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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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# VI | The Second Stage of the Amendment Process of the 1945 Constitution, 25 November 1999 – 18 August 2000

## VI.1 THE WORKING SCHEDULE OF THE SECOND AMENDMENT STAGE

Unlike the amendment process in the first stage, the second amendment process was allocated quite a long time, from 25 November 1999 to 18 August 2000. It was expected that the amendment of the 1945 Constitution could be completed by 18 August 2000.<sup>1</sup>

## VI.2 THE ACTING INSTITUTIONS AND THE AMENDMENT PROCESS

### VI.2.1 PAH I members and leadership, 1999-2000

On 25 November 1999, the MPR Working Body set up three Ad-Hoc committees. PAH I oversaw continuing the amendment. PAH II was to discuss the relevant MPR Decrees. A Special Ad-Hoc Committee (*PAH Khusus*) oversaw supporting the activities of PAH I and PAH II.<sup>2</sup> The number of PAH I members was increased.<sup>3</sup> Several MPR Working Body members were replaced. Among others, F-PDI-P withdrew Amin Aryoso. They replaced him with Jakob Tobing, the author. Most of the key persons of PAH III remained.<sup>4</sup>

Further, the leadership of PAH I changed. Jakob Tobing (F-PDI-P) was elected as chairman and Harun Kamil (F-UG) and Slamet Effendy Yusuf (F-PG) as Deputy Chairs. Ali Masykur Musa remained as secretary.<sup>5</sup> The leadership was collegial. The chairperson and the deputy chairmen alter-

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1 See Attachment VI.1. The second stage of the amendment process was carried out within the framework of the MPR 2000 annual session. The annual meeting itself was held from 7 to 18 August 2000, while the Working Body and Ad Hoc Committee activities began in November 1999. In the annual session, there were two main activities, namely the session where high state institutions submit performance reports and the meetings to continue amendments to the 1945 Constitution and to prepare any new MPR Decrees deemed necessary.

2 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 7. During the first stage, the draft constitutional amendment had been prepared by PAH III.

3 See Attachment VI.2.

4 This included Harun Kamil from the Functional Groups and chairman of PAH III, Slamet Effendy Yusuf and Andi Mattalatta from GOLKAR, J.E. Sahetapy, Harjono and Pataniari Siahaan from F-PDI-P, Zain Bajaber and Lukman Hakim Saifuddin from F-PPP, Yusuf Muhammad and Ali Masykur Musa from F-KB, and Patrialis Akbar from F-Reformasi and Hamdan Zoelva from F-PBB.

5 See Attachment VI.3. The list of the members of PAH I BP-MPR, 1999–2000.

nately led PAH I meetings. The secretary coordinated the arrangement and recording of meeting activities and led the activities of PAH I working teams, such as chairing the small team to draft PAH I's meeting outcomes.

## VI.2.2 The amendment's process

In accordance with MPR Decree No. IX/1999, the MPR continued amending the 1945 Constitution, reviewing certain existing MPR decrees and discussing new necessary decrees. The legal-organizational structure of the process at this second stage was similar to the first one. As stipulated by Article 92 of MPR Decree No. II/1999 on standing procedures,<sup>6</sup> the process consisted of four stages (see V.2.1.4).

Prior to the annual session in August 2000, PAH I still had 41 working days which were allocated to regular meetings, informal consultations, and the drafting teams.<sup>7</sup> After a two-day meeting of the MPR Working Body, PAH I resumed deliberations about amendment drafts from November 1999 to July 2000.<sup>8</sup> In August 2000, the MPR plenary session established Commission A (*Komisi A*) to discuss the outcomes of PAH I before the final MPR plenary meeting in August 2000.

At the beginning of the process, PAH I decided not to directly discuss the revision material chapter by chapter, but to review it as a whole, to have a comprehensive view of the changes. Then, after PAH I agreed to discuss the matters sequentially, the review was finalized chapter by chapter. In that way, PAH I could add new chapters if need be.

At the same time, another MPR Ad-Hoc committee, PAH II, was assigned to prepare eleven new MPR decrees to replace four existing MPR decrees. These four decrees were a decree on a situation in which the president and/or vice president of the Republic of Indonesia is incapacitated (Decree No. VII/MPR/1973), on Positions and Working Relationships of the Supreme State Institution with or among the State High Institutions (Decree No. III/MPR/1978), on Elections (Decree No. XIV/MPR/1998), and on Sources of Order of Law and Hierarchy of Legislation (Decree No. XX/MPRS/1966).

PAH II was also meant to draft new decrees on a Procedure for the President's Accountability, on the Role of the Armed Forces in State Affairs, on National Reconciliation, and on Decentralization.<sup>9</sup>

6 MPR Decree No. II/MPR/1999 on Standing Orders and Procedures of the MPR.

7 From 7 to 18 August 2000, the MPR scheduled the annual session for the first time, during which the high state institutions (i.e., the President, the DPR, the General Auditor, the Supreme Court, and the Supreme Advisory Board) should deliver their respective accountability to the MPR. This meant affirming the MPR's supreme authority.

8 See Attachment VI.1, the Working Schedule of the 2<sup>nd</sup> Amendment.

9 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp 4–5.

Thus, two different committees (PAH I and PAH II) simultaneously carried out the MPR's reform process. To complicate matters, little of their work matched and some was contradictory.<sup>10</sup>

With over six months to carry out the assignment and in addition to the ordinary meetings, PAH I also scheduled programs to obtain broader input. Accordingly, PAH I organized visits to the regions, organized public hearings both in Jakarta and the regions, invited written proposals from the public, and conducted seminars and workshops and comparative studies abroad.<sup>11</sup> Furthermore, all PAH I meetings were basically open to the public. Likewise, to improve media coverage, periodic meetings with mass media were conducted. As the PAH I chairman stated, the amendment process should be rich, transparent, and lucid, involving as many parties as possible and providing opportunities for contemplation.<sup>12</sup>

Thus, in December 1999 and January 2000, PAH I dispatched eight teams to visit the regions. In cooperation with universities and research associations, PAH I conducted six seminars on politics, education, religion, socio-cultural matters, regional autonomy, constitutional law, and economics.<sup>13</sup> The seminar participants included academics, members of the province or district DPR, members from political parties, public figures, NGO activists, and representatives of mass organizations.

PAH I also dispatched teams to conduct public hearings in seven provinces: Maluku, North Maluku, South East Sulawesi, Central Sulawesi, Jambi, Bengkulu, and Central Kalimantan. The public hearing participants were similar to the seminar participants. Subsequently, the event outcomes were reported to PAH I.

The PAH I provincial visit team reports were presented to the PAH I meeting on 4 February 2000. The reports made clear that the public was unaware of the amendment of the 1945 Constitution that the October 1999

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10 For instance, PAH II prepared an MPR decree, which was then ratified as MPR Decree no. III/2000, which asserted in Article 5 that the MPR has the authority to review the law's constitutionality, while PAH I was preparing an independent judicial state institution, the Constitutional Court, with authority to conduct constitutional review. Later, MPR Decree no. III/2000 was annulled by MPR Decree no. I/2003.

11 PAH I sent nine teams to 21 countries: I. Iran and Russia; II. Malaysia, Philippines, and South Africa; III. People's Republic of China, Japan, and South Korea; IV. United States of America and Canada; V. Egypt and United Kingdom; VI. Greece and Germany; VII. Italy and the Netherlands; VIII. Spain and France; IX. Denmark, Hungary, and Sweden. PAH I did not draw conclusions on the findings during the comparative study but expected each faction to absorb and reflect on their findings based on their respective views.

12 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 309.

13 The seminar on politics was held in Banjarmasin (19 to 20 March 2000), on education and socio-cultural matters in Semarang (22 to 23 March 2000), on religion and socio-cultural matters in Mataram, Lombok (22 to 23 March 2000), on regional autonomy in Pekanbaru (24 to 25 March 2000), on constitutional law in Bandar Lampung (25 to 26 March 2000), and on economics in Yogyakarta (25 to 26 March 2000).

MPR session had conducted. Apparently, the outcomes had not been disseminated to the public.<sup>14</sup>

Besides the above, PAH I also invited scholars and prominent figures to public hearings with PAH I. To obtain comparative perspectives, a member argued that PAH I needed reliable sources which could explain from a historical, philosophical, and cultural perspective why – for example – there are unitary and federal states, why countries such as (Federal) Germany are strong, why Yugoslavia was split during the reform process, and why France adopted the form of a unitary state.<sup>15</sup> PAH I also received in-person and written input from various societal interest groups, including religious organizations, farmers' associations, and universities. PAH I also formed teams to receive public input, both verbally and in writing.<sup>16</sup>

To improve public awareness around the amendment process, the MPR Secretariat General, in cooperation with the United Nations Development Programme (UNDP), set up a television station in the MPR compound to broadcast PAH I meetings in real-time. Meanwhile, there had been an overlap of PAH I and PAH II activities. PAH II believed they were tasked with carrying out political reforms and thus with organizing activities to absorb the aspirations of the people. In that regard, in the coordination meeting between PAH I and PAH II, secretary of PAH I Ali Masykur Musa reminded that every MPR decision must be in accordance with the constitution. Further, Musa urged closer coordination between PAH II and PAH I. F-PG had previously argued that the prevailing MPR decrees, which contain fundamental substances, should be revoked and its substances accommodated in the Constitution.<sup>17</sup>

During the second stage, PAH I managed to finalize the drafts of a considerable number of constitutional provisions.<sup>18</sup> Some of them had been debated during the first stage: the law-making process and the DPR's provisions. Others were introduced and would be finalized during this second stage: provisions on regional government (Chapter VI, 1945 Constitution) and human rights (Chapter XA, 1945 Constitution). In July 2000, PAH I reported the results to the MPR Working Body for further process. At this stage, the MPR, following its rule of procedure, formed MPR Commissions.

14 As reported by Andi Mattalatta and Hamdan Zoelva. *Majelis Permusyawaratan Rakyat Republik Indonesia, op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 421.

15 As stated by Soedijarto (F-UG). *Ibid.*, p. 55.

16 *Majelis Permusyawaratan Rakyat Republik Indonesia, op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 36.

17 As expressed by Agun Gunandjar Sudarsa (F-PG). *Ibid.*, p. 83.

18 They consisted of Articles 18, 18A, and 18B on decentralization and autonomy, Article 19 on the DPR (*Dewan Perwakilan Rakyat*), Article 20(5) to resolve the pending part of the process on law-making, Article 20A, 22A, and 22B on functions and other provisions of the DPR, Chapter IXA Article 25E on State Territory, Chapter X on the Citizen and Resident, Chapter XA Articles 28A to 28J on Human Rights, Chapter XII Article 30 on Defense and State Security, and Chapter XV Articles 36A, 36B, and 36C on the National Flag, the State Emblem, and the National Anthem.

After the PAH I's works were concluded by the MPR Working Body, the drafts were submitted to MPR Commission A. Subsequently, Commission A discussed the work of PAH I along with the Introductory Views of the factions. These were presented at the beginning of the Commission A meeting. The outcome was then reported to the MPR plenary session for a decision.

As regulated by the MPR standing order, no new topic can be raised at the commission meeting unless all factions agree to discuss the topic. To expedite the process, factions agreed to conduct informal consultations between the Commission meetings, if necessary.

The PAH I factions also invited three constitutional law experts to attend the Commission A meetings as associate experts. However, they could not participate in the discussions. These experts were Bagir Manan (University of Pajajaran), Soewoto Moeljo Soedarmo (University of Airlangga), and Mahfud MD (University of Gajah Mada).<sup>19</sup> They assisted PAH I in editing the draft revisions that the factions had agreed on.

The second stage finalized certain issues while further discussing others, including the law-making process and the rule of law. Here, the process began to touch on sensitive Indonesian political history, including the Jakarta Charter<sup>20</sup> and the federal state.<sup>21</sup>

Meanwhile, in the community there were criticisms over the amendments' substance and creation process. On 5 July 2000, a delegation from the Communication Forum of the Retired Military and Police (*Forum Komunikasi Purnawirawan TNI dan Polri*) met with the F-KKI. They stated their objection to PAH I amending the 1945 Constitution. The Forum's Secretary General, Syaiful Sulun, stated that the changes should be made through a tight procedure, using in-depth studies and involving the public.<sup>22</sup> Constitutional law experts Mohammad Mahfud MD and Thalib Puspokusumo considered that the amendment process was not transparent.<sup>23</sup> Various other parties who were also critical of the process urged the MPR not to ratify the amendment.<sup>24</sup> Meanwhile, Harun Al Rasid asserted that the MPR should accomplish the 1945 Constitution's reform.<sup>25</sup>

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19 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 108. The experts had attended the previous meetings.

20 See II.3. The making of the 1945 Constitution.

21 On 17 August 1945, Indonesia was proclaimed a unitary republic. On 27 December 1949, Indonesia became a federal republic. On 17 August 1950, it became a unitary republic again. Amidst discussions regarding the centre-regional and interregional relations, questions about the federal state were raised again.

22 *Kompas Daily*, 5 July 2000, p. 8.

23 *Kompas Daily*, 26 July 2000, p. 8. Amien Rais, the chairman of the MPR was also the Chairman of the National Mandate Party (*Partai Amanat Nasional* – PAN).

24 As stated by Bara Hasibuan, deputy secretary general of PAN. *Suara Pembaruan*, newspaper, 8 August 2000, p. 1.

25 *Kompas Daily*, 15 July 2000, p. 6. Harun Al Rasid is a professor of constitutional law at the University of Indonesia, Jakarta.

Eventually, from 7 to 18 August 2000, the MPR convened an Annual Session to finalize the second amendment stage outcomes.

The MPR finally approved and promulgated the second amendment on 18 August 2000.

### VI.2.2.1 *The discussions*

At this stage, PAH I had more opportunities to fully discuss the topics that were evolving in the public, in seminars, and in public hearings (see above VI.2.2).<sup>26</sup> The debates covered decentralization, human rights, people's sovereignty, the MPR's position and authority, rule of law, education, presidential elections, and the representation of the regions' aspirations in national level policymaking.

At the second stage's beginning, PAH I's newly elected chairman attempted to review certain outcomes of the previous amendment process, which he deemed were not properly established. These outcomes included the clause that the President shall have regard for the consideration of the DPR before accrediting foreign envoys, which is not common in the diplomatic world.<sup>27</sup> However, all other PAH I members firmly stated that what had been agreed as an amendment to the 1945 Constitution should not be changed again, except for technical editing (e.g., adjusting the numbering of paragraphs). PAH I members argued that once an already ratified amendment could be questioned, other decisions could also be withdrawn. Consequently, the PAH I chairman frequently reminded the factions that they had agreed not to change the Preamble and the unitary form of state during the first amendment stage.<sup>28</sup> Ultimately, the Constitutional amendment could not be completed during the August 2000 MPR Annual Session as planned. The MPR decided to postpone finalizing pending topics to the following MPR annual session.

Looking at the broader society, the openness that flourished during the process of *reformasi* brought to surface latent feelings of discontent and various other aspirations. It encouraged people to associate their aspirations and grievances with the reform process. In provinces such as Riau,

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26 The second stage lasted from November 1999 to August 2000, while the first stage lasted only for two weeks. During this period, PAH I received input from over 200 sources, i.e., 7 state institutions, 27 regional and local governments, 10 universities, 20 experts, 25 NGOs, 4 professional organizations, 7 religious organizations and 100 individual sources.

27 The new stipulation in the Constitution was triggered by certain Australian Parliament members rejecting the new Indonesian ambassador to Australia, Lt. Gen. Herman Leopold Mantiri in 1995. See *Media Indonesia Minggu*, newspaper, 9 July 1995.

28 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 1999, Edisi Revisi, Sekretariat Jenderal, 2010, p. 562. By contrast, Denny Indrayana writes that Tobing's reaffirmation of the agreement to maintain the Preamble of the 1945 Constitution and the unitary form of the state was unsubstantiated. See Denny Indrayana, *op. cit.*, p. 192.

East Kalimantan, and Papua, people directed their anger toward the central government. They felt that they had been treated unfairly. Natural resources from their regions (e.g., oil and gas) were exploited, with only a tiny fraction of the revenue and no significant infrastructure developed in return. Important regional positions, such as governorships and district head positions, were dominated by officials appointed by the central government. Thus, the regions generally condemned the highly centralized government system. For instance, the East Kalimantan Province DPR demanded the establishment of a federal state in East Kalimantan.<sup>29</sup> Likewise, the participants in the seminar on regional autonomy in Pekanbaru in March 2000 demanded broad autonomy, a federal state, or even separation.<sup>30</sup> A public hearing in North Maluku revealed the opinion that the MPR should draft a totally new Constitution.<sup>31</sup>

In the meantime, armed separatist movements in Aceh and Papua, as well as in East Timor, escalated their activities, fighting for independence. These were the circumstances in which discourses and demands to strengthen regional authority or to change the unitary state form into a federal state were escalating.

There were also those who argued that the 1945 Constitution should be maintained as it was. A delegation from PGI (the Indonesian Council of Churches),<sup>32</sup> a constitutional law expert, and an expert on the Armed Forces dual-function theory<sup>33</sup> separately stated before a PAH I public hearing that the original 1945 Constitution was theoretically sound and did not need alteration. It was the people, especially the MPR as the holder of people's sovereignty, who did not implement it purely and consistently. What must be improved, they stated, were the lesser laws, such as MPR decrees and governance practices. Likewise, some public hearing participants in East Nusa Tenggara asserted that the MPR should maintain the 1945 Constitution to avoid national disintegration.<sup>34</sup>

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29 *Kompas Daily*, 2 December 1999.

30 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 9. A delegation of the Free Riau movement, including their presidential candidate, also attended the seminar.

31 As reported by Baharuddin Arintonang (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 18.

32 PGI stands for *Persekutuan Gereja-Gereja di Indonesia*. As stated by J.M. Pattiasina from PGI. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 542-544

33 As stated by BG (ret.) A.S.S. Tambunan before a PAH I public hearing on 8 March 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 254.

34 However, as reported by Hamdan Zoelva (F-PBB), who led the PAH I team to Kupang, East Nusa Tenggara, the public hearings did not object to the amendments to the 1945 Constitution if the Preamble, the form of a unitary state and presidential system were maintained. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 435.



PAH I began its activities by delivering and discussing the Introductory Views presented by the factions. On that occasion, all factions affirmed their respective intention to reform the 1945 Constitution while maintaining the Preamble, the form of unitary state, and the presidential system. Factions proposed that the Constitution should affirm supremacy of law, human rights, checks and balances, independent judicial power, judicial review, direct presidential election, improvement of regional autonomy, the existence of the political parties, and elections.<sup>35</sup>

In that meeting, the F-PDI-P reminded the members that PAH I should discuss the *negara hukum* or *demokratische rechtsstaat* (democratic state based on the rule of law) and its very important components such as *grondrechten* (fundamental rights) and *scheiding van machten* (the separation of powers).<sup>36</sup> However, the attitude towards maintaining the MPR as the highest state institution still existed.<sup>37</sup>

After a series of public hearings, seminars, workshops, and comparative studies, conducted during the period from December 1999 to April 2000, PAH I made a tabulation and matrix of the issues related to the Constitution's amendment. Subsequently, PAH I conducted discussions to find solutions to the various opinions and ideas regarding the amendment. For that purpose, factions prepared in advance the list of issues to be deliberated, which were conveyed ahead of the PAH I plenary discussion.

Eventually, based on the extent they were agreed in PAH I, the MPR Working Body grouped the materials into the following categories:<sup>38</sup>

Group A consisted of chapters on:

1. Flag, Language, National Emblem, and National Anthem
2. Citizen and Resident
3. Defense and Security

Group B consisted of chapters on:

1. DPR (*Dewan Perwakilan Rakyat* – DPR)
2. Regional Government
3. State Territory

Group C consisted of chapters on:

1. Human Rights
2. Judiciary Authority and Law Enforcement

35 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 74–139.

36 *Ibid.*, p. 56. As stated by Sutjipno (F-PDI-P).

37 *Ibid.*, pp. 109, 170.

38 Group A consisted of materials that had been fully agreed upon while Group D consisted of materials that had not yet found any agreement. Groups B and C consisted of materials that had basically been agreed on, but with multiple draft changes. Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 625–626.

3. Council for Representation of the Regions<sup>39</sup> (*Dewan Perwakilan Daerah – DPD*)
4. Election
5. Public Finances
6. General Auditor

Group D consisted of chapters on:

1. Form, Basis, and Sovereignty
2. Authority of State Government
3. MPR (*Majelis Permusyawaratan Rakyat*)
4. National Economy and Social Welfare
5. Education and Culture
6. Religion
7. Amendment of the Constitution, including regulation of transitional provisions
8. Supreme Advisory Board or DPA (*Dewan Pertimbangan Agung*)

The following section sets out the debate on Constitutional provisions regarding education, which focused on the difference between teaching and education, a national versus decentralized standards framework, and the role of education in preserving culture and upholding morality. While a national system of free education was preliminarily agreed on, due to time constraints, the ratification of the amendments was further postponed.

On the third PAH I meeting on 6 December 1999, in the factions' introductory deliberations, a F-PDIP member conveyed that PAH I should affirm the relationship between the Constitution's articles and Pancasila's principles. For example, Article 31 states: "Every citizen shall be entitled to acquire education", while the fifth principle of Pancasila states "social justice for all the people of Indonesia." A F-Reformasi member stated that Article 31 should be improved. A F-PDKB member stated that it should be maintained.<sup>40</sup> Subsequently, in a public hearing with experts on 13 December 1999, a F-UG member underlined that Article 31 and Article 32 on advancing Indonesian national culture were intended to realize the ideal of building a nation state. Unfortunately, these two things had never been taken seriously. In Germany and Japan, the state supervises education. In Taiwan, the Constitution states that the central government provides 15% of the education budget while provinces provide 35%. In Indonesia, there are no such provisions at all.<sup>41</sup>

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39 The English translation used by the Constitutional Court is the Regional Representative Council, which sounds more like the Representative Councils of the Province or the District.

40 Stated by Hobbes Sinaga (F-PDIP), A.M. Luthfi (F-Reformasi), Gregorius Seto Harianto (F-PDKB). See *Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 80, 109, 125.

41 Stated by Soedijarto (F-UG). *Ibid.*, p. 215.

Regarding the ideal of building a nation state, an expert asserted that it was not the ethnicity, race, religion, or region, but the values of independence and justice that unite the nation.<sup>42</sup>

#### VI.2.2.2 Public Hearing Views on Education

In a public hearing on 24 February 2000, a delegation from Universitas Jember proposed that the term “education” should replace the term “teaching” in Article 31 (1) and (2).<sup>43</sup>

In a public hearing on 28 February 2000 with IAIN (*Institut Agama Islam Negeri* – State Institute for Islamic Studies), Syarif Hidayatullah, and ITB (*Institut Teknologi Bandung* – Bandung Institute of Technology), an IAIN speaker stated that the formulation of Article 31 on Education was too general. A new formulation was necessary to end the injustice, discrimination, and inequality in education. The state’s treatment of all education institutions should be equal. Further, the state should also pay attention to those who attend private schools, as they are also citizens.<sup>44</sup> Basically, the ITB delegation underlined human equality as the main factor for the nation’s progress and dignity, the need to build an intelligent society, that education is a determining factor in progress and prosperity, and the importance of fostering the spirit of nationalism. A delegation stated that education should be prioritized over other fields. Another delegation noted that culture’s role in the post-industrial and post-modern period is very important. Further, the delegation argued that Article 32 is still considered very general. The complexity brought about by the internet over culture is quite serious and this must be considered. In future global interactions, mastery of science and technology are important to both participating and competing in progress.<sup>45</sup>

In a public hearing on 29 February 2000 with PGI (*Persekutuan Gereja-Gereja di Indonesia* – Council of Churches in Indonesia) and KWI (*Konferensi Wali Gereja Indonesia* – Bishops’ Conference of Indonesia), a KWI delegate argued that the Constitution should not allow a centralized education system. Further, education would have to be interpreted as the development of science and technology, character, national awareness, and culture. The PGI delegation discussed Article 32, stating that the government should develop Indonesian national culture.<sup>46</sup>

42 As stated by Pranarka. *Ibid.*, p. 228.

43 Article 31 (1) stated “Every citizen shall be entitled to acquire teaching”. Article 31 (2) stated “The government shall undertake and shall conduct one national teaching system, which shall be regulated by law”. As stated by Samsi Husairi (University of Jember). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 399.

44 As stated by Azyumardi Azra (IAIN Syarif Hidayatullah). *Ibid.*, pp. 453-456, 477.

45 As argued by delegation of ITB, Imam Buchori, I Dewa Gde Raka, Rizal Zaenuddin Tamin, Filino Harahap, Bana Kartasasmita. *Ibid.*, pp. 483-502.

46 As stated by A. Djoko Wiyono (KWI) and Pattiasina (PGI). *Ibid.*, pp. 540, 552.

On the same day, in the subsequent public hearing with MUI (*Majelis Ulama Indonesia* – Indonesia Ulema Council), NU (*Nahdlatul Ulama* – Association of Muslim Scholars) and Muhammadiyah, a MUI speaker, agreed that the term “education” should replace “teaching” in Article 31 (1). Section (2) should be changed to read, “The government shall undertake and shall conduct one national educational system that aims to create a generation of believers and devotion to God Almighty and mastering science and technology, which is regulated by law”.<sup>47</sup> A NU speaker argued that the Constitution should clearly state that every citizen should acquire proper and just education and guarantee the eradication of discrimination either culturally, structurally or in budget appropriations.<sup>48</sup> Regarding the education gap between public and private institutions and between men and women, a member noted that there are no existing gaps in education’s implementation. She stressed that in the future, every citizen should have the same opportunity.<sup>49</sup>

A delegation from Parisadha Hindu stated in a public hearing on 1 March 2000 that Article 31 could be maintained. After completing the above public hearings, PAH I planned to complete the discussion on Articles 31 and 32 on 21 and 22 June 2000.

In the beginning of the PAH I meeting on 21 June 2000, the chairman of PAH I underlined that education and culture are very important and central to nation building. The chairman recalled a proverb that says that “if we want to live one day, cook rice and eat. If we want to live one year, plant rice. But if a nation wants to develop and prosper, educate the people.”<sup>50</sup>

In that meeting, PAH I members proposed a new formulation of Articles 31 and 32. All factions agreed that the constitutional provisions regarding education must be strengthened to include culture. The factions agreed that each citizen has the same right to obtain education and receive basic education for free. It was also stated that education is a nation’s investment in the future, not just for survival, but to carry out cultural transformation. The Constitution needs to emphasize a high minimum state budget allocation for the education sector. Correspondingly, it was proposed that Article 32 be refined so that culture should be perceived from the aesthetic, cognitive, and normative dimensions.<sup>51</sup>

A F-UG member reminded that Soekarno, the first president of Indonesia, always reminded the nation that we were facing “*many revolutions in one generation*”, requiring a revolution in the way of thinking, working, and so on. Based on that, he proposed that the chapter on education should consist of two articles, one on education and the other on culture. Further,

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47 As stated by K.H. Ismail Hasan (MUI). *Ibid.*, p. 578

48 As stated by Ahmad Bagja (NU). *Ibid.*, p. 590.

49 As stated by Rosnaniar (F-PG). *Ibid.*, pp. 559, 609.

50 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Enam, Edisi Revisi, Sekretariat Jenderal, 2010, p. 64.

51 *Ibid.*, pp. 65 - 81.

he proposed that every citizen has the right to free basic education, and the government should strive for one national education system to develop national culture and build national civilization. Furthermore, the member proposed that for that purpose, the central and regional governments are obliged to allocate sufficient education budgets. He also proposed that those governments should be obliged to protect and nurture national and local cultures and to advance the sciences.<sup>52</sup>

One F-PDIP member emphasized that the right of citizens to education is firmly stated in the Universal Declaration of Human Rights. For that purpose, he proposed that the state should allocate at least 15% of the state budget towards education. The member underlined that education is a transmission process of culture from one generation to the next. Further, he proposed changing the title of Chapter 31 from 'Education' to 'Education and Culture'. However, the member also believed that the chapter on education and culture should consist only of one paragraph.<sup>53</sup>

One member emphasized the importance of education's goal. It is not merely about the transfer of science and technology, but also about shaping attitude and virtuous behaviour.<sup>54</sup> Another member suggested that Article 31 should include that the education system also aim to improve and develop faith and piety.<sup>55</sup> Another member added that the government should guarantee the people's right to preserve and develop their cultures.<sup>56</sup> Then, the PAH I chairman underlined that the development of national culture is a dynamic process that should maintain its roots. Its development must nurture its heritage, preventing the culture from being uprooted.<sup>57</sup>

An informal meeting was held to bring together various proposals for amendments to Articles 31 and 32. This continued with the formulation team meeting on 22 June 2000. The team summarized the 'proposal of changes' draft to Articles 31 and 32 for further discussion at the upcoming Commission A meeting. The draft contains proposals for change that still contain alternatives. For example, the proposal for Article 31 (3) had three alternatives.<sup>58</sup> Article 31 (5) had two alternatives.<sup>59</sup>

52 Stated by Soedijarto (F-UG). *Ibid.*, pp. 65 – 66.

53 Proposed by Muhammad Ali (F-PDIP). *Ibid.*, pp. 68 - 69.

54 Stated by Rosnaniar (F-PG). *Ibid.*, p. 69.

55 Proposed by Lukman Hakim Saifuddin (F-PPP). *Ibid.*, p. 71.

56 Proposed by Yusuf Muhammad (F-KB). *Ibid.*, p. 73.

57 *Ibid.*, p. 117.

58 These alternatives included (1) "The government shall organize and shall execute one national education system, which is regulated by law", (2) "The government shall organize and shall execute one national education system, to develop the intellectual life of the nation, which is regulated by law", and (3) "The government shall organize and shall execute one national education system, to enhance faith and piety, the noble characters and to educate the nation's life, which is regulated by law".

59 These alternatives were (1) "The state advances science and technology for the advancement of civilization and unity" and (2) "The state advances science and technology which are not in contradiction with religious values for the advancement of civilization and the prosperity of human kind". See Enclosures of MPR Decree no. IX/MPR/2000.

While a national system of free education was preliminarily agreed on, due to time constraints, Commission A did not have time to discuss the education draft reported by PAH I.<sup>60</sup> However, the MPR plenary session agreed to accept the PAH I report as material for amending the Constitution, to be discussed at a later stage.<sup>61</sup>

A document summarizing the materials on the above issues was submitted to Commission A on 11 August 2000 for further process.<sup>62</sup> Commission A agreed to prioritize materials that had been fully agreed by the factions before discussing other materials.<sup>63</sup>

Discussions in the commission were preceded by the factions' Introductory Views. To finalize the work, an informal consultation group was formed, also functioning as a drafting team. It consisted of the Commission A leadership and Commission A faction leaders.

To enhance the formulation of the outcomes, experts on Indonesian language, constitutional law, and international law assisted the drafting team before the draft was submitted to the Commission A plenary.<sup>64</sup>

Eventually, Commission A agreed on seven chapters, consisting of 23 articles and 57 verses:

- Chapter VI on Regional Government
- Chapter VII on DPR (*Dewan Perwakilan Rakyat*)
- Chapter IXA on State Territory
- Chapter X on Citizen and Resident
- Chapter XA on Human Rights
- Chapter XII on State Defence and Security
- Chapter XV on the Flag, Language, National Emblem, and National Anthem

However, Commission A did not finalize discussions on the following chapters:

- A. Judicial Authority
- B. The Council for Representation of the Regions
- C. Election
- D. Public Finances
- E. Education and Culture

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60 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 615 – 627.

61 See MPR Decree no. IX/MPR/2000.

62 The sixth MPR plenary session on 11 August 2000 formed three commissions, which were Commission A (to finalize the drafts of the second stage of amendment of the 1945 Constitution), Commission B (to finalize the drafts of the new MPR decrees), and Commission C (to finalize the MPR's opinion regarding the annual reports of the President, DPA, DPR, and MA on the implementation of the GBHN). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 73-75.

63 *Ibid.*, p. 108.

64 *Ibid.*, p. 625.

Finally, due to time constraints, Commission A did not discuss the following:

- Chapter on the Form, Basis, and Sovereignty
- Chapter on the Government Authority
- Chapter on the MPR (*Majelis Permusyawaratan Rakyat*)
- Chapter on the National Economy and Social Welfare
- Chapter on the Religion
- Chapter on the Amendment of the Constitution
- Chapter on the Supreme Advisory Board

Eventually, on 18 August 2000, the MPR Plenary Session passed the second amendment of the 1945 Constitution. Significant changes included the devolution of government power to the regions and the incorporation of human rights in the Constitution. Then, the plenary asked the MPR Working Body to continue the amendment process and to complete the amendment by the 2002 MPR annual session at the latest. Unlike in the first amendment, the MPR issued MPR Decree No. IX/ 2000, to which a list of pending amendment issues was attached.<sup>65</sup>

## VI.2.3 The content

### VI.2.3.1 *Rule of law state (negara hukum) and judicial review*

From the beginning, all factions in the MPR had emphasized that the rule of law ought to be asserted in the Constitution. They wanted to affirm that Indonesia is a *negara hukum* (state based on law) in the Constitution's first article.<sup>66</sup> The factions, alternating between the terms *negara hukum*, *rechtsstaat*, and 'rule of law', deplored that this had not been included in the 1945 Constitution since its inception.<sup>67</sup> Similarly, NGOs and the public wanted *negara hukum* to be affirmed in the Constitution.<sup>68</sup>

During the first phase, these discussions had remained rather general (see V.4.7.4).

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<sup>65</sup> See Attachment VI.4.

<sup>66</sup> Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 77-81.

<sup>67</sup> In the original 1945 Constitution, Indonesia as a state based on law (*rechtsstaat*) and not just on power (*machtsstaat*) was stated in the Elucidation (Government System, I.1), but not in an article of the Constitution. The Constitution also did not state that the judiciary is an independent authority.

<sup>68</sup> As stated among others by Bambang Widjojanto from the Indonesia Legal Aid Institute and Luhut Pangaribuan from the Indonesia Legal Aid and Human Rights Association. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 235. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 422-439.

At the second phase's start, the factions urgently wanted to discuss the *democratische rechtsstaat* or *negara hukum* and its relation with important concepts such as *grondrechten* (fundamental rights) and *scheiding van machten* (the separation of powers).<sup>69</sup> Factions argued that the rule of law has a strong capacity to prevent the recurrence of authoritarian power<sup>70</sup> and that supremacy of law is a fundamental element of democracy.<sup>71</sup> Concurrently, factions also perceived the rule of law as the main principle of human rights.<sup>72</sup> Thus, according to PAH I, to uphold legal certainty, the amended Constitution should be placed as the land's supreme law, the legal system's highest law.<sup>73</sup> Subsequently, statements were made that the whole judiciary should culminate in the Supreme Court and that the Constitution should ensure Supreme Court independence.<sup>74</sup> Like in the first stage, members argued that to set up supremacy of law, the Supreme Court should be attributed with the authority to conduct judicial review.<sup>75</sup> Alongside judicial independence, factions stated that the judiciary should be controlled by a newly-established independent commission.<sup>76</sup> This was due to the factions'

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69 As stated among others by Sutjipno (F-PDI-P). Ibid. In the initial part of the discussions, Dutch terms were often used. Later, English terms such as 'rule of law' were frequently referred to.

70 As emphasized by Asnawi Latief (F-PDU). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 84.

71 As stated by Valina Subekti Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 133, 137, 172.

As stated by Pataniari Siahaan (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 127.

As emphasized by, among others, Agun Gunandjar Sudarsa (F-PG), Lukman Hakim Saifuddin (F-PPP), Asnawi Latief (F-PDU) and Hamdan Zoelva (F-PBB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 90, 99, 102.

As stated by Zain Bajeber (F-PPP) and Anthonius Rahail (F-KKI). See Ibid., p. 153.

As argued by, among others, Gregorius Seto Harianto (F-PDKB), Gunandjar Sunandar (F-PG), and Asnawi Latief (F-PDU). See Ibid. pp. 83-85, 124, 167. Academics, such as Philipus M. Hadjon from Airlangga University agreed with the position. See Ibid., p. 337.

As stated by Hamdan Zoelva (F-PBB). See Ibid. p. 99. (F-UG) and Ali Masykur Musa (F-KB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 133, 137, 172.

72 As stated by Pataniari Siahaan (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 127.

73 As emphasized by, among others, Agun Gunandjar Sudarsa (F-PG), Lukman Hakim Saifuddin (F-PPP), Asnawi Latief (F-PDU) and Hamdan Zoelva (F-PBB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 90, 99, 102.

74 As stated by Zain Bajeber (F-PPP) and Anthonius Rahail (F-KKI). See Ibid., p. 153.

75 As argued by, among others, Gregorius Seto Harianto (F-PDKB), Gunandjar Sunandar (F-PG), and Asnawi Latief (F-PDU). See Ibid. pp. 83-85, 124, 167. Academics, such as Philipus M. Hadjon from Airlangga University agreed with the position. See Ibid., p. 337.

76 As stated by Hamdan Zoelva (F-PBB). See Ibid. p. 99.



awareness of past judicial weaknesses. Considering the judiciary's importance, factions also expressed the need to enhance the judge's credibility and restore a proper legal culture within the courts.<sup>77</sup>

However, during this stage, the notion that the MPR is the highest holder of popular sovereignty was still influential. For example, some held that to ensure the judiciary's independence, it needed to be directly under and accountable to the MPR.<sup>78</sup> Correspondingly, not everyone agreed that the Supreme Court should have the power of judicial review. Factions, academics, and certain groups in society voiced this opinion.<sup>79</sup> Those against argued that the Supreme Court stands on the same level as state institutions that promulgate laws. Thus, the highest authority should rest with the supreme institution, i.e., the MPR. In contrast, others argued that the Constitution could establish a judicial institution with the authority to undertake judicial review (such as Germany's Constitutional Court). If the review was conducted by a political institution such as the MPR, it would be a political rather than a judicial review.<sup>80</sup> All factions agreed that the Supreme Court should keep its authority to conduct judicial review on legislative products below the level of a law. However, they differed in attributing the power of reviewing a law against the Constitution.

As the discussion continued, factions agreed that there should be an authority to conduct judicial review. However, they disagreed on who should have the authority: the Supreme Court,<sup>81</sup> the MPR, or a Constitutional Court within the Supreme Court. There were two further opinions regarding the Constitutional Court. First, the MPR should form the Constitutional Court as an Ad-Hoc court.<sup>82</sup> Second, an independent and permanent Constitutional Court should exist within the judicial branch.<sup>83</sup>

In accordance with the procedural PAH I rules for consensus through deliberation, the deliberations were often interspersed by informal meetings. Through such meetings, factions developed an understanding that

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77 As noted by Yusuf Muhammad (F-KB), see *Ibid.* pp. 159, and J.E. Sahetapy (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 264.

78 Yusuf Muhammad (F-KB) argued that to guarantee the judiciary's independence, it should be responsible directly to the MPR. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 159.

79 As argued among others by Dahlan Ranuwiharjo from the University of Jember, I Dewa Gede Atmaja from the University of Udayana, and Pattiasina from the Indonesian Communion of Churches. See *Ibid.*, pp. 231, 365-366, 551.

80 As stated by Bagir Manan. *Ibid.*, p. 319.

81 As proposed by Slamet Effendy Yusuf (F-PG) and Anthonius Rahail (F-KKI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 180.

82 As proposed by Agun Gunandjar Sunarsa (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 170.

83 As proposed by I Dewa Gede Palguna (F-PDI-P). See *Ibid.* p. 200.

the judicial power may also consist of several institutions, for example, a Supreme Court, a Constitutional Court, and a Judicial Commission.<sup>84</sup> Eventually, the factions agreed that the rule of law should be incorporated in the Constitution's first Article.<sup>85</sup> However, they could not yet agree on an exact formulation.

In general, factions accepted that rule of law is infused with human rights.<sup>86</sup> Therefore, the Constitution should affirm that Indonesia is a *negara hukum*, i.e., a rule of law state. However, it was also stated that any government action should be based on the law.<sup>87</sup> In response to the latter, others argued that the term *negara berdasar hukum* (rule by law) should be differentiated from *negara hukum* (rule of law). The term *negara hukum*, it was argued, contains all the good paradigms (e.g., respecting human rights, checks and balances, and limitation of power). However, *negara berdasar hukum* seems to mean that all the state's actions are based on the law, irrespective of whether such law upholds human rights or is totalitarian.<sup>88</sup> With that understanding, the PAH I chairman eventually concluded to use the term *negara hukum* (rule of law) instead of *negara berdasar hukum*, which seemed closer to the 'rule by law' concept.<sup>89</sup>

During the second phase, PAH I could not complete a draft amendment of the Constitution regarding the rule of law. It just managed to compile a variety of alternative amendments to be discussed in the following session. However, it managed to agree that the Constitution should establish an independent and permanent Constitutional Court. In the meantime, PAH II drafted a decree stating that the MPR could review the constitutionality of laws and their compatibility with MPR decrees. PAH II had been assigned with reviewing the existing MPR decrees and drafting new decrees. At the end of the MPR session, this draft was ratified as MPR Decree No. III/2000 on Sources of Law and the Hierarchy of Legislations.<sup>90</sup>

Surprisingly, the same MPR plenary meeting agreed that one of the PAH I's next assignments was to continue preparing the establishment of an

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84 In an informal consultation, the chairman of PAH I persuaded the factions to comprehend that the discussions were not merely about the Supreme Court, but rather on the judicial branch in a state that implemented the separation of powers principle, whereby the Supreme Court is the court of cassation. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 193.

85 *Ibid.*, p. 108.

86 As asserted by Hamdan Zoelva (F-PBB), the essence of the rule of law should be limited by upholding and respecting human rights. See *Ibid.*, pp. 127–128.

87 Patrialis Akbar (F-Reformasi) argued that what was important is that every government action should be based on law, therefore, the Constitution should affirm that Indonesia is a *negara berdasar hukum* (a state based on law). See *Ibid.*, p. 133.

88 As emphasized by Andi Mattalatta (F-PG). See *Ibid.*

89 *Ibid.*, p. 135.

90 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 220. The formulation was drafted by PAH II and signed by all factions.

independent and permanent Constitutional Court.<sup>91</sup> This incident showed that in PAH I, which consisted of various factions, there had been a unification of opinion that led to the opinions of their respective factions.

### VI.2.3.2 Human rights

One can read a strong message on human rights in the 1945 Constitution's Preamble, which was not properly elaborated in the Constitution's articles. The third *sila* (principle) of the foundational state ideology Pancasila, which is embedded in the Preamble (see III.2.1.2), affirms that the state of Indonesia should be based on Just and Civilized Humanity (*Kemanusiaan yang adil dan beradab*).<sup>92</sup> The PAH I factions realized that the provisions on human rights in the original 1945 Constitution were insufficient. In its Special Session in October 1998, the MPR ratified MPR Decree No. XVII/1998 on Human Rights.<sup>93</sup>

All PAH I factions argued that the decree's content should be in a separate chapter of the Constitution.<sup>94</sup> To confirm their endorsement, the military and police faction (F-TNI/POLRI) submitted a full draft of the new Article 28A on human rights.<sup>95</sup> Likewise, various communities, such as NGOs, academics, and the public wanted human rights provisions in the Constitution.<sup>96</sup> Various stakeholders reminded PAH I that the provisions

91 See Article 25 of the Attachment of MPR Decree No. IX/2000 on the Assignment of the Working Body of the People's Consultative Assembly to prepare draft amendments to the 1945 Constitution.

92 As reaffirmed by the chairman of PAH I. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 350. The 1945 Constitution was written three years before the United Nations Universal Declaration on Human Rights was ratified in 1948.

93 On 21 May 1998, under public pressure for reformation, President Suharto resigned, and Vice President Habibie replaced him. To respond to the demand for reform, the MPR conducted a special session on 10-13 November 1998, which promulgated MPR Decree No. XVII on Human Rights and MPR Decree No. XIV on the Amendment and Supplement to MPR Decree No. III of 1998 on General Election that expedited the general election from 2002 to 1999.

94 As stated by among others, Hobbes Sinaga (F-PDI-P), Agun Gunandjar Sudarsa (F-PG), Abdul Khaliq Ahmad (F-KB), Lukman Hakim Saifuddin (F-PPP), Hamdan Zoelva (F-PBB), Anthonius Rahail (F-KKI), Gregorius Seto Harianto (F-PDKB), Hendi Tjaswadi (F-TNI/Polri), Valina Singka Subekti (F-UG) and Sutjipno (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 80-146.

95 *Ibid.*, p. 177.

96 As recorded in various public hearings in Jakarta and the regions. See *Ibid.*, pp. 80, 349, 366, 430, 433, and 436. In a public hearing on 29 February 2000, Ahmad Watik Pratiknya from Muhammadiyah argued that the provision on human rights should be included explicitly in the Constitution. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 586. Nurcholis Madjid stated in Den Haag that the defect of the old regime was in ethics and social morality, as well as in ignoring values of humanity for decades. See Kompas Daily, 5 May 2000.

on human rights should also include women's rights, environmental rights, and traditional communal rights (*hak ulayat*).<sup>97</sup> Later, in a public hearing on 25 February 2000, the Commander of the Armed Forces affirmed that ABRI (the military and the police) endorsed including human rights provisions in the 1945 Constitution.<sup>98</sup> An academic delegation stated that since the original 1945 Constitution embraced integralism (i.e., the state is above all), human rights is not an essential part of such conception of the state. Under such a system, the delegation argued, a security approach aimed at unity is more important than democracy and human rights. Therefore, besides the national identity's core values, a new value system must also be adopted in the Constitution. The new value system would contain human rights, democracy, supremacy of law, environmental preservation, social solidarity, intellectual property, increasing the role of women, transparency, and openness.<sup>99</sup>

Some NGOs, considering the broadness of human rights provisions and their relation to other constitutional principles, doubted whether the constitution could accommodate them merely through an amendment.<sup>100</sup> They argued that the original Constitution's integralist concept had to be replaced with constitutionalism, outlining the limitation of powers, government accountability to the people, as well as the protection of human rights.<sup>101</sup> They insisted on replacing the 1945 Constitution with a new one.<sup>102</sup> However, regional groups argued that Indonesian culture differs from the basic principles of universal human rights and that it would be an exaggeration if all principles of universal human rights would be included in the Constitution.<sup>103</sup>

One aspect of human rights which came up in the discussions was

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97 As stated by Valina Singka Subekti (F-UG), Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 345, and Saafuruddin Bahar of the Indonesian Association of Political Sciences (AIPSI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 285.

98 Asserted by Admiral Widodo, the Commander of the Armed Forces. See *Ibid.*, p. 424.

99 As stated by ITB lecturers, Rizal Zaenuddin Tamin, Filino Harahap, Guswin Agus, Bana Kartasasmita, Yasraf Amir Piliang, Imam Buchori, Dimitri and ITB student's representatives, Ari Wicaksono and Ferdiman. Stated in PAH I public hearing on 28 February 2000. *Ibid.*, pp. 488-533.

100 As stated by Hendardi of the Legal Aid Foundation (PBHI). See *Ibid.*, pp. 232, 233. In the subsequent stage of the amendment process, this argument became one of the impeding factors. With this argument, many human rights activists did not believe that the amendment could produce a reliable constitution, so they called for a new constitution.

101 As stated by Ihdhal Kasim of the Institute for Policy Research and Advocacy (ELSAM). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 104-105.

102 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 232, 233.

103 As reported by Lukman Hakim Saifuddin (F-PPP) from public hearings in the regions. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 430.

non-discrimination, i.e., that the Constitution should guarantee non-discriminatory treatments of citizens.<sup>104</sup> In discussing the topic, factions always referred to the underlying principles of human rights. All factions agreed on the principle of non-discrimination.<sup>105</sup> Factions underlined that equality and justice cannot be achieved if the constitution is discriminative.<sup>106</sup> More important than the constitutional protection against, for instance, racism, was a guarantee to be treated equally.<sup>107</sup> In that context, factions pointed to Article 27(1) of the original UUD 1945. It confirmed that every citizen shall be equal before the law and in government and shall respect the law and government without exception.<sup>108</sup> Further, factions agreed that the terminologies of *warga negara asli* (native citizen) and *warga negara non-pribumi* (non-native citizen) should be interpreted only as information on where the citizen originated from.<sup>109</sup>

Then, in the following consultation meeting, factions stipulated that the final draft of Chapter X on citizens would be adjusted based on the final discussion's conclusions on human rights, because their contents are associated.<sup>110</sup> At this stage, nearing the MPR Working Body session in July 2000, the factions in PAH I discussed whether the concept of human rights is universal or particular and if universal, whether there could be any consideration for particularistic aspects. Some argued that particularistic views had been a manipulation by the authoritarian ruler to protect the regime while ignoring the protection of human rights. Thus, in their opinion, as Indonesia is part of a global society, the views which emphasize particularism should be abandoned, although some aspects of particularism may be taken into consideration. Correspondingly, the view that human rights is a Western concept must be abandoned. However, there must be respect for non-derogable or unalienable rights, which are the rights the state cannot violate under any circumstance.<sup>111</sup>

On the other hand, others reminded the committee that an individual person exists in a variety of communities, such as *rechtsgemeenschappen* (legal communities) and *volksgemeenschappen* (folk communities). This indicates that a person may be living in an environment with a diversity of norms. Thus, the discussion continued, the fundamental rights of a person should be protected from possible violations by state authorities. On the

104 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 153.

105 As stated by A.M. Luthfie (F-Reformasi), Soedijarto (F-UG), Lukman Hakim Saifuddin (F-PPP), and Hendi Tjaswadi (F-TNI/Polri). *Ibid.*, pp. 157-160.

106 As stated by Agun Gunandjar Sudarsa (F-PG). *Ibid.*, p. 153.

107 As reiterated by the author as the chairman of PAH I. See *Ibid.*, 166.

108 Article 27(1) of the original 1945 Constitution. This article has been maintained.

109 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 320-322. Non-native citizen is citizen whose ethnicity is not of the archipelago's.

110 *Ibid.*, pp. 330-331.

111 As stated by Slamet Effendy Yusuf (F-PG). *Ibid.*, p. 316.

other hand, one needs state institutions to protect a person's fundamental rights from infringements by fellow citizens.<sup>112</sup> Others argued that to avoid anarchy, the Constitution should affirm that human rights must be in accordance with the norms of ethics, religions, decency, and law. Further, it was reminded that since the state, according to the Pancasila, is based on the belief in the Almighty God, religious teachings must be obeyed. Therefore, the right to not embrace religion as a fundamental right, needs to be questioned.<sup>113</sup> Similarly, not every faction could accept that freedom of *kepercayaan*<sup>114</sup> (the local set of beliefs) should be included in the Constitution.

Meanwhile, a member from an Islamic faction argued that Indonesia should combine the Universal Declaration of Human Rights, which is universal, with the 1990 Cairo Declaration, which asserts that rights and freedoms should be subject to *syariah* (Islamic teachings).<sup>115</sup> Responding to these opinions, some argued that this would lead to problems. Regarding religious norms, it would raise questions as to which religious norms would be applicable in a pluralistic society like Indonesia.<sup>116</sup> Others argued that the Constitution should not emphasize rights more than obligations, but that it should be balanced.<sup>117</sup>

To ease concerns, other members elucidated that inherent in human rights is the obligation to respect others, which limits individual rights.<sup>118</sup> Others added that human beings hold the fundamental rights in accordance with their nature, value, and dignity as being the noblest creature. The human being is created as an individual as well as a social being. Rights should therefore be regulated so that one person's fundamental rights shall not ignore another's.<sup>119</sup> Another member cited the 1993 Vienna Convention, which states "every person shall be subject to the laws and regulations, created solely to provide the rights and freedoms of others." Others quoted Article 36 of MPR Decree No. XVII/1998 on Human Rights, which states "every person shall have the duty to accept the restrictions established by the law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, security and public order in a democratic

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112 As stated by Sutjipno (F-PDI-P). Ibid, p. 362.

113 As argued by A.M. Luthfie (F-Reformasi). Ibid, pp. 328, 336.

114 *Kepercayaan* is a generic term for a local set of beliefs, such as mysticism, *kejawen* (traditional Javanese mysticism), and paganism. *Kepercayaan* existed in the archipelago of Indonesia before the arrival of religions.

115 Proposed by Ali Hardi Kiaidemak (F-PPP) by quoting Article 25 of the Declaration of the 1990 Cairo Organisation of Islamic Conference. See Ibid., pp. 369-370.

116 As stated by Slamet Effendy Yusuf (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 328.

117 As stated by Harun Kamil. See Ibid., p. 333.

118 As stated by Valina Singka Subekti (F-UG) and Hendi Tjaswadi (F-TNI/POLRI). Ibid., pp. 334-335.

119 As stated by Gregorius Seto Harianto (F-PDKB). Ibid, p. 358.

society.”<sup>120</sup> Another issue was different perceptions regarding the scope of non-retrospectivity as a non-derogable right.

Thus, PAH I members made various proposals regarding human rights, from a complete article on human rights to individual principles for consideration. Eventually, a collection of scattered opinions on human rights needed compilation and synchronization before they could be reported in the following stage. To organize the different ideas, PAH I tasked a select team with systematizing the material and reporting their work to the drafting team.<sup>121</sup>

Prior to forming the team, the PAH I chairman reiterated that a human right is not a gift from the state, but inherent in human beings. The constitution does not grant or create it, but rather recognizes and guarantees it.<sup>122</sup> The Constitution’s stipulation of human rights should be sufficiently detailed, to avoid fundamental topics becoming daily political issues subject to judicial review.<sup>123</sup> At last, the team managed to conclude almost all issues on human rights, except the issue of *kepercayaan* (local set of beliefs) and the scope of non-derogable non-retrospectivity.

Discussion on the draft was resumed in the MPR Working Body meeting on 2 August 2000. Despite the differences on the above two issues, there was no substantive debate. At the end, the MPR Working Body approved the PAH I report and agreed on the human rights provisions, except on the above two issues. After the draft was reported to Commission A, most of the subsequent Commission A debates centred on the first issue. Impatient with the impasse, some proposed removing the article on freedom of religion from the chapter on human rights. They argued it was stipulated in the original Article 29(2) of the 1945 Constitution and so did not need to be included in the new chapter.<sup>124</sup> However, the Commission A chairman reminded members that it would be strange if a chapter on human rights did not contain freedom of religion, a basic human right.<sup>125</sup> Other members supported the chairman’s argument and affirmed that freedom of religion and freedom of *kepercayaan* are both basic rights.<sup>126</sup>

Nevertheless, those opposed to including freedom of *kepercayaan* stated that they had no objection to the substance of that freedom. They were only

120 Cited by Lukman Hakim Saifuddin (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Risalah Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 366.

121 Consisted of Slamet Effendy Yusuf (F-PG), Harjono (F-PDI-P), Lukman Hakim Saifuddin (F-PPP), Asnawi Latief (F-PDU), and Valina Singka Subekti (F-UG). *Ibid.*, p. 382.

122 *Ibid.*, p. 371.

123 *Ibid.*, p. 373.

124 Proposed by Lukman Hakim Saifuddin (F-PPP), Happy Bone Zulkarnain and Slamet Effendy Yusuf, both from F-PG. Article 29(2) of Chapter XI on Religion of the initial UUD 1945 states that ‘*The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.*’ See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 422.

125 See *Ibid.*, p. 424.

126 As stated by Amidhan (F-PG), an Islamic scholar. *Ibid.*, p. 425.

concerned with including it in the Constitution. They suggested the issue should be settled by voting.<sup>127</sup> The Chairman encouraged a consensual solution.<sup>128</sup> The objection is more a matter of sensibility rather than substance. They do not want religion to be conflated with belief, which they argue to be heresy that needs repentance or that those who have not embraced religion must be enlightened.

In the end, Commission A agreed that freedom of belief should be included in the human rights chapter together with freedom of religion, but in different words.<sup>129</sup>

The discussions on the non-derogability of non-retrospectivity also took time. Commission A wanted to clearly outline when the non-retrospective principle did not apply. It also included the affirmation that universally, the non-retrospective principle does not apply to war crimes and crimes against humanity.<sup>130</sup> Commission A agreed as non-derogable the right against trial under a retrospective law, excluding war crimes and crimes against humanity. The definition is consistent with the legal restriction of human rights, to ensure respect for the rights themselves. It also reflects the Universal Convention to which Indonesia is a signatory.<sup>131</sup>

Further, an informal consultation between the Commission A leadership and the MPR faction representatives on 13 August 2000 agreed on the human rights chapter's final draft. The final amendment changed 'the protection, advancement, upholding and fulfilment of human rights are the responsibility of the government' to 'the protection, advancement, upholding and fulfilment of human rights are the responsibility of the state, especially the government'.<sup>132</sup>

However, in the last Commission A meeting, some new changes were made. In the preceding informal meetings between factions, the formulation of human rights had been fully agreed upon and had been reported to the factions. However, disregarding that agreement, Dimiyati Hartono (F-PDI-P) questioned the agreement and made a new proposal regarding consumer rights. This opportunity had been used by some members to re-submit proposals that had been rejected before, such as adding 'religious values' alongside moral consideration, security and public order as factors restricting human rights.<sup>133</sup>

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127 Ibid., p. 428. Quite a number of Indonesians adhere to local set-of-beliefs that do not belong to Hinduism, Confucianism, Buddhism, Muslim or Christian. Some are from pre-Hindu times or later. In general, religious followers consider the belief not on par with religions and want them to repent and embrace religion. Until now, the Ministry of Education and Culture has invested 190 organizations of groups of followers of the local set-of-belief in God Almighty. The presence of the organization is now recognized before the law.

128 Ibid., p. 431.

129 Proposed by Hamdan Zoelva (F-PBB). See Article 28E (1) and (2), Chapter XA on Human Rights, the 1945 Constitution.

130 Stated by Hendi Tjaswadi (F-TNI/Polri). Ibid., p. 462.

131 Ibid., pp. 461-478.

132 Based on a proposal by Lukman Hakim Saifuddin (F-PPP). See Ibid., p. 515.

133 See Ibid., pp. 518-519.



Ultimately, the eighth People's Consultative Assembly plenary meeting on 15 August 2000 accepted fully the works of Commission A. Then, in the 9th MPR plenary meeting on 18 August 2000, the MPR ratified the new Chapter XA on Human Rights in the 1945 Constitution.<sup>134</sup>

### VI.2.3.3 *Limitation of powers*

During the amendment process' first stage, factions pointed out that the concentration of power in the president's hands and the vagueness of its limitation were the main causes of past abuses of power. In the PAH I meeting on 6 December 1999, the meeting's first speaker, a F-PDI-P member reiterated that to limit the president's authority, several provisions had been incorporated into the 1945 Constitution.<sup>135</sup>

In its introductory view, a F-UG speaker stated that various distortions occurred during the previous regimes because constitutionalist principles were not strongly enough embedded in the 1945 Constitution. She argued that a constitution should limit the government's power to prevent an arbitrary application of power. Therefore, a constitution should become the manifestation of the highest law, which should be obeyed by both the people and the government. Thus, the constitution should specify constitutionalist principles.<sup>136</sup> Furthermore, the members stated that the amended 1945 Constitution must set stricter limits regarding the president's power and further empower the DPR and MPR to hold the president accountable.<sup>137</sup>

In a public hearing in Balikpapan, East Kalimantan, the participants urged that the Constitution should limit the president's power and establish checks and balances.<sup>138</sup> Yet, the idea of limiting the president's power was often taken very far. In subsequent meetings, PAH I members proposed limiting presidential authority to such an extent that it would take on the form of a parliamentary system. For example, many proposed that the president should have the DPR's approval when appointing ministers. During the MPR 2000 Annual Session, the MPR determined Decree No. VII/MPR/2000 (drafted by PAH II), which requires the president to gain the DPR's approval (rather than consideration) in appointing the armed forces commander and police chief. By contrast, the Constitution affirms that the president holds the highest authority over the military.

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134 Ibid., pp. 651-697.

135 As stated by Hobbes Sinaga (F-PDI-P). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 73.

136 As stated by Valina Singka Subekti (F-UG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 133.

137 Ibid., p. 181.

138 Ibid., p. 432. As reported by Asnawi Latief (F-PDU).

The Indonesia Legal Aid Foundation's delegation (*Yayasan Lembaga Bantuan Hukum Indonesia*) stated that the state authorities, MPR, DPR, the president and others should be equipped with the authority to undertake their tasks, with a clear and rigid limit to avoid abuses of power.<sup>139</sup> In that regard, a F-PDI-P speaker affirmed that the history of constitutions is the history of limiting power, intended to protect people from its abuse. However, the limitation of power is not an end, but rather a legal certainty. Regarding this matter, F-UG agreed that checks and balances do not occur only between the branches in the *trias politica*, but also between the parliament and institutions outside the parliament, so that checks and balances also occur in political communication.<sup>140</sup>

An IKADIN delegation<sup>141</sup> in that same public hearing emphasized that the Constitution should limit the state's power, adhering to human rights. The delegation argued that, so far, power had been concentrated in the president's hands, causing totalitarianism and authoritarianism.<sup>142</sup> Further, an AIPI delegation<sup>143</sup> argued that the president is too powerful. AIPI assumed that Soepomo was too idealistic and utopian, so that if Soepomo's opinion was followed, only a super-human could become president. Furthermore, the delegation said that the founding fathers (despite a Western education) opposed the parliamentary system implemented in Western countries. It seemed they had chosen the presidential system due to the parliamentary system's weaknesses without seriously examining the presidential system.<sup>144</sup> Stating that "power tends to corrupt,"<sup>145</sup> another AIPI delegation asserted that the 1945 Constitution's system does not control power, which allowed President Suharto to become authoritarian.<sup>146</sup> A PWI delegation<sup>147</sup> argued that the 1945 Constitution's Elucidation clause, which states that the concentration of power and responsibility lies with the President, had strengthened the authoritarian tendency, becoming *l'état c'est moi* – the state is me.<sup>148</sup>

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139 As stated by Bambang Widjojanto of the Indonesia Legal Aid Institute or LBHI (*Lembaga Bantuan Hukum Indonesia*). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 235. Stated in a public hearing on 21 February 2000.

140 As asserted by Valina Singka Subekti (F-UG). *Ibid.*, p. 242.

141 Also known as *Ikatan Advokat Indonesia* or the Association of Indonesian Advocates.

142 As emphasized by Frans Hendra Winarta from IKADIN. *Ibid.*, pp. 258 – 259.

143 Also known as *Asosiasi Ilmu Politik Indonesia* or the Association Indonesian Political Science.

144 As stated by Saafuruddin Bahar from AIPI. *Ibid.*, p. 281. Soepomo was the chairman of the small team of BPU-PK for drafting the Constitution in 1945. Stated in a PAH I public hearing on 22 February 2000.

145 Quoting Lord Acton.

146 As stated by Isbodroini Soejanto (AIPI). *Ibid.*, p. 287.

147 Also known as the *Persatuan Wartawan Indonesia* or the Indonesian Journalists Association.

148 As expressed by Syamsul Basri (PWI). *Ibid.*, p. 328.

In that regard, a F-PDU speaker argued that the 1945 Constitution's main weakness lay in its implementation, depending on the leader's mood and ignoring the system. At the same time, it failed to clearly limit the president's authority, plunging the country into authoritarianism.<sup>149</sup> A Muhammadiyah delegation stated that the checks and balances arrangement should not only debate whether to follow *trias politica*. What mattered was the need to balance and empower the three groups of state governance.<sup>150</sup> An ELSAM delegation<sup>151</sup> asserted that the changes to the Constitution should not focus just on adding new articles but on constitutionalism.<sup>152</sup> A WALHI delegation<sup>153</sup> stated that the people should have the right to obtain information about the exercise of state power, so that its control would not be limited to the DPR representatives.<sup>154</sup>

Regarding the limitation of powers, an Armed Forces political officer expressed his views. Referring to the words of Bung Karno, he argued that the 1945 Constitution does not copy any other constitutional system. Instead of dividing the authority into the executive, legislative, and judicial, the 1945 Constitution knows eight powers: the power to make the Constitution, the power to make broad outlines of state policy, the executive power, the state finance power, the diplomatic power, the military power, the power to bestow honours and the judiciary power. Further, the officer explained that the president holds four positions: the MPR's mandate holder, the head of state, the head of government and the co-authority on law-making (alongside the DPR). The 1945 Constitution organizes the state based on modern management, emphasizing control. Since the president holds the four positions, the president is powerful. In that regard, the control consists of political control (conducted by the DPR and the people) and technical control (conducted by the Supreme Council, the Audit Board, and the Supreme Court). With such control, the president is less likely to abuse their power.<sup>155</sup>

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149 As argued by Asnawi Latief (F-PDU). *Ibid.*, p. 431.

150 As stated by Ahmad Watik Pratiknya from Muhammadiyah. *Ibid.*, p. 585. Stated in a PAH I public hearing on 29 February 2000.

151 Also known as *Lembaga Studi dan Advokasi Masyarakat* or the Institute for Policy Research and Advocacy.

152 Constitutionalism meaning that the Constitution should contain provisions on the limitation of powers, accountability of the government to the people, and the protection of human rights. As stated by Ifdhal Kasim. *Majelis Permusyawaratan Rakyat Republik Indonesia, op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 104. Stated in a PAH I public hearing on 2 March 2000.

153 Also known as the *Wahana Lingkungan Hidup Indonesia* or the Indonesian Forum for Environment.

154 As conveyed by Emy Hafild of WALHI (*Wahana Lingkungan Hidup Indonesia*). *Ibid.*, p. 105.

155 As stated by Brig. Gen. A.S.S. Tambunan, a political officer of the Armed Forces. *Ibid.*, p. 253. Stated before a PAH I public hearing on 8 March 2000.

In that context, F-PDI-P asserted that the essence of a *democratische rechtsstaat* (democratic constitutional state) is democracy as *staatsvorm* (state form), a state which is limited and framed by the principles of *negara hukum*, in the form of *rechtsstaatsgedachte* (rule of law idea), thus avoiding anarchy. Further, a *democratische rechtsstaat* is based on a *scheiding van machten* (separation of powers), which creates the checks and balances needed to prevent human rights violations.<sup>156</sup>

In an MPR plenary meeting on 15 August 2000, a F-KKI member argued for reconsidering a draft MPR decree on the armed forces and police roles, especially the appointment of the armed forces commander and police chief. The F-KKI questioned whether the DPR must approve the appointment, or whether an earnest consideration and recommendation by the DPR would suffice. Further, the speaker proposed further studying how to build the new system, reviewing issues such as the division and separation of the executive and legislative powers.<sup>157</sup>

The experience during the New Order era, where the President's power was unlimited, had caused all factions to talk about the importance of building and understanding mechanisms to properly limit the president's powers.

#### VI.2.3.4 Sovereignty and the MPR (the People's Consultative Assembly)

Article 1 (2) of the original 1945 Constitution states that sovereignty is in the hands of the people and exercised in full by the MPR. Thus, the original 1945 Constitution made the people's and MPR's sovereignty united and inseparable, adopting the MPR's supremacy. What this provision is supposed to mean in the context of democracy, how the MPR should be reformed, and who should join the MPR became topics of lengthy discussions in the amendment process.

In the beginning of the second phase, the PAH I Chairman reminded the committee that the 1945 Constitution's Preamble firmly embraces the values of people's sovereignty, social justice, and human rights.<sup>158</sup> In general, factions agreed that in the past, people's sovereignty had been neglected and so should be improved in conformity with the Preamble.<sup>159</sup> A member stated that if the people directly elect the president, the MPR's position should be reconsidered. Accordingly, another member added, the system that

156 As stated by Sutjipno (F-PDI-P). Ibid., p. 264. Sutjipno always used the Dutch terms.

157 As expressed by FX Soemito (F-KKI). Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Ketiga, Jilid 17, *Risalah Rapat Paripurna ke-7 s/d ke-10 (Sidang Tahunan 2000)*, Sekretariat Jenderal MPR-RI, 2000, p. 119. Later, the draft was ratified as MPR Decree No. VII/2000 on the Role of the Indonesian National Military and the Role of the Indonesian National Police. This part does not appear in the minutes of the 2010 Revised Edition.

158 As stated by the author in a public hearing with experts on 13 December 1999. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 191.

159 As stated by Hobbes Sinaga (F-PDI-P) and Agun Gunandjar Sudarsa. See Ibid., p. 78, 81.

places the MPR as the sole implementer of people's sovereignty should be reviewed.<sup>160</sup> Factions proposed various ideas on how to improve the MPR's position. There were also factions who wished to maintain the MPR as it was.<sup>161</sup> Civil society and academic experts were similarly divided.<sup>162</sup> Indeed, during the second stage, there were still different opinions about how people's sovereignty was comprehended in connection with the MPR's existence.

In the public hearings, there were those who defended the system by arguing that the existing system matched the integralist familial system adopted by Indonesia. They argued that this system adheres to an integrated sovereignty principle, where there is political, economic, and social democracy and the morality of believing in God the Almighty. Therefore, Indonesia did not implement *trias politica*. Indonesia is a new and familial state. It is not a synthesis of the individualist liberal state and the proletariat dictatorship. One speaker emphasized that Indonesia exists in-between.<sup>163</sup>

Starting his response by saying *de waarheid is hard* (the truth is painful), a PAH I member from PDI-P disagreed, stating that the integralist concept is Hegelian and fascist and there was no *apologia* needed for saying that.<sup>164</sup> Others doubted the conformity of integralism with modern democratic principles that recognize fundamental rights and the separation of powers.<sup>165</sup> Furthermore, a member added that if the 1945 Constitution's system synthesizes liberal and authoritarian systems (based on familial and mutual cooperation), then checks and balances depend on the awareness of system actors. In such circumstances, self-restraint is important, without which the whole system fails. Therefore, it is doubtful whether this system should be maintained.<sup>166</sup> Another member added that with checks and balances, the MPR cannot become the highest state institution. Checks and balances should exist where the powers automatically control each other. Therefore, the MPR cannot be the highest institution which distributes power and oversees other institutions.<sup>167</sup>

Other members argued that the MPR should be maintained as the highest state institution and executor of people's sovereignty, but that its

160 As stated by Hamdan Zoelva (F-PBB). *Ibid.*, p. 94.

161 As stated by A.M. Luthfie (F-Reformasi) and Yusuf Muhammad (F-KB). See *Ibid.*, pp. 109, 159.

162 As stated by Pranarka, Dahlan Ranuwihardjo, Sri Soemantri, and Pattiasina. *Ibid.*, pp. 201, 231-232, 241 and Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 542-543. In that regard, Pattiasina argued that the appointed representatives of the functional groups should be replaced by the representatives of the isolated and backward people.

163 As stated by Dardji Darmodihardjo of the *Paguyuban Manggala* (Association of National Level Instructors of State's Ideology Training) and Brig. Gen. A.S.S. Tambunan, a political officer of the Armed Forces. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 69, 253-254.

164 As stated by J.E. Sahetapy (F-PDI-P). *Ibid.*, pp. 72-73.

165 As argued by Sutjipno (F-PDI-P). *Ibid.*, p. 74.

166 As argued by Andi Mattalatta (F-PG). *Ibid.*, p. 78.

167 As argued by Pataniari Siahaan (F-PDI-P). *Ibid.*, p. 92.

authority should be reviewed<sup>168</sup> or limited to the powers stipulated in the Constitution.<sup>169</sup> Some proposed limiting the MPR's power by omitting the last word "*sepenuhnya*" in Article 1(2) of the 1945 Constitution.<sup>170</sup> Checks and balances could come from strengthening both the MPR (as the highest state institution) and all subordinate state institutions.<sup>171</sup> However, empowering the MPR as the supreme institution would instill a parliamentary characteristic, rendering the political system unstable.<sup>172</sup>

Others argued that if the people elect a president directly, the MPR should be abolished.<sup>173</sup> Others believed that despite direct elections, the president must remain accountable to the MPR.<sup>174</sup> Another suggestion was to regard the MPR as a Constituent Assembly in another form, dealing with constitutional issues.<sup>175</sup>

Factions and society at large also differed about the MPR's membership. Within the factions in the PAH I, there were members who argued that those who do not exercise their voting rights and who keeps the same distance with each contestant should have their representatives be appointed members of the MPR.<sup>176</sup> Likewise, the functional groups who are accommodated in the house of representatives and regional representatives should be represented in the MPR.<sup>177</sup> In society there was also the opinion

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168 As argued by Hamdan Zoelva (F-PBB), Valina Singka Subekti (F-UG) and Seto Harianto (F-PDKB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 121, 130.

169 As proposed by Asnawi Latief (F-PDU) and Taufiqurrahman Ruki (F-TNI/POLRI), see *Ibid.*, pp. 103, 175.

170 Article 1(2) of the original 1945 Constitution states that the "Sovereignty shall be vested in the hands of the people and shall be executed by the People's Consultative Assembly in full" (emphasis added). As proposed by Samsi Husairi and Suharsono from the University of Jember and Ahmad Bagdja from the Board of Nahdlatul Ulama (NU). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 398, 590.

171 As proposed by Agun Gunandjar Sudarsa (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 84.

172 As argued by Harjono (F-PDI-P). See *Ibid.*, pp. 304-305.

173 As argued by Lukman Hakim Saifuddin (F-PPP), Hatta Mustafa (F-PG), and Bagir Manan from the University of Pajajaran Bandung. See *Ibid.*, pp. 92, 273, 355.

174 As stated by A.M. Luthfie (F-Reformasi), Gregorius Seto Harianto (F-PDKB) and Hendi Tjaswady (F-TNI/POLRI). See *Ibid.*, pp. 121, 130.

175 As argued by Bagir Manan of University of Pajajaran. See *Ibid.*, p. 353.

176 As argued by Anthonius Rahail (F-KKI). See *Ibid.*, p. 116.

177 As argued by Hendi Tjaswady (F-TNI/POLRI). See *Ibid.*, p. 130. The membership of the existing MPR (700 members) consisted of 462 members of the DPR elected in the election and 38 President's appointed members of DPR from the Armed Forces and the Police, 135 delegates of the provinces elected by the Provincial House of Representatives (5 members from each of the 27 provinces) and 65 representatives of the functional groups proposed by their respective organization to and selected by the KPU (Komisi Pemilihan Umum – General Election Commission). See Law no. 4/1999 on the Composition and the Status of the People's Consultative Assembly, the House of Representatives, and the Regional Houses of Representatives.

that the existing composition of the members of the MPR, which included members of the DPR, the regional delegations who were elected by the provincial Houses of Representatives and the appointed delegates of the functional groups and the Armed Forces (the military and the police), could be maintained.<sup>178</sup>

Alternatively, there was suggestion that the MPR should only comprise of members of the House of Representatives (DPR) and members of the Council for Representation of the Regions (DPD) who are elected in elections.<sup>179</sup> In addition, there were those who argued that the MPR should comprise of the elected members of the DPR and members of the DPD and augmented only with appointed delegates of the Armed Forces.<sup>180</sup>

Previously, the Armed Forces commander asserted that as the highest state institution holding the people's sovereignty, the MPR should consist of DPR members: directly elected political party representatives and regional delegates. The Armed Forces had decided to abandon its involvement in practical politics since its neutrality in the 1999 election and by ending its presence in the DPR. However, he added that the Armed Forces' personnel are citizens with equal political rights, namely the right to vote and to stand in elections. Nevertheless, the Armed Forces would not employ that right to vote and to stand in elections for the sake of unity and cohesiveness in carrying out its duty. By contrast, the commander emphasized that the Armed Forces wished to contribute to determining the nation's future direction. Against that backdrop, he affirmed that whether having an Armed Forces faction in the MPR was necessary or not depended entirely on PAH

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178 As reported from PAH I public hearings in Palangka Raya, Central Kalimantan. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 24. In that regard, Pattiasina from the Indonesian Churches Communion (PGI) proposed to replace the delegates of the functional groups with representatives of the isolated and backward communities. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 545.

179 As among others argued by Valina Singka Subekti, an appointed MPR member from Functional Group (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 257, and A. Djoko Wiyono from Bishop's Conference of Indonesia (KWI), Ahmad Watik Pratiknya of Muhammadiyah, Ahmad Bagdja of Nahdlatul Ulama (NU). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 517, 585, 590, and by Ida Bagus Gunada from Parisadha Hindu, Affan Gaffar from University of Indonesia and others. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 5-6, 287.

180 As argued by Yusuf Muhammad (F-KB) and Anthonius Rahail (F-KKI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 116, 159, and such as reported from a public hearing in Palangka Raya, Central Kalimantan. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 24.

I's deliberations. The Armed Forces did support the MPR's position as the highest political institution that determined national policy.<sup>181</sup>

Another topic regarding the MPR was its future form. In the future, the MPR could be retained as a bicameral institution which consists of two chambers: the DPR and the DPD. Proponents of the DPD's formation explained that it was not a representation of states, such as in a federal country (e.g., the United States or the Federal Republic of Germany), but as a forum to channel the distinctiveness of each province's interests at a national level policy making process from a unitary state Republic of Indonesia.<sup>182</sup> Others argued that if the MPR is no longer the supreme institution, the MPR should become a non-permanent body which consists of the House of Representatives (DPR) and the Council for Representation of the Regions (DPD).<sup>183</sup> Thus, after obtaining various ideas regarding people's sovereignty and the MPR, PAH I began to discuss the topic during the internal meeting on 20 May 2000.

PAH I could not complete this topic during the amendment process' second stage and postponed it to the next stage.<sup>184</sup>

#### VI.2.3.5 *Elections and political parties as constitutional instruments for the circulation of power*

Continuing the discussions from the amendment's first stage, all PAH I factions contended that the Constitution should contain election provisions. One PAH I member stated that the 1945 Constitution is unique because it affirms that the Unitary State of the Republic of Indonesia is a democratic state that adheres to people's sovereignty and has people's representative institutions, but it has no election provisions (See III.2.2.2).<sup>185</sup>

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181 As asserted by Admiral Widodo, the Commander of the Armed Forces before a PAH I public hearing on 25 February 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, Ibid., pp. 424, 445.

182 As argued by Ichlasul Amal of Gajah Mada University, see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 378, and Isbodroini of Indonesian Academy of Sciences (AIPI) and John Pieris of Christian University of Indonesia (UKI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 290, 390.

183 As stated by Lukman Hakim Saifuddin (F-PPP), Hamdan Zoelva (F-PBB), Asnawi Latief (F-PDU), Gregorius Seto Harianto (F-PDKB) and Yusuf Muhammad (F-KB). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 212.

184 The topic of the composition of the MPR was finally agreed upon in the fourth phase of the amendment process in 2002.

185 Stated by Hobbes Sinaga (F-PDI-P). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 25. Until then, the provisions on elections were regulated by ordinary laws. Deliberately, provisions on elections were not incorporated in the original 1945 Constitution. See Sekretariat Negara Republik Indonesia, *op. cit.*, p. 42.



At the start of the 6 December 1999 PAH I meeting, factions argued the Constitution should stipulate those elections are the process for realizing people's sovereignty and political parties are essential in a democratic country.<sup>186</sup> This opinion was widely shared by the public. Public regional hearings reported that the Constitution should stipulate that an election is to be conducted simultaneously, periodically, generally, secretly, and fairly.<sup>187</sup> Factions endorsed this. Discussions focused on whether elections for members of the Houses of Representatives should be different from the elections for executive positions (e.g., president, governor, regent, and mayor). A small PAH I team was assigned to explore the ideas. It concluded that political parties should nominate the candidates for the Houses of Representatives and that DPD candidates should be individuals.<sup>188</sup> The factions also concluded that elections should be managed by a national, permanent, and independent commission.<sup>189</sup> Lastly, factions concluded that different articles should regulate the election of the president and members of the Houses of Representatives.

Subsequently, considering conclusions regarding regional autonomy and human rights, the factions agreed that heads of regions (i.e., governors, regents, and mayors) should be elected democratically. These elections could be adjusted to the local context, especially its history, customary law, and traditions, as long as they were still democratic.<sup>190</sup>

Factions agreed that not every political party could stand in the elections, but that they would need to meet certain requirements. The Constitution also needed provisions regarding political parties. It had to affirm that a political party is the manifestation of people's political aspirations and should be managed openly and democratically. It was noted that in some countries like Germany and South Korea, the government financially supports political parties.<sup>191</sup> Others underlined that political party provi-

186 Stated among others by Hamdan Zoelva (F-PBB) and Anthonius Rahail (F-KKI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 96, 116.

187 Reported in the PAH I meeting on 6 June 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 5.

188 DPD stands for *Dewan Perwakilan Daerah* or the Council for Representation of the Regions.

189 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 13.

190 Factions agreed that the state should recognize and respect units of regional government of a specific or special nature and that the state should recognize and respect entities of *adat* (customary) law along with their traditional rights, which were later stipulated in Article 18B of the 1945 Constitution. Similarly, factions agreed that the state should respect the cultural identity and rights of traditional communities in harmony with civilization, which later became one of the human rights stipulated in Article 28I (3) of the 1945 Constitution. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 515-521.

191 As elucidated by Soedijarto (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 17.

sions should not merely complement election provisions. The Constitution should also determine the threshold and other requirements for a political party to participate in the elections. While the Constitution should guarantee the rights to establish and join a political party, a plan to adjust the political party system to the presidential system would also be necessary.<sup>192</sup>

Regarding the threshold, the discussion considered Germany as an example. A political party that obtains less than 5% of the votes should hand the votes to the political party or parties who won more than 5%.<sup>193</sup> A political party has an important role in educating the nation and raising the rationality level in the political process.<sup>194</sup> However, as reported to the MPR Working Body on 2 August 2000, although PAH I agreed on election principles, it did not reach an overall agreement, especially regarding the presidential election.<sup>195</sup> Thus, election topics were included in the attachment of MPR Decree No. IX/2000 for further deliberation.<sup>196</sup>

#### VI.2.3.6 Presidential election

At the beginning of the amendment process' second stage, factions reiterated their respective opinions regarding the presidential election. There were factions who argued that the people should directly elect the president and vice president.<sup>197</sup> Public hearings and regional working visits revealed that this opinion had also evolved among the public at large.<sup>198</sup> A delegation at a PAH I public hearing emphasized that a direct presidential election is the hallmark of democracy and is more legitimate. The MPR electing the president is prone to manipulation.<sup>199</sup> Likewise, another delegation stated that a direct presidential election is more legitimate. An academic noted that if the president is elected directly by the people, she or he is not accountable

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192 As argued by Pataniari Siahaan (F-PDI-P). *Ibid.* p. 46.

193 As elucidated by Soedijarto (F-UG). *Ibid.* p. 47.

194 As emphasized by Sutjipno (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Enam, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 385-386.

195 *Ibid.* p. 454.

196 See Attachment VI.4.

197 As stated by Lukman Hakim Saifuddin (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 42.

198 As reported by teams of PAH I who undertook working visits to North Sumatera, Aceh, West Sumatera and South Sumatera. *Ibid.* pp. 421, 423. Also stated in a PAH I public hearing by Ida Bagus Gunadha from Parisadha Hindu and Suhadi Sanjaya from the Indonesian Buddhist Council (WALUBI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, *Ibid.*, pp. 6, 35.

199 As argued by Saafuruddin Bahar from the Association of Indonesia Political Sciences (AIP) and Azyumardi Azra from the Indonesian State Institute of Islamic Studies (IAIN) Ciputat. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, *Ibid.*, pp. 282, 454. A similar opinion was also stated by Guswin Agus from Bandung Institute of Technology (ITB) in a PAH I public hearing. See *Ibid.* p. 489.

to the MPR.<sup>200</sup> However, in a direct election, people will have a sense of ownership, they will feel more responsible and more represented.<sup>201</sup> There was also a regional report supporting a direct election, but it added that the candidates should be nominated by the political party that had won the election for the House of Representatives.<sup>202</sup>

However, other factions, and some of the people consulted, also argued that the MPR should continue to elect the president and the vice president. They argued that the people were not ready for a direct election and that it would not conform to the fourth principle (*sila*) of *Pancasila*, which requires deliberation among representatives.<sup>203</sup> Likewise, an academic argued that conducting a direct presidential election is difficult and that it could endanger national integration. Further, the argument that an indirect presidential election is less legitimate than a direct presidential election is without an academic basis.<sup>204</sup> In the meantime, the PDI-P Central Board's meeting on 11 April 2000 decided<sup>205</sup> that the MPR should conduct the presidential and vice-presidential election, as stipulated in the 1959 version of the 1945 Constitution.<sup>206</sup>

Another matter regarded the issue of ethnic (minority) groups: Javanese versus non-Javanese. One speaker stated that if the candidate won the elections with a simple majority, then the Javanese would dominate the election. Therefore, a presidential candidate should win the election if they win 50% of votes in half of the provinces, plus one.<sup>207</sup> In response, other member said that the above formulation would result in non-Javanese domination. It is a paradox, moving from one extreme to the other. Therefore, the member stated that what is important is that the Constitution should limit the powers of the president.<sup>208</sup>

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200 As argued by John Pieris from the Indonesian Christian University (UKI). *Ibid.* p. 391.

201 As emphasized by Theo Sambuaga (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 261.

202 As reported from South Kalimantan. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 24.

203 As proposed by Hendi Tjaswady (F-TNI/POLRI) (F-KB) and Syarif Muhammad Alaydrus. Hendi Tjaswady stated further that direct election by the people was not in accordance with the desire of some factions to strengthen the MPR. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 467, 468.

204 As asserted by Affan Gafar from the University of Indonesia (UI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 259-260.

205 According to the PDI-P secretary general. PDI-P is also known as the Indonesian Democratic Party of Struggle.

206 As stated by Sutjipto, the Secretary General of PDI-P. See *Kompas Daily*, 12 April 2000, p. 6.

207 As stated by Saafuruddin Bahar from AIPI. Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 282.

208 As stated by Isbodroini Soejanto (AIPI). *Ibid.* p. 316.

Regarding the requirement that the president and the vice president should be a native Indonesian (according to Article 6(1) of the initial Constitution), some wanted to change it and others proposed maintaining it.<sup>209</sup> One academic argued that, although it contradicts reform ideas, the requirement should remain because of its social sensitivity.<sup>210</sup> Another asserted that the requirement was discriminatory and incompatible with democracy. It would be sufficient if the Constitution required the candidate to be an Indonesian citizen.<sup>211</sup> Similarly, delegations from various society groups argued that the president and vice president should be non-naturalized<sup>212</sup> Indonesian citizens<sup>213</sup> who were at least 35 years old.<sup>214</sup>

Later, in an informal meeting on 3 July 2000, PAH I noted two alternatives on how to organize a presidential election with MPR involvement. First, as proposed by F-Reformasi, the election would consist of two stages. Firstly, the MPR would elect two presidential candidates. Then the people would vote by choosing between these two candidates. Alternatively, as proposed by F-PDI-P, the two presidential candidates will be nominated by the political parties finishing first and second in the general election, after which the MPR would elect the president from among the two candidates. Other factions were still in favour of a direct election by the people.<sup>215</sup>

Eventually, PAH I did not manage to conclude this topic and agreed to discuss it further at the next opportunity.<sup>216</sup>

#### VI.2.3.7 Decentralization

Feelings of dissatisfaction, of being ignored or treated unfairly by the central government, had been circulating in the regions for quite some time. Many felt they did not get a fair share of the proceeds of their region's natural resources or did not have sufficient authority to manage the regions. Political societies often heard critics say that the realization of Indonesian national unity (*bhinneka tunggal ika* – unity in diversity) had apparently only emphasized unity (*tunggal*) while ignoring diversity (*bhinneka*).

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209 As reported by Valina Singka Subekti (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 427.

210 As argued by Nazaruddin Syamsuddin from AIPI. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 277, 310.

211 As asserted by Isbodroini Soejanto from AIPI. *Ibid.* p. 287.

212 As stated by Teddy Yusuf from PSMTI. See *Ibid.* p. 148.

213 As argued by Ida Bagus Gunadha from Parisadha Hindu and Suhadi Sanjaya from the Indonesia Buddhist Association (WALUBI) and Teddy Yusuf from the Indonesian Chinese Clan Social Association (PSMTI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 6, 35, 148. Teddy Yusuf is a retired Brigadier General of the Indonesian Military.

214 As proposed by Ida Bagus Gunadha from Parisadha Hindu. *Ibid.* p. 6.

215 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Enam, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 281, 284.

216 See Attachment VI.4.

The New Order's end and the reform era's beginning had paved the way for the people's various aspirations and disappointments to surface. Movements appeared openly demanding the establishment of a federal state or a separation from Indonesia in various regions (e.g., Aceh, Papua, Riau, and East Kalimantan).

This was not a formal topic at the October 1999 amendment meeting. Nevertheless, the public and MPR members frequently discussed central and regional government tensions, such as the lack of delegation of regional authority and unfair financial relations between the central and local governments.

Amin Rais, the MPR's chairman, speaking to the delegation of the Communication Forum of Eastern Indonesia,<sup>217</sup> asserted that one should fight for the idea of a federal state.<sup>218</sup> In a television interview, Rais warned that the regional upheavals could not be considered simple or trivial. Assuming that Indonesia was in a similar stage of reform, Rais reminded the committee that the rigid centralized government system practiced in the Soviet Union and Yugoslavia had broken these countries. To avoid the danger of balkanization, Rais offered the establishment of a Republic of United States of Indonesia with a federal system.<sup>219</sup> The suggestion immediately drew protests<sup>220</sup> and sparked societal debates between supporters and opponents.<sup>221</sup> Responding to the critics, the speaker explained that he had tried to trigger a discussion which eventually agree on an appropriate solution.<sup>222</sup> In the meantime, on 1 December 1999, independent activists in Jayapura, Papua, hoisted *Bintang Kejora* (the Morning Star), the flag of independent Papua that had been raised in 1961.<sup>223</sup>

Initiated by the Forum of Regional Representatives, a "Unitarianism versus Federalism" seminar was planned in the MPR compound on 7 December 1999. The MPR chairman was to be the keynote speaker. Instantly, factions

217 Also known as the *Forum Komunikasi Indonesia Bagian Timur*.

218 Media Indonesia Daily, 26 October 1999, p. 13.

219 Television interview with Amien Rais, MPR speaker, 25 November 1999.

220 As stated in the Working Body meeting on 25 November 1999 by Pramono Anung (F-PDI-P). See Majelis Permusyawaratan Rakyat Republic of Indonesia, Buku Kesatu, Jilid 1, *Risalah Rapat ke-4 sampai dengan ke-7, Badan Pekerja MPR (Sidang Tahunan 2000)*, Sekretariat Jenderal MPR-RI, 2000, p.38. This minute is an old version before it was revised in 2010. The 2010 version does not include this information.

221 Arbi Sanit from the University of Indonesia (UI) supported the idea while Ichlasul Amal of Gajah Mada University (GAMA) disagreed. See *Kompas Daily*, 2 December 1999. Amal warned not to get stuck in terminology which juxtaposes a unitary state with a federal state; what matters is the substance.

222 See Majelis Permusyawaratan Rakyat Republic of Indonesia, Buku Kesatu, Jilid 1, *op. cit.*, Sekretariat Jenderal MPR-RI, 2000, p. 40.

223 1 December 1961 is assumed by the Organization of Free Papua as West Papua's Independence Day. Based on the New York Agreement of 15 August 1962, the Dutch Government handed over the regional administration to UNTEA (United Nations Temporary Executive Authority). On 1 May 1963, UNTEA handed over the region to Indonesia.

protested the event, asserting that the initiative violated the preliminary agreement to the amendment process, which included maintaining the republic's unitary state.<sup>224</sup> The MPR's chairman could discuss the issue at a university campus as a professor, but it could be considered a political move if discussed in the MPR.<sup>225</sup> Another member argued that PAH I was not in the position to protest the event.<sup>226</sup>

Accordingly, one member's faction was ready to discuss the issue but the faction was firm in upholding the unitary state.<sup>227</sup> Another member underlined that the MPR should listen carefully to the regions' aspirations with a problem-solving approach.<sup>228</sup> Another member warned that any attempt to change the unitary state would be unconstitutional and should be revoked.<sup>229</sup> However, argued others, the MPR could facilitate discussions regarding the possibilities of implementing a federal state system.<sup>230</sup> Then, PAH I chairman reminded everyone that there was an agreement to maintain the unitary state based on the rule of law. Accordingly, there should be space for a responsive national discourse so that it could be socialized, understood, and eventually shared by the whole nation.<sup>231</sup>

A member argued that the slogans of unity and oneness were overly imposed, leading to a more authoritarian and centralistic government. This was against the idea of *bhinneka tunggal ika* (unity in diversity), upheld by the founding fathers. Thus, he continued, the issue should be discussed, keeping in mind that the federal state is frightening to many due to its negative historical connotation. However, discussions should not be considered taboo, since it was Mohammad Hatta, the first vice president, who sparked the idea. In the future, the provincial government should at least have complete autonomy.<sup>232</sup> Another member argued that problems would not necessarily be overcome by changing the unitary state to a federal state. In a federal state, the chance that a state separates from the Republic increases and political and economic infiltrations from the outside become easier. Furthermore, the unitary state should protect the whole nation. The

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224 As stated by Soewarno (F-PDI-P), Rully Chairul Azwar (F-PG), Ali Masykur Musa (F-KB), Soedijarto (F-UG), Hamdan Zoelva (F-PBB), and Happy Bone Zulkarnain (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 40, 70.

225 As stated by Sutjipno (F-PDI-P). See *Ibid.*, p. 66.

226 As argued by Theo Sambuaga (F-PG). *Ibid.*, p. 67.

227 As asserted by Agun Gunandjar Sudarsa (F-PG). *Ibid.*, p. 83.

228 As argued by Hamdan Zoelva (F-PBB). See *Ibid.*, p. 94.

229 As stated by Asnawi Latief (F-PDU). *Ibid.*, p. 102.

230 As stated by Hamdan Zoelva (F-PBB) and Patrialis Akbar (F-Reformasi). *Ibid.*, pp., 161, 164.

231 As stated by the chairman of PAH I before a public hearing on 13 December 1999. See *Ibid.*, p. 191.

232 As stated by A.M. Luthfie (F-Reformasi). *Ibid.*, p. 110.

nation consists of hundreds of tribes with different religions, languages, and various customs and traditions, inhabiting thousands of islands. For that reason, he continued, sufficiently funded development programs would be needed to develop a broad level of regional autonomy.<sup>233</sup>

In the meantime, the same discourses also evolved in society. There were those in favour of maintaining the state's unitary form,<sup>234</sup> those who wanted a federal republic, and even those who wanted to separate from Indonesia.<sup>235</sup> Some argued that changing the form of the state was beyond the MPR's authority, because the authority belonged to the people as the owners of sovereignty.<sup>236</sup> A member reminded the committee that the unrests in Aceh, South Sulawesi, Maluku, and Papua were not trivial. They endangered the reform process. Gorbachev had brought down the Soviet Union with his *Glasnost* and *Perestroika*. This was a serious issue that needed a constitutional amendment. Therefore, PAH I should thoroughly discuss the central government's domination of economics, politics, and social-cultural affairs, alongside the demands for a federal state and secession. She noted that broad autonomy remained the best solution.<sup>237</sup> In that regard, another member argued that those problems did not originate in the state's form, but from mistakes in state governance.<sup>238</sup> Likewise, another member underlined that the real problem was not the state's unitary form but rather how authority was distributed and how regions were respected.<sup>239</sup>

Responding to the deliberations, the PAH I chairman asserted that there was no intention to change the unitary state or contradict it with the ideas of decentralization. The unitary state without decentralization, he continued, was authoritarian. The unitary state system recognizes autonomy as a sub-system for decentralization.<sup>240</sup>

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233 As stated by Anthony Rahail (F-KKI), *Ibid.*, p. 114.

234 As asserted by Ruslan Abdulgani and Pranarka. See *Ibid.*, pp., 196, 203. Abdulgani is one of the prominent figures of the 1945's revolution, Minister of Information under President Soekarno, and former Indonesian Permanent Representative to the United Nations.

235 A report from a public hearing in Jayapura, Papua, on 4 February 2000, recorded a "suggestion" from the audience to delete paragraph I of the Preamble, which states, "Whereas independence is the alienable right of all nations, therefore, all colonialism must be abolished in this world as it is not in conformity with humanity and justice", because it was not appreciated in accordance with the wishes of the majority of the Papuan people who wanted to be independent. Further, the public hearing reported that a federal form of the state should be considered. See *Ibid.*, p. 438.

236 As stated by Hendi Tjaswady (F-TNI/POLRI). *Ibid.*, p. 129.

237 As stated by Valina Singka Subekti (F-UG). *Ibid.*, p. 182.

238 As stated by Taufiqurrahman Ruki (F-TNI/POLRI). *Ibid.*, p. 175.

239 As stated by Yusuf Muhammad (F-KB). *Ibid.*, p. 158.

240 As asserted by the chairman of PAH I in a PAH I meeting on 16 December 1999. See *Ibid.*, p. 347.

The issue also evolved among academics. The unitary state should be maintained<sup>241</sup> and autonomy should be delegated to the provincial government. According to Van Vollenhoven's theory,<sup>242</sup> the provincial level conditions reflected the country's real conditions.<sup>243</sup> Others argued that autonomy should be delegated to the district level, because as Mohammad Hatta once said, autonomy should be as close as possible to the community and district-level autonomy would minimize chances of separation.<sup>244</sup> Some emphasized that autonomy should be delegated as broadly as possible. Others underlined that the level of authority delegated to the regions is the most important.<sup>245</sup> There was also an argument that the third principle of *Pancasila*, the unity of Indonesia (*Persatuan Indonesia*), was understood as unity and practically implemented as a unitary state, but that it should be implemented as a united or federal state.<sup>246</sup>

Responding to these discourses, an academic reminded the committee that Indonesia is a young country with a pluralistic society, with a strong ethnic, racial, and religious orientation, with diversity at the village level. This diverse society is prone to conflict. Handling it incorrectly will cause disintegration. Therefore, multiculturalism should be promoted. Conflicts should not be eliminated. The resolution of conflict by force should be avoided. The process of becoming Indonesia should continue as a transformation instead of an engineering process.<sup>247</sup> Responding to the argument, a PAH I member stated that Indonesia should learn from the Dutch who colonized the country and maintained a level of pluralism for two reasons, namely for their colonial interests and scientific purposes. Those drafting amendments should learn from history that they need a concrete historical foundation and should avoid myths.<sup>248</sup> Another academic stated firmly that federalism should be completely rejected. The diverse Indonesian society is not assembled and united based on certain religious, ethnic, racial and class

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241 As stated by Samsi Husairi of the University of Jember and Azyumardi Azra of the Indonesian State Institute of Islamic Studies (IAIN) Ciputat, Jakarta. See *Ibid.*, pp. 397, 455.

242 Cornelis van Vollenhoven was a Dutch anthropologist, famous for his work "*Hukum Adat*" (Customary Law) in the Netherlands East Indies and respected as "*Bapak Hukum Adat*" (The Father of the Customary Law). At the age of 27, he was appointed Professor of Constitutional Law and Administration of the Dutch Overseas Regions and Customary Law of the Netherlands East Indies at Leiden University.

243 As stated by Ismail Suny of the University of Indonesia (UI) in a PAH I public hearing on 13 December 1999. *Ibid.*, p. 252.

244 As argued by Ichlasul Amal (Gajah Mada University – GAMA). *Ibid.*, p. 387.

245 As argued by Isbodroini and Diana Fauziah of the Academies of Sciences Indonesia (AIPI). *Ibid.*, p. 316.

246 As stated by Nazaruddin Syamsuddin of AIPI. *Ibid.*, pp. 236, 318.

247 As stated by Sardjono Yatiman of the University of Indonesia (UI) in a PAH I public hearing on 7 March 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 219-222.

248 As stated by Sutjipno (F-PDI-P). *Ibid.*, p. 227.



identities, and does not support federalism.<sup>249</sup> The public at large voiced similarly diverse opinions. Either maintain the unitary state with a broad level of provincial or district autonomy,<sup>250</sup> change it into a federal state, or demand a separation from Indonesia.<sup>251</sup> There was also the view that the unitary state form is final and that a broad level of autonomy should be implemented within it.<sup>252</sup>

There was also an economic side to these debates. A PAH I seminar on the economy in Yogyakarta recommended that the allocation and utilization of economic regional resources should be regulated by laws respecting regional interests, the national economy's integrity, and equitable sharing, following sustainable development principles. The seminar recommended that disadvantaged regions be prioritized to reduce regional disparities.<sup>253</sup>

Eventually, the factions agreed to uphold the unitary form of the Republic of Indonesia, including those that had previously raised the issue of federalism (F-PBB and F-Reformasi).<sup>254</sup>

From then on, the factions focused on how to devolve sufficient authorities and develop fair financial relationships between the governments to develop the regions. Eventually, Commission A tasked a drafting team to formulate the conclusions regarding decentralization as an amendment to the articles on Regional Government. To formulate the articles, Commission A invited a team of associate experts. The Commission A chairman asked Bagir Manan to draft the articles using the "mathematical derivative-integral relationship". The formulation should affirm that the province is

249 As stated by Affan Gaffar (UI). *Ibid.*, p. 257.

250 As stated by among others Pattiasina from the Indonesian Council of Churches (PGI), Achmad Bagdja from Nahdlatul Ulama (NU), Ahmad Watik Pratiknya (Muhammadiyah), see Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 541, 549, 586, and Ida Bagus Gunadha (Parisadha Hindu), see Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 7.

251 As reported among others from Banda Aceh, Medan and Ujung Pandang. See *Ibid.*, pp. 421, 437. Public hearings in Jayapura and Pekanbaru also reported the demand for independence, separation from Indonesia. See *Ibid.*, p. 439 and Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 9, 22, 23.

252 As stated by, among others, Tarman Azam of the Journalists Association of Indonesia (PWI). Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 321.

253 Seminar on economy in Yogyakarta, 25 March 2000. Conducted by PAH I in collaboration with the Association of Indonesian Economists (ISEI) and GAMA. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 13-14.

254 Among others, A.M. Luthfie (F-Reformasi) explicitly asserted that F-Reformasi agreed that the unitary state is the final form of state. See *Ibid.*, p. 523.

derived from the unitary state and the district is derived from the province, so that there is hierarchical relationship.<sup>255</sup> Further, Commission A concluded that all regions are granted a broad level of autonomy, which is stipulated by law and adjusted to each region's peculiarities.

In that regard, the Constitution ensured that the state shall recognize and respect the traditional regional communities along with their customary rights. This would occur in-line with social development and while respecting the unitary state principles. Regarding the financial relationship between the central and regional governments, each shall be determined according to the region's actual conditions. Therefore, the level of regional autonomy is tiered and asymmetrical. Further, it was concluded that the central government would control matters regarding religion, education, finance, defence, and foreign relations.

Regarding regional leader elections, a faction in the PAH I meeting suggested that they should be democratically elected under laws that would recognize each region's distinctiveness and historical background.<sup>256</sup> The elections would not be uniform but would recognize the regions as sub-systems of the unitary state. The PAH I Chairman concluded that either the regional leaders would be elected by the local House of Representatives (DPRD) or directly by the people.<sup>257</sup> Later, another member suggested the governor should be elected by the provincial House of Representatives and then submitted to the central government for approval, considering the governor's two functions (i.e., being both the central government's representative and provincial leader).<sup>258</sup> Eventually, considering each region's distinctiveness and historical background, it was concluded that the regional leaders (i.e., the governor, *bupati* (district head), and *walikota* (city mayor) would be elected in various democratic ways, to be regulated further by law.<sup>259</sup>

On 18 August 2000, the MPR ratified the amendment of Article 18 of the 1945 Constitution, which provides for a broad level of regional autonomy.

#### VI.2.3.8 Social welfare (*kesejahteraan sosial*)

At this stage, PAH I also discussed the economy and social justice. The fifth *sila* (principle) of *Pancasila* states that the people's sovereignty in Indonesia is based on "realizing social justice for all the people of Indonesia." At

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255 The derivative-integral relationship in mathematics can be described as the relationship between parts or fractions of a whole which, when merged again, will reshape the original integrity.

256 As proposed by Hobbes Sinaga (F-PDI-P). See *Ibid.*, p. 517.

257 As concluded by the chairman of PAH I on 29 May 2000. *Ibid.*, p. 544.

258 As proposed by Harjono (F-PDI-P). *Ibid.*, p. 565.

259 As proposed by Lukman Hakim Saifuddin (F-PPP) in an informal consultation of Commission A on 13 August 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 399.

the PAH I plenary meeting on 6 December 1999, the first faction speaker asserted the urgency of strengthening the consistency of certain articles with the fifth principle of *Pancasila*: Articles 31 and 32 of Chapter XIII on Education and Articles 33 and 34 of Chapter XIV on Social Welfare.<sup>260</sup> Likewise, others emphasized that the national economic system should realize prosperity and social justice.<sup>261</sup> Others proposed clarifying Article 33 on Social Welfare.<sup>262</sup>

In a PAH I public hearing, a scholar stated that a market economy is a technical device that is indispensable for realizing social welfare (*kesjahteraan sosial*), which is an ideological concept.<sup>263</sup> Further, an economist argued that the Indonesian economy should be organized as a managed market economy, which is based on efficiency and equity. A managed market economy relates to human rights and democracy and should include a social safety net scheme.<sup>264</sup> However, another economist reminded the committee that while the convergence of a market economy and social welfare is a global trend, one should be realistic. A welfare state is expensive and inefficient if the state is fully responsible for the citizens' welfare, so a social safety net scheme is necessary and should be incorporated into the Constitution.<sup>265</sup> Furthermore, considering the increasingly integrated global economy, the national economy requires increasing competitiveness and efficiency that should be sustained by law and order based on the supremacy of law.<sup>266</sup>

PAH I members raised various concerns. One member argued that the ideas mentioned above did not reflect the essence of Article 33 because they did not specify the role of cooperatives and overly emphasized the role of the free market.<sup>267</sup> Another member sought clarity on the differences between the proposed managed market economy and the previous regime's developmentalism, which pursued growth and emphasized stability at the expense of democracy.<sup>268</sup>

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260 Stated by Hobbes Sinaga (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 80.

261 As stated by Agun Gunandjar Sudarsa (F-PG), Abdul Khaliq Ahmad (F-KB), and Valina Singka Subekti (F-UG) *Ibid.*, p. 86, 89, 137.

262 As stated by Sutjipno (F-PDI-P). *Ibid.*, p. 146. Stated in a PAH I public hearing on 13 December 1999.

263 As stated by Pranarka from the Centre for International and Strategic Studies (CSIS) in a PAH I public hearing on 13 December 1999. *Ibid.* p. 225.

264 As stated by Irzan Tanjung from the Indonesian Economists Association (ISEI) in a PAH I public hearing on 21 February 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 194, 197.

265 As stated by Sri Adiningsih (ISEI). *Ibid.* pp. 199, 201.

266 As stated by Prasetiono (ISEI). *Ibid.* pp. 204-205.

267 As argued by Frans Matrutty (F-PDI-P). *Ibid.* p. 207.

268 As stated by I Gusti Dewa Palguna (F-PDI-P). *Ibid.* p. 211.

The original Article 33 contains the following sentence: “The land and water and the natural wealth contained in it shall be controlled by the state and utilized for the optimal welfare of the people.” This was one of the issues discussed at length. In relation to this statement, an academic at a PAH I public hearing mentioned that the third paragraph of Article 33, which states “*dikuasai oleh Negara*” (shall be controlled by the state), had been interpreted as removing native legal rights, especially traditional communal rights (*hak ulayat*). The suggestion was to re-center the interpretation back on the people’s economy.<sup>269</sup>

The same aspiration also evolved in public regional hearings, such as in West Sumatera, South Sumatera, and Papua. They reported a demand to change the phrase “shall be controlled by the state” (*dikuasai Negara*) to “shall be managed by the state” (*dikelola negara*) or “shall be protected and managed by the state” (*dilindungi dan dikelola Negara*).<sup>270</sup> Therefore, economists and constitutional experts had to define the operational meaning of “shall be controlled by the state and shall be utilized for the greatest benefit of the people.” One member of PAH I held that this phrase is not obsolete and must be implemented. Under the control of the state should be understood as ‘regulated’ (rather than ‘owned’) by the state.<sup>271</sup>

On the same topic, another PAH I member argued that “*dikuasai Negara*” (controlled by the State) and “*ekonomi kekeluargaan*” (familial economy system) were obscure terms in the original Article 33 and needed clarification.<sup>272</sup> Similarly, “*dikuasai Negara*” (controlled by the state) in Article 33(2) should be replaced by “*diatur oleh Negara*” (regulated by the state). This change would imply that the state regulates based on people’s aspirations and economic principles of natural resource management, which should follow ecological insights.<sup>273</sup>

A related issue was the term “familial economy”. One academic questioned this term. It was a justification of state corporatism, where the state is the big brother and cooperative arm of the government. The familial economy should be replaced by an equal partnership.<sup>274</sup>

In the ensuing public hearing, a delegation proposed clarifying and strengthening the familial economy’s implementation, moving beyond capital ownership. It argued that Article 33 should affirm an anti-monopoly stance. Further, achieving prosperity should happen democratically while

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269 As stated by I Dewa Gede Atmadja from Udayana University. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 366.

270 *Ibid.* pp. 424, 425, 438.

271 As asserted by Hobbes Sinaga (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 218.

272 As stated by Ahmad Hafiz Zawawi (F-PG). *Ibid.* p. 509.

273 As underlined by Asnawi Latief (F-PDU). *Ibid.* p. 510.

274 As stated by Yasraf Amir Piliang of Bandung Institute of Technology (ITB). *Ibid.* p. 494.

respecting human rights and the principles of people's sovereignty.<sup>275</sup> Another delegation asserted that the economy should be based on economic democracy, which envisages prosperity for everyone. The Constitution should reiterate that the state controls the country's essential economic sectors that affect people's lives.<sup>276</sup>

In another public hearing, a delegation proposed changing Article 33(1) from "the economy shall be organized as a common venture based upon the principles of a familial system" to "the economy shall be organized as a common venture based upon the principles of a familial system and democracy (*kerakyatan*), which gives priority to the sharing of proceeds." The delegation argued that Article 33 should stipulate that the government (under the people's supervision) controls and manages the land, water, and natural resources, regulated further by laws.<sup>277</sup> Another delegation asserted that the Constitution must ensure that the state is responsible for and should always take the side of low-income people to eliminate social disparities.<sup>278</sup>

During a PAH I public hearing on 9 March 2000, which involved several prominent economists, the PAH I chairman reiterated that the amendment was dealing with people's sovereignty, i.e., how this concept should be translated into the state's role in the economy. There was a strong call for the concerned articles to elaborate on welfare, justice, and prosperity, including Article 33.<sup>279</sup> Widjoyo Nitisastro stated that the MPR and Broad Outlines of State Policy are beneficial, providing the opportunity to re-assess the country's development every five years. Nitisastro asserted the importance of Article 33. It contains the foundation of economic democracy, which asserts the people's welfare (rather than individual prosperity) as a priority. Therefore, replacing Article 33's provisions would be difficult.<sup>280</sup>

In response, a member argued that in the last 50 years, the implementation of policies and programs (e.g., deregulation, de-bureaucratization, or privatization) had conflicted with the essence of Article 33. Another member urged the economists to clarify which economic concept would support the Constitution rather than just saying "*bukan ini*" or "*bukan itu*" ("not this" or "not that"). The same member argued that the "principles of a familial economy" should be changed to the "principles of justice" or "principles of economic democracy."<sup>281</sup> In that discussion, a member argued that he could not

275 As proposed by A. Djoko Wiyono from the Bishop Conference of Indonesia (KWI). Ibid. pp. 539-540.

276 As argued by Pattiasina from the Indonesian Communion of Churches (PGI). Ibid. p. 552.

277 As proposed by Nazri Adlani from the Indonesia Ulema Council (MUI). Ibid. pp. 578-579.

278 As proposed by Ahmad Bagja from Nahdlatul Ulama (NU). Ibid. p. 590.

279 As stated by the chairman of PAH I. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 290.

280 Ibid., pp. 295-296. Prof. Dr. Widjoyo Nitisastro was one of the prominent architects of economic policy during the previous regime.

281 As stated by Rully Chairul Azwar (F-PG). Ibid. p. 303.

agree with including an economic system in the Constitution. He thought it would hinder the government's initiatives. He stated that the economic system will always be dynamic and changing. He questioned whether prosperity and social justice for all people could only be achieved through an economic system based on familial principles. Likewise, he questioned whether it would be possible to achieve prosperity for all without placing natural resources under the state's control (*dikuasai Negara*). Any government, he asserted, without compromising on the principles of economic democracy and the rules of the market economy, holds the authority and is required to intervene in the market to achieve prosperity and welfare.<sup>282</sup> Another member argued against this, that although Indonesia recognizes an integrated economic system, in practice, it combines a traditional economy, the global economy, and a cooperative system. It should, the member proposed, change to a social market economy, such as that implemented in Germany, in which there are interdependencies between all the actors, small and large, and between the regions.<sup>283</sup>

One member, returning to the concept of familial economy, argued that the economy should be structured as a joint effort based on the principle of family. It is the prosperity of the people that takes precedence, not the prosperity of a person, he stated. However, to regard the cooperative as the only appropriate actor in the economy would be excessive. At least the Constitution should confirm that there are several economic actors, such as state enterprises, private ventures, and cooperatives.<sup>284</sup> Another member argued that establishing the Preamble's depicted welfare state is difficult. She stated that "even the developed welfare states such as Germany and Scandinavian countries are struggling to uphold the welfare state system."<sup>285</sup> To this, Nitisastro added that neither market forces nor government interventions are perfect. He argued that there should be checks and balances in which the government checks how these two systems interact and the House of Representatives controls the government.<sup>286</sup>

In the ensuing public hearing, another economist proposed changing the formulation in Article 33 from "the economy shall be organized as a common venture based on the principles of the familial system" into "the economy shall be organized as a common venture based on popular principles and social justice." The economist argued that in the context of the national economy, familial principles are irrelevant because the familial system is a mechanical form of solidarity that does not support individual productivity. Besides, familial principles are likely to lead to nepotism, collusion, and corruption. Hence, the familial system's mechanical solidarity should be replaced by organic solidarity, which has a clear division of work

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282 As stated by Theo Sambuaga (F-PG). Ibid. p. 307.

283 As stated by Soedijarto (F-UG). Ibid., p. 308.

284 As argued by Ahmad Hafidz Zawawi (F-PG). Ibid. p. 309.

285 As argued by Valina Singka Subekti (F-UG). Ibid. p. 313.

286 Ibid. p. 320-321.

and is oriented towards productivity, which in turn will stimulate competition of productivity and bring progress. Within this competition, the economist elucidated, which involves the weak and the strong, the social justice principle will guarantee that each will get a share of the economic benefit in accordance with their respective rights.<sup>287</sup> In that regard, another economist reminded them, whether one likes it or not, the Indonesian economy will integrate with the global economy. Hence, he warned against dwelling on populism and justice, reminding that efficiency is also important. Therefore, he argued, Article 33 should be amended and stipulate a managed economy based on efficiency and justice. When necessary, the state should intervene to influence the market because the market cannot always increase efficiency and justice.<sup>288</sup>

From 25 to 26 March 2000, a seminar on economy which was organized by ISEI (the Indonesian Economist Association)<sup>289</sup> and the Faculty of Economy, Gajah Mada University in Yogyakarta<sup>290</sup> suggested the following amendments to Article 33:

- (1) The economy shall be organized based on the principles of humanity, justice, competitiveness and efficiency, the freedom and protection of the consumers, the sustainable advantages, and the equality among the economic actors, aimed for the welfare of all the people.
- (2) All natural resources, which are on state territory shall be regulated by the state and its utilization shall be regulated for the prosperity of the maximum number of people with regard to the property rights of the people.
- (3) The branches of the ventures which are important to the state and are the basic needs of the people are under the authority of the state, regulated and managed based on the principles of efficiency and justice.

Further, the seminar also proposed amending Article 34 to the following:

- (1) The poor as well as abandoned children shall be assisted by the state.<sup>291</sup>
- (2) Every citizen has the right to decent public facilities.
- (3) The government is obliged to provide public facilities.
- (4) In case the provision of a public facility is related to more than one region, the central government will act as the coordinator.

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287 Proposed by Bungaran Saragih from Bogor Agricultural University (IPB). Ibid. p. 328-329.

288 As argued by Sri Adiningsih from Gajah Mada University (GAMA). Ibid. p. 338.

289 ISEI stands for *Ikatan Sarjana Ekonomi Indonesia*.

290 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 15.

291 The original Article 34(1) stated that such children should be taken care of by the state.

As stated above, at the beginning of the second stage, a member argued that Chapter XIII on Education and Chapter XIV on Social Welfare should be made more consistent with the Pancasila, which affirms social justice for all Indonesian people.<sup>292</sup> In this regard, regional public hearings proposed that the Constitution stipulate the percentage of the education budget.<sup>293</sup> Another academic proposed that Article 31 on Education should affirm just education for every citizen. Injustice, discrimination, and inequalities should be ended.<sup>294</sup> Similarly, another academic added that the discrimination against the *pesantren* (Islamic boarding schools) should stop.<sup>295</sup>

Discussing education, a university delegation argued that education and mastering sciences and technologies are the main factors that determine the welfare and development of a nation and thus, education should be prioritized. In that regard, they stated, the national economy should be developed based on the culture of the nation and human resources instead of on natural resources.<sup>296</sup> Another delegation also emphasized that education is the determinant factor of economic development.<sup>297</sup> In response to these comments, a PAH I member agreed that the budget for education should increase. In Taiwan, the member said, the Constitution stipulates that 15% of the national budget, 20% of the provincial budget, and 25% of the district budget should go towards education.<sup>298</sup>

Reiterating an earlier point, another PAH I member stated that countries which allocate 4% of their GDP to education enjoy the benefits, such as people's increased productivity. These countries include the USA, Germany, the Netherlands, Japan, South Korea, Taiwan, and Malaysia. Countries that do not follow this standard, such as those in Latin America, are still developing, even 100 years after independence and with academic institutions older than Harvard University.<sup>299</sup>

In a public hearing, a delegation representing the Catholic church argued that Article 31 on Education needed substantive revision. The Constitution should prevent the centralization of education. Education must be construed as advancing science and technology, morality, national consciousness, and culture.<sup>300</sup> Another religious (Islamic) delegation emphasized the

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292 As stated by Hobbes Sinaga (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 80.

293 Reported by Hatta Mustafa (F-PG). *Ibid.* p. 425.

294 As stated by Azyumardi Azra from the State Islamic Institute (IAIN). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 456.

295 As reminded by Nazaruddin Umar (IAIN). *Ibid.* p. 458.

296 As argued by Rizal Zaenuddin Jamin from the Bandung Institute of Technology (ITB). *Ibid.* p. 486.

297 As emphasized by Bana Kartasasmita (ITB). *Ibid.* p. 491.

298 As stated by Soedijarto (F-UG). *Ibid.* p. 514.

299 As stated by Soedijarto (F-UG). *Ibid.* p. 307.

300 As proposed by A. Djoko Wiyono from Bishops Conference of Indonesia (KWI). *Ibid.* p. 540.



importance of character building. Intelligent persons with a good character will form a civil society that is able to protect people from excessive or unnecessary penetration of state power, while they support and complement the state's functions.<sup>301</sup> Correspondingly, another Islamic delegation argued that the Constitution should guarantee that every citizen has a decent and just education and, therefore, any discrimination in education (cultural, structural, or financial) should be eliminated.<sup>302</sup> The Indonesian Muslim Cleric Council delegation proposed changing the term *pengajaran* (teaching) in Article 31 to *pendidikan* (educating). Teaching is more material in nature. It is about science and technology but says little about norms and morality. Article 31(2) should read "the government shall manage and organize one system of national education which leads to faith in and fear of God the Almighty and the mastering of sciences and technologies which is regulated by law."<sup>303</sup> However, another academic argued that the percentage of the budget allocated for education is a technical matter, which should not be included in the Constitution, as the Constitution should only contain principal matters.<sup>304</sup>

By the end of the second stage, PAH I could not agree on finalized versions of Chapters XIII and XIV and agreed to proceed to the next stage.

#### VI.2.3.9 Article 29 and the obligation to implement Islamic Sharia

The initial Article 29 drafted by the Investigating Commission from June to August 1945 stated, "The State shall be based on Divinity with the obligation to implement Islamic Sharia for the adherents" (*Negara berdasar atas Ketuhanan dengan kewajiban menjalankan syariat Islam bagi pemeluk-pemeluknya*).<sup>305</sup> The last seven words of that sentence were and still are the most contested words in Indonesian politics. This phrase was part of the draft first principle of the state's foundation, embedded in the draft *Mukadimah* (the Preamble) of the Constitution. It was drafted by the Team of Nine, led by Soekarno and embedded in the draft Article 29. When the manuscript of the *Mukadimah* was reported to the Investigating Commission's plenary session, it was rejected. Subsequently, the Investigating Commission (BPUPK) replaced it with a declaration of independence, referring to the idea of the Greater East Asia Co-Prosperty Sphere and followed by a short Preamble. The short new Preamble also contained those seven words.

301 As stated by Ahmad Watik Pratiknya from Muhammadiyah. Ibid. p. 586.

302 As stated by Ahmad Bagdja of Nahdlatul Ulama (NU). Ibid. p. 590.

303 As proposed by Nazri Adlani from the Indonesian Ulema Council (Majelis Ulama Indonesia - MUI). Ibid. pp. 578, 579.

304 As argued by Affan Gaffar from the University of Indonesia (UI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 286.

305 There is no official English translation of *Ketuhanan Yang Maha Esa*. In this thesis, I use the term "One and only God" which emphasises the Oneness character of God without explicitly pointing to a certain God of a certain religion.

Then, after the *Mukadimah* was rejected and replaced with the new Preamble, the BPUPK finalized the draft constitution, approving it on 16 July 1945 and reporting it to the Japanese authorities for approval. However, due to World War II, the Japanese authorities did not respond. It was this constitution's draft that was reported and discussed in the Indonesian Independence Preparatory Committee (PPKI) session on 18 August 1945, one day after the proclamation of Indonesia's independence.<sup>306</sup>

In that PPKI meeting, the rejected *Mukadimah* manuscript was restored again.<sup>307</sup> However, delegations from North Sulawesi heavily protested the stipulation authorizing the state to require Muslim citizens to implement Islamic Sharia. Regions in eastern Indonesia, for instance, vowed to secede from Indonesia if the provision was not repealed. To prevent the disintegration of the one-day old republic, Mohammad Hatta initiated a reform process with approval from prominent Islamic scholars. The Preparatory Committee plenary meeting agreed to omit the seven words from the *Mukadimah* and from the draft Article 29(1).<sup>308</sup> (See II.3).

Thus, Article 29 of the 1945 Constitution states that:

- (1) The State shall be based upon the belief in the One and only God.
- (2) The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.

While most people accepted this decision, certain societal groups were disappointed. Immediately, the 'seven words' (*tujuh kata*) became a symbol of the struggle in favour of state authority deciding whether Muslim citizens would be required to implement Islamic law. Most people and the government assumed that the stipulation is final. However, groups that support the restoration of the seven words into the constitution remain active, especially when the Constituent Assembly (*Konstituante*) was drafting a new constitution.<sup>309</sup> The seven words have become a slogan of struggle for those who fight for the establishment of an Islamic state in Indonesia (see V.4.6). The third PAH I meeting on 6 December 1999 was meant to discuss the Introductory Views of the Factions. During this meeting, F-PBB (an Islamic faction) proposed that the Constitution should affirm that Indonesia is not a secular state and that the Constitution's provision on religion should be strengthened. The state should be based on the principles of the One and Only God as believed by each religion. Therefore, the faction proposed

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306 See Risalah Sidang BPUPKI, PPKI, 28 May 1945–22 August 1945, *op.cit.*, p.p. 361, 386–388.

307 See Sekretariat Negara, *op. cit.*, p. 248.

308 *Ibid.* p. 414.

309 The democratic 1955 general election established the *Konstituante*, the Constituent Assembly, with the task of making a new constitution. Despite the *Konstituante* almost finishing the draft, it failed to agree on the state's foundation, whether it would be Islam or *Pancasila*. Eventually, the *Konstituante* was dissolved on 5 July 1959 by a presidential decree.

revising Article 29(1) to “The State shall be based upon the belief in the One and Only God, with the obligation for the adherents of the religions to implement the teachings and the Sharia of their respective religions.”

The faction proposed deleting “belief” (*kepercayaannya itu*) at the end of Article 29(2), arguing that *kepercayaan* obscured the article’s understanding of religion. However, the speaker asserted that F-PBB did not want to change the Preamble of the 1945 Constitution, because the Preamble is a noble agreement of the nation and the state of Indonesia that should be maintained. Moreover, F-PBB affirmed that human rights should be incorporated into the Constitution just as in other modern democratic constitutions.<sup>310</sup> F-PBB was the only faction to propose this during the preliminary deliberation.<sup>311</sup>

It was the first time since the 1956-1959 *Konstituante* (the Constituent Assembly) session that the topic was raised and discussed openly in a state institution.<sup>312</sup> In response to the Introductory Views, other factions argued that proposals to revise Constitutional articles, such as Article 29, should adhere to the principles of the 1945 Constitution as stated in its Preamble, which is the basis for the founding of the Indonesia nation and state. The factions emphasized that the changes to the Constitution should also be based on human rights principles.<sup>313</sup> Then, a faction proposed that the Constitution should adopt MPR Decree No. XVII/1998 on Human Rights.<sup>314</sup> However, another PAH I member asserted that to regard religions as subordinate to human rights and to implement Islam according to state laws would be a problem.<sup>315</sup>

310 Proposed by Hamdan Zoelva (F-PBB). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 93, 100, 161.

311 F-PBB is the faction of PBB (*Partai Bulan Bintang*—The Crescent Moon and Star Party), a political party that was established in 1998 which declared itself as the heir and the successor of *Masyumi*, a prominent Islamic political party during the old era. *Masyumi* based its vision and mission on Islam and aimed to establish an Islamic state in Indonesia.

312 During the *Konstituante* session in 1959, Saifuddin Zuhri (NU) demanded to include *Piagam Jakarta* (Jakarta Charter) into the 1945 Constitution as a condition to accept the re-enactment of the 1945 Constitution. Zuhri and other Islamic parties’ representations, among others Tahir Abubakar (PSII) and Kahar Muzakkir (Masyumi), rejected Soekarno’s proposal that *Piagam Jakarta* is (only) a historical document that inspires the Preamble and Article 29 of the 1945 Constitution. See Adnan Buyung Nasution, *Aspirasi Pemerintahan Konstitusional di Indonesia, Studi Sosio-Legal Atas Konstituante 1956 – 1959*, Sylvia Tiwon (transl.), Pustaka Utama Grafiti, in cooperation with Eka Tjipta Foundation, Jakarta 1995, pp. 361-364.

313 As stated by Sutjipno (F-PDI-P), Hatta Mustafa (F-PG), Zain Bajaber (F-PPP), Yusuf Muhammad (F-KB), Asnawi Latief (F-PDU), and Taufiqurrahman Ruqi (F-TNI/Polri). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 142, 146, 148, 154, 157, 167.

314 As proposed by Asnawi Latief (F-PDU). *Ibid.*, p. 167.

315 As argued by Ali Hardi Kiaidemak (F-PPP). *Ibid.* p. 471.

Thus, the factions were divided between those who wanted to change and maintain Article 29. Certain pro-reformists argued that the obligation to abide by religious law was for all religions, while others argued that it was only for adherents of Islam. Some pro-reformists fluctuated between these two positions,<sup>316</sup> while others maintained their stance throughout.<sup>317</sup>

Similar positions existed among academics and the public at large. An academic stated that it would be better to abolish 'the seven words' (*tujuh kata*) from the Jakarta Charter (*Piagam Jakarta*) manuscript, including for Muslims. Based on *Pancasila*, the state can provide worship facilities, but the state has no authority to oblige someone to worship or prohibit splinter groups from worshipping.<sup>318</sup> Other academics asserted that the Constitution's provision to guarantee freedom to adhere to one's religion is highly relevant<sup>319</sup> and religious freedom should be given the widest possible scope, so that religious scholars can carry out the teachings of their respective religions.<sup>320</sup> The state should not intervene unless there are matters that cause conflict which interfere with national interests.<sup>321</sup>

On the other hand, a delegation from the Indonesian Ulema Council at a public hearing argued that since the state is based on the belief in the One and Almighty God, God is not only the centre of beliefs but also provides teachings and guidance as a value system, as the basis of norms and laws for all believers. Hence, the delegation stated, state operations could not violate the teaching of religions.<sup>322</sup> Another delegation from Parisadha Hindu argued that Article 29 should be maintained but a new paragraph should be added saying that "The state guarantees every religion's followers to carry out their respective teachings and religious activities all over the country with due respect to the community and the environment."<sup>323</sup> In that regard, another delegation from Indonesian Chinese Clan Social Association added that the state is not in a position to ratify what is and is not a religion.<sup>324</sup>

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316 In the introduction to the deliberations, F-PBB proposed that the obligation was for all religions, see *Ibid.* p. 100, but later affirmed that the obligation was only for the adherents of Islam. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 411-412.

317 As asserted by A.M. Luthfie (F-Reformasi). *Ibid.* p. 411.

318 As stated by Dahlan Ranuwihardjo. *Ibid.* pp. 207-208.

319 As argued by Azyumardi Azra from The State Institute for Islamic Studies (IAIN). *Ibid.* p. 455.

320 As stated by M. Amin Suma (IAIN). *Ibid.* p. 461.

321 *Ibid.*

322 As stated by Nazri Adlani from the Indonesian Ulema Council (MUI) on 27 February 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 577.

323 As proposed by Ida Bagus Gunadha from Parisadha Hindu. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 8.

324 As underlined by *Teddy Rusli* from the Indonesian Chinese Clan Social Association (PSMTI). *Ibid.* p. 171.

Reports from provinces of Aceh and North Sumatera stated that *Pancasila* and Islamic *Sharia* should be incorporated into the Preamble,<sup>325</sup> that Article 29 should be maintained,<sup>326</sup> and that Article 29 could be maintained if the word *kepercayaan* (set of beliefs) was omitted.<sup>327</sup> From Maluku, it was reported that the religious and human rights provisions should be combined.<sup>328</sup> Reports from Jambi and Bengkulu wanted the state to oblige every citizen to implement their respective religion's teachings to enhance the nation's morality.<sup>329</sup>

In his foreword to the PAH I meeting on 14 June 2000, the meeting's chair reiterated that based on *Pancasila*, the Republic of Indonesia respected religions and should maintain a good relationship with them, but that the state should not interfere too much in religions' internal affairs. Religious diversity should be accepted and respected as a fact.<sup>330</sup> F-Reformasi asserted that the original Article 29 should remain but proposed to adding a third verse, stipulating that:

- (3) Every follower of a religion is obliged to implement the teachings of their respective religion.<sup>331</sup>

The F-PBB's speaker stated that the 1959 version of the 1945 Constitution makes the state passive towards religions, only guaranteeing its citizens the freedom to implement their respective religions. The state should not only issue prohibitions and restrictions for people to practice their faith; it should also provide the widest space for every person to implement the teachings of their respective religions. The relationship between the state and religions should be set out in this Constitution. The citizen should be active in implementing their religion's teachings because the teaching of a religion is only meaningful if its followers fully implement it. Therefore, the Constitution should stipulate its implementation. The F-PBB proposed revising Article 29 as follows:

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- 325 Reported at public hearings in Aceh and North Sumatera. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 421.
- 326 Reported at public hearings in Nusa Tenggara Timur and Papua. From Papua a proposal was also reported to add a new paragraph saying: "the state should respect the places of worship." *Ibid.* pp. 436, 438.
- 327 Reported at a seminar on Religion and Culture conducted in Mataram, West Nusa Tenggara Barat. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 8.
- 328 Reported in Maluku. *Ibid.* p. 17.
- 329 Reported in Jambi and Bengkulu. *Ibid.* p. 22.
- 330 The meeting was presided by Harun Kamil, the Vice-Chairman of PAH I. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 410.
- 331 As asserted by A.M. Luthfie (F-Reformasi). *Ibid.*, p. 411.

- (1) The State shall be based upon the belief in the One and Only God, with the obligation to implement Islamic Sharia for the adherents.
- (2) The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion.<sup>332</sup>

F-PDU asserted that religion is essential to human life and is a fundamental right that the state ought to guarantee, as stated in the Universal Declaration of Human Rights, which they also wanted to incorporate into the Constitution. F-PDU supported maintaining the original Article 29(1), proposing only a small change in the second paragraph, so that it would read:

- (1) The State shall be based upon the belief in the One and Only God.
- (2) The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion.<sup>333</sup>

F-KKI proposed changing Chapter XI's title from "*Agama*" (Religions) to "*Ketuhanan Yang Maha Esa*" (The One and Only God) and to revise Article 29 to state:

- (1) The State shall be based upon the belief in the One and Only God, Just and Civilized Humanity, Unity of Indonesia, Democratic Life guided by Wisdom in Deliberation/Representation, and Social Justice for the whole of the people of Indonesia.
- (2) The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion and belief and to build their respective houses of worship.
- (3) The State shall guarantee just and equal services to all religious followers.<sup>334</sup>

F-PDKB expressed their wish to maintain the initial Article 29 and invited the meeting to reconsider the terminology of religion. They reminded members that 'religion' excluded certain beliefs that could not be categorized into mainstream religions. In that regard, *kepercayaan* (local set of beliefs) is a term that accommodates such people.<sup>335</sup>

F-TNI/Polri proposed maintaining the original Article 29(1) and (2) so that the amendment would not deviate from its objectives.<sup>336</sup> Likewise, F-UG affirmed it wanted to retain the original Article 29(1) and proposed revising paragraph (2), so that it would read:

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332 As stated by Hamdan Zoelva (F-PBB). *Ibid.*, pp. 411-412.

333 As argued by Asnawi Latief (F-PDU). *Ibid.*, p. 413.

334 As proposed by Anthonius Rahail (F-KKI). *Ibid.*, p. 414.

335 As asserted by Gregorius Seto Harianto (F-PDKB). *Ibid.*, p. 415.

336 As stated by Taufiqurrahman Ruki (F-TNI/Polri). *Ibid.*, p. 416.

- (1) The State shall be based upon the belief in the One and Only God.
- (2) The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion.<sup>337</sup>

However, F-PPP proposed revising Article 29 to restrain the distribution of views which may disturb religious followers, so that it would read:

- (1) The State shall be based upon the belief in the One and Only God, with the obligation to implement Islamic Sharia for the adherents.
- (2) The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion.
- (3) The State shall prohibit the spread of ideologies contrary to the belief in the One and Only God.<sup>338</sup>

F-PDI-P wanted to maintain the original Article 29 because the original formulation “contains the principles and wisdom, which so far have managed to maintain the unity of Indonesia.”<sup>339</sup> However, F-PG proposed changing Article 29(2) and adding a third paragraph, stating that:

- (1) The State shall be based upon the belief in the One and Only God.
- (2) The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion.
- (3) The State’s operations shall not be in contradiction with the values, norms, and laws of the religions.<sup>340</sup>

Similarly, F-KB proposed changing Article 29 to read:

- (1) The State shall be based upon the belief in the One and Only God, with the obligation to implement the teachings of the religion, each according to his/her religion.
- (2) The State upholds ethical values and morals of humanity which are taught by every religion.
- (3) The State guarantees all persons the freedom to believe in his/her religion and to worship, each according to the belief of his/her religion.<sup>341</sup>

Eventually, out of 11 factions in PAH I, only 3 factions (i.e., F-PDI-P, F-TNI/Polri, and F-PDKB) wanted to maintain the original Article 29. The other 8 proposed minor or major changes. Regarding Article 29(1), 7 factions (i.e., F-Reformasi, F-PDU, F-PDKB, F-TNI/Polri, F-UG, F-PDI-P, and F-PG)

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337 As affirmed by Sutjipto (F-UG). *Ibid.*, p. 417.

338 As conveyed by Zain Bajeber (F-PPP). *Ibid.*, pp. 418-419.

339 As affirmed by Soewarno (F-PDI-P). *Ibid.*, p. 420.

340 As proposed by Rosnaniar (F-PG). *Ibid.*, p. 422.

341 As stated by Yusuf Muhammad (F-KB). *Ibid.*, p. 423.

wanted to maintain the original, while F-PBB and F-PPP proposed inserting the “*tujuh kata*” (the ‘seven words’). F-KKI proposed adding the principles of “Just and civilized humanity, Unity of Indonesia, Democratic Life guided by Wisdom in Deliberation/Representation, and Social justice for the whole of the people of Indonesia”, so that paragraph (1) would contain the complete principles of *Pancasila*. F-KB proposed adding “with the obligation to implement the teachings of the religion, each according to his/her religion”. F-Reformasi, F-KKI, F-PG, and F-KB proposed adding one new paragraph to Article 29.

In the ensuing informal meeting on 14 June 2000, factions attempted to reach a consensus.<sup>342</sup> Those who wanted to maintain the original Article 29 (e.g., F-TNI/POLRI) argued that if the state required followers to implement religious teachings, then anyone who would not implement the teaching would be violating the law and should be punished.<sup>343</sup> Further, F-PDI-P reiterated that the state is a national state and that the removal of the “*tujuh kata*” with the consent of the prominent Islamic figures had been hitherto safeguarding the existence of the state.<sup>344</sup>

On the other hand, F-PBB and F-PPP stated that adding the “*tujuh kata*” perfected the 1945 Constitution. F-PBB stated that the President’s Decree of 5 July 1959 (which re-enacted the 1945 Constitution) confirmed that the *Piagam Jakarta* (Jakarta Charter) is the soul of and has an inseparable connection with the 1945 Constitution. A religion is useful if it is implemented. However, the stipulation was intended only for Muslims, not as a privilege, because it was expected that followers of other religions would also implement their respective religion’s teachings. He then stated that F-PBB could accept the “*tujuh kata*” being incorporated into another part of Article 29, keeping the initial paragraph (1) intact.<sup>345</sup> F-PPP added that the stipulation would enhance the participation of most people in overcoming national challenges.<sup>346</sup>

By contrast, F-PDKB warned that the issue would bring the nation back to dissension.<sup>347</sup> In reply, F-Reformasi argued that the obligation should apply to all religions. If the state recognizes a religion, the state should require followers to implement that religion’s teachings.<sup>348</sup> F-KB agreed that the obligation should apply to all religions.<sup>349</sup> Commenting on the discussions, F-KB reminded members that Indonesia is a nation state. The relationship between the state and religion is neither secular (as in Western

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342 Ibid., p. 427.

343 As argued by Taufiqurrahman Ruki (F-TNI/POLRI). Ibid., p. 428.

344 As argued by Frans Matrutty (F-PDI-P). Ibid., p. 430.

345 As argued by Hamdan Zoelva (F-PBB) and Lukman Hakim Saifuddin (F-PPP). Ibid., pp. 432, 433.

346 Ibid., p. 434.

347 As expressed by Gregorius Seto Harianto (F-PDKB). Ibid., p. 435.

348 As argued by Patrialis Akbar (F-Reformasi). Ibid., p. 435.

349 As stated by Yusuf Muhammad (F-KB). Ibid., p. 437.



countries) nor integrative (such as in the Middle East), where religion is included in the state system. Instead, it is symbiotic, where the state needs the values and norms of the religions and the religions need the enforcement power of the state. The same member emphasized that the “space” of Pancasila and the “space” of Islam in state affairs are different.<sup>350</sup>

Finding the debate too lengthy, a F-PPP speaker urged the committee to forward the issue to the plenary session so that it could be decided through voting. The speaker disagreed that the proposal would open old wounds or cause the nation’s disintegration. Further, the speaker stated that, though the stipulation is in the Constitution, it does not mean that it can be enforced automatically.<sup>351</sup>

Trying to avoid misunderstanding and prejudice, a F-KB speaker stated that there was agreement on two substantial issues: First, that the state is based on the One and Only God and second, that it should guarantee to all religious followers that they are free to implement the teachings of their respective religions.<sup>352</sup> However, a F-KKI speaker warned that the public perceived these PAH I discussions as opening old wounds and that they were concerned about the future consequences.<sup>353</sup> Then, in response to F-PPP’s argument, the F-TNI/POLRI speaker reminded members that if the plenary would vote on this matter, the proposal would surely be defeated and that one should be aware of the implications.<sup>354</sup> Meanwhile, F-PG emphasized it did not agree with omitting the term *kepercayaan*. They questioned how people who believe in *kepercayaan* and thus do not belong to a mainstream religion would be accommodated.<sup>355</sup>

In the subsequent informal consultation meeting on 20 June 2000, the factions maintained similar stances. The F-Reformasi representative questioned the understanding of the “obligation to implement religious law” in other religions. They believed such an obligation was correct in Islam but questioned whether other faiths would find this excessive.<sup>356</sup>

In response, the PAH I chairman stated that religion is about salvation, which is a grace of God rather than the fruit of human effort. When it is transformed into the relationship with the state, God does not need anyone to help one’s relationship with their God, including the state. Therefore, borrowing the state’s hand to oblige people to implement God’s teachings

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350 As asserted by Ali Masykur Musa (F-KB). *Ibid.*, p. 443. The speaker used the word “*kamar*” (room) to illustrate the difference entity of state and religions.

351 As stated by Lukman Hakim Saifuddin (F-PPP). *Ibid.*, pp. 444-445.

352 As stated by Yusuf Muhammad (F-KB). *Ibid.*, p. 446.

353 As stated by Anthony Rahail (F-KKI). *Ibid.*, p. 447. See the composition of members of MPR.

354 As reminded by Taufiqurrahman Ruki (F-TNI/POLRI). *Ibid.*, p. 448. He recalled various bloody conflicts caused by certain parties attempt to establish an Islamic state in Indonesia.

355 As elucidated by Amidhan (F-PG). *Ibid.*, p. 452.

356 As stated by A.M. Lutfi (F-Reformasi). *Ibid.*, p. 561.

becomes irrelevant.<sup>357</sup> Previously, the Chairman had reminded them that a basic right is not a gift from the state or any group, but *fitriyah*, a gift from God. Therefore, the state should guarantee, rather than give or boost, a basic right. So, he pointed out, the original Article 29 is an excellent and genius formulation, as it stands subtly between the secular and theocratic state. A tiny shift would be enough to push the state to either side.<sup>358</sup>

Then, a F-PG representative elucidated that in Islam there are two groupings of laws: *diyanih* (normative) and *kodoi'* (instrumental). For example, embracing religion is free (*diyanih*), but there are government regulations to enforce harmony that must be obeyed (*kodoi'*). In that regard, what is needed is to obey the rules (*kodoi'*) and respect and encourage, not force, the implementation of religious teachings.<sup>359</sup> The informal meeting failed to agree on this contentious issue.

In the subsequent MPR plenary meeting on 10 August 2000, most of the factions merely repeated their respective positions, except F-UG, who expressed a change in their position. The F-UG speaker asserted that Article 29 is the heart of the Constitution and that the Article should therefore be maintained.<sup>360</sup>

During that same meeting, F-PPP strongly refuted the allegation that asking to oblige the implementation of Islamic *shari'a* for its followers is a threat to the nation. The proposal was not intended to establish an Islamic state, but rather to deny the notion that the state, religions, and democracy are contradictory. The proposal meant to strengthen Indonesian nationalism and reaffirm Islamic nationalism as well as reject the accusation that the universality of Islam does not recognize nationalism.<sup>361</sup> F-PBB reasserted that including 'the seven words' would help overcome moral decadence. People would be free to worship other religions, a guarantee that comes from Islamic *sharia* itself.<sup>362</sup>

In the same session, the F-KB speaker clarified and reaffirmed maintaining the original Article 29. Religion and the state are two different entities, which must be distinguished but not juxtaposed.<sup>363</sup>

The F-PDKB speaker proposed deleting Article 29(1) because its content was inherent in the Preamble. The freedom of religion is a human right. Therefore, the state has no authority to require people to implement their religions' teachings or to intervene their religious lives.<sup>364</sup>

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357 Ibid., p. 561.

358 Ibid., p. 560.

359 As stated by Amidhan (F-PG). Ibid., p. 562.

360 As confirmed by Valina Singka Subekti (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 27.

361 As asserted by Zainuddin Isman (F-PPP). See Ibid., p. 36-37.

362 Ibid., p. 55.

363 As confirmed by Ali Masykur Musa (F-KB). Ibid. p. 44.

364 As stated by K. Tunggul Sirait (F-PDKB). Ibid., p. 68.

Meanwhile, societal responses were mixed. Several orthodox Islamic organizations<sup>365</sup> supported inserting the seven words.<sup>366</sup> Eggi Sudjana, chairman of the Indonesian Muslim Workers Brotherhood (*Persaudaraan Pekerja Muslim Indonesia*), stated that prejudice against Jakarta Charter supporters and the stigma that they are Islamic state supporters were baseless, stemming from fearful hypocrites or anti-Islamic infidels.<sup>367</sup>

However, most of the Islamic community rejected including *tujuh kata* ('the seven words') in the Constitution. Azyumardi Azra, the Rector of the State Islamic Institute Jakarta, stated that the proposed inclusion was not urgent and came only from a small group in the Islamic community. The factions who proposed the topic were just looking for political publicity, positioning themselves as Muslim defenders. He warned that adding the *tujuh kata* would cause conflict among Muslims due to the Muslim community's plurality.<sup>368</sup> Other Islamic leaders also rejected the idea.<sup>369</sup> Madjid stated that reinserting the seven words would confirm a formalistic and exclusive Islam. Similarly, Mas'udi reminded the Muslim community that the state could then interfere in religion, which would eventually bring *kemudaratatan* (disadvantages) to the religion itself. Further, the inclusion would revive the old prejudice about the desire to establish an Islamic state in Indonesia, contrary to the vision of a national state which treats all people equally.<sup>370</sup>

During the Commission A meeting on 11 August 2000, factions mostly repeated their previous stances. Most factions suggested that the MPR should ratify the fully agreed on materials. F-PDI-P suggested that the discussions on the other issues should resume in the next MPR session. Further, F-PDI-P appealed that the crucial issues, which could endanger the existence of the Unitary State of the Republic of Indonesia should be

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365 These organisations included the Indonesian Islamic Dakwah Council or DDII (*Dewan Dakwah Islamiyah Indonesia*), the Islam Defender Front or FPI (*Front Pembela Islam*), the Islamic Student Association or HMI (*Himpunan Mahasiswa Islam*), the Islamic Student Front or FMI (*Front Mahasiswa Islam*), the Indonesian Islamic Student or PII (*Pelajar Islam Indonesia*), the Indonesian Islamic Youth Movement or GPII (*Gerakan Pemuda Islam Indonesia*), and *Hizbuth Tahrir*.

366 Umar Basalim, *Pro-Kontra Piagam Jakarta di Era Reformasi*, Rofiqul-Umam Ahmad and Janedjri M. Gaffar (eds.), Pustaka Indonesia Satu, Jakarta, 2002, p. 151.

367 *Ibid.*, p. 144.

368 *Media Indonesia*, newspaper, 7 August 2000.

369 These included Nurcholish Madjid, the Rector of the University of Paramadina, K.H. Hasyim Muzadi, the Chairman of Nahdlatul Ulama, Ahmad Syafii Maarif, the Chairman Muhammadiyah, and Masdar S. Mas'udi, the Chairman of the Centre for Empowerment of Pesantren (Islamic Boarding School).

370 *Suara Pembaruan*, newspaper, 10 August 2000. NU and Muhammadiyah are the two largest Islamic organizations in Indonesia, with a total of more than 60 million members. See also Muhammadiyah Studies, 1 January 2013.

discussed in a consultation meeting among the factions, not in the commission, so they would not be recorded in a document of the nation's history.<sup>371</sup>

The F-PPP speaker once again urged for the inclusion of the "*tujuh kata*" in Article 29 of the 1945 Constitution. Citing the speech of the late K.H. Wahid Hasyim, a charismatic leader of *Nahdlatul Ulama* (NU), the speaker stressed that the provision does not mean the enforced implementation of Islamic law, because by holding on to the principle of deliberation, coercion would not occur. Further, the speaker asserted that F-PPP was responsible for saving the nation from the dangers of secularism and de-humanism and restoring "the gentlemen's agreement"<sup>372</sup> between the two major communities in the country on the proper proportion. He also emphasized that F-PPP does not recognize the separation between religion and state.<sup>373</sup> Likewise, the F-Reformasi speaker emphasized that the state should be pro-active in its efforts so that the adherents, regardless of their religion, become more devout.<sup>374</sup> The F-PBB speaker asserted that the *tujuh kata* ought to be inserted into the Constitution as an effort to bring Muslims closer to their religion.<sup>375</sup>

Responding to these statements, the F-TNI/Polri speaker stated that they disapproved of discussing the topic altogether, warning that it could cause conflict and lead to national disintegration.<sup>376</sup> Similarly, the F-PDKB speaker reminded the other members that it was the *tujuh kata* that had led to a failing *Konstituante* and had resulted in the issuance of the presidential decree to return to UUD 1945. For more than twenty years, during which time the *tujuh kata* were not included in the Constitution, Christians had had serious difficulties with building places of worship. Thousands of churches had been destroyed or burned. The fundamental question is whether the proposal is a strategic step to gradually establish an Islamic state.<sup>377</sup>

This statement was met with a fierce response. F-Reformasi and F-PPP members expressed that the accusation offended Muslims and appealed not to raise such sensitive topics. The facts showed, the F-PPP member stated, that many churches in Java were burned in retaliation for the burning of mosques in eastern Indonesia.<sup>378</sup> Aware of the issue's sensitivity, the meeting's chairman urged calm and cooperation, cancelling the meeting, and

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371 As stated by Hobbes Sinaga (F-PDI-P). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 111.

372 The speaker seems to refer to the decision-making process of the 1945 Constitution on 18 August 1945. See Sekneg, *op. cit.*, pp. 412–420.

373 As stated by Lukman Hakim Saifuddin (F-PPP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 113–114.

374 As stated by A.M. Luthfie (F-Reformasi). *Ibid.*, p. 120.

375 As asserted by Nadjih Ahmad (F-PBB). *Ibid.*, p. 121.

376 As reminded by INT Aryasa (F-TNI/Polri). *Ibid.*, p. 125.

377 As conveyed by Seto Harianto (F-PDKB). *Ibid.*, p. 127.

378 As stated by Muchtar Adam (F-Reformasi) and Abdul Kadir Aklis (F-PPP). *Ibid.*, p. 130.

inviting the factions to an informal gathering. During that gathering he appealed to them to keep a peaceful atmosphere and prevent their followers from becoming provocative.<sup>379</sup> The next day, following a F-PPP member's suggestion, the meeting was opened with a prayer following each member's religion, which pleaded for a peaceful atmosphere.<sup>380</sup> Then, the F-PDKB speaker who raised the issue apologized for any misunderstandings and retracted his remarks.

Eventually, Commission A postponed the discussion on Article 29 and agreed to resume it in the next MPR annual session in 2001. The commission reported this conclusion to the MPR plenary meeting on 15 August 2000.<sup>381</sup> Nevertheless, in the final F-PBB statement during this meeting, the speaker confirmed that the obligation to apply Islamic sharia inherent in the Jakarta Charter was not intended for individual Muslims, but addressed to the state, requiring the implementation of Islamic sharia for its adherents. Further, the speaker argued that there are *sharia* implementations that require state authority. He told others not to worry, since the obligation applies only to Muslims.<sup>382</sup> Then, a F-PPP speaker asserted that adjusting Article 29 would be a top priority for F-PPP in the MPR until the end of the amendment process.<sup>383</sup>

In short, until the very end of the session, the factions had different attitudes regarding Article 29.<sup>384</sup> Ultimately, the MPR decided to postpone the discussion on Article 29 until the next MPR annual session in 2001.

#### VI.2.3.10 *Pancasila as the foundation of the state*

PAH I also discussed the issue of the state's foundation. F-PDI-P proposed adding a paragraph (2) to Article 1 of the 1945 Constitution, affirming that the foundation of the state is *Pancasila* which is Belief in the Oneness of God (*Ketuhanan Yang Maha Esa*), Just and Civilized Humanity (*Kemanusiaan Yang Adil dan Beradab*), the Unity of Indonesia (*Persatuan Indonesia*), Democratic Life guided by Wisdom in Deliberation/Representation (*Kerakyatan Yang Dipimpin oleh Hikmat Kebijaksanaan, Dalam Permusyawaratan Perwakilan*)

379 The meeting was chaired by Jakob Tobing (F-PDI-P), the chairman of PAH I and Commission A. *Ibid.*, p. 131.

380 As proposed by Sukardi Harun (F-PPP). *Ibid.*, pp. 134, 137.

381 *Ibid.*, pp. 631, 646.

382 As stated by M.S. Kaban (F-PBB). *Ibid.*, p. 657. Kaban argued that Christiaan Snouck Hurgronje and other orientalist had been working systematically to marginalize Islamic sharia in Indonesia since colonial times. Hurgronje, Kaban argued, had replaced Van den Berg's *Theory Receptio in Complexu*, which imposes Islamic law on the entire indigenous population who are Muslim, with a reception theory which states that Islamic law is applicable if accepted by customary law.

383 As asserted by Lukman Hakim Saifuddin (F-PPP). *Ibid.*, p. 674.

384 See Attachment VI.5.

and for all the People of Indonesia (*Keadilan Sosial bagi seluruh Rakyat Indonesia*).<sup>385</sup> F-PG, F-PDKB, F-TNI/POLRI and F-UG agreed.<sup>386</sup>

F-KB endorsed the idea but proposed not mentioning the term *Pancasila* explicitly. Instead, it proposed, “The State of Indonesia is based on Belief in the Oneness of God, Just and civilized humanity, the Unity of Indonesia, Democratic Life guided by Wisdom in Deliberation/Representation and Social Justice for all the People of Indonesia”.<sup>387</sup> F-Reformasi agreed and stated that mentioning the five principles in the article as the basic guidance of the state clearly would give a clear future guideline and leave minimal room for deviation. The member added that F-Reformasi did not want to include the term *Pancasila* out of fear it would be misunderstood, without elaborating further.<sup>388</sup>

By contrast, F-PDU and F-PBB argued that it was not necessary to mention *Pancasila* or its five principles as the foundation of the state in the Constitution’s articles. The principles are included in the Preamble, which had been agreed and would not be amended. Further, F-PBB reiterated that the factions had agreed that the Preamble animates the articles of the Constitution.<sup>389</sup> However, F-KB responded that it was necessary to include the Preamble’s substance, i.e., the principles of *Pancasila* in Article 1 as a confirmation of the starting point for the future.<sup>390</sup> To clarify his previous proposal, the F-PDI-P speaker affirmed that a state requires a *staat fundamentele normen* (state philosophical foundation) which should be clearly formulated. There is no need to worry that by placing *Pancasila* in the articles of the Constitution, its position will weaken and become the object of change following the provisions of Article 37. It does not make sense that if *Pancasila* is placed in Article 1, it can be changed using Article 37. Not all provisions in the articles of the Constitution are subject to Article 37, such as a statement on people’s sovereignty.<sup>391</sup>

In the subsequent informal consultation meeting on 17 May 2000, the PAH I chairman concluded that all factions agreed that *Pancasila* is the foundation of the state. The problem was its position. The first issue was whether it was sufficient for it to be mentioned only in the Preamble or whether it should also be included in the Constitution. The second issue was whether the name of the state’s foundation, *Pancasila*, should be mentioned in the Constitution or whether it was sufficiently stored in the nation’s collective

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385 As conveyed by Harjono (F-PDI-P). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 77.

386 As stated by Hatta Mustafa (F-PG), Gregorius Seto Harianto (F-PDKB), Hendi Tjaswadi (F-TNI/Polri) and Valina Singka Subekti (F-UG), *Ibid.*, pp. 78–89.

387 As stated by Abdul Khaliq Ahmad (F-KB). *Ibid.*, p. 81.

388 As stated by Patrialis Akbar (F-Reformasi). *Ibid.*, pp. 82, 99.

389 As stated by Asnawi Latief (F-PDU) and Hamdan Zoelva (F-PBB). *Ibid.*, pp. 94–95.

390 As proposed by Yusuf Muhammad (F-KB). *Ibid.*, p. 101.

391 As stated by Harjono (F-PDI-P). *Ibid.*, p. 106. Article 37 of the 1945 Constitution concerns the procedure of amending the Constitution.

memory.<sup>392</sup> Then, a F-PPP member invited his PAH I colleagues to reflect on why the forefathers who had drafted the three Constitutions known to Indonesia<sup>393</sup> did not explicitly mention *Pancasila* in an article and had kept it in the Preamble. Following their example, the member argued, let us keep the term in the Preamble and not lower it to the level of ordinary norms in the Constitution's chapters, as this would mean that the *Pancasila* can be changed.<sup>394</sup>

Still defending a different view, the F-TNI/POLRI speaker reiterated that maintaining the Preamble does not mean merely maintaining its text, but that the Constitution's articles should refer to it. Hence, F-TNI/POLRI stressed that the fear that *Pancasila* could be changed was baseless. Further, the speaker argued that what should be included in the article is just the term *Pancasila*, without detailing its principles. It would be sufficient if the articles refer to *Pancasila* as the principles embodied in the Preamble.<sup>395</sup> Likewise, F-UG and F-KB argued that the Constitution should affirm *Pancasila* as the foundation of the state.<sup>396</sup>

F-PBB, F-PDU, and F-Reformasi agreed with F-PPP. They argued that since everybody regarded Pancasila as the foundation of the state, it should be maintained in the Preamble. F-PBB questioned why we should debate something that was not a problem.<sup>397</sup> F-PDI-P opined that now, after the indoctrination program for state awareness of the old government has passed, we need to include Pancasila in the articles of the Constitution with reference to the Preamble. As a pluralistic but united nation, *bhinneka tunggal ika*, it is important for the people to understand the precepts of Pancasila as one indivisible organic entity.<sup>398</sup>

In this context, a F-PG member asserted that the correct version of Pancasila was among the versions in the Preamble promulgated on 18 August 1945 or mentioned by Soekarno in his famous speech on 1 June 1945. Referring to Pancasila in the Preamble would end the debate about which version is correct.<sup>399</sup> Then, F-PPP reminded the committee that since no one rejects Pancasila, this was not a problem.<sup>400</sup> Another F-PPP member stated that the issue was not about agreeing on whether *Pancasila* was the foundation of the state, because this was already included in the Preamble.<sup>401</sup>

Eventually, the debate on the foundation of the state was postponed.

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392 Ibid., p. 108.

393 These were the 1945 Constitution, the Constitution of the Federal Republic of Indonesia, and the Provisional Constitution of 1950.

394 As argued by Ali Hardi Kiaidema (F-PPP). Ibid., pp. 114 – 115.

395 As emphasized by Hendi Tjaswadi (F-TNI/Polri). Ibid., p. 115.

396 As asserted by Sutjipto (F-UG) and Abdul Khaliq Ahmad (F-KB). Ibid., pp. 117, 118.

397 As asserted by Hamdan Zoelva (F-PBB), Asnawi Latief (F-PDU), and A.M. Luthfi (F-Reformasi). Ibid.

398 As asserted by Pataniari Siahaan (F-PDI-P). Ibid., p. 119.

399 As argued by Slamet Effendy Yusuf (F-PG). Ibid., p. 120.

400 As asserted by Zain Bajeber, (F-PPP). Ibid., p. 122.

401 As stated by Ali Hardi Kiaidema (F-PPP). Ibid., p. 127.

### VI.2.3.11 Law-making process

The law-making process had been discussed but not completely finalized in the first amendment stage (See V.4.7.8). PAH I had not agreed on how to react to a bill that was approved jointly by parliament and the president, which the president later refused to promulgate. In that case, a delegation at a public hearing argued that the bill should be submitted to the MPR for a decision. If the MPR approved the bill, the president should promulgate the bill as law.<sup>402</sup>

A F-PPP member proposed that if the jointly approved bill was not promulgated by the president within 30 days of approval, the bill would automatically become law.<sup>403</sup> Considering the DPR and president's equal positions, PAH I accepted the idea and concluded that the Constitution would declare a bill that had been jointly agreed by the DPR and the president valid as statute, if the President did not promulgate it within 30 days after the bill had been agreed.

### VI.2.3.12 Other topics

At the end of the PAH I session in March 2000, the PAH I chairman reported to the Working Body that PAH I still needed to discuss the following:<sup>404</sup>

- Composition of the MPR's membership,
- Presidential election,
- Implementation of regional autonomy,
- The status of the Elucidation of the 1945 Constitution,
- The economic system regarding Article 33.

Further, PAH I reported that it had agreed on the following topics that needed to be included in the 1945 Constitution:

- Human rights,
- National police,
- Independence of the judiciary (Supreme Court, judges, general attorney),

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402 As conveyed by Ida Bagus Gunadha from Parisadha Hindu in a PAH I public hearing on 1 March 2000. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 7. During the New Order era, there was no provision for settlement procedures if the President did not promulgate a law that had been jointly approved by the DPR.

403 As proposed by Ali Hardi Kiai Demak (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 593. Stated in a PAH I meeting on 30 May 2000.

404 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 201-202.



- Gender equality,
- Education budget,
- Foundation of the state (ideology),
- Position and working relationship of the highest state institution with or between the high state institutions,
- General election,
- Relationship between the central government and the regions,
- Council of Regional Delegates.

### VI.3 THE OUTCOMES OF THE SECOND AMENDMENT

During the Commission A session, only a few amendment proposals were agreed. The MPR agreed to continue the amendment process during the next annual session. The MPR plenary agreed to assign the further preparation of changes to the MPR Working Body. The amendment materials that had not been finalized and which had not been discussed in the MPR 2000 session would be added to the assignment as preparatory material for the upcoming amendment stage. Eventually, in the MPR plenary meeting on 18 August 2000, all factions, after delivering their respective Final Notes, agreed with the second amendment to the 1945 Constitution.<sup>405</sup> In their notes, factions expressed their disappointment that the MPR annual session could not accomplish the amendment and hoped that it would be finalized in the subsequent MPR annual session.

To finalize the remaining amendment topics, the MPR passed MPR Decree No. IX/2000, which stipulates that the process was to be continued in the MPR 2001 annual session and that the whole amendment should be completed during the MPR 2002 annual session at the latest. A list of the unfinished amendment topics was attached to that decree.<sup>406</sup>

#### VI.3.1 The second amendment

Below are the amended articles of the 1945 Constitution agreed on during the second stage of the amendment process, compared with the original articles from the 1959 version of the 1945 Constitution.

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405 Hartono Mardjono from F-PBB submitted his *minderheidsnota* (minority note) against MPR Decree No. VII/MPR/2000 that stipulates that TNI will still have their representatives in the MPR until 2009 at the latest and Ghazali from FPP declared his personal rejection of the decree. See above.

406 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 694. MPR Decree no. IX/MPR/2000 tasks BP-MPR to continue amendment process and attaches the materials. See Attachment VI.4.

Article	Original	Second Amendment <sup>407</sup>
CHAPTER VI	CHAPTER VI REGIONAL GOVERNMENT	CHAPTER VI REGIONAL AUTHORITIES
18	The division of the territory of Indonesia into large and small regions shall be prescribed by law in consideration of and with due regard to the principles of deliberation in the government system and the hereditary rights of special territories.	<ol style="list-style-type: none"> <li data-bbox="686 298 1045 566">(1) The Unitary State of the Republic of Indonesia is divided into provincial regions and those provincial regions are divided into regencies (<i>kabupaten</i>) and municipalities (<i>kota</i>), whereby every one of those provinces, regencies, and municipalities has its regional government, which shall be regulated by laws.</li> <li data-bbox="686 566 1045 753">(2) The regional governments of the province, the regency and the municipality shall regulate and manage their own government affairs according to the principles of autonomy and the duty of assistance.</li> <li data-bbox="686 753 1045 940">(3) The regional governments of the province, the regency, and the municipality have Regional People’s Councils (<i>Dewan Perwakilan Rakyat Daerah</i>) whose members are elected through a general election.</li> <li data-bbox="686 940 1045 1110">(4) Every Governor, Regent (<i>Bupati</i>) and Mayor (<i>Walikota</i>) respectively head of regional government of the provinces, regencies, and municipalities, shall be elected democratically.</li> <li data-bbox="686 1110 1045 1243">(5) The regional governments exercise the widest autonomy, save to government affairs determined by law as the affairs of the central government.</li> <li data-bbox="686 1243 1045 1375">(6) The regional governments are entitled to determine regional regulations and other regulations for the execution of the autonomy and the duty of assistance.</li> <li data-bbox="686 1375 1045 1479">(7) The structure and procedures for the conduct of regional government shall be regulated by laws.</li> </ol>

407 The texts are from the English version of the 1945 Constitution of the Republic of Indonesia, published by the Office of the Registrar and the Secretariat General of the Constitutional Court of the Republic of Indonesia, 2015.

408 Customary.

18A	(none)	<p>(1) The authority relations between the central government and the regional government of the provinces, the regencies, and the municipalities, or among provinces and regencies and municipalities, shall be regulated by law by having regard to regional specificity and diversity.</p> <p>(2) The financial relations, public services, the utilization of natural resources and other resources between the central government and the regional governments shall be regulated and be executed justly and harmoniously by virtue of laws.</p>
18B	(none)	<p>(1) The state shall recognize and respect units of regional governments of specific or special nature which shall be regulated by laws.</p> <p>(2) The state shall recognize and respect entities of the <i>adat</i><sup>408</sup> law societies along with their traditional rights to the extent they still exist and are in accordance with the development of the society and the principles of the Unitary State of the Republic of Indonesia, which shall be regulated by laws.</p>
19	<p>(1) The composition of the People's Representative Council shall be further regulated by law.</p> <p>(2) The People's Representative Council shall convene a session at least once a year.</p>	<p>(1) The members of the People's Representative Council are elected through general election.</p> <p>(2) The structure of the People's Representative Council shall be regulated by laws.</p> <p>(3) The People's Representative Council shall convene at least once a year.</p>
20	<p><i>(Article 20 has been amended in first amendment. The second amendment added the fifth verse).</i></p>	<p>(5) In the event a bill having been jointly approved as such has failed validation by the President within a period of thirty days as of such bill having been approved, the bill as such shall lawfully become a law and shall be promulgated.</p>

20A	(none)	<p>(1) The People’s Representative Council shall have legislative, budget, and supervisory functions.</p> <p>(2) In the execution of its functions, besides the rights regulated by the other articles of this Constitution, the People’s Representative Council holds the right of interpellation, the right of enquette, and the right of expression.</p> <p>(3) Besides the rights regulated by the other articles of this Constitution, every member of the People’s Representative Council has the right to submit queries, to convey proposals and opinions as well as the right of immunity.</p> <p>(4) Further provisions regarding the rights of the People’s Representative Council and the right of the members the People’s Representative Council shall be regulated by laws.</p>
22A	(none)	Further provisions regarding the procedures for the enactment of laws shall be regulated by laws.
22B	(none)	A member of the People’s Representative Council can be discharged from his/her office, the conditions and procedures of which shall be regulated by laws.
CHAPTER IXA	(none)	CHAPTER IXA THE STATE TERRITORY
25A	(none)	The Unitary State of the Republic of Indonesia is an archipelagic state having an Archipelagic ( <i>Nusantara</i> ) character with a territory, the borders and rights of which shall be stipulated by laws.
CHAPTER X	CHAPTER X CITIZENS	CHAPTER X CITIZENS AND INHABITANTS
26		<p>(2) The inhabitants are Indonesian citizens and foreigners residing in Indonesia.</p> <p>(3) Matters regarding citizens and inhabitants shall be regulated by laws.</p>
27		(3) Every citizen shall be entitled and be obliged to participate in efforts to defend the state.

CHAPTER XA	(none)	CHAPTER XA HUMAN RIGHTS
28A	(none)	Every person shall be entitled to live and be entitled to defend his/her life and living.
28B	(none)	(1) Every person shall be entitled to establish a family and to further descendants through legal marriage. (2) Every child shall be entitled to viability, to grow up, and to develop as well as be entitled to protection against violence and discrimination.
28C	(none)	(1) Every person shall be entitled to self-development through the fulfilment of his/her basic needs, be entitled to acquire education and to obtain the benefit of science and technology, arts and culture, for the sake of enhancing his/her quality of life and for the sake of the welfare of mankind. (2) Every person shall be entitled to self-advancement in the struggle of his/her rights collectively in order to develop the society, the nation and his/her country.
28D	(none)	(1) Every person shall be entitled to recognition, guaranty, protection, and equitable legal certainty as well as equal treatment before the law. (2) Every person shall be entitled to work as well as to obtain reward and just and decent treatment in work relationships. (3) Every citizen shall be entitled to obtain equal opportunity in government. (4) Every person shall be entitled to citizenship status.
28E	(none)	(1) Every person shall be free to embrace a religion and to worship according to his/her religion, to choose education and teaching, to choose work, to choose citizenship, to choose a place to reside in the territory of the state and to leave it, as well as be entitled to return.

		<p>(2) Every person shall be entitled to freedom to be convinced of a belief, to express thought and to do so in accordance with his/her conscience.</p> <p>(3) Every person shall be entitled to the freedom of association, to assemble and to expression.</p>
28F	(none)	<p>Every person is entitled to communicate and to obtain information for the development of his/her personality and social environment, as well as be entitled to seek, to obtain, to own, to store, to process and to convey information by means of all kinds of available channels.</p>
28G	(none)	<p>(1) Every person shall be entitled to protection of his/her own person, family, honour, dignity, and property under his/her control, as well as be entitled to protection against threat or fear to do or omit to do something being his/her fundamental human right.</p> <p>(2) Every person shall be entitled to be free from torture or treatment that humiliates human dignity and be entitled to the right to obtain political asylum from another country.</p>
28H	(none)	<p>(1) Every person is entitled to live prosperously physically and spiritually, to have a place to reside, and to acquire a good and healthy living environment as well as be entitled to obtain health care.</p> <p>(2) Every person is entitled to receive ease and special treatment in order to obtain the same opportunity and benefit in order to achieve equality and justice.</p> <p>(3) Every person is entitled to social security that enables his/her integral self-development as a dignified human being.</p> <p>(4) Every person shall be entitled to personal property and such property rights shall not be taken over arbitrarily by whomsoever.</p>

28I	(none)	<p>(1) The rights to live, the right not to be tortured, the right of freedom of thought and conscience, the right of religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under a retroactive law are all human rights that cannot be reduced under any circumstance whatsoever.</p> <p>(2) Every person is entitled to be free from discriminative treatment on whatsoever basis and is entitled to acquire protection against such discriminative treatment.</p> <p>(3) The cultural identity and right of traditional societies shall be respected in harmony with the development of the age and civilizations.</p> <p>(4) The protection, advancement, enforcement, and fulfilment of human rights shall be the responsibility of the state, particularly the government.</p> <p>(5) For the enforcement and protection of human rights in accordance with the principle of a democratic state based on law, the execution of human rights shall be guaranteed, regulated, and set out in statutory rules and regulations.</p>
28J	(none)	<p>(1) Every person shall respect human rights of the others in the order of life of the society, nation, and the state.</p> <p>(2) In the exercise of his/her rights and freedoms, every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations for morality, religious values, security, and public order in a democratic society.</p>

CHAPTER XII	CHAPTER XII NATIONAL DEFENCE	CHAPTER XII DEFENCE AND SECURITY OF THE STATE
30	<p>(1) Every citizen shall have the right and duty to participate in the defence of the country.</p> <p>(2) The rules governing defence shall be further regulated by law.</p>	<p>(1) Every citizen shall be entitled and shall participate in the efforts towards the defence and security of the state.</p> <p>(2) The efforts toward the defence and security of the state shall be executed through a system of defence and security of the entire people by the Indonesian National Military (<i>Tentara Nasional Indonesia</i>) and the State Police of the Republic of Indonesia (<i>Kepolisian Negara Republik Indonesia</i>) as the main force, and the people as the supporting force.</p> <p>(3) The Indonesian National Military consists of the Army, the Navy, and the Air Force as the state apparatus with the duty of defending, protecting, and maintaining the integrity and sovereignty of the state.</p> <p>(4) The State Police of the Republic of Indonesia as a state apparatus which safeguards the security and order of the society has the duty to protect, to nurture, to serve the society, as well as to enforce the law.</p> <p>(5) The structure and position of the Indonesian National Military, the State Police of the Republic of Indonesia, the authority relationships of the Indonesian National Military and the State Police of the Republic of Indonesia in the performance of their duties, the conditions for participation of the citizens in the effort of defence and security of the state, as well as matters related to defence and security shall be regulated by laws.</p>



CHAPTER XV	CHAPTER XV FLAG AND LANGUAGE	CHAPTER XV THE NATIONAL FLAG, LANGUAGE AND COAT OF ARMS AS WELL AS THE NATIONAL ANTHEM
35	The national flag of Indonesia shall be <i>Sang Merah Putih</i> (the Red-and-White).	The Flag of the State of Indonesia is the Red and White ( <i>Sang Merah Putih</i> ).
36	The state language shall be <i>Bahasa Indonesia</i> .	The Language of the State is the Indonesian Language ( <i>Bahasa Indonesia</i> ).
36A	(none)	The Coat of Arms of the State of Indonesia is the <i>Pancasila Eagle (Garuda Pancasila)</i> with the watchword Unity in Diversity ( <i>Bhinneka Tunggal Ika</i> ).
36B	(none)	The National Anthem is Great Indonesia ( <i>Indonesia Raya</i> ).
36C	(none)	Further provisions regarding the Flag, the Language, the Coat of Arms, and the National Anthem shall be regulated by laws.

#### VI.4 ANALYSIS AND COMMENTS

##### VI.4.1 The process

Initially, assuming the 1945 Constitution was President Soekarno's legacy, PDI-P was hesitant to amend UUD 1945 and tended to take a defensive and reactive position against amendment ideas. Yet, occasionally, some F-PDI-P members were active in proposing ideas for change.<sup>409</sup>

In November 1999, several PAH I members were replaced. Among others, F-PDI-P replaced Amin Aryoso<sup>410</sup> with the author, who was then elected as the PAH I chairman. From then on, the F-PDI-P, the MPR's largest faction, became proactive in amendment process.

Few of the proposals submitted during the previous phase were agreed on. In accordance with MPR Decree No. IX/1999, the MPR resumed the amendment process in November 1999. For this purpose, the MPR formed the MPR Working Body which subsequently formed PAH I<sup>411</sup> and PAH II to prepare any new necessary MPR decree(s) and to review the existing ones. The factions resumed the process after a comprehensive discussion

409 See VI. 6.1.

410 Later, Amin Aryoso would become active in the movement to stop the amendment process and to restore the 1959 version 1945 Constitution. See VIII.2.7. Constitutional Commission.

411 During the first amendment, the drafts were prepared by PAH III.

of the related issues and continued discussing the issues in order of each Constitutional chapter. Factions agreed to use the previous MPR session's minutes as the base material.

The MPR scheduled the MPR Working Body to begin its work on 1 November 1999 and to give a progress update at the MPR plenary meeting on 8 August 2000. The plenary meeting occurred during the MPR 2000 Annual Session, which was scheduled from 7 to 18 August 2000. The MPR plenary meeting then formed Commission A to discuss the reported draft and update the MPR plenary meeting on 9 August 2000. The MPR plenary decision-making meeting was scheduled for 18 August 2000.

Similar to the previous phase, the amendment process was conducted at four levels, which emphasized deliberation and consensus. Unlike the previous phase, which lasted for only 12 days, this phase was scheduled to last from November 1999 to August 2000. The process had become much more thorough and aimed at participation and knowledge development. PAH I could seek broad participation throughout the amendment process. Public hearings were conducted both in Jakarta and the regions, and PAH I invited public figures, experts, civic organizations, NGOs, and activists to the hearings. In collaboration with universities and academic institutions, several seminars and workshops on topics relevant to the constitution were also conducted in Jakarta and the regions. To supplement these sessions, PAH I members were provided with constitutions from other countries and additional information. PAH I also dispatched teams abroad to conduct comparative studies on issues related to the constitution, in which the members could compare and absorb the associated information without having to draw a common conclusion on these issues. PAH I invited speakers to deliver special lectures, including prominent Indonesian figures, national figures in the struggle for independence, and leading Indonesian and international thinkers in the fields of constitutional law, socio-politics, and economics.

To further communicate PAH I activities to the public, regular meetings with the media were arranged. All PAH I meetings would be open to the public. The public were encouraged to submit their ideas and aspirations. In collaboration with the UNDP (United Nations Development Programme), the MPR's Secretariat General set up a television station to broadcast MPR meetings in real time. PAH I members also participated in various seminars and workshops on constitutional reform organized by the public. The side effect of the openness, the foreign observers, the international scholarly lectures, and PAH I members attending public events was that certain parties accused the MPR of manipulating the process, with the Constitutional amendment process supposedly being controlled by foreign interests.<sup>412</sup>

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412 See RM. A.B. Kusuma, *op. cit.*, p. xv.

Public involvement was extensive enough to represent different societal views. With nearly eight months of consultation time, the internal deliberations in PAH I, the MPR Working Body, Commission A, and the MPR plenary meeting were intensive and extensive. The factions had ample opportunity to discuss a wide range of topics regarding the constitutional reform. However, there were critiques as well. Certain parties wanted to replicate the process conducted in Thailand in 1997, which involved soliciting input from every individual citizen. However, this would have prolonged the process even more in a country the size of and with such a heterogeneous society as Indonesia.

As discussed in the previous chapter, having the MPR factions feel a sense of ownership and responsibility for completing the amendment process encouraged the factions to learn more about the issues evolving in the community and to communicate them to their respective supporters. Various latent political issues were expressed openly at the PAH I forums. This was quite remarkable, given that they had been silenced for so many years. These issues included aspirations for decentralization and autonomy, support for creating a federal state, and the desire to secede from Indonesia. These issues were associated with certain regions feeling disappointed and angry with the central government because of a sense of injustice, discrepancy of development and negligence over the years. Similarly, the aspiration to make the implementation of Islamic sharia obligatory for its followers was openly proposed and discussed at various PAH I forums. Lastly, people expressed their aspirations for the rule of law, democracy, social justice, and democratic elections. Considering the broad changes they desired, certain individuals insisted that the 1945 Constitution should be replaced by an entirely new Constitution.

On the other hand, the process raised concerns in certain circles that the amendment process would open a Pandora's box of classical Indonesian politics, which could be uncontrollable and endanger the existence of the Indonesian nation and state. This led to opposition against amending the Constitution. Those against the amendment, who thought the lower-level statutes and the Constitution's implementation that required improvement, also had a fair chance to express their stance in the PAH I meetings.<sup>413</sup> There were three different attitudes toward changing the 1945 Constitution: those who supported the amendment process, those who wanted to revoke the 1945 Constitution and replace it with a new constitution, and those wanted to maintain the original 1945 Constitution.

Among the factions, especially in PAH I, there was an overwhelming majority in favour of reforming the 1945 Constitution. Elements in F-PDI-P and F-UG were hesitant about the changes, with a F-PDI-P minority regarding the 1945 Constitution as the legacy of President Soekarno. F-ABRI had always supported the reform but strove to maintain the MPR as the highest

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413 As expressed by, among others, A.S.S. Tambunan. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Revised Edition, p. 252.

state institution which would compose the country's major policies (e.g., the Broad Outlines of State Policy) and involve ABRI's delegates. However, various military retirees began to criticize and reject amendments openly and strongly. There were attempts to revise agreed on changes.<sup>414</sup> However, since the beginning of the second amendment stage, PAH I had confirmed that ratified amendments could not be changed at a later stage.

During the Commission A meetings, constitutional law experts were invited as associate experts of the Commission, including Bagir Manan, Soewoto Moeljo Soedarmo, and Mahfud MD. They helped consolidate ideas but were not involved in decision-making. For example, the author, as Commission A's chairman, asked Bagir Manan to draft the conclusion on Commission A discussions on decentralization based on the "mathematical principle" of the "derivative-integral" relationship.<sup>415</sup> The Commission accepted the draft, which eventually became Article 18A (1) of the Second Amendment.

Considering the public discourse, the amendment process interacted directly with real political problems and Indonesia's challenges. It was solution oriented. The process became a communication channel between the people and the state. Nevertheless, presumptions and allegations persisted that the process was closed and elitist. Thus, the process of amending the 1945 Constitution reflected Simon Chesterman's description of process, that it must answer the question of 'for whom' the constitution was made. Constitutions are for citizens who have their own history, culture, and political aspirations, because the state cannot be built from the outside. It should not be sterile from, but in conversation with, the country's direct political challenges.<sup>416</sup>

Given the escalating armed conflicts in Aceh and Papua and the regions' profound disappointment with the central government associated with unequal levels of development, the amendment process could be perceived as part of an attempt to prevent conflict and as a reconciliation promotion process.<sup>417</sup>

One problem was that with PAH II composing new MPR decrees and reviewing the existing ones, the political reform process followed a dual track with two incompatible strands. As happened during the previous phase, mismatches and contradictory issues occurred. For instance, while PAH I discussed making the state institutions equal to establish checks and balances, PAH II continued to view the MPR as the highest state institu-

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414 Personal notes.

415 Derivative-integral is a calculus theorem which states that differentiation is the reverse process to integration.

416 Simon Chesterman, *State-Building, the Social Contract, and the Death of God*, paper presented at *The Future of State building: Ethics, Power and Responsibility in International Relations*, University of Westminster, London, October 2009.

417 See Gregoire C N Webber, *op. cit.*, Department of Law, London School of Economics and Political Sciences, in 2010 WG Hart Legal Workshop: *Comparative Aspects on Constitutions: Theory and Practice*.

tion, which should be strengthened. While PAH I discussed a mechanism for an independent judiciary to review the law's constitutionality and ensure the constitution's supremacy, PAH II drafted a decree stipulating that the MPR held this authority, maintaining the MPR's supremacy.<sup>418</sup> PAH II also worked on issues which were more relevant to the content of the Constitution and therefore should have been discussed in PAH I, such as the relationship with other high state institutions, and the hierarchy of legal status. PAH II also prepared MPR decrees on the accountability procedures of the president to the MPR, on the political role of the Indonesian Armed Forces or ABRI (*Angkatan Bersenjata Republik Indonesia*), and on decentralization. The evidence shows a lack of synchronization between PAH I and PAH II, as well as among the factions' and the MPR's leaders.<sup>419</sup>

In the meantime, the public found it difficult to follow the discussions. Many issues were discussed and there was no comprehensive preliminary draft of changes. The deliberation and consensus approach and the specific interests of the political parties involved made the process slow. Certain societal groups became increasingly dissatisfied with the amendment process.

Further complicating matters, NGOs tried to impose their ideas on the Constitution and to take over the process from the MPR. They accused the MPR of being dominated by short-sighted political interests, and of being closed and monopolizing the process. They continued to call for the establishment of an independent and expertise-based constitutional commission, which they expected would carry out their ideas. They demanded a complete overhaul of the 1945 Constitution. They argued that the presumption that the Preamble may not be changed was mystical.<sup>420</sup> Furthermore, they insisted that Indonesia should emulate Thailand's constitution-making process, which was conducted by an independent commission set up by the DPR and, as claimed by the NGOs, involved ordinary people directly in the process.<sup>421</sup>

Eventually, PAH I, as reported to Commission A, was unable to agree on the draft amendment issues enclosed to MPR Decree No. IX/1999 within the allocated time and reported the results to the MPR plenary session. As a solution, Commission A proposed approving the agreed-on sections as the second amendment to the 1945 Constitution, scheduling the unfinished sections to be completed at the 2002 MPR annual session at the latest.

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418 MPR Decree No. III/2000 on Sources of Law and the hierarchy of legislation.

419 See also Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kesatu, Jilid 1, *Risalah Rapat ke-4 sampai ke-7 BP-MPR (Sidang Tahunan 2000)*, Sekretariat Jenderal MPR-RI, 2000, p. 70.

420 As stated by Bambang Wijayanto from Yayasan Lembaga Bantuan Hukum Indonesia (YLBHI). See Majelis Permusyawaratan Rakyat Republik Indonesia, op. cit., Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 257.

421 *Ibid.*, pp. 234-236. The 1997 Constitution was the first Thailand constitution to be drafted by a popularly-elected Constitutional Drafting Assembly, hence was popularly called the "People's Constitution". It was widely hailed as a landmark in Thai democratic constitutional reform. However, in September 2006, the military launched a coup and abrogated the People's Constitution.

Managing the meeting debates was decisive for the amendment process' success. Since the topics were quite sensitive, such as the relationship between the regions and the central government and the proposal that the Constitution should oblige the implementation of religious teaching, the meeting atmospheres were often heated and emotional.<sup>422</sup> However, the MPR procedure stipulates that in most forums,<sup>423</sup> a decision can only be made by consensus.<sup>424</sup> Therefore, the leadership and members reminded each other continuously to keep the meeting friendly and peaceful, so that a rational process could be maintained.<sup>425</sup>

Since the decision-making process emphasized deliberation and compromise, there was intensive lobbying between the factions and compromised results. Factions tried to align their respective opinions, making it a more sustainable amendment process. However, some in the public perceived the MPR as delaying the process, giving rise to suspicion regarding the MPR's intention and sincerity towards amending the Constitution.<sup>426</sup>

The largest part of the proposed amendment was not completed and had to be postponed. Ultimately, the MPR plenary session on 18 August 2000 ratified the agreed draft as the second amendment of the 1945 Constitution. Further, the MPR decided that the amendment should be continued and finalized at the 2002 MPR annual session at the latest, as stated in MPR Decree No. IX/2000.

Without the strong commitment of political parties and the armed forces (i.e., the military and police) to complete the amendment and maintain security and order, there would have been a volatile situation. There could have been chaos where parts of the amended constitution were already in effect, their contents different or contradictory to unamended parts of the constitution still in effect.

#### VI.4.2 The substance

In the previous stage, factions delivered many proposals associated with the *negara hukum* or the rule of law state.<sup>427</sup> However, this debate was complicated by the notion that many members held of the MPR being the highest

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422 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 125–132.

423 The exceptions are the final decision-making in the MPR plenary meeting and the preceding Commission meeting.

424 MPR Decree No. II/MPR/1999, Article 79.

425 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 131.

426 *Op. cit.*, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 234–235.

427 These included proposals on the supremacy of law, an independent judiciary, human rights, the freedom of religion and Article 29, people's sovereignty and the MPR, the elections and the political parties as the constitutional instruments for power circulation, the presidential election, decentralization, social welfare, *Pancasila* as the foundation of the state and the law-making process.

political body. This stemmed from the intensive political indoctrination during the previous regime and from MPR Decree No. I/1999<sup>428</sup> asserting that the October 1999 MPR session was conducted to strengthen the MPR's role, as the highest institution, being the sole executor of the people's sovereignty in full.<sup>429</sup>

During the second amendment process, factions were more assertive in proposing the rule of law and the supremacy of law.<sup>430</sup> Although they could not finalize an agreement, they affirmed their desire to stipulate the rule of law state in the Constitution. They also acknowledged its links to the principles of human rights, separation of powers, an independent judiciary system,<sup>431</sup> and as expressed by the public,<sup>432</sup> it being the basis of a democracy.<sup>433</sup> However, the MPR and the public still thought that to guarantee its supremacy the judiciary should be directly accountable to the MPR.<sup>434</sup> Another problem was that many still understood the rule of law more as rule by law.<sup>435</sup>

During the deliberations, PAH I concluded that the 1945 Constitution is the supreme law of the land. Thus, most members argued that there should be a way to test the law's constitutionality.<sup>436</sup> The only exception was Fuad Bawazir (F-Reformasi).<sup>437</sup> However, members differed on how constitutional review should be performed. PAH I concluded that the Supreme Court or MA (*Mahkamah Agung*) should be the cassation court for all judicatures. All factions agreed that the Supreme Court should have the authority to perform judicial review of secondary legislation. However, the factions and the public differed on reviewing the constitutionality of acts of parliament. Some argued that it should be conducted by the MPR,<sup>438</sup> whereas

428 The full title being MPR Decree No. I/1999 on the fifth change to MPR Decree No. I/MPR/1983 on the Standing Order of the MPR (which paved the way for convening the 1999 MPR general session).

429 MPR Decree No. II/MPR/1999 on Rule and Order, Chapter II Article 2.

430 Sutjipno (F-PDI-P), for instance, at the beginning of the second amendment, on 3 December 1999, was the first who resolutely proposed that PAH I should discuss a democratic state based on the rule of law (*negara hukum* or *demokratische rechtsstaat*) and its components such as *grondrechten* (fundamental rights) and *scheiding van machten* (separation of powers). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 56.

431 See *Ibid.*, pp. 83 – 128.

432 See *i.e.*, *Ibid.*, pp. 422, 439.

433 *Ibid.*, p. 861, 863.

434 See *Ibid.*, pp. 159, 552.

435 *Ibid.*, pp. 133-134.

436 At the outset, the speakers in the discussions did not seem to distinguish between the review of the law in respect of the Constitution or the constitutional review and the review of the lesser legislation in respect of the law or the judicial review. However, later the factions distinguished between the two different types of reviews.

437 Fuad Bawazir (F-Reformasi) argued that constitutional review is not useful because it will lead to political uncertainty. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 322.

438 Such as stated by Lukman Hakim Saifuddin (F-PPP), Patrialis Akbar (F-Reformasi), Hendi Tjaswady (F-TNI/Polri), and Yusuf Muhammad (F-KB), See *Ibid.*, pp. 255-258.

others argued that this should be done by an independent judiciary body or by the Constitutional Court.<sup>439</sup> Experts, activists, and participants at PAH I public hearings were similarly divided.<sup>440</sup>

In general, there were three opinions regarding who would hold the authority to perform constitutional review: The Supreme Court, the Constitutional Court, or the MPR.<sup>441</sup> Although all factions in PAH I had agreed that Chapter I of the Constitution should affirm that Indonesia is a *negara hukum* (the rule of law state),<sup>442</sup> PAH I could not agree on the details of constitutional review, so it limited itself to compiling ideas raised in previous meetings.

Regarding the law-making process, PAH I agreed that a bill that had been jointly agreed by the DPR and the president, but not promulgated by the president within 30 days, should automatically come into force and the president should promulgate the law. This clause ensures that a law is a product of a democratic process that is subject to the provisions of the Constitution.

All factions agreed that the Constitution should guarantee the independence of the judiciary. By function, the Supreme Court should be the highest in the court system. All judicial bodies should be subordinate to it, including ordinary courts, religious courts, administrative courts, military tribunals, and tax courts.<sup>443</sup> However, PAH I could not agree on the establishment of the Constitutional Court and judicial review.<sup>444</sup> In the meantime, while PAH I was discussing judicial review and whether the power should be bestowed on the Supreme Court, PAH II drafted an MPR decree stipulating that the MPR can review laws against the Constitution and MPR decrees passed by the MPR plenary.<sup>445</sup> It also stipulated that the Supreme Court could test secondary legislations against the primary legislation. Finally, the MPR decree assigned PAH I to conduct constitutional reviews based on

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439 Such as asserted by Hobbes Sinaga (F-PDI-P), Hamdan Zoelva (F-PBB), Sutjipto (F-UG), and Agun Gunandjar Sudarsa (F-PG), *Ibid.*, p. 324. Saifuddin and Akbar argued that if the case is purely legal, judicial review should be conducted by the Supreme Court, but if political, by the MPR. See *Ibid.*, pp. 255-258.

440 See i.e., Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 231, 319, 365-366.

441 *Ibid.*, p. 170. Agun Gunandjar Sudarsa (F-PG) argued that the Constitutional Court should be an ad-hoc court which is formed by the MPR based on a proposal of the Supreme Court.

442 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 108, 131.

443 *Ibid.*, pp. 211-214. The conclusion to place the Supreme Court as the court of cassation for all courts, including the religious courts (Islam), contains problems regarding law enforcement in a society which has diverse norms and traditions that are valid as legal rules.

444 In a PAH I informal consultation meeting on 4 July 2000, Fuad Bawazir (F-Reformasi) argued that he could not accept a Constitutional Court with the authority to conduct constitutional review because it would lead to political uncertainty. See *Ibid.*, p. 322.

445 MPR Decree No. III/2000 on Law Resources and Hierarchy of Legislations.



existing laws. However, PAH I decided to postpone the assignment and to continue discussing the establishment of an independent judicial process to test the constitutionality of the law.<sup>446</sup>

Another controversial issue was the basis and form of the state. F-PDI-P proposed revising Article 1(1) to “Indonesia shall be a unitary state in the form of Republic and based on the Rule of Law.” It also proposed rewriting Article 1(2) from “Sovereignty shall be vested in the hands of the people and be executed in full by the MPR” to “Sovereignty shall be vested in the hands of the people and be executed according to the Constitution.”<sup>447</sup> This proposal demonstrates how the rule of law began to gain traction in the amendment process. While it did not fully accept the proposal at this stage, PAH I began to appreciate the idea of the law’s supremacy over the MPR’s supremacy.

Regarding the Constitution stipulating adherence to human rights, there was no significant obstacle to achieving an agreement. The previous Special MPR Session in 1998 had determined MPR Decree No. XVII/1998 on Human Rights. All factions agreed to incorporate the substance of this MPR decree into the Constitution.<sup>448</sup> The same opinion was also voiced at various public hearings by NGOs,<sup>449</sup> religious organizations,<sup>450</sup> interest groups, and the public.<sup>451</sup> Regarding this topic, PAH I members could be categorized into two groups.

The first group acknowledged that human rights are inherent in human beings in the form of *fitriyah* (inherent natural disposition) or as *imago Dei*,<sup>452</sup>

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446 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 220. Despite the fact that the leadership of PAH I had informed the factions and the leadership of the MPR, PAH II continued to draft the decree which eventually, with the approval of the factions and the leaderships in the MPR, passed by the MPR plenary as MPR Decree No. III/MPR/2000 on Law Resources and Hierarchy of Legislation, Article 5 (1) and (2).

447 As conveyed by Harjono (F-PDI-P). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 77-78. The proposal to affirm that Indonesia is a rule of law state, “Indonesia is a unitary state in the form of a Republic and based on the Rule of Law” was determined in an internal F-PDI-P meeting on 5 April 2000, along with a proposal to revise paragraph (2) of Article 1 to become “the sovereignty is in the hands of the people and is exercised according to this Constitution”. See F-PDI-P document dated 5 April 2000.

448 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 301-378.

449 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 101. See also, *Ibid.*

450 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 586. Such as stated by Ahmad Watik Pratiknya from Muhammadiyah before a PAH I public hearing on 29 February 2000.

451 *Ibid.*, p. 176, 177. See also *Kompas Daily*, 5 May 2000.

452 *Ibid.*, p. 358. Such as stated by Gregorius Seto Harianto (F-PDKB). *Imago Dei* (“image of God”): A theological term, applied uniquely to humans, which denotes the symbolical relation between God and humanity. The term has its roots in Genesis 1:27, wherein “God created man in his own image. . .”

and not as a gift of the state.<sup>453</sup> The state must recognize human rights to further uphold them.<sup>454</sup> This group contended that human rights are not a Western concept,<sup>455</sup> and although some particularistic consideration may be necessary in their implementation, human rights should be comprehended as universal,<sup>456</sup> corresponding well with Islamic teachings.<sup>457</sup> This group also argued that limiting rights is inherent in the concept, as it includes the obligation to respect other rights.<sup>458</sup> According to this interpretation, the basic rights of a person should be protected from possible violations by the state, while having state institutions protect the fundamental rights from infringements by fellow members.<sup>459</sup> Any elaboration and regulation regarding human rights should be intended only to protect and interpret the articles, and not to eliminate any substance of human rights.<sup>460</sup> Also, in a pluralistic society such as Indonesia, it is difficult to implement religious norms, which are applicable to everyone.<sup>461</sup>

The second group argued that human rights should be limited. Since the state is based on One Almighty God, the human rights provisions in the constitution should also confirm that, besides having rights,<sup>462</sup> there is an obligation to obey religious teachings.<sup>463</sup> The substance of the Universal Declaration of Human Rights should be combined with the 1990 Cairo Declaration of Human Rights, which asserts that rights and freedoms should subject to *syariah* (Islamic teachings).<sup>464</sup> Furthermore, the rights should not contradict the culture of Indonesia.<sup>465</sup>

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453 Ibid., p. 371. Such as reiterated among others by Slamet Effendy Yusuf (F-PG), Asnawie Latief (F-PDU), and Hamdan Zoelva (F-PBB).

454 As stated by the author as the chairman of PAH I. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 329.

455 Ibid., p. 368. As stated by Slamet Effendy Yusuf (F-PG).

456 Ibid., p. 316.

457 Ibid., p. 355. As stated by Asnawie Latief from F-PDU. F-PDU is a merger of members of the MPR from small Islamic political parties, e.g., Nahdlatul Ummah Party (PNU), Indonesian Islamic Association Party (PSII), Indonesian Majelis Syuro Muslimin (Masyumi), and People Sovereign Party (PDR).

458 Ibid., p. 334. As stated by Valina Singka Subekti (F-UG) and Hendi Tjaswadi (F-TNI/Polri).

459 Ibid., p. 362. As emphasized by Sutjipno (F-PDI-P).

460 Ibid., p. 351. As stated by Syarif Muhammad Alaydrus from an Islamic political party faction, the F-KB.

461 Ibid., p. 325.

462 Ibid., p. 406.

463 Ibid., p. 336.

464 Ibid., pp. 369-370. Quoted by Ali Hardi Kiaidemak as the content of Article 25 of the Declaration of the 1990 Cairo Organisation of the Islamic Conference.

465 Ibid., p. 352.

Eventually, PAH I and the MPR Working Body managed to conclude a new draft of the human rights provision. It stipulated that the limitation in carrying out the rights and freedoms of each person shall be subject to the restrictions set forth by law with a view solely towards ensuring recognition and respect for the rights and freedoms of others and to meet the fair demands following the considerations of morality, security, and public order in a democratic society, as set forth in Article 36 of MPR Decree No. XVII/1998.

However, although the limitations had been concluded, Commission A accepted adding 'religious values' alongside moral considerations, security and public order as the factors restricting human rights.<sup>466</sup> This addition was approved at the MPR plenary meeting. The addition of religious values rather than religious teachings as the boundary of implementing human rights creates room for discussing which religious values matched the environment and were generally accepted. However, because of the difficulty in translating religious values into provisions of general application, this addition can also give rise to difficulties in upholding human rights.

Other differences of opinions included whether the freedom of religion only concerns religions or also traditional beliefs (*kepercayaan*),<sup>467</sup> and whether the right not to be tried under the non-retrospective law, such as for a past act of genocide, was understood as a non-derogable right.<sup>468</sup> Ultimately, in the Commission A meeting in August 2000, the MPR agreed to confirm the freedom of religion and *kepercayaan* (traditional beliefs) in the Constitution, though the confirmation is not stipulated in the same paragraph, denoting that religion is not at the same level as *kepercayaan*. Likewise, Commission A agreed on the right not to be tried under the non-retrospective law.

Another contentious issue was the F-PBB and F-PPP proposal to insert the *tujuh kata* (the seven words), which obliges Muslims to implement Islamic *sharia*. They proposed re-inserting it into Article 29, as it was originally in the draft Constitution prepared by the Investigating Commission in July 1945, before it was dropped during the PPKI's ratification of the 1945 Constitution on 18 August 1945. They argued that there are Islamic *sharia* that require state authority for their implementation.<sup>469</sup> They also asserted

466 Ibid., p. 519. As proposed by A.M. Luthfie (F-Reformasi) in the Commission A meeting in August 2000.

467 These alternatives are related to certain convictions that religion should not be equated with *kepercayaan*. *Kepercayaan* is a generic term for a local set of beliefs, such as mysticism, *kejawen* (traditional Javanese mysticism), and paganism.

468 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 455.

469 As expressed by M.S. Kaban (F-PBB) See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 657.

that they wanted to maintain the Preamble and incorporate the full human rights chapter into the Constitution.<sup>470</sup>

Several observations can be made based on this debate. It demonstrates that the aspiration that the state should oblige followers of Islam to implement Islamic *sharia* (Islamic laws) still exists in certain communities.<sup>471</sup> Therefore, certain political parties use the issue to gain or maintain support. It was the first time the issue was deliberated formally in a state institution after it was discussed and contested by the Investigating Commission and the *Konstituante*. During the 1959-1966 Old Order (*Orde Lama*) and 1966-1998 New Order (*Orde Baru*), the government prohibited public discussions of the issue.

The debate is no longer focused on the issue of the foundation of the state, i.e., whether Indonesia should be based on *Pancasila* or on Islam. Every faction accepts *Pancasila* as the foundation of the state. Instead, the discourses had shifted to an instrumental level, namely the relationship of the state and the religious life of the citizen. For some, in a state based on *Pancasila*, in which “belief in the One and Only God” is the first principle, the state should oblige every citizen to implement their respective religious teachings.<sup>472</sup> Therefore, the Constitution should stipulate that no state operation may contradict religious values, norms, and laws.<sup>473</sup> This points to the existence of a diversity of norms in a society, contradicting the perception that the constitution is the highest law.

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470 As stated by Hamdan Zoelva (F-PBB) See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 93, 100, 161.

471 As reported among others in from Aceh and North Sumatera in a PAH I meeting on 4 February 2000. *Ibid.*, p. 421.

472 At a PAH I public hearing on 29 February 2000, Nazri Adlani from the Indonesian Ulema Council or MUI (*Majelis Ulama Indonesia*) proposed to revise paragraph (2) of Article 29 to become “Every follower of a religion is obliged to implement the teachings of their respective religion.” Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 577. The same was heard at public hearings in, among others, Jambi and Bengkulu. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 22. Likewise, Patrialis Akbar (F-Reformasi) and Yusuf Muhammad (F-KB) argued that the obligation should not be limited to Muslims only, but should apply to all religions. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 457, 458.

473 As proposed by Rosnaniar (F-PG), see *Ibid.*, p. 422. Nazri Adlani of the Majelis Ulama Indonesia or MUI (*Majelis Ulama Indonesia*) argued that there should be no laws that contradict religious values, norms and laws. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 577.

Thus, the issue raised suspicion among certain communities that the proposal was an effort to establish an Islamic state.<sup>474</sup> Those who opposed the proposal, both in the MPR and in the public, expressed their opinions openly.<sup>475</sup>

Eventually, out of 11 factions, only 3 factions in PAH I insisted on maintaining the original Article 29.<sup>476</sup> All other factions proposed either minor or major changes to Article 29.<sup>477</sup> With regard to Article 29(1), seven factions agreed to maintain the original version,<sup>478</sup> while only F-PBB and F-PPP proposed inserting the *tujuh kata* ('the seven words').<sup>479</sup>

Likewise, PAH I could not reach agreement on inserting a provision in the articles of the Constitution which affirms that the philosophical foundation of the state is *Pancasila*, which principles are detailed in the fourth paragraph of the Preamble.<sup>480</sup> Despite the fact that all factions agreed that the state is based on *Pancasila*, deliberations about the proposal show that F-KB, F-PPP, F-PBB, F-Reformasi and F-PDU were concerned that inserting a provision in the Constitution could create unnecessary political problems

474 As stated by Seto Harianto (F-PDKB). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 127.

475 Dahlan Ranuwihardjo argued that the state has no authority to instruct or to force someone to worship. Azyumardi Azra, the president of IAIN, emphasized that the provision in the Constitution which guarantees the freedom to adhere to one's religion is still relevant. Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 455. Taufiqurrochman Ruki (F-TNI/Polri) emphasized that if the state requires the followers to implement religious teaching, then anyone who does not implement such teaching violates the law and should be punished. See, Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 430. Likewise, Ali Masykur Musa (F-KB) reminded the committee that Indonesia is a nation state, so that "the room of Pancasila" and "the room of Islam" is different. *Ibid.*, p. 459. The author stated that God does not need anyone to help one's relationship with his/her God, including the state. Therefore, borrowing the state's hand to oblige the people to implement God's teachings, becomes irrelevant. *Ibid.*, p. 561. Nurcholish Madjid, the Rector of the University of Paramadina, K.H. Hasyim Muzadi, the Chairman of Nahdlatul Ulama, Ahmad Syafii Maarif, the Chairman of Muhammadiyah, and Masdar S. Mas'udi, the Chairman of the Centre for Empowerment of *Pesantren* (The Islamic Boarding School), rejected the idea of reinserting the *tujuh kata*. As stated by Madjid, to reinsert 'the seven words' in the Jakarta Charter means confirming a formalistic and exclusive Islam. *Suara Pembaruan*, newspaper, 10 August 2000.

476 These were F-PDI-P, F-TNI/Polri and F-PDKB.

477 Later, as affirmed by Ali Masykur Musa, F-KB agreed to maintain the original Article 29. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tujuh, Edisi Revisi, Sekretariat Jenderal, 2010, p. 44.

478 These were F-Reformasi, F-PDU, F-PDKB, F-TNI/Polri, F-UG, F-PDI-P, and F-PG.

479 See Attachment VI.5., Positions of Factions regarding Article 29.

480 As proposed by, among others, Harjono (F-PDI-P), Hatta Mustafa (F-PG), Gregorius Seto Harianto (F-PDKB), Hendi Tjaswadi (F-TNI/Polri) and Valina Singka Subekti (F-UG), See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 77-79.

associated with the history of *Pancasila*.<sup>481</sup> The debates show that Indonesian society is marked by three separate normative systems, namely indigenous customary law (*adat* law), Islamic law, and civil law. These coexist and do not always align,<sup>482</sup> with customary law and Islamic law also consisting of diverse legal environments.<sup>483</sup>

The MPR could not resolve the debates during the second amendment phase, but that did not hinder it from agreeing and ratifying the new Chapter XA on human rights. The debates demonstrate that the relation between human rights and religion is a complicated issue that will continue to be debated in Indonesia.

At the beginning of the second amendment process, as the first speaker in the PAH I preliminary discussion, F-PDI-P emphasized strengthening the consistency of Article 31 on Education, Article 32 on Culture, Article 33 on National Economy, and Article 34 on Social Welfare in realizing social justice.<sup>484</sup>

The discussions repeated that education is essential for improving the quality of human resources as a requirement for economic development.<sup>485</sup> In that regard, the Constitution should emphasize efforts to empower every individual and social group to enhance people's participation in and contribution to development.<sup>486</sup> Therefore, the factions agreed that the article on education should confirm equal education for every citizen, an end to injustice and discrimination in education,<sup>487</sup> and guarantee the right to a decent and just education for every citizen.<sup>488</sup> The discussion also pointed out that education contributes to the development of intelligent people with good character who help form a civil society that can protect itself from

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481 See *Ibid.*, pp. 117, 118, 122. The draft of the foundation of the state proposed by Soekarno in his speech on 1 June 1945 is also called *Pancasila*. On the other hand, the draft of the first principle of the *Pancasila* approved by BPUPK contains the *tujuh kata*, the obligation to implement Islamic Sharia for its followers, while the 1949 Constitution and the provisional 1950 Constitution contain a version of *Pancasila* with a different set of principles.

482 See Jan Michiel Otto, *Sharia and National Law in Indonesia*, in *Sharia incorporated, A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, Jan Michiel Otto (ed.), Leiden University Press, 2010, pp. 440-441.

483 KH. Abdurrahman Wahid (ed.), *Ilusi Negara Islam, Ekspansi Gerakan Islam Transnasional di Indonesia* (Illusion of Islamic State, The Expansion of Transnational Islamic Movements in Indonesia), LibForAll Foundation, 2009, p. 133.

484 Stated by Hobbes Sinaga (F-PDI-P) in the first PAH I meeting on 6 December 1999. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 80.

485 As argued by, among others Soedijarto (F-PDI-P), see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 210 and Bana Kartasasmita from Bandung Institute of Technology (*Institut Teknologi Bandung* – ITB), *Ibid.*, p. 491.

486 As argued by Rizal Zaenuddin Jamin (ITB). *Ibid.*, p. 502.

487 As stated by Azyumardi Azra from the State Islamic Institute or IAIN (*Institut Agama Islam Negeri*). See *Ibid.*, p. 456.

488 Stated by Ahmad Bagja from Nahdlatul Ulama (NU). *Ibid.*, p. 590.

excessive and unnecessary intervention of state power, while fulfilling aspects of social life that are beyond the state's reach.<sup>489</sup> To reinforce this argument, a proposal was submitted that the Constitution should stipulate a state budget of between 15% and 25% of GDP for education.<sup>490</sup>

The PAH I forum also realized that the Indonesian economy will increasingly integrate with the global economy. Hence, as a developing country, Indonesia should not only organize its economy based on populism and justice but should also pay attention to efficiency and, accordingly, Article 33 must be amended. However, it was concluded that the market cannot always increase efficiency and justice while marginal groups often suffer in a market mechanism. Thus, the state should intervene to influence the market,<sup>491</sup> in which the market should be perceived as a technical concept that cannot be avoided by anyone.<sup>492</sup> The discussants also reminded each other that interventions must comply with the supremacy of law.<sup>493</sup>

Further, it was emphasized that prosperity should be achieved through a democratic process or people's sovereignty.<sup>494</sup> In that regard, a F-PDI-P speaker asserted that economic development should not follow developmentalism that pursues growth and emphasizes stability at the expense of democracy.<sup>495</sup>

The factions agreed that the Indonesian economy should be organized as a managed market economy, based on efficiency and equity. However, since the economy is related to human rights and democracy, a social safety net scheme should also be introduced to prevent untenable conditions.<sup>496</sup> Most members preferred a social market economy,<sup>497</sup> in which the state sides with low-income communities.<sup>498</sup> In this context, Widjojo Nitisastro asserted that the original Article 33 should be maintained since the article is

489 Stated by Ahmad Watik Pratiknya from Muhammadiyah. *Ibid.*, p. 586.

490 Proposed by Soedijarto (F-PDI-P). See *Ibid.*, p. 514.

491 As argued by Adiningsih from the Indonesian Economist Association or ISEI (*Ikatan Sarjana Ekonomi Indonesia*). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 226.

492 As stated by Pranarka of the Centre for Strategic and International Studies (CSIS). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 225.

493 As asserted by Prasetyono (ISEI) and Harun Kamil (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 204-205, 219.

494 As stated by Djoko Wiyono from the Bishop Conference of Indonesia or KWI (*Konperensi Waligereja Indonesia*). *Ibid.*, p. 540.

495 As asserted by I Dewa Gede Palguna (F-PDI-P). Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 211.

496 As asserted by Irzan Tanjung (ISEI). *Ibid.*, pp. 194, 197.

497 As stated by Soedijarto (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 308.

498 As stated by Ahmad Bagja (NU-Nahdlatul Ulama), see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 590.

the foundation of economic democracy which holds that the priority is the welfare of the people, not the prosperity of individuals.<sup>499</sup>

PAH I also discussed the state's role in the economy. Some argued that the principle of kinship hinders individual productivity because the system refers to mechanical solidarity without compensatory obligations. It also discussed the global trend of market liberalization and social welfare convergence. However, the discussion noted that Indonesia must be realistic because the welfare state is an expensive concept and can damage the people's work spirit.<sup>500</sup> Most members agreed that the state should manage and regulate important economic sectors but does not need to own them. In the end, PAH I did not complete the amendments to Articles 31, 32, 33, and 34. The issue was postponed to the next stage. During the discussions at this stage, although all factions agreed that according to the Preamble the state should be based on people's sovereignty,<sup>501</sup> there was still a level of ambiguity on the notion of people's sovereignty and the MPR's position as the holder and the implementer of the sovereignty.

At the outset, almost all factions still placed the MPR above all other state institutions. However, gradually, nearly all PAH I factions began challenging the MPR's omnipotence. PAH I member opinions ranged from abolishing the MPR<sup>502</sup> to maintaining it as the highest body, albeit with limited authority, as explicitly stipulated in the Constitution, which implies that the MPR is no longer the sole implementer of people's sovereignty.<sup>503</sup>

There was the argument in a PAH I meeting that the existence of a state institution which holds sovereignty in full conforms to the theory of state sovereignty, which contradicts the theory of people's sovereignty. The theory of state sovereignty will always produce a totalitarian state, whereas people's sovereignty will lead to democracy.<sup>504</sup> Thus, F-PDI-P proposed changing Article 1(2) from "Sovereignty shall be vested in the hands of the people and be executed in full by the MPR" to "Sovereignty

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499 Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 295, 296. Widjojo Nitisastro was the chief economist during the previous regime.

500 As stated by Adiningsih (ISEI), see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 199, 201, and Valina Singka Subekti (F-UG), see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 313.

501 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 78, 81.

502 The argument was that if the president is elected directly by the people, the MPR is no longer necessary. See *Ibid.*, pp. 273, 355, Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 56.

503 *Ibid.*, p. 365.

504 As reiterated by Bagir Manan. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 333.



shall be vested in the hands of the people and be executed according to the Constitution.”<sup>505</sup>

This proposal demonstrates how the rule of law began to emerge resolutely in the amendment process. However, though most of the factions agreed that the MPR was no longer the supreme authority with unlimited power,<sup>506</sup> some still argued that the MPR was the highest state institution that should control all other state institutions.<sup>507</sup>

Eventually, PAH I concluded that it had abandoned the notion that the MPR is the reincarnation of the people, which holds and distributes unlimited power.<sup>508</sup> Thus, although the formal proposal was not accepted at this stage, PAH I started to abandon the concept of the supremacy of the MPR and accept the concept of the supremacy of law.

The original 1945 Constitution is unique regarding elections. Whereas it asserts that the sovereignty is in the hands of the people and there are people’s representative institutions, there is no stipulation on elections or political parties.<sup>509</sup> Thus, the public and all factions agreed that the amendment should include stipulations about elections and political parties as the instrument of and process for realizing people’s sovereignty in this democratic country.<sup>510</sup> Accordingly, all factions agreed that the Constitution should stipulate that elections should be conducted periodically in a direct, free, and general manner and undertaken by a non-partisan, national, and independent election commission.<sup>511</sup>

Further, PAH I concluded that the Constitution should guarantee the existence of political parties and that a political party should satisfy certain requirements to be eligible to participate in an election.<sup>512</sup> Regarding presi-

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505 As proposed by Harjono (F-PDI-P). See above p. 299. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 77-78.

506 See *Ibid.*, p. 212.

507 As stated by Patrialis Akbar (F-Reformasi), see *Ibid.*, pp. 216-218, 225.

508 As concluded by the Chairman of PAH I. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 322.

509 As stated by Hobbes Sinaga (F-PDI-P), see *Ibid.*, p. 25.

510 As stated by, among others, Hamdan Zoelva (F-PBB), Anthonius Rahail (F-KKI), Yusuf Muhammad (F-KB), at a public hearing in Maluku, see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 96, 116, 159, 437 or by Ida Bagus Gunadha of Parisadha Hindu, see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 437.

511 As stated, among others, by T.M. Nurliff (F-PG) and Ali Masykur Musa (F-KB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Enam, Edisi Revisi, Sekretariat Jenderal, 2010, p. 391.

512 As proposed by Pataniari Siahaan (F-PDI-P), a political party should satisfy a certain parliamentary threshold to contest in the election. See, Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 46. At the time, there were more than 100 political parties, and 48 of them were eligible to participate in the 1999 election.

dential elections, however, factions and the public at large were divided. Most preferred a direct election of the president by the people,<sup>513</sup> though a small group argued that the president should be elected by the MPR.<sup>514</sup> Those who preferred elections by the MPR argued that the people were not ready for a direct election.<sup>515</sup>

Eventually, PAH I could not agree on elections and political parties. These topics were carried over to the subsequent phase.

Demand for a devolution of government authority to the regions was another significant issue in public discourse, which became a topic during the second amendment process. Driven by frustration and anger against the sense of injustice and unequal regional development, the regions demanded fair treatment and adequate authority from the central government to manage their respective regions. Certain provinces, such as Riau and East Kalimantan, demanded the establishment of a federal state. In Aceh and Papua, armed insurrections fighting for independence continued to rise. The MPR considered this issue dangerous because countries like the Soviet Union, Yugoslavia, and Czechoslovakia, which maintained rigid centralized systems of government, underwent “balkanization” and after splitting up during the reform process, disappeared in world history.

The public was divided into those who supported the idea of establishing a federal state and those who supported the unitary republic,<sup>516</sup> whereas the factions argued that the unitary state should be maintained.<sup>517</sup> One of the preliminary agreements among the factions was maintaining the unitary

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513 As proposed by, among others, Lukman Hakim Saifuddin (F-PPP), and at public hearings by Isbroidini Soejanto (AIPI), Bambang Widjojanto (LBHI), John Pieris (UKI), Azyumardi Azra (IAIN) and Guswin Agus (ITB), see *Ibid.*, p. 92, 423, and Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 254, 391, 454, 489.

514 As asserted by Sutjipto, the Secretary General of PDI-P. *Kompas Daily*, 12 April 2000, p. 6.

515 As stated by, among others Syarif Muhammad Alaydrus (F-KB) see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 468, and Soedijarto (F-UG), see Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 267.

516 Among others, Amien Rais, the MPR speaker, in a television interview on 25 November 1999 and Arbi Sanit, a university lecturer, as quoted in *Kompas Daily*, 2 December 1999, argued that Indonesia should become a federal republic. Later, Rais elucidated that it was his personal view as an attempt to lure the issue into the amendment process in order to obtain an appropriate solution. See Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kesatu, Jilid 1, *Risalah Rapat ke-4 sampai dengan ke-7, Badan Pekerja MPR (Sidang Tahunan 2000)*, Sekretariat Jenderal MPR-RI, 2000, p. 40. This record does not appear in the Revised Edition (2010) of the minutes of the amendment process.

517 Asnawi Latief (F-PDU) for instance, asserted that any attempt to change the unitary state is unconstitutional and must be revoked. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 102. Admiral Widodo, the commander of the Indonesian National Armed Forces, reiterated that an amendment to the 1945 Constitution should be conducted in reference to the unitary state of Indonesia. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2000, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 422.

state of the Republic of Indonesia, but to guarantee justice the chairman of PAH I asserted that PAH I should discuss the issue<sup>518</sup> to ensure that the unitary state is based on the rule of law.<sup>519</sup> Thus, during the seminars, public hearings and other PAH I forums, the issue was discussed.

Eventually, PAH I concluded that the unitary form of the state is the most suitable for a heterogeneous people in an archipelago country such as Indonesia to grow together as a nation. However, they agreed that what matters is not the form of the state but how much autonomy is given to the regions,<sup>520</sup> to enable a region to administer itself under its respective characteristics. The discussions show that PAH I perceived autonomy as a sub-system or a derivative of a system of the unitary state. Thus, by definition, autonomy cannot contradict the existing national government system in which the central government delegates certain authorities to the autonomous regions through democratically made laws.

In that regard, the MPR determined that the amended Constitution should ensure the recognition and respect of units of regional authority that are special and distinct. Further, it was concluded that the provisions regarding regional autonomy should be included in the Constitution.<sup>521</sup> Thus, from this point onwards, the debate no longer focused on the question of whether Indonesia should be a federal or unitary state. Factions agreed to maintain the unitary state and the debate shifted to decentralization and autonomy.

## VI.5 FINALIZING THE PENDING ISSUES

The MPR plenary session on 18 August 2000 determined to finalize the amendments to the 1945 Constitution. To this end, it approved MPR Decree No. IX/2000, which instructed the MPR Working Body to prepare the draft changes to the 1945 Constitution and stipulated that the material for the changes consisted of the 1999-2000 MPR Working Body's pending issues, attached to MPR Decree No. IX/2000.<sup>522</sup>

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518 The author as the chairman of PAH I asserted that there should be a responsive national discourse regarding the issue. See *Ibid.*, p. 191.

519 *Ibid.*, p. 362.

520 As argued by, among others Diana Fauziah Arifin (AIP) and Tarman Azam (PWI), see *Ibid.*, pp. 316, 421.

521 As among others concluded by Ahmad Watik from Muhammadiyah. *Ibid.*, p. 586.

522 See Attachment VI.6.4.