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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 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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>

Subsequently, the MPR plenary session from 1 to 21 October 1999 agreed on the following working agenda:<sup>7</sup>

- Election of a new president and vice president from 1999-2004.

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.<sup>8</sup>
- 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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> The decision-making shall pass four discussion stages, except for the Accountability Report of the President and other matters considered necessary by the Assembly.<sup>12</sup>

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.<sup>13</sup>

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.<sup>14</sup>

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.<sup>15</sup> 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,

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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.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

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.<sup>19</sup>

#### 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

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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,<sup>20</sup> 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.<sup>21</sup> 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,<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup>

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.<sup>25</sup> F-PG proposed enclosing the revision within the existing Constitution.<sup>26</sup> F-Reformasi, F-KKI, F-PDU, F-PPP, and F-PDKB proposed adding the revisions as an addendum to the original 1945 Constitution.<sup>27</sup>

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.<sup>28</sup>

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 Puspojo (F-PDI-P), Hamdan Zoelva (F-PBB), and Taufiqurachman 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 Muhammadiyah (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. Muhammadiyah 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.<sup>29</sup>

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.<sup>30</sup> In this context, a member of F-Reformasi reminded the MPR not to forget to reform the Constitution as a whole.<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup> 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 Bajebber (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.<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup>

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.<sup>37</sup>

Similarly, human rights lawyer Adnan Buyung Nasution argued that some articles in the 1945 Constitution left room for the president to exert authoritarian rule.<sup>38</sup> 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.<sup>39</sup>

In August 1999, Himawan Estu Bagijo, a legal scholar from Airlangga University, Surabaya, stated that Article 1, paragraph (2)<sup>40</sup> of the 1945 Constitution actually eliminates people's sovereignty.<sup>41</sup>

On 30 August 1999, the Institute for National Resilience or Lemhannas (Lembaga Ketahanan Nasional) organized a discussion where Eep Saefullah, Matori Abdul Djilil, 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.<sup>42</sup>

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.<sup>43</sup>

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 Puspwardojo 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.<sup>44</sup>

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.<sup>45</sup>

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 Puspwardojo 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.<sup>46</sup>

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.<sup>47</sup> 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.<sup>48</sup>

The factions also reiterated that the original 1945 Constitution was a provisional constitution that was hastily promulgated and enacted after the proclamation.<sup>49</sup> The addition of a constitutional amendment article was intended for future improvements.<sup>50</sup>

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.<sup>51</sup>

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.<sup>52</sup> For some Islamic political communities, the Jakarta Charter that contains the ‘seven words’ (tujuh kata)<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

This issue shows Islamic political parties’ sensitivity towards the Jakarta Charter and their acceptance of the 1945 Constitution and Indonesian politics in general.<sup>56</sup> 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 *stiltzweigend* (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.<sup>57</sup>

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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup>

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), Muhammad (F-Reformasi), Hamdan Zoelva (F-PBB), Vincent Radja (F-KKI), Taufiqurrachman Ruki (F-TNI/Polri), Asnawi Latif (F-PDU), Zain Bajebur (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*.<sup>61</sup> 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.<sup>62</sup> In that regard, F-KB stated that all high state institutions, except the DPR, must be responsible to the MPR.<sup>63</sup>

Many academics, such as Miriam Budiardjo and Maswadi Rauf,<sup>64</sup> argued in favour of maintaining the MPR as the supreme body.<sup>65</sup> Harun Kamil (F-UG), Chairman of PAH III,<sup>66</sup> 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.<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup> 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.<sup>72</sup>

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,<sup>73</sup> and previously from F-PDKB.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup>

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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 Bajaber (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.<sup>78</sup> 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.<sup>79</sup>

#### 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<sup>80</sup> 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.<sup>81</sup> Likewise, factions proposed strengthening the MPR's authority, relinquishing the concept of the president as the single authority to exercise power on behalf

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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), Muhammadiyah (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.<sup>82</sup> F-PDU proposed introducing a direct presidential election.<sup>83</sup> As emphasized by the F-UG speaker, a constitution should establish the limitation of powers, so that power cannot be arbitrary.<sup>84</sup>

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.<sup>85</sup>

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,<sup>86</sup> 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.<sup>87</sup> On granting titles, decorations, and other honours, the president shall abide by the law.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup>

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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), Taufiqurrahman 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.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup>

#### 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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup>

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.<sup>97</sup> As reminded by a speaker of F-PDI-P, PAH III had not yet come to an agreement on the substance of the phrase.<sup>98</sup>

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.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup> Thus, the speaker argued, the law would rule in the future, no longer being subordinate to the ruler.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

Nonetheless, F-Reformasi, while underlining the rule of law's importance, argued that the discussion about the rule of law was not a priority.<sup>106</sup> 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.<sup>107</sup> 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-

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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 1<sup>st</sup> 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.<sup>108</sup> Hereby, the speaker stressed that he understood the rule of law as a principle that contains just and moral principles.<sup>109</sup> 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.<sup>110</sup> Annoyed by the debate, F-UG urged discussing the supremacy of law during that same session.<sup>111</sup> 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.”<sup>112</sup>

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.<sup>113</sup>

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.<sup>114</sup> Similarly, F-UG argued that since there was a strong desire to uphold the supremacy of law, it should be incorporated into Article 1.<sup>115</sup> F-TNI/Polri supported that proposal, but considering that it needed a clearer understanding, proposed postponing the topic.<sup>116</sup> 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

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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 Bajebber (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.<sup>117</sup> 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.<sup>118</sup>

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 ("*demokratische rechtsstaat*").<sup>119</sup> 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.<sup>120</sup> 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,<sup>121</sup> 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.<sup>122</sup>

The original 1945 Constitution stipulates that the Indonesian president shall be an indigenous Indonesian citizen.<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> In response, a F-PDI-P speaker emphatically asserted that the use of the term indigenous (*asli*) was a seed for Nazism.<sup>127</sup>

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.<sup>128</sup>

#### 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.<sup>129</sup>

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.<sup>130</sup> Further, F-PDU asserted that all judicial matters should be brought under the Supreme Court.<sup>131</sup> Similarly, F-UG proposed that the substance of the amendment should cover, among others, the autonomy of

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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.<sup>132</sup>

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.<sup>133</sup> In that regard, F-PDI-P asserted that the Supreme Court should be strengthened, with Supreme Court judges appointed by the DPR.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup>

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.<sup>137</sup> F-UG, F-PPP, F-PDKB and F-KB asserted that the Supreme Court should be the highest court, organizing all courts under itself.<sup>138</sup>

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.<sup>139</sup> 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.<sup>140</sup> Similarly, F-Reformasi argued that the chairman (Chief Justice) and deputy chairman of the Supreme Court should be elected and confirmed by the MPR.<sup>141</sup>

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.<sup>142</sup> 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 Sihalohe (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 Bajebber (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 Bajebber (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 Bajebber (F-PPP), Andi Mattalatta (F-PG) and Aberson Marle Sihalohe (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.<sup>143</sup> 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.<sup>144</sup> Likewise, F-PBB warned that the MPR is a political institution that should not interfere with judicial matters.<sup>145</sup> 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.<sup>146</sup>

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.<sup>147</sup> 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.<sup>148</sup> 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.<sup>149</sup> F-PG supported the Supreme Court having the authority to actively conduct judicial reviews of laws and lower legislation.<sup>150</sup>

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.

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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.<sup>151</sup> 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.<sup>152</sup>

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.<sup>153</sup> Similarly, F-PDI-P argued in favour of direct election by the people of the president and vice president.<sup>154</sup> 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.<sup>155</sup> Similarly, F-PDI-P argued in favour of direct election by the people of the president and vice president.<sup>156</sup> 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.<sup>157</sup> 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.<sup>158</sup> 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 Muhammadiyah (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.<sup>159</sup>

Eventually, PAH III concluded that the election of the president and vice president was among the amendment priorities of the 1945 Constitution.<sup>160</sup> 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.<sup>161</sup> Likewise, F-PDKB argued that in law-making, the DPR and president should jointly approve a bill.<sup>162</sup> F-TNI/Polri affirmed that the presidential law-making power should be limited.<sup>163</sup> 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.<sup>164</sup>

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,<sup>165</sup> but, F-KKI, F-PDU, F-PDKB and F-UG maintained that the president and DPR should hold joint law-making powers.<sup>166</sup> F-PBB argued in a similar vein that the president should hold the right to approve or reject a DPR-concluded bill.<sup>167</sup> 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.<sup>168</sup>

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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.<sup>169</sup> 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.<sup>170</sup> 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."<sup>171</sup>

The law professors invited for a public hearing gave a different view.<sup>172</sup> 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.<sup>173</sup>

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."<sup>174</sup> 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.<sup>175</sup> 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."<sup>176</sup>

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

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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.<sup>177</sup> 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.<sup>178</sup> 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.<sup>179</sup>

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.<sup>180</sup>

## 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.<sup>181</sup>

Articles	Original	First Amendment <sup>182</sup>
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	<p>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:</p> <p>The oath of the President (the Vice President):  <i>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.</i></p> <p>The Promise of the President (the Vice President):  <i>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.</i></p>	<p>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:</p> <p>The oath of the President (the Vice President):  <i>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.</i></p> <p>The pledge of the President (the Vice President):  <i>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.</i></p> <p>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.</p>
13	(2) The President shall receive the credentials of foreign ambassadors.	<p>(2) In case of appointment of ambassadors, the President shall pay regard to the consideration of the DPR.</p> <p>(3) The President receives the accreditation of ambassadors of other nations by having regard to the consideration of the DPR.</p>
14	The President may grant clemency, amnesty, pardon and restoration of rights.	<p>(1) The President grants clemency and rehabilitation by paying regard to the consideration of the Supreme Court.</p> <p>(2) The President grants amnesty and abolition by paying regard to the consideration of the DPR.</p>

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. (3) These Ministers shall head government departments.	(2) The ministers shall be appointed and discharged by the President. (3) Every minister shall be in charge of certain affairs in the government.
20	(1) Every law shall require the approval of the DPR. (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. 2) Every bill shall be discussed by the DPR and the President in order to acquire joint approval. 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. 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. (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.<sup>183</sup> 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.

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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.<sup>184</sup> However, there was also the idea that judicial power should be controlled by the MPR as the holder of people's sovereignty in full.<sup>185</sup> 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.<sup>186</sup> 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.<sup>187</sup>

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-

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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.<sup>188</sup> 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.<sup>189</sup> Joseph Raz noted the tendency to use the term as a shorthand description of the positive aspects of any political system.<sup>190</sup> 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.<sup>191</sup>

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.

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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.