and forming men and women with noble character that shall be further regulated by law.[362] However, others did not respond to this proposal. Thus, PAH I reported the outcomes to the MPR Working Body plenary meeting on 25 July 2002, in which Article 31(3) had two alternatives.[363]

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358 As stated by Frans F.H. Matrutty (F-PDIP). Ibid., p. 240. 'Not to mix oil with water' (*Jangan mencampur air dengan minyak*) is a common saying in Indonesia, means do not mix the things that do not coincide with each other.

359 As conveyed by I Dewa Gede Palguna (F-PDIP). Ibid., p. 241.

360 The meeting was chaired by Harun Kamil (F-UG). Ibid., p. 601.

361 The meeting was led by Harun Kamil, the vice PAH I chairman. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 135 – 137.

362 As stated by Soedijarto (F-UG) and Ida Fauziah (F-KB). Ibid., pp. 373 – 374.

363 See Ibid., p. 347. There is a technical error in the minutes of the MPR: the MPR Working Body meeting was conducted after the PAH I meeting. However, the minutes of the MPR Working Body meeting was placed before the minutes of the PAH I meeting.

Trying to resolve the differing opinions among the factions, while the August 2002 amendment deadline drew near, a consultation meeting between the MPR and faction leaders was conducted on 29 July 2002. On that occasion, Amien Rais, the MPR Speaker who led the consultation, stated that the MPR leadership would open the broadest possibilities for deliberation so that the decision on the matter could be achieved by consensus. However, following the MPR rules of procedure, if a consensus was not reached before the deadline, the decision would be taken by a majority vote.[364]

Then, a F-PG speaker stated that Article 31(3) related to Article 29(1) and Article 29(2). Hence, these matters could be exchanged.[365] In response, F-PPP argued that the topics could be brought to the MPR's Commission to find a solution.[366] Accordingly, F-PDIP argued that informal consultations proposed by the MPR leadership would be very helpful to achieve an understanding, while the Commission would try to find a way out. In the meantime, cross-faction meetings would try to find rapprochement (see VIII.2.4).[367]

Thereby, the MPR Working Body completed its task and reported its results to the MPR plenary meeting. The same process was followed as before: the plenary session set up commissions to complete the drafting of the MPR decisions. Commission A was formed to complete the drafting of the last constitutional amendments. [368]

In the subsequent Commission A meeting on 5 August 2002, the alternatives of Article 31(3) were debated further. A member from F-Reformasi member reiterated the faction's choice of alternative (2). The terms of *iman* and *taqwa* (faith and piety) belong to all religions.[369] On the other hand, F-TNI/Polri affirmed that the phrase 'educating the nation's life' contained a broad meaning, including raising the nation's faith, piety, and noble character.[370]

Similarly, in the Commission A meeting on 6 August 2002, F-PDU, F-PBB, F-Reformasi, F-PPP, F-PG, F-UD, and F-UG confirmed their choice of alternative (2), while F-KKI, F-PDIP, and F-TNI/Polri endorsed alterna-

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364 Ibid., p. 418.

365 As stated by Fahmi Idris (F-PG). Ibid., p. 424.

366 As stated by Aisyah Amini (F-PPP). Ibid., p. 427.

367 As stated by Arifin Panigoro (F-PDIP). Ibid.

368 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 11, 23. The Commission A leadership consisted of Jakob Tobing (F-PDIP) as chairman, H. Slamet Effendy Yusuf (F-PG), H. Zain Bajeber (F-PPP), K.H. Amroe Al Mutaksin (F-KB), K.H. Najih Ahjad (F-PBB), Gregorius Seto Harianto (F-PDKB), I Ketut Astawa (F-TNI/Polri), Muhammad Hatta Mustafa (F-UD), and Harun Kamil (F-UG) as vice chairmen. Jakob Tobing from F-PDIP was re-elected Commission A chairman, having earlier been rejected by several F-PDIP members. See Ibid., p. 11.

369 As stated by Patrialis Akbar (F-Reformasi). Ibid., pp. 71 – 72.

370 As affirmed by R. Sulistyadi (F-TNI/Polri). Ibid., p. 80.

tive (1).[371] In that meeting, F-PDKB proposed a new formulation that was intended to address the differences of alternatives (1) and (2), which stated "the government organizes and manages a national education system which enhances the faith and the piety, intellectuality and a noble character to develop the nation's intellectual life." Subsequently, F-PDKB stated that if that proposal was unacceptable, F-PDKB would choose alternative (1).[372] Similarly, the F-KB speaker proposed a new formulation, which stated "the government organizes and manages a national education system to develop the nation's intellectual life and to form the people with noble character which shall further be regulated by law(s)."[373]

*VIII.2.4.7 Formulating Article 31(3)*

To overcome a further stalling of the discussions, the MPR faction leaders, led by Arifin Panigoro, the F-PDIP Chairman, organized an informal consultation meeting with the Commission A leadership on 7 August 2002. As explained in the previous section on Article 29, during this meeting, both articles were agreed to be discussed in tandem. In that regard, a F-PPP member reminded to maintain harmony and respect each other.[374] A F-PDU member reminded of the messages of President Megawati Soekarnoputri, Chairperson of the PDI-P and Vice President Hamzah Haz, the Chairperson of PPP, to avoid voting in the whole amendment process. Therefore, the member urged, let's strive to avoid voting on Article 29.[375] Further, factions agreed not to disclose to the public that Article 29 and Article 31 had been agreed in one package (see VIII.2.4).[376]

Subsequently, Commission A editors formulated Article 31(3), stating: "the government organizes and manages a national education system that enhances faith, piety, and noble character, to develop the nation's intellectual life that shall be further regulated by law(s)." They reported this formulation to the Commission A plenary meeting on 8 August 2002.[377] In that meeting, as expected, F-KKI confirmed it accepted the new Article 31 if the original Article 29 was maintained. F-PBB stressed that the decision about Article 29 should not be taken by majority vote.[378] Commission A agreed to

371 As conveyed by Sayuti Rahawarin (F-PDU), Aminuddin Jayanegara (F-PBB), Mohammad Asikin (F-Reformasi), Khodidjah H.M. Saleh (F-PPP), Marwah Daud Ibrahim (F-PG), Harifuddin Cuwidu (F-UD) and Shidiq Aminullah (F-UG), and Birinus Joseph Rahawadan (F-KKI), Zulvan Lindan (F-PDIP) and Abdul Rahman Gaffar (F-TNI/Polri). Ibid., pp. 220 – 242. The meeting was chaired by Zain Bajeber (F-PPP), the vice Commission A chairman.

372 As conveyed by Gregorius Seto Harianto (F-PDKB). Ibid., pp. 219, 247.

373 As stated by Amin Sa'id Husni (F-KB). Ibid., p. 226.

374 As stated by Ali Hardi Kiaidemak (F-PPP). Ibid., p. 400.

375 As stated by Sayuti Rahawarin (F-PDU). Ibid., p. 400.

376 As stated by Fahmi Idris (F-PG). Ibid., p. 403.

377 Ibid., p. 529.

378 As stated by Astrid Susanto (F-KKI) and Amaruddin Djajasubita (F-PBB). Ibid., p. 535.

report the draft to the MPR plenary meeting on 9 August 2002, where it was approved by acclamation.[379]

Ultimately, on 10 August 2002, the MPR ratified the new Article 31 on Education, which asserts that every citizen has the right to education and the obligation to enrol in basic education, while the government has the obligation to fund this education.[380]

### VIII.2.5 National Economy and Social Welfare

This section sets out the discussion on Articles 33 and 34, including insights from financial leaders, experts, public hearings, and faction debates. It concludes with the ratified amendments to both articles.

During the previous stage, PAH I had discussed Social Welfare and had agreed to revise Article 33. PAH I had not managed to finish the changes. Various existing proposals were summarized in the enclosures to MPR Decree No. XI/2001 for later discussion. The topic is related to the principles of the rule of law, which among others emphasize that the government should respect and strive to fulfil the social and economic rights of citizens. In the previous stage, PAH I considered changing the title of Chapter XIV, which consists of Article 33 on Economy and Article 34 on Social Welfare, from 'Social Welfare' to 'National Economy and Social Welfare'. The draft new Article 33 did not contain the term *'asas kekeluargaan'* (kinship/familial principle) (see Attachment VIII.7)

The discussion of the Chapter on Social Welfare was resumed in the MPR Working Body plenary meeting on 10 January 2002. In that meeting, F-PDIP emphasized that the changes to the Constitution's articles, including Articles 33 and 34, should translate the spirit and philosophy contained in the Preamble of the 1945 Constitution. F-UG and F-Reformasi reminded the committee that the changes to Article 33 should be finalized.[381] F-UD reiterated that based on economic democracy, the welfare of society should be prioritized over individual welfare. Hence, the state economy should be arranged as a collective venture based on the familial principle, to achieve common prosperity.[382] Likewise, F-UG emphasized the importance of maintaining the spirit of Article 33 as the foundation of developing an economic system which ensures social justice for all the people. Countries such as Scandinavia and Germany are strong global economic players, whose economic systems are not fully based on the concept of a free market economy.[383]

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379 Ibid., p. 698. See also above *"Compromising to Retain the Original Article 29"*.

380 Ibid., p. 751.

381 As conveyed by Zainal Arifin (F-PDIP), Ami Syamsidar Budiman (F-UG) and Umirza Abidin (F-Reformasi). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 51, 57, 63.

382 As stated by Hatta Mustafa (F-UD). Ibid., p. 65.

383 As argued by Soedijarto (F-UG). Ibid., p. 145.

*VIII.2.5.1 Insights from Financial Leaders*

Minister of Finance, Boediono, affirmed in the PAH I meeting on 25 February 2002, that Article 33's spirit should be maintained. Changes to the article should be aimed at clarifying the guidelines and concepts regarding the foundation of the national economy. Further, the national economy should be based on a concept of national economic unity, which should be explicitly contained in the Constitution. Furthermore, the Minister argued that the economic actors are broader than just cooperatives, state enterprises, and private enterprises, including personal businesses. The state, through its state budget, is also an actor at the macro-level, while the consumer, the whole society, is an economic actor at the micro-level.[384]

The Governor of *Bank Indonesia* (the Central Bank), Syahril Sabirin, underlined that the economic system should be more flexible with the involvement of the private sector and the government's guidance so that efficiency could be achieved without sacrificing public interests.[385]

On that occasion, the Minister of Cooperatives, Small and Medium Enterprises, Ali Marwan Hanan, stated that Indonesia does not have to choose between either a market economy or socialism, but can opt for a popular economy, based on economic democracy and a just market, in which the production is done by all for all, under the guidance and supervision of the public, which is opposed to an individualistic economy and etatism. The Constitution should confirm that the production branches that are important for the state and dominate people's lives should not only be in the government's hands. To prevent an abuse of power, they should also be regulated through legislation. Regarding economic actors, the minister argued that it should not be limited to cooperatives only but include state and private enterprises. Further, in an economic democracy, welfare is the right of all people. Therefore, to prevent the oppression of the people, the control of production should not be in the hands of individuals in power. Therefore, Article 33(1) should not be changed.[386]

In response, a F-PG member reminded the committee that the market's role is important. Communist China dealt with the global economy, adopted a pragmatist approach, and replaced the planned economy system with a planned market economy system. By contrast, Indonesia should choose a market economy without hesitation.[387] Other F-PG and F-PPP members noted that PAH I had witnessed a sharp polemic on Indonesia's economic system among the Team of Experts between Article 33 reformists (Syahrir, Bambang Soedibyo, Sri Mulyani, and Sri Adiningsih) and originalists

384 Ibid., pp. 229-231.
385 Ibid., p. 233.
386 Ibid., pp. 237-239.
387 As stated by Amidhan (F-PG). Ibid., p. 248.

(Mubyarto and Dawam Raharjo). This even led to Mubyarto's resignation from the Expert Team (see VII.2.1).[388]

Referring to this debate, minister Boediono argued that the familial principle is a very elastic term that can cause misunderstandings, so it should be replaced with more measurable terms, such as efficiency, justice, sustainability, and economic democracy.[389] Likewise, the Governor of the Bank of Indonesia argued that the terms 'popular' or 'familial' economy should be clarified.[390] Minister Marwan Hanan added that any economic system should consider the prevailing market system.[391]

### *VIII.2.5.2 Insights from Experts and Public Hearings*

In a PAH I public hearing on 28 February 2002, a CINAPS (Centre for Indonesian National Policy Studies) expert stated that the new draft Article 33's term, 'the collective venture of all the people',[392] is confusing, especially relative to the expansion of economic actors, including state enterprises, the private sector, and individual ventures.[393] Likewise, a CSIS (Centre for Strategic and International Studies) researcher proposed clarifying the term *'usaha bersama'* (collective venture) relative to individual businesses. Article 34, which states 'Impoverished persons and abandoned children shall be taken care of by the State', should also be clarified, because of its broad and complex implications. The social security system should not mean that the state will take care of all people, as this would discourage people from working and overload the state.[394]

Discussing the topic, a CIDES (Centre for Information and Development Studies) scholar asserted that one cannot apply a neutral spirit and free choice to the economic system articles. The (original) title of Chapter XIV, Social Welfare, indicates that the economy should be organized to develop social welfare, not something that stands alone. The economy is not value-free. Following the principles of *Pancasila*, the economic system should be oriented to the Almighty God, which means that ethics and morals apply, not materialism. What should be sought is virtue. As the first Vice President Mohammad Hatta once said, Article 33 is an attempt to realize the image of God's kingdom in the world, full of love and justice. In considering the economic articles, one should prioritize the people's economic lives and social justice. We should firmly reject *exploitation de l'homme par l'homme*, affirm the

388 As stated by Happy Bone Zulkarnaen (F-PG) and previously by Ali Hardi Kiaidemak (F-PPP). Ibid., pp. 243, 251.
389 Ibid., p. 256.
390 Ibid., p. 259.
391 Ibid., p. 262.
392 In Indonesian, this reads: *"usaha bersama seluruh rakyat"*.
393 As conveyed by Has Tampubolon of CINAPS (Centre for Indonesian National Policy Studies). Ibid., p. 373.
394 As conveyed by Anton Legowo of CSIS (Centre for Strategic and International Studies). Ibid., p. 377.

link between people and justice, and not get stuck in the law of the jungle, *homo homini lupus*. Yet, the scholar acknowledged that Article 33 should be reformed to accommodate the dynamics of change. Independence should be added to the article.[395] Regarding developing a social security system in Article 34, another CIDES scholar also reminded everyone to consider the limits of the state's capability.[396]

Erfan Maryono[397] stated that a market economy seems to bind the government's hands to help its people. The state is not allowed to provide subsidies to people in fear of distorting the market, which eventually torments people. Countries that implement a market economy seldom get out of that situation, except through radical social change. Therefore, the original Article 33 should be maintained.[398]

In response, a F-PG speaker argued that in the prevailing global reality, in the interdependent world, upholding economic independence is not feasible.[399] Another F-PG speaker reiterated that the article on economy is not value-free. The statement that the economy is a function of social welfare is a commitment, an alignment that should be embedded in the Constitution. Furthermore, the familial principle is more the soul and spirit of the nation, the character and morality of Indonesia's economy. This opens the way to including the principles of independence and efficiency.[400]

Responding to the discussions, the CSIS researcher denied that he was against the ideas of developing a social security system. Adopting social welfare ideas, as embedded in Article 34, must be followed by contextual thinking about applicability. The ideas should not stop at spiritual and substantive levels. They should be broken down to be implementable.[401] In that regard, a CIDES speaker noted that after independence, the economic structure remained in place and most assets were in the hands of a tiny fraction of the people. That is why Article 33 begins with the imperative sentence that 'the national economy shall be organized', an instruction to re-structure the national economy, which had not been carried out.[402] Further, another CIDES speaker admitted that the familial principle is opposed to efficiency. However, it is the government's and DPR's responsibility to reconcile these conflicting objectives, as the state's *mission sacre`* to obtain economic growth with justice and equality.[403]

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395 As conveyed by Adi Sasono of CIDES (Centre for Information and Development Studies). Ibid., pp. 381-382.
396 As stated by Umar Juoro (CIDES). Ibid., p. 387.
397 A researcher from the Institute for Development of Rural Technology (Lembaga Pengembangan Teknology Pedesaan – LPTP), Surakarta.
398 As conveyed by Erfan Maryono from the Institute for Development of Rural Technology or LPTP (*Lembaga Pengembangan Teknologi Pedesaan*), Surakarta. Ibid., p. 390.
399 As asserted by Happy Bone Zulkarnaen (F-PG). Ibid., p. 395.
400 As stated by Theo Sambuaga (F-PG). Ibid., p. 400.
401 As asserted by Tommy Legowo (CSIS). Ibid., p. 406.
402 As stated by Adi Sasono (CIDES). Ibid., p. 409.
403 As stated by Umar Juoro (CIDES). Ibid., p. 412.

In the subsequent PAH I public hearing on 4 March 2002, Roeslan Abdulgani contended that the original Article 33 should not be changed. Quoting Soekarno, Abdulgani stated that Article 33 formulates the popular economy, which Hatta named *het economische Pancasila* (economy of Pancasila).[404]

In the next PAH I public hearing on 5 March 2002, a UKI delegation proposed clarifying the branches of production that are important to the state and the definition of 'under the authority of the state' (*dikuasai negara*). Further, the delegation proposed including the principles of justice and democracy in Article 33.[405] PAH I compiled the materials regarding the national economy and social welfare. Then, PAH I introduced them, other materials, and the enclosures of MPR Decree No. XI/2001 to the public through various regional forums, such as public hearings and assessment forums.

Subsequently, PAH I teams that attended the forums reported to the PAH I meeting on 19 March 2002. The Bandung audience wanted to maintain the principle of the familial economy as the foundation of the national economy. The Banjarmasin audience argued that the new title of Chapter XIV, 'National Economy and Social Welfare' and the proposed changes included the popular economy concept. The Bali audience proposed reforming Article 33 and maintaining Article 34, which states that 'the impoverished persons and the abandoned children should be taken care of by the government'. By contrast, Semarang and Palembang participants proposed maintaining the original Article 33 and Article 34. Surabaya participants argued for reforming Article 33. In Makassar, certain participants argued for implementing the familial principle, while others proposed including the principles of justice, efficiency, and democracy in Article 33.[406]

### *VIII.2.5.3 Factions Debate the Economy*

PAH I resumed the discussion on Article 33 and Article 34 on 27 March 2002. A F-PDKB member asserted that the economy should be based on the principles of justice, efficiency, and economic democracy. About Article 34, F-PDKB affirmed that instead of merely providing the facility, the state should be resolutely responsible for health care and public services, as they are fundamental to humanity.[407] A F-UD member questioned whether the

404 Ibid., p. 423.

405 As proposed by Anton Reinhart from UKI (*Universitas Kristen Indonesia* – Christian University of Indonesia). Ibid., p. 464.

406 As reported by Abdul Azis Imran Pattisahusiwa from Bandung, Soedijarto from Banjarmasin, Sutjipno from Bali, Hatta Mustafa from Semarang, Rully Chaerul Azwar from Palembang, Retno Triani Johan from Surabaya, and Ali Hardi Kiaidemak from Makassar. Ibid., pp. 624-641.

407 As stated by Gregorius Seto Harianto (F-PDKB). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 75-76.

principle of efficiency should be included in the Constitution, since it (rather than equitable distribution) is beneficial for the people and regions.[408] On the other hand, F-PDIP asserted that the familial principle in the national economy should be maintained. However, it should be implemented with the principles of efficiency, justice, and economic democracy. In that regard, the original Article 33 should be maintained with certain new provisions.[409] F-PDU contended that Article 33 should be amended to ensure it is based on the principles of collectivity, familiality or brotherhood, democracy, and justice. Since 'efficiency' is a principle at the implementation level, it should not be inserted in the Constitution. Further, on Article 34, F-PDU proposed accentuating health care services.[410]

Commenting on the discussion, a F-Reformasi member stated that, as far as he knew, the term economic democracy is not known in the textbook.[411] Further, a F-PPP member argued that since there is no just and fair market, the familial principle should be included in Article 33. In this regard, efficiency is not a principle, hence the national economy should be based on the general principles of familiality or brotherhood, justice, independence, and democracy.[412] F-TNI/Polri added that the original 'Social Welfare' title of Chapter XIV should be maintained. It reflects the idea that the economy in Article 33 should be fostered to increase state capability to provide social welfare service to the people as stipulated in Article 34. Ultimately, both articles are about social welfare.[413]

A F-UG member argued that Article 33 should contain the principle of a familial economy to develop an interdependent economy, in which the large and small ventures are mutually supportive in a social market economy. Then, the economy should be developed as a sustainable collective venture based on the principles of a familial economy, justice, and efficiency. Further, the economy should be developed as an all-encompassing concept, prioritizing social welfare and health care services. [414] A F-PG member argued that the new "National Economy and Social Welfare" title of Chapter XIV was appropriate. Then he suggested including the principle of *ekonomi kekeluargaan* (familial economy), which was not included in the MPR Working Body's draft, without sacrificing the modern economic principles. Further, it was not sufficient if the vital sectors stipulated in Article 33(2) were only controlled by the state. They should be further regulated by law, based on the principles of justice and efficiency.[415] Similarly, another F-PG member acknowledged that the term *kekeluargaan* (familial) is controversial, as it

408 As argued by Hatta Mustafa (F-UD). Ibid., p. 77.
409 As stated by Hobbes Sinaga (F-PDIP). Ibid., p. 79.
410 As stated by Asnawi Latief (F-PDU). Ibid., p. 81.
411 As stated by Fuad Bawazier (F-Reformasi). Ibid., p. 84.
412 As argued by Ali Hardi Kiaidemak (F-PPP). Ibid., p. 86.
413 As expressed by Affandi (F-TNI/Polri). Ibid., p. 88.
414 As argued by Soedijarto (F-UG). Ibid., pp. 91-92.
415 As conveyed by T.M. Nurlif (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 93.

can be interpreted in various ways and cannot be interpreted clearly as an understanding of economic development. Therefore, PAH I should replace the term with "justice, efficiency, and economic democracy." Furthermore, the F-PG member agreed with Mubiyarto, that the spirit of *kekeluargaan* may lead to the left or right, as long as not too much. Therefore, Article 33 should not omit the term *kekeluargaan* and include the principles of justice, efficiency, and economic democracy. It seems that Indonesia embraces shy capitalism and disguised socialism.[416]

Regarding the terms, the meeting chairman argued that the term *kekeluargaan* (familial) is the opposite of *perseorangan* (individual), describing the struggle between individualism and collectivism, which dominated at the time. Now, all ideologies have entered a new variant, shifted to the middle, and meet each other at some point.[417] In response, a F-PDIP member stated that Article 33 should be consistent with the Preamble's messages, with the principle of a state based on the rule of law, and especially with *grondrechten*, fundamental rights. Therefore, Chapter XIV's original "Social Welfare" title should be maintained.[418]

On the other hand, a F-UD member stressed that economic development should pay attention to both the ecological and sustainability aspects of renewable and non-renewable natural resources. Further, development should respect *hak ulayat* (traditional communal rights) of the people and guarantee the equitable development of all regions.[419] Similarly, a F-KB speaker underlined that economic development should protect the ecosystem, adhere to human rights, and keep regional development equitable.[420] Then, a F-PDIP speaker reminded the committee of the economic system under President Suharto, *Suhartoism*, which caused a deep discrepancy between the rich and the poor. It marred all policies and is difficult to eradicate, like the *hydra*. It must be ended, and thus, the original Article 33 should be maintained. Therefore, Chapter XIV's original "Social Welfare" title should be kept.[421] Regarding *hak ulayat* (traditional communal rights), especially land rights, a F-UG speaker stated that the recognition of ulayat rights has been resolved under the agrarian law. Therefore, if it was included in the Constitution, it could lead to complicated excesses.[422]

A F-KB speaker agreed that the phrase on *hak ulayat* could be omitted since it was already included in Article 18B on Human Rights, but that equitable regional development should be included.[423] Subsequently, a F-PDIP speaker asserted that the state is obliged to achieve social justice

416 As underlined by Ahmad Hafiz Zawawi (F-PG). Ibid., p. 95.
417 The meeting was presided by Slamet Effendy Yusuf. Ibid., p. 100.
418 As expressed by Sutjipno (F-PDIP). Ibid., p. 102.
419 As expressed by Vincent T. Radja (F-UD). Ibid., p. 105.
420 As stated by Ida Fauziah (F-KB). Ibid., p. 106.
421 As conveyed by Frans Matrutty (F-PDIP). Ibid., p. 109.
422 As reminded by Sutjipto (F-UG). Ibid., p. 112.
423 As conveyed by Erman Suparno (F-KB). Ibid., p. 113.

for all Indonesian people. Article 33 stipulates that the national cake should be distributed based on the familial principle. There is distributive justice and consumptive justice. In distributive justice, everyone receives the same amount, which is not just about contribution to production. In that regard, the familial principle can do better, although there are many tools required, such as agrarian law, labor law, the fiscal system, and the subsidy system. Thus, F-PDIP concluded, the term *asas kekeluargaan* (familial principle) is the appropriate term for the purpose. Regarding Article 34, F-PDIP asserted that the state is obliged to develop a social security system for all people to achieve a welfare state.[424] Another F-PDIP member argued that the Constitution does not necessarily specify the economic actors, such as state enterprises, cooperatives, and so forth. The economic actors are the people.[425]

Eventually, the meeting chair concluded that the economic actors would not be specified in the Article. Let it evolve according to development. Further, *hak ulayat* (traditional communal rights) should also not be included. The principle of national economic unity should be upheld. Do not let autonomy, a necessary concept, create excessive *peraturan daerah* (regional regulations) that weaken national economic unity.[426]

In the subsequent formulation team meeting on 5 April 2002, the PAH I chairman stated that in the previous meeting, most PAH I members expressed the will to maintain the original Article 33 and only to add the clauses of justice, efficiency, and that Indonesia is one national economic unity.[427] Further, he asserted that Article 33(1), Article 33(2), and Article 33(3) are the ultimate goals, which are not fully rational and pragmatic. The goals are about *das Sollen* (the envisioned future), which is asymptotic, a condition that will never be reached, but could be approximated and should be always pursued. They are the dreams that inspire us on how the economy should develop. Therefore, the sections should not be changed. In Article 33(4), there are the guiding principles on how the dreams can be pursued. Furthermore, the principle of efficiency is often (mis)understood as financial efficiency, being about the right way of allocating resources, a concept based on the real opportunity value of resources. Therefore, its measurement is not financial, but about its contribution to the national economy. Hence, it is possible that a project is financially loss-making, but has a positive value because it boosts the national economy. "Control by the state" is an accordion-like principle. To be more efficient, the state can choose between using the resources directly, or giving them to private actors. With this principle, the government should be held accountable and not waste resources. Furthermore, sustainability has accommodated the intention of environmentally sound and sustainable development. It means

424 As stated by Harjono (F-PDIP). Ibid., p. 116.
425 As stated by Soewarno (F-PDIP). Ibid., p. 120.
426 The meeting was chaired by Slamet Effendy Yusuf (F-PG), the vice PAH I chairman. Ibid., pp. 120, 122.
427 As stated by Jakob Tobing (F-PDIP). Ibid., p. 305.

that renewable resources are protected and for non-renewable resources, alternatives should be available.Similarly, maintaining equitable regional development and unity of the national economy is very important.

In conclusion, the PAH I chairman stated that Article 33(1), Article 33(2), and Article 33(3) should remain, and Article 33(4) should be added, noting sustainability, environment, equitability of development, and unity of the national economy. Regarding the cooperative ventures, one should not accentuate any particular economic actor. With the familial principle implemented, along with principles of efficiency and justice, not only the cooperatives will have a familial venture character. However, the ventures that go public that offer shares in small nominal fractions will also reflect the familial character.[428]

Then, F-UG, F-Reformasi, and F-PDIP speakers argued that the term *dikuasai* (to be under the authority of) should be maintained, since it may mean 'to own and/or to control.'[429] However, a F-KB member contended that, if not restricted, Article 33(1), Article 33(2), and Article 33(3) will adopt etatism as the model of managing the Indonesian economy. Therefore, if those sections are to be maintained, they should be accompanied by Article 33(4), which will open a healthy competition as in a market system; or else economic etatism coupled with a market economy will develop, as practiced in the Scandinavian countries. Further, the cooperative as the trademark of the Indonesian economy would be preserved.[430]

Regarding the proposal for changes, a F-PDIP member stressed that the original Article 33(1) is perfect. The speaker also approved of the term *menguasai* (under the authority of) because it could mean *mengatur* (to control) while reflecting that the national assets belong to the people, as represented by the state. Further, he stressed that the equitable distribution aspect should be emphasized in the article.[431] A speaker from F-UG reminded that up until that point, Article 33 had had no impact on the national economy. That is because the article is not imperative, merely a statement of principles. Therefore, there should be a fifth section that contains instructions for implementing the principles by law.[432]

In response, a F-PDIP speaker proposed replacing the term "*dikuasai*" (under the authority of) with the terms "*diatur dan ditentukan oleh negara*" (regulated and determined by the state). With such a formulation, the new section is unnecessary because it already means that it should be regulated

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428 Jakob Tobing, the author, proposed the term *effisiensi berkeadilan* (efficiency with justice) which is based on opportunity value concept, which is different from the notion in efficiency in micro financial concept, in a Komisi A meeting on 7 August 2002. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 313, 314.

429 As stated by Sutjipto (F-UG), Fuad Bawazir (F-Reformasi) and Frans Matrutty (F-PDIP). Ibid., pp. 316, 317, 321.

430 As argued by Ali Masykur Musa (F-KB). Ibid., pp. 318, 319.

431 As stated by Soewarno (F-PDIP). Ibid., p. 323.

432 As stated by Soedijarto (F-UG). Ibid., p. 324.

further by laws.[433] Accordingly, a F-PG speaker argued that the term *diatur* (regulated) by the state should be included. Under certain circumstances, the state may not be able to invest when the project is needed by the people. In that case, the state should give the private sector the opportunity to invest, but since it relates to the people's basic needs, the state should retain control of the venture.[434]

Another F-PDIP speaker argued that all the factions had agreed on the content of the changes to Article 33, which just required refinement. Article 33(1) to Article 33(4) were intended for implementers to follow, i.e., state, government, and economic actors. The Article required a phrase stating that it must be further regulated by law.[435]

Eventually, the meeting chair concluded that in principle, the changes to Article 33 had been agreed and only required refinement. Since no faction had commented on Article 34, the chair concluded that the draft in the Attachment of MPR Decree No. XI/2001 was agreeable to all factions.[436]

#### *VIII.2.5.4 Refining Article 33*

Subsequently, PAH I discussed refining Article 33. A F-KB speaker argued that there was a controversy about the principles of familial and market economies because the definition of a 'national economy' required a principle that would ensure proportional justice to everyone. Therefore, the justice principle should be incorporated into Article 33(1) instead of into the new Article 33(4).[437] However, as concluded by the meeting chairman, other factions did not agree with the proposal and wanted to maintain the original Article 33(1), Article 33(2), and Article 33(3).[438]

Further, PAH I deliberated on the principles that should be included in Article 33(4). Thus, PAH I agreed to put efficiency with justice, continuity, environmental perspective, self-sufficiency, maintaining balanced progress, and unity of the national economy in Article 33(4). However, a F-PDKB speaker reiterated that economic democracy should be the basis for economic development.[439] In a similar vein, a F-KB member argued that the unity of national economy should be coupled with a just market economy system or a social market economy.[440]

In response, a F-PDIP member emphasized that the market economy is a managed or intervened market, in which justice, efficiency, and sustainability are the principles in the democratically intervened market

433 As stated by Hobbes Sinaga (F-PDIP). Ibid., p. 326.
434 As argued by T.M. Nurlif (F-PG). Ibid., p. 327.
435 As stated by Harjono (F-PDIP). Ibid., p. 328.
436 The meeting was presided by Slamet Effendy Yusuf. Ibid. See Attachment VIII.7.
437 As stated by Yusuf Muhammad (F-KB). Ibid.
438 Ibid., p. 329.
439 As argued by Gregorius Seto Haryanto (F-PDKB). Ibid., p. 332.
440 As argued by Ali Masykur Musa (F-KB). Ibid., p. 334.

economy.[441] Then, a F-PG speaker argued that the national economy is the people's collaborative effort. Therefore, the togetherness principle should be included in this article as well.[442]

Then, PAH I agreed that there should be a clause that requires implementing these provisions stipulated by law. Thus, the draft new Article 33 was agreed and subsequently reported on for further deliberation.[443]

### *VIII.2.5.5 Regional Forums and Validity Meetings on the Economic System*

In the subsequent regional assessment forums, economic issues did not attract many responses from local participants. However, participants in Pontianak made an important suggestion, proposing that demography and population insights should also be considered as principles of economic development and that Article 34 should stipulate that the state shall develop a system of social and economic security for all people and to protect and empower the weak and the incapable, in accordance with human dignity.[444]

Further, a validity meeting in Bali proposed clarifying the term *dikuasai oleh negara* (controlled by the state) in Article 33(3). The term may imply the danger of state expansion over the people's rights. The meeting also proposed changing the term with "shall be regulated by the state with laws."[445]

In a PAH I subsequent meeting to review the reports from the validity meetings on 27 May 2002, Hasyim Djalal, a resource person, agreed that Article 33(1) and Article 33(2) should not be changed since they contain a certain philosophy. However, Article 33(3) should be adjusted. For instance, the term *bumi* (the land), is a geographical term, rather than a legal one. The term used should conform the sovereign rights recognized internationally. There are two objects that fall into the term *dikuasai* (under the authority of): territory and natural resources. Indonesia has a 200-mile economic zone, not all of it Indonesian territory. Its resources are under the authority of Indonesia. Therefore, the terms in Article 33(3) should be adjusted to conform to international legal conventions.[446]

### *VIII.2.5.6 Faction Disagreements Persist*

Thus, on 4 June 2002, PAH I reported the draft to the MPR Working Body plenary meeting.[447] In the final MPR Working Body plenary meeting on 25

441 As stated by Jakob Tobing (F-PDIP). Ibid.
442 As stated by Ahmad Hafiz Zawawi (F-PG). Ibid., p. 335.
443 Ibid., p. 338.
444 As conveyed by Mailan Panggabean from the University of Tanjungpura, Pontianak and by Pabali, also from University of Tanjungpura. Ibid., pp. 726, 737. The validity meeting was conducted in Pontianak, on 21 May 2002.
445 As reported by I Dewa Gede Palguna.Ibid., p. 837.
446 Ibid., p. 786.
447 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 7. See Attachment VIII.8.

July 2002, it was agreed that the Chapter XIV draft should not be changed, except its title, which would change from Social Welfare to National Economy and Social Welfare.[448]

In the ensuing Commission A meeting on 6 August 2002, factions discussed the drafts. In general, factions could agree on the drafts of the amended Articles 33 and 34. However, a F-UG speaker questioned the agreement on the title and the sections of Article 33 and 34. F-UG argued that the title change had caused a serious distortion. "Social Welfare" emphasizes that the main objective is the people's welfare. In that regard, the national economy is the derivative of that objective. Regarding the principles in Article 33(4), F-UG argued that efficiency may change the production process to become capital intensive and would neglect labour intensive processes. Efficiency also contradicts the intention to achieve independence. Therefore, the terms efficiency with independence, efficiency with justice, and so forth, should be included.[449]

A F-PDIP member also disagreed with Article 33's revision. Article 33(1) contains the principles of economic democracy. The instruments to implement those principles are absent.[450] In that regard, another F-PDIP member asserted that discussing the national economy and social welfare could not be separated from the *rechtsstaatgedachte* or a state based on the rule of law and *volkssoevereiniteit* (sovereignty of the people). In a *materiële rechtsstaat* (substantive state based on the rule of law), besides the civil and political basic rights, there are economic, social, and cultural rights. Hence, the substance of Articles 33 and 34 is related to the rule of law, which is confirmed in Article 1(2) and Article 1(3). Further, F-PDIP accepted the formulation of the drafts of Article 33(4) and Article 33(5).[451]

Similarly, a F-PG member reiterated that F-PG agreed with the draft amendments to Articles 33 and 34. Articles 33(1)-(3) emphasizes economic democracy, to achieve prosperity for the people. However, neither the state nor market forces should fully dominate the economy. Further, Chapter XIV's title should be changed from Social Welfare to National Economy and Social Welfare. Article 33 is about the national economy and Article 34 is about social welfare.[452] Likewise, the F-PPP, F-KB, F-Reformasi, F-PBB, F-KKI, F-PDU, F-TNI/Polri, and F-UD speakers endorsed the draft amendments to Articles 33 and 34.[453] Accordingly, F-UG agreed with the draft

448 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 347.

449 As conveyed by Sri Edi Swasono (F-UG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 277.

450 As argued by Ramson Siagian (F-PDIP). Ibid., p. 280.

451 As argued by Sutjipno (F-PDIP). Ibid., p. 283.

452 As reiterated by Zawawi (F-PG). Ibid., p. 285.

453 As affirmed by Sjaful Rahman (F-PPP), Ali Masykur Musa (F-KB), A.M. Luthfi (F-Reformasi), Bondan Abdul Madjid (F-PBB), Sutradara Ginting (F-KKI), Asnawi Latief (F-PDU), Sugih Mangunsukarto (F-TNI/Polri) and Vincent Radja (F-UD). Ibid., pp. 285 – 291.

Chapter XIV changes, including the title. However, the term efficiency should be discussed further.[454] Eventually, the meeting chairman concluded that the substance of amendment to Articles 33 and 34 had been agreed and the formulation team would refine the formulation.[455]

### *VIII.2.5.7 Commission A: Refining the Formulation*

In the Commission A formulation team meeting on 7 August 2002, the Commission A chairman stated that some consider that efficiency is capitalistic efficiency. In fact, the meaning of efficiency depended on which book one read. Further, sustainability and environmental insights are a single concept, so that the term 'environmental insight' could be omitted.[456] However, a F-UD member objected to omitting the term. The term was a demand of the public and the NGOs.[457]

Then, Sri Edy Swasono, a FUG member, reiterated that the objective of national development is not economic growth. Rather, the measure of development's success is the increase or decrease of social welfare, while efficiency is a technical matter. Another problem is that micro-efficiency may contradict macro-level efficiency. Even in the theoretical realm, these two efficiencies are an unsolvable contradiction. Further, he proposed that the cooperative as the appropriate enterprise for the economic system, as discussed in the Elucidation of the 1945 Constitution, should be explicitly mentioned in Article 33.[458] In response, a F-PG member stressed that the objective, the greatest prosperity of the people, had been confirmed in Article 33(3). Indeed, development should be just and efficient as well.[459] Likewise, F-Reformasi argued that it is better to have an overlap of principles in Article 33(4) rather than an omitted principle.[460] More critically, a F-PDIP member emphasized that efficiency may contradict togetherness or *gotong-royong* (mutual help).[461]

Then, the PAH I chairman asserted that the term efficiency should be understood through the opportunity cost concept, not as a micro-finance concept. As he had stated previously, a project may be financially loss-making for the government. However, if it provides significant employment and benefit many people, that is efficiency. Any investment should be considered as resulting in the greatest prosperity for the people, with no sources wasted.[462]

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454 As stated by Hariyadi B. Sukamdani (F-UG). Ibid., p. 291.
455 The meeting was presided by I Ketut Astawa (F-TNI/POLRI). Ibid., p. 294.
456 Ibid., p. 496.
457 As stated by Hatta Mustafa (F-UD). Ibid., p. 497.
458 Ibid., pp. 498-500.
459 As stated by Ahmad Hafiz Zawawi (F-PG). Ibid., p. 500.
460 As stated by Fuad Bawazir (F-Reformasi). Ibid., p. 501.
461 As argued by Amin Aryoso (F-PDIP). Ibid., p. 502.
462 Ibid., p. 502. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 313.

A F-PG member added that efficiency is necessary to prevent a high-cost economy. However, justice could not be neglected. Hence, both principles should be coupled, not juxtaposed.[463] In response, Swasono stated that the term 'efficiency' in economic studies can have a double meaning. What should be achieved is productive and economical, not wasteful. Therefore, the term 'efficiency' may well be too technical for a constitution.[464]

To that end, the chairman stressed that both principles, justice, and efficiency, should be comprehended jointly. In that regard, we should make use of the latest developments in science and technology. Considering the time constraints, the chairman concluded by urging all to finalize the differences in the subsequent informal consultation between the Commission A and faction leaders.[465]

In the ensuing informal consultation meeting, conducted right after the formulation meeting, the leadership of F-UG stated that F-UG, in which Eddy Swasono was a member, confirmed that F-UG approved the draft amendments to Articles 33 and 34. With that confirmation, all factions agreed to accept the draft amendments to Articles 33 and 34, with a small change to Article 33(4).[466] The Commission A chairman then reported the outcomes of the consultation to the Commission A plenary, which agreed to it. Subsequently, the draft was reported to the MPR plenary meeting on 9 August 2002.[467]

Ultimately, with endorsement from all factions, in the MPR plenary meeting on 10 August 2002, the draft was ratified as the amendment to Chapter XIV on National Economy and Social Welfare of the 1945 Constitution.[468]

## VIII.3 The Constitutional Commission

During this last amendment stage process, faction discussions about the constitutional commission were not as intense as in the previous stages. However, civil society continued to demand a constitutional commission take over the amendment process.

In the first MPR Working Body meeting on 10 January 2002, a F-PPP speaker reminded the committee that in the previous annual session, F-PPP proposed constitutional commission's formation had not been concluded.

463 As conveyed by Ahmad Hafiz Zawawi (F-PG). Ibid., p. 503.
464 Ibid., p. 503.
465 Ibid., p.522
466 The informal meeting was led by Arifin Panigoro (F-PDIP). Ibid., p.p. 395-409.
467 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 530. See also Attachment VIII.9.
468 Ibid., pp., 704, 751. Regarding the decision, Sri Edi Swasono (F-UG) stated objection to the change of the title of Chapter XIV from 'Social Welfare' to 'National Economy and Social Welfare' and mentioned that the term 'cooperative' is not specified in Article 33. See Ibid., pp. 703-704. See also VIII.5.

However, F-PPP modified the proposal. Rather than under the MPR, the constitutional commission should be formed by the MPR Working Body and be responsible to the MPR Working Body. Further, F-PPP proposed that PAH I should determine the other commission's requirements. F-PPP admitted that its previous idea to task the constitutional commission with the overall amendment revision would not be possible due to time constraints. Therefore, F-PPP suggested that such a commission could be established by the next 2004 election. However, the possibility of forming such a commission should be stated in Article 37.[469]

In the same vein, a F-KB speaker stated that in anticipation of difficulties in achieving logic formulations that may hamper the amendment's completion, F-KB would continue proposing a draft MPR Decree on the constitutional commission's formation.[470] Regarding the constitutional commission, F-UD argued that its formation should not reduce the MPR's role and function in conducting the constitutional amendment.[471] On that occasion, F-TNI/Polri called for caution in revamping fundamental issues in the Constitution to prevent the nation's disintegration. Therefore, instead, PAH I should seek assistance from the Expert Team in finalizing the amendment.[472]

In its first meeting on 11 January 2002, PAH I formed a small team to prepare the working schedule for finalizing the amendments and a plan to form a constitutional commission.[473] Regarding this schedule, F-UG and F-PPP speakers argued that sufficient time should be allocated for in-depth discussions and communicating with the people. Further, the F-PPP speaker reminded others that although the draft could be made by a constitutional commission, it still needed approval from the plenary MPR meeting. There would be no guarantee that the draft would not be changed. Therefore, by adopting the working plan, it was no longer necessary to discuss a constitutional commission itself.[474]

### VIII.3.1 Views on a Constitutional Commission

Then, in a PAH I meeting on 28 January 2002 for the factions to express their Introductory Views on the amendment, only F-KB talked about a constitutional commission. In that meeting, the F-KB speaker stated that the constitutional commission should be discussed in more depth. Effectiveness of a fundamental law needs all the people as determinants, not just certain

469 As stated by Abdul Azis Imron Pattisahusiwa (F-PPP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 54-55.

470 As stated by Ida Fauziah (F-KB). Ibid., p. 61.

471 As argued by Hatta Mustafa (F-UD). Ibid., p. 66.

472 As proposed by Mardiono (F-TNI/Polri). Ibid., p. 67.

473 The small team was led by Ali Masykur Musa (F-KB). Ibid., p. 96.

474 As stated by Soedijarto (F-UG) and Zain Bajeber (F-PPP). Ibid., pp. 113, 115.

people, particularly not only the ruling elite.[475] Furthermore, the F-KB speaker criticized the MPR for still being open to appointing MPR members from functional groups, the military, and the police. He also deplored that the MPR's chosen system was not purely bicameral. If the DPR and Regional Representative Council were equal, then there would be checks and balances.

Moreover, in a PAH I public hearing on 27 February 2002, a Coalition of NGOs delegation demanded that the MPR should stop the amendment process. The Coalition strongly denounced the constitutional amendments that had already been adopted. They considered that the amendment process was counter-productive to the development of democracy in Indonesia, since the amendment process was elitist, with only a handful of people making the decisions and public involvement being minimal. Furthermore, the MPR did not publicize the draft content of all changes to the constitution, which would allow the public to participate in the process. Similarly, the MPR did not have the in-depth knowledge of what a democracy means, its terms and principles, and its checks and balances. Changes were only partial, because the MPR did not venture out of the frame and the value system of the 1945 Constitution, which was not worth keeping. The MPR had also not succeeded in determining a fully direct presidential election. The second-round election was still to be conducted by the MPR. Further, a checks and balances system had not been realized and the outcome tended to become legislative heavy, creating an overly strong parliament. Moreover, the mere *trias politica* was outdated. The separation of powers no longer only concerned the three power branches. For example, the constitutions of Thailand and South Africa now noted state auxiliary agencies, such as a national commission of human rights, ombudsman, national commission for corruption eradication, and a general equality commission.

Furthermore, the F-KB speaker criticized the MPR for still being open to appointing MPR members from functional group, military, and police delegates. He also deplored that the MPR's chosen system was not purely bicameral. If the DPR and Regional Representative Council were equal, then there would be checks and balances.

The delegation reiterated that an independent commission would be better suited, as it would be free from ulterior motives. Thus, the MPR should no longer conduct the amendment process and determine the outcomes. The process must be handed over to an independent constitutional commission. A constitutional commission should no longer work on amending the Constitution and instead make a new one, the NGO coalition speaker asserted.[476]

In response, a F-UG member said that state institutions could change the constitution not only in Indonesia. In certain countries, representatives rather than the people have the right to change the constitution. Consti-

475 As conveyed by Erman Suparno (F-KB). Ibid., pp. 154,155.

476 As conveyed by Bambang Widjajanto (Coalition of NGOs). Ibid., pp. 315-325, 363.

tutional amendments are passed by the United States' Congress and Germany's *Bundesversammlung* (Federal Assembly).[477] Then, a F-PDIP member emphasized that the MPR had met and received many different ideas and aspirations from many organizations, NGOs, and the public since 1999. PAH I had also received input and considerations from experts. Therefore, if one aspiration is not acceptable, it does not mean that the MPR has failed to accommodate people's aspirations. Further, an NGO with a partial opinion has no right to claim it speaks for the people. It is the people's representatives in the MPR who are entitled to conclude what is in accordance with the people's interests and what is not.[478] Accordingly, a F-PG speaker noted that the F-PG once proposed forming a constitutional commission with full authority. However, the proposal was criticized because it was unclear whom the commission represented. The MPR has the constitutional authority to ratify the constitution and its members may also have certain intellectual capacities. Of course, citizens also have intellectual competence. Those who had the knowledge could draft a complete constitution and show it to the MPR and the public, so that the MPR would have a comprehensive (rather than a partial) overview of the matter.[479]

On that matter, a NGOs speaker stated that the NGOs did not want to negate the MPR's authority in determining the final draft new constitution. However, because a constitution should principally prevent an abuse of power, the draft constitution should be drafted by an independent constitutional commission.[480] Another NGO delegation emphasized that it was unacceptable to leave the constitution-making process to the political struggle of political powers without involving the public. The people should decide, not the interests of political powers. Therefore, Article 37 should be amended to allow an independent constitutional commission to do the work, rather than a process that is full of trivial political interests stemming from political powers.[481]

In a PAH I public hearing on 28 February 2002, a CSIS delegation stated that the amendment process seemed elitist. The MPR allocated only 20% of its time to conduct public hearings and another 36% for arranging informal consultations and formulation, which were conducted in closed sessions. This led the public to not know how the amendment process had taken place. In reviewing the 1945 Constitution, the MPR should have a clear basic concept of the future state. Whether as an amended or new constitution, it should develop an integrative, adaptive Constitution that guarantees human rights and adopts checks and balances. The MPR may have difficulties in doing that. Likewise, another CSIS speaker stated that the MPR, consciously or not, had preserved the basic concept of the original

477 As expressed by Soedijarto (F-UG). Ibid., p. 338.
478 As stated by Frans Matrutty (F-PDIP). Ibid., pp. 346-347.
479 As stated by Andi Mattalatta (F-PG). Ibid., pp. 352-353.
480 As stated by Smita Notosusanto (NGOs). Ibid., pp. 359-360.
481 As stated by Munir (NGOs). Ibid., p. 362.

1945 Constitution, some of which constituted the reasons for reforming the Constitution. Therefore, CSIS proposed forming an independent constitutional commission to undertake the task. This did not mean removing the MPR's authority to ratify the new constitution.[482]

In response, a F-PG speaker reiterated that from the beginning, the MPR wanted to reform the constitution, not replace it. The basic reference is the 1959 version of the 1945 Constitution, especially the Preamble as the benchmark of the grand design for absorbing the new dynamics, such as democratization, *reformasi*, law enforcement, and human rights.[483] Likewise, a F-UG speaker reiterated that the reference was the Preamble, which contains the ideology. As the successor to and heir of the state's founders, the reform should be based on the state's ideology.[484] A CSIS speaker later recognized that the constitution's reform ideology is the declaration of independence and the Preamble. Whereas the state's form was open to reconsideration, whether a unitary or a federal state, the republic's form should be maintained.[485]

Regarding the MPR's authority to amend the 1945 Constitution, a University of Pancasila delegation addressed this in a PAH I public hearing on 5 March 2002. It stated that with the new Article 1(2) stating that people's sovereignty is no longer exercised by the MPR, the MPR had lost its authority to amend the constitution and therefore the amendment could not be continued.[486]

In a PAH I public hearing on 12 March 2002, a UNTAG (*Universitas Tujuh Belas Agustus* – University of 17 August) delegation from Semarang also urged the MPR to discontinue the constitutional amendment. The MPR should evaluate the previous constitutional amendments. The fourth amendment draft would most likely have a negative impact on the country, because the amendment had been conducted carelessly and in haste.[487]

In response, a F-PDIP speaker stated that all opinions would be considered by the MPR as input alongside thousands of other opinions. The MPR would continue to revamp the Constitution's articles that were incompatible with the Preamble's messages.[488] Further, the PAH I chairman asked the university delegates to develop a well-informed mentality in society, in the spirit of intelligentsia and discourses based on facts, not prejudice, to contribute to the Constitution.[489]

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482 As conveyed by Tommy A. Legowo and Anton Djaruamaku, both from CSIS. Ibid., pp. 375, 377
483 As stated by Theo Sambuaga (F-PG). Ibid., p. 400.
484 As underlined by Soedijarto (F-UG). Ibid., p. 403.
485 As stated by Tommy A. Legowo (CSIS). Ibid., p. 406.
486 As conveyed by Abdul Kadir Besar (University of Pancasila). Ibid., p. 478.
487 As stated by Hendro Sukmono (UNTAG). Ibid., p. 530.
488 As stated by Sutjipno (F-PDIP). Ibid., p. 535.
489 Ibid., p. 543.

Meanwhile, a FKIK (*Forum Kajian Ilmiah Konstitusi* – Forum of the Scientific Study of the Constitution) delegation met with Soetardjo Soerjogoeritno, the DPR's Vice Speaker from F-PDIP. Believing the changes had deviated from what they considered to be the values contained in the Preamble, the delegation urged the MPR to stop the constitutional amendment. Soerjogoeritno expressed his support of the demand.[490] In addition, a *Forum Demokrasi* (the Democracy Forum) speaker stated that an independent constitutional commission was the best alternative to avoid a total amendment failure of the 1945 Constitution. He expressed concern over the legislators of the MPR who were occupied by the struggle to further their own interests within the amendment process.[491]

On 1 May 2002, a delegate from the European Union visited Indonesia to learn about the country's development and met with PAH I. One of the delegate's questions was whether PAH I had invited NGO input during the amendment process and then they suggested that PAH I invite the NGOs.[492]

### VIII.3.2 Intervention Attempts Increase

In the meantime, in many places, particularly along the northern coast of the island of Java, riots began to occur, while demands to stop the amendment process intensified. Responding to the situation, the military sent a mixed signal. They were not satisfied with the outcome of the amendment process. However, they adjured the MPR to accomplish the task and said they would accept the outcome as a transitional constitution that should be reviewed after the 2004 election. To that end, they proposed that an independent constitutional commission should fix the amendment.[493]

Regarding the amendments' comprehensiveness as a system, in a PAH I plenary meeting on 5 June 2002 to synchronize the amendment outcomes, a F-PDIP speaker stated that MPR members should allocate time to review whether the system built by the amendments was workable.[494] Another F-PDIP member reminded that the amendments' completions involved the good name of PAH I and the MPR. In society, there seemed to be many

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490 The delegation consisted of, among others, Budi Harsono, A.S.S. Tambunan, Sri Mulyono Herlambang (F-UG), Amin Aryoso (F-PDIP), Sadjarwo Sukardiman (F-PDIP). See *Kompas Daily*, 9 April 2002.

491 As stated by Rahman Tolleng from *Forum Demokrasi* (the Democracy Forum). See *The Jakarta Post*, Daily Newspaper, 19 April 2002.

492 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 537. The delegates were from Ireland, United Kingdom, Austria, and Spain.

493 *Suara Pembaruan Daily*, 26 April 2002.

494 As stated by Pataniari Siahaan (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 17.

disturbing demands and dissatisfaction, although among MPR members, there were no problems.[495] Likewise, a F-Reformasi member emphasized that if PAH I failed to finalize the amendments, it was the failure of those who were striving for reform and civil supremacy. A vacuum created by no constitution is very dangerous and must be avoided.[496] A F-PDIP member stressed once again that in synchronizing the outcomes, it should be reviewed whether the system would be compatible with the basic principles embedded in the Preamble, the unitary form of the Republic of Indonesia that adheres to *Bhinneka Tunggal Ika* (Unity in Diversity), the principles of the presidential system, and the principles of checks and balances.[497] Then, a F-KB member reminded all that establishing checks and balances should not cause the pendulum to swing too far towards over-empowering the legislature.[498]

Later, in a PAH I public hearing on 10 July 2002, a GMNI (*Gerakan Mahasiswa Nasional Indonesia* – Indonesian National Student Movement) delegation conveyed a statement asserting that the amendment endangered the safety of the nation and the state. Amendments had changed fundamentally the state structure, the political system, and the economic system of the country. Therefore, the fourth amendment must be stopped, the first, second, and third amendments ought to be revoked, and the original 1945 Constitution should be reinstated.[499] Then, another delegate added that GMNI was not a priori against amendments, but that amendments should be editorial improvements of existing articles or adding new sections without changing the substance of the existing ones.[500]

Despite this pressure, factions were not that interested in establishing a constitutional commission. It appeared that factions were more focused on finalizing the amendment. However, various parties outside the MPR continued to press for establishing a constitutional commission.

In a PAH I plenary meeting on 25 July 2002 to finalize the amendment draft, in its final remarks, the F-UG speaker criticized the foreign funded NGOs, which were vigorously discrediting the MPR. These NGOs considered the MPR as not radical enough in amending the 1945 Constitution, so they proposed a constitutional commission to draft a new constitution. However, because of the MPR's solidity, the MPR still had the mandate to continue the amendment.[501] On the other hand, the F-KB speaker stated that

495 As expressed by Soewarno (F-PDIP). Ibid., p. 18.
496 As asserted by A.M. Luthfi (F-Reformasi). Ibid., p. 20.
497 As stated by Sutjipno (F-PDIP). Ibid., p. 27.
498 As expressed by Ali Masykur Musa (F-KB). Ibid., p. 29.
499 As conveyed by Dihot P. Simarmata from GMNI (*Gerakan Mahasiswa Nasional Indonesia* – Indonesian National Student Movement). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 96.
500 As expressed by Bambang Ramada (GMNI). Ibid.
501 As stated by Soedijarto (F-UG). Ibid., p. 370.

a constitutional commission (once proposed by F-KB) could be considered if it was necessary to formulate a more systematic and comprehensive Constitution.[502]

### VIII.3.3 Military Calls for Stopping the Amendment

While the MPR Annual Session was getting closer to its end, on 7 June 2002, General Endriartono Sutarto was appointed as the new TNI Chief, replacing Admira Widodo Adisutjipto. The new TNI chief, General Endriartono Sutarto said that the amendment process had deviated from its original purpose. Further, Sutarto confirmed that the military supported establishing a constitutional commission, comprising of constitutional law experts and non-political groups to take over the amendment process. Furthermore, Sutarto asserted that in case the process failed, the military and the police would support the President reinstating the original unamended 1945 Constitution.[503]

Endorsement of the military's proposal to form a constitutional commission came from various parties. In Padang, West Sumatera, the Coalition for a New Constitution demanded that the MPR establish a constitutional commission by changing Article 37. Further, the Coalition insisted that the amended Constitution should be declared as a transitional Constitution and that a constitutional commission should draft a new Constitution. Furthermore, the Coalition demanded that a new MPR would ratify the draft new Constitution. If the MPR refused, the draft should be brought to a referendum.[504] Likewise, a Coalition for a New Constitution speaker said that the process and result of the ongoing constitutional amendment violated the spirit of reform. A constitutional commission is a must and the MPR must endorse it this year. A LBH (*Lembaga Bantuan Hukum* – the Legal Aid Institute) Jakarta speaker added that the amended Constitution should be declared as a transitional Constitution and a constitutional commission should be tasked with drafting changes or drafting a new Constitution.[505]

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502 As expressed by Ida Fauziah (F-KB). Ibid., p. 374.

503 *The Jakarta Post*, newspaper, 31 July 2002. See also, "*Sikap TNI dan POLRI terhadap amandemen Undang-Undang Dasar 1945*" (The stance of Indonesia's National Army and Republic of Indonesia's Police towards the amendment of UUD 1945), 30 July 2002.

504 *Media Indonesia*, newspaper, 1 August 2002, p. 25.

505 As conveyed by Hadar N. Gumay, the Coalition for a New Constitution and Paulus Mahulette from LBH (*Lembaga Bantuan Hukum* – the Legal Aid Institute). *The Jakarta Post*, newspaper, 1 August 2002. The Coalition for a New Constitution consisted of CETRO (Center for Electoral Reform), the Jakarta Legal Aid Institute, the Indonesian Forum for the Environment, the Women's Coalition, the Commission for National Law Reform, and individuals.

In the meantime, Saiful Sulun, the secretary general of the *Front Pembela Proklamasi '45* (Front of the Defenders of the '45 Proclamation) issued a statement rejecting and not recognizing any of the MPR decisions that ratify the constitutional amendments.[506] According to Sulun,the amendment had left out the soul and spirit of the original 1945 Constitution.[507] Further, Sulun stated that the amendment had adopted a bicameral system that could lead to federalism. Sulun was suspicious that the system was nothing more than a Western agenda, including that of the U.S. Indonesia could not apply American values, he stated.[508] Resistance also spread to the MPR itself. Amin Aryoso, a F-PDIP member, along with other F-PDIP members, on behalf of *Gerakan Nurani Parlemen* (Parliament's Conscience Movement), declared that the constitutional amendment was not only excessive, but foolish.[509] In the meantime, this fraction in F-PDIP actively collected signatures to reject the amendments. A PDIP deputy leader stated that they attempted to obtain support from F-PDIP, F-KB, and F-TNI/Polri members.[510] Matori Abdul Djalil, Minister of Defense, and a PKB (Partai Kebangkitan Bangsa – Party of National Awakening) leader agreed and endorsed the military proposal.[511]

In a statement, a political scientist group under AIPI (*Asosiasi Ilmu Politik Indonesia* – Indonesian Political Science Association) declared that the constitutional amendment showed signs of evolving without a direction, arbitrarily, and even partially. There was a risk of deadlock and that could cause a constitutional crisis. It could also lead to President Megawati issuing a decree ordering a return to the original 1945 Constitution. Further, AIPI warned that readopting the original 1945 Constitution would set back the country's reform movement. However, they agreed that the amended Constitution should be transitional.[512]

There were also counter forces. Adnan Buyung Nasution, a constitutional law expert and an icon of resistance against the New Order, stated that the constitutional amendment should be conducted since constitutional reform is part of the reform processing society, the nation, and the state. The process should not be halted even if a constitutional commission should be established.[513]

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506 *Kompas*, newspaper, 1 August 2002, p. 2. *Front Pembela Proklamasi '45* mainly consisted of retired military personnel. Saiful Sulun is a retired lieutenant general of the Army, former commander of East Java Regional Military Command (1985-1987) and People's Consultative Assembly Deputy Speaker (1987-1992).

507 *Media Indonesia*, newspaper, 1 August 2002, p. 25.

508 *The Jakarta Post*, newspaper, 1 August 2002.

509 *Kompas*, newspaper, 1 August 2002, p. 2. Other F-PDIP members were Permadi, Marah Simon, Sukono, and Mat Alamin Kraying.

510 As stated by *Imam Mundjiat*, a national PDI-P leadership deputy chairman. *Tempo*, newspaper, 1 August 2002.

511 Ibid.

512 As stated by Syamsuddin Haris, one of the AIPI chairmen. *The Jakarta Post*, newspaper, 1 August 2002.

513 *Media Indonesia*, newspaper, 1 August 2002, p. 26.

Vice President Hamzah Haz, the PPP chairman, rejected the Armed Forces Commander's proposal to declare the amended Constitution a transitional Constitution.[514] A transitional Constitution would cause instability.[515] Similarly, Jimly Asshidiqqie, a constitutional law expert, rejected enacting the amended Constitution as a transitional Constitution, since it would cause legal uncertainty. Further, the armed forces' statement was alarming and caused suspicion that the military would return to their old political role.[516] Bagir Manan, the Chief Justice of the Supreme Court argued that a provisional constitution would be inappropriate and weaken its position as the fundamental law.[517]

### VIII.3.4 Attempts to Stop or Promote the Amendment

Protests were not limited to the media or public hearings. Student activists staged demonstrations in various cities all over the country, such as in Jakarta, Makassar, Yogyakarta, Kediri, and Bogor, demanding the amendment's completion. Others demanded a referendum to amend the Constitution. The students warned the anti-reformists that they would confront them.[518]

Thus, approaching the 2002 MPR Annual Session's end, demands to establish a constitutional commission escalated into various and at-times contradictory objectives. For certain people, a constitutional commission would be an instrument to correct the draft amendment formulations, considered as driven by political group interests. For others, a commission would be an instrument to cancel certain or all changes, especially those of the political system, such as the MPR's lowered position from the highest state institution and sole executor of people's sovereignty. There were also those who argued that the existence of a constitutional commission would open the opportunity to cancel the changes and replace the 1945 Constitution with a completely new Constitution. However, there were also those who considered that the constitutional commission would be a middle way to prevent the constitutional amendment from ending up in a deadlock.

Then, several MPR members attempted to foil the MPR plenary session, which would be convened on 1 August 2002. Soetardjo Soerjogoeritno[519] and Bambang Pranoto, both from F-PDIP, stated that they would interrupt the plenary session by questioning the MPR's legitimacy to perform the amendment after the third amendment declared that the MPR would no longer implement the people's sovereignty. Another F-PDIP member,

514 *Media Indonesia*, newspaper, 1 August 2002, p. 1.
515 *Tempo*, newspaper, 1 August 2002, p. 8.
516 *Media Indonesia*, newspaper, 1 August 2002, p. 1.
517 *Media Indonesia*, newspaper, 2 August 2002, p. 8.
518 *Kompas*, newspaper, 1 August 2002, p. 2.
519 Soetardjo Soerjogoeritno was also the DPR deputy speaker from F-PDIP.

Mundjiat, and the deputy PDIP chairman declared that their action would be supported by 60 F-PDIP and 40 F-KB members.[520]

In an internal PDIP meeting, one of the F-PDIP members proposed issuing a decree to reinstate the original 1945 Constitution. President and PDI-P Chairperson Soekarnoputri refused and instructed F-PDIP to overcome the matter. Further, Soekarnoputri warned F-PDIP members not to disturb the MPR session.[521]

In his opening remarks at the MPR plenary meeting on 1 August 2002, Amien Rais, the MPR Speaker, emphasized that constitutional reform is a demand of history. The amendment ensures a democratic Indonesia.[522]

However, attempts to foil the amendment continued. Sri Hartati Moerdaja (F-UG) disclosed to journalists that 58 out of 60 F-UG members wanted to review the amendment. Likewise, Soerjogoeritno added that F-PDIP, F-UG, and F-KB had agreed to reject the amendment.[523] There were about 200 MPR members rejecting the amendment, Soerjogoeritno confirmed.[524] Then Soewignyo, F-PDIP's deputy secretary, claimed that Taufik Kiemas, Megawati Soekarnoputri's husband, and Guruh Soekarnoputra, President Soekarno's youngest son, had also signed the amendment rejection. Confirmed by journalists, Kiemas asserted that he never rejected the amendments, but he did refuse "excessive changes" to the Constitution.[525]

### VIII.3.5 The Factions' Response

Likewise, in the first MPR plenary meeting on 1 August 2002, certain F-UG and F-PDIP members asserted that the MPR, which had lost its supreme power, no longer had the authority to ratify the fourth amendment. Therefore, all amendments should be cancelled and the MPR should be restored as the executor of the people's sovereignty in full. Further, they asserted that this MPR annual session had no constitutional basis to continue.[526]

However, in the MPR plenary meeting on 2 August 2002, according to the preliminary faction views on the MPR Working Body's work, all factions wanted to finalize the amendment. Only F-PG, F-UG, F-KKI, and F-PDKB mentioned a constitutional commission. A F-PG speaker proposed forming a constitutional commission, to be described in the Additional Provisions, reporting to the new MPR composed by the 2004 election. However, this

520 Mundijat was a PDIP Central Board deputy chairman.
521 As proposed by Syahrul Azmir Matondang. See also *Koran Tempo*, newspaper, 1 August 2002, p. 1.
522 *Kompas*, newspaper, 2 August 2002, p. 1.
523 *Koran Tempo*, newspaper, 2 August 2002, p. 1.
524 *Media Indonesia*, newspaper, 2 August 2002, p. 1.
525 *Koran Tempo*, newspaper, 2 August 2002, p. 1.
526 As stated by Arief Biki (F-UG), Muhammad Ali (F-PDIP) and Syahrul Azmir Matondang (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 442, 443, 444.

should not postpone finalizing the amendment.[527] Furthermore, a member of the F-UG stated that if later it turned out that there were still parts that were not aligned, the Constitutional Commission could later harmonize them.[528] A F-KKI speaker also proposed tasking a constitutional commission with conducting a comprehensive amendment synchronization, which should be completed by mid-2003 and ratified during the 2003 MPR Annual Session.[529] Only a F-PDKB speaker went further, reiterating that F-PDKB had from the beginning proposed that changes to the 1945 Constitution should be conducted by establishing a state commission to maintain distance from practical political interests.[530]

In a Commission A meeting on 7 August 2002, the Commission A chairman explained that regarding the MPR plenary meeting on the next day, 8 August 2002, an informal consultation meeting of faction leaders and a formulation team meeting would be conducted intermittently. An informal consultation meeting between the MPR and Commission A leaders would also be held. Commission A would also receive delegations from *Front Nasionalis Marhaenis* (Nationalist Marhaenist Front).[531] Thus, throughout 7 and 8 August 2002, Commission A intermittently conducted a plenary meeting, a formulation team meeting, and an informal consultation of the factions. It also conducted an informal consultation meeting between the Commission A and MPR faction leaders and an informal consultation meeting with the Commission A faction representatives.[532]

In the 7 August 2002 meeting, F-UG agreed that forming the constitutional commission could be based on the MPR decree. The commission should have MPR members as its members.[533] On that occasion, F-TNI/Polri reiterated that if the MPR rejected the constitutional commission's

527 As proposed by Agun Gunandjar Sudarsa (F-PG). Ibid., pp. 466, 467.

528 As stated by Said Agil Siradj (F-UG). Ibid., p. 469.

529 As stated by Sutradara Ginting (F-KKI). Ibid., p. 494.

530 As stated by Manasse Malo (F-PDKB). Ibid., p. 499.

531 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 347-348. *Front Nasionalis Marhaenis* is a joint forum of organizations which support the political legacy of Soekarno, the founder of the Marhaenist movement, founder of the National Party of Indonesia and Indonesia's first president, it includes *Pemuda Demokrat Indonesia, Gerakan Mahasiswa Nasional Indonesia, Gerakan Rakyat Nasional Indonesia, Keluarga Besar Marhaenis, Gerakan Siswa Nasional Indonesia, Persatuan Tani Indonesia, Lembaga Putera Fajar, and Partai Nasional Indonesia (PNI). Marhaen,* is the name of a poor peasant from West Java who was used by Soekarno as the symbol of the alignments of PNI's struggle for the poor and oppressed. PNI is the main founder of PDI-P.

532 The 2002 MPR Annual Session was scheduled to finish on 11 August 2002. Until 7 August 2002, several important issues, such as the MPR's composition, the second round of presidential elections, the proposal to amend Article 29, the revision of articles on education and culture, the revision of articles 33 and 34 on national economy and social welfare, and the proposal to establish a constitutional commission had not been concluded.

533 As affirmed by Soedijarto (F-UG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 303.

work, the people should decide on that MPR's rejection through a referendum to ensure the work had firm legality and strong legitimacy.[534]

In the informal Commission A consultation meeting on 7 August 2002, the chairman invited the faction representatives to finalize establishing a constitutional commission. He reminded the Commission that all factions agreed the amendment formulation needed synchronization and improvement. All factions agreed that the process should not disturb preparing the 2004 election. Further, the factions agreed that the commission would be an instrument of and responsible to the MPR. However, the factions differed on whether the commission would be the MPR's internal instrument or an external commission that would be inserted into the MPR as an MPR instrument. Factions also differed on whether the commission should be a constitutional, national, or synchronization commission.[535]

A F-UG representative requested clarity on whether a constitutional commission would be formed to solve the deadlock articles in the amendment, to synchronize the amendment process outcomes, or to accommodate those who so far had not been involved in the amendment process. If it was merely for synchronization purposes, a constitutional commission was unnecessary.[536] A F-Reformasi speaker argued that since the amendment would be accomplished in 2002, a constitutional commission was unnecessary. If the commission was to conduct the constitutional changes, the Constitution that constituted the MPR as the holder of this authority should be amended. Further, there was uncertainty around and difficulty in determining which civil society organization should be represented in the commission.[537] A F-PDU speaker reiterated that forming a constitutional commission that is not chosen by the people had no constitutional basis.[538] Likewise, a F-PDKB speaker concluded that the constitutional commission's formation was baseless.[539]

Subsequently and in line with the attitude of the Armed Forces' leaders, F-TNI/Polri urged the MPR to consider whether it would lose its legitimacy if a constitutional commission was established. If the constitutional commission would be responsible to the MPR, it was acceptable. In terms of political logic, public demand, the logic of the law, and its urgency, the constitutional commission could be established constitutionally by inserting a provision in the Additional Provisions or the Transitional Provisions.[540]

F-TNI/Polri was clearly worried about the conflict between the conservatives, who thought the changes to the Constitution were excessive and messy, and the "ultra-modernists" (progressive radicals), who insisted on

534 As conveyed by Ishak Latuconsina (F-TNI/Polri). Ibid., p. 305.
535 Ibid., p. 363. The informal meeting was led by Jakob Tobing, the Commission A chairman.
536 Ibid., p. 416.
537 As argued by Patrialis Akbar (F-Reformasi). Ibid., pp. 417-418.
538 As stated by Sayuti Rahawarin (F-PDU). Ibid., p. 420.
539 As expressed by Gregorius Seto Harianto (F-PDKB). Ibid., p. 421.
540 As stated by Slamet Supriyadi (F-TNI/Polri). Ibid., p. 423.

more fundamental changes or even a new Constitution. Therefore, a way out should be found. The MPR should be shown as owned by everyone. The amendment process should not exclude multiple groups. Looking at current developments, increasing numbers of people became nervous that the amendment would be deadlocked, leaving the state without a constitution. Therefore, F-TNI/Polri filed options, i.e., to try to finalize the draft that was still disputed. If this was not successful, they would go back to the original texts. Alternatively, the suggestion was to finalize the fourth amendment, ratify a transitional Constitution, and set up a constitutional commission to reorganize the Constitution.[541]

F-PBB argued that the factions' differing attitudes regarding the constitutional commission were a matter of political choice. Further, if the commission was merely to synchronize the amendment outcomes, it seemed too large for that purpose. That could be undertaken, for instance, by experts. Hence, the amendment outcomes should be maintained and, if necessary, reviewed again after the 2004 election.[542] Likewise, F-PDU argued that the constitutional commission's formation would not solve the problem, but rather create new problems.[543] The F-PG speaker took a different position, assuming that the amendment outcome was the maximum that could be achieved and urged forming the constitutional commission. The commission could be supported by the Additional Provision. The issue was not an academic matter, but a way to contain public complaints. There was an urgency to establish it, even though the commission might not succeed. However, the commission should not interfere with preparing legislation for the 2004 election.[544] Likewise, F-Reformasi, considering the possibility of turmoil in society, proposed accommodating the commission, to be formed by the post-election MPR.[545]

The PAH I chairman reminded the committee that persuasion or canalization of the demand was necessary but should not lead to new problems. PAH I was dealing with diverse demands. There were those who accused PAH I of having gone too far and being too messy, and those who denounced that PAH I had done nothing useful at all.[546] In addition, F-PG stated that everyone would demand their respective aspiration be accommodated. Against that background, the constitutional commission's formation was a precaution to avoid political upheaval. There were issues in the amendment process that could become hotspots for social unrest.[547]

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541 Ibid., p. 439.
542 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 426.
543 As stated by Harifuddin Cawidu (F-PDU). Ibid., p. 427.
544 As stated by Andi Mattalatta (F-PG). Ibid., pp. 427-428.
545 As stated by A.M. Fatwa (F-Reformasi). Ibid., p. 430.
546 As stated by Jakob Tobing, the PAH I Chairman. Ibid.
547 As reminded by Fahmi Idris (F-PG). Ibid., p. 432.

Accordingly, F-PDIP proposed that the commission be established now and begin its work after the 2004 election. However, if there was an external commission to improve the MPR's work, it would undermine the MPR's credibility.[548] Quipping F-PDIP as two-faced, F-PBB resolutely disagreed with forming a constitutional commission. The new MPR should tackle the issues, he asserted.[549] Then, the F-PPP, F-KKI, and F-PDKB speakers stated that a constitutional commission was acceptable and would reduce pressure on the MPR. However, the new post-election MPR should form it.[550] F-PDIP added that the commission's formation should be discussed after the amendment's completion.[551]

The chairman concluded that the factions agreed that the fourth amendment should be completed and implemented, and the 2004 election should be conducted on time. There should be a conducive situation until the election.

Factions still differed on what kind of constitutional commission to establish, whether it would be large and powerful or a commission to help synchronize PAH I's work. The score of factions who supported or opposed establishing a kind of constitutional commission was not relevant. Then, the chairman invited factions for an informal consultation to overcome differences before the formulation team resumed the discussion.[552]

Until the end, factions maintained different positions. F-PDIP, F-PG, F-KKI, F-Reformasi, F-PDKB, F-PPP, F-KKI, and F-TNI/Polri agreed to form a commission. F-PBB, F-PDU, and F-UG rejected the idea. Yet, the factions that agreed differed on who would form the commission, to whom the commission would be responsible, the purview of its authority, and when it should be formed and commence its work.

### VIII.3.6 The Draft MPR Decree

While the consultation took place, the PAH I chairman reported to the Commission A meeting that the informal consultation was still discussing forming a constitutional commission and had not yet reached an agreement.[553] A F-PDIP member asked Commission A not to decide on the fourth amendment before the constitutional commission issue was clarified. For F-PDIP itself, the position of a constitutional commission was decisive.[554]

548 As proposed by Pataniari Siahaan (F-PDIP). Ibid., p. 433.
549 As stated by Najih Ahjad (F-PBB). Ibid., p. 435.
550 As stated by Lukman Hakim Saifuddin (F-PPP), Birinus Joseph Rahawadan (F-KKI), and Gregorius Seto Harianto (F-PDKB). Ibid., p. 442.
551 As stated by Zainal Arifin (F-PDIP). Ibid., p. 467.
552 Ibid., pp. 446, 447.
553 Ibid., p. 540.
554 As stated by Ramson Siagian (F-PDIP). Ibid., p. 543.

Subsequently, in the Commission A informal meeting on 8 August 2002, most factions considered that the commission should be determined by an MPR decree instead of being included in the Additional Provisions. Further, the PAH I chairman proposed that a constitutional commission should be formed by the MPR Working Body.[555]

Thus, the formulation team drafted an MPR decree to confirm that a constitutional commission would be formed to conduct a comprehensive study of the constitutional amendment. In the draft, the MPR tasked the MPR Working Body to prepare forming the constitutional commission and to report preparation results to the MPR 2003 Annual Session at the latest for a decision.[556] The PAH I chairman confirmed that the commission's name should be lower case, *'komisi konstitusi'* (constitutional commission), since it was not a specific institution, but rather a working unit.[557] Further, the chairman asked the formulation team to confirm whether there was still a faction that wanted the Additional Provision as the legal basis for the constitutional commission's formation. To that end, Andi Mattalatta (F-PG) confirmed there was none.[558]

The F-TNI/Polri speaker confirmed that all factions agreed that the constitutional commission's formation would be regulated by an MPR decree, and it was unnecessary to include it as a constitutional provision.[559] The formulation team incorporated the agreement in the draft MPR decree and reported it to the Commission A plenary meeting conducted after the consultation meeting.

In the meantime, Commission A continued receiving delegations from several organizations with different and even contradictory opinions. The *Barisan Rakyat Indonesia Penjaga Demokrasi* (Indonesia People's Ranks for Guarding Democracy) demanded the constitutional commission's formation. The Coalition for a New Constitution demanded the constitutional commission's formation to draft a new Constitution. The *Front Pembela Proklamasi 45* (The Front of the Defenders of the '45 Proclamation) called for discarding the three ratified amendments and the fourth amendment draft, and for forming a constitutional commission for a complete amendment overhaul. The *Front Nasionalis Marhaenis* (Nationalist Marhaenist Front) rejected the entire constitutional amendment, expressed a motion of no-confidence in the MPR, and mentioned that they expected a constitutional commission would be formed to revise the amended Constitution.[560]

555 Ibid., pp. 574-575.
556 Ibid., pp. 579-580.
557 Ibid., p. 581.
558 Ibid., p. 582.
559 As confirmed by Slamet Supriyadi (F-TNI/Polri). Ibid., p. 585.
560 Ibid., p. 590.

### VIII.3.7 Commission A Agrees on Constitutional Commission

Subsequently, on 8 August 2002, Commission A discussed the draft MPR decree that the formulation team presented.[561] On that occasion, F-PDIP members urged clarifying the constitutional commission's task, which was 'to study comprehensively'. A lengthy study would prolong the problem and if the commission was formed in 2003, it would be too late.[562] Likewise, a F-UG member argued that the public wanted a constitutional commission to make a comprehensive draft Constitution, based on the first, second, third, and fourth amendments.[563] In response, the Commission A chairman reminded everyone that 2003 was just four months away, and the MPR needed time to form the constitutional commission. Further, the Chairman stated that 'to study comprehensively' was broader than 'to synchronize'. It included the possibility of improvement, so that new drafts could be introduced.[564] Ultimately, the draft MPR decree on establishing a constitutional commission was accepted by all Commission A members in a cheerful atmosphere. As Hamdan Zoelva (F-PBB) testified, members shook hands afterwards, some were tearful, and the meeting closed with a prayer of gratitude recited by Nadjih Ahjad (F-PBB).[565]

Subsequently, Commission A reported the draft to the MPR plenary meeting on the evening of 9 August 2002. An appointed delegate from the MPR's veteran organization interrupted, stating that what had occurred in the MPR was outrageous. Instead of resolving comprehensively the challenges facing the country, the MPR was dominated by short-term political interests. Therefore, Rais Abin, the veterans' speaker, expressed hope that a constitutional commission could be the last vehicle to convey their aspirations. The member asked if the veterans' representatives could participate in the constitutional commission.[566] In the evening, on the suggestion of Arifin Panigoro, the MPR's F-PDIP chairman and MPR's leader convened a consultation meeting with the factions' chairpersons. He insisted an immediate consultation since F-TNI/Polri proposed changing the draft MPR decree on the constitutional commission.[567]

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561 Ibid., p. 602.

562 As expressed by Haryanto Taslam and Ramson Siagian, both from F-PDIP. Ibid., pp. 595-596.

563 As stated by Usep Fathuddin (F-UG). Ibid., p. 598.

564 Ibid., p. 599.

565 Ibid., p. 603.

566 Interruption by Rais Abin from F-UG. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 616. See also *Koran Tempo*, newspaper, 10 August 2002, p. 8.

567 As suggested by Arifin Panigoro, the F-PDIP Chairman. Ibid., p. 619. Panigoro wanted to confirm F-PDIP's official stance on the constitutional commission, because there were several FPDIP members who had different opinions.

During that consultation, F-TNI/Polri stated that the draft MPR decree was confusing. The meaning of 'to conduct a comprehensive study' was obscure. The new 2003 MPR could convene and cancel the MPR's decree on the commission, before the commission became operational. To be adopted as an improvement to the amendments, the product of the constitutional commission must meet the very complicated requirements of Article 37, which regulates the procedures for changes to the Constitution. Furthermore, the MPR should canalize the aspiration of the public who are continuously pressuring the MPR. For the purpose, the commission should be underneath and not competing with the MPR.[568]

In response, a F-PG speaker stated that psychologically, it was understandable that we had to canalize the feelings of the senior military. However, F-TNI/Polri should also respect the hard work of the factions that had struggled to reach an agreement. Political leaders must have dignity. The terror of those once in power should not intimidate people today.[569] Likewise, F-Reformasi, F-PBB, F-KKI, F-KB, F-PDU, and other faction speakers contended maintaining the drafted decree. F-UG reminded others that the agreement was the most that could be achieved, while F-PG asserted that the formulation was a compromise between the two extremes of making a new constitution or amending the constitution.[570] F-PDIP added that the MPR should avoid a deadlock at this late stage. The MPR must secure its works and should be ready to face any kind of pressure and threat.[571]

At the consultation meeting's end, the F-TNI/Polri speaker asserted that what the faction proposed was solely for the benefit of all. F-TNI/Polri will say goodbye to politics in 2004, with no ulterior motives. If F-TNI/Polri's proposals were not accepted, it would cause no problems.[572] Nonetheless, another F-TNI/Polri speaker confirmed that the faction had consulted President Megawati Soekarnoputri to confirm the constitutional commission's formation in 2002.[573]

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568 As conveyed by Slamet Supriyadi (F-TNI/Polri). The draft new section (1) of the Additional Provision of the Constitution prepared by the MPR Working Body tasks the MPR with reviewing the substance and the legal status of the decree of the Provisional People's Consultative Assembly and the People's Consultative Assembly to be decided in the People's Consultative Assembly 2003 Annual Session. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 619 – 620.

569 As stated by Anwar Arifin (F-PG). Ibid., pp. 620-621.

570 As expressed by A.M. Luthfi (F-Reformasi), Hamdan Zoelva (F-PBB), Anthonius Rahail (F-KKI), Yusuf Muhammad (F-KB), Asnawi Latief (F-PDU), Harun Kamil (F-UG) and Fahmi Idris (F-PG). Ibid., pp. 621-628.

571 As asserted by Arifin Panigoro (F-PDIP). Ibid., p. 629.

572 As asserted by Slamet Supriyadi (F-TNI/Polri). Ibid., p. 630.

573 As confirmed by Ronggo Soenarso (F-TNI/Polri). Koran Tempo, newspaper, 10 August 2002, p. 1.

### VIII.3.8 Protests Continue

In the meantime, in front of television cameras, broadcast nationwide, Bambang Widjajanto from the Coalition of NGOs for a New Constitution demonstratively tore to shreds the draft MPR decree on the constitutional commission's formation. He acclaimed that the suggested constitutional commission deceived the people.[574] A *Kompas* newspaper article stated that the constitutional commission was toothless.[575] Likewise, Mukti Fadjar, a professor of constitutional law at the University of Brawijaya, Malang, on behalf of the Coalition for a New Constitution, stated that the proposed constitutional commission was deceptive, a distortion of the ideal version.[576]

Meanwhile, hundreds of students gathered at the MPR building's compound, demanding the amendment finalization.[577] To put political pressure on those who had been trying hard to hinder the reform of the 1945 Constitution, the demonstrators also awarded the trophy of *"Pengkhianat Reformasi"* (the Traitor of Reformasi) to Soetardjo Soerjogoeritno (the DPR deputy speaker from PDI-P), Taufik Kiemas (husband of Megawati Soekarnoputri), Amin Aryoso (a figure from the Movement of Parliamentary Conscience), and Hartati Murdaya (a F-UG member).[578]

### VIII.3.9 MPR Plenary Meeting: Additional Provision versus Decree

In the MPR plenary meeting on 9 August 2002, no faction rejected the MPR Working Body's work. However, on that occasion, a F-TNI/Polri speaker reminded the meeting that the changes to the Constitution would have a significant impact on the people's lives and the nation for a long time. Therefore, the MPR should listen seriously and give attention to all aspirations in society. All were aware that the changes to the Constitution were far from perfect. That was why from the outset, F-TNI/Polri contended that through a give-and-take approach, the fourth amendment should be completed, so that the amended Constitution may be used to ensure that the nation conduct a general election in 2004. Afterwards, the amended 1945 Constitution should be improved again in a comprehensive way. Further, a constitutional commission that was formed based on an MPR decree contained uncertainty, because it could be revoked in the next MPR session. In that regard, the MPR should provide a stronger legal foundation for establishing the commission by incorporating it in the Additional Provision.[579]

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574 *Media Indonesia*, newspaper, 10 August 2002, p. 6.
575 *Kompas*, newspaper, 10 August 2002, p. 6.
576 *Koran Tempo*, newspaper, 10 August 2002, p. 11.
577 *The Jakarta Post*, newspaper, 10 August 2002.
578 *Koran Tempo*, newspaper, 10 August 2002, p. 8.
579 As conveyed by E. Tatang Kurniadi (F-TNI/Polri). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 654.

Commenting on the issue in the media, a University of Brawijaya lecturer argued that the constitutional commission's legal basis was indeed quite weak. He noticed that MPR members were arrogant, considered themselves as authoritative and with the legitimacy to amend the Constitution, with no respect for other opinions.[580] Likewise, a University of Andalas, Padang, Law Faculty lecturer considered the constitutional commission's formation as deceiving the people. The name did not reflect the substance.[581]

When the MPR plenary meeting was continued on 10 August 2002, F-KB stated that although they accepted the MPR Working Body's outcomes, they preferred to have the legal basis for establishing a constitutional commission incorporated in the Additional Provision.[582] On the other hand, F-PPP pointed out that a constitutional commission could be understood as improving the amendment or be used to revoke the MPR's work. For that reason, the formulation in the MPR decree was a compromise that could be achieved.[583] Likewise, F-UG and F-PG contended that the formulation regarding the constitutional commission was the best result that could be achieved.[584] Similarly, Arifin Panigoro (F-PDIP) concluded that a constitutional commission was necessary to undertake the comprehensive study needed to improve the amendments formulations.[585] Thus, although the process had reached the final stage, the factions had not reached an agreement on the constitutional commission's formation. Therefore, another informal consultation meeting between the MPR and faction leaders was conducted.

In that consultation, F-TNI/Polri proposed a new section to the Additional Provision, which stated, "The first, second, third and fourth constitutional amendments, are valid from its enactment until 2004, to bring the people to carry out the general election. These changes would be improved by a body or commission formed by the MPR in 2002 and to report its results to the MPR formed by the 2004 elections."[586] In response, F-PBB reminded the meeting that initially they had assumed that a constitutional commission was unnecessary, since the Article 37 constitutional amendment procedure was simple. Further, F-PBB questioned whether there would be no Constitution if the new MPR rejected the commission's work. Furthermore, F-PBB questioned why establishing the commission should be included in the Additional Provision if the MPR had the authority to change the Constitution. Thereby, F-PBB appealed to all factions to accept the draft decree that had been painstakingly and happily agreed. The

580 As stated by Mukti Fadjar. *Media Indonesia*, newspaper, 11 August 2002, p. 2.
581 As stated by Saldi Isra. Ibid., p. 4.
582 As stated by Yusuf Muhammad (F-KB). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 666.
583 As argued by Chozin Chumaidy (F-PPP). Ibid., p. 671.
584 As stated by Rais Abin (F-UG) and Fahmi Idris (F-PG). Ibid., pp. 672, 678.
585 As concluded by Arifin Panigoro (F-PDIP), who led the meeting. Ibid., p. 682.
586 As proposed by Ronggo Soenarso (F-TNI/Polri). Ibid., p. 714.

speaker recalled how Commission A members shook hands and were even tearful, relieved after the long and tense debates.[587]

Nevertheless, the debates continued and the factions persisted with their respective opinions. Seemingly annoyed, Husni Thamrin, the deputy MPR Speaker from F-PPP, stated that the F-TNI/Polri proposal was a humiliation. Whatever would happen after 2004, as leaders, members should not be afraid, Thamrin asserted. "If we have to go to prison, we were in prison before. If we have to die, yes, if that is the time, nothing to be afraid of", Thamrin stated emotionally.[588] Then, a F-Reformasi speaker emphasized that it was a matter of political choice. The amendments should be finalized, whatever the risk. In response, a F-TNI/Polri speaker reiterated their position (see V.2) and said that the proposal was to canalize the people's aspiration, in anticipation of chaos, and to include the public in making the Constitution.[589] A F-PDIP member responded that so far, the so-called canalization process had brought uncertainty. According to the MPR code of conduct, unless the MPR Working Body has fully prepared or all parties have fully agreed an issue to be discussed, it cannot be included in the agenda. Hence, the discussion should return to the draft that had been agreed the night before. That was the best possible outcome.[590]

Eventually, the informal consultation meeting failed to reach a compromise on the issue. After the MPR plenary meeting was resumed, F-TNI/Polri emphasized that this time, they urged explicitly inserting the new section III into the Additional Provision, which stated "The First, the Second, the Third, and the Fourth Amendments to the 1945 Constitution are valid from the time they are enacted until 2004, to bring Indonesian people to carry out the 2004 elections, and to be completed by a MPR Commission formed by the Assembly in 2002, and to report the results to the MPR formed by the 2004 election." The F-KB and F-PDIP speakers were of the same opinion.[591]

In accordance with Article 84 of MPR Decree No. II/1999 on the Standing Order of the MPR, if a deliberation in a MPR plenary meeting fails to reach agreement and time runs out, a decision can be made by voting. Thus, eventually, the MPR leadership decided that it had to vote on several issues that could not be decided by consensus.[592]

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587 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 716.

588 Ibid., p. 723.

589 As stated by Supriyadi (F-TNI/Polri) and A.M. Fatwa (F-Reformasi). Ibid., pp. 724-725.

590 As stated by Jakob Tobing (F-PDIP). Ibid., p. 725.

591 As stated by Abdul Rahman Gaffar (F-TNI/Polri), Amru Al-Mu'tashim (F-KB) and Syahrul Azmir Matondang (F-PDIP). Ibid., pp. 728,729. The new paragraph is the paragraph that has been proposed previously by Ronggo Soenarso (F-TNI/Polri). See Ibid., p. 714.

592 There were several issues that had not reached agreement, such as the MPR's composition, Article 29, on Amendment to the Additional Provision of the Constitution, and on the Establishment of the Constitutional Commission. Eventually, the composition of the People's Consultative Assembly was decided by voting. This is the only decision which was made by voting in the whole amendment process from 1999 to 2002; all others were decided by consensus.

The first vote concerned the MPR's composition, whereby the question regarded the alternative that all MPR members should be elected (see VII.3.2 and VIII.2.1).[593] Then, a F-PDIP member proposed adjourning the meeting for an informal consultation. The draft Additional Provisions had been approved. If they were ratified, then there was already a new amended Constitution. Where would the additional constitutional commission rules be inserted? It was desirable to adjourn the meeting for an informal consultation, to use collective wisdom to solve the problem.[594] Another F-PDIP member argued the opposite. The agreed draft should be ratified before discussing the new proposal.[595]

Eventually, the MPR Chairman, Amin Rais, adjourned the meeting for 30 minutes to give the factions time to prepare for the subsequent decision-making. When the meeting resumed, the plenary agreed unanimously to ratify the new clauses 1 and 2 of the Additional Provision.[596] Again, the factions could not reach agreement on the proposed third clause. F-TNI/Polri insisted on incorporating the new clause in the Additional Provision.[597] In response, F-PDIP asserted that the proposal had deviated from the previous agreement. Therefore, F-PDIP insisted that the decision should be taken by voting, and if the new clause would be rejected then the MPR constitutional commission decree should be revoked, so there would be no constitutional commission at all.[598]

### VIII.3.10 Constitutional Commission by MPR Decree

At midnight on 10 August 2002, the MPR Chairman adjourned the meeting for another 30-minute break.[599] When the meeting resumed, the Chairman reminded the members that time had almost run out, and the MPR 2002 Annual Session was scheduled to close that morning at 10:00.[600] Eventually, a F-TNI/Polri speaker reiterated that the faction had no intention to impede the amendment process or violate the deliberation's result. A higher legal

593 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 735.
594 As proposed by Amin Aryoso (F-PDIP). Ibid., p. 744.
595 As argued by I Dewa Gede Palguna (F-PDIP). Ibid. The agreed draft new Additional Provision comprises of clause 1 which states that the People's Consultative Assembly is tasked with undertaking a review of the content and the status of the Decrees of the Provisional People's Consultative Assembly and the People's Consultative Assembly for decision by the People's Consultative Assembly at its session in 2003. The 2nd clause states that with the enactment of the Amendment to the Constitution, the Constitution of the State of the Republic of Indonesia shall consist of the Preamble and the Articles. The new clause proposed is the proposal submitted by F-TNI/Polri. See Ibid., p. 714.
596 Ibid., pp. 746, 747.
597 As insisted by Slamet Supriyadi (F-TNI/Polri). Ibid., p. 747.
598 As asserted by Zaenal Arifin (F-PDIP). Ibid., pp. 747, 748.
599 Ibid., p. 749.
600 Ibid., p. 750.

basis for a constitutional commission was desirable, placed in the Additional Provision. However, paying close attention to the MPR's evolving aspirations, F-TNI/Polri eventually withdrew the proposal.[601] They stated support of the amendment.[602]

This meant that the MPR plenary meeting had accomplished its tasks. Moved by the historical event, a F-Reformasi member, Afni Achmad invited the plenary to close the meeting by singing the national anthem. Preceded by a prayer of gratitude recited by Muhammad Cholil Bisri (F-KB), led by Sukowaluyo (F-PDIP), MPR members stood up and sang the national anthem, *Indonesia Raya* (the Great Indonesia), before Amien Rais closed the meeting at 01.50 am.[603]

In an interview on 11 August 2002, the MPR Chairman, Amin Rais, guaranteed that a non-partisan expertise-based constitutional commission would be formed before the following year to synchronize the amended Constitution. Accordingly, the Commander of the Armed Forces, General Endriartono Soetarto, asserted that the Armed Forces accepted all MPR decisions and would guard the decisions. Similarly, Taufik Kiemas emphasized that F-PDIP wholeheartedly accepted the decisions. Yet, Todung Mulya Lubis, from the Coalition for a New Constitution, conveyed condolences upon forming the constitutional commission, which according to Lubis, should have a stronger legal basis.[604]

## VIII.4 The outcomes. The fourth amendment

Finally, on 10 August 2002, at the end of the 2002 MPR annual session, the MPR plenary session ratified the fourth amendment of the 1945 Constitution. Thus, the four-stage amendment process to the 1945 Constitution that had begun in October 1999 was completed. The results of the fourth amendment phase were as follows:

601 As asserted by Slamet Supriyadi (F-TNI/Polri). Ibid.
602 *Tempo News Room*, 11 August 2002.
603 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 753.
604 *Koran Tempo*, newspaper, 12 August 2002, p. 1.

| *Articles* | *Original (After the 1st, 2nd, and 3rd Amendments)* | *Fourth Amendment*[604] |
|---|---|---|
| *CHAPTER II* | | |
| 2 | (1) MPR shall consist of the DPR members augmented by the delegates from the regional territories and groups as provided by the statutory regulations. | (1) The People's Consultative Assembly consists of members of the People's Representative Council (Dewan Perwakilan Rakyat) and members of the Regional Representative Council (Dewan Perwakilan Daerah) elected through general elect-ions and to be further regulated by law. |
| 3 | -- | (Correction in numbering) |
| 6A | (4) (Still in alternatives) | (4) In the event no candidate President and Vice President is elected, two of the candidate President and the Vice President pairs acquiring the first and second majority vote in the general election shall be elect-ed by the people directly, and the pair acquiring the majority votes of the people shall be inaugurated as the President and the Vice President. |
| 8 | (none) | (3) If the President and the Vice President pass away, resign, are discharged, or are not able to perform their obligations during their term of office simultaneously, the caretaker of the presidential office shall be jointly the Minister of Foreign Affairs, the Minister of Home Affairs, and the Minister of Defence. At the latest thirty days thereafter, the People's Consultative Assembly shall convene to elect the President and the Vice President from two candidate President and Vice President pairs proposed by a political party or a combination of political parties whose candidate President and Vice President acquired the first and the second majority vote in previous general election, up to the expiry of term of their office. |

605 The English version of the 1945 Constitution published by the Office of Registrar and the Secretariat General of the Constitutional Court of the Republic of Indonesia, 2015.

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| 11 | (Reinstated, technical correction of the 3rd amendment) | (1) The President with the approval of the People's Representative Council declares war, makes peace and concludes treaties with other countries. |
| 16 | (none) | The President establishes an advisory council with the task of rendering advice and consider-ations to the President, which shall be further regulated by laws. |
| *CHAPTER IV* | *SUPREME ADVISORY COUNCIL* | *Abolished* |
| *CHAPTER VIII* | *FINANCE* | *FINANCE* |
| 23B | (none) | The denomination and value of the currency shall be stipulated by laws. |
| 23D | (none) | The State shall possess a central bank, the structure, position, authorities, responsibilities, and independence of which shall be regulated by laws. |
| *CHAPTER IXA* | *THE STATE TERRITORY* | *THE STATE TERRITORY* |
| 25A | | (Numbering correction) |
| *CHAPTER XIII* | *CHAPTER XIII EDUCATION* | *CHAPTER XIII EDUCATION AND CULTURE* |
| 31 | (1) Every citizen has the right to acquire teaching.<br>(2) The government shall undertake and shall conduct one national education system which shall be further regulated by law. | (1) Every citizen shall be entitled to acquire education.<br>(2) Every citizen shall follow basic education, and the government shall finance it.<br>(3) The government shall undertake and shall conduct one national educational sys-tem, which enhances faith and piety as well as noble character in the frame of educating the life of the nation, which shall be regulated by laws.<br>(4) The state shall prioritize the education budget by at least twenty percent of the state budget of income and expend-iture as well as from the region-al budgets of income and ex-penditure in order to fulfil the needs for the conduct of national education.<br>(5) The state advances science and technology by upholding reli-gious values and national unity for the advancement of civil-ization as well as prosperity of mankind. |

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| 32 | The state advances Indonesia's national culture. | (1) The state advances Indonesia's national culture amidst the world civilizations by guaran-teeing freedom of the society to maintain and to develop its cultural values.<br>(2) The state respects and main-tains regional languages as a national cultural treasure. |
| *CHAPTER XIV* | *SOCIAL WELFARE* | *NATIONAL ECONOMY AND SOCIAL WELFARE* |
| 33 | | *(Additional new clauses)*:<br>(4) The national economy shall be conducted by virtue economic democracy under the principles of togetherness, efficiency with justice, sustainability, environ-ment insight, autonomy, as well as by safeguarding the balance of progress and natio-nal economy unity.<br>(5) Further provisions regarding the execution of this article shall be regulated by laws. |
| 34 | Destitute people and neglected children shall be nurtured by the state. | (1) Destitute people and neglected children shall be nurtured by the state.<br>(2) The state shall develop a social security system for all the people and empower the poor and incapable society in with human dignity.<br>(3) The state shall be responsible for the provision of decent health care facilities and public service facilities.<br>(4) Further provisions regarding the execution of this article shall be regulated by laws. |
| 37 | (1) To amend the Constitution, no less than 2/3 of members of MPR shall be in attendance.<br>(2) Decisions shall be taken with the approval of no less than 2/3 of its total members in attendance. | (1) A proposal for amendment to the articles of the Constitution can be set out in an agenda for a session of the People's Consultative Assembly if submitted by at least 1/3 of the sum of the members of the People's Consultative Assembly.<br>(2) Every proposal to amend articles of the Constitution shall be submitted in writing and clearly indicate the part proposed for amendment and the reasons therefor. |

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| | | (3) In order to amend articles of the Constitution, a Session of the People's Consultative Assembly shall be attended by at least 2/3 of the sum of the members of the People's Consultative Assembly.<br>(4) The resolution to amend articles of the Constitution shall be conducted by the approval of at least fifty percent plus one member of the People's Consultative Assembly.<br>(5) Particularly regarding the form of the Unitary State of the Republic of Indonesia no amendment can be made. |
| *TRANSITIONAL PROVISIONS* | *TRANSITIONAL PROVISIONS* | *TRANSITIONAL PROVISIONS* |
| Article I | The Preparatory Committee for Indonesian's Independence shall arrange and conduct the transfer of administration to the govern-ment of Indonesia. | All existing statutory rules and regulations shall remain in force to the extent no new ones are pro-vided according to this Constitu-tion. |
| Article II | All existing state institutions continue to function and regu-lations remain functioning to the extent no new ones are esta-blished in conformity with this Constitution. | All existing state institutions shall remain functioning to the extent of executing the provisions of the Constitution and no new ones are provided according to this Cons-titution. |
| Article III | For the first time, the President and the Vice President shall be elected by the Preparatory Committee for Indonesia's Inde-pendence. | The Constitutional Court shall be established on the 17 August 2003 at the latest and prior to its esta-blishment all of its authorities shall be conducted by the Supreme Court. |
| Article IV | Prior to forming the People's Consultative Assembly, the People's Representative Council and the Supreme Advisory Council in accordance with this Constitution, all the power shall be exercised by the President assisted by a national committee. | (none) |
| *ADDITIONAL PROVISIONS* | *ADDITIONAL PROVISIONS* | *ADDITIONAL PROVISIONS* |

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| Article I | Within six months after the end of the Great Asia War, the President of Indonesia shall take preparatory steps and execute all the provisions of this Constitution. | The People's Consultative Assembly is assigned to conduct a review against the material and legal status of the Stipulations of the Provisional People's Consult-ative Assembly and of the Sti-pulations of the People's Consul-tative Assembly for judgement in the Session of the People's Con-sultative Assembly of the year 2003. |
| Article II | Within six months after its formation, the MPR shall conve-ne a sitting to enact the Consti-tution. | By the enactment to this the Constitution, the Constitution of the State of the Republic of Indonesia of the Year 1945 shall consist of the Preamble and the articles. |

## VIII.5 Analysis and comments

### VIII.5.1 The process

The amendment process at this final stage was based on the MPR rules of procedures as set out in MPR Decree No. II/1999, similar to the procedure applied in the previous stages. Again, a PAH I was formed and assigned to finalize the third stage's pending materials as attached to MPR Decree No. XI/2001, which according to MPR Decree No. IX/2000 should be completed by the end of the 2002 MPR Annual Session.

All the materials, except the one on the appointed MPR members, were completed by deliberation and consensus, including the proposed amendments to Article 29 on religion, which was resolved through a special consensus at the end of the Annual Session. This topic was concluded in the plenary session, in which the proponents of change to Article 29 were present, asserting they were not involved in the decision-making process and understood that the decision was legitimate and binding on all (see VIII.2.4).

A conclusion about the MPR's composition was deliberately delayed until the final stage.[606] This issue had been associated with the efforts, particularly by F-UG, to maintain the MPR's position as a consultative institution of all elements of society that determine the Broad Outlines of State Policy.[607] Apparently, F-UG continued to push the decision-making by

606 As elucidated by Hamdan Zoelva (F-PBB). See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p.

607 As emphasized among others by Djoko Wiyono (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 110.

voting presuming that F-TNI/Polri, many F-PDIP members, and elements of other factions would support their position.[608] Thus, the MPR had to solve the issue through voting.

Regarding the proposal to insert 'the seven words' (*tujuh kata*), "*Negara berdasar atas Ketuhanan dengan kewajiban menjalankan syariat Islam bagi pemeluk-pemeluknya"* (The State shall be based on Divinity with the obligation to implement Islamic Sharia for the adherents), factions kept their respective previous positions. As discussed in the previous chapters, although the group in favour of including 'the seven words' was much smaller in numbers, they urged taking the decision by voting. Other factions did not agree. For the proponents, voting would become an issue of accountability to their supporters. For others, voting could send the wrong message to the communities, as though the aspiration was not appreciated and had been treated arbitrarily. The discussions about Article 29 could not be regarded as merely an intellectual discourse. Thus, PAH I urged the leaders of the political powers to do their utmost to reach a unanimous decision and avoid decisions that could further "pain wounded hearts".[609] Wisdom could be gleaned from an Indonesian proverb: "*Seperti menarik rambut dalam tepung, rambut jangan putus, tepung jangan berserak.*" It's like pulling hair from the flour, hair doesn't break, and flour doesn't scatter. The solution should not complicate the next process and this context, so as not to stir-up blind-fanaticism in Indonesia. Finally, through intensive informal consultations involving top leaders of political powers, such as PDI-P's Megawati Soekarnoputri and PPP's Hamzah Haz, all factions agreed to allow the plenary MPR meeting to maintain the original Article 29. The supporters of 'the seven words' (*tujuh kata*), although they had attended the plenary session, would not participate in the decision-making process, although they would not withdraw their proposal.[610] However, proponents of the Article 29 amendment affirmed that the MPR plenary decision is binding on everyone.[611] An understanding was reached when all factions agreed on the Islamic factions' proposal concerning Article 31 on Education, which stated that education's purpose "*… is to enhance faith and piety and noble character in the frame of educating the life of the nation*" (*yang meningkatkan keimanan dan ketakwaan serta akhlak mulia dalam rangka mencerdaskan kehidupan bangsa*).[612]

608 As indicated by Amin Aryoso (F-PDIP). See Ibid., p. 107.

609 As stated by Jakob Tobing, the PAH I chairman. See Ibid., p. 687.

610 As affirmed by, among others Syahfriansyah (F-PPP), Nadjih Ahjad (F-PBB), Asnawi Latief (F-PDU) and Muttammimul'Ula (F-Reformasi). See Ibid., pp. 690 – 695.

611 As expressed by Shiddiq Aminullah (F-UG), when he asked to be recorded that he did not join the agreement, although aware that if the deliberations had concluded, as a citizen one should obey the decision. See Ibid., p. 693.

612 As disclosed by Arifin Panigoro, F-PDIP Chairman and Slamet Supriyadi, F-TNI/Polri Chairman. See Ibid, pp. 392, 399.

As a state based on *Pancasila*, in which one of the principles is "belief in One and Only God", factions agreed that the religious values should guide the nation.[613] This was a unique way to overcome the stalemate in a heterogeneous country such as Indonesia. Deliberation and compromise would not directly solve the fundamental differences, but this approach maintains communication between communities and with state institutions. Further, it could prevent the alienation and radicalization process of certain groups in society. It provided opportunities and space for further communication and sustainable dialogue among the communities and with state institutions. At the same time, the progress of programs in all fields, including in education, can be expected to change attitudes towards the essence of religious life more than formal rules that allow for harmonious religious life in a pluralistic society.

The amendment process at this late stage was quite complicated. Inside the MPR, arguing that the changes endangered the nation's integrity, elements of F-PDIP, F-UG and F-KB strove to stop the process. They argued that the amendment had rooted out the soul and spirit of the original 1945 Constitution. They claimed to have more than 200 supporters, including Taufik Kiemas, husband of Megawati Soekarnoputri and Guruh Soekarnoputera, the son of President Soekarno, who signed the petition to stop the amendment.[614] Several civil society organizations, such as Forum of Academic Studies of the Constitution (*Forum Kajian Ilmiah Konstitusi* – FKIK),[615] the Front of Defenders of 1945 Proclamation (*Front Pembela Proklamasi '45*), the Indonesian National Student Movement (GMNI – *Gerakan Mahasiswa Nasional Indonesia*), and Parliament's Conscience Movement (*Gerakan Nurani Parlemen*) also demanded revoking the amendments and reinstating the original 1945 Constitution. They argued that there was nothing wrong with the original 1945 Constitution. It was the lesser laws that required improvement. Eliminating the MPR as the supreme state institution deviated from the original idea of an independent Indonesia. Forming the Regional Representative Council was a step towards building a bicameral system and establishing a federal state in Indonesia. Furthermore, some found that the

613 The proposed phrase to the new Article 31 points to the values of religions, not to the teachings of certain religion, in this case Islam. The words *iman* (faith) and *takwa* (piety), as many words in the Indonesian language, are derived from Arabic language and are not exclusively used by Islam. Whereas the word *iman* is commonly used by other religions, *takwa* is mostly used by Muslims.

614 As stated by Soewignjo, Deputy Secretary of F-PDIP,*Koran Tempo*, newspaper, 2 August 2002, and by Soetardjo Soerjogoeritno, DPR Deputy Speaker from F-PDIP. See also, *Media Indonesia*, newspaper, 2 August 2002. However, Taufik Kiemas refuted. Kiemas asserted that he never rejected the amendment, what he rejected is the excessive changes to the Constitution. See *Koran Tempo*, newspaper, 2 August 2002, p. 1.

615 The delegates of FKIK were among others, Budi Harsono, A.S.S. Tambunan, Sri Mulyono Herlambang (F-UG), Amin Aryoso (F-PDIP) and Sadjarwo Sukadiman (F-PDIP). *Kompas Daily*, 9 April 2002.

MPR, after the third amendment eliminated its highest position, no longer had the authority to amend the Constitution.[616] They even accused the proponents of PAH I of applying a Western, US-centric agenda in Indonesia.[617]

Some NGOs and academics attempted to stop the amendment process by arguing that the amendment was elitist and tainted with ulterior political party interests, being partial and lacking clear direction, failing to ensure that the presidential election would be conducted directly by the people in both rounds. They argued that the amendment had formed only a weak bicameral system and tended to preserve the basic concept of the old 1945 Constitution, such as maintaining the functional groups' appointed delegates, the source of the Constitution's undemocratic character. These groups insisted on an independent and expertise-based constitutional commission, which would compose a comprehensive draft constitutional amendment.[618] Further, the comprehensive draft should be submitted to the MPR for approval. In case the MPR failed to approve the draft, the draft would be brought before the people to decide on in a referendum. Others contended that the amendment outcome had been counter-productive to reform. They argued that the original concept of the 1945 Constitution could not accommodate the reforms required to bring in a democratic Constitution. Therefore, *Koalisi Untuk Konstitusi Baru* (the Coalition for a New Constitution) demanded a totally new constitution that should be drafted by an independent constitutional commission.[619] For that purpose, they proposed adjusting Article 37.

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616 As stated by among others, Abdul Kadir Besar, of University Pancasila, Jakarta. See, Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, p. 478, and Soetardjo Soerjogoeritno (DPR Deputy Speaker from PDIP) and Sri Hartati Moerdaja (F-UG). See *Media Indonesia*, newspaper, 2 August 2002, p. 1.

617 As stated by MayGen (ret.) Saiful Sulun, the Secretary General of *Front Pembela Proklamasi '45. The Jakarta Post*, newspaper, 1 August 2002. In general, PAH I meetings were scheduled to be open to both domestic public and from abroad. As Indonesia is one of the largest countries in the world and is classified as a non-democratic country, strategically located at the confluence of the Indian and Pacific oceans, the ongoing democratization process had attracted the world's attention, so that PAH I open meetings were always attended by many observers from within and outside the country, including from the United States.

618 As stated by among others, Rahman Tolleng of Democracy Forum. *The Jakarta Post*, newspaper, 19 April 2002. At that time, the pressure to retain the appointed MPR members was quite strong, at least as reported in the mass media. There were several MPR members from various factions, mainly from F-PDIP and FUG who spoke out loudly in defending the existence of the appointed MPR members, including those appointed from the military and police. This impression was widespread and gave rise to the impression that the MPR could not be expected to bring about meaningful reforms to the 1945 Constitution.

619 *Media Indonesia*, newspaper, 1 August 2002. They considered that the existing political configuration could not be expected to reform. They sought to be in that role, as previous generations had done in the Indonesian national revival of the 1920s, in seizing and defending independence in the 1945s, in ending President Sukarno's rule in the mid-1960s and in ending the New Order's rule in the late 1990s.

The accusations are clearly wrong. The amendments had been carried out openly and involved a wide community of scholars, activists, community leaders, mass media, and so on, not only in Jakarta but also throughout Indonesia. As proven in the end, all the requirements of a democratic constitution were embedded in it, including people's sovereignty, separation of powers, rule of law, respect for human rights, a free and independent judiciary, periodic and fair circulation of power, and institutions and procedures for its implementation.

Certain others contended that the amendment should be finalized in 2002 and the amended Constitution should be declared as a transitional Constitution,[620] to be reviewed later by an independent constitutional commission.[621] Factions such as F-TNI/Polri and F-PG argued that the constitutional commission should report its review to the new MPR formed by the 2004 general election.[622] To ensure the process, they proposed including the establishment of a constitutional commission in the clause of the Additional Provision of the 1945 Constitution. F-TNI/Polri considered that the mechanism was needed to build a bridge between the conservatives and ultra-modernists, and to canalize public aspirations.[623] However, many others opposed framing the amended 1945 Constitution as a transitional Constitution, arguing that it would cause instability.[624]

In this political situation, all factions gradually asserted that the amendment should be completed during the 2002 MPR Annual Session as scheduled.[625] The same attitude also evolved in the public.[626] Factions argued that the amendment was almost done, that the principles of constitutionalism had already been installed, and a constitutional commission should not impede preparing the 2004 general election. However, acknowledging that the amendments might have weaknesses, there were also those who argued

620 As stated by, among others Bambang Widjajanto of the Coalition of NGOs. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 315-325, 363. See also *Jakarta Post*, newspaper, 1 August 2002.

621 As argued by Syamsuddin Haris of the Indonesian Association of Sciences or AIPI (*Asosiasi Ilmu Pengetahuan Indonesia*). *Jakarta Post*, newspaper, 1 August 2002.

622 As proposed by Agun Gunandjar Sudarsa (F-PG), see Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 446-467.

623 As stated by Slamet Supriyadi (F-TNI/Polri), see Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 439. He used the term "ultra-modernist".

624 As stated by among others, Hamzah Haz, Vice President and PPP chairman, *Tempo*, newspaper, 1 August 2002, p. 8 and Jimly Asshidiqqie of the Expert Group, *Media Indonesia*, newspaper, 1 August 2002, p. 1.

625 Gradually, factions who previously supported the idea of an independent constitutional commission, such as F-PPP, backed off. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 54-55.

626 As stated by, among others Adnan Buyung Nasution, a prominent figure of the democratic movement. *Media Indonesia*, newspaper, 1 August 2002.

that after the amendment was done, the factions could consider establishing a constitutional commission.[627]

Experiencing all these obstacles and very formidable challenges, it is very encouraging that in the end, all MPR factions are united in completing the amendments to the 1945 Constitution. Although the amendments might have weaknesses, the factions contended that the authority to amend the Constitution was in the MPR's hands. Therefore, PAH I concluded that the constitutional commission must be an instrument of and be responsible to the MPR.[628] Further, some asserted that the amendment process was quite open and responsive enough though not every aspiration could be acceptable to everyone.[629] Therefore, the constitutional commission should academically review the amendment, checking the amendment's consistency with the principles embodied in the Preamble and the compatibility among the sub-systems included in the Constitution.[630] Afterwards, the MPR had to decide. Certain factions argued that the commission could be formed before the 2003 MPR Annual Session and report to it.[631] Still others contended that it might be formed immediately and carry out its assignment after the 2004 general election. Others argued that the constitutional commission should be formed by the post-2004 election MPR,[632] while others proposed discussing the commission after the amendment's completion.[633] There were also differences on who would become constitutional commission members.[634] Many factions could not accept the commission being occupied by non-elected members.[635]

Amid the clamor, the Armed Forces, as conveyed by General Endriartono Sutarto, stated that the amendment had deviated from its original purpose and confirmed that the Armed Forces supported forming an independent constitutional commission to take over the amendment process. General Sutarto further asserted that the amended Constitution should be

627 As stated by Andi Mattalatta (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 427-428.

628 As concluded by Jakob Tobing in a Commission A informal consultation on 7 August 2002. Ibid., p. 363.

629 As stated *by Frans Matrutty* (F-PDIP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 346.

630 As proposed by Sutjipno (F-PDIP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 27.

631 As proposed by Sutradara Ginting (F-KKI), See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 494.

632 As argued among others, by A.M. Fatwa (F-Reformasi), Najih Ahmad (F-PBB), Lukman Hakim Saifuddin (F-PPP), and Joseph Rahawadan (F-KKI). See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 430 – 443.

633 As stated by Zainal Arifin (F-PDIP). Ibid., p. 467.

634 As stated by Patrialis Akbar (F-Reformasi). Ibid., p. 418.

635 As emphasized by Sayuti Rahawarin (F-PDU). Ibid., p. 420.

declared a transitional constitution, and if the amendment process failed, the Armed Forces would support the President, if the President reinstated the original 1945 Constitution.[636]

To ensure the constitutional commission's formation and that the subsequent 2003 MPR Annual Session could not annul it, F-TNI/Polri insisted that the constitutional commission's formation be included as a clause in the 1945 Constitution's Additional Provision.[637] Thus, while the factions and public were engaged in the issue, some attempted to halt the amendment process, including a F-PDIP member who stated that he spoke without his faction's leadership permission, by insisting that further amendments should be undertaken by a commission that would also review the existing results.[638]

There were elements in the F-PDIP who tried to stop the amendments because of their belief that the 1945 Constitution is the legacy of President Soekarno, the founding father of Indonesia, with the amendments deviating from the ideals of the 1945 Constitution. F-UG elements wanted to maintain the existence of appointed delegates from functional groups and the military and police in the MPR as the embodiment of the familial political system. Elements of F-TNI/POLRI thought they ought to protect the existence of the unitary state of the Republic of Indonesia based on Pancasila, endangered by the amendments and interests of other factions.

Thereby, establishing a constitutional commission became the meeting point of various or contradictory political interests of various parties around the amendment process. These F-PDIP elements tried hard to stop the amendment. They demanded that President Megawati Soekarnoputeri issue a decree to stop the amendment and return to the original 1945 Constitution.[639] Alleging that Jakob Tobing (F-PDIP) had directed the amendment process and caused it to deviate from the ideals of the nation, they bent over backwards to prevent Tobing from being re-elected as Commission A chairman.[640]

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636 The statement of the Indonesian Armed Forces regarding "The stance of Indonesia's National Military and the Police of the Republic of Indonesia regarding the amendment of the 1945 Constitution" (*Sikap TNI dan POLRI terhadap amandemen Undang-Undang Dasar 1945*), issued on 30 July 2002. See also, *The Jakarta Post*, newspaper, 31 July 2002.

637 As asserted by Tatang Kurniadi (F-TNI/Polri), Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 654. Previously, in a Commission A meeting, as stated by Slamet Supriyadi, F-TNI/Polri had agreed that forming the constitutional commission was not necessary to be included in the Additional Provision of the Constitution. See Ibid., p. 585.

638 As insisted by among others, Ramson Siagian (F-PDIP), See Ibid., p. 543.

639 *Koran Tempo*, newspaper, 1 August 2002, p. 1.

640 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 11, 23. The leadership team of Commission A consisted of Jakob Tobing (F-PDIP) as chairman, H. Slamet Effendy Yusuf (F-PG), H. Zain Bajeber (F-PPP), K.H. Amroe Al Mutaksin (F-KB), K.H. Najih Ahjad (F-PBB), Gregorius Seto Harianto (F-PDKB), I Ketut Astawa (F-TNI/Polri), Muhammad Hatta Mustafa (F-UD), and Harun Kamil (F-UG) as vice chairmen.

Then, in a Commission A meeting on electing the Commission A leadership on 4 August 2002, which was chaired by an MPR leader, the F-PDIP spokesperson proposed re-appointing Jakob Tobing as the Chairman.[641] However, several F-PDIP members in Commission A expressed their disagreement and stated they would propose another member.[642] To overcome the matter, the Chairperson of the meeting, in accordance with the MPR meeting rules, handed over the solution to the internal F-PDIP. In response, Megawati refused to replace Jakob Tobing and instructed F-PDIP to maintain Tobing as the chairman of Commission A and not to hinder the completion of the amendment of the 1945 Constitution.[643] In the end, only F-TNI/Polri insisted on including the constitutional commission provision in a clause of the Additional Provision.[644] However, in the last minutes, after their proposal was fiercely and emotionally challenged by others,[645] F-TNI/Polri, emphasizing the importance of maintaining the integrity of the nation and state, withdrew its proposal.[646]

The MPR finally decided to establish a constitutional commission that was tasked with conducting a comprehensive academic study of the changes and proposing necessary improvements to the MPR.[647] However, certain groups, consisting of NGOs, scholars, and campus activists, were very disappointed. They expected a constitutional commission with the full authority to design a complete constitutional amendment or create an entirely new constitution.[648]

The political dynamics overarching the proposed constitutional commission show that the supporters and opponents of constitutional amendments were motivated by certain political views that were promoted by political groups, which were organized and fairly rooted in society. In society, there are still groups who want Indonesia to require the implementation of Islamic sharia for its adherents, those who want the dual-function role of ABRI, who want the MPR as the highest institution of the state – the holder of the people's sovereignty in full. Therefore, it is not impossible that the political turmoil that occurred could provide an oppor-

641 Proposed by F-PDIP spoke person Didi Supriyanto. Ibid. p. 10.
642 As argued by F-PDIP members, Marah Simon, Haryanto Taslam, Amin Aryoso, Imam Mundijat. Ibid, pp. 11-18.
643 Ibid., pp. 10-23.
644 Stated by E. Tatang Kurniadi, F-TNI/Polri. See Ibid., p. 654.
645 Previously, Anwar Arifin (F-PG) stated unequivocally that the MPR should not shrink just because of the terror by the people who were once in power. See Ibid, pp. 620-621. Arifin Panigoro, the F-PDIP Chairman, asserted that the MPR should be ready to face any kind of pressure and any threat. See Ibid., p. 629. Husni Thamrin (F-PPP), the deputy MPR Speaker stated emotionally that the F-TNI/Polri proposal was a humiliation. Nothing to be afraid of, Thamrin said, not prison nor death. See Ibid., p. 723.
646 Stated by Slamet Supriyadi (F-TNI/Polri). See Ibid., p. 750.
647 MPR Decree No. I/MPR/2002.
648 See e.g., Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 315-325, 363.

tunity for those aspirations to be fulfilled. Therefore, in the future, it can be predicted that if the amended 1945 Constitution has not been implemented properly, for whatever reason, contestation will emerge once again. It is not impossible that there will be a demand for a return to the original 1945 Constitution.

Meanwhile, a conclusion on the second round of presidential elections was achieved smoothly. With a firm directive from the party's leadership, F-PDIP, the only faction that disagreed with the provision, eventually agreed with the second round of the presidential election being conducted directly by the people.

At the end, it is interesting to note that after PAH I successfully completed its work, PAH I members shook hands and embraced each other. Similarly, at the time the MPR successfully completed the task, MPR members spontaneously recited prayers according to their respective religions and stood up, singing the national anthem, Indonesia Raya.[649]

The incidents reflect that the amendment process, with all the debates and contestations, was not a process of losing or winning. Rather, the inclusive and consensus-driven approach throughout the amendment process had built a sense of common responsibility that the constitutional amendment was a task that had to be completed together.

The amendment process had stimulated the MPR's members, especially PAH I members, to take a long-term view instead of focusing on short-term interests.[650]

### VIII.5.2 The substance

Until the final amendment stage in the 2002 MPR Annual Session, the factions could not agree on the existence of the functional groups' appointed delegates as MPR members. The last informal consultation of the factions amid the last MPR plenary meeting failed to solve the stalemate, so it had to be decided by balloting.

Following the rules of procedure laid down in MPR Decree No. II/1999, in the final MPR plenary meeting, if deliberation failed to reach consensus, the decision could be made by voting, especially when the time for discussion had expired and a decision was indispensable. This was the only decision made by ballot during the entire 1999-2002 amendment process.

Both sides had their respective conceptual arguments. The side favouring augmenting the MPR's composition with an appointed functional group delegation said it represented poor people's interests, such as workers and

649 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 753.

650 See Adriaan Bedner, *The Need for Realism*., p. 192.

peasants, who tended be neglected by an open and free market democratic system dominated by the bourgeoisie. Therefore, there had to be a state institution that represented all groups in society with the authority to determine the outline of state policy, which would guarantee justice and the sustainability and consistency of development. The government should not select delegates, as it had in the past, but functional groups should choose them democratically themselves. This stance was adopted by most members of the F-UG and by several F-PDIP and other faction members. Proponents of the idea, estimating that they had enough support, then pushed the decision through voting,[651] which they expected could win, and further halted and reversed the entire amendment process.

However, most other factions contended that the MPR members should consist only of elected DPR and Regional Representative Council members. They argued that a general election is the best way to appoint people's representatives and there should be no exceptions.[652] Moreover, it could not be justifiable to select appointed delegates to represent backward people based on the magnitude of a particular tribe or group, and to consider their backwardness as something that was constitutionally permanent.[653] Adopting adherence to human rights, such as freedoms of association, assembly, and expression, and affirming that democracy and people's sovereignty are subjugated to the Constitution's principles, prevented the possibility of manipulating groups in a democratic process.[654] Further, improving the political party and general election systems could prevent the representative system from manipulation by rent seekers. The improvement of Chapter XIII on Education and Culture and Chapter XIV on National Economy and Social Welfare, which were concluded during this final stage, provide a constitutional basis and a state's obligation to enhance the quality of life and justice for everyone.

Regarding the Broad Outlines of State Policy, although it has benefits, such as the sustainability and integrity of the development programs for the entire country and in all sectors, it contains a systemic weakness. To be effective, the Broad Outlines need to have a binding legal position on the President and all other state agencies, which requires that all state institutions are subject and accountable to the institution that determines the Broad Outlines, the MPR. As discussed in the previous chapter, this kind of

651 The proponent claimed to have more than 200 F-PDIP members and of other factions supporting the stance. See among others, *Media Indonesia*, newspaper, 2 August 2002, p. 1.

652 As stated by, among others Kohirin Suganda (F-TNI/Polri). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 82.

653 There is the question of appropriateness in deciding who will represent the backward people, such as in Papua or Kalimantan or else, where there are several tribes, large and small, with different cultures and traditions or even different languages.

654 As affirmed by Article 1 and Article 28A to 28J of the 1945 Constitution.

arrangement denies checks and balances while requiring a political system be based on the one-party system or be dominated by a political power to ensure its sustainability, which is authoritarian. Otherwise, a characteristically parliamentary system will be very unstable.[655] Therefore, behind the appointed functional group delegate debates, there was contestation between an authoritarian system (with a supreme MPR embedded in the original 1945 Constitution) and the constitutional democratic system (with a supreme Constitution developed during the amendment process). For a developing and vast country such as Indonesia, sustainability and consistency in development programs are important. Besides the development goal stipulations as embodied in the 1945 Constitution's Preamble, and the provisions regarding basic rights, the education system, economic justice, and social welfare, an outline of development policy could be determined by law that binds all parties without sacrificing democratic values.

To accommodate the people's aspirations, the process should be open to the public, involving representatives from society's interest groups. The law-making process involving the DPR, Regional Representative Council, and President would be open to the public, while the constitutionality of laws could be reviewed by the Constitutional Court. Therefore, people's aspirations needed to be properly accommodated. To ensure the sustainability and consistency of the policy as statute, it could be valid for a certain period and all other development programs should conform to the statute. On the other hand, any necessary adjustment to the program could be done by a democratic law-making process as stipulated by the Constitution.

Eventually, the decision taken by ballot was to abolish the functional groups' appointed delegates from future MPR membership. Thus, ultimately, on 10 August 2002, the new Article 2(1) of the 1945 Constitution that states, "MPR consists of members of DPR and members of Regional Representative Council members elected through general elections and to be further regulated by laws", was ratified.[656]

Regarding the presidential election, in the third amendment phase, factions managed to agree that in the first round, the President and Vice President should be elected on one ticket directly by the people. The pair who can obtain more than 50% of the total national votes, with at least 20% in each province in more than half of the provinces, shall be declared as

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655 During the era of President Soekarno (1959-1967) and President Abdurrahman Wahid (1999-2001), the main political job domestically for the President was to control the MPR. In the end, both Presidents were dismissed by the MPR. During the era of President Suharto (1967-1998), Suharto controlled the MPR and stayed in power for three decades. The system designed by BPUPK was coupled with a one-party system, the *Partai Nasional Indonesia*, known as *Partai Pelopor* (the Vanguard Party). See Sekretariat Negara Republik Indonesia, *op.cit.*, pp. 503 – 505.

656 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p.p. 734 – 735.

the elected President and Vice President.[657] However, the MPR could not conclude what should be done if there was no candidate pair who would win the first round. Several PAH I regional validity meetings showed that the public were divided.[658]

Eventually, F-PDIP agreed that the second round of presidential elections should be conducted directly by the people.[659] Thus, the MPR plenary meeting on 10 August 2002 ratified this amendment. This decision completed the provision on direct presidential elections as stipulated in Article 6A of the 1945 Constitution.

Regarding the proposal to amend Article 29, two main issues remained, mostly related to arguments that repeated the previous discussions. The discussion no longer concerned the rejection of Pancasila as the state ideology. There was no proposal to add 'the seven words' of the Jakarta Charter to the Preamble. Since the beginning, all factions, including Islamic factions, resolutely affirmed that Pancasila as embedded in the Preamble was final and should be maintained as the state ideology.[660] Rather, the debate was on Article 29 regarding implementing Pancasila's first principle in daily practice: Belief in the One and Only God. It was about the state's role in the people's religious lives. Proponents argued that the state should actively require citizens to exercise their religion. In general, all factions acknowledged that in a state based on Pancasila, there should be enlightenment of one's faith so that people shun away from immoral things, such as corruption.[661]

Amidst these different opinions, the factions tried to find a solution. Certain factions proposed maintaining the original Article 29 and adding a new section: "the state shall guarantee the implementability of Islamic

657 Article 6A of the amended 1945 Constitution.

658 Validity meetings in Palembang, Pontianak, Malang, Jogyakarta and Solo, for instance, reported that the participants were divided into those who endorsed a direct second round and those who preferred election by the MPR. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 833-845. Nasirwan from Muhammadiyah University Pontianak, West Kalimantan, argued that the second round should be handed to the people. Conducting the second round by the MPR is a half-hearted attempt at reform, Nasirwan stated. Ibid., p. 739. On the other hand, Hasyim Djalal argued, considering the economics and the political costs, a second-round election conducted by the MPR would be better, on the condition that the MPR comprises of elected members. Money politics won't be more prominent in an election by the MPR than in a direct election, said Djalal. Ibid., p. 606.

659 See above, VIII.2.2. *Ratification: People-Led Second Round.*

660 As stated by among others, Asnawi Latief (F-PDU). As a Nahdlatul Ulama (NU) member who had affirmed that *Pancasila* is final, he conformed with the stance of NU. See Ibid. Hamdan Zoelva (F-PBB) during the second amendment asserted that Pancasila is final. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 93.

661 As stated by Zacky Siradj (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 696. Further Siradj argued that the original Article 29 should be maintained.

Sharia which is obligatory for its followers."[662] Others proposed that, because the state should be just to everyone, the obligation should be applied to every religion.[663] Others argued that Article 29 was already a compromise and should be maintained, while implementing Islamic Sharia would be more appropriate through a legislation (rather than constitutional) process.[664]

Regarding the term *kepercayaan*, the debate was about whether it was understood as a set of traditional beliefs or as faith in a religion. The factions proposing the Article 29 amendment argued that it should be interpreted as faith in a religion, since the traditional beliefs (*aliran kepercayaan*) were already accommodated in the chapter on human rights. However, others rejected any revision to Article 29. Islamic Sharia, like the concept of the state, is a vast subject with various interpretations that could lead to clashes among believers.[665] In addition, there would be problems concerning who would have the authority to interpret religious norms.[666] Further, there were risks that could be caused by amending Article 29, especially amidst the political upheavals around the demands for regional autonomy that were shaking the country at the time.[667]

Thereby, the MPR was divided. There were F-PBB, F-PPP, F-PDU factions and F-Reformasi and F-UG elements who proposed inserting the obligation for Muslims to implement Islamic Sharia into the Constitution. Then, there were F-PDIP, F-PG, F-TNI/Polri, F-KB, F-UD, F-KKI, F-PDKB factions and F-Reformasi and F-UG elements who wanted to maintain the original Article 29. Proponents of maintaining the original Article 29 far outnumbered amendment advocates.[668] However, the latter group retained its opinion and affirmed that it is not enough to enforce Islamic Sharia on the individual only through freedom of worship, that the state should be

662 As proposed by Yusuf Muhammad (F-KB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 579. Previously, Ali Masykur Musa (F-KB) stated that if the proposal was not acceptable, F-KB preferred to maintain the original Article 29. See Ibid., p. 204.

663 As proposed by Patrialis Akbar (F-Reformasi). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 71.

664 As stated by A.M. Fatwa (F-Reformasi). See Ibid., p. 223.

665 As reminded by Zulvan Lindan (F-PDIP) and Harifuddin Cawidu (F-UD). Cawidu further argued that a Muslim can certainly implement Sharia without having to be sustained by the state in a formal constitution. See Ibid., pp. 234, 239.

666 As stated by Hasyim Djalal.See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 758.

667 As reminded by Kohirin Suganda (F-TNI/Polri). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 590.

668 See III.2. The composition of the faction in the People's Consultative Assembly as the result of the 1999 election.

involved, and that this should be stipulated at the constitutional level.[669] Thus, until the end of Commission A's 2002 August session, factions failed to agree on the issue.[670] The public was similarly divided. Certain people argued that the obligation should be included in Article 29,[671] while others argued against.[672]

The discussion shows that there are people who believe that the state should require Muslims to practice Islamic law and that for certain political parties, the issue is a matter of political support. It also confirms that for certain communities, religious law is regarded as a positive law in addition to positive state law, which indicates a diversity of legal norms. On the other hand, certain people regard the issue as a real risk, and threatened to secede from Indonesia if the proposal was approved.[673]

It became clear that the issue is highly sensitive and reaches deep and far into the future. From constitutionalism's point of view, the debate showed that the 1945 Constitution as the supreme law would still face challenges posed by the interpretation of religious laws, in conjunction with customary laws and traditions.

Thus, PAH I and the subsequent Commission A could not achieve agreement regarding the proposal to amend Article 29. As discussed previously, the differences were resolved uniquely, through several informal consultations that involved the top leaders of political powers and compromises.

From an optimistic viewpoint, this settlement enabled an atmosphere conducive to an ongoing stakeholder dialogue, outlining how religious values could be integrated as rules in our daily lives. Although this is not a simple matter, a respectful atmosphere, tolerance, attention, and perseverance, supported by the progress of development, can produce positive results. In addition, such an approach can prevent the alienation of certain groups, which could otherwise foster radical attitudes in certain communities in society.

669 As asserted by M.S. Kaban (F-PBB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 648.

670 See Ibid., p. 399.

671 The participants of a public hearing in Bandung, for instance, argued that the state should oblige the people to implement their respective religions. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 624.

672 In a validity test meeting in Pontianak, for instance, Tanrizal, a teacher at the Junior High School (SMP) no. I expressed that belief in a religion is a basic human right. Therefore, it is a contradiction if the state obliges people to exercise their religion. Further, Tanrizal said that if it were the case, then one should report to the police if a neighbor did not practice their religion. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 728.

673 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 143.

Concerning education, factions believed that there was no more valuable an investment in the future than a quality basic education.[674] Thus, PAH I managed to conclude fundamental changes to the Constitution's provisions. It affirmed that education is a basic right, that every citizen is required to obtain a preliminary education,[675] and that the government is obliged to pay for it.[676] For that purpose, factions agreed that at least 20% of state and local budgets should be set aside for education.

Meanwhile, lengthy debates on the national policy's goal took place. As reported by PAH I to the MPR Working Body, there were two opinions on the national policy's goal. The first argued that the government should organize and implement a national education system that aimed at enhancing the nation's intellectual life and creating humans with a noble character, that would be further regulated by law. This group argued that the nation's intellectual life as embodied in the Preamble has a broad meaning, including intellectual intelligence, faith, piety, and morality.[677] The second group argued that the government should organize and implement a national education system that aimed at improving faith, piety, and morality, and at enhancing people's intellectual lives. In response to the second alternative, people pointed out that if education was also about enhancing faith and piety, then it had entered the theological domain and there would be problems in deciding whose interpretations were authoritative.[678]

In the last Commission A meeting, the first position was shared by F-PDIP, F-TNI/Polri, F-KKI, and F-PDKB. Conversely, F-PG, F-PPP, F-PBB, F-Reformasi, F-PDU, F-UD, and F-UG preferred the second alternative. Trying to solve the difference, F-KB proposed a new formulation that stated that "the Government organizes and manages a national education system to enhance the nation's intellectual life and to shape the nation's noble character, which shall be further regulated by law."[679] Nevertheless, Commission A could not resolve the difference.

As already discussed, the differences regarding Article 31 were overcome through an informal consultation that involved political party leaders.

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674 As asserted by, among others, Franz Magnis Suseno in a PAH I public hearing. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 446.

675 As stated by Hatta Mustafa (F-UD). See Ibid., p. 65.

676 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 2.

677 As stated by I Ketut Astawa (F-TNI/Polri) and Retno Triani Djohan (F-UG). See Ibid., pp. 259-262.

678 As argued by I Dewa Gede Palguna (F-PDIP). See Ibid., p. 241.

679 As proposed by Amin Sa'id Husni (F-KB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 226.

The factions agreed that the differences on Articles 29 and 31 should be solved jointly.[680] All factions accepted Article 31's second alternative and in return, agreed that the MPR should maintain the original Article 29. The agreement was ultimately approved in the plenary MPR meeting on 11 August 2002.

Regarding Article 33 on Economy, at the outset, the factions concluded that the sections of Article 33 as attached to MPR Decree No. XI/2001 should be revised. However, in accordance with the public's aspirations, the factions decided not to revise the original sections in Article 33,[681] partially since it firmly stated its determination to end injustice and the growing discrepancy between the rich and poor.[682] In this context, some argued that the principle of familial economy (*ekonomi kekeluargaan*) would sacrifice modern economic principles,[683] and the term "under the control of the state" (*dikuasai oleh negara*) could expose the danger of state expansion over the right of the people.[684] However, others argued that, although the familial principle (*ekonomi kekeluargaan*) was considered contradictory with efficiency, it is the soul and spirit of the nation.[685] Thus, the familial economy principle should be maintained and coupled with the principles of efficiency, justice, and economic democracy.[686] The measure is the advancement of the national economy.[687]

Further, others argued that the market's role was important,[688] and that although there is no just and fair market, it should not be neglected.[689] The economy should be developed in a democratically managed or intervened

680 See Ibid., p. 399. As also affirmed by Arifin Panigoro, the F-PDIP Chairman in the MPR, in an interview in Jakarta, 11 October 2014.

681 During the fourth stage, PAH I exposed the preliminary conclusion to the public through various forums, such as public hearings and validity tests. This was a hotly debated topic in the Expert Group that caused Mubyarto who wanted to retain the original Article 33, resigned. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 243, 251.

682 As stated by, among others Soedijarto (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 145.

683 As stated by T.M. Nurliff (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 93.

684 As reported by I Dewa Gede Palguna (F-PDIP) during a validity meeting in Bali. See Ibid., p. 837.

685 As asserted by Theo Sambuaga (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 400.

686 As argued by Hobbes Sinaga (F-PDIP). See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 79. See also VIII.2.6.

687 Ibid., pp. 313-314.

688 As stated by, among others Amidhan (F-PG). See Ibid., p. 248.

689 As reminded by Ali Hardi Kiaidemak (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 86.

market, in which justice, efficiency, and sustainability are the leading principles.[690] Therefore, its implementation would be consistent with the principles of the state based on the rule of law (*negara hukum*) and people's sovereignty, which adhere to economic, social, and cultural rights as well as civil and political rights.[691]

Thus, they agreed to maintain the original Article 33(1), Article 33(2), and Article 33(3), and to add provisions regarding principles on how the economy should be developed and that it should be further regulated by law.[692]

Regarding Article 34, which states that "(1) Destitute and neglected children shall be nurtured by the state", the factions had no objection to the previous conclusions as attached to MPR Decree No. XI/2001. Likewise, all agreed on changing the title of Chapter XIV from 'National Economy' to 'National Economy and Social Welfare.'

There were proposals and attempts to amend Article 37 on the procedures for amending the 1945 Constitution. Among other things, to establish a constitutional commission that is authorized to make over-all changes to the Constitution.[693] However, this proposal was not agreed on. Further, the MPR factions agreed to revise Article 37 with new provisions stating that the Preamble is not an object that can be amended and the form of the unitary state of the Republic of Indonesia is unamendable.

Additional and Transitional Provisions in the original 1945 Constitution regulate the transition from the Japanese colonial era to an independent Indonesia and, therefore, must be amended. Certain parties used this opportunity to try and replace it with provisions stating that the amended 1945 Constitution was a provisional Constitution and to establish a constitutional commission to redesign the Constitution. For that purpose, the additional provision would also contain an order to establish a constitutional commission.[694] As discussed above, the proposal was not agreed.

In the end, the MPR decided that the Transitional and Additional Provisions stipulate that the Constitutional Court, which was agreed upon, should have been established on 17 August 2003, and assigned the MPR to review the contents and status of all existing MPR provisions to be decided in the 2003 MPR session, emphasizing that with the completion of the amendments, the 1945 Constitution consists only of the Preamble and the articles.

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690 As concluded by Jakob Tobing who presided the conclusion meeting. See Ibid., pp. 313-314, 334.

691 As asserted by Sutjipno (F-PDIP). See Ibid., p. 100. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit*., Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 283.

692 Ibid.

693 Ibid., pp. 587-604.

694 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit*., Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 423.

Later, in a consultative meeting on the evening of 8 August 2002, Commission A agreed the proposal for the formation of a constitutional commission.[695] Then, the consultation meeting was continued with the Commission A meeting, which was its last meeting in the 2002 MPR session, when the agreement was formalized. [696] Also reported to the meeting the petitions of student delegation from University of Bung Karno, who refused the amendments to the UUD 1945, the statement of students' unit of the *Pemuda Pancasila* who asked that presidential election in both the 1st and the 2nd conducted directly by the people, to allocate education's budget of a minimum 25%, to restore Article 29 to its origin and to complete the amendment of the UUD 1945. Also from *Barisan Rakyat Indonesia* who demanded the establishment of a constitutional commission and from Coalition for New Constitution who demanded a totally new constitution.[697] The last was *Lembaga Kordinasi Strategik Marhaenis* (LKSM – Marhaenis Strategic Coordination Institute) who firmly rejected all amendments to the 1945 Constitution that had been carried out by the MPR, conveyed a motion of no-confidence to the MPR of the 1999 election and hoped the formation of a constitutional commission to revise the amended Constitution.[698]

To ensure that the agreement would be accepted by the MPR plenary, at the suggestion of the Chair of the F-PDIP Faction in the MPR, Arifin Panigoro, the Speaker of the MPR and the faction leaders agreed to hold a deliberation meeting at midnight before 9 August 2002, factions reached agreement on the establishment of a constitutional commission.

Subsequently, on 9 August 2002, the MPR Commissions reported their works to MPR plenary meeting.

In the meantime, the MPR plenary meeting on 9 August 2002 approved the amendment to Chapter XIV by acclamation.[699] The new provisions in Chapter XIII and Chapter XIV regarding education, culture, economy, and social welfare embrace a substantive strategy in achieving social justice and social welfare based on the rule of law.

The establishment of a constitutional commission was one of the last issues to be decided approaching the end of the 2002 MPR annual session. On 9 August 2002, MPR plenary session decided to issue Decree no. I/MPR/2002 which assigned the MPR Working to establish a constitutional commission to conduct a comprehensive study on the amendments to the 1945 Constitution.

In 2003 annual session, based on decision no. 4/MPR/2003, MPR formed the constitutional commission, that had 7 (seven) months working time. The commission was responsible to the MPR through the Working Body, who should then report its conclusion to the MPR plenary session on 7 September 2004.

695 Ibid., p. 586.
696 Ibid., pp. 587-604.
697 Ibid., p. 589.
698 Ibid., pp. 589-590.
699 Ibid., p. 698.

Then, the constitutional commission reported the study to MPR Working Body. But, after studying it, the Working Body did not approve the study because it was not in accordance with the MPR decision. Among other things, the constitutional commission decided on differences of opinion in the commission by voting, while the MPR decision no. 4/MPR/2003 does not allow voting in formulating the study results. On the other hand, the MPR Working Body concluded that the amendments to the UUD 1945 are good enough.

# IX Conclusions

Finally, after a long and exhausting effort that started in October 1999, the amendment of the 1945 constitution was completed in August 2002, almost four years later. It had been a gradual, sustained, open, and deliberative process. The reform did not just add or remove certain sections of the original 1945 Constitution. While the fundamentals of the nation and state embedded in the Preamble and the Republic's unitary state form were maintained and guided the reform, the amended Constitution in the end has become a hallmark of constitutionalism.[1] It stands at a clear distance from the original text in its rejection of the authoritarian concepts in the 1959 version of the 1945 Constitution. It contains all the elements required in a democratic constitution, including people's sovereignty, rule of law, protection of fundamental rights, separation of powers, checks and balances, independent judiciary, and periodic and free elections.

Thus, the amendment process and its outcomes had peacefully transformed Indonesia from the second largest authoritarian country to the third largest democracy in the world.

## IX.1 A long history of attempts to establish constitutionalism

The amendment process occurred in response to a peak demand for political reform in Indonesia during the political crisis ignited by Asia's monetary crisis, which engulfed the country in 1997. However, as discussed in this study, aspirations and attempts to create a democratic constitution had existed ever since the drafting of the 1945 Constitution. This already became apparent from the discussions in the Investigating Commission for the Preparation of Independence, which convened from May to July 1945. The occupying fascist Japanese military administration envisioned a constitution that would establish an independent Indonesia as part of a geo-political Greater East Asia Co-prosperity Sphere led by Japan, as it had done earlier in Burma and the Philippines in 1943.[2] Only the Constitution's Preamble was free from Japan's WWII fascist ideas, as they were formulated by an independent team of nine, led by Soekarno, who worked outside Japanese control.

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1 See also Adriaan Bedner, *The Need for Realism*., p. 177.

2 Including as revealed in the confidential Secretariat Paper no. 3167, 14 March 1942 of the Japanese Empire Ministry of Navy. See Harry J. Benda, James K. Irikura, Koichi Kishi, *op.cit.*, p. 26.

Central to the Preamble are the five pillars of *Pancasila*: the belief in the One and Only God, a Just and Civilized Humanity, the Unity of Indonesia, the People's Sovereignty, which is Led by Wisdom in Deliberation amongst Representatives of the People and Social Justice for All the People of Indonesia. Thus, the original 1945 Constitution comprises of two unmatched parts: the Preamble, which contains the pure aspirations of Indonesian independence, and the Articles, which were tainted with Japan's fascist ideas.

Only one day after the declaration of independence, on 18 August 1945, the Committee for the Preparation of Independence of Indonesia agreed that the 1945 Constitution should be improved as soon as possible. However, this did not happen, and in October 1945 the then Minister of Justice, Soepomo, added an Elucidation to the Constitution which made it deviate further from democratic principles. Nonetheless, in the collective consciousness, the revolutionary spirit of the proclamation of Indonesia's independence and the subsequent zest for defending it were linked to the birth of the 1945 Constitution. This enhanced the constitution as a symbol of triumphant national struggle for independence and the nation's dignity, far exceeding its text and contents. The main political powers' emotional bond to the 1945 Constitution, notably the military and the police, was to remain a formidable obstacle for reform and promoted the return to this Constitution in 1959 after the political turmoil of the 1950s under the Constitution of the Federal Republic of Indonesia, the 1950 Provisional Constitution, and the failed attempt to enact a new Constitution between 1956-1959.

Between 1959-1965, based on the 1945 Constitution, President Soekarno ruled the country under an authoritarian system, which ended with a failed attempt at a coup by leftist military officers and was followed by a counter-military takeover and a massacre of communists – and those accused of being communists – in 1965-1966, organized by the army. In 1967, General Suharto, backed by the military and students, became the next president.

Suharto promised to implement the 1945 Constitution purely and consistently. His New Order government prioritized economic development, emphasized security and stability and ignored many of the people's fundamental rights. To ensure his government's stability and effectiveness, he kept the highest political institution, the MPR, under strict control. Suharto developed the Functional Groups (*Golongan Karya* – GOLKAR) to dominate the political system, together with a major role for the Armed Forces in a system called *dwifungsi*.

Under the New Order, the economy and education grew impressively. The former created a strong legitimacy for Suharto's government, but the latter promoted the rise of critical intellectuals. As the regime aged, the 1945 liberator generation of Indonesians (*Angkatan '45*) were slowly disappearing from the scene, both in the administration and in the army. This moved Suharto to envisaging a new civil-supremacy political system in which the political role of the Armed Forces would be significantly reduced, and elections would be free and transparent. Similar ideas of reform sprang up among the ruling elite, including in the military and the police.

However, Suharto was opposed by the military leadership, which led to a serious conflict between the President and the military. When the 1997 Asian monetary crisis struck it quickly destroyed Suharto's remaining legitimacy and turned into a deep political crisis, which directly weakened the regime and eventually led to Suharto's resignation. He was succeeded by his Vice-President BJ Habibie, who immediately took action to facilitate reform. Then, under pressure from student demonstrations and demands from dissidents, a special MPR session was convened from 10 to 13 November 1998. The session decided to revoke MPR Decree No. IV/MPR/1993 and to allow changes to the 1945 Constitution. It expedited the scheduled 2002 elections to June 1999 and allowed new political parties. It enacted an Assembly Decree on human rights and created a Working Platform for constitutional reform.

Key to the events that were to unfold was that, amid student demonstrations, the main political powers agreed to reform the 1945 Constitution – the government, represented by President Habibie; the opposition, represented by Megawati Soekarnoputri, Abdurrahman Wahid (Gus Dur), and Amien Rais; and the Armed Forces, represented by General Wiranto. They agreed to maintain the Constitution's Preamble, the unitary form of the Republic of Indonesia, and Pancasila as the foundation of the state. They also agreed that the reform should be conducted constitutionally, in accordance with the Constitution's provisions.

In short, the opportunity to reform the 1945 Constitution was created through several factors: (1) latent aspirations and reform pressure in society; (2) the internal conflict within the regime; (3) the serious economic crisis that weakened the regime; (4) the existence of reformist groups within the ruling elite; (5) the agreement between the main political powers to conduct constitutional reform; (6) the attitudes and concerns of prominent religious leaders and the existence of Islamic organizations such as NU and Muhammadiyah who accepted Pancasila and the national principle of unity in diversity (*bhinneka tunggal ika*); (7) the availability of procedures for constitutional amendment, and; (8) the commitment of the Armed Forces to abide by the Constitution and take part in the reform process.

## IX.2 The reform process – The challenge of consensus-making

The amendment process to the 1945 Constitution was conducted from 1 October 1999 to 10 August 2002 in a four-stage process that had not been planned from the beginning. Because of the symbolical authority of the 1945 Constitution, replacing it with a new constitution was not acceptable to the main political powers and therefore the MPR decided to reform the existing Constitution through amendment. The approach was deliberative, inclusive, and consensus-oriented, committed to genuine reform and to affirming a democratic constitution's immutable principles. President Habi-

bie's commitment to the reform and his policy of respecting freedom of the press also helped the process, as did the military's attitude to abide by the Constitution. Through the MPR Special Session in November 1998 the ideas concerning reform were channelled into the formal political process.

Very important to the process was the agreement to allow new political parties to be established and to have democratic elections before amending the Constitution. The MPR that was formed after these elections had strong legitimacy to amend the 1945 Constitution.[3] This paved the way for another important feature of the process, i.e. that there was no academic draft prepared in advance. Instead, the political factions in the MPR submitted proposals, which were compiled as the base material for amending the Constitution. This promoted the openness of the process, as did the deliberation and consensus approach in decision-making. As a result, each faction, regardless of size, saw itself as an actor contributing to the process. This bolstered the factions' sense of ownership and commitment to the amendment process as a shared duty.

Similarly, the fact that deliberation and consensus-making were necessary motivated the representatives of the various factions, particularly in the Drafting Committee (PAH I), to get to better know and understand each other. This encouraged mutual respect and personal friendships and made the process increasingly inclusive, which further helped achieve consensus and compromises. The fact that PAH I members congratulated each other after finalizing the draft amendments in August 2002 is testimony to the feelings they had of having engaged in a joint undertaking and shared responsibility. Likewise, when the amendment process was completed on 10 August 2002, the MPR members spontaneously agreed to pray together and sing the national anthem *Indonesia Raya*.[4]

In any democratic constitutional reform process, consensus-making is the main challenge. Our case was no exception, as there were conflicting opinions on many subjects. Therefore, we had to develop an attitude towards and atmosphere for consensus-building. Even though the MPR initially provided a short amendments timeframe, we knew the process would be complicated. Therefore, we avoided creating an atmosphere of rushed decision-making.

If there were several suggestions or opinions, we often recorded these as various options or alternatives. All ideas were recorded in the minutes, so the members knew their views were taken seriously. We considered each speech and opinion on its merits rather than differentiating between contributions from large and small factions. All PAH-I leaders adopted this approach. When members felt respected, they became open to the opinions

3 See Donald L. Horowitz, *op.cit*., p. 1. See also Adriaan Bedner, *The Need for Realism*; p. 192.

4 Proposed by Afni Achmad (F-Reformasi). Then, Mohammad Cholil Bistri (F-KB) led the prayer and Suko Waluyo (F-PDIP) led the assemblies to sing the national anthem, *Indonesia Raya*. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit*., Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 753.

of others. This method helped build a sense of unity between the PAH-I members. It even became common for PAH-I members from various factions to share opinions different from those of their factions. Such members would often successfully try to address the issue in their faction in the same spirit.

We addressed each topic individually. If we could not deal with a topic (e.g., because the atmosphere became too heated), we tried to postpone it and move to another topic. We tried to avoid tense situations. Certain issues were resolved by reference to other resolutions, such as the delicate issue of the relationship between state and religion.[5]

Personal factors also helped the process. The chairman of the F-PDIP faction in the MPR, Arifin Panigoro, had been a classmate of the national armed forces commander, general Endriarto Sutarto, in their Bandung secondary school. I attended the same school, was in the year above, and was one of the organisers of extra-curricular activities. Several members had also been activists in the 1966 student demonstrations and had remained friends ever since. These connections helped nurture the required openness and depth in the discussions.

It is telling that once the PAH-I members agreed on a position, they would defend, explain, and promote it, such as the decision-making process in establishing a Constitutional Court.[6] It could be said that we worked in the spirit of *musyawarah*, as embedded in the Pancasila.

The next important feature of the process was that it was public in nature. Most PAH I meetings were open to the public and broadcast live through the MPR television station. Students, activists, NGOs, journalists, and domestic and foreign observers were free to attend, to communicate with PAH I members and to submit written proposals to PAH I. Through various programs, such as public hearings, seminars, workshops and comparative studies, PAH I reached out to the public at large. This enabled PAH I to better deal with sensitive political issues, including whether the state

5 Proposed changes to Article 29 on religion were resolved by referring to Article 31 on education and culture. Since these topics were considered quite sensitive, resolving them involved the party's highest leadership, in this case, President Megawati Soekarnoputri, chairwoman of PDI-P and Vice-President Hamzah Haz, chairman of PPP, an Islamic political party.

6 Regarding the right to constitutionally review laws, all PAH I members agreed that such review must be carried out by an independent judicial body, in this case, the Constitutional Court. However, MPR members from a different Ad-Hoc committee disagreed. They argued that the MPR should conduct such reviews as the highest state institution. The leadership of the factions and the MPR agreed with these members. It was decided that the MPR would have the right to review the constitutionality of laws. That decision was stipulated in MPR Decree no. III/2000. However, the PAH I members remained united and kept advocating for their position. In the end, the factions and MPR leaders were convinced that the right to review the constitutionality of laws should be in the hands of an independent judiciary and MPR Decree no. III/2000 was repealed. All factions eventually agreed with PAH I's proposal to include the establishment of a Constitutional Court in the Constitution.

should implement Islamic Sharia for its adherents or whether to change from a unitary to a federal state. Through hearings PAH I became more aware of threats of secession if the state would implement Islamic law and insights on the tension between the central and regional governments.

This study has demonstrated that the public was willing to express aspirations, disappointments, and anger, frankly and openly in the constituted state forums. It also showed that the amendment process interacted with the actual political challenges in Indonesia, in which reforming the 1945 Constitution was also an attempt to resolve social challenges instead of a project dwelling solely on theoretical principles.

Clearly, this openness combined with the political nature of the debates made it more difficult to achieve decisions. Nonetheless, in the end, debates, deliberations, compromises and consensus generated acceptable solutions. While certain topics could be solved in a single session, most were completed gradually or piecemeal, such as Article 6A on the presidential election and Article 20 on law-making. Of much importance was that unsolved parts could be moved to later sessions, while previously concluded parts were maintained. Thus, bit by bit, changes were made starting from the outer edge, moving from the simple and most acceptable topics to the more difficult ones. This enabled factions to gradually move away from the original 1945 Constitution's principles, dethroning the MPR from its position as the highest state institution and holder of people's sovereignty with unlimited power, and affirming the rule of law and constitutional supremacy.[7] In the end, all changes were decided unanimously through deliberations, except that of appointed functional group delegates in the MPR.

## IX.3 Risks, ongoing tensions, and the Constitutional Commission

Without the strong commitment from all parties, the security forces, military, and police, to abide by the Constitution and maintain rule and order, this phased approach would have failed, especially when the amendment process was still running, with the incomplete Constitution in force. It should be noted that the prolonged and cumbersome process in the MPR, especially in the beginning, caused discontent among the public. Critics argued that there was a lack of democratic participation and representation. The criticism mainly concerned the slowness and lack of directional clarity of the deliberation process for consensus. Certain NGOs claimed they already had the right formulations for the required changes and that

7 Horowitz concluded that "The Indonesians, … awaited the development of a consensus, which took more than three years to emerge. Only in 2001 did they enact an amendment that withdrew sovereignty from the MPR, acknowledged that it belonged with the people, and created a separation-of-powers regime, with a directly elected president and vice president not subject to removal on mere policy grounds." See Donald L. Horowitz, *op.cit.*, pp. 57-58.

the process could be completed much more rapidly. For example, they suggested changes be made quickly through voting or referendums. At some point this resulted in considerable public pressure to remove the amendment process from the MPR and assign it to an expertise-based constitutional commission. Some activists and politicians considered such a commission as a tool to cancel certain amendments that had already been adopted. A few would like to use it to thwart and take over the entire amendment process.[8]

Obviously, the MPR did not agree with this idea, and for good reason. The proposal of an expert constitutional commission ignored the Constitution's political nature and its relation with the political realities of the time. Reform through such a commission would moreover have been undemocratic, as it would not have involved properly elected political representatives.[9] It also found that the proposed expert commission's suggested procedure was flawed. The MPR and the members of PAH I finalized proposals by voting, while the members of the expert commission would debate matters and submit all ideas in compilation to the MPR if they could not reach consensus. This would have meant that the process should have started all over again. Finally, the MPR argued that the existing amendments were sufficient and should be maintained.

During its 2002 annual session, to pacify some of its critics, the MPR decided to form a constitutional commission with the task to conduct comprehensive study on the changes to the 1945 Constitution. The MPR also assigned the Working Body to formulate the composition, the position, the authority, and the membership of the commission.[10] In the 2003 annual session, the MPR issued MPR Decision no. 4/MPR/2003 on the composition, position, authority and membership of the Constitutional Commission. The Decision stated that the Commission was responsible to the People Consultative Council through the Working Body. The Decision also asserted that the study should not be concluded by voting. Further, the Commission was to study the amended Constitution comprehensively for improvements, not to start the amendment process all over again.[11] The Constitutional Commission indeed proposed several reforms to the Working Body. However, instead, the MPR plenary session on 26 September 2004 accepted the Working Body's proposal to reject the Constitutional Commission's recommendations.[12]

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8 See e.g. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, p. 543.

9 There are countries which applied this approach, such as Thailand (1999) and Iraq (2004), which eventually proved as ineffective.

10 MPR Decision no. I/MPR/2002.

11 See MPR Decision no. 4/MPR/2003, 7 August 2003.

12 See MPR Decision no. 4/MPR/2004, 26 September 2004 and its enclosure.

## IX.4 Constitutional reform: The importance of process

Reforming the constitution through a majoritarian approach might have produced a textually good constitution, but it would have run a considerable risk of producing a constitution that would have been unacceptable to many Indonesians. If there is one thing the case of Indonesia demonstrates, it is that constitutional reforms can consider, but need not imitate or follow, foreign institutional forms and processes or theories.[13] There is no single correct path of constitutional democracy and no single set of institutional choices that is best for a constitutional democracy in the face of major social divisions.[14] Distinctive forms and processes (*sui generis*) that are acceptable to all parties need to be found, within the limits imposed by democracy and rule of law.[15] Indeed, although experts proposed logically sound concepts, ultimately compromises needed the political art of constitutional amendment decision-making.[16]

Likewise, the idea of a referendum being held if the MPR rejected the constitutional commission's proposal overly simplified the matter. Especially in a highly diverse society as Indonesia, a yes-or-no referendum was not an effective way of deciding substantive constitutional issues. A referendum could have caused Indonesia as a state to disintegrate, further highlighting divisions within a diverse society amidst economic hardships and strained relations with regional governments.

The minutes of the MPR discussions show that the factions were initially unaware of the scale and depth of the necessary revisions to the original 1945 Constitution and how profoundly the amendment would alter the original articles. This also applied to public intellectuals and the broader public. Somehow, a spirit of reform became dominant and concepts such as people's sovereignty, rule of law, and separation of powers became familiar to a wide audience, notwithstanding different ideas about their meaning. PAH I was the main pacesetter for reform, its members often ahead of the political parties they represented in developing ideas on specific topics, which were then later accepted.

For understanding the process, it is also important to be aware that language is not only something of ratio and logic, but also of emotion and feeling. Besides the content, the choice of words and intonation of speech were crucial in getting an idea or proposal accepted or rejected. Although scientific arguments and literary concepts were influential, conclusions were made based on the most acceptable agreements.

Where serious differences of opinion emerged, the original text of the Constitution sometimes provided a way out. This was the case with the original Article 29 on freedom to worship, which after long deliberation was

13 Compare Daniel J. Elazar, *op.cit.*
14 See Donald L. Horowitz, *op.cit.*, p. 261.
15 See also Walter Murphy, *op.cit.*, pp. 499-504.
16 Daniel J. Elazar, *op.cit.*

maintained. Factions that wanted changes to the article in the end accepted that they would have to find other opportunities to address this matter politically.[17]

In addition to debates over substantive issues, one structural flaw of a procedural nature plagued the process, i.e. the division of tasks between PAH I and PAH II. The latter had been assigned the task to review the MPR decrees and to draft new ones, which it did under the assumption that, under the amendments, the MPR would remain the supreme political body. An example is the PAH II draft which assigned the power of constitutional review of statutes to the MPR, which was approved by the leaders of the different factions and the leadership of the MPR.[18] At the same time, PAH I was discussing the establishment of an independent judicial body for constitutional review. It took considerable time and effort for PAH I to convince the MPR to select the latter option.[19] Another example is the MPR Decree which required the President to obtain prior approval from the DPR to appoint the Chief of National Police and the Armed Forces Commander, which was not in line with the design of a presidential system of government.[20] Some of these issues were only resolved after the completion of the amendment process, when the MPR plenary session cancelled a number of the MPR decrees concerned.[21] However, the fact that not all MPR decrees have been revoked indicates that there are still differences of opinion concerning the role of the MPR within the state structure, which may emerge again in the future. It is worth noting that, at least until the second amendment, most factions maintained that the MPR should remain the highest political institution within the state structure, as originally established in the 1945 Constitution.[22]

PAH II activities also helped to relieve some of the public pressure as it could respond more quickly to demands for significant and immediate reforms, where amendment to the Constitution undertaken by PAH I needed more time.

Finally, it should be noted that over this period of four years, every conceivable topic has been discussed by MPR members, many of them time and again. No topic suddenly appeared in the results of the process

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17 See e.g. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, pp. 690, 694, 695.

18 The MPR plenary session stipulated the decision in the MPR Decree no. III/MPR/2000 on the Sources and the Order of the Legislations.

19 In the third phase of amendment in 2001, the Constitution asserted that the Constitutional Court is authorized to perform judicial review upon the law toward the Constitution.

20 MPR Decree no. VII/MPR/2000 on the Role of Indonesian National Armed Forces and the Role of Indonesian National Police, Article 3 paragraph (3) and paragraph (7).

21 However, until this dissertation is written, there are MPR decrees and legislations that are inconsistent with the 1945 Constitution which are still in force, including the above statutes.

22 See e.g. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 24, 61, 69, 84, and 661.

by surprise, as if falling from the sky. The extensive records of the many meetings of PAH I simply refute allegations that the amendments to the 1945 Constitution had been planned or guided by foreign institutions or other outsiders.

## IX.5 Result: Main features of the amended Constitution

After having looked at the history and the nature of the amendment process, this Conclusion will now look at the major results of the amendment process. They concern the preservation of the Preamble with the Pancasila as the foundation of the state, the decision to subjugate state power to the Constitution and to make Indonesia a state under the rule of law, including the introduction of a separation of powers and checks and balances, as well as fundamental rights and freedoms.

Of major importance is the introduction of a mechanism for testing the constitutionality of laws by a Constitutional Court *(Mahkamah Konstitusi)*. The democratic nature of the state is further guaranteed by introducing fair and free elections. The amended Constitution moreover guarantees the fundamental rights of Indonesian citizens to a better life, social welfare and social justice. More concretely, it obliges the state to provide basic education, decent health and other basic needs facilities, and to intervene in the market in order to achieve a proper balance between economic growth and redistribution of wealth.

### IX.5.1 Maintaining the Preamble

As discussed above, the MPR decided to maintain the Preamble of 1945 Constitution. Hence, the amendments were limited to the articles of the Constitution and to the Elucidation. Maintaining the Preamble with the Pancasila served to uphold the moral values of the 1945 Constitution as well as its symbolic meaning and sense of continuity. The amendments served to democratize the 1945 Constitution in order to achieve national goals based on the Pancasila. Article 37 and Article II uniquely embed the Preamble's position. Article 37 defines how the Constitution's articles can be amended. Article II states that the Constitution consists of the Preamble and the articles. This effectively means that the Preamble of the Constitution is non-amendable.

### IX.5.2 Supremacy of the Constitution

In the third phase of the amendment process, the MPR decided to amend Article 1(2). The stipulation that "Sovereignty is in the hands of the people and is exercised in full by the People's Consultative Assembly" was

replaced by "Sovereignty shall be vested in the hands of the people and be executed according to the Constitution".

This new section (2) affirms that the democratic political system adopted is subject to the fundamental principles and rights embedded in the Constitution.[23] This provision ended the supremacy of the MPR of the original 1945 Constitution. Furthermore, it affirms that the 1945 Constitution is the supreme law of the land and the highest law in the Indonesian legal system,[24] so there should be no laws and regulations that contradict it.

### IX.5.3 Rule of law (negara hukum)

Ultimately, at the end of the third phase of the amendment process, on 9 November 2001, the MPR plenary meeting decided to add a new section (3) to Article 1 which confirms that *"Negara Indonesia adalah negara hukum"* (the State of Indonesia is a state based on the rule of law). Article 1(2) was also amended to become "Sovereignty shall be vested in the hands of the people and be executed according to the Constitution".

Together with the above-mentioned Article 1(2) about the supremacy of the constitution, the new Article 1(3) constitutes a fundamental change to the original 1945 Constitution. By claiming that Indonesia is a state under the rule of law all exercise of state power is subjugated to the law.[25] Unsurprisingly, it took considerable time and effort to introduce these changes, as they had been proposed and discussed in the PAH already in October 1999.[26] However, the PAH members involved were cautious, as they realized that the *negara hukum* is not a mere statement but an ideal that requires many measures and tools to be able to realize the justice it aims to achieve.[27]

### IX.5.4 Separation of powers / checks and balances

The 1945 Constitution did not adhere to the principle of separation of powers or checks and balances, but confided in the spirit, wisdom, and judgement of state actors.[28] In this system, the MPR distributed power to Parliament, the President, the Audit Board and the Supreme Court, all of which were

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23 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p.102.

24 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Satu, Revised Edition, pp.102.

25 See also Walter F. Murphy, *Constitutional Democracy, Creating and Maintaining a Just Political Order.* The John Hopkins University Press, Baltimore, 2007, p. 10.

26 See e.g. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 106.

27 Ibid., pp. 117, 129.

28 See the 1959 version 1945 Constitution, Elucidation, IV.

accountable to the MPR. The amendments fully overhauled this system, establishing the separation of powers. The authority of state institutions no longer relies on the MPR but directly on their Constitutional mandate. The amendments have extended the number of guardian institutions with a Constitutional Court, a National Human Rights Commission and a Judicial Council.

### IX.5.5 Independent judiciary

The 1959 version of the 1945 Constitution did not provide for the independence of the judiciary, as it asserted that the supreme authority is vested in the MPR. This provision undermined the statement in the Elucidation that the judicial power must be free from government intervention.[29] Now, Article 24 of the amended Constitution affirms that the judiciary is independent. It moreover attributes the power to the Supreme Court to conduct judicial review of laws and regulations below the level of acts of parliament.[30]

### IX.5.6 Constitutional Court

A path-breaking amendment was the introduction of a Constitutional Court charged with constitutional review of acts of parliament.[31] Although the amended Constitution does not explicitly mention the authority of the Court to resolve petitions brought by individuals, its Article 28I does provide that the protection, advancement, enforcement, and fulfilment of human rights shall be the responsibility of the state, and more in particular of the government. Given the complexity and diversity of norms adhered to in society, PAH I decided to not explicitly open up the possibility of individual petitions in the Constitution, as this would carry broad political implications. However, once established, the Constitutional Court itself immediately made clear that it was willing to accept such petitions and is has become a major player in determining the constitutionality of acts of parliament.

### IX.5.7 Constitutional democracy

The 1945 Constitution did not acknowledge elections as a constitutional instrument for the circulation of powers. General elections were regulated

29 Ibid., on Chapter IX, Judicial Power.
30 Paragraph (1) Article 24A, the 1945 Constitution.
31 Paragraph (1) Article 24C, the 1945 Constitution.

in an act of parliament instead of in the Constitution.[32] This changed in the second amendment to the Constitution, which guarantees free and periodical elections of Parliament, as well as of the President and the Vice-President. Chapter VIIB of the amended Constitution introduces this constitutional basis for elections, which should be carried out in a democratic manner, with five-year intervals and organized by a national, permanent and autonomous commission. Likewise, Article 18(4) on Regional Authorities determines that the heads of the provinces, regencies and municipalities shall be elected democratically. The amendments also provide a constitutional basis for political parties.[33]

Another important democratic novelty concerned law-making and stipulates that a law must be made by a democratically elected Parliament in a process of deliberation with the directly-elected President. A bill can only be ratified as a law by prior joint approval of both state institutions.[34]

### IX.5.8 Human Rights

At the end of the second amendment phase, on 18 August 2000, the MPR decided to incorporate a full new chapter of human rights (Chapter XA Articles 28A to 28J) into the 1945 Constitution, in addition to the already existing Articles 27 (equality before the law) and 29 (freedom of religion). During the deliberations, members of PAH I asserted that human rights are *fitriyah*, inherent to the human being, and not a gift of the state or the constitution. Accordingly, they are not considered as of particularistic but as of universal validity.[35]

The new Article 28I provides that certain rights cannot be limited under any circumstances. These non-derogable rights are those to life, freedom from torture, freedom of thought, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a retroactive law. Article 28I (4) obliges the state, and especially the government to protect, to uphold and to fulfil these rights.

Article 28J (1) emphasizes that every person should respect the human rights of others. Article 28J (2) stipulates limitations on the exercise of human rights. First, each person shall abide by statutory limitations. These may only be stipulated with the purpose of guaranteeing the recognition of

32 The first general election during the 1945 Constitution was conducted in 5 July 1971 by the Provisional MPR Decree no. XI/1966 and under Law no. 15/1999 on General Election and Law no. 16/1999 on the Composition and the Position of MPR, the DPR and the DPRD. The subsequent elections during the new order era, including the 1999 election, were also conducted based on MPR Decrees.

33 See Articles 6A paragrah (2), Article 22E paragraph (3), the 1945 Constitution.

34 Article 20 of the 1945 Constitution.

35 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 316.

as well as respect for the rights and freedoms of others. In addition, rights may be limited in order to comply with just demands of morality, religious values, security, and public order in a democratic society.

### IX.5.9 Decentralization

One of the fundamental decisions by the MPR was to maintain the unitary form of the Republic of Indonesia,[36] to keep the archipelago in all its diversity together as a nation in the spirit of the nationalists, who in 1929 pledged to the idea of "one nation, one country, and one national language", the so-called *Sumpah Pemuda*. However, PAH I concluded that the level of decision-making on many issues should be brought closer to the regions to overcome the challenges of discrepancies in their development, problems in the span of administrative control, recognition of their distinct characteristics, and to promote public participation in government.[37]

Hence PAH I's conclusion that a decentralized form of government should be included in the amendments to the Constitution. Such decentralization should take into account the needs and differences of the regions concerned, meaning that not all regions would need the same degree and form of autonomy. Thus, in the second phase of amendment, the MPR determined to revise Article 18 accordingly.

The new Article 18B rules that the State shall recognise and respect units of regional authorities that are special and distinct. It further affirms that the State shall recognize and respect the traditional communities along with their traditional customary rights. Nonetheless, the provision is clear in asserting that the powers of the regions are derived from the national government and can be changed, reduced, expanded or revoked by law.

Regional heads and members of the Regional Councils are elected and mandated by the people to implement the provisions of the laws. However, their authorities are not directly derived from the sovereignty of the people. In order to link the regions better to the centre and to guarantee a better representation of regional interests the MPR founded the Regional Council (*Dewan Perwakilan Daerah*).[38] The DPD is also part of the MPR and can balance the representation of the densely populated island of Java with representatives from the 'outer islands'.[39]

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36 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 52.

37 See e.g. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 158, 182, 361.

38 See Chapter VIIA of the 1945 Constitution.

39 See e.g. Articles 2 and 3, Article 7B paragraphs (1), (6), (7), and Article 8 paragraphs (2), (3) of the reformed 1945 Constitution.

### IX.5.10 Social justice

As set forth in the Preamble of the 1945 Constitution, Indonesia aims, inter alia, to develop the intellectual life of the nation, to improve public welfare and to achieve social justice. Based on those ideals, members of PAH I considered the Constitution not merely as a set of principles and an arrangement of institutions, but also as a legal foundation and an instruction to the government to achieve these goals.

A democratic system in itself does not offer sufficient guarantees to this end,but it generates more and better information to achieve them. Therefore, the amendments to Articles 31, 32, 33 and 34 of the Constitution, and the provisions on the fundamental rights of the people as set forth in Chapter XA on Human Rights, assert that the state should actively engage in empowering the people and governing the allocation of resources.

As revealed in the discussion in PAH I, the Constitution should not emphasize a particular approach to promoting justice, such as a utilitarian, a social-egalitarian or a libertarian one.[40] Article 31 aims to improve the capacity of the person by stipulating that basic education is compulsory and must be financed by the government; Article 32 ensures the freedom of the people to maintain and develop their cultural values. The reformed Article 33 requires the state to pro-actively intervene in the economy in order to utilize the resources properly and to ensure balanced development of the regions. In doing so, the government is required to apply decent measures to avoid either a planned or a fully free market economy.[41] The guiding principle that was adopted in the fourth Amendment is the principle of just efficiency (*efisiensi berkeadilan*), which means that development has to take into account not only direct economic values, but also other values, such as the value of preservation of the environment.[42] Finally, Article 34 obliges the state to intervene to aid those who are in need of help and to establish a social system that provides health care and other services to enable them to develop themselves in accordance with human dignity.

The above provisions share a 'substantive freedom approach' to cope with poverty, inequality, poor health and similar problems, and thus realise social justice.[43] Thus, the rule of law in the amended Constitution is a

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40 See e.g. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 51, 61, 65, 145, 237-239, and 277-278.

41 See among others Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 320-321, 338, and Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 313 – 319, and 334.

42 The chairman of PAH I proposed the term *efisiensi berkeadilan* (efficiency with justice). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.,* Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 496-503.

43 See Amartya Sen, *Development as Freedom*, *op.cit.*, p. 74.

developmental and redistributive justice model of the rule of law, which is committed to eradication of backwardness, poverty and injustices.[44]

### IX.5.11 Article 29 and freedom of religion

I have not discussed Article 29 in the above subsection on human rights – even though it is part of the constitution's section on human rights – because it deserves a separate subsection. Article 29 and its guarantee of freedom of religion constituted potentially one of the main stumbling blocks of the entire amendment process because of the persistent efforts of some Islamic MPR factions to incorporate into the Constitution a provision that Islamic law would apply to all Indonesian Muslims (the so-called 'seven words' or *tujuh kata*). Despite these efforts, in the end the MPR plenary meeting in August 2002 unanimously decided to maintain the original Article 29

The debate about Article 29 was no longer a contestation about the foundation of the state as it was during the Investigating Commission's session in 1945 or in the meetings of the *Konstituante* in 1956-1959. All factions affirmed that they accepted Pancasila as the foundation of the state. Instead, the debate shifted to the role of the state in religious affairs in a state based on Pancasila, whose first principle is the Belief in the One and Only God (*Ketuhanan yang Maha Esa*).

Nonetheless, the debate concerning Article 29 continued until the very end of the amendment process. A stalemate resulted from the refusal of certain factions to withdraw their proposal to include the 'seven words' into Article 29 and the refusal of their opponents who defended the original Article 29 to take a vote on this issue. Then, through informal consultations, which involved the newly elected President Megawati Soekarnoputri and Vice-President Hamzah Haz, who represented opposing sides on the issue, the Islamic factions agreed not to force a vote on their proposal on the condition that their proposal regarding section (3) of Article 31 on Education would be accepted.[45]

However, these factions also asserted that they would continue their struggle democratically in the future. Therefore, despite the fact that the MPR formally and legally has decided to retain the original Article 29, disagreement over this fundamental issue has not been resolved but postponed. This means that the solution of Article 29 is a provisional one, leaving homework for the future.

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44 See among others Articles 31, 32, 33, and 34 of the 1945 Constitution.

45 Islamic factions proposed paragraph (3) of Article 31 should affirm that the system of national education includes "raising the level of spiritual belief, devoutness and moral character in the context of developing the life of the nation". This phrase was agreed by MPR to be part of paragraph (3) of Article 31 in the 4th amendment.

## IX.6 Final observations

Indonesia's experience in reforming its constitution as described in this book, through a continuous series of amendments from 1999 to 2002, allows us to make a few final observations.

First, a successful process of constitutional amendment requires that the main political forces in a country are willing to achieve a preliminary agreement on the need to reform. There needs to be the minimum of a shared vision among them. Once such agreement has been reached it can only be maintained through hard work and perseverance. This provides the minimum political order needed to support the democratic process for reforms, in particular when this process is lengthy.

In the case of Indonesia, the starting point was the agreement to maintain the unitary state of the Republic of Indonesia and the Preamble of the 1945 Constitution which contains the state ideology Pancasila. They symbolize the spirit of the proclamation of independence, and provide a beacon for national development that virtually all Indonesians agree upon. They represent something fundamentally and authentically Indonesian, a symbol of unity, of national identity, and of shared value, which evokes strong emotions.

Second, constitutional change is a serious and fundamental matter. It involves reconsidering the very basic foundation of the existence of the state, its ideals and its distinctive characteristics. This is something that requires time as well.

In the case of Indonesia, the political elites realized that Indonesia is a vast and heterogeneous nation, which consists of various groups, large and small, that can only be united when the state heeds its motto of *bhinneka tunggal ika*, unity in diversity. This insight translated into a process of changes to the constitution that was inclusive and deliberative – and unavoidably also slow, cumbersome and rambling – and that intentionally avoided change by way of a winner-takes-all approach in order to prevent the deepening of the fault lines in the country.

This inclusive and deliberative approach did not yield technically perfect formulations and made it harder to adopt clauses from other constitutions or as advocated for in the scholarly literature. However, it upheld the basic principles of constitutionalism and it made sure that all those involved in the process subscribed to them. As a result, the process became one of growing collective awareness of these principles and their importance among the Indonesian public at large and especially among the main political forces, instead of a process of mere constitutional transplantation.

Agreement on and comprehension of the principles of constitutionalism as well as creativity and ability to compromise are key ingredients in encouraging the propensity for aggregation and convergence among political groups with different orientations. This requires conducive circumstances that can only be created through good personal relationships among the key actors. If things work out well, this becomes a self-propelling

process in which the inclusive and deliberative process helps the actors to better understand each other.

Third, constitutional changes occur in the midst of the reality of political challenges external to the constitutional amendment process, and these changes can only be constituted in interaction with these challenges. This forces those engaged in constitutional change to also engage in efforts to prevent political challenges from becoming unmanageable and to find solutions for them. On the upside, this awareness of the political reality will inform the actors to forge tools in the constitutional amendments to prevent certain political controversies from emerging or to include tools for resolving them. Thus, the process of constitutional change is also an instrument for conflict resolution and reconciliation.

Fourth, a reformed Constitution is not an end goal. A diverse, ever-changing nation such as Indonesia, with its daily life governed by so many different social and religious norms that continuously evolve, cannot be assumed to directly follow all the principles in the Constitution. In that regard, the amended Constitution should be conceived as a better way to navigate the state and the nation towards the national ideals contained in the Preamble of the Constitution.

There is no perfect Constitution, and the amended Constitution should be a living Constitution that can be further improved. The changes to Article 37 on Amendment of the Constitution ensure that this can be done in a constitutional way, with the basic condition that the Preamble with the Pancasila as the basis of the state, and the unitary state form of the Republic of Indonesia are non-amendable. These basic principles of the nation and the ideals inherent in the Preamble will remain the foundation for Indonesia's future as a nation.

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MPR Decree no. XVII/1998 on *Human Rights.*

MPR Decree no. II/1999, on *the Rules of Procedures of the People's Consultative Assembly.*

MPR Decree no. IV/1999 on *the Broad Outlines of State Policies, 1999 – 2004.*

MPR Decree no. IX/MPR/1999 on *the Assignment of the Working Body the People's Consultative Assembly of the Republic of Indonesia to proceed with changing the 1945 Constitution of the Republic of Indonesia.*

MPR Decree no. III/MPR/2000 on *the Sources of Law and the Hierarchy of Legislation.*

MPR Decree no. IV/MPR/2000 on *the Policy Recommendations on Administration of Regional Autonomy.*

MPR decree no. VII/MPR/2000 on *the Role of Indonesian National Armed Forces and the Police of the Republic of Indonesia.*

MPR Decree no. VIII/MPR/2000 on *the Annual Reports of the High State Institutions before the People's Consultative Assembly of the Republic of Indonesia 2000 Annual Session*.

MPR Decree no. IX/MPR/2000 on *The Assignment of the Working Body of the People's Consultative Assembly of the Republic of Indonesia to prepare the draft of amendments of the 1945 Constitution of the Republic of Indonesia.*

MPR Decree no. II/MPR/2001 on *the Accountability of the the President of the Republic of Indonesia, KH Abdurrahman Wahid.*

MPR Decree no. III/MPR/2001 on *Attestation of the Vice President of the Republic of Indonesia Megawati Soekarnoputri as the President of the Republic of Indonesia.*

MPR Decree no. XI/MPR/2001 on *the Revision to MPR Decree no. IX/MPR/2000 on the Assignment of the Working Body of MPR to prepare the draft of the amendments of the 1945 Constitution of the Republic of Indonesia.*

MPR Decree no. I/MPR/2002 on *the formation of the Constitutional Commission.*

# Attachments

III.1 The outcome of the 1999 election.

| No. | Political party | % votes | ∑ seats | % seats |
|---|---|---|---|---|
| 1. | Indonesia Democratic Party – Struggle (PDIP) | 33.74 | 153 | 33.11 |
| 2. | GOLKAR Party (Partai GOLKAR) | 22.44 | 120 | 25.97 |
| 3. | United Development Party (PPP) | 10.71 | 58 | 12.55 |
| 4. | National Awakening Party (PKB) | 12.61 | 51 | 11.04 |
| 5. | National Mandate Party (PAN) | 7.12 | 34 | 7.36 |
| 6. | Moon and Star Party (PBB) | 1.94 | 13 | 2.81 |
| 7. | Justice Party (PK) | 1.36 | 7 | 1.52 |
| 8. | Democracy and Love the Nation Party (PDKB) | 0.52 | 5 | 1.08 |
| 9. | Congregation Awakening Party (PNU) | 0.64 | 5 | 1.08 |
| 10. | Justice and Unity Party (PKP) | 1.01 | 4 | 0.87 |
| 11. | People Sovereign Party (PDR) | 0.40 | 2 | 0.43 |
| 12. | Indonesia Democratic Party (PDI) | 0.33 | 2 | 0.43 |
| 13. | United Party (PP) | 0.62 | 1 | 0.22 |
| 14. | Indonesia Muslim Political Party (Masyumi) | 0.43 | 1 | 0.22 |
| 15. | Indonesian Islamic Association Party (PSII) | 0.36 | 1 | 0.22 |
| 16. | Indonesia National Party (PNI-Front Marhaenis) | 0.35 | 1 | 0.22 |
| 17. | Unity in Diversity Party (Partai Bhinneka Tunggal Ika – PBI) | 0.34 | 1 | 0.22 |
| 18. | Indonesia National Party (PNI-Massa Marhaenis) | 0.33 | 1 | 0.22 |
| 19. | Union of Indonesia's Independence Supporter Party (IP-KI) | 0.31 | 1 | 0.22 |
| | TOTAL | 95.56 | 462 | 100 |

III.2 The composition of the MPR factions after the 1999 elections.[1]

| No. | Faction | Σ Member |
|---|---|---|
| 1 | Faction of Democratic Indonesian Party – Struggle (F-PDIP) | 185 |
| 2 | Faction of Functional Groups Party (F-PG) | 182 |
| 3 | Faction of Delegations of Functional Groups (F-UG) | 73 |
| 4 | Faction of United Development Party (F-PPP) | 69 |
| 5 | Faction of National Awakening Party (F-KB) | 58 |
| 6 | Faction of Reformation (F-Reformasi)* | 48 |
| 7 | Faction of Indonesian National Armed Forces/Indonesian Police (F-TNI/Polri) | 38 |
| 8 | Faction of Crescent Moon and Star Party (F-PBB) | 14 |
| 9 | Faction of Unitary of Indonesian Nationhood (F-KKI)** | 14 |
| 10 | Faction of Association of Daulatul Ummah (F-PDU)*** | 9 |
| 11 | Faction of Democracy and Love the Nation Party (F-PDKB) | 5 |
| | Total | 695 |

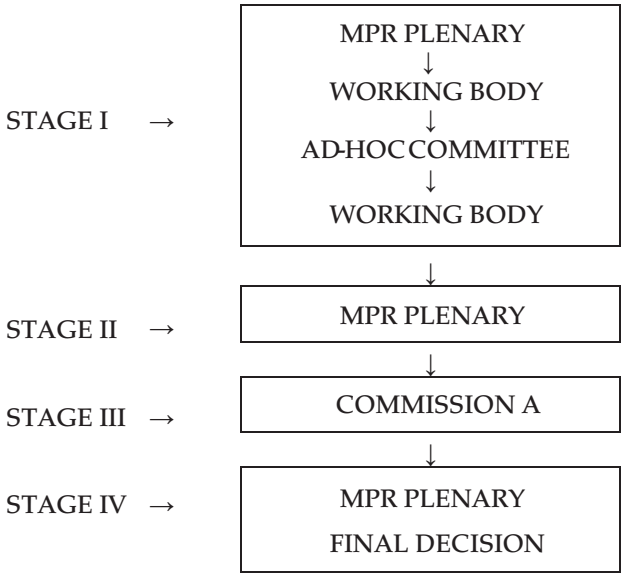
| *Notes:* | *Alliances of MPR members from:* |
|---|---|
| * | National Mandatory Party (PAN) and Justice Party (PK). |
| ** | Indonesian Democratic Party (PDI), Association of Indonesian Independence Supporters Party (IP-KI), Marhaen Mass Indonesian National Party (PNI-MM), Marhaenist Front Indonesian National Party (PNI-FM), Justice and United Party (PKP), Bhinneka Tunggal Ika – Unity in Diversity Party (PBI), United Party (PP), Democratic Catholic Party. |
| *** | Nahdlatul Ummah Party (PNU), Indonesian Islamic Association Party (PSII), Indonesian Majelis Syuro Muslimin (Masyumi), and People Sovereign Party (PDR). |

1 The MPR General Assembly decided that the MPR members elected by the Provincial People's Representatives Council should join other factions, except the Faction of the Military and the Police (F-TNI/Polri). The total number of MPR members was 700, but 5 members of the Assembly that were supposed to be elected in the province of East Timor were not since East Timor had separated from Indonesia and become the independent state of the Republic of Timor Leste.

V.1 The working schedule of the first amendment, 4 October 1999 – 19 October 1999.

| 4 OCTOBER 1999 |
|---|
| The 6th Plenary Meeting of the MPR General Session |
| Formation of the MPR Working Body |
| 6 October 1999 |
| The Meetings of the Working Body: |
| 1. The Decision of the Working Schedule |
| 2. The Formation of PAH III |
| 7 October 1999 – 13 October 1999 |
| PAH III's Programs: |
| Plenary Discussions |
| Public Hearings |
| Informal Consultation |
| Drafting Team |
| 14 October 1999 |
| The 3rd Meeting of the Working Body: |
| Progress report of PAH III |
| Approval of the Works of PAH III |
| Closing Meeting of the Working Body |
| 18 October 1999 |
| Formation of Commission C |
| Commission C's programs |
| 19 October 1999 |
| Plenary Meeting of the MPR |
| Progress Report of Commission C |
| Ratification of the First Amendment of UUD 1945 |

V.2 The stages of discussions.



V.3 The composition of the factions in the MPR Working Body (BP-MPR) during the 1 – 21 October 1999 MPR general assembly.

| No. | Faction | Number of Members |
|---|---|---|
| 1 | Faction of Democratic Indonesian Party – Struggle (F-PDIP) | 24 |
| 2 | Faction of Functional Groups Party (F-PG) | 21 |
| 3 | Faction of Delegations of Functional Groups (F-UG) | 9 |
| 4 | Faction of United Development Party (F-PPP) | 8 |
| 5 | Faction of National Awakening Party (F-KB) | 7 |
| 6 | Faction of Reformation (F-Reformasi)* | 6 |
| 7 | Faction of Indonesian National Armed Forces/Indonesian Police (F-TNI/Polri) | 5 |
| 8 | Faction of Crescent Moon and Star Party (F-PBB) | 2 |
| 9 | Faction of Unitary of Indonesian Nationhood (F-KKI)** | 2 |
| 10 | Faction of Association of Daulatul Ummah (F-PDU)*** | 1 |
| 11 | Faction of Democracy and Love the Nation Party (F-PDKB) | 1 |
| 12 | Speaker and Vice Speakers of MPR | 6 |
| | Total | 90 |

V.4 The composition of the MPR factions in Ad-Hoc Committee III of the Working Body of the MPR (PAH III, BP-MPR), October 1999.[2]

| No | FACTION | Number of Members |
|---|---|---|
| 1 | Faction of Democratic Indonesian Party – Struggle (F-PDIP) | 7 |
| 2 | Faction of Functional Groups Party (F-PG) | 5 |
| 3 | Faction of Delegations of Functional Groups (F-UG) | 2 |
| 4 | Faction of United Development Party (F-PPP) | 2 |
| 5 | Faction of National Awakening Party (F-KB) | 2 |
| 6 | Faction of Reformation (F-Reformasi)* | 2 |
| 7 | Faction of Indonesian National Armed Forces/Indonesian Police (F-TNI/Polri) | 1 |
| 8 | Faction of Crescent Moon and Star Party (F-PBB) | 1 |
| 9 | Faction of Unitary of Indonesian Nationhood (F-KKI)** | 1 |
| 10 | Faction of Association of Daulatul Ummah (F-PDU)*** | 1 |
| 11 | Faction of Democracy and Love the Nation Party (F-PDKB) | 1 |
| | Total | 25 |

2 The Assembly decided that members from Regional Delegates (*Utusan Daerah*) should join other factions, except F-TNI/Polri.

V.5 The list of the members of PAH III BP-MPR, October 1999.

| No. | Name | Faction | Position |
|---|---|---|---|
| 1 | Harun Kamil, S.H. | F-UG | Chairman |
| 2 | Drs. Slamet Effendy Yusuf, M.Si. | F-PG | Vice-Chairman |
| 3 | H. Amin Aryoso, S.H., M.H. | F-PDIP | Vice-Chairman |
| 4 | K.H. Yusuf Muhammad, Lc. | F-KB | Secretary |
| 5 | Dr. Harjono, S.H., M.C.L. | F-PDIP | Member |
| 6 | Hobbes Sinaga, S.H., M.H. | F-PDIP | Member |
| 7 | Prof. Dr. J. E. Sahetapy, S.H., M.H. | F-PDIP | Member |
| 8 | Aberson Marle Sihaloho | F-PDIP | Member |
| 9 | H. Julius Usman, S.H. | F-PDIP | Member |
| 10 | Drs. Frans F.H. Matrutty | F-PDIP | Member |
| 11 | Andi Mattalatta, S.H., M. Hum. | F-PG | Member |
| 12 | Drs. Agun Gunanjar Sudarsa | F-PG | Member |
| 13 | H.M. Hatta Mustafa, S.H. | F-PG | Member |
| 14 | Drs. T.M. Nurlif | F-PG | Member |
| 15 | H. Zain Bajeber, S.H. | F-PPP | Member |
| 16 | Drs. H. Lukman Hakim Saifuddin | F-PPP | Member |
| 17 | Dra. Khofifah Indar Parawansa, M.Si. | F-KB | Member |
| 18 | Ir. Hatta Rajasa | F-Reformasi | Member |
| 19 | H. Patrialis Akbar, S.H. | F-Reformasi | Member |
| 20 | Hamdan Zoelva, S.H. | F-PBB | Member |
| 21 | Drs. Antonius Rahail | F-KKI | Member |
| 22 | Drs. H. Asnawi Latief | F-PDU | Member |
| 23 | Drs. Gregorius Seto Harianto | F-PDKB | Member |
| 24 | Vice Air Marshall Hendi Tjaswadi, S.H., S.E., M.B.A., C.N., M. Hum. | F-TNI/Polri | Member |
| 25 | Dra. Valina Singka Subekti, M.A. | F-UG | Member |

VI.1 The working schedule of the second amendment stage, 25 November 1999 – 18 August 2000.

| **The Schedule of the Process of the Second Amendment of the 1945 Constitution 25 November 1999 – 18 August 2000** |
|---|
| 25 November 1999 |
| *The 4th Meeting of the Working Body* |
| Formation of PAH I |
| 29 November 1999 – 3 March 2000 |
| *PAH I's Programs* |
| Plenary Discussions |
| Public Hearings, Visits to Regions, Seminars, Workshops, Comparative Studies |
| Selected Team |
| Informal Consultations |
| Drafting Team |
| 6 March 2000 |
| *The 5th Meeting of the Working Body* |
| Progress Report of PAH I |
| 7 March 2000 – 22 May 2000 |
| *PAH I's Programs* |
| Plenary Discussions |
| Public Hearings |
| Selected Team |
| Informal Consultations |
| Drafting Team |
| 23 May 2000 |
| *The 6th Meeting of the Working Body* |
| Progress Report of PAH I |
| 23 May 2000 – 29 July 2000 |
| *PAH I's Programs* |
| Plenary Discussions |
| Informal Consultations |
| Drafting Team |
| 2 August 2000 |
| *The 7th Meeting of the Working Body* |
| Progress Report of PAH I |
| Adoption of the Works of PAH I |
| Closing of the Working Body |

| 7 August 2000 – 11 August 2000 |
|---|
| *MPR Plenary Meeting* |
| Factions' General Views on the Works of the Working Body |
| Formation of Commission A |
| 11 August 2000 – 14 August 2000 |
| *Commission A's Programs* |
| Plenary Discussions |
| Informal Consultations |
| Drafting Team |
| 15 August 2000 – 18 August 2000 |
| *MPR Plenary Meeting* |
| Progress Report of Commission A |
| Factions' Final Notes |
| Ratification of the Second Amendment to the 1945 Constitution |

VI.2 The composition of the MPR factions in Ad-Hoc Committee I of the Working Body of the MPR (PAH I, BP-MPR), 1999 – 2000.

| **No.** | **Faction** | **Number of Member** |
|---|---|---|
| 1 | Faction of Democratic Indonesian Party – Struggle (F-PDIP) | 12 |
| 2 | Faction of Functional Groups Party (F-PG) | 11 |
| 3 | Faction of Delegations of Functional Groups (F-UG) | 4 |
| 4 | Faction of United Development Party (F-PPP) | 4 |
| 5 | Faction of National Awakening Party (F-KB) | 4 |
| 6 | Faction of Reformation (F-Reformasi)* | 3 |
| 7 | Faction of Indonesian National Armed Forces/Indonesian Police (F-TNI/Polri) | 2 |
| 8 | Faction of Crescent Moon and Star Party (F-PBB) | 1 |
| 9 | Faction of Unitary of Indonesian Nationhood (F-KKI)** | 1 |
| 10 | Faction of Association of Daulatul Ummah (F-PDU)*** | 1 |
| 11 | Faction of Democracy and Love the Nation Party (F-PDKB) | 1 |
| | Total | 44 |

VI.3 The list of the members of PAH I of the Working Body of the MPR (BP-MPR) 1999-2000.[3]

| No. | Name | Faction | Position |
|---|---|---|---|
| 1 | Drs. Jakob Tobing, MPA | F-PDIP | Chairman |
| 2 | Harun Kamil, SH | F-UG | Vice-Chairman |
| 3 | Drs. Slamet Effendy Yusuf, M.Si. | F-PG | Vice-Chairman |
| 4 | Drs. Ali Masykur Musa, M.Si. | F-KB | Secretary |
| 5 | Hobbes Sinaga, S.H., M.H. | F-PDIP | Member |
| 6 | Prof. Dr. J. E. Sahetapy, S.H., M.H. | F-PDIP | Member |
| 7 | May. Gen. Pol. (ret). Drs. Sutjipno | F-PDIP | Member |
| 8 | I Dewa Palguna, S.H., M.H. | F-PDIP | Member |
| 9 | Prof. Dr. Frans F.H. Matrutty | F-PDIP | Member |
| 10 | H. Julius Usman, S.H. | F-PDIP | Member |
| 11 | Dr. Harjono, S.H., M.C.L.H. | F-PDIP | Member |
| 12 | Ir. Pataniari Siahaan | F-PDIP | Member |
| 13 | Drs. Soewarno | F-PDIP | Member |
| 14 | Drs. Katin Subyantoro | F-PDIP | Member |
| 15 | Dr. Drs. Muhammad Ali, S.H., Dipl. Ed., M.Sc. | F-PDIP | Member |
| 16 | Drs. Baharuddin Aritonang | F-PG | Member |
| 17 | Ir. Ahmad Hafiz Zawawi, M.Sc. | F-PG | Member |
| 18 | Dra. H. Rosnaniar | F-PG | Member |
| 19 | Drs. Agun Gunanjar Sudarsa | F-PG | Member |
| 20 | Andi Mattalatta, S.H., M. Hum. | F-PG | Member |
| 21 | H.M. Hatta Mustafa, S.H. | F-PG | Member |
| 22 | Dr. H. Happy Bone Zulkarnain | F-PG | Member |
| 23 | Ir. H. Rully Azwar | F-PG | Member |
| 24 | Drs. T.M. Nurlif | F-PG | Member |
| 25 | Drs. Theo L. Sambuaga | F-PG | Member |
| 26 | H. Ali Hardi Kiaidemak, S.H. | F-PPP | Member |
| 27 | Drs. H. Lukman Hakim Saifuddin | F-PPP | Member |
| 28 | H. Zain Bajeber, S.H. | F-PPP | Member |
| 29 | H. Alimarwan Hanan, S.H. | F-PPP | Member |
| 30 | Drs. Abdul Khaliq Ahmad | F-KB | Member |
| 31 | K.H. Yusuf Muhammad, LC. | F-KB | Member |
| 32 | Drs. K.H. Syarief Moehammad Alaydarus | F-KB | Member |
| 33 | Prof. Dr. H. Soedijarto | F-UG | Member |

3 Secretariat-General of MPR.

| No. | Name | Faction | Position |
|---|---|---|---|
| 34 | Dra. Valina Singka Subekti, M.A. | F-UG | Member |
| 35 | Sutjipto, S.H. | F-UG | Member |
| 36 | Ir. A.M. Luthfi | F-Reformasi | Member |
| 37 | H. Patrialis Akbar, S.H. | F-Reformasi | Member |
| 38 | Dr. Fuad Bawazier | F-Reformasi | Member |
| 39 | Vice Air Marshall Hendi Tjaswadi, S.H., S.E., M.B.A., C.N., M. Hum. | F-TNI/Polri | Member |
| 40 | May. Gen. Pol. Drs. Taufiequrochman Ruki | F-TNI/Polri | Member |
| 41 | Hamdan Zoelva, S.H. | F-PBB | Member |
| 42 | Drs. Antonius Rahail | F-KKI | Member |
| 43 | Drs. H. Asnawi Latief | F-PDU | Member |
| 44 | Drs. Gregorius Seto Harianto | F-PDKB | Member |

## VI.4 The Annex of MPR Decree no. IX/2000.

| **Annex of MPR Decree no. IX/MPR/2000 and related original texts of UUD 1945 after the 1st amendment.** | | |
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| *Chapter/ Article* | *Original* | *Proposed Alterations* |
| CHAPTER I | CHAPTER I<br>FORM OF THE STATE AND SOVEREIGNTY | CHAPTER I<br>THE FORM OF THE STATE, (THE BASIS), AND SOVEREIGNTY |
| Article 1 | (1) The State of Indonesia shall be a unitary state in the form of a republic.<br>(2) Sovereignty is in the hands of the people and is exercised in full by the People's Consultative Assembly. | (1) Not changed.<br><br>(2) *Alternative I:*<br>The state basis is sufficiently in the Preamble of UUD 1945.<br><br>*Alternative II:*<br>The state basis is incorporated in Chapter I, with alternative formulations:<br>a. The state basis is Pancasila, i.e. Ketuhanan Yang Maha Esa (Belief in the Oneness of God), Kemanusiaan Yang Adil dan Beradab (Just and civilized humanity), Persatuan Indonesia (The unity of Indonesia), Kerakyatan Yang Dipimpin oleh Hikmat Kebijaksanaan, Dalam Permusyawaratan dan Perwakilan (Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives), Keadilan Sosial bagi seluruh Rakyat Indonesia, (Social justice for all of the people of Indonesia).<br>b. The state of Indonesia based on Ketuhanan Yang Maha Esa (Belief in the Oneness of God), Kemanusiaan Yang Adil dan Beradab (Just and civilized humanity), Persatuan Indonesia (The unity of Indonesia), Kerakyatan Yang Dipimpin oleh Hikmat Kebijaksanaan, Dalam Permusyawaratan dan Perwakilan (Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives), Keadilan Sosial bagi seluruh Rakyat Indonesia, (Social justice for all of the people of Indonesia).<br>(3) The sovereignty is in the hands of the people and exercised by the People's Consultative Assembly.<br>(4) The state of Indonesia is a state based on rule of law. |

| CHAPTER II | CHAPTER II<br>PEOPLE's CONSULTATIVE ASSEMBLY | CHAPTER II<br>PEOPLE's CONSULTATIVE ASSEMBLY |
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| Article 2 | (1) The People's Consultative Assembly shall consist of the members of the House of Representatives augmented by the delegates from the regional territories and groups as provided for by statutory regulations.<br>(2) The People's Consultative Assembly shall convene a sitting at least once in every five years in the capital of the state.<br>(3) All decisions of the People's Consultative assembly shall be taken by a majority vote. | (1) The People's Consultative Assembly (MPR) consists of members of the House of Representatives and members of the Regional Council who are elected in elections and augmented with delegations of certain communities who, due to their tasks and functions, do not exercise their right to vote.<br>(2) Not changed.<br>(3) Not changed. |
| Article 3 | The People's Consultative Assembly shall determine the constitution and the State's policies in broad outlines (GBHN). | *Alternative 1: If the President is elected by the MPR.*<br>The tasks, the authorities, and the rights of the MPR are:<br>1. To alter and to determine the Constitution.<br>2. To determine the guidelines of the policy of State.<br>3. To elect, to determine, and to inaugurate the President.<br>4. *Alternative 1:*<br>To dismiss the President and/or the Vice President in his/her tenure if proven that they are violating the Constitution, the State's policies in broad outlines, committing treason, conducting crimes, conducting bribery, and/or conducting a disgraceful act.<br>*Alternative 2:*<br>To dismiss the President and/or the Vice President in his/her tenure if proven that they are violating the Constitution, the State's policies in broad outlines, committing treason, conducting crimes, conducting bribery, and/or conducting disgraceful acts, which is proven by the Constitutional Court.<br>5. *Alternative 1:*<br>To evaluate the President's accountability at the end of his/her tenure.<br>*Alternative 2:*<br>Not necessary.<br>6. May establish a Working Body to prepare the implementation of the Assembly programs. |

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| | | *Alternative 2: If the President is elected directly by the people.*<br>The tasks, the authorities, and the rights of the Assembly:<br>1. To alter and to determine the Constitution.<br>2. *Alternative 1:*<br>Not necessary to determine GBHN.<br>*Alternative 2:*<br>To determine and to ratify GBHN.<br>3. *Alternative 1:*<br>To determine and to inaugurate the elected President and Vice President.<br>*Alternative 2:*<br>To determine 2 pairs of the candidates of the President and Vice President to be elected directly by the people, and to inaugurate the elected President and Vice President.<br>4. *Alternative 1:*<br>To dismiss the President and/or the Vice President in his/her tenure if proven violating the Constitution, violating the state policy outlines, committing treason, conducting crimes, conducting bribery, and/or conducting disgraceful acts.<br>*Alternative 2:*<br>To dismiss the President and/or the Vice President in his/her tenure if proven violating the Constitution, violating the state policy outlines, committing treason, conducting crimes, conducting bribery, and/or conducting disgraceful acts, which is proven by the Constitution Court.<br>5. *Alternative 1:*<br>To evaluate the President's accountability at the end of his/her tenure.<br>*Alternative 2:*<br>Not necessary.<br>6. May establish a Working Body to prepare the implementation of MPR programs. |
| Article 3A | None | Article 3A |
| | | Further provisions on the composition, position and execution of tasks, authority, and rights of the MPR, are regulated by MPR decree. |
| CHAPTER III | CHAPTER III<br>STATE GOVERNANCE POWER | CHAPTER III<br>STATE GOVERNANCE POWER |
| Article 4 | (1) The President of the Republic of Indonesia shall hold the power of government in accordance with the Constitution.<br>(2) In exercising his duties, the President shall be assisted by a Vice-President. | (1) The President of the Republic of Indonesia as the Head of State and the Head of Government executes the state governance in accordance with the Constitution.<br>(2) Not changed. |

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| Article 6 | (1) The President shall be a native Indonesian citizen.<br><br>(2) The President and the Vice-President shall be elected by the People's Consultative Assembly by a majority vote. | (1) The President and the Vice President are Indonesian citizens since birth and have never accepted another citizenship through their own will.<br>(2) None. |
| Article 6A | None | *Alternative 1 variant 1:*<br>(1) The President and the Vice President are elected in a pair directly by the people.<br>(2) The package of the candidates of President and Vice President elected by the MPR are determined by the 2 packages that obtain the most votes.<br>(3) The President and the Vice President are declared elected if the pair obtain the most electoral votes.<br>(4) The conditions and the procedures of the election of the President and the Vice President are regulated by law.<br>*Alternative 1 variant 2:*<br>(1) The President and the Vice-President are elected in a package directly by the people.<br>(2) The president and the Vice-President are determined elected if the pair obtain the majority of votes.<br>(3) The requirements and the procedures of the election of the President and the Vice-President shall be further regulated by law.<br>*Alternative 2 variant 1:*<br>The President and the Vice President are elected by the MPR with the majority of votes from the pair of candidates of President and Vice President nominated by the first and the second winning political parties of the election, which is conducted directly, publicly, freely, confidentially, fairly and honestly.<br>*Alternative 2 variant 2:*<br>(1) The candidates of President and Vice President are decided in one package by the political parties participating in the election before the implementation of the election.<br>(2) A package that obtains more than 50% of the votes in the election is determined by the MPR as President and Vice President.<br>(3) In case no package of the candidates of President and Vice President obtain more than 50% of the votes, the two packages of candidates that obtain the first and the second most votes in an election are elected by the MPR and the package that obtain the most votes is determined as the President and the Vice President.<br>(4) The conditions and the procedure of electing the President and the Vice President are regulated in legislation. |

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| Article 8 | Should the President pass away, resign or be unable to perform his/her duties during the tenure, he/she will be succeeded by the Vice-President until the end of his/her tenure. | (1) If the President passes away, resigns, is dismissed, or is not able to undertake his/her responsibilities in his/her tenure, he/she will be succeeded by the Vice President until the end of the tenure.<br>(2) In vacancy of the Vice President:<br>*Alternative 1:*<br>In case of vacancy of the vice presidency, the MPR conducts a special session to elect and determine the Vice President.<br>*Alternative 2:*<br>No need to fill up the vice presidency.<br>(3) The President and the Vice President are permanently hindered.<br>*Alternative 1:*<br>In case the president and the Vice President simultaneously pass away, resign, are dismissed, or are not able to undertake their responsibilities in their tenure, the acting president is (the leadership of MPR) (the speaker of DPR and the speaker of DPD) (Minister of Foreign Affair, Minister of Home Affairs, Minister of Defence).<br>Within one month, the MPR should conduct a special session to elect the new president and vice president to fill up the remaining (presidential) tenure.<br>*Alternative 2:*<br>In case the president and the Vice President simultaneously pass away, resign, are dismissed, or not able to undertake their responsibilities in their tenure, the acting president is (the leadership of MPR) (the speaker of DPR and the speaker of DPD) (Minister of Foreign Affair, Minister of Home Affairs, Minister of Defence).<br>Within and no later than (three) (six) months, the acting President should conduct an election for the new President and Vice President for a tenure of five years. |
| Article 10A | None | The President holds the highest authority upon the National Police of the Republic of Indonesia. |
| Article 11 | In agreement with the House of representatives, the President declares war, makes peace and concludes treaties with other states. | (1) Not changed.<br>(2) The President in making other international agreements which result in a burden over the state finances, and/or requires changes or making statutes should make such agreements with the approval of the DPR.<br>(3) Further provisions on the international agreement shall be regulated by law. |
| Article 15A | None | Further provisions on the presidency shall be regulated by law. |

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| CHAPTER IV | CHAPTER IV<br>SUPREME ADVISORY BOARD. | *Alternative 1:*<br>Chapter on the SUPREME ADVISORY BOARD omitted.<br>The Supreme Advisory Board is abolished, replaced with a new formulation, as follows: |
| Article 16 | (1) The composition of the Supreme Advisory Council shall be determined by law.<br>(2) The Council has the duty to reply to inquiries raised by the President and has the right to submit recommendations to the government. | |
| Article 16A | None | The President can form an advisory body which functions to give considerations to the President in accordance with the needs that are determined by law. (To be incorporated into Chapter III on The State Governance Power). |
| | None | *Alternative 2:*<br>The Supreme Advisory Board is not changed, with the following formulation:<br>CHAPTER IV<br>THE SUPREME ADVISORY BOARD<br>Article 16<br>The Supreme Advisory Board comprises of members who are elected by the DPR based on individual integrity, national insight, societal prominences in society, and their respective dedications toward the country and the nation.<br>Article 16A<br>The Board is obliged to answer to the President's inquiries and is entitled to submit proposals to the President in overcoming the state's matters. |
| Article 16B | None | The composition and the position of the Supreme Advisory Board is determined by law. |
| CHAPTER V | CHAPTER V<br>STATE's MINISTERS | CHAPTER V<br>STATE's MINISTERS |
| Article 17 | (1) The President shall be assisted by the State Ministers.<br>(2) These Ministers shall be appointed and removed by the President.<br>(3) Each State Minister shall be responsible for a particular area of Government activity. | (1) Not changed.<br>(2) Not changed.<br>(3) Not changed.<br>(4) The formation, change, and dissolution of state ministries shall be further regulated by law. |

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| CHAPTER VII A | None | CHAPTER VIIA<br>REGIONAL COUNCIL |
| Article 22D | None | (1) Members of DPD are elected from each province through elections.<br>(2) Each member of the DPD from each province is equal and the number of all DPD members shall not exceed one-third of the number of DPR members.<br>(3) The composition of the DPD shall be regulated by law. |
| Article 22E | None | (1) The DPD may submit to the DPR the bills related to regional autonomy, the relationship between the centre and the regions, the formation, the division and the merging of a region, management of the natural resources and other economic resources and the financial balances between the centre and regions.<br>(2) *Alternative 1:*<br>The DPD extends considerations to the DPR upon the bill on state budget and the bills in regard to taxation, fiscal matters, religions, regional autonomy, the relationship between the centre and the regions, the formation, the division and the merging of a region, management of the natural resources and other economic resources and the financial balances between the centre and regions.<br>*Alternative 2:*<br>The DPD extends considerations to the DPR upon the bill on state budget and the bills in regard to taxation, fiscal matters, religions, and participating in the debates on bills on regional autonomy, the relationship between the centre and the regions, the formation, the division and the merging of a region, the management of the natural resources and other economic resources and the financial balances between the centre and regions.<br>(3) The DPD may control the implementation of the laws in regard to regional autonomy, the formation, the division and the merging of the regions, the relationship between the centre and the regions, the management of the natural and economic resources, the implementation of the state budget, taxation and fiscal matters, and religions and to submit the outcomes of the control to the DPR as considerations for further follow-up.<br>(4) A member of the DPD may be dismissed from its membership based on the decision of Honorary Council which is formed by the DPD if he/she is proven to commit treason to the state, bribery crimes, corruption, and other crimes with a sanction of imprisonment of 5 years or more, or by conducting themselves in other disgraceful manners. |

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| CHAPTER VIIB | None | CHAPTER VIIB<br>THE GENERAL ELECTIONS |
| Article 22F | None | (1) The general election is the realization of the people's sovereignty that is conducted in a general, free, secret, honest, fair and direct manner once every five years.<br>(2) The general elections are conducted to elect members of the DPR, DPD, and DPRD.<br>(3) The general elections to elect DPR and DPRD members are participated in by political parties.<br>(4) The general election to elect DPD members is participated in by candidates from political parties and individual candidates.<br>(5) The general elections shall be organized by a general election commission of a national, permanent, and independent character.<br>(6) Further provisions regarding general elections shall be regulated by law. |
| CHAPTER VIII | CHAPTER VIII<br>FINANCE | CHAPTER VIII<br>FINANCE |
| Article 23 | (1) The State Budget shall be determined annually by law. In the event that the House of Representatives does not approve a draft budget, the government shall adopt the budget of the preceding year.<br>(2) All Government taxes shall be further regulated by law.<br>(3) The forms and denominations of the currency shall be further regulated by law.<br>(4) Other financial matters shall be further regulated by law.<br>(5) In order to examine the accountability of the state finance, a State Audit Board shall be established by statutory regulation. The findings of the Board shall be reported to the House of representatives. | (1) The State Budget is determined annually by law.<br>(2) The bill on the State Budget shall be submitted by the President to be discussed with the DPR to achieve the joint approval to become a law. In the discussion process, the DPR considers the opinions of the DPD.<br>(3) In case the DPR does not approve the bill on the State Budget submitted by the President, the Government implements the State Budget of the preceding year. |
| Article 23A | None | All taxes and other compulsory levies for the needs of the state shall be further regulated by law. |
| Article 23B | None | The currency of the Republic of Indonesia is Rupiah. |

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| Article 23C | None | Other matters concerning state finance shall be further regulated by law. [Originating from Article 23 clause (4) of the original text]. |
| Article 23D | None | *Alternative 1:*<br>(1) The state of Indonesia owns a central bank which is independent, namely Bank Indonesia which holds authority to issue and to circulate currency.<br>(2) The composition, position and other authorities shall be regulated by law.<br>*Alternative 2:*<br>The state of Indonesia owns a central bank or other finance authority institution which is independent and holds the authority to issue and to circulate currency, whose composition, position and other authorities shall be regulated by law.<br>(3) *Alternative 1:*<br>The leadership of the central bank is nominated and inaugurated by the President with the approval of the DPR.<br>*Alternative 2:*<br>The leadership of the central bank or other finance authority institution is nominated and inaugurated by the President with the approval of the DPR. |
| CHAPTER VIIIA | None | CHAPTER VIIIA<br>BADAN PEMERIKSA KEUANGAN (BPK)<br>THE STATE AUDITOR BOARD |
| Article 23E | None | (1) BPK is a state institution which is free from government and other state institution influences, which functions to supervise and to audit the management and accountability of state finance.<br>(2) BPK is the sole state institution for supervising and auditing state finance which is based in the capital city and shall have representatives in every capital city of the provinces.<br>(3) The result of the supervising and examining of state finance is submitted to the House of Representatives and the Regional Council.<br>(4) The result of supervising and examining of regional finance is submitted to the Regional Council.<br>(5) The results of the supervision and examination should be followed up by the institutions and/or representative institutions which are referred to in this article in accordance with legislation. |

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| Article 23F | None | (1) The members of BPK are selected by the House of Representatives with regard to the considerations of the Regional Council and shall be installed by the President.<br>(2) The leadership of BPK is elected from among and by the members of BPK. |
| Article 23G | None | Further provisions concerning BPK shall be regulated by law. |
| CHAPTER IX | CHAPTER IX<br>THE JUDICIAL POWER | CHAPTER IX<br>KEKUASAAN KEHAKIMAN DAN PENEGAKAN HUKUM<br>(THE JUDICIAL POWER AND LAW ENFORCEMENT) |
| Article 24 | (1) The judicial power shall be implemented by a Supreme Court and such other courts of law as provided by law.<br>(2) The composition and powers of these legal bodies shall be further regulated by law. | (1) The judicial power is an independent power and free from the influences of other state institutions and from any other parties.<br>(2) The judicial power shall be carried out by a Supreme Court and by its subordinate judicatory bodies dealing with general, religious, military, state administrative judicial fields, which its composition, functions and authorities shall be further regulated by law. |
| Article 24A | None | The Supreme Court shall have the competence to try cassation cases, to review regulations made under a law against that law, as well as other competences as provided by law. |
| Article 24B | None | (1) The supreme justices shall be installed and dismissed by The People's Consultative Assembly based on regard by the Judicial Commission.<br>(2) The Judicial Commission is independent, with its composition, position and membership regulated by law.<br>(3) The chairman and the vice chairman of the Supreme Court shall be chosen from among and by the supreme justices. |
| Article 25 | The appointment and removal of justices shall be further regulated by law. | The conditions to become or to be dismissed as a judge are determined by law. |
| Article 25A | None | To uphold the honor and maintain the dignity and conduct of the justices, the Honorary Council of Justices shall be established. |

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| Article 25B | None | (1) Within the realm of the Supreme Court, a Constitutional Court is established.<br>(2) The Constitutional Court possesses the authority to review the law materially, giving a decision on the conflict between the laws, (*alternative 1:* make a decision over the dispute of authority between state agencies, between central and local government. *Alternative 2:* no need), and exercise other authorities provided by law.<br>(3) The decision of the Constitutional Court is the first and final decision.<br>(4) *Alternative 1:*<br>The Constitutional Court consists of nine justices, who are installed and dismissed by the People's Consultative Assembly, in which 3 justices are proposed by the President, 3 justices are proposed by the Supreme Court, and 3 justices are proposed by the DPR.<br>*Alternative 2:*<br>The justices of the Constitutional Court are appointed and dismissed by the People's Consultative Assembly, whereas the structure and the number of the justices of the Constitutional Court shall be determined by law.<br>(5) The justice of the Constitutional Court should be a statesman who masters the Constitution and constitutional law, and shall not act concurrently as a state official, and fulfil other requirements established by the law. |
| Article 25C | None | (1) The Attorney is an independent state agent exercising the power of prosecution in criminal cases.<br>(2) The Attorney is led by an Attorney General who is appointed and dismissed by the President with the approval of the House of Representatives (with regard to considerations of the Regional Council).<br>(3) The composition, the position, and other authorities of the Attorney shall be regulated by law. |
| Article 25D | None | (1) Investigation in criminal cases is the duty and the authority of Indonesian National Police which is regulated by law.<br>(2) Other officials may conduct investigations at the behest of the law. |
| CHAPTER XI | CHAPTER XI<br>RELIGION | CHAPTER XI<br>*Alternative 1:*<br>RELIGION (Not changed).<br>*Alternative 2:*<br>KETUHANAN YANG MAHA ESA (THE ONE AND ONLY GOD). |

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| Article 29 | (1) The State shall be based in belief in the One and Only God.<br>(2) The State guarantees all persons the freedom of worship, each according to his/her own religion or belief. | Section (1):<br>*Alternative 1:*<br>(1) The State is based on belief in the Oneness of God (Ketuhanan Yang Maha Esa) (Not changed).<br>*Alternative 2:*<br>(1) The State is based on belief in the Oneness of God (Ketuhanan Yang Maha Esa) with the obligation to implement Islamic sharia for its followers.<br>*Alternative 3:*<br>(1) The State is based on belief in the Oneness of God (Ketuhanan Yang Maha Esa) with the obligation to implement the teachings of the religions by its respective followers.<br>*Alternative 4:*<br>(1) The State is based on Belief in the Oneness of God, Just and civilized humanity), The unity of Indonesia, Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives, Social justice for all of the people of Indonesia.<br>Section (2):<br>*Alternative 1:*<br>(2) The State guarantees all persons the freedom of worship, each according to his/her own religion or belief. (Not changed).<br>*Alternative 2:*<br>(2) The State guarantees all persons the freedom of belief to his/her religion and to worship in accordance with his/her religion.<br>*Alternative 3:*<br>(2) The State Guarantees all persons the freedom to believe in his/her religion and to worship in accordance with his/her religion and belief and to build their respective places of worship.<br>*Alternative 4.*<br>(2) The State Guarantees all persons the freedom to believe in his/her religion, to implement the teachings of the religions and to worship in accordance with the beliefs of their respective religions.<br>On addition of new section:<br>*Alternative 1:*<br>Not necessary.<br>*Alternative 2:*<br>Addition of new sections:<br>a. The State should protect the people from the spreading of the teaching which is contrary to the belief in the oneness of God.<br>b. The State administration must not be contradictory with the values, norms and the religious law.<br>c. The State should adhere to the values of ethics and human morality thought by religions. |

| CHAPTER XIII | CHAPTER XIII<br>EDUCATION | CHAPTER XIII<br>EDUCATION AND CULTURE |
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| Article 31. | (1) Every citizen has the right to receive education.<br>(2) The Government shall manage and organise one system of national education which shall be further regulated by law. | (1) Each citizen has the right to an education.<br>(2) Each citizen is obliged to follow elementary education and the government has the duty to fund this.<br>Section (3):<br>*Alternative 1:*<br>(3) The Government organizes and implements a national education system, to be regulated by law.<br>*Alternative 2:*<br>(3) The Government organizes and implements a national education system that aims at educating the national life and in creating humans with noble character, that shall be regulated by law.<br>*Alternative 3:*<br>(3) The Government organizes and implements a national education system, to be regulated by law, that aims to improve the faith, piety, morality and education on national life, which shall be regulated by law.<br>Section 4:<br>*Alternative 1:*<br>(4) The State is obliged to prioritize the education budget from the State Budget to meet the needs of implementation of the national education.<br>*Alternative 2:*<br>(4) The State is obliged to prioritize the education budget, using at least 20% of the State Budget and the Regional Budgets to meet the needs of implementing national education.<br>Section 5:<br>*Alternative 1:*<br>(5) The Government advances science and technology with a view to promoting civilization and unity.<br>*Alternative 2:*<br>(5) The Government advances science and technology which is not contradictory to the religious values and to promoting civilization and unity and for the well-being of humanity. |
| Article 32 | The Government shall advance the national culture. | (1) The State guarantees the good old cultural values and developing the better new cultural values.<br>(2) The Government advances the Indonesian national culture while guaranteeing the freedom of the society to preserve and to develop their cultures.<br>(3) The State honors and nurtures local languages as national cultural treasures. |

| CHAPTER XIV | CHAPTER XIV<br>SOCIAL WELFARE | CHAPTER XIV<br>NATIONAL ECONOMY AND SOCIAL WELFARE |
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| Article 33 | (1) The economy shall be organized as a common endeavor based upon the principles of the familial system.<br>(2) Sectors of production which are important for the country and affect the life of the people shall be under powers of the state.<br>(3) The land, the waters and the natural riches contained therein shall be controlled by the State and exploited to the greatest benefit of the people. | (1) The economy is to be structured and developed as a sustainable common endeavor of all people based on principles of justice, efficiency, and economic democracy to realize the prosperity, welfare, and social justice for all people.<br>(2) Production sectors that are vital to the state and that affect the livelihood of a considerable part of the population are to be controlled by the state based on principles of justice and efficiency that shall be regulated by law.<br>(3) The land and the waters as well as the natural riches therein are to be managed and/or controlled by the state and to be utilized to the greatest benefit of the people, that shall be regulated by law.<br>(4) The economic actors are the cooperatives, state enterprises, and private business including individual endeavors.<br>(5) Organizing and developing the national economy should always prevent damage to and improve the environment, taking into consideration and respecting traditional rights, as well as guaranteeing the balanced development of the whole country. |
| Article 34 | Impoverished persons and abandoned children shall be taken care of by the State. | (1) Not changed.<br>(2) The State develops a social security system for all people and to empower the weak and disabled people in accordance with humanity.<br>(3) The State is responsible for providing health service facilities and adequate public services. |
| CHAPTER XVI | CHAPTER XVI<br>AMENDMENTS TO THE CONSTITUTION | CHAPTER XVI<br>AMENDMENTS TO THE CONSTITUTION. |
| Article 37 | (1) In order to amend the Constitution, not less than 2/3 of its member of the People's Consultative Assembly shall be in attendance.<br>(2) Decisions shall be taken with the approval of not less than 2/3 of its members in attendance. | (1) Proposals to amend articles of the Constitution can be put on the agenda of the MPR session if submitted by at least 1/3 of the total number of members in the MPR.<br>(2) Each proposal to amend articles of the Constitution has to mention clearly which part should be amended.<br>(3) To amend articles of the Constitution the MPR session has to be attended by at least 2/3 of all members of the MPR [Originated from the original article 37 (1)]. |

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| | | (4) A decision to amend articles of the Constitution requires the agreement of at least more than 3/4 of all the MPR members, except for the amendment of the Preamble of UUD 1945, the Form and the Integrity of the Territory of the Unitary State of the Republic of Indonesia, which should require the consent of more than 50% of the people of Indonesia.<br>(5) The requirements for amendments of the Constitution shall be further regulated by the decision of the People's Consultative Assembly. |
| | TRANSITIONAL PROVISIONS | TRANSITIONAL PROVISIONS |
| Article I | The Preparatory Committee for Indonesia's Independence shall arrange and conduct the transfer of administration to the Government of Indonesia. | All existing state institutions and regulations shall remain valid as long as they have not been replaced by new ones under this Constitution. |
| Article II. | All existing state institutions continue to function and all regulations remain valid as long as no new ones are established in conformity with this Constitution. | The additional members of the People's Consultative Assembly referred to in Article 2 section (1) UUD 1945 are the delegates of the Indonesian National Military and delegates of the Indonesian National Police.<br>The provisions on the additional members of the People's Consultative Assembly as referred to in this Article are valid as long as the People's Consultative Assembly do not change them. |
| Article III | For the first time, the President and the Vice President shall be elected by the Preparatory Committee for Indonesia's Independence. | None |
| Article IV | Prior to the formation of the People's Consultative Assembly, the House of Representatives and the Supreme Advisory Council in accordance with this Constitution, all the powers shall be exercised by the President assisted by a national committee. | None |
| | ADDITIONAL PROVISIONS. | CLOSING PROVISIONS |
| | (1) Within six months after the end of the Great Asia War, the President of Indonesia shall take preparatory steps and execute all the provisions of this Constitution.<br>(2) Within six months after its formation, the People's Consultative Assembly shall convene a sitting to determine the Constitution. | The amendments to this Constitution are ratified on ..... |

VI.5 The positions of the MPR factions regarding Article 29 at the end of the second amendment stage.

| **The positions of the Factions on Article 29 on 20 June 2000.** | | | |
|---|---|---|---|
| F-PDIP | The State shall be based upon the belief in One and Almighty God. | The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion or belief. | |
| F-PG | The State shall be based upon the belief in One and Almighty God. | The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion. | The State's operation shall not be contrary to the values, the norms, and the laws of the religions. |
| F-UG | The State shall be based upon the belief in One and Almighty God. | The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion. | |
| F-PPP | The State shall be based upon the belief in One and Almighty God with the obligation to implement Islamic Shari'a for the adherents. | The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion. | The State shall prohibit the spread of ideologies contrary to the belief in One and only God. |
| F-KB | The State shall be based upon the belief in One and Almighty God. | The State upholds ethical values and morals of humanity which are taught by every religion. | The State guarantees all persons the freedom to believe his/her religion and to worship, each according to the belief of his/her religion |
| F-Reformasi | The State shall be based upon the belief in One and Almighty God. | The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion. | Every follower of a religion is obliged to implement the teachings of their respective religion. |
| F-TNI/Polri | The State shall be based upon the belief in One and Almighty God. | The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion or belief. | |
| F-PBB | The State shall be based upon the belief in One and Almighty God with the obligation to implement Islamic Shari'a for the adherents. | The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to the beliefs of his/her religion. | |

| | | | |
|---|---|---|---|
| F-KKI | The State shall be based upon the belief in the One and only God, The Just and civilized humanity, Unity of Indonesia, Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives, and Social justice for the whole of the people of Indonesia. | The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion and belief and to build their respective houses of worship. | The State shall guarantee the just and equal services to all the followers of the religions. |
| F-PDU | The State shall be based upon the belief in One and Almighty God. | The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to the beliefs of his/her religion. | |
| F-PDKB | The State shall be based upon the belief in One and Almighty God. | The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to the beliefs of his/her religion or belief. | |

VII.1 The working schedule of the third amendment stage, 5 September 2000 – 9 November 2001.

| **The Schedule of the Process of the Third Amendment of the 1945 Constitution<br>5 September 2000 – 9 November 2001** |
|---|
| 5 September 2000. |
| The 1st Meeting of the Assembly Working Committee<br>The Establishment of PAH I |
| 6 September 2000 – 29 March 2001 |
| PAH I's Activities<br>Plenary Meetings 1 – 12<br>Public Hearings, Visit to Regions, Seminars, Workshops, Selected Teams.<br>Establishment of Expert Group |
| 29 March 2001. |
| The 2nd Meeting of the Assembly Working Body.<br>Progress Report of PAH I to the Working Body<br>24 April 2001 – 17 July 2001<br>PAH I's Activities<br>Plenary Meetings 13 – 22 |
| 29 August 2001 |
| The 3rd Meeting of the Assembly Working Body.<br>Determining the schedule of the Assembly 2001 Annual Session.<br>Progress Report of PAH I to the Working Body. |
| 3 September 2001 – 10 October 2001 |
| PAH I's Activities<br>Plenary Meetings 23 – 38<br>Small/Selected Team Meetings |
| 23 October 2001 |
| The 5th Meeting of the Assembly Working Body<br>Approval of the drafts prepared by PAH I<br>Closing of the Working Body. |
| 1 – 4 November 2001 |
| Plenary Meetings of the Assembly 2001 Annual Session<br>Plenary Meetings 1 – 5<br>Progress Reports from the Working Body<br>Establishment of the Assembly Commissions A, B, C. |
| 4 -8 November 2001 |
| Commission A's Activities<br>Plenary Meetings 1 – 5<br>Drafting Committee Meetings<br>Lobbies. |
| 8 – 9 November 2001 |
| Plenary Meetings of the Assembly 2001 Annual Session<br>Plenary Meetings 6 – 8<br>Progress Reports from the Assembly Commissions.<br>Approval of the Assembly Decisions<br>Closing of the Assembly 2001 Annual Session |

VII.2 The composition of the MPR factions in Ad-Hoc Committee I of the Working Body of the MPR (PAH I, BP-MPR), December 2000 – August 2001.

| No | FACTION | Number of Members |
|---|---|---|
| 1 | Faction of Democratic Indonesian Party – Struggle (F-PDIP) | 13 |
| 2 | Faction of Functional Groups Party (F-PG) | 12 |
| 3 | Faction of Delegations of Functional Groups (F-UG) | 5 |
| 4 | Faction of United Development Party (F-PPP) | 4 |
| 5 | Faction of National Awakening Party (F-KB) | 4 |
| 6 | Faction of Reformation (F-Reformasi) | 3 |
| 7 | Faction of Indonesian National Armed Forces/Indonesian Police (F-TNI/Polri) | 2 |
| 8 | Faction of Crescent Moon and Star Party (F-PBB) | 1 |
| 9 | Faction of Unitary of Indonesian Nationhood (F-KKI) | 1 |
| 10 | Faction of Association of Daulatul Ummah (F-PDU) | 1 |
| 11 | Faction of Democracy and Love the Nation Party (F-PDKB) | 1 |
| | Total | 47 |

VII.3 The list of the members of PAH I of the Working Body of the MPR, 2000-2001.

| No. | Name | Faction | Position |
|---|---|---|---|
| 1. | Drs. Jakob Tobing, M.P.A. | F-PDIP | Chairman |
| 2. | Harun Kamil, S.H. | F-UG | Vice-Chairman |
| 3. | Drs. H. Slamet Effendy Yusuf | F-PG | Vice-Chairman |
| 4. | Drs. Ali Masykur Musa, M.Si. | F-KB | Secretary |
| 5. | Prof. Dr. J.F. Sahetapy, S.H., M.A. | F-PDIP | Member |
| 6. | Drs. Soewarno | F-PDIP | Member |
| 7. | H. Julius Usman | F-PDIP | Member |
| 8. | Drs. Frans F.H. Matrutty | F-PDIP | Member |
| 9. | Dr. Harjono, S.H., M.Cl. | F-PDIP | Member |
| 10. | Hobbes Sinaga, S.H., M.H. | F-PDIP | Member |
| 11. | Drs. Katin Subyantoro | F-PDIP | Member |
| 12. | Ir. Pataniari Siahaan | F-PDIP | Member |
| 13. | H. Haryanto Taslam | F-PDIP | Member |
| 14. | MajGen. Pol. (Ret.) Drs. Sutjipno | F-PDIP | Member |
| 15. | I Dewa Gede Palguna, S.H., M.H. | F-PDIP | Member |
| 16. | Ir. Zainal Arifin | F-PDIP | Member |
| 17. | Drs. Theo Sambuaga, M.A. | F-PG | Member |
| 18. | Andi Mattalatta, S.H., M.H. | F-PG | Member |
| 19. | H.M. Hatta Mustafa, S.H. | F-PG | Member |
| 20. | Ir. Ahmad Hafiz Zawawi, M.Sc. | F-PG | Member |
| 21. | Drs. Agun Gunandjar Sudarsa | F-PG | Member |
| 22. | Drs. Baharuddin Aritonang, Apt. | F-PG | Member |
| 23. | Drs. T.M. Nurlif | F-PG | Member |
| 24. | Dr. H. Happy Bone Zulkarnaen, M.S. | F-PG | Member |
| 25. | Dra. Hj. Rosnaniar | F-PG | Member |
| 26. | Ir. H. Rully Chairul Azwar | F-PG | Member |
| 27. | H. Amidhan | F-PG | Member |
| 28. | H. Zain Bajeber, S.H. | F-PPP | Member |
| 29. | H. Ali Hardi Kiaidemak, S.H. | F-PPP | Member |
| 30. | H. Ali Marwan Hanan, S.H. | F-PPP | Member |
| 31. | Drs. H. Lukman Hakim Saifuddin | F-PPP | Member |
| 32. | K.H. Yusuf Muhammad, L.C. | F-KB | Member |
| 33. | Drs. K.H. Hb. Syarief M. Alaydarus | F-KB | Member |
| 34. | Drs. Abdul Khaliq Ahmad | F-KB | Member |
| 35. | H. Patrialis Akbar, S.H. | F-Reformasi | Member |
| 36. | Ir. A.M. Luthfi | F-Reformasi | Member |

| No. | Name | Faction | Position |
|---|---|---|---|
| 37. | Dr. Fuad Bawazier, M.A. | F-Reformasi | Member |
| 38. | Drs. H. Asnawi Latief | F-PDU | Member |
| 39. | Hamdan Zoelva, S.H. | F-PBB | Member |
| 40. | Drs. Anthonius Rahail | F-KKI | Member |
| 41 | Gregorius Seto Harianto | F-PDKB | Member |
| 42. | Air Vice Marshall H. Hendy Tjaswadi S.H.,MB. CN., MH. | F-TNI/Polri | Member |
| 43. | BG. Pol. Drs. Taufiequrachman Ruki, S.H. | F-TNI/Polri | Member |
| 44. | Prof. Dr. H. Soedijarto, M.A. | F-UG | Member |
| 45. | Dra. Valina Singka Subekti, M.Si. | F-UG | Member |
| 46. | Drs. Ahmad Zacky Siradj | F-UG | Member |
| 47. | Sutjipto, S.H. | F-UG | Member |

VII.4 The members of the Group of Experts of PAH I, 2000 – 2001.

| | |
|---|---|
| Chairman | Prof. Dr. Ismail Suny |
| Vice Chairman | Prof. Dr. Maria W.W. Sumardjono |
| Secretary | Dr. Nasaruddin Umar |
| Politics | |
| Coordinator | Prof. Dr. Maswadi Rauf |
| Secretary | Dr. Bachtiar Effendy |
| Members | Prof. Dr. Afan Gaffar |
| | Prof. Dr. Nazaruddin Syamsuddin |
| | Prof. Dr. Ramlan Surbakti |
| | Dr. Riswanda Himawan |
| Law | |
| Coordinator | Prof. Dr. Sri Sumantri Martosoewignyo |
| Secretary | Dr. Satya Arinanto |
| Members | Prof. Dr. Dahlan Thayeb |
| | Prof. Dr. Hasyim Djalal |
| | Prof. Dr. Ismail Suny |
| | Prof. Dr. Suwoto Mulyosudarmo |
| | Prof. Dr. Jimly Asshidiqie |
| | Prof. Dr. Maria Sumardjono |
| | Prof. Dr. Muhsan |
| Economy | |
| Coordinator | Prof. Dr. Mubiyarto |
| Secretary | Dr. Sri Mulyani |
| Members | Prof. Dr. Bambang Sudibyo |
| | Prof. Dr. Dawam Rahardjo |
| | Dr. Didik Rachbini |
| | Dr. Sri Adiningsih |
| | Dr. Syahrir. |
| Education | |
| Coordinator | Prof. Dr. Willy Toisuta |
| Secretary | Dr. Yahya Umar |
| Members | Prof. Dr. Wuryadi |
| Religions and Socio-Cultural | |
| Coordinator | Prof. Dr. Azyumardi Azra |
| Secretary | Dr. Komaruddin Hidayat |
| Members | Dr. Eka Darmaputera |
| | Dr. Nazaruddin Umar |
| | Prof. Dr. Sardjono Yatiman[4] |

4 Prof. Dr. Sardjono Yatiman passed away before the commission began the assignment.

## VII.5 The comparison between the third amendment and the draft.

The comparison between the parts of UUD 1945 after the first and the second amendments, with the draft of amendments prepared by PAH I and BPR-MPR, and the final decision of the MPR on 9 November 2001 (the third amendment).

| *Chapter and Article.* | *Parts of UUD 1945 after the 1st and the 2nd amendments* | *The outcomes of BP-MPR decided on8 November 2001* | *Decision of the 7th MPR Plenary Meeting (continued) on 9 November 2001 (The Third Amendment)* |
|---|---|---|---|
| CHAPTER I | | | |
| 1 | (2) Sovereignty is in the hands of the people and is exercised by the People's Consultative Assembly. | (2) Sovereignty is in the hands of the people and is implemented according to this Constitution.<br>(3) The state of Indonesia shall be a state based on the rule of law. | (2) Sovereignty is in the hands of the people and is implemented according to this Constitution.<br>(3) The state of Indonesia shall be a state based on the rule of law. |
| CHAPTER IA | None | CHAPTER IA<br>The State Basis. | None (Postponed) |
| 1A | | *Alternative 1:*<br>The state basis is *Pancasila, ie Ketuhanan Yang Maha Esa* (Belief in the Oneness of God), *Kemanusiaan Yang Adil dan Beradab* (Just and civilized humanity), *Persatuan Indonesia* (The unity of Indonesia), *Kerakyatan Yang Dipimpin oleh Hikmat Kebijaksanaan, Dalam Permusyawaratan dan Perwakilan* (Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives), *Keadilan Sosial bagi seluruh Rakyat Indonesia,* (Social justice for all of the people of Indonesia).<br>*Alternative 2:*<br>None (Embedded already in the Preamble) | |
| CHAPTER II | PEOPLE's CONSULTATIVE ASSEMBLY. | PEOPLE's CONSULTATIVE ASSEMBLY. | PEOPLE's CONSULTATIVE ASSEMBLY. |
| 2 | None | (1)<br>*Alternative 1:*<br>The MPR consists of DPR Members and DPD Members who are elected in elections, augmented with delegations of interest groups which shall further regulated by law.<br>*Alternative 2:*<br>The MPR consists of DPR Members and DPD Members who are elected in elections and shall be regulated further by law. | Postponed. |

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| 3 | The People's Consultative Assembly shall determine the constitution and the guidelines of the policy of the State. | (1) The People's Consultative Assembly has the authority to amend and to enact the Constitution.<br>(2) *Alternative 1:*<br>The People's Consultative Assembly shall determine the guidelines of the policy of the State.<br>*Alternative 2:*<br>None.<br>(3) *Alternative 1:*<br>The People's Consultative Assembly shall elect the President and the Vice President from the two pairs, in case no pair is elected in the election.<br>*Alternative 2:*<br>None.<br>(4) The People's Consultative Assembly shall inaugurate the President and/or the Vice President.<br>(5) The People's Consultative Assembly may only remove the President and/or the Vice President during his/her term of office in accordance with the Constitution. | (1) The People's Consultative Assembly has the authority to amend and to enact the Constitution.<br>(2) The People's Consultative Assembly shall inaugurate the President and/or the Vice President.<br>(3) The People's Consultative Assembly may only remove the President and/or the Vice President during his/her term of office in accordance with the Constitution. |
| 6 | (1) The President shall be a native Indonesian.<br>(2) The President and the Vice-President shall be elected by the People's Consultative Assembly by a majority vote. | (1) The President or the Vice President shall be a citizen of Indonesia since birth, shall never have acquired another citizenship by his/her own will, shall never have committed an act of treason and shall be mentally and physically capable of performing the tasks and duties of President or Vice President.<br>(2) The requirements to become President or Vice-President shall be further regulated by law. | (1) The President or the Vice President shall be a citizen of Indonesia since birth, shall never have acquired another citizenship by his/her own will, shall never have committed an act of treason and shall be mentally and physically capable of performing the tasks and duties of President or Vice President.<br>(2) The requirements to become President or Vice-President shall be further regulated by law. |
| 6A | (none) | (1) The President and the Vice-President shall be elected as a single ticket directly by the people.<br>(2) Each candidate ticket for President and Vice-President shall be proposed prior to the holding of a general election by political parties or a combination of political parties which are participants in the general election. | (1) The President and the Vice-President shall be elected as a single ticket directly by the people.<br>(2) Each candidate ticket for President and Vice-President shall be proposed prior to the holding of a general election by political parties or a combination of political parties which are participants in the general election. |

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| | | (3) Any tickets of candidates for President and Vice-President which have reached a poll of more than fifty percent of the total number of votes during the general election and an additional poll of at least twenty percent of the votes in more than half of the total number of provinces in Indonesia shall be declared elected as the President and the Vice-President.<br><br>(4) *Alternative 1:*<br>In the event that there is no elected candidate ticket of the President and the Vice President, the two tickets which have received the first and the second highest total of votes in a general election shall be submitted to the MPR, and the ticket which receives the highest votes shall be inaugurated as the President and the Vice President.<br>*Alternative 2:*<br>In the event that there is no elected candidate ticket for the President and the Vice President, the two tickets which have received the first and the second highest total of votes in a general election shall be submitted directly to an election by the people, and the ticket which receives the highest total number of votes shall be inaugurated as the President and the Vice President.<br>(5) The procedure for the holding of the election of the President and the Vice-President shall be further regulated by law. | (3) Any tickets of candidates for President and Vice-President which have reached a poll of more than fifty percent of the total number of votes during the general election and an additional poll of at least twenty percent of the votes in more than half of the total number of provinces in Indonesia shall be declared elected as the President and the Vice-President.<br>(4) In the event that there is no elected candidate ticket for the President and the Vice President, the two tickets which have received the first and the second highest total number of votes in a general election shall be submitted directly to an election by the people, and the ticket which receives the highest total number of votes shall be inaugurated as the President and the Vice President.<br><br>(5) The procedure for the holding of the election of the President and the Vice-President shall be further regulated by law. |
| 7A | (none) | The President and/or the Vice-President may be removed from his/her position during his/her term of office by the People's Consultative Assembly on the proposal of the House of Representatives, when it is proven that he/she has violated the law through an act of treason, corruption, bribery, or other serious criminal offences, or through moral turpitude, and/or that he/she no longer meets the qualifications to serve as President and/or Vice-President. | The President and/or the Vice-President may be removed from his/her position during his/her term of office by the People's Consultative Assembly on the proposal of the House of Representatives, when it is proven that he/she has violated the law through an act of treason, corruption, bribery, or other serious criminal offences, or through moral turpitude, and/or that he/she no longer meets the qualifications to serve as President and/or Vice-President. |

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| 7B | (none) | (1) Any proposal for the removal of the President and/or the Vice-President may be submitted by the House of Representatives to the People's Consultative Assembly only by first submitting a request to the Constitutional Court to investigate, bring to trial, and issue a decision on petition of the House of Representatives either that the President and/or the Vice-President has violated the law through an act of treason, corruption, bribery, or other serious criminal offences, or through moral turpitude, and/or that the President and/or the Vice-President no longer meets the qualifications to serve as President and/or Vice-President. | (1) Any proposal for the removal of the President and/or the Vice-President may be submitted by the House of Representatives to the People's Consultative Assembly only by first submitting a request to the Constitutional Court to investigate, bring to trial, and issue a decision on petition of the House of Representatives either that the President and/or the Vice-President has violated the law through an act of treason, corruption, bribery, or other serious criminal offences, or through moral turpitude, and/or that the President and/or the Vice-President no longer meets the qualifications to serve as President and/or Vice-President. |
| | | (2) The petition of the House of Representatives that the President and/or the Vice-President has violated the law or no longer meets the qualifications to serve as President and/or Vice-President is undertaken in the course of implementing the scrutinizing function of the House of Representatives. | (2) The petition of the House of Representatives that the President and/or the Vice-President has violated the law or no longer meets the qualifications to serve as President and/or Vice-President is undertaken in the course of implementing the scrutinizing function of the House of Representatives. |
| | | (3) The submission of the request of the House of Representatives to the Constitutional Court shall only be made with the support of at least 2/3 of the total number of the House of Representatives who are present in a plenary session attended by at least 2/3 of its total members. | (3) The submission of the request of the House of Representatives to the Constitutional Court shall only be made of the support of at least 2/3 of the total number of the House of Representatives who are present in a plenary session attended by at least 2/3 of its total members. |
| | | (4) The Constitutional Court has the obligation to investigate, bring to trial, and reach the most just decision on the petition by the House of Representatives at the latest 90 (ninety) days after the request of the House of Representatives has been received by the Constitutional Court. | (4) The Constitutional Court has the obligation to investigate, bring to trial, and reach the most just decision on the petition by the House of Representatives at the latest 90 (ninety) days after the request of the House of Representatives has been received by the Constitutional Court. |

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| | | (5) If the Constitutional Court decides that the President and/or the Vice-President is proved to have violated the law through an act of treason, corruption, bribery, or other serious criminal offences, or through moral turpitude; and/or the President and/or the Vice-President is proven to no longer meet the qualifications to serve as President and/or Vice-President, the House of Representatives shall hold a plenary season to submit the proposal to remove the President and/or the Vice-President to the People's Consultative Assembly.<br>(6) The People's Consultative Assembly shall convene a sitting to decide on the proposal of the House of Representatives at the latest 30 (thirty) days after its receipt of the proposal.<br>(7) The decision of the People's Consultative Assembly over the proposal to remove the President and/or the Vice-President shall be taken during a plenary session of the People's Consultative Assembly attended by at least 3/4 of the total members and shall require the approval of at least 2/3 of the total members who are present, after the President and/or the Vice-President has been given the opportunity to present his/her explanation to the plenary session of the People's Consultative Assembly. | (5) If the Constitutional Court decides that the President and/or the Vice-President is proved to have violated the law through an act of treason, corruption, bribery, or other serious criminal offences, or through moral turpitude; and/or the President and/or the Vice-President is proven to no longer meet the qualifications to serve as President and/or Vice-President, the House of Representatives shall hold a plenary season to submit the proposal to remove the President and/or the Vice-President to the People's Consultative Assembly.<br>(6) The People's Consultative Assembly shall convene a sitting to decide on the proposal of the House of Representatives at the latest 30 (thirty) days after its receipt of the proposal.<br>(7) The decision of the People's Consultative Assembly over the proposal to remove the President and/or the Vice-President shall be taken during a plenary session of the People's Consultative Assembly attended by at least 3/4 of the total members and shall require the approval of at least 2/3 of the total members who are present, after the President and/or the Vice-President has been given the opportunity to present his/her explanation to the plenary session of the People's Consultative Assembly. |
| 7C | (none) | The President may not freeze and/or dissolve the House of Representatives. | The President may not freeze and/or dissolve the House of Representatives. |

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| 8 | Should the President pass away, resign or be unable to perform his/her duties during his/her term of office, he/she shall be succeeded by the Vice-President until the expiry of his/her term of office. | (1) In the event that the President passes away, resigns, is removed, or is not capable of performing his/her tasks and duties during his/her term of office, he/she will be replaced by the Vice-President until the end of his/her term of office.<br>(2) In the event that the position of the Vice-President is vacant, the People's Consultative Assembly should hold a session within 60 (sixty) days at the latest to elect a Vice-President from two candidates nominated by the President. | (1) In the event that the President passes away, resigns, is removed, or is not capable of performing his/her tasks and duties during his/her term of office, he/she will be replaced by the Vice-President until the end of his/her term of office.<br>(2) In the event that the position of the Vice-President is vacant, the People's Consultative Assembly should hold a session within 60 (sixty) days at the latest to elect a Vice-President from two candidates nominated by the President. |
| 11 | In agreement with the House of Representatives, the President declares war, makes peace and concludes treaties with other states. | (2) In making other international treaties which will produce an extensive impact on the lives of the people which is linked to the state's financial burden, and/or which will require an amendment to or enactment of an act, the President shall obtain the approval of the House of Representatives.<br>(3) Further provisions regarding international treaties shall be further regulated by law. | (2) In making other international treaties which will produce an extensive impact on the lives of the people which is linked to the state's financial burden, and/or which will require an amendment to or enactment of an act, the President shall obtain the approval of the House of Representatives.<br>(3) Further provisions regarding international treaties shall be further regulated by law. |
| CHAPTER IV | SUPREME ADVISORY COUNCIL | *Alternative 1:*<br>THIS CHAPTER IS DELETED AND INCLUDED IN CHAPTER III, THE STATE GOVERNANCE POWER. | Deleted. |
| 16 | | *Alternative 2:*<br>*Not changed, with the following contents:*<br>SUPREME ADVISORY COUNCIL.<br>(1) The Council has the duty to reply to the questions raised by the President and has the right to submit recommendations to the President in running the state governance.<br>(2) The Council shall comprise of members which are proposed by DPR and DPD based on personal integrity, national insight, the public prominence and their record of devotion to the state and the nation, that shall be selected and installed by the President.<br>(3) The composition and the status of the Council shall be further regulated by law. | None |

| CHAPTER V | CHAPTER V STATE MINISTERS | | CHAPTER V STATE MINISTERS |
|---|---|---|---|
| 17 | | (4) The formation, change, and dissolution of state ministries shall be further regulated by law. | (4) The formation, change, and dissolution of state ministries shall be further regulated by law. |
| CHAPTER VIIA | (NONE) | CHAPTER VIIA REGIONAL COUNCIL | CHAPTER VIIA REGIONAL COUNCIL |
| 22C | (none) | (1) The members of the Regional council shall be elected from every province through general elections.<br>(2) The total number of members of the Regional council in every province shall be the same, and the total number of the Regional council shall not exceed one-third of the total number of the House of Representatives.<br>(3) The Regional council shall convene a sitting at least once every year.<br>(4) The Structure and composition of the Regional council shall be further regulated by law. | (1) The members of the Regional council shall be elected from every province through general elections.<br>(2) The total number of members of the Regional council in every province shall be the same, and the total number of the Regional council shall not exceed one-third of the total number of the House of Representatives.<br>(3) The Regional council shall convene a sitting at least once every year.<br>(4) The Structure and composition of the Regional council shall be further regulated by law. |
| 22D | (none) | (1) The Regional council may propose bills to the House of Representatives which are related to regional autonomy, the relationship between central and local governments, the formation, expansion and merger of regions, the management of natural resources and other economic resources, and the financial balance between the center and the regions.<br>(2) The Regional council shall participate in the discussion of bills related to regional autonomy, the relationship of central and local governments, the formation, expansion and merger of regions, the management of natural resources and other economic resources, and the financial balance between the center and the regions; and shall provide consideration to the House of Representatives over Bills and the State Budget and over Bills on taxation, education, or religion. | (1) The Regional council may propose bills to the House of Representatives which are related to regional autonomy, the relationship between central and local governments, the formation, expansion and merger of regions, the management of natural resources and other economic resources, and the financial balance between the center and the regions.<br>(2) The Regional council shall participate in the discussion of bills related to regional autonomy, the relationship of central and local governments, the formation, expansion and merger of regions, the management of natural resources and other economic resources, and the financial balance between the center and the regions; and shall provide consideration to the House of Representatives over Bills and the State Budget and over Bills on taxation, education, or religion. |

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| | | (3) The Regional council may section the implementation of laws concerning regional autonomy, the formation, expansion and merger of regions, the relationship of central and local governments, management of natural resources and other economic resources, implementation of the State Budget, taxation, education, or religion and shall submit the result of such oversight to the House of Representatives for consideration to be followed up on.<br>(4) The members of the Regional council may be removed from office under requirements and procedures that shall be further regulated by law. | (3) The Regional council may section the implementation of laws concerning regional autonomy, the formation, expansion and merger of regions, the relationship of central and local governments, management of natural resources and other economic resources, implementation of the State Budget, taxation, education, or religion and shall submit the result of such oversight to the House of Representatives for consideration to be followed up on.<br>(4) The members of the Regional council may be removed from office under requirements and procedures that shall be further regulated by law. |
| CHAPTER VIIB | (none) | CHAPTER VIIB<br>GENERAL ELECTIONS | CHAPTER VIIB<br>GENERAL ELECTIONS |
| 22E | (none) | (1) General elections shall be conducted in a general, free, secret, honest, fair and direct manner once every five years.<br>(2) General elections shall be conducted to elect the members of the House of Representatives, the Regional council, the President and the Vice-President, and the Regional House of Representatives.<br>(3) The participants in the general election of the members of the House of Representatives and the Regional House of Representatives are political parties.<br>(4) The participants in the general election of the members of the Regional council are individuals.<br>(5) The general elections shall be organized by a general election commission of a national, permanent, and independent character.<br>(6) Further provisions concerning general elections shall be further regulated by law. | (1) General elections shall be conducted in a general, free, secret, honest, fair and direct manner once every five years.<br>(2) General elections shall be conducted to elect the members of the House of Representatives, the Regional council, the President and the Vice-President, and the Regional House of Representatives.<br>(3) The participants in the general election of the members of the House of Representatives and the Regional House of Representatives are political parties.<br>(4) The participants in the general election of the members of the Regional council are individuals.<br>(5) The general elections shall be organized by a general election commission of a national, permanent, and independent character.<br>(6) Further provisions concerning general elections shall be further regulated by law. |

| CHAPTER VIII | FINANCE | FINANCE | FINANCE |
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| 23 | (1) The State Budget shall be determined annually by law. In the event that the House of Representatives does not approve a draft budget, the government shall adapt the budget of the preceding year. | (1) The State Budget as a form of state financial management shall be determined annually by law and shall be implemented in an open and accountable manner for the greatest prosperity of the people. | (1) The State Budget as a form of state financial management shall be determined annually by law and shall be implemented in an open and accountable manner for the greatest prosperity of the people. |
| | (2) All government taxes shall be further regulated by law. | (2) The bill on the State Budget shall be submitted by the President for joint consideration to the House of Representatives, which shall take into account the opinions of the Regional council. | (2) The bill on the State Budget shall be submitted by the President for joint consideration to the House of Representatives, which shall take into account the opinions of the Regional council. |
| | (3) The forms and denominations of the currency shall be further regulated by law. | (3) In the event that the House of Representatives fails to approve the proposed bill on the State Budget submitted by the President, the Government shall implement the State Budget of the preceding year. | (3) In the event that the House of Representatives fails to approve the proposed bill on the State Budget submitted by the President, the Government shall implement the State Budget of the preceding year. |
| | (4) Other financial matters shall be further regulated by law. | | |
| | (5) In order to examine the accountability of the state finances, a State Audit Board shall be established by statutory regulation. The findings of the Board shall be reported to the House of Representatives. | | |
| 23A | (none) | All taxes and other levies for the needs of the state of a compulsory nature shall be further regulated by law. | All taxes and other levies for the needs of the state of a compulsory nature shall be further regulated by law. |

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| 23B | (none) | *Alternative 1:*<br>The currency of Indonesia is Rupiah.<br>*Alternative 2:*<br>The currency of Indonesia shall be further regulated by law. | Postponed. |
| 23C | (none) | Other matters concerning state finance shall be further regulated by law. | Other matters concerning state finance shall be further regulated by law. |
| 23D | (none) | (1) The State of the Republic of Indonesia shall have a central bank (which is independent), (which is Bank Indonesia) which has the authority to issue and to circulate currency.<br>(2) The composition, the status, and its other authorities shall be further regulated by law. | Postponed. |
| CHAPTER VIIIA | (none) | CHAPTER VIIIA<br>SUPREME AUDIT BOARD | CHAPTER VIIIA<br>SUPREME AUDIT BOARD |
| 23E | (none) | (1) To examine the management and accountability of state finance, there shall be a single Supreme Audit Board which shall be free and independent.<br>(2) The result of any examination of state finance shall be submitted to the House of Representatives, the Regional council, and the Regional House of Representatives in line with their respective authority.<br>(3) Action following the result of any such examination will be taken by representative institutions and/or bodies according to law. | (1) To examine the management and accountability of state finance, there shall be a single Supreme Audit Board which shall be free and independent.<br>(2) The result of any examination of state finance shall be submitted to the House of Representatives, the Regional council, and the Regional House of Representatives in line with their respective authority.<br>(3) Action following the result of any such examination will be taken by representative institutions and/or bodies according to law. |
| 23F | (none) | (1) The members of the Supreme Audit Board shall be chosen by the House of Representatives, which shall have regard to any considerations of the Regional Council, and will be formally appointed by the President.<br>(2) The leadership of the Supreme Audit Board shall be elected by and from the members. | (1) The members of the Supreme Audit Board shall be chosen by the House of Representatives, which shall have regard to any considerations of the Regional Council, and will be formally appointed by the President.<br>(2) The leadership of the Supreme Audit Board shall be elected by and from the members. |

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| 23G | (none) | (1) The Supreme Audit Board shall be based in the capital city of the state, and shall have representation in every province.<br>(2) Further provisions concerning the Supreme Audit Board shall be further regulated by law. | (1) The Supreme Audit Board shall be based in the capital city of the state, and shall have representation in every province.<br>(2) Further provisions concerning the Supreme Audit Board shall be further regulated by law. |
| CHAPTER IX | CHAPTER IX<br>JUDICIAL POWER | CHAPTER IX<br>JUDICIAL POWER | CHAPTER IX<br>JUDICIAL POWER |
| 24 | (1) The judicial power shall be implemented by a Supreme Court and such other courts of law as provided by law.<br>(2) The composition and powers of these legal bodies shall be further regulated by law. | (1) The judicial power shall be independent and shall possess the power to organize the judicature in order to enforce law and justice.<br>(2) The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, a religious affairs court, a military tribunal, state administrative courts, and by a Constitutional Court. | (1) The judicial power shall be independent and shall possess the power to organize the judicature in order to enforce law and justice.<br>(2) The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, a religious affairs court, a military tribunal, state administrative courts, and by a Constitutional Court. |
| 24A | (none) | (1) The Supreme Court shall have the authority to hear a trial at the highest level of cassation, to review ordinances and regulations made under any acts, and shall possess other authorities as provided by law.<br>(2) Each justice of the Supreme Court must possess integrity and an honorable personality, and shall be fair, professional, and possess legal experience.<br>(3) Candidate justices of the Supreme Court shall be proposed by the Judicial Commission to the House of Representatives for approval and shall subsequently be formally appointed to office by the President.<br>(4) The chief and deputy chief of the Supreme Court shall be elected by and from the justices of the Supreme Court.<br>(5) The structure, status, membership and judicial procedure of the Supreme Court and its subsidiary bodies of judicature shall be further regulated by law. | (1) The Supreme Court shall have the authority to hear a trial at the highest level of cassation, to review ordinances and regulations made under any acts, and shall possess other authorities as provided by law.<br>(2) Each justice of the Supreme Court must possess integrity and an honorable personality, and shall be fair, professional, and possess legal experience.<br>(3) Candidate justices of the Supreme Court shall be proposed by the Judicial Commission to the House of Representatives for approval and shall subsequently be formally appointed to office by the President.<br>(4) The chief and deputy chief of the Supreme Court shall be elected by and from the justices of the Supreme Court.<br>(5) The structure, status, membership and judicial procedure of the Supreme Court and its subsidiary bodies of judicature shall be further regulated by law. |

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| 24B | (none) | (1) There shall be an independent Judicial Commission which shall possess the authority to propose candidates for appointment as justices of the Supreme Court and shall possess further authority to maintain and ensure the honor, dignity and behavior of judges.<br>(2) The members of the Judicial Commission shall possess legal knowledge and experience and shall be persons of integrity with an honorable personality.<br>(3) The members of the Judicial Commission shall be appointed and removed by the President with the approval of the House of Representatives.<br>(4) The structure, composition and membership of the Judicial Commission shall be further regulated by law. | (1) There shall be an independent Judicial Commission which shall possess the authority to propose candidates for appointment as justices of the Supreme Court and shall possess further authority to maintain and ensure the honor, dignity and behavior of judges.<br>(2) The members of the Judicial Commission shall possess legal knowledge and experience and shall be persons of integrity with an honorable personality.<br>(3) The members of the Judicial Commission shall be appointed and removed by the President with the approval of the House of Representatives.<br>(4) The structure, composition and membership of the Judicial Commission shall be further regulated by law. |
| 24C | (none) | (1) The Constitutional Court shall possess the authority to try a case as final and binding and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding over disputes of a general election.<br>(2) The Constitutional Court shall possess the authority to issue a decision over a petition concerning alleged violations by the President and/or the Vice-President as provided by the Constitution.<br>(3) The Constitutional Court shall be composed of 9 (nine) persons who shall be constitutional justices and who shall be confirmed in office by the President, of whom 3 (three) shall be nominated by the Supreme Court, 3 (three) nominated by the House of Representatives, and 3 (three) nominated by the President. | (1) The Constitutional Court shall possess the authority to try a case as final and binding and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding over disputes of a general election.<br>(2) The Constitutional Court shall possess the authority to issue a decision over a petition concerning alleged violations by the President and/or the Vice-President as provided by the Constitution.<br>(3) The Constitutional Court shall be composed of 9 (nine) persons who shall be constitutional justices and who shall be confirmed in office by the President, of whom 3 (three) shall be nominated by the Supreme Court, 3 (three) nominated by the House of Representatives, and 3 (three) nominated by the President. |

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| | | (4) The chief and deputy chief of the Constitutional Court shall be elected by and from the constitutional justices.<br>(5) Each constitutional justice must possess integrity and an honorable personality, shall be fair and be a statesman who has a command of the Constitution and constitutional knowledge, and shall not act concurrently as a state official.<br>(6) The appointment and removal of constitutional justices, the judicial procedure, and other provisions concerning the Constitutional Court shall be further regulated by law. | (4) The chief and deputy chief of the Constitutional Court shall be elected by and from the constitutional justices.<br>(5) Each constitutional justice must possess integrity and an honorable personality, shall be fair and be a statesman who has a command of the Constitution and constitutional knowledge, and shall not act concurrently as a state official.<br>(6) The appointment and removal of constitutional justices, the judicial procedure, and other provisions concerning the Constitutional Court shall be further regulated by law. |

## VII.6 The Annex of MPR Decree no. XI/2001.

| **Annex of the Assembly Decree no. XI/MPR/2001 and related original texts of the 1945 Constitution after the 1st & 2nd amendments.** | | |
|---|---|---|
| *Chapter/ Article* | *Original* | *Proposed Alterations* |
| CHAPTER II | CHAPTER II<br>PEOPLE's CONSULTATIVE ASSEMBLY | CHAPTER II<br>PEOPLE's CONSULTATIVE ASSEMBLY |
| Article 2 | (1) The People's Consultative Assembly shall consist of the members of the House of Representatives augmented by the delegates from the regional territories and groups as provided for by statutory regulations.<br><br>(2) The People's Consultative Assembly shall convene a sitting at least once every five years in the capital of the state.<br>(3) All decisions of the People's Consultative Assembly shall be taken by a majority vote. | (1) *Alternative 1:*<br>The People's Consultative Assembly (MPR) consists of members of the House of Representatives and members of the Regional Council who are elected in elections and augmented with delegations of functional groups which shall be further regulated according to law.<br>*Alternative 2:*<br>The People's Consultative Assembly (MPR) consists of members of the House of Representatives and members of the Regional Council who are elected in elections and shall be further regulated by law.<br>Notes:<br>Membership of TNI/Polri, in accordance with the Assembly Decree no. VII/MPR/2000 is agreed to be incorporated in the Transitional Article of the 1945 Constitution.<br>(2) Remained.<br><br>(3) Remained. |
| Article 3 | The People's Consultative Assembly shall determine the constitution and the State's policies in broad outlines (GBHN). | (2) *Alternative 1:*<br>The People's Consultative Assembly elects the President and the Vice President in the event that no candidate ticket of the President and the Vice President is elected through the election.<br>*Alternative 2:*<br>This section is not necessary. |

| CHAPTER III | CHAPTER III<br>STATE GOVERNANCE POWER | CHAPTER III<br>STATE GOVERNANCE POWER |
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| Article 6A | None | (4) *Alternative 1:*<br>In the event no candidate President and Vice President pair is elected, two of the candidate President and Vice President pairs acquiring the first and second majority vote in the general election shall be elected by the People's Consultative Assembly and the pair acquiring the majority votes shall be inaugurated as the President and the Vice President.<br>*Alternative 2:*<br>In the event no candidate President and Vice President pair is elected, two of the candidate President and Vice President pairs acquiring the first and second majority vote in the general election shall be elected by the people directly and the pair acquiring the majority votes of the people shall be inaugurated as the President and the Vice President. |
| Article 8 | (3) None | (3)*Alternative 1:*<br>If the President and the Vice President pass away, resign, are dismissed, or are not able to undertake his/her responsibilities during his/her tenure, simultaneously, the Acting Presidency will collectively include the Minister of Foreign Affairs, Minister of Home Affairs, and the Minister of Defense. Within one month afterwards, at the latest, the People's Consultative Assembly shall convene a sitting to elect until the end of the tenure the President and the Vice President from 2 packages of President and Vice President candidates nominated by the political party or combination of political parties whose President and the Vice President candidate packages obtained the first and the second largest votes in the previous election.<br>*Alternative 2:*<br>In the event of a simultaneous vacancy of the Presidency and the Vice Presidency, the Speaker of the House of Representatives and the Speaker of the Regional Council will act respectively as Acting President and Acting Vice President. Within one month afterwards, at the latest, the People's Consultative Assembly shall convene a sitting to elect until the end of the tenure the President and the Vice President from 2 packages of President and Vice President candidates nominated by the political party or combination of political parties whose President and the Vice President candidate packages obtained the first and the second largest votes in the previous election. |
| CHAPTER IV | CHAPTER IV<br>SUPREME ADVISORY BOARD. | *Alternative 1:*<br>CHAPTER ON THE SUPREME ADVISORY COUNCIL OMITTED AND INCLUDED IN CHAPTER III, THE STATE GOVERNANCE POWER.<br><br>*Alternative 2:*<br>The Supreme Advisory Board is retained, with the following provisions:<br>CHAPTER IV<br>SUPREME ADVISORY BOARD. |

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| Article 16 | (1) The composition of the Supreme Advisory Council shall be determined by law.<br>(2) The Council is obliged to reply to inquiries raised by the President and has the right to submit recommendations to the government. | (1) The Supreme Advisory Board is obliged to reply to the inquiries of the President and is entitled to submit proposals and recommendations to the President on state governance matters.<br>(2) The Supreme Advisory Board shall comprise of members who are proposed by the House of Representatives and the Regional Council based upon personal integrity, national insight, public prominence, and the record of their dedications to the country and the nation, to be selected and determined by the President.<br>(3) The composition and the status of the Supreme Advisory Board shall be further regulated by law. |
| CHAPTER VIIB | None | CHAPTER VIIB<br>THE GENERAL ELECTIONS |
| Article 22F | None | (1) The general election is the realization of the people's sovereignty that is conducted in a general, free, secret, honest, fair and direct manner once every five years.<br>(2) The general election is conducted to elect members of the House of Representatives, the Regional Council, and the regional House of Representatives.<br>(3) The general elections to elect members of the House of Representatives and members of the regional House of Representatives are participated by political parties.<br>(4) The general election to elect members of the Regional Council is participated by candidate from political parties and individual candidates.<br>(5) The general elections shall be organized by a general election commission of a national, permanent, and independent characters.<br>(6) Further provisions regarding general elections shall be regulated by law. |
| CHAPTER VIII | CHAPTER VIII<br>FINANCE | CHAPTER VIII<br>FINANCE |
| Article 23B | None | *Alternative 1:*<br>The currency of the Republic of Indonesia is Rupiah.<br>*Alternative 2:*<br>The currency of the Republic of Indonesia shall be determined by law. |
| Article 23D | None | (1) *Alternative 1:*<br>The state of Indonesia shall possess (which is independent) [Bank Indonesia] which holds authority to issue and to circulate currency.<br>(2) The composition, position and other authorities shall be regulated by law. |
| CHAPTER ? | None | CHAPTER ?<br>LAW ENFORCEMENT |
| Article 25C | None | (1) Attorney is an independent state institution to implement the authority to prosecute in criminal cases.<br>(2) Attorney is led by the Attorney General who shall be appointed and dismissed by the President upon approval of the House of Representatives (with regard to the consideration of the Regional Council).<br>(3) The composition, position and other authorities of Attorney shall be regulated by law. |

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| Article 25D | None | (1) Investigation in criminal cases is the duty and the authority of Indonesian National Police which is regulated by law.<br>(2) Other officials may conduct investigations at the behest of the law. |
| CHAPTER XI | CHAPTER XI<br>RELIGION | CHAPTER XI<br>*Alternative 1:* RELIGION (Not changed).<br>*Alternative 2:* KETUHANAN YANG MAHA ESA (THE ONE AND ONLY GOD). |
| Article 29 | (1) The State shall be based in belief in the One and Only God.<br>(2) The State guarantees all persons the freedom to worship, each according to his/her own religion or beliefs. | Section (1):<br>*Alternative 1:*<br>(1) The State is based on belief in the Oneness of God (Ketuhanan Yang Maha Esa) (Not changed).<br>*Alternative 2:*<br>(1) The State is based on belief in the One and only God (Ketuhanan Yang Maha Esa) with the obligation to implement Islamic sharia for its followers.<br>*Alternative 3:*<br>(1) The State is based on belief in the One and only God (Ketuhanan Yang Maha Esa) with the obligation to implement the teachings of the religions by its respective followers.<br>*Alternative 4:*<br>(1) The State is based on Belief in the One and only God, Just and civilized humanity, The unity of Indonesia, Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives, and social justice for all of the people of Indonesia.<br><br>Section (2):<br>*Alternative 1:*<br>(2) The State guarantees all persons the freedom to worship, each according to his/her own religion or beliefs. (Not changed).<br><br>*Alternative 2:*<br>(2) The State guarantees all persons the freedom to believe in his/her religion and to worship in accordance with his/her religion.<br>*Alternative 3:*<br>(2) The State Guarantees all persons the freedom to believe in his/her religion and to worship in accordance with his/her religion and belief and to build their respective places of worships.<br>Alternative 4.<br>(2) The State Guarantees all persons the freedom to believe in his/her religion, to implement the teachings of the religions and to worship in accordance with the beliefs of their respective religions.<br>On the addition of a new section:<br>*Alternative 1:*<br>Not necessary.<br>*Alternative 2:*<br>Addition of new sections:<br>a. The State should protect the people from the spreading of teaching which is contrary to the belief in oneness of God.<br>b. The State administration must not contradict the values, norms and the religious law.<br>c. The State should adhere to the values of ethics and human morality taught by religions. |

| CHAPTER XIII | CHAPTER XIII<br>EDUCATION | CHAPTER XIII<br>EDUCATION AND CULTURE |
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| Article 31. | (1) Every citizen has the right to receive education.<br>(2) The Government shall manage and organise one system of national education which shall be further regulated by law. | (1) Each citizen has the right to an education.<br>(2) Each citizen is obliged to follow elementary education and the government is obliged to fund this.<br>Section (3):<br>*Alternative 1:*<br>(3) The Government organizes and implements a national education system, to be regulated by law.<br>*Alternative 2:*<br>(3) The Government organizes and implements a national education system that aims to educate the national life and create humans with noble character, which shall be regulated by law.<br>*Alternative 3:*<br>(3) The Government organizes and implements a national education system, to be regulated by law, which aims to improve faith, piety, and morality and to educate the national life, which shall be regulated by law.<br>Section 4:<br>*Alternative 1:*<br>(4) The State is obliged to prioritize the education budget from the State Budget to meet the needs of implementing the national education.<br>*Alternative 2:*<br>(4) The State is obliged to prioritize the education budget through at least 20% of the State Budget and the Regional Budgets to meet the needs of implementing the national education.<br>Section 5:<br>*Alternative 1:*<br>(5) The Government advances science and technology with a view to promoting civilization and unity.<br>*Alternative 2:*<br>(5) The Government advances science and technology that does not contradict religious values or promoting civilization and unity for the well-being of humanity. |
| Article 32 | The Government shall advance the national culture. | (1) The State nurtures good old cultural values and developes better new cultural values.<br>(2) The Government advances Indonesian national culture while guaranteeing the freedom of society to preserve and develop their cultures.<br>(3) The State honors and nurtures local languages as national cultural treasures. |

| CHAPTER XIV | CHAPTER XIV<br>SOCIAL WELFARE | CHAPTER XIV<br>NATIONAL ECONOMY AND SOCIAL WELFARE |
|---|---|---|
| Article 33 | (1) The economy shall be organized as a common endeavor based upon the principles of the familial system.<br>(2) Sectors of production which are important for the country and affect the life of the people shall be under state powers.<br>(3) The land, the waters and the natural riches contained therein shall be controlled by the State and exploited to the greatest benefit of the people. | (1) The economy is to be structured and developed as a sustainable common endeavor of all people based on principles of justice, efficiency, and economic democracy to realize the prosperity, welfare, and social justice for all people.<br>(2) Production sectors that are vital to the state and that affect the livelihood of a considerable part of the population are to be controlled by the state based on principles of justice and efficiency that shall be regulated by law.<br>(3) The land and the waters as well as the natural riches therein are to be managed and/or controlled by the state to be utilized to the greatest benefit of the people and shall be regulated by law.<br>(4) The economic actors are the cooperatives, state enterprises, and private businesses including individual endeavors.<br>(5) Organizing and developing the national economy should always prevent damage to and improve the environment, consider and respect traditional rights, as well as guarantee the balanced development of the whole country. |
| Article 34 | Impoverished persons and abandoned children shall be taken care of by the State. | (1) (Not changed).<br>(2) The State develops a social security system for all people and empowers weak and disabled people in accordance with humanity.<br>(3) The State is responsible for providing health service facilities and adequate public services. |
| CHAPTER XVI | CHAPTER XVI<br>AMENDMENTS TO THE CONSTITUTION | CHAPTER XVI<br>AMENDMENTS TO THE CONSTITUTION. |
| Article 37 | (1) In order to amend the Constitution, not less than 2/3 of the People's Consultative Assembly members shall be in attendance.<br>(2) Decisions shall be taken with the approval of not less than 2/3 of its members in attendance. | (1) Proposals to amend articles of the Constitution can be put on the agenda of the People's Consultative Assembly session if submitted by at least 1/3 of the total number of members in the People's Consultative Assembly.<br>(2) Each proposal to amend articles of the Constitution must mention clearly which part should be amended.<br>(3) To amend articles of the Constitution the People's Consultative Assembly session must be attended by at least 2/3 of People's Consultative Assembly members [Originated from the original article 37 (1)].<br>(4) A decision to amend articles of the Constitution requires the agreement of more than at least 3/4 of the People's Consultative Assembly members, except for the amendment of the Preamble of the 1945 Constitution, the Form and the Integrity of the Territory of the Unitary State of the Republic of Indonesia, which should require the consent of more than 50% of the people of Indonesia.<br>(5) The requirements for amending the Constitution shall be further regulated by the decision of the People's Consultative Assembly. |

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| | TRANSITIONAL PROVISIONS | TRANSITIONAL PROVISIONS |
| Article I | The Preparatory Committee for Indonesia's Independence shall arrange and conduct the transfer of administration to the Government of Indonesia. | All existing state institutions and regulations shall remain valid as long as they have not been replaced by new ones under this Constitution. |
| Article II. | All existing state institutions continue to function and all regulations remain valid as long as no new ones are established in conformity with this Constitution. | The additional members of the People's Consultative Assembly referred to in Article 2 section (1) the 1945 Constitution are the delegates of the Indonesian National Military and delegates of the Indonesian National Police.<br>The provisions on the additional members of the People's Consultative Assembly as referred to in this Article are valid as long as the People's Consultative Assembly does not change them. |
| Article III | For the first time, the President and the Vice President shall be elected by the Preparatory Committee for Indonesia's Independence. | None |
| Article IV | Prior to the formation of the People's Consultative Assembly, the House of Representatives and the Supreme Advisory Council in accordance with this Constitution, all the powers shall be exercised by the President assisted by a national committee. | None |
| | ADDITIONAL PROVISIONS. | CLOSING PROVISIONS |
| | (1) Within six months after the end of the Great Asia War, the President of Indonesia shall take preparatory steps and execute all the provisions of this Constitution.<br>(2) Within six months after its formation, the People's Consultative Assembly shall convene a sitting to determine the Constitution. | The amendments to this Constitution are ratified on<br>..... |

VIII.1 The composition of the factions in Ad-Hoc Committee I of the Working Body of the MPR (PAH I, BP-MPR), 2001 – 2002.

| **No.** | **Faction** | **Σ members** |
|---|---|---|
| 1. | Fraksi Partai Demokrasi Indonesia Perjuangan (F-PDIP) | 13 |
| 2. | Fraksi Partai GOLKAR (F-PG) | 11 |
| 3. | Fraksi Utusan Golongan (F-UG) | 4 |
| 4. | Fraksi Kebangkitan Bangsa (F-KB) | 4 |
| 5. | Fraksi Partai Persatuan Pembangunan (F-PPP) | 4 |
| 6. | F-Reformasi | 3 |
| 7. | F-Utusan Daerah (F-UD) | 3 |
| 8. | Fraksi TNI/Polri | 2 |
| 9. | Fraksi Daulatul Ummah (F-PDU) | 1 |
| 10. | Fraksi Partai Bulan Bintang (F-PBB) | 1 |
| 11. | Fraksi Kebangkitan Kebangsaan Indonesia (F-KKI) | 1 |
| 12. | Fraksi Partai Demokrasi Kasih Bangsa (F-PDKB) | 1 |
| | Total | 48 |

VIII.2 The list of the members of PAH I of the working body of the MPR, 2001-2002.

| No. | Name | Faction | Position |
|---|---|---|---|
| 1. | Drs. Jakob Tobing, M.P.A. | F-PDIP | Chairman |
| 2. | Harun Kamil, S.H. | F-UG | Vice-Chairman |
| 3. | Drs. H. Slamet Effendy Yusuf | F-PG | Vice-Chairman |
| 4. | Drs. Ali Masykur Musa, M.Si. | F-KB | Secretary |
| 5. | Prof. Dr. J.F. Sahetapy, S.H., M.A. | F-PDIP | Member |
| 6. | Drs. Soewarno | F-PDIP | Member |
| 7. | K.H. Drs. Achmad Aries Munandar, M.Sc. | F-PDIP | Member |
| 8. | Drs. Frans F.H. Matrutty | F-PDIP | Member |
| 9. | Dr. Harjono, S.H., M.Cl. | F-PDIP | Member |
| 10. | Hobbes Sinaga, S.H., M.H. | F-PDIP | Member |
| 11. | Drs. Katin Subyantoro | F-PDIP | Member |
| 12. | Ir. Pataniari Siahaan | F-PDIP | Member |
| 13. | H. Haryanto Taslam | F-PDIP | Member |
| 14. | MajGen. Pol. (Ret.) Drs. Sutjipno | F-PDIP | Member |
| 15. | I Dewa Gede Palguna, S.H., M.H. | F-PDIP | Member |
| 16. | Ir. Zainal Arifin | F-PDIP | Member |
| 17. | Ir. H. Rully Chairul Azwar | F-PG | Member |
| 18. | H. Amidhan | F-PG | Member |
| 19. | Drs. Theo Sambuaga, M.A. | F-PG | Member |
| 20. | Andi Mattalatta, S.H., M.H. | F-PG | Member |
| 21. | M. Akil Mochtar, S.H. | F-PG | Member |
| 22. | Ir. Ahmad Hafiz Zawawi, M.Sc. | F-PG | Member |
| 23. | Drs. Agun Gunandjar Sudarsa | F-PG | Member |
| 24. | Drs. Baharuddin Aritonang, Apt. | F-PG | Member |
| 25. | Drs. T.M. Nurlif | F-PG | Member |
| 26. | Dr. H. Happy Bone Zulkarnaen, M.S. | F-PG | Member |
| 27. | H. Abdul Azis Imran P., S.H. | F-PPP | Member |
| 28. | H. Zain Bajeber, S.H. | F-PPP | Member |
| 29. | H. Ali Hardi Kiaidemak, S.H. | F-PPP | Member |
| 30. | Drs. H. Lukman Hakim Saifuddin | F-PPP | Member |
| 31. | Ir. H. Erman Suparno, MBA., M.Si. | F-KB | Member |
| 32. | K.H. Yusuf Muhammad, L.C. | F-KB | Member |
| 33. | Dra. Ida Fauziyah | F-KB | Member |
| 34. | H. Patrialis Akbar, S.H. | F-Reformasi | Member |
| 35. | Ir. A.M. Luthfi | F-Reformasi | Member |
| 36. | Dr. Fuad Bawazier, M.A. | F-Reformasi | Member |

| No. | Name | Faction | Position |
|---|---|---|---|
| 37. | Drs. H. Asnawi Latief | F-PDU | Member |
| 38. | Hamdan Zoelva, S.H. | F-PBB | Member |
| 39. | Drs. Anthonius Rahail | F-KKI | Member |
| 40. | Gregorius Seto Harianto | F-PDKB | Member |
| 41. | BG. Kohirin Suganda S. | F-TNI/Polri | Member |
| 42. | MajGen. Pol. Drs. I Ketut Astawa | F-TNI/Polri | Member |
| 43. | Prof. Dr. H. Soedijarto, M.A. | F-UG | Member |
| 44. | Drs. Ahmad Zacky Siradj | F-UG | Member |
| 45. | Sutjipto, S.H. | F-UG | Member |
| 46. | Dra. Psi. Retno Triani Djohan, M.Sc. | F-UD | Member |
| 47. | H.M. Hatta Mustafa, S.H. | F-UD | Member |
| 48. | Ir. Vincent Radja | F-UD | Member |

VIII.3 The Working Schedule of the fourth amendment stage, 9 January 2002 – 11 August 2002.

| **9 January 2002 – 11 August 2002** |
|---|
| 9 January 2002 |
| Consultation Meeting of the Leaderships of the Assembly and the Factions |
| 10 January 2002 |
| The 1st Meeting of the Assembly Working Body<br>Preparation of PAH I |
| 11 January 2002 – 11 March 2002 |
| PAH I Activities<br>Plenary Meetings 1st – 11th.<br>Public Hearings, Selected Teams. |
| 12 March 2002. |
| The 2nd Meeting of the Assembly Working Body<br>Progress Report of PAH I to the Assembly Working Body |
| 12 March 2002 – 21 March 2002 |
| PAH I Activities<br>Plenary Meetings 12 – 17<br>Selected Team. |
| 25 March 2002 – 6 April 2002 |
| PAH I Activities<br>PAH I Plenary Meetings 18th – 21st.<br>Formulating Team 3 – 6 April 2002 |
| 7 April 2002 – 30 April 2002 |
| Visit to Regions<br>Overseas Comparative Studies. |
| 1 May 2002 – 4 June 2002 |
| PAH I's Activities<br>1 May 2002: Visit of Delegation from European Union<br>Synchronization and Selected Team Meetings<br>Validation Meetings<br>22nd Plenary Meeting. |
| 4 June 2002 |
| The Assembly Working Body Plenary Meeting<br>Report of PAH I |
| 5 June 2002 – 27 June 2002 |
| PAH I Activities.<br>PAH I Plenary Meeting 23rd – 34th.<br>Synchronization. |
| 27 June 2002 – 2 July 2002 |
| PAH I Activities.<br>Synchronization Meeting 1st – 8th.<br>Selected Team on the Constitutional Court. |

| 4 July 2002 – 25 July 2002 |
|---|
| PAH I Activities<br>PAH I Plenary Meetings 35th – 37th.<br>Public Hearing.<br>Consultation Meeting of the Leaderships of the Working Body and PAH I<br>PAH I Finalization Meeting 1st – 7th.<br>Selected Team for Finalization. |
| 25 July 2002 – 29 July 2002 |
| Report of PAH I to the Working Body.<br>Discussion on Article 29.<br>Consultations. |
| 1 – 3 August 2002 |
| MPR 2002 Annual Session.<br>Factions' general view.<br>Consultation meeting of MPR leaders with the factions.<br>Formation of Commissions. |
| 4 – 8 August 2002 |
| Commission A meetings.<br>Consultation meetings of Commision A and Factions' leaders.<br>Discussion on the draft of the fourth changes of the 1945 Constitution.<br>Lobbies.<br>Discussions on Articles 29 and 31.<br>Discussions on Article 33.<br>Discussions on Constitutional Commission. |
| 8 – 9 August 2002 |
| Plenary session.<br>Lobby on the draft of the changes to the 1945 Constituion.<br>Lobby on the formation of the Constitutional Commission.<br>Report of the Commissions.<br>Discussions on Article 37. |
| 9 -11 August 2002 |
| Final statements of the factions.<br>Ratifications of amendments of 1945 Constitution and other MPR decisions.<br>Closing of MPR 2002 Annual session. |

## VIII.4 The Annex of MPR Decree no. IX/2001.

| **Chapter/ Article** | **The 1945 Constitution** | **Draft of Proposed Alterations by the Assembly Working Body, 2001.** |
|---|---|---|
| *CHAPTER II* | *CHAPTER II*<br>*PEOPLE's CONSULTATIVE ASSEMBLY* | *CHAPTER II*<br>*PEOPLE's CONSULTATIVE ASSEMBLY* |
| Article 2 | (1) The People's Consultative Assembly shall consist of the members of the People's Representatives Council augmented by the delegates from the regional territories and groups as provided for by statutory regulations.<br>(2) The People's Consultative Assembly shall convene a sitting at least once every five years in the capital of the state.<br>(3) All decisions of the People's Consultative assembly shall be taken by a majority vote. | (1) *Alternative 1:*<br>The People's Consultative Assembly (MPR) consists of members of the People's Representatives Council and members of the Regional Council who are elected in elections and augmented with delegations of functional groups which shall be further regulated according to law.<br>*Alternative 2:*<br>The People's Consultative Assembly (MPR) consists of members of the People's Representatives Council and members of the Regional Council who are elected in elections and shall be further regulated by law.<br>Notes:<br>Membership of TNI/Polri in accordance with MPR Decree no. VII/MPR/2000 is agreed to be incorporated in the Transitional Article of UUD 1945.<br>(2) Not changed.<br>(3) Not changed. |
| Article 3 | The People's Consultative Assembly shall determine the constitution and the State's policies in broad outlines (GBHN). | *Alternative 1:*<br>The People's Consultative Assembly elects the President and the Vice President in the event that no candidate ticket with the President and the Vice President is elected in the election.<br>*Alternative 2:*<br>This section is not necessary. |

## VIII.5 The alternative drafts of Article 31 after the 2nd amendment.

| | **The initial 1945 Constitution** | **The Annex of Assembly Decree no. XI/2001** |
|---|---|---|
| *CHAPTER XIII* | *CHAPTER XIII*<br>*EDUCATION* | *CHAPTER XIII*<br>*EDUCATION AND CULTURE* |
| Article 31. | (1) Every citizen has the right to receive teaching.<br>(2) The Government shall manage and organise one system of national teaching which shall be regulated by law. | (1) Every citizen has the right to an education.<br><br>(2) Every citizen is obliged to have elementary education and the government is obliged to fund this.<br><br>Section (3):<br>*Alternative 1:*<br>(3) The Government organizes and implements a national education system, to be regulated by law.<br>*Alternative 2:*<br>(3) The Government organizes and implements a national education system that aims to develop the nation's intellectual life and to create humans with noble character, which shall be regulated by law.<br>*Alternative 3:*<br>(3) The Government organizes and implements a national education system, to be regulated by law, that aims to improve faith, piety and morality and developing the nation's intellectual life, which shall be regulated by law.<br>Section 4:<br>*Alternative 1:*<br>(4) The State is obliged to prioritize the education budget from the State Budget to meet the needs of implementing the national education.<br>*Alternative 2:*<br>(4) The State is obliged to prioritize the education budget through at least 20% of the State Budget and the Regional Budgets to meet the needs of implementing the national education.<br>Section 5:<br>*Alternative 1:*<br>(5) The Government advances science and technology with a view to promoting civilization and unity.<br>*Alternative 2:*<br>(6) The Government advances science and technology which is not contradictory to religious values, promoting civilization and unity and the well-being of humanity. |

VIII.6 The alternative drafts of Article 31 as reported to the Working Body on 4 June 2002.

| | **The Annex of Assembly Decree no. XI/2001** | **The draft of Article 31 as prepared by PAH I and reported to the Working Body on 4 June 2002.** |
|---|---|---|
| *CHAPTER XIII* | *CHAPTER XIII*<br>*EDUCATION AND CULTURE* | *CHAPTER XIII*<br>*EDUCATION AND CULTURE* |
| Article 31. | (1) Every citizen has the right to an education.<br>(2) Every citizen is obliged to have elementary education and the government is obliged to fund this.<br>Section (3):<br>*Alternative 1:*<br>(3) The Government organizes and implements a national education system, to be regulated by law.<br><br>*Alternative 2:*<br>(3) The Government organizes and implements a national education system that aims at developing the nation's intellectual life and creating humans with noble character, which shall be regulated by law.<br>*Alternative 3:*<br>(3) The Government organizes and implements a national education system, to be regulated by law, that aims to improve faith, piety, and morality and developing the nation's intellectual life, which shall be regulated by law.<br>Section 4:<br>*Alternative 1:*<br>(4) The State is obliged to prioritize the education budget from the State Budget to meet the needs of implementing the national education.<br>*Alternative 2:*<br>(4) The State is obliged to prioritize the education budget through at least 20% of the State Budget and the Regional Budgets to meet the needs of implementing the national education.<br>Section 5:<br>*Alternative 1:*<br>a. The Government advances science and technology with a view to promoting civilization and unity.<br>*Alternative 2:*<br>(5) The Government advances science and technology which is not contradictory to religious values, promoting civilization and unity and the well-being of humanity. | (1) Every citizen has the right to an education.<br><br>(2) Every citizen is obliged to have elementary education and the government is obliged to fund this.<br>Section (3):<br>*Alternative 1:*<br>(3) The Government organizes and implements a national education system, to be regulated by law.<br><br>*Alternative 2:*<br>(3) The Government organizes and implements a national education system that aims at developing the nation's intellectual life and creating humans with noble character, which shall be regulated by law.<br><br>*Alternative 3:*<br>(3) The Government organizes and implements a national education system, to be regulated by law, that aims to improve faith, piety, and morality and developing the nation's intellectual life, which shall be regulated by law.<br><br>Section (4):<br><br>(4) The State is obliged to prioritize the education budget through at least 20% of the State Budget and the Regional Budgets to meet the needs of implementing the national education.<br><br>Section (5):<br><br>(5) The Government advances science and technology which is not contradictory to religious values, promoting civilization and unity and the well-being of humanity. |

## VIII.7 The Annex of Assembly Decree no. XI/MPR/2001, Chapter XIV.

| | **ORIGINAL** | **PROPOSED CHANGES** |
|---|---|---|
| *CHAPTER XIV* | *CHAPTER XIV*<br>*SOCIAL WELFARE* | *CHAPTER XIV*<br>*NATIONAL ECONOMY AND SOCIAL WELFARE* |
| Article 33 | (1) The economy shall be organized as a common endeavor based upon the principles of the familial system.<br><br>(2) Sectors of production which are important for the country and affect the life of the people shall be under powers of the state.<br><br>(2) The land, the waters and the natural riches contained therein shall be controlled by the State and exploited to the greatest benefit of the people. | (1) The economy is to be structured and developed as a sustainable common endeavor of all people based on principles of justice, efficiency, and economic democracy to realize prosperity, welfare, and social justice for all people.<br>(2) Production sectors that are vital to the state and that affect the livelihood of a considerable part of the population are to be controlled by the state based on principles of justice and efficiency which shall be regulated by law.<br>(3) The land and the waters as well as the natural riches therein are to be managed and/or controlled by the state to be utilized to the greatest benefit of the people, which shall be regulated by law.<br>(4) The economic actors are the cooperatives, state enterprises, and private businesses including individual endeavors.<br>(5) Organizing and developing the national economy should always prevent damage to and improve the environment, consider and respect traditional rights, as well as guarantee the balanced development of the whole country. |
| Article 34 | Impoverished persons and abandoned children shall be taken care of by the State. | (1) Not changed.<br>(2) The State develops a social security system for all people and empowers weak and disabled people in accordance with humanity.<br>(3) The State is responsible for providing health service facilities and adequate public services. |

VIII.8 The draft of Article 33 as reported by PAH I to the Working Body on 4 June 2002.

| | **ORIGINAL** | **PROPOSED CHANGES** |
|---|---|---|
| *CHAPTER XIV* | *CHAPTER XIV*<br>*SOCIAL WELFARE* | *CHAPTER XIV*<br>*NATIONAL ECONOMY AND SOCIAL WELFARE* |
| Article 33 | (1) The economy shall be organized as a common endeavor based upon the principles of the familial system.<br>(2) Sectors of production which are important for the country and affect the life of the people shall be under powers of the state.<br>(3) The land, the waters and the natural riches contained therein shall be controlled by the State and exploited to the greatest benefit of the people. | (1) Not changed.<br>(2) Not changed.<br>(3) Not changed.<br>(4) The national economy shall be conducted on the basis of economic democracy upholding the principles of justice, togetherness, efficiency, sustainability, environmental insight, independency, and maintaining equitable development, and the unity of the national economy.<br>(5) Further provisions regarding the implementation of this article shall be regulated by law. |
| Article 34 | Impoverished persons and abandoned children shall be taken care of by the State. | (1) Not changed.<br>(2) The State develops a social security system for all people, to empower weak and disabled people in accordance with humanity.<br>(3) The State is responsible in providing the health service facilities and the adequate public services. |

## VIII.9 The drafts of Chapter XIV of the Working Body and of Commission A.

| | **Draft of Working Body** | **Draft of Commission A** |
|---|---|---|
| *CHAPTER XIV* | *CHAPTER XIV*<br>*NATIONAL ECONOMY AND SOCIAL WELFARE* | *CHAPTER XIV*<br>*NATIONAL ECONOMY AND SOCIAL WELFARE* |
| Article 33 | (1) Not changed.<br>(2) Not changed.<br>(3) Not changed.<br>(4) The national economy shall be conducted on the basis of economic democracy upholding the principles of justice, togetherness, efficiency, sustainability, environmental insight, independency, and maintaining equitable development and the unity of the national economy.<br>(5) Further provisions regarding the implementation of this article shall be regulated by law. | (1) Not changed.<br>(2) Not changed.<br>(2) Not changed.<br>(4) The national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, justice with efficiency, sustainability, environmental insight, independency, and maintaining equitable development and the unity of the national economy.<br>(5) Further provisions regarding the implementation of this article shall be regulated by law. |
| Article 34 | (1) Not changed.<br>(2) The State develops a social security system for all people, to empower weak and disabled people in accordance with humanity.<br>(2) The State is responsible for providing health service facilities and adequate public services. | (1) Not changed.<br>(2) The State develops a social security system for all people, to empower weak and disabled people in accordance with humanity.<br>(3) The State is responsible for providing health service facilities and adequate public services. |

# 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 Consitution 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.

# Samenvatting (Dutch Summary)

## De essentie van de constitutionele hervorming van 1999-2002 in Indonesië
## *het vormgeven van de NEGARA HUKUM*

### Een rechtssociologisch onderzoek

Toen Indonesië na het aftreden van president Soeharto in 1998 begon met de opbouw van democratie en rechtsstaat, werd al snel duidelijk dat dit onmogelijk zou zijn zonder hervorming van de Grondwet van 1945. Deze Grondwet werd als symbool van de onafhankelijkheidsstrijd als bijna 'heilig' beschouwd en was tijdens de revolutie van 1945 tot 1949 van kracht geweest. Vanaf 1950 kende Indonesië nog twee andere grondwetten, totdat in 1959 de Grondwet van 1945 werd hersteld.

De Grondwet van 1945 bestond uit een Preambule, 33 artikelen, en een Toelichting die in 1948 werd toegevoegd door Minister van Justitie Soepomo. In de Preambule, opgesteld door een team van negen personen onder leiding van Soekarno en Hatta, werd de geest, de strijd en de droom van de Indonesische bevolking vastgelegd. De artikelen daarentegen, die waren opgesteld tijdens de Japanse bezetting van Indonesië, legden de grondslag voor een autoritaire staatsvorm: geen rechtsstaat, geen mensenrechten en geen algemene verkiezingen. De volkssoevereiniteit werd toegekend aan de hoogste volksraadpleging, die bestond uit parlementsleden en benoemde leden. De Toelichting versterkte de integralistische en autoritaire concepten in de Grondwet van 1945. Echter, de vervanging van deze Grondwet door een volledig nieuwe bracht het risico van diepgaande etnische conflicten met zich mee, dat Indonesië in een proces van balkanisering zou kunnen storten.

In dit proefschrift wordt besproken hoe de integralistische en autoritaire kenmerken van de Grondwet van 1945 werden vervangen door beginselen van democratie en rechtsstaat, terwijl de Preambule en de eenheid van de staat werden gehandhaafd.

Hoofdstuk 1 is een inleiding, waarin ik beschrijf hoe de oorspronkelijke Grondwet van 1945 op bijzondere wijze rond het jaar 2000 werd geamendeerd. De belangrijkste actor was de Raadgevende Volksvergadering van de Republiek Indonesië (*Majelis Permusyawaratan Rakyat Republik Indonesia* of MPR-RI), die bevoegd is tot het wijzigen van de Grondwet. Deze MPR-RI bestond uit veertien facties: twaalf die bij de algemene verkiezingen van 7 juni 1999 democratisch waren verkozen en twee die waren benoemd: die van de Strijdkrachten en de zogenaamde Functionele Groepen. De MPR vormde een ad hoc comité (PAH) en twee commissies om ontwerpwijzigingen voor te bereiden: PAH III en commissie C tijdens de zitting van oktober 1999, en PAH I en commissie A gedurende de periode november 1999-augustus 2002. Het amenderingsproces bestond uit vier fasen, waarbij elke fase een voortzetting van de vorige was.

De MPR stelde vooraf geen ontwerp op van de gewenste wijzigingen, maar gebruikte de oorspronkelijke Grondwet van 1945 als werkdocument. De MPR begon de besprekingen voor elke wijziging met een overzicht van het gehele stelsel. Men kwam overeen dat alleen de artikelen en de Toelichting zouden worden gewijzigd en dat de beginselen van de democratie en de rechtsstaat daarin zouden worden opgenomen.

Aanvankelijk was de MPR van plan de wijzigingen in één keer door te voeren tijdens zijn algemene zitting in oktober 1999. Toen dit echter niet haalbaar bleek, zette de vergadering het proces voort en besloot dat het geheel uiterlijk tijdens de jaarlijkse zitting van 2002 moest worden afgerond. Vervolgens begon de MPR één voor één de beginselen en bepalingen van de Grondwet van 1945 te bespreken.

De vergaderingen van PAH III, PAH I en Commissie A waren altijd openbaar. Deskundigen uit binnen- en buitenland werden uitgenodigd om hun visies en suggesties te delen. Ook verschillende functionele, sociale en religieuze organisaties werden uitgenodigd om input te leveren. PAH I hield openbare hoorzittingen in de regio's en organiseerde ook vergelijkende studies in verschillende landen. Periodiek hield PAH I persconferenties om het amenderingsproces bekendheid te geven. De MPR richtte zelfs een televisiestation op om het proces live uit te zenden. In de derde fase nodigde PAH I deskundigen van verschillende disciplines uit om als team input en analyses te leveren aan PAH I.

In hoofdstuk 1 worden de opmerkingen van wetenschappers en intellectuelen over het amenderingsproces en de bereikte resultaten besproken. Sommigen van hen stelden dat het amenderingsproces niet democratisch was geweest, of zelfs dat het was mislukt; dat de stapsgewijze aanpak zonder academisch ontwerp tot paradoxen en inconsistenties had geleid; dat het proces door het buitenland was gecontroleerd en gefinancierd; en dat de onafhankelijkheid van de rechterlijke macht niet gewaarborgd zou zijn. Andere wetenschappers betwistten deze conclusies en merkten op dat het amenderingsproces een opmerkelijke prestatie was, het resultaat van een werkelijk democratisch, eigenzinnig proces, en dat het een robuuste constitutionele democratie heeft opgeleverd.

Hoofdstuk II gaat verder in op de unieke positie van de Grondwet van 1945, en geeft een korte geschiedenis van de totstandkoming ervan, hoe zij werd toegepast onder de regimes van de Oude en de Nieuwe Orde, en hoe de gebeurtenissen van 1998-1999 uiteindelijk tot het amenderingsproces leidden.

Hoofstuk III bespreekt de politieke dynamiek tijdens het einde van de Nieuwe Orde en hoe de ontwikkelingen voorafgaand aan de politieke crisis van 1997-1998 de weg naar hervormingen al openden. In hoofdstuk IV wordt het theoretisch kader van het proefschrift geschetst en worden de begrippen rechtsstaat, democratie, grondwet en constitutionele democratie behandeld.

Hoofdstuk V is het eerste inhoudelijke hoofdstuk. Het behandelt de start van het amenderingsproces, dat duurde van 6 tot 21 oktober 1999, en de

inhoud van het eerste amendement. Er wordt beschreven hoe de facties overeenstemming bereikten om de versie van de Grondwet van 1945 die was ingevoerd door President Soekarno's decreet van 5 juli 1959 als basis te gebruiken. De facties werden het eens dat de amendementen de Grondwet democratisch en rechtsstatelijk moesten maken. Wegens de beperkte tijd werd echter weinig vooruitgang geboekt en besloten werd het amenderingsproces voort te zetten – en te voltooien – tijdens de jaarlijkse zitting van de MPR in 2000.

In hoofdstuk VI wordt de tweede amenderingsfase besproken, die duurde van 25 november 1999 tot 18 augustus 2000. Deze fase was onrustig, aangezien de politieke opening die door het proces van *reformasi* was gecreëerd allerlei latente gevoelens van ontevredenheid aan de oppervlakte had gebracht. PAH I besprak gevoelige onderwerpen, zoals de onvrede in de regio's die zich door de centrale regering onrechtvaardig behandeld voelden, en schendingen van de mensenrechten. Sommige actoren, ook binnen de facties in de MPR, hadden moeite met deze ontwikkelingen en probeerden het amenderingsproces tegen te houden, maar dit mislukte.

In deze fase werden de meningsverschillen over fundamentele constitutionele vraagstukken duidelijk. Terwijl PAH I de noodzaak van een onafhankelijke gerechtelijke procedure om de grondwettigheid van wetten te toetsen besprak, concludeerde een ander ad hoc comité, PAH II, waarin dezelfde facties vertegenwoordigd waren als in PAH I, dat grondwettelijke toetsing een bevoegdheid van de MPR moest blijven. In dit stadium nam de MPR het standpunt van PAH II over. PAH I bleef echter bij zijn conclusie dat de grondwettelijke toetsing een gerechtelijke procedure zou moeten zijn, uitgevoerd door een onafhankelijk constitutioneel hof. Ten slotte slaagde PAH I erin de leiders van de facties ervan te overtuigen dat standpunt over te nemen.

PAH I slaagde er tevens in om de mensenrechten in de Grondwet op te laten nemen, overeenkomstig de Universele Verklaring van de Rechten van de Mens van de Verenigde Naties. Verder werd een begin gemaakt met het bespreken van de bepaling dat Indonesië een unitaire, constitutionele staat is, gebaseerd op de rechtsstaat, met de soevereiniteit in handen van het volk. In deze fase sprak Commissie A veelvuldig met deskundigen op het gebied van constitutioneel recht om deze ideeën te helpen uitwerken.

De MPR was echter niet in staat om, zoals eerder overeengekomen, de grondwetswijzigingen in dit stadium af te ronden. Men besloot toen opnieuw het proces voort te zetten tijdens de volgende jaarlijkse zitting van de MPR en het amendement af te ronden tijdens de jaarlijkse zitting van de MPR in 2002.

In hoofdstuk VII wordt de periode van 5 september 2000 tot 9 november 2001 besproken. Deze derde fase werd gekenmerkt door politieke onrust, maar desalniettemin werden veel belangrijke beslissingen in het amenderingsproces genomen, zoals de bevestiging dat Indonesië een constitutionele democratie is, met "checks and balances", en garanties voor de onafhankelijkheid van de rechterlijke macht. Ook werden een Consti-

tutioneel Hof en een Raad van Regionale Vertegenwoordigers opgenomen in het ontwerp. De MPR herriep bovendien decreet III/MPR/2000 waarin werd bepaald dat de bevoegdheden om de grondwettelijkheid van wetten te toetsen bij de MPR berust.

Terwijl het amenderingsproces gaande was, verklaarde president Abdurrahman Wahid in januari 2001 in reactie op eisen van verschillende pressiegroepen, dat hij een staatscommissie zou installeren om een alternatief constitutioneel ontwerp op te stellen. Toen de betrekkingen tussen Wahid en de MPR verslechterden, vaardigde hij een decreet uit om de MPR te schorsen, waarop de MPR op haar beurt hem afzette. Hij werd opgevolgd door Vice-president Megawati Soekarnoputri. Aanvankelijk bevestigde zij het idee van de staatscommissie te steunen, maar al snel verklaarde zij zich akkoord met de continuering van het lopende amenderingsproces.

In februari 2001 stelde het MPR-werkorgaan een groep deskundigen met verschillende academische achtergronden samen om PAH I bij te staan. Het ging om een intern adviesorgaan waarvan de suggesties en aanbevelingen niet bindend waren. Tegelijkertijd investeerde de MPR veel tijd en moeite in publiciteit, door persconferenties, seminars etc. Bovendien moedigde PAH I het publiek aan om voorstellen voor grondwetswijziging in te dienen tijdens openbare hoorzittingen, seminars en bezoeken die in elke regio werden georganiseerd. Naast de raadpleging van de Groep van Deskundigen, had PAH I ook overleg met andere experts, uit Indonesië en uit het buitenland, en organiseerde het vergelijkende studiebezoeken aan verschillende landen in Azië, Afrika, Europa en de VS. In samenwerking met UNDP zette het secretariaat-generaal van de MPR bovendien een televisiestation op voor rechtstreekse uitzendingen van de vergaderingen over het amenderingsproces.

Aan het eind van deze fase kwamen de facties overeen te verklaren dat de soevereiniteit berust bij het volk, wordt uitgeoefend volgens de Grondwet, en dat de staat Indonesië een rechtsstaat is. Er werd echter nog geen overeenstemming bereikt over de toekomst van de benoemde leden van de MPR. Evenmin kon de MPR tot een conclusie komen over de voorstellen tot handhaving of wijziging van Artikel 29 betreffende godsdienst en de aard van het onderwijsstelsel.

Hoofdstuk VIII behandelt de laatste fase van het amenderingsproces, van 9 januari 2022 tot 11 augustus 2002. In deze fase hield PAH I opnieuw openbare hoorzittingen in de provincies en bijeenkomsten met universiteiten, deskundigen en diverse belanghebbenden. Men ontving ook bezoek van een delegatie van de Europese Unie. De politieke onrust was echter nog niet voorbij en verschillende actoren probeerden het amenderingsproces stop te zetten en de oorspronkelijke Grondwet van 1945 te herstellen. Een cruciale kwestie was de toekomst van de benoemde MPR-leden van de functionele groepen en met name die van de Strijdkrachten. Uiteindelijk werd deze kwestie beslist via een open stemming – de enige stemming die gedurende de gehele periode van vier jaar van het amenderingsproces heeft plaatsgevonden. De meerderheid stemde voor afschaffing van benoemde

MPR-leden. Opmerkelijk genoeg stemde meer dan de helft van de F-PDIP-leden tegen de afschaffing, terwijl alle leden van de Strijdkrachten-factie vóór stemden.

Een ander belangrijke kwestie betrof de verkiezing van de president. Er werd gekozen voor directe verkiezingen, waarbij ook de tweede ronde een rechtstreekse verkiezing zou zijn, in plaats van een tweede ronde door de MPR.

Een harde noot om te kraken was artikel 29 over Godsdienst. Na een lang en ingewikkeld proces werd besloten dit artikel te handhaven, samen met een vernieuwd Artikel 31 over Onderwijs en Cultuur. Deze laatste bepaling voorziet in één nationaal onderwijsstelsel dat geloof en vroomheid, alsmede een nobel karakter dient te bevorderen. Over de Artikelen 33 en 34, betreffende de Nationale Economie en Sociale Rechtvaardigheid, kwamen de facties overeen om een beginsel van efficiëntie met rechtvaardigheid op te nemen in plaats van een beginsel dat alleen op economische efficiëntie is gericht.

Gedurende deze hele fase bleven sommige maatschappelijke groeperingen eisen dat er een onafhankelijke constitutionele commissie zou worden ingesteld om het amenderingsproces over te nemen. Zij wilden dat deze commissie een nieuwe grondwet zou opstellen in plaats van de bestaande te wijzigen. Daardoor kwam het hele proces onder aanzienlijke druk te staan, die nog verder toenam toen de Strijdkrachten tegen het einde van de jaarlijkse zitting van de MPR van 2002 verklaarden dat de aangenomen amendementen afweken van het oorspronkelijke doel en zij daarom hun steun uitspraken voor een onafhankelijke constitutionele commissie. Indien die commissie zou falen, zouden het leger en de politie het herstellen van de oorspronkelijke Grondwet van 1945 steunen. Andere groepen stelden een soortgelijk alternatief voor en eisten dat de MPR een commissie zou installeren die een door de MPR te ratificeren grondwet zou opstellen. Indien de MPR dit ontwerp zou weigeren, zou er een referendum over gehouden moeten worden. Tegelijkertijd nam ook de weerstand tegen de amendering binnen de MPR toe, maar de meerderheid van zijn leden was vastbesloten het proces af te ronden. Uiteindelijk stemde de MPR bij wijze van compromis in met de oprichting van een constitutionele commissie die tot taak had een uitvoerige studie te maken van de door de MPR aangebrachte amendementen.

De sleutel tot de succesvolle afronding van de debatten was de wijziging van het standpunt van de Strijdkrachten, die uiteindelijk hun volledige steun uitspraken voor het door de MPR gevoerde amenderingsproces. Zo steunden uiteindelijk alle facties in de MPR de amendementen zoals die in een proces van vier jaar tot stand waren gekomen. Ontroerd door dit historische moment, en voorafgegaan door een gebed van dankbaarheid, stonden alle MPR-leden op en zongen *Indonesia Raya*, het volkslied. Hierna werd de plenaire vergadering van de MPR gesloten.

Hoofdstuk IX vormt de conclusie van het boek. Het bespreekt de redenen waarom de amendementen Indonesië vreedzaam konden hervormen,

van een autoritaire staat tot een democratie. Verschillende factoren hebben aan dit proces bijgedragen, maar de belangrijkste is dat de hoofdrolspelers uiteindelijk boven zichzelf uitstegen en bereid waren compromissen te sluiten om een betere toekomst voor het land te garanderen.

# Curriculum Vitae

Jakob Tobing (Jakob Samuel Halomoan Lumbantobing) was born on 13 July 1943 in Kotabaru-Reteh, Riau, Indonesia. He went to secondary school in Bandung where he also obtained a Bachelor's degree in architectural engineering at the Institut Teknologi Bandung. In addition he received a Degree in Public Administration, from the Higher Institute for Public Administration in 1976 and in 1980 he graduated from the Master Programme in Economics and Government at the John F. Kennedy School of Government, Harvard University.

Jakob Tobing served as a member of the Indonesian parliament from 1968-1997 and from 1999-2004. In this capacity he was Chairman of Commssion VI for Industry, Energy, Mining and Investment (1971-1979), Chairman of the Special Commission for the 2nd Five-year Development Plan (Repelita II) (1972), Member of Committee I for Foreign Affair and Defence (1999-2004), and – most important for this PhD-thesis – Chairman of Ad Hoc Commission I (PAH I) of the People's Consultative Assembly, also from 1999-2004.

He has held many other positions as well, among others as a lecturer in policy analysis, at the Faculty of Political Sciences of Universitas Indonesia, Chairman of the Foundation of Christian Universities of Indonesia, 2001-2004, Ambassador Extraordinary and Plenipotentiary of the Republic of Indonesia to the Republic of Korea, from 2004-2008, President of the Leimena Institute, from 2008-2020 and advisor to the Constitution Forum, from 2008-present.

In 2013 he became an external PhD candidate at Leiden Law School of Leiden University under the supervision of Prof. dr. J.M. Otto and Prof. dr. A.W. Bedner.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2022 and 2023

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