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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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## VII | The Third Stage of the Process of Amendment of the 1945 Constitution, 5 September 2000 – 9 November 2001

### VII.1 THE ACTING INSTITUTION AND THE PROCESS

This section outlines the four stages of the amendment process, the working schedule, the faction compositions, and the list of PAH I members.

The MPR plenary session on 18 August 2000 determined to finalize the amendments to the 1945 Constitution. Further, in Decree No. IX/2000, the MPR affirmed that it should complete the 1945 Constitution amendment during the 2002 MPR Annual Session at the latest.

The assignment came with the provision that the amendments, which had been approved and ratified in the first and second amendment stages, could not be changed. Thus, the 1945 Constitution's third amendment continued from the first and second amendments.

On the other hand, as the previous chapter discusses, during the MPR 2000 annual session, PAH I discussed how to conduct an independent constitutional review of laws. However, based on the draft prepared by PAH II, the MPR's plenary stipulated MPR Decree No. III/2000, stating that it was the MPR that had the authority to conduct such constitutional reviews. Based on this decree, the MPR plenary session assigned PAH I to prepare the constitutional review of the laws.<sup>1</sup>

The third amendment process began with the MPR Working Body's first meeting on 5 September 2000. It formed PAH I to prepare the draft amendment following the provisions of MPR Decree No. IX/2000 and the basic agreement in place since the first amendment, i.e., to maintain:

- The Preamble of the 1945 Constitution,
- Pancasila as the state ideology,
- The unitary form of the Republic of Indonesia,
- The presidential system, and
- To conduct the changes in form of addendum to the existing 1945 Constitution.

In accordance with Article 92 of MPR Decree No. II/1999 on the Assembly Standing Procedure, the amendment process consisted of the following four stages:

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1 Members of the MPR used the term 'judicial review of law' as the term for testing the constitutionality of law.

- First stage: The MPR Working Body deliberations on the materials. The outcomes would form the main materials for the second stage. The MPR Working Body set forth PAH I to prepare the materials for the amendment.<sup>2</sup>
- Second stage: The MPR plenary meeting deliberates, beginning with the elucidation of the materials by the MPR leadership and followed by factions' general views.
- Third stage: MPR Commission A deliberates, formed by the MPR plenary.<sup>3</sup> The outcomes of Commission A form the draft MPR decision.
- Fourth stage: The factions make final remarks and the MPR proceeds with decision making.

Article 37(3) of the prevailing Constitution stipulated that the decision to revise the 1945 Constitution required that at least two-thirds of MPR members are present at the meeting and a decision must be approved by at least two-thirds of the members who attend the meeting.

#### VII.1.1 The third stage's working schedule

During the 2001 annual session, the MPR allocated the Working Committee the period of 5 September 2000 to 9 November 2001 to prepare the subsequent changes to the 1945 Constitution.<sup>4</sup>

#### VII.1.2 Composition of PAH I factions, 2000 – 2001

In the period of 2000-2001, the MPR Working Body consisted of 90 members, who proportionally represented the MPR's 11 factions.<sup>5</sup>

#### VII.1.3 Members of PAH I BP-MPR, 2000 – 2001

Approaching the MPR 2001 Annual Session, the proportionality of PAH I faction members changed. PDIP faction members increased from 12 to 13 members. F-UG increased from 4 to 5 members. F-PG increased from 11 to 12 members. Overall, PAH I membership increased from 44 to 47 members.<sup>6</sup>

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2 The MPR Working Body also formed PAH II in charge of reviewing the existing MPR decrees and preparing the new MPR decrees which were deemed necessary.

3 The MPR also formed Commission B in charge of finalizing the works of the previous PAH II.

4 See Attachment VII.1. The working schedule of the third stage of amendment process, 2000-2001.

5 See Attachment VII.2. The composition of the Factions in PAH I, 2000-2001.

6 See Attachment VII.3. List of PAH I members, 2000-2001.

## VII.2 POLITICAL SITUATION IN THE 3<sup>RD</sup> STAGE

This section discusses the 2001 Assembly leadership change, the Team of Experts' formation, and their ideas on the amendment process. After certain debates, it was decided that the third stage was indeed an amendment process (rather than the drafting of a new Constitution) and that PAH I should continue the process (rather than a proposed Constitutional Commission).

During the third stage, the political situation became increasingly volatile. Abdurrahman Wahid, who was elected by the MPR as President in the Assembly's general session in October 1999, engaged in a political conflict with the MPR. On 22 July 2001, he issued a presidential decree to freeze the Assembly, to hold elections within one year, and to dissolve the GOLKAR party.<sup>7</sup> However, the decree was barren. All political parties, including the military and the police, refused the decree.

On 23 July 2001, the MPR dismissed President Abdurrahman Wahid<sup>8</sup> and replaced him with Vice President Megawati Soekarnoputri.<sup>9</sup>

On 16 August 2001, President Megawati Soekarnoputri said in her state address that a constitutional commission should be formed to prepare a comprehensive text of amendments to the 1945 Constitution. This commission should compile the materials systematically and be based on expertise, to be reviewed and determined by the MPR's general session.<sup>10</sup> But then, after reconsidering the complications that could arise from the formation of

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7 Because of various measures taken by President Abdurrahman Wahid, the MPR decide to depose him. For example, in respect of the President's instruction to the Coordinator Minister for Politics, Social and Security Agum Gumelar to arrest the Chief of the National Police on 13 July 2001, the MPR required the president to provide accountability in the special session of the MPR in August 2001. In response, the president demanded the MPR to revoke the decision and if the MPR did not cancel the decision, the President stated he would issue a decree on the state of emergency and freeze the MPR/DPR, expedite the election and decommission the cabinet. Responding to the threat, MPR speaker Amien Rais asserted that the President has no authority to dissolve the MPR and DPR, and that the MPR would accelerate the implementation of the MPR special session. See *Media Indonesia* daily, 14 July 2001. Subsequently, the MPR expedited the start of the special session from August 1, 2001 as scheduled, to July 21, 2001.

8 MPR Decree No. II/2001, 23 July 2001.

9 MPR Decree No. III/2001, 23 July 2001, on Attestation of the Vice President of the Republic of Indonesia Megawati Soekarnoputri as the President of the Republic of Indonesia.

10 The Address of State by President Megawati Soekarnoputri, 16 August 2001. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, p. 9. It seems that President Megawati Soekarnoputri continued her predecessor's, President Abdurrahman Wahid, policy. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, p. 185.

such a commission, President Megawati agreed to continue the amendment process as before<sup>11</sup> and PAH I did so.<sup>12</sup>

In the meantime, political turbulence continued. In various areas, such as Aceh, Riau, Kalimantan, Maluku and West Irian, dissatisfaction with the central government continued to grow. The Aceh region in particular continued to be restive. On 6 September 2001, separatists shot and killed Dayan Daud, President of Syah Kuala University in Aceh, on his way home from campus.<sup>13</sup>

During this situation, in October 2001, Commission A completed the draft Constitutional amendments.

### VII.2.1 Forming the Team of Experts (TA – Tim Ahli)

On 5 September 2000, during the first MPR Working Body meeting, factions proposed forming a team of experts to assist PAH I in amending the 1945 Constitution.<sup>14</sup> PAH I asked members with an academic background in constitutional law to share their knowledge with other members.<sup>15</sup>

Only on 7 December 2000, PAH I began discussing forming the expert group. PAH I expected that the experts would be non-partisan and have doctoral or master's degrees with experience in constitutional law, criminal law, civil law, customary law, politics, economics, finance, education, socio-cultural issues, comparative religion, environment, decentralization, public administration, and other required areas of expertise.<sup>16</sup> However, members argued that PAH I should not fixate on experts' formal educational backgrounds but rather consider their academic authority.<sup>17</sup> The experts would have to understand the relevance of their disciplines to politics and statehood.<sup>18</sup>

11 Immediately after the speech, in a meeting with President Megawati, the author explained that the formation of the independent commission was not in accordance with the initial agreement on making amendments following the provisions of Article 37 of the UUD 1945. This would hinder the further process. President Megawati understood the complications and agreed to continue the amendment process as before.

12 Led by the PAH I chairman, several members of PAH I from FPDI-P went before President Megawati / Chairperson of PDI-P. In the meeting, Megawati agreed that the amendments should continue as usual. Her previous speech was prepared by the staff of the former president.

13 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 212.

14 As proposed among others by Muhammad Iqbal (F-UG), Vincent T. Radja (F-KKI) and Soewarno (F-PDIP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 14, 25, 27.

15 This included such as J.E. Sahetapy, professor of Constitutional Law at Airlangga University, Surabaya. *Ibid.* p. 90.

16 *Ibid.* pp. 157-158.

17 As stated by Zain Bajebur (F-PPP), Sutjipno (F-PDIP), A.M. Luthfi (F-Reformasi), J.E. Sahetapy (F-PDIP) and Abdul Khaliq Ahmad (F-KB). *Ibid.* pp. 160-162, 168.

18 As stated by Pataniari Siahaan (F-PDIP). *Ibid.* p. 172.

One member asserted that the group should be ad-hoc and temporary, assisting with certain articles,<sup>19</sup> while another member argued that PAH I members were elected to represent their faction's aspirations and, therefore, these experts should function only as assistants or advisory academics. Besides, the member continued, social sciences are not value neutral. Faction proposals always contain their constituents' political interests.<sup>20</sup> Another member asserted that the expert input was not binding. If it were binding, then PAH I would be *zogenaamd*, the constituted MPR committee for amending the Constitution in name only.<sup>21</sup>

Another member assumed that the Team of Experts would serve as a sparring partner to PAH I, testing the draft amendments' validity and applicability.<sup>22</sup> Similarly, another member emphasized that although the experts were expected to help solve certain difficult issues, decision-making was in the hands of PAH I.<sup>23</sup> And finally, yet another one reminded the committee that a constitution is a fundamental law, so the input from experts should not make the constitution very technical.<sup>24</sup>

In response to the reminders, the PAH I chairman reiterated that it was important to encourage public discourse on constitutional matters to raise awareness and encourage public participation in the amendment process. While affirming that the political decisions and political responsibility are in the hands of PAH I, the chairman reiterated that it should involve the public in the process from the beginning, without creating the impression that it was not capable of performing its task.<sup>25</sup>

On 16 January 2001, PAH I began to realize the idea of establishing a team of experts. On 23 January 2001, PAH I listed 90 names of expert group candidates nominated by PAH I members. Then, PAH I formed a small team to scrutinize and select the candidates. The team considered the candidates' respective insights on national and state issues, their solid academic credentials, and the financial costs. It was explained to the experts that, based on their expertise, they were being asked to help formulate the draft amendment to the 1945 Constitution which was being discussed by the ad-hoc committee. It was also explained that they were the ad hoc committee's internal group and the formulations they proposed were non-binding.

On 6 February 2001, the small team selected 30 candidates by consensus and reported them to PAH I. On 20 February 2001, in a meeting attended by the leaders of the MPR Working Body, PAH I, PAH II, and the Special PAH, the MPR further discussed the expert group's establishment, media

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19 As stated among others by Zain Bajaber (F-PPP), Hatta Mustafa (F-PG). Ibid. pp. 160, 163.

20 As stated by A.M. Luthfie (F-Reformasi). Ibid. p. 161.

21 As argued by Frans Matruty and Happy Bone Zulkarnain (F-PG) bid. p. 164.

22 As argued by Harjono (F-PDIP) and Baharuddin Aritonang (F-PG). Ibid. pp. 167, 171.

23 As stated by Theo Sambuaga (F-PG) and Patrialis Akbar (F-Reformasi). Ibid. p. 175, 176.

24 As stated by Ahmad Hafiz Zawawi (F-PG). Ibid.

25 As stated by the PAH I chairman (F-PDIP). Ibid., pp. 165-177.

coverage, the socialization of PAH I's activities, and the UNDP's offer of support to cover the amendment process.<sup>26</sup>

Regarding the UNDP's support, because it concerned technical matters, PAH I decided that the UNDP should cooperate with the MPR's Secretariat General rather than directly with PAH I.<sup>27</sup>

On 27 February 2001, at the third amendment stage's beginning, PAH I formed a Team of Experts or TA (*Tenaga Ahli*), consisting of experts from various academic backgrounds.<sup>28</sup>

With expert input, the amendment could produce a constitution that is a comprehensive system and help build Indonesia as a modern, strong, and democratic nation amongst the nations of the world.<sup>29</sup>

#### VII.2.1.1 *The Team of Experts: Goals*

The Team of Experts would work from 1 March 2001 to 31 August 2001. PAH I outlined the following term of references:

- 1) To provide input to PAH I of the MPR Working Body.
- 2) To develop a study on the inter-relationship of all draft changes to the 1945 Constitution.
- 3) To make reviews, commentaries, and opinions to, and to discuss with PAH I the drafts of the revisions to the 1945 Constitution which are in the enclosures of MPR Decree No. IX/2000.<sup>30</sup>
- 4) To describe the relationship between the Preamble of the 1945 Constitution and the Articles of the 1945 Constitution.

26 The small team was led by Ali Masykur Musa (F-KB). *Ibid.*, p. 270. UNDP offered the MPR to establish a television coverage system to help build transparency of the amendment process.

27 As reminded by Soedijarto (F-UG). *Ibid.*, p. 282.

28 See Attachment VII.4. These experts included Afan Gafar, Bachtiar Effendy, Maswadi Rauf, Nazaruddin Syamsuddin, Ramlan Surbakti, and Riswanda Himawan as experts on political sciences; Dahlan Thayeb, Hasyim Jalal, Ismail Suny, Suwoto Moeljo Soedarmo, Jimly Asshiddiqie, Maria Sumarjono, Muhsan, Satya Arinanto, and Sri Sumantri Mulyosuwignyo as experts in law; Bambang Sudibyo, Dawam Rahardjo, Didik Rachbini, Mubiyarto, Sri Adiningsih, Sri Mulyani and Syahrir as the economic team; Azyumardi Azra, Eka Darmaputera, Komaruddin Hidayat, Nazaruddin Umar and Sardjono Yatiman as experts on religion and socio-cultural issues; and Willy Toysuta, Wuryadi, and Yahya Umar as experts on education. PAH I also listed several prominent figures and experts who would be asked as resource persons to PAH I. See, Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 252, 253.

29 As emphasized later by the PAH I chairman at the end of the PAH I session on 17 July 2001. *Ibid.*, p. 796.

30 Pataniari Siahaan (F-PDIP) reiterated that the drafts in the enclosure of MPR Decree No. IX/2000 are a compilation of compromises on various ideas from the 11 factions which are built on the different strands of philosophy. See *Ibid.*, p. 626.

- 5) To submit the reviews, the commentaries, and the opinions to PAH I. The academic review should be the work of the experts as a team, not an individual opinion. In drawing conclusions, the team should avoid taking decisions by voting but should aim for consensus instead. If there are unsettled differences among the team, the alternative views should be presented.
- 6) To be entitled to attend the formal and the informal meetings of PAH I, including the informal consultations.
- 7) To closely assist the process of preparing the draft changes to the 1945 Constitution during the MPR 2001 annual session.<sup>31</sup>

#### VII.2.1.2 Engaging the Public

After the experts' groups were formed, the PAH I chairman stated that the experts could help encourage public discussions on constitutional matters to raise awareness and public participation in the amendment process.<sup>32</sup> However, a member argued that absorbing and formulating public aspirations was the MPR's responsibility, not that of the experts. The experts could, however, help PAH I formulate aspirations in a comprehensive way.<sup>33</sup> Another member stressed that the Team of Experts should be allowed to criticize the works of PAH I because what PAH I produced should not just be a political product, but also an ethical, moral, and intellectual product.

Subsequently, PAH I planned to:

- Assisted by the Team of Experts, review the topics in the enclosure of MPR Decree No. IX/2000 and other topics proposed by the Team of Experts, followed by informal consultation to seek preliminary agreements.
- Form a small team consisting of representatives of PAH I and the Team of Experts to process the preliminary agreements to become draft amendments of the constitution.
- After the small team has reported the drafts to PAH I, to disseminate and to conduct *uji shahih* (assessment) on the drafts.
- Synchronize and finalize the draft documents and report these to the MPR Working Body.<sup>34</sup>

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31 Ibid, pp. 252, 253, 384.

32 Ibid., p. 158.

33 As argued by Theo Sambuaga (F-PG). Ibid., p. 260.

34 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 7-8. Assessment was conducted in a forum to test the appropriateness of a draft. However, the results or conclusions of the forum were not binding.



To optimize the outcomes, besides the PAH I plenary meetings, discussions also occurred elsewhere, such as in selected small teams, drafting teams, synchronization meetings, informal consultation meetings, and finalization meetings. All meetings were open to the public.<sup>35</sup>

Subsequently, the MPR Working Body further processed the drafts and transferred them to the MPR for finalization through deliberations in the plenary meetings and in the subsequent Commission A meetings. Finally, the MPR would decide on the amendments in a plenary meeting. Factions could question the results at any stage, even when a draft had been discussed and concluded.

However, based on regional visits and various other sources, PAH I learned that the public at large did not know much about the first and second amendment outcomes. Therefore, to encourage public participation in the amendment process, PAH I decided to dispatch teams to the regions to publicize the amendment outcomes and conduct public hearings.

Nevertheless, either because the amendment results were considered inadequate, as insufficiently absorbing the people's aspirations, or because there was a desire to create a new constitution, some political observers, NGOs, and activists increased their pressure on the MPR to establish an independent commission to prepare the draft amendments or to draft a new constitution.

### VII.2.1.3 *Debate: State Commission and Redrafting the Constitution*

On 16 January 2001, a member reported to PAH I that President Abdurrahman Wahid was preparing a state commission for drafting a complete amendment to the 1945 Constitution, which would be submitted to the MPR.<sup>36</sup> One member immediately expressed his support of President Wahid's idea. However, most others were doubtful or disagreed. Several issues were raised: whether the MPR had the sole authority to amend the constitution, the status of the first and second amendments if the state commission was to write a complete draft for amending the 1945 Constitution,<sup>37</sup> and whether the idea came from the assumption that the MPR member quality was below the academic standard and that the amendment should

35 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, p. 388. The working teams consisted of proportional representations of the factions, in which the smallest factions were represented by one member and the largest had three to four representatives. According to the MPR standing procedures, at this stage, a decision or conclusion was drawn by deliberation and consensus. Decision by voting could be conducted only at the Commission and MPR plenary meeting levels.

36 Reported by Andi Mattalatta (F-PG). *Ibid.*, p. 185.

37 As stated by, among others, Gregorius Seto Harianto (F-PDKB) and A.M. Luthfie (F-Reformasi). Hobbes Sinaga questioned the status of the first and second amendments. *Ibid.*, p. 191.

not be conducted by the MPR alone.<sup>38</sup> Some members refused a state commission, although PAH I welcomed any input.<sup>39</sup>

The PAH I chairman stated that the president's initiative should be considered as an effort to link public aspirations with the MPR. Likewise, another member reminded PAH I to disclose itself and establish a link with the public. The public distrust in the MPR was not a matter of credibility or legitimacy but rather a side-effect of a state in transition. The MPR should respond to the public distrust by getting closer to the public.<sup>40</sup>

One member reminded the committee that even though PAH I might be constitutionally authoritative, the state commission could override the MPR in the public eye. PAH I members then proposed that the MPR should communicate with the president, suggesting an internal commission subordinate to the MPR.<sup>41</sup> Towards the meeting's end, the PAH I chairman asked PAH I members to show a positive attitude and not to overreact to the president's initiative, the expert group's role, and public criticism. He reiterated that the sole authority to amend the constitution was indeed in the MPR's hands and precisely because of that, PAH I should take steps so that the people would have a strong sense of ownership in the MPR's work.

Later, the chairman reminded the committee members that most people have a special feeling towards the 1945 Constitution, with its exalted position in Indonesia's history. People perceive and comprehend the 1945 Constitution not only in a rational way. There are emotional factors that need to be considered in the amendment process. Thus, the chairman reiterated, it was not only the outcomes that mattered. The process was also very important, and here public involvement had been lacking in the previous stages. Furthermore, the chairman explained that after consulting with President Megawati, she agreed to cancel the plan to form a state commission because it was not in accordance with the initial agreement, whereby the MPR would make amendments in accordance with Article 37 of the Constitution. She then agreed that the MPR should continue the amendment process.<sup>42</sup>

#### VII.2.1.4 *Debate: Amending versus Rewriting Constitution*

On 7 March 2001, the Team of Experts or TA (*Tenaga Ahli*) attended their first PAH I meeting. The PAH I chairman underlined that each TA member could have their opinion on a matter, but a group opinion required mutual consent. Furthermore, an agreement ought to be reached by consensus and if consensus could not be reached, the opinions should be delivered as a set of alternatives rather than voting on a set conclusion.<sup>43</sup>

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38 As stated by Pataniari Siahaan and Soewarno, both from F-PDIP. Ibid., pp. 188, 205.

39 As stated by Agun Gunandjar Sudarsa (F-PG) and Soedijarto (F-UG). Ibid. p. 186.

40 As argued by Valina Singka Subekti (F-UG). Ibid., pp. 198, 199.

41 As suggested by Andi Mattalatta (F-PG) and Sutjipno (F-PDIP). Ibid., pp. 202, 203.

42 As stated by the PAH I chairman. Ibid., pp. 209, 295-297. See above.

43 Ibid., p. 295.

On 20 March 2001, the Team of Experts conveyed their reviews on the amendment's draft.<sup>44</sup> The Team of Experts speaker stated that by making new articles, adding new ideas, reconstructing chapters, and creating new chapters in the first and second amendment stages, PAH I had conducted more than a simple addendum and instead had attempted to rewrite the constitution. Therefore, the Team of Experts proposed writing a new constitution instead, retaining the Preamble and the form of a unitary state.<sup>45</sup> In addition, the Team of Experts reported their work on the topics of law, economy, education, religion and socio-cultural matters.<sup>46</sup> Furthermore, they made a statement that they would work to establish an integrated system in the Constitution to prevent executive-heavy practices from repeating themselves and to institute checks and balances between state institutions to build a democracy.<sup>47</sup>

Appreciating the Team of Experts' work, PAH I members reminded them of the challenges in integrating the initiated ideas in the system.<sup>48</sup> To the various statements, the chairman responded that PAH I and the team of Experts should develop frequent and in-depth interactions to prevent two separate, independent, and contradictory concepts being drafted.<sup>49</sup> The Team of Experts on Law coordinator proposed re-writing the entire manuscript, the original 1945 Constitution and its amendments, into one compact constitution after the amendments had been completed.<sup>50</sup> However, the economic experts found it difficult to agree because of the principal differences between them.<sup>51</sup> Indeed, among the Team of Experts, there were often differences of opinion and even disputes.<sup>52</sup>

In the end, the Team of Experts did not convince PAH I that the first and second stages had effectively rewritten the constitution and that PAH I should approach the amendment process as if rewriting the constitution in its entirety.

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44 Ibid., pp. 293—775.

45 As reported by Ismail Suny. *Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 303.

46 Preceded by Maswadi Rauf, Sri Soemantri reported about studies on law aspects, Mubyarto, Sudibyo and Sri Mulyani reported on studies in economics, Willy Toisuta on education and Komaruddin Hidayat on religion and socio-cultural aspects. Ibid., pp. 304-319. At this stage, the principal differences of opinion among the economists between those who emphasized the role of the state versus the role of the market, were already noticeable. Sometime later, Mubyarto, who believed that the original Article 33 should be maintained, resigned from the Team of Experts.

47 As stated by Ismail Suny. Ibid., p. 331.

48 As reminded by Pataniari Siahaan (F-PDIP). Ibid., p. 329.

49 Ibid., p. 335.

50 Proposed by Jimly Asshidiqie. Ibid., p. 348.

51 Ibid., p. 309.

52 As revealed by Mubiyarto. Ibid., p. 612.

### VII.2.1.5 Debate: PAH I versus Constitutional Commission

In March 2001, an NGO coalition argued that the Team of Experts was useless<sup>53</sup> and demanded that the MPR should establish a constitutional commission to draft a new constitution. Likewise, among the Team of Experts, some opposed the staged approach that produced the first and the second amendments, preferring to restructure the entire Constitution at once.<sup>54</sup> One expert even asserted that the Team of Experts on Law strongly supported establishing a constitutional commission.<sup>55</sup>

In response, a PAH I member asserted that such a committee's work is not clearly defined, while the MPR is a real representation of the people.<sup>56</sup> Likewise, another member warned against getting caught up in an attempt to rewrite the constitution simply because this was the wish of certain groups that wanted a new constitution.<sup>57</sup> Another member stated that PAH I must aim for the amendments to create a constitution, which also functioned as social engineering tool.<sup>58</sup> Likewise, the PAH I chairman affirmed that PAH I members assumed that a constitution is not just a compilation of fundamental laws, but also serves as a social engineering instrument in building the nation of Indonesia. Therefore, PAH I and the Expert Group should consider each other's opinions. It seemed that the presidential system's supporting systems had not been understood properly.

However, this was not the end of the discussion, which went into all kinds of directives. One expert underlined the need to rewrite or reorganize the entire manuscript of the Constitution, without changing its meaning.<sup>59</sup> Another expert stated that the entire constitution required rearranging rather than just grammatical improvements.<sup>60</sup> Another expert argued in favour of renewing the constitution so that new articles could be added.<sup>61</sup> One expert noted that the Team of Experts' work should not be perceived as a final and ready-to-use formulation.<sup>62</sup>

In response, a PAH I member stated that the amendment process should be realistic. If the systematic proposal by the Team of Experts was used as a reference, the changes would not merely consist of an amendment, but take the form of alterations in structure, systems, and substances that would require longer discussions, more thoughts, and more time.<sup>63</sup> Other members

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53 *Kompas Daily*, 24 March 2001.

54 As disclosed by Ismail Suny. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 780.

55 As asserted by Jimly Asshidiqie. *Ibid.*, p. 353.

56 As stated by Soedijarto (F-UG). *Ibid.*, p. 359.

57 Asserted by Frans Matrutty (F-PDIP). *Ibid.*, p. 372.

58 As stated by I Dewa Gede Palguna (F-PDIP). *Ibid.*, p. 370.

59 As stated by Afan Gaffar. *Ibid.*, p. 399.

60 As stated by Jimly Asshidiqie. *Ibid.*, pp. 401, 402.

61 As stated by Suwoto Moeljo Soedarmo. *Ibid.*, p. 410.

62 As argued by Maswadi Rauf. *Ibid.*, p. 466.

63 Responded by Hamdan Zoelva (F-PBB). *Ibid.*, p. 734.

described the amendment process as the renovation of an old house. “It seems a mess for a while, but after it is completed it will look good”, one member pointed out.<sup>64</sup> Another member added that the amended constitution should be politically, sociologically, and culturally sound, with a solid philosophical and legal foundation.<sup>65</sup> Finally, a PAH I member cut the discussion short by arguing that the political scientists are indeed experts in political science, but that the political parties and politicians better comprehend state and political matters.<sup>66</sup> In the end, the idea of forming a constitutional commission did not materialize.

After this discussion, the Expert Group discussed and criticized the amendment drafts attached to MPR Decree No. IX/2000, discussed them with PAH I, and eventually PAH I decided the final outcomes.<sup>67</sup> As stated previously, these internal discussions did not always lead to consensus. During the 18th PAH I meeting on 23 May 2001, Mubiyarto from the Economic Team of Experts declared his resignation from the Team of Experts because he felt that the working atmosphere within the economics sub-team was not conducive.<sup>68</sup>

### VII.3 DISCUSSIONS ON THE 1945 CONSTITUTION’S ARTICLES

During the third amendment stage, PAH I discussed at least 14 amendment topics, relying on three sets of materials. The materials included the previous MPR Working Body’s reports,<sup>69</sup> the Team of Experts recommendations in response to the MPR Working Body reports, and new materials (e.g., public hearing insights, new ideas, and faction submissions).

64 As stated by Amidhan (F-PG) and Slamet Effendy Yusuf (F-PG). *Ibid.*, pp. 513, 514.

65 As stated by Harjono (F-PDIP). *Ibid.*, p. 516.

66 As stated by Pataniari Siahaan (F-PDIP). *Ibid.*, p. 627.

67 PAH I conducted 12 dialogues with the Team of Experts: 1) the coordination meeting on 7 March 2001; 2) presentation of the study of the Team of Experts to PAH I on the enclosure of MPR Decree No. IX/2000 on 29 March 2001; 3) discussion on religions, socio-cultural matters and education on 24 April 2001; 4) discussion on politics and law on 10 May 2001; 5) discussion on politics and law on 15 May 2001; 6) discussion on the economy on 16 May 2001; 7) discussion on politics and law on 17 May 2001; 8) discussion on the economy on 23 May 2001; 9) discussion on politics and law and a general review of the report of the Team of Experts on 29 May 2001; 10) the review of the factions of the opinions of the Team of Experts on 5 July 2001; 11) the responses of the Team of Experts on the opinions of the factions on 10 July 2001; 12) the meeting of PAH I and the Team of Experts on Chapter I on 17 July 2001.

68 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 649, 656. Mubiyarto particularly protested against the leadership under Ismail Suny in dealing with the differences of opinions among the experts. Mubiyarto felt he had to suppress his opinion whenever it was supported by only a minority.

69 These reports were attached to MPR Decree No. IX/2000.

### VII.3.1 Sovereignty and the MPR

#### VII.3.1.1 Previous Stage Discussions

During the first amendment, almost all factions and academics thought that the MPR should be maintained as the supreme institution which holds the people's sovereignty. PAH I members dissented only on the degree of MPR power, with some ascribing absolute and others only partial power to the MPR. However, all placed the MPR at the top of the system, in a kind of "*trias politica* system" in which the MPR distributes power to the executive, legislative, and judicial branches.<sup>70</sup> However, it was also discernible that notions of democracy had begun to take effect. Factions had begun to question the MPR's omnipotence.

During the second stage, the way in which people's sovereignty was comprehended in connection with the MPR's existence was still ambiguous. While most of the factions were still of the opinion that the MPR is the highest institution to whom all other state institutions are responsible, the arguments against that conception became more apparent.

#### VII.3.1.2 Third Amendment: Exercising Sovereignty Based on the Constitution

This section outlines the debate on whether state institutions should be accountable to the MPR, the MPR's legislative and accountability roles, and which institution would exercise sovereignty. It concludes with the final decision that sovereignty is vested in the people and exercised according to the Constitution.

In the first MPR Working Body meeting on 5 September 2000, factions were still divided between those who argued that the obligation for the high state institutions to submit an accountability report to the MPR plenary meeting during the MPR annual session should be reconsidered and those who argued that this obligation should be maintained to prevent mistakes and uphold checks and balances.<sup>71</sup>

Subsequently, in a PAH I meeting on 29 March 2001, the Team of Experts detailed their recommendations on various alternatives in the Enclosures of MPR Decree No. IX/2000. The Group recommended that the MPR should comprise of DPR and Regional Representative Council members. Since both groups are elected, this would put an end to appointed members in

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70 At the outset, some MPR members comprehended the distribution of powers by MPR as a kind of *trias politica* which is actually based on distribution of powers not on separation of power.

71 For instance, Agun Gunandjar Sudarsa (F-PG) and Ali Hardi Kiaidemak (F-PPP) argued that the obligation should be reconsidered whereas A.M. Luthfi (F-Reformasi) argued to maintain the obligation. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 13, 16, 19.

the MPR.<sup>72</sup> Furthermore, the sub-group of law experts reported that they supported the idea of forming a bicameral parliamentary system, in which the DPR and the Regional Representative Council would hold legislative power. The MPR would become a joint session between the DPR and the Regional Representative Council with the authority to determine the Constitution and to inaugurate and dismiss the president and vice president.<sup>73</sup> Therefore, the MPR should be an incidental forum of the DPR and the Regional Representative Council<sup>74</sup> within a strong bicameral system.<sup>75</sup> Some PAH I members argued that in such a bicameral system, the MPR is a joint session and not a permanent institution.<sup>76</sup> However, another member observed that this proposition contradicted the MPR being the implementer of people's sovereignty,<sup>77</sup> which holds the authority to determine the Broad Outlines of State Policy (*Garis-Garis Besar Haluan Negara*).<sup>78</sup>

The political experts sub-group insisted that the MPR should be merely a joint session between the DPR and the Regional Representative Council. It should not be a legislative institution that exercises legislative and other functions of a people's representative institution. It should also not be a permanent institution and thus not have supporting elements. However, they also contended that the MPR's existence should be maintained, since the MPR is embedded in the people's minds. It can function to represent and accommodate the regions' aspirations.<sup>79</sup> Then, a member questioned how the MPR can be both a DPR and Regional Representative Council joint session and summon a session (as an institution) if the positions of the president and vice president become vacant.<sup>80</sup>

Elaborating further on the recommendation, a sub-group expert stated that the MPR's existence depends on the changes of other state institutions. If the president is elected directly by the people, the president is not accountable to the MPR but to the people. The MPR has no authority to elect the president and the vice president or to set the Basic Outlines of State Policy. Further, the sub-group argued that the public is keen on creating a bicameral system, because it helps establish checks and balances and increases representativeness, especially considering the population's uneven distribution. A bicameral system, the expert continued, is more suitable for a country with a society that is marked by sharp social cleavages caused by multiple and overlapping senses of ethnicity, religion, and

72 As conveyed by Nazaruddin Syamsuddin of the Team of Experts. *Ibid.*, p. 344.

73 As stated by Jimly Asshidiqie of the law experts' sub-group. *Ibid.*, pp. 350, 352.

74 As stated by Suwoto Moeljo Soedarmo. *Ibid.*, p. 409.

75 As stated by Maswadi Rauf. *Ibid.*, p. 467.

76 As underlined by Hamdan Zoelva (F-PBB) and Andi Mattalatta (F-PG). *Ibid.*, pp. 360, 361.

77 As argued by Pataniari Siahaan (F-PDIP). *Ibid.*, p. 364.

78 As questioned by Ali Masykur Musa (F-KB). *Ibid.*, p. 509.

79 As elucidated by Afan Gaffar and Maswadi Rauf. *Ibid.*, p. 468.

80 As argued by Asnawi Latief (F-PDU). *Ibid.*, p. 476.



regionalism, such as Indonesia. In that regard, the draft made by PAH I that gives legislative power only to the DPR did not follow the prevalent bicameral system. Therefore, the Team of Experts did not agree with the draft formulated by PAH I.<sup>81</sup>

On sovereignty, the Team of Experts proposed changing the MPR as the embodiment of people's sovereignty to sovereignty being in the people's hands and exercised according to the Constitution's provisions. This would accommodate other possibilities, such as a direct presidential election and the establishment of a representative democracy.<sup>82</sup> Further, the Team of Experts argued that the people's sovereignty should be delegated directly to the DPR, Regional Representative Council, president and so forth, instead of to the MPR and from there, to the president, DPR, and so forth.<sup>83</sup>

In a PAH I meeting on 5 July 2001, F-PDIP suggested – similar to the enclosures of MPR Decree No. IX/2000 – to omit the word “*sepenuhnya*” (in full) from Article 1 (2) to become “sovereignty is in the hands of the people and exercised by the MPR.”<sup>84</sup> Hence, the MPR's authorities and functions would be limited to:<sup>85</sup>

- 1) Amending and ratifying the Constitution.
- 2) Determining the Broad Outlines of State Policy.
- 3) Electing, deciding, and installing the president and the vice president.
- 4) Dismissing the president or the vice president during his/her tenure, if he/she is proven to violate the Constitution, treason, to violate the Broad Outlines of State Policy, to commit a criminal offense, to commit a criminal offense of bribery, or to commit a disgraceful act, based on the decision of the Constitutional Court.
- 5) Assessing the accountability of the president at the end of the tenure.
- 6) Forming the MPR Working Body to prepare the MPR's programmes.

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81 As elaborated by Afan Gaffar. *Ibid.*, pp. 391-393.

82 As argued by Jimly Asshidiqie. Previously, Harjono (F-PDIP) had proposed the similar idea that “the sovereignty is in the hand of the people and exercised according to the provisions in the Constitution” in PAH I meeting on 17 May 2000, during the 2nd amendment. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 77-78.

83 As stated by Ramlan Surbakti. *Ibid.*, p. 688. Later Jimly Asshidiqie stated that the Team of Experts concluded that MPR as a forum of joint session should be retained.

84 The original Article 1 (2) UUD 1945 states “*Kedaulatan adalah di tangan rakyat, dan dilakukan sepenuhnya oleh Majelis Permusyawaratan Rakyat*” (Sovereignty is in the people's hands and is exercised in full by the People's Consultative Assembly). The proposed new Article 1 (2) states that “*Kedaulatan adalah di tangan rakyat, dan dilakukan sepenuhnya oleh Majelis Permusyawaratan Rakyat*” (Sovereignty is in the people's hands and is exercised in full by the People's Consultative Assembly). This suggestion unveils the internal dynamics of PDI-P. There is the sentiment amongst PDI-P that the MPR system is a legacy of Soekarno, the founder of the country and the spiritual leader of PDI-P.

85 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 724.



However, F-PDIP stated that there should be strong checks and balances, in which the legislative, executive, and judicial powers are equal institutions that stem from the implementation of people's sovereignty.<sup>86</sup> Likewise, F-TNI/Polri stated that the MPR should be retained, its authorities and functions adjusted, and MPR membership should accommodate the provisions in MPR Decree No. VII/2000.<sup>87</sup> In response, the Team of Experts stated that if F-PDIP and others would like to maintain the presidential system, the proposal to authorize the MPR to determine the Broad Outlines of State Policy and to evaluate the president's accountability at the end of his/her tenure should be removed.<sup>88</sup> Another expert added that in the future, the DPR and the Regional Representative Council would take over the MPR's important position. The MPR is merely a joint session of the DPR and the Regional Representative Council, and therefore, the expert continued, the DPR and the Regional Representative Council should be equal and each should hold the right to veto.<sup>89</sup> Conversely, F-PG contended that the MPR is a legislative body equal to the executive and judicial institutions. It should have the power to amend the constitution and impeach the president.<sup>90</sup>

F-UG argued that the MPR was designed by the republic's founders to support the political system's stability through its role as mediating state institution between the DPR and the government. Therefore, the MPR should remain the highest state institution, consisting of DPR and Regional Representative Council members, elected democratically and augmented by the appointed delegations of interest groups in society.<sup>91</sup>

In response, F-PBB stated that the MPR is not a supreme institution and merely a joint session. Therefore, the phrase stating that the people's sovereignty is exercised by the MPR should be omitted. Furthermore, F-PBB confirmed that the presence of a supreme state institution would nullify the mechanism of checks and balances.<sup>92</sup>

A F-PDIP member disagreed, arguing that the highest authority cannot be divided and therefore should be vested in a body which is the embodiment of all the people of Indonesia. He found support with another who said that without such power, the MPR could not have dismissed President

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86 As proposed by Katin Subiyantoro (F-PDIP). *Ibid.*, p. 727.

87 As stated by Affandi (F-TNI/Polri). *Ibid.* MPR Decree No. VII/2000 stipulates that members of the Indonesian Armed Forces and Indonesian National Police do not use their right to vote in the election. The participation of the Indonesian Armed Forces and the Indonesian National Police in determining the direction of national policy will be through the People's Consultative Assembly until 2009 at the latest.

88 As emphasized by Suwoto Moeljo Soedarmo. *Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 783.

89 As stated by Maswadi Rauf. *Ibid.*, p. 786.

90 As stated by Happy Bone Zulkarnain (F-PG). *Ibid.*, p. 736.

91 As conveyed by Soedijarto (F-UG). *Ibid.*, p. 747.

92 As stated by Hamdan Zoelva (F-PBB). *Ibid.*, p. 806.

Abdurrahman Wahid.<sup>93</sup> However, another member reminded him that F-PDIP had previously proposed that sovereignty is in the people's hands and is exercised following the Constitution.<sup>94</sup> Thus, it was fine to maintain the MPR as the highest institution, but its supremacy should be subordinate to the supremacy of the constitution.<sup>95</sup>

F-TNI/Polri also affirmed that sovereignty is in the people's hands, but that it should be exercised following the process regulated in the Constitution.<sup>96</sup> Other factions agreed with F-TNI/Polri's position, which reflected the Team of Experts' recommendation.<sup>97</sup> On 6 September 2001, F-PG, F-PPP, and F-PDKB agreed that the MPR does not have the authority to elect the president and the president should be elected directly by the people.<sup>98</sup>

Commenting on the debates, the PAH I chairman reminded the members that the MPR is the central body of the system, therefore, the discussions should be contextual and interrelated. Further, he underlined that all agreed that sovereignty is in the people's hands, whether exercised according to the Constitution or by the MPR. Therefore, there is no other sovereignty except the one in the people's hands. The legislation should conform to that notion. The legislative process should be conducted by the representative of the people, who hold the sovereignty. Further, the chairman stated that the MPR does exist, whether its members comprise of the DPR and the Regional Representative Council only or are augmented by the delegations of interest groups. He posited that naming it was an academic problem best left to the experts. PAH I should focus on the substance of the concept, rather than the term itself.<sup>99</sup>

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93 As stated by Soedijarto (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 104, 149.

94 As stated by Soewarno (F-PDIP). *Ibid.*, p. 96. F-PDIP had proposed the formulation previously. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Empat, pp. 77-78. Previously, in an internal memo of policy dated 5 April 2000, sent to F-PDIP members in PAH I, with a copy sent to the Chairperson of PDI-P Megawati Soekarnoputri, the author, as the Chairman of the F-PDIP group in PAH I, asserted the stance of F-PDIP that 'sovereignty is in the people's hands and is exercised according to the Constitution' and that 'Indonesia is a unitary state in the form of a Republic and based on the Rule of Law'. The document is with the author.

95 As reiterated by Katin Subiyantoro (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 151.

96 As asserted by Affandi (F-TNI/Polri). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 814.

97 As confirmed by, among others, Lukman Hakim Saifudin (F-PPP), Happy Bone Zulkarnaen (F-PG), Asnawi Latief (F-PDU), A.M. Luthfi (F-Reformasi) and Gregorius Seto Harianto (F-PDKB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 95, 99, 102, 104, 127.

98 As stated by Theo Sambuaga (F-PG), Zain Bajeber (F-PPP) and Seto Harianto (F-PDKB). *Ibid.*, pp. 165, 166, 168.

99 *Ibid.*, pp. 172 – 173.

F-TNI/Polri reconfirmed that the MPR should remain as the embodiment of the unity of Indonesia, guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives.<sup>100</sup> A F-PDIP member added that referring to the MPR as just a legislature was demeaning to its position. If the MPR is simply a forum of a joint session, it would not have the sovereignty to determine the Constitution.<sup>101</sup> In that regard, F-Reformasi insisted that the MPR belongs to the legislative power in a broader meaning, since it could produce legal products and other political decisions that could serve as an umbrella for other legislations.<sup>102</sup> Then, a F-PPP speaker reiterated that the Constitution separates the legislative, executive, and judicative powers. Therefore, in the future, there is no longer a supreme state institution that distributes the power. F-PPP was in favour of people's sovereignty being exercised according to the Constitution. The MPR still has the right to make decisions but is limited to *penetapan* (decisions) and can no longer issue *pengaturan* (regulations), the member asserted.<sup>103</sup> On the other hand, F-UG insisted that to ensure sustainable national policies that bind all state institutions, the MPR's authority to determine the Broad Outlines of State Policy should remain.<sup>104</sup> F-PPP and F-PG disagreed.<sup>105</sup>

### VII.3.1.3 Outstanding Disagreements

On 10 September 2001, at the beginning of the 26<sup>th</sup> PAH I meeting, the PAH I chairman reminded all that PAH I had not agreed on several things. Some factions wanted the MPR to take the form of a joint session between the DPR and the Regional Representative Council. Others wanted to maintain the MPR as a separate state institution. Although all factions agreed that the president should be elected directly by the people, there were factions who wanted the MPR to have a role in the process, whether in the initial or in the final part. Others argued that the MPR should not be involved in the process. The chairman reminded that there was also a suggestion that the existing MPR should pre-select the presidential candidates, which would subsequently be elected by the people.<sup>106</sup>

In response, F-UG and F-TNI/Polri reiterated that the MPR should remain the highest institution, the embodiment of all the people, and a permanent institution that distributes the authorities, directly or indirectly, to other high state institutions, regardless of whether the president would

100 As stated by Affandi (F-TNI/Polri). *Ibid.*, p. 173.

101 As stated by Hobbes Sinaga (F-PDIP). *Ibid.*, p. 178.

102 As stated by Patrialis Akbar (F-Reformasi). *Ibid.*, p. 181.

103 As conveyed by Lukman Hakim Saifuddin (F-PPP). *Ibid.*, p. 186.

104 As argued by Soedijarto (F-UG). *Ibid.*, p. 196.

105 As asserted by Lukman Hakim Saifuddin (F-PPP) and Rully Chairul Azwar (F-PG). *Ibid.*, pp. 197, 225.

106 *Ibid.*, pp. 216-217.

be elected directly or indirectly. The MPR, the speakers argued, holds ultimate powers, including determining the Constitution, determining and ratifying the Broad Outlines of State Policy and installing or impeaching the president.<sup>107</sup> However, F-KB and F-PPP argued again that the MPR's permanent existence should end. The MPR should be a joint session. Since the president is elected directly by the people, it is not necessary for the MPR to determine the Broad Outlines of State Policy.<sup>108</sup> Conversely, F-Reformasi argued that the MPR should remain a permanent institution that implements people's sovereignty. This would follow the fourth section of the Preamble, which states that "democracy is guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives." As the MPR accommodates all national components and holds the authority to amend and determine the Constitution, it should remain the highest state institution, according to F-Reformasi. To prevent the president from becoming authoritarian, the member continued, the MPR should hold the power to determine the Broad Outlines of State Policy, which will be an instrument to control the president. For example, the violation of the Broad Outlines of State Policy can be a reason to impeach the president. Later, F-Reformasi added that the MPR as a permanent institution does not mean that the MPR can confiscate people's sovereignty.<sup>109</sup>

On 5 September 2001, a F-PPP member stated that the F-PPP agreed that sovereignty is exercised by the MPR, though not "in full", so as to provide space for other forms of sovereignty, such as a referendum.<sup>110</sup> Other factions, as well as the F-PPP, insisted that sovereignty should be exercised following the Constitution, opening the opportunity for a more flexible future arrangement.<sup>111</sup> In contrast, F-UG asserted that the MPR does indeed represent the people and it is only the term "*sepenuhnya*" or "in full" that should be deleted,<sup>112</sup> and that the MPR, as the highest and permanent institution should continue to distribute the authority to other institutions.<sup>113</sup> By the end of 10 September 2001, deliberations on the MPR's authority were still not concluded. Thus, at the beginning of the PAH I small team meetings that began on 12 September 2001, the factions' stances still varied as before. Opinions even differed within factions.

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107 As affirmed by Harun Kamil (F-UG) and Affandi (F-TNI/Polri). Ibid., p. 218.

108 As argued by Andi Najmi Fuady (F-KB) and Ali Hardi Kiaidemak (F-PPP). Ibid., p. 222.

109 As stated by Patrialis Akbar (F-Reformasi). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. p. 149.

110 As conveyed by Zain Bajaber (F-PPP). Ibid., p. 124.

111 As asserted by Asnawi Latief (F-PDU), Gregorius Seto Harianto (F-PDKB), Lukman Hakim Saifuddin (F-PPP) and Katin Subiyantoro (F-PDIP). Ibid., pp. 125, 127, 147, 149.

112 As argued by Soedijarto (F-UG). Ibid., p. 149.

113 As emphasized by Harun Kamil (F-UG). Ibid.

#### VII.3.1.4 Report to MPR Working Body – Disagreements Persist

In the report to the MPR Working Body on 23 October 2001, the PAH I chairman conveyed that the members still had different opinions on sovereignty. The first group supported the notion that sovereignty is in the people's hands and is exercised by the MPR. The second group holds that sovereignty is in the people's hands and is exercised according to the Constitution.<sup>114</sup>

Subsequently, in the first Commission A meeting on 5 November 2001,<sup>115</sup> the F-KKI and F-Reformasi speakers asserted that the MPR is the embodiment of all the people and therefore should remain the highest state institution which exercises sovereignty in full.<sup>116</sup> Similarly, several Commission A members from F-PPP, F-Reformasi, F-PDIP, and F-UG affirmed that the MPR should remain the highest state institution, which implements the sovereignty of the people, although not in full.<sup>117</sup> On the other hand, F-KB, F-TNI/Polri, F-PDIP, F-PG, F-PDU, F-PBB, F-PPP and F-PDKB confirmed that people's sovereignty should be implemented according to the Constitution.<sup>118</sup> At that opportunity, a F-PDIP member reiterated that the concentration of power in the MPR is actually authoritarianism, a concept of etatism.<sup>119</sup> Another member argued that since the word "*sepenuhnya*" (in full) had been omitted, it is proper to say that the sovereignty of the people is rightfully exercised by the MPR.<sup>120</sup>

However, in an informal consultation meeting of the Commission A drafting team on 7 November 2001, the factions managed to agree that sovereignty is in the people's hands and exercised according to the Constitution.<sup>121</sup> They reported the agreement to Commission A on 8 November 2001.<sup>122</sup> Yet, F.X. Soemitro (F-KKI) and Bambang Pranoto (F-PDIP) insisted

114 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 547.

115 Commission A was established and began its activities on 5 November 2001. See Attachment VII.1.

116 As stated by F.X. Sumitro (F-KKI) and Imam Addaruqutni (F-Reformasi). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 87, 95, 130.

117 As stated by Syahrudin Kadir (F-PPP), Patrialis Akbar (F-Reformasi), Achmad Aries Munandar (F-PDIP), and Soedijarto (F-UG). See *Ibid.*, pp. 93, 99, 112, 124.

118 As confirmed by Amru Al Mu'tashim (F-KB), Ishak Latuconsina (F-TNI/Polri), I Dewa Gede Palguna (F-PDIP), Laden Mering (F-PG), Asnawi Latief (F-PDU), Hamdan Zoelva (F-PBB), Lukman Hakim Saifuddin (F-PPP), and Gregorius Seto Harianto (F-PDKB). *Ibid.*, pp. 88, 89, 97, 104, 109, 110, 114, 133. There were differences in opinion within F-PDIP and F-PPP.

119 As stated by I Dewa Palguna (F-PDIP). Majelis Permusyawaratan Rakyat Republic Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 97.

120 As argued by Patrialis Akbar (F-Reformasi). *Ibid.*, p. 112.

121 *Ibid.*, pp. 447, 559.

122 *Ibid.*, p. 553.

that the result of the lobby meeting should be first reported to the floor for further deliberation. Pranoto argued that all this time, the floor only had the opportunity to express their aspirations, and that they could merely hope that their wishes would be met by the leadership. The leadership, through informal consultation, would draw the conclusion. The member complained that members who hold the authority were not represented in that forum. Therefore, the member urged that the draft formulated in the informal consultation should be reported to the floor for further deliberation, so that the report which Commission A would submit to the subsequent MPR plenary meeting would be a democratically and fully agreed-on draft.<sup>123</sup>

In response, the Commission A chairman pointed out that each faction, with all factions represented in the lobby meeting, should manage their respective internal processes. Hereby, according to the MPR standing procedure, factions were intended to raise the MPR's effectivity and efficiency.<sup>124</sup> However, F-KKI demanded delaying the changes of Chapters I, II, and III, since they were strategic chapters on the form and system of state governance power. The MPR should first ask the people through a referendum, the F-KKI speaker insisted.<sup>125</sup> At the meeting's end, the chairman invited the faction representatives and Commission A leadership for a lobby meeting, to prepare the report for the MPR plenary meeting. In that meeting, all the faction representatives agreed on the formulation that the people's sovereignty should be implemented according to the Constitution.<sup>126</sup>

#### *VII.3.1.5 Ratified Agreement*

Eventually, in MPR plenary meetings on 8 and 9 November 2001, all factions endorsed the third change to the 1945 Constitution. In the MPR plenary meeting on 9 November 2001, the MPR ratified the third amendment to the 1945 Constitution. Article 1(2) previously stated, "*Sovereignty shall be vested in the hands of the people and be exercised in full by the MPR.*" It now read, "*Sovereignty shall be vested in the hands of the people and be exercised according to the Constitution.*"<sup>127</sup>

#### *VII.3.2 The MPR's composition*

This section details the debates as to whether MPR members should be elected or appointed, concluding that this issue was further postponed until the MPR 2002 annual session.

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123 Ibid., p. 555.

124 Ibid., p. 556.

125 As demanded by F.X. Soemitro (F-KKI). Ibid., p. 573.

126 Ibid., p. 608.

127 Ibid., p. 682.



From the beginning of the amendment process, factions had argued about the MPR's membership. Some factions argued that all MPR members should be elected. Others argued that the MPR's elected members should be augmented by appointed delegations of interest groups in society, either because they could not use their voting rights because of their duties or because they were difficult to be represented by the existing political groupings.

In March 2001, the Team of Experts (TA) recommended that the MPR should comprise of DPR and Regional Representative Council members, who are both elected, thus ending appointments to the MPR.<sup>128</sup> In response, a F-UG member argued that Indonesia should develop its model of democracy through a state institution that represents all of Indonesia's people, including those whose interests are not accommodated in the programmes of the political parties. This conception is in line with Lijphart's recommendation that a democracy needs an institution to express conflict and disagreement as well as to support legitimation and consensus. On that ground, the member proposed that the MPR should comprise of the DPR and the Regional Representative Council, which are elected and augmented with delegations of interest groups, as stipulated by law.<sup>129</sup>

Another member suggested that members could be added to the MPR from the delegations of certain societal groups, who due to their duties and functions could not use their right to vote in the elections. Regarding interest groups, they should form their own political party to voice their interests if these were not accommodated by political parties.<sup>130</sup> Likewise, another member argued that the MPR should consist of the elected DPR and the Regional Representative Council. Regarding the representation of interest groups, this member contended that the representation of interest groups should not have to take the form of representing regions, tribes, gender, and so forth, but could be idea-based.<sup>131</sup> However, a F-UG member reiterated that, as the reincarnation of all the people, all interest groups and all people should be represented in the MPR, embodying the spirit of deliberation. Further, F-UG stated that the inclusion of non-directly elected

128 As explained by Nazaruddin Syamsuddin in the 12th PAH I meeting on 29 March 2001. See Majelis Permusyawaratan Rakyat Republic Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 344.

129 As stated by Soedijarto (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 167. Soedijarto further maintained that the MPR consists of the DPR, DPD and delegations of interest groups and holds the authority to amend and to determine the Constitution, to determine *Garis-Garis Besar Haluan Negara* (Broad Outlines of State Policy), and to elect, to determine, and to install the president and the vice president. See *Ibid.*, p. 196.

130 As stated by Patrialis Akbar (F-Reformasi). *Ibid.*, p. 181.

131 As argued by Lukman Hakim Saifuddin (F-PPP). *Ibid.*, p. 187. Previously, Ramlan Surbakti (TA) argued that the representation is not only in form of representation in ideas, but many desires for representation in presence. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 611.

members in non-executive institutions does not mean that the system is not democratic. Examples include members of senates in France and Canada, or the members of the *Bundesrat* in Germany who are elected by the States. Therefore, appointed MPR members are necessary alongside members of the DPR and the Regional Representative Council who are elected by the people. The delegations of the interest groups, F-UG affirmed, do not want to be in the DPR or the Regional Representative Council, but in the MPR, which has the authority to amend and to determine the Constitution, to determine the Broad Outlines of State Policy, and to elect, to determine and to inaugurate the president and the vice president.<sup>132</sup>

Likewise, F-KKI affirmed that the MPR should remain a permanent body that accommodates the delegations of components of society who cannot participate in the election and holds the authority to determine the Broad Outlines of State Policy.<sup>133</sup> Against this argument, a F-PDIP member held that all elements in society (e.g., workers, peasants, fishermen, religious groups, and so forth) have been accommodated in the political parties. Therefore, the appointed members in the MPR should not be an issue. Meanwhile, the president (as the supreme executive authority) could involve them in the administration of the state.<sup>134</sup> On 4 November 2001, a F-PDIP speaker in the MPR plenary meeting reiterated that by including political leaders, community leaders and regional leaders, MPR members are political, local, and interest group representatives. Further, the speaker reiterated that the military and police's DPR representation and MPR representation will end in 2004 and 2009, respectively, at the latest.<sup>135</sup>

During the Commission A meeting on 5 November 2001, which discussed the formulation of the third set of changes of the 1945 Constitution, the factions' positions towards the MPR's membership remained unchanged. The speakers of F-KB, F-PG, F-PDU, F-PBB, F-PPP and F-PDKB asserted that the MPR should consist of DPR and Regional Representative Council members.<sup>136</sup> On the other hand, the speakers of F-UG, F-Reformasi, F-PDIP, F-TNI/Polri and F-KKI affirmed that the MPR should also include appointed delegations of interest groups further regulated by law.<sup>137</sup> In addition, F-KKI reiterated that the MPR should remain the highest political

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132 As stated by Soedijarto (F-UG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 247.

133 As stated by Anthonius Rahail (F-KKI). *Ibid.*, p. 250.

134 As stated by Frans Matrutty (F-PDIP). *Ibid.*, p. 251.

135 As conveyed by Pataniari Siahaan (F-PDIP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 60.

136 As stated respectively by Amru Al Mu'tashim (F-KB), Laden Mering (F-PG), Asnawi Latief (F-PDU), Hamdan Zoelva (F-PBB), Lukman Hakim Saifuddin (F-PPP) and Gregorius Seto Harianto (F-PDKB). See *Ibid.*, pp. 88, 104, 109, 111, 115, 133.

137 As stated by Sutjipto (F-UG), Patrialis Akbar (F-Reformasi), Soewarno (F-PDIP), Affandi (F-TNI/Polri), and F.X. Sumitro (F-KKI). *Ibid.*, pp. 102, 113, 122, 128. F-PDIP was divided into those who support and reject the appointed MPR members from the group's delegations.



institution. Interest group delegations in the MPR should be regulated by the Constitution instead of by law.<sup>138</sup>

### VII.3.2.1 MPR Membership – Disagreements Persist

Until the end of the session, Commission A could not agree on the MPR's membership. If the MPR postponed the topic, a member warned, it would be impossible to determine the election of the president, to conclude the concept of the Regional Representative Council, and for the Election Commission to prepare the next election that was only one and a half years away. Therefore, the decision about the two alternatives on MPR membership should be made following the MPR standing procedure.<sup>139</sup>

On 7 November 2002, a Commission A lobby meeting did not manage to resolve the differences. On 8 November 2001, during the Commission A plenary meeting, factions agreed to submit the matter to the MPR plenary meeting for a further decision.<sup>140</sup>

On 9 November 2001, in the MPR plenary meeting, factions conveyed their final statements on the matter. F-PDIP reiterated that MPR members should be elected, maintaining "representation on the basis of election," through which the aspirations of the interest groups and regions could be accommodated. The representation of the Armed Forces and Police should be stipulated in the Transitional Provisions of the Constitution.<sup>141</sup> Similarly, F-PG, F-PPP, F-KB, F-Reformasi, F-PBB, and F-PDKB affirmed that sovereignty materializes through elected members in the DPR and the Regional Representative Council.<sup>142</sup> However, F-TNI/Polri affirmed that besides elected members, delegations of interest groups should also be included in the MPR as the embodiment of all the people. However, they added that it is not in the interest of the Armed Forces and Police to remain in the MPR, which would last until 2009 in any case, following MPR Decree No. VII/2000.<sup>143</sup>

A strong proponent of elected-only membership noted his regret that agreement could not be reached. He said he expected that this could be decided in the next MPR annual session so there would still be time to complete the reform of legislation necessary for the implementation of the 2004 elections.<sup>144</sup>

138 As stated by F.X. Sumitro (F-KKI). *Ibid.*, pp. 87, 131.

139 As stated by Asnawi Latief (F-PDU). *Ibid.*, p. 598. However, Latief later pointed out that voting or postponing the issue would bear similar consequences. See *Ibid.*, p. 657.

140 *Ibid.*, pp. 608, 616.

141 As stated by I Dewa Gede Palguna (F-PDIP). *Ibid.*, p. 633. MPR Decree No. VII/2000.

142 As stated by T.M. Nurliff (F-PG), Muhammad Thahir Saimima (F-PPP), Erman Suparno (F-KB), Umirza Abidin (F-Reformasi), Hamdan Zoelva (F-PBB), and Gregorius Seto Harianto (F-PDKB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 637, 641, 646, 648, 652, 669.

143 As stated by Ishak Latuconsina (F-TNI/Polri). *Ibid.*, p. 649.

144 As stated by Asnawi Latief (F-PDU). *Ibid.*, p. 657.

On the other hand, F-KKI contended that the overall design of the political system's renewal remained incomplete. Many things were still unclear, such as whether the MPR is a permanent body or a joint session, and if permanent, whether it consists of two, two-and-a-half, or three chambers. F-KKI was not convinced of the draft changes. However, if a majority wanted an immediate decision, F-KKI hoped to compete honourably in the decision by ballot.<sup>145</sup> Interestingly, F-UG, whose members were appointed to the MPR, did not state their stance towards MPR membership.<sup>146</sup>

### VII.3.2.2 *Ratifying Agreements and Postponing MPR Membership*

To overcome the stalemate, the MPR chairman invited the Commission A and faction leadership to a consultation meeting. Ultimately, the factions agreed to ratify the drafts that had been agreed and postpone the remainder, such as MPR membership and the second round of the presidential elections.<sup>147</sup>

The third amendment was ratified in the MPR plenary meeting on 9 November 2001. The topics lacking consensus would be postponed. This became the MPR Working Body's task which needed to be completed during the MPR 2002 annual session.<sup>148</sup>

### VII.3.3 *Negara Hukum (The State based on the Rule of Law)*

This section details the debates regarding whether the Constitution should read that Indonesia is a state based on a democratic rule of law versus the rule of law. While the PAH I chairman emphasised throughout that most factions agreed on the substance and differed on the wording, the ratified amendment eventually read that Indonesia is a state based on the rule of law.

All factions had agreed that Indonesia is a *negara hukum*, a state based on the rule of law. However, some were hesitant to include these in the Constitution before all the constitutional provisions were agreed. Members pointed out that the rule of law is not a simple term. It relates to several other principles, such as human rights, separation of powers, an independent judiciary, and so forth. The decision must be made while taking these aspects into account.<sup>149</sup> At the beginning of the third amendment stage,

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145 As stated by K.H. Hamid Mappa (F-KKI). *Ibid.*, pp. 662, 667.

146 *Ibid.*, p. 639.

147 *Ibid.*, p. 674.

148 This decision was confirmed by MPR Decree No. XI/2001 on the Revision of MPR Decree No. IX/2000 on the Assignment of the MPR Working Body to Prepare the Changes to the 1945 Constitution, 9 November 2001.

149 As underlined by among others Harjono (F-PDIP) and Slamet Effendy Yusuf (F-PG). *Ibid.*, p. 401.

F-PDI-P argued that the 1945 Constitution should be the basic law that contains the legal norms that all legislations must follow under the constitutionality principle.<sup>150</sup>

Discussions continued with the Team of Experts on 20 March 2001.<sup>151</sup> An expert stated that *negara hukum* is not stated in the original 1945 Constitution but in its Elucidation. Therefore, following the MPR's initial agreement, it could be directly transferred into the amended articles. However, the rule of law concept in the constitution should be understood alongside democracy and people's sovereignty. The Team of Experts, therefore, recommended a new formulation: "*Negara Indonesia adalah negara hukum yang berkedaulatan rakyat*" (the State of Indonesia is a state based on the rule of law which is based on people's sovereignty).<sup>152</sup> They proposed that the rule of law and democracy should be included in the fourth section of Article 1, which states "*Indonesia adalah negara hukum yang demokratis*" (Indonesia is a state based on the rule of law which is democratic).<sup>153</sup>

In response, F-PDIP suggested that if what was intended is a *demokratische rechtsstaat* (democratic state based on the rule of law), the following was not the correct formulation: "*Indonesia adalah negara hukum yang demokratis*" (Indonesia is a state based on the rule of law which is democratic). It is democracy that is limited by the rule of law, so democracy does not turn into anarchy.<sup>154</sup> On the other hand, F-UG and F-PBB argued that *negara hukum* rather than 'democratic' should be emphasized, since this was already inherent in the Constitution's articles.<sup>155</sup> *Negara hukum* contains the ideas of a constitutional system, the rule of law, and the adherence to human rights. Therefore, it is unnecessary to add 'democratic'.<sup>156</sup> However, F-PDU argued that 'democratic' should be included since regimes like *Orde Baru* and the *Hitler* regime claimed to be based on the rule of law, while being authoritarian.<sup>157</sup>

Likewise, F-PPP and F-Reformasi argued that, to avoid an authoritarian rule of law, the formulation should affirm that Indonesia is a state based on the rule of law which is democratic (*Indonesia adalah negara hukum yang demokratis*).<sup>158</sup> A F-PDIP member argued that the formulation '*Indonesia adalah*

150 As asserted by Pataniari Siahaan (F-PDIP). *Ibid.*, p. 59.

151 The Team of Experts was established on 27 February 2001.

152 As stated by Jimly Asshidiqie. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 349.

153 *Ibid.*, p. 459.

154 As argued by Sutjipto (F-PDIP). *Ibid.*, p. 502. The discussion to conclude the acceptable Indonesian term for (democratic) *rechtsstaat* or "state based on the rule of law" continued for some time until eventually it was agreed that *negara hukum* captures this term best.

155 As argued by Sutjipto (F-UG) and Hamdan Zoelva (F-PBB). *Ibid.*, pp. 804, 805.

156 As stated by Hamdan Zoelva (F-PBB). *Ibid.*, p. 805.

157 As argued by Asnawi Latief (F-PDU). *Ibid.*, p. 808.

158 As stated by Lukman Hakim Saifuddin (F-PPP) and A. M. Luthfi (F-Reformasi). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 95, 102, 104.

*Negara Hukum* is sufficient, since a *negara hukum* is a democratic state. Another member underlined that *negara hukum* is sufficient since it contains *grondrechten* (fundamental rights), *scheiding van machten* (separation of powers), *wetmatigheid van het bestuur* (legality of the administration), and *administratieve rechtspraak* (administrative jurisdiction). By comparison, the United Nation's defined democracy as including *grondrechten* (fundamental rights), namely *burgerlijke rechten* (civil rights), *politieke* (political), *economische* (economic), *sociale* (social), and *culturele rechten* (cultural rights).<sup>159</sup> F-UG agreed that *negara hukum* is sufficient.<sup>160</sup>

Against this position, a F-PG member argued that a state based on the rule of law is merely an instrument of politically and economically strong social actors, and an alternative to liberalism and individualism. Therefore, the right term is "*Indonesia adalah negara hukum demokratis*" (Indonesia is a democratic *negara hukum*).<sup>161</sup> F-TNI/Polri noted that the 1945 Constitution's Elucidation states that Indonesia should be based on law (not only on power) and on a constitution or fundamental law (not on absolutism). Thus, the state's authority is not unlimited since it is restricted by fundamental law. Therefore, the constitutional system should be clarified by the constitution and there should be a clear hierarchy of laws, where laws are elaborations of the constitution.<sup>162</sup>

Commenting on the discussions, the PAH I chairman asserted that *negara hukum* (rule of law) is different from *negara berdasar hukum* (rule by law). The latter is based on formal legality, such as in the case of *Hitler's* regime, while *negara hukum* adheres to human rights, democracy, accountability of the authority, and so forth. However, the encouraging news was that all factions have the same idea. In that regard, the chairman recommended that the state being based on the rule of law and being a democratic state should not be separated. Therefore, though the rule of law needs *macht* (power), Indonesia should not be a state based on the legalistic rule of law, since this is not based on the principle of justice.<sup>163</sup>

Still, the debate was not finished, as a member stated that the democratic *rechtsstaat* is a radical response to the liberal law, because the rule of law is not automatically democratic.<sup>164</sup> Then, F-PDU warned that the democratic rule of law does not depend on mentioning 'democratic', but on the mechanism implemented in the constitution.<sup>165</sup> Further, another member underlined that the term *negara hukum* is sufficiently comprehensive,

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159 As asserted by Soewarno (F-PDIP) and Sutjipno (F-PDIP). *Ibid.*, p. 97. The equivalent term for *negara hukum* is rule of law, to distinguish it from rule by law.

160 As stated by Soedijarto (F-UG). *Ibid.*, p. 104.

161 As stated by Happy Bone Zulkarnaen (F-PG). *Ibid.*, pp. 99-100.

162 As elaborated by Affandi (F-TNI/Polri). *Ibid.*, p. 101.

163 As elucidated by the author, who was presiding the meeting. *Ibid.*, pp. 103, 105.

164 As stated by Happy Bone Zulkarnaen (F-PG). *Ibid.*, p. 155.

165 As stated by Asnawi Latief (F-PDU). *Ibid.*, p. 157.

given that the four aforementioned elements are adopted.<sup>166</sup> The chair of the meeting then concluded that the Constitution's articles should define *negara hukum*.<sup>167</sup>

Until the end of the PAH I session, factions remained divided into two camps. The first camp supported inserting "The State of Indonesia shall be a *negara hukum*". The second camp preferred "The State of Indonesia shall be a *negara hukum yang demokratis*". PAH I reported the two alternatives to the MPR Working Body meeting on 23 October 2001.<sup>168</sup>

In the subsequent Commission A meeting on 5 November 2001, a F-PG member stated that regarding the latest paradigm, the rule of law is impossible in a non-democratic state. Therefore, F-PG should change its position and support the first alternative.<sup>169</sup> However, another F-PG member responded that since only a democratic society can produce responsive laws, the term "*negara hukum yang demokratis*" should be included.<sup>170</sup> The first member still asserted that F-PG opt for the first alternative.<sup>171</sup>

Then, F-PDIP, F-KKI and F-KB members proposed adopting the original phrase from the 1945 Constitution's Elucidation: "Indonesia shall be a *negara hukum (rechtsstaat)*, and is not founded on power alone (*machtsstaat*)".<sup>172</sup> However, another F-PDIP member asserted that *negara hukum* (state based on the rule of law) is sufficient, because what is important is that the state's governance is democratic.<sup>173</sup> F-TNI/Polri contended that because Indonesia is a democratic state, it is a state based on the rule of law, even without including the term.<sup>174</sup> F-PDU, F-Reformasi, F-PBB, F-PPP, F-PDIP, F-KB, and F-TNI/Polri and F-UG agreed to accept the term *negara hukum*.<sup>175</sup> Conversely, F-UG and F-Reformasi continued to prefer the second alternative (*negara hukum yang demokratis*, democratic state based on the rule of law).<sup>176</sup>

Trying to reach a conclusion, the Commission A chairman emphasized that all agreed on the substance. *Negara hukum* is not only democratic, but

166 As asserted by Sutjipno (F-PDIP). *Ibid.*, p. 159.

167 The meeting was led by Slamet Effendy Yusuf (F-PG), the Vice PAH I chairman. *Ibid.*, p. 160.

168 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 546.

169 As conveyed by Agung Gunandjar Sudarsa (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 86.

170 As argued by Bambang Sadono (F-PG). *Ibid.*, p. 93.

171 *Ibid.*, p. 118.

172 As proposed by Dimiyati Hartono (F-PDIP), F.X. Sumitro (F-KKI) and Amru Al Mu'tashim (F-KB). *Ibid.*, pp. 86, 87.

173 As stated by Laden Mering (F-PDIP). *Ibid.*, p. 104.

174 As stated by Ishak Latuconsina (F-TNI/Polri). *Ibid.*, p. 89.

175 As affirmed by Hartono Mardjono (F-PDU), Imam Addaruqutni (F-Reformasi), Hamdan Zoelva (F-PBB), Lukman Hakim Saifuddin (F-PPP), Soewarno (F-PDIP), Soedijarto (F-UG), Yusuf Muhammad (F-KB) and Affandi (F-TNI/Polri). See *Ibid.*, pp. 95, 96, 110, 114, 120, 124, 126, 128.

176 As asserted by Nursyahbani Katjasungkana (F-UG) and Patrialis Akbar (F-Reformasi). *Ibid.*, pp. 101, 112.

also a state with supremacy of law and adherence to human rights, where the government authority is limited by law, with equality before the law, due process of law, and so forth. Therefore, the task is to apply the proper legal terminologies.<sup>177</sup> At the end of the meeting, the chairman invited faction delegations and the Commission A leadership for a consultation meeting to resolve differences.<sup>178</sup> The consultation meeting was successful and reported the outcomes to Commission A on 8 November 2001. All agreed on the phrase *Negara Indonesia adalah negara hukum*.<sup>179</sup> Nonetheless, in the subsequent Commission A meeting, a F-KKI member insisted that the changes that concern Chapter I should be postponed.<sup>180</sup> None of the other factions disputed the conclusions. F-KB underlined that the Constitution should reflect the people's sovereignty, *negara hukum*, and checks and balances, and affirmed that the agreed formulations reflected these principles.<sup>181</sup>

In the MPR Plenary Meeting on 8 November 2001, Commission A reported its work, which asserted *Negara Indonesia adalah negara hukum*.<sup>182</sup> All factions endorsed Commission A's work, with F-PDIP underlining the importance of Indonesia being *negara hukum*, which contains the principles of supremacy of law, democracy, adherence to human rights and limitation to the power of the government by law.<sup>183</sup> F-PBB stated that the formulation *negara hukum* is a step forward in amending the Constitution, reflected in the democratic law-making process and the Constitution's human rights provisions.<sup>184</sup> Finally, after a short interruption among the MPR leaders for an informal consultation meeting, the factions and Commission A, in the MPR plenary meeting on 9 November 2001, approved the provision in Article 1(3) of the 1945 Constitution that stipulates, "*Negara Indonesia adalah negara hukum*" (The state of Indonesia is a state based on the rule of law).

#### VII.3.4 The independent judicial power and law enforcement

This section details the debates about Supreme Court membership procedures, the judiciary's independence, and the separation of powers – focusing on enforcement powers and the delegation of judicial review. Ultimately, PAH I did not agree on most of these topics, but rather focused its attention on the Constitutional Court and the Judicial Commission, which sections VII.3.5 and VII.3.6 discuss.

The judiciary's independence was also debated from the amendment process' start. Certain PAH I members believed that establishing an inde-

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177 Ibid., p. 105.

178 Ibid., p. 135.

179 Ibid., p. 558.

180 As insisted by F.X. Soemitro (F-KKI). Ibid., p. 573.

181 As asserted by Ali Masykur Musa (F-KB). Ibid., p. 605.

182 Ibid., p. 616.

183 As stated by I Dewa Gede Palguna (F-PDIP). Ibid., p. 633.

184 As stated by Hamdan Zoelva (F-PBB). Ibid., p. 652.



pendent judicial authority should be the main amendment issue. During previous discussions, factions had asserted that the Supreme Court should be the only highest court and the ultimate institution of judicial power, functioning as the cassation court. The Supreme Court would organize all courts under itself and be equal to other branches of power, as part of the checks and balances. The independent judicial power should be explicitly affirmed in the Constitution to ensure the realization of the law's supremacy.

However, factions were also divided. Some contended that the judicial power should be accountable to the MPR as the highest state institution. Others argued that the MPR could not interfere in judicial matters. Some understood the judicial power as embodied in the Supreme Court. Others thought the judicial power could be divided across several institutions such as the Supreme Court, the Constitutional Court, and so forth. Some thought that the Supreme Court should hold the authority to conduct judicial review. Others argued that the authority to conduct judicial review should lie with the MPR. Still others suggested establishing a constitutional court for this task.

During the previous period, factions thought that the judicial authority provision should also include other law enforcement agencies such as the prosecutor, police, and the penitentiary, to ensure the realization of the supremacy of law.<sup>185</sup> As included in MPR Decree No. IX/2000, the MPR Working Body concluded that the chapter on judicial power should also include law enforcement.

Further, all factions had recognized the importance of judicial quality, which determines the independent judicial power's credibility. Therefore, a supervisory system should be adopted without infringing on judicial independence.

In the MPR Working Body meeting on 5 September 2000, a PAH I member mentioned that at the start of the reform, supremacy of law had been one of the demands of the students that so far had not been touched.<sup>186</sup> To meet that demand, others proposed prioritizing judicial power, which could immediately be used to measure the government's performance.<sup>187</sup>

On 24 April 2001, PAH I met with the Team of Experts to discuss establishing a mechanism of checks and balances to produce good governance. An expert recommended that the president should propose the Supreme Court's members, vice chairman and chairman to the DPR for approval. The Supreme Court should also serve to resolve political conflicts, such as between the DPR and the president, or between the people and the state.<sup>188</sup>

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185 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 169 - 190.

186 As stated by A.M. Luthfi (F-Reformasi). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 19, 20.

187 As proposed by Soedijarto and Harun Kamil, both of F-UG. *Ibid.*, pp. 46, 78.

188 As conveyed by Afan Gaffar. *Ibid.*, p. 395.

In the subsequent meeting on 10 May 2001, the experts also recommended inserting a new clause into Article 24, stating that the judicial power is independent and free from the influence of other state institutions and political parties. The judicial power should be exercised by the Constitutional Court and the Supreme Court. The Supreme Court's authority to try a case at the cassation level and other authorities should be established by law. A constitutional law expert advised that the Supreme Court should have 45 justices who meet certain requirements.<sup>189</sup> However, to avoid the impression that law enforcement is under the judiciary's control, law enforcement should be under neither judicial nor state governance authorities. The public prosecution and police's functions are described in separate chapters.<sup>190</sup>

Later, this expert reaffirmed that the public prosecution's position should be in a separate chapter. It should be an independent institution that implements the prosecution's authority in criminal cases, with no authority in civil cases. Hitherto, criminal cases were subject to decisions based on the opportunity and legality principles, which created the possibility of delaying a case on political grounds. Therefore, the constitution should assert that prosecution of criminal cases should be based on the legality and justice principles. Previously, the public prosecutor's position was a government instrument. Now the constitution should regulate this authority. Further, only the police can and must investigate criminal cases. Thus, the public prosecutor prosecutes while the police investigate. Through such professional separation, an integrated judicial system can be developed to support the state-building efforts based on the rule of law.<sup>191</sup>

One member added that it is the navy's duty to investigate fisheries at sea, the rangers in the forests, and so forth, to build an integrated justice system.<sup>192</sup> In that regard, another member believed that the judicial authority should merge with law enforcement. Enforcement should not only be conducted by the public prosecution and police. Further, the judge should also enforce the law, which is based on justice.<sup>193</sup> Another member argued that the legality principle should also apply to the trial process. Therefore, only the judge decides when to apply the legality principle.<sup>194</sup> In that regard, another member pointed out that in the theory of law, besides the legality and justice principles, there are legal certainty, utility, and human rights principles. Therefore, it is better not to mention these principles in the constitution but develop them in the relevant laws.<sup>195</sup> Regarding the legality principle, an expert emphasized that only a judge can determine

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189 As conveyed by Jimly Asshidiqie. *Ibid.*, p. 482.

190 *Ibid.*, p. 526.

191 As elaborated by Jimly Asshidiqie. *Ibid.*, pp. 601-603.

192 As elucidated by Zain Bajeber (F-PPP). *Ibid.*, p. 615.

193 As stated by Slamet Effendy Yusuf (F-PG). *Ibid.*, p. 616.

194 As argued by Harjono (F-PDIP). *Ibid.*, pp. 619-620.

195 As stated by Hamdan Zoelva (F-PBB). *Ibid.*, p. 626.



the application of legal principles, put aside the positive law or legality principle, and base a decision on the values of justice. Further, the public prosecution should base an indictment on the sense of justice so that the prosecution can deal with past cases that could not be reached through the legality principle.<sup>196</sup>

Subsequently, in a PAH I meeting on 5 July 2001, when factions responded to the reviews of the Team of Experts, F-PG, F-PPP, F-PDU and F-TNI/Polri stated that separating law enforcement and the judicial authority can avoid the impression that law enforcement is part of the judicial authority.<sup>197</sup> Yet, a member argued that the constitution should assert that law enforcement should be implemented based on the supremacy of law, be free and independent, and be oriented towards the principle of justice.<sup>198</sup> Further, another member argued for clarifying the definition of law enforcement.<sup>199</sup> At the end of the meeting, all factions, as stated by the vice PAH I chairman who chaired the meeting, contended that PAH I needed to further formulate the judicial power's provisions. For this purpose, a drafting team should be formed.<sup>200</sup> In response, members agreed that the formulation still needed further deliberation, in which the Team of Experts should be involved.<sup>201</sup> Another member urged that the formulation should be finalised before the next Annual Session. The drafting team should comprise only of PAH I members.<sup>202</sup>

Discussions about the judicial power were resumed on 25 September 2001. In that meeting, the vice chairman reminded all that the original title of the chapter was simply Judicial Power.<sup>203</sup> Previously, the vice chairman said, the MPR Working Body had extended it to become Judicial Power and Law Enforcement, as it also included the police prosecutors. Meanwhile, the Team of Experts recommended separate chapters on the judicial power, law enforcement, and human rights, based on the *trias politica* separation of powers principle. In response, F-PDIP insisted that the title of the chapter should cover both the judicial power and law enforcement. Further, it should assert that the judicial power is an independent authority, free from the influence of other state institutions and political parties. Further, F-PDIP affirmed that the Supreme Court is a cassation court, with the authority to

196 As argued by Soewoto Moeljo Soedarmo. *Ibid.*, p. 665.

197 As stated by Happy Bone Zulkarnaen (F-PG), Zain Bajeber (F-PPP), Asnawi Latief (F-PDU), and Affandi (F-TNI/Polri). *Ibid.*, pp. 737, 741, 745, 760. Actually, all factions accepted the reviews of the Team of Experts, but due to time restraints factions did not read all written views and assumed they had been read.

198 As stated by Happy Bone Zulkarnaen (F-PG). *Ibid.*, p. 737.

199 As argued by Bajeber (F-PPP). *Ibid.*, p. 745.

200 The meeting was chaired Slamet Effendy Yusuf (F-PG), the Vice PAH I chairman. *Ibid.*, p. 770.

201 As responded by Hobbes Sinaga (F-PDIP) and Theo Sambuaga (F-PG). *Ibid.*, pp. 768, 769.

202 As stated by Harun Kamil and Soedijarto, both from F-UG. *Ibid.*, pp. 771, 773.

203 The meeting was chaired by Harun Kamil, the Vice PAH I chairman. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 263, 264.

review all legislation. The Supreme Court justices, F-PDIP affirmed, should be appointed and dismissed by the People's Consultative Assembly based on the Judicial Commission's proposal.<sup>204</sup> F-PDU agreed with F-PDIP, but argued that if the Supreme Court still holds the judicial review authority, the Constitutional Court is unnecessary.<sup>205</sup> Likewise, F-Reformasi agreed with the title, but questioned introducing the Constitutional Court and Judicial Commission.<sup>206</sup> Referring to the enclosures of MPR Decree No. IX/2000, F-PG affirmed that the Supreme Court justices should be appointed and dismissed by the People's Consultative Assembly based on the Judicial Commission's proposal.<sup>207</sup>

F-PPP reiterated that the articles in this section should regulate law enforcement, not the law enforcers, which include more than the judges, public prosecution, and police. Moreover, an integrated criminal justice system begins with a police investigation and then proceeds with a public prosecution, trial by judges, imprisonment, supervision by judges for conditional punishment, and so forth. F-PPP questioned whether the provisions of the constitution should be so detailed, as this could disrupt the judicial process in the future. Further, considering the existing Supreme Court's workload, F-PPP insisted that the judicial review authority should be given to another institution.<sup>208</sup>

F-PBB also disagreed with combining the titles and proposed separating the judicial power from law enforcement. Further, F-PBB appreciated the stance of the Expert Group that the Supreme Court and the Constitutional Court should take a passive role. This means that, without a claim, the Supreme Court or the Constitutional Court cannot conduct a judicial review of the legislation.<sup>209</sup> Regarding Supreme Court justice recruitment, F-PDIP concurred with F-TNI/Polri and F-UG that the DPR should do this based on a Judicial Commission's proposal. Their ceremonial appointment should then be conducted by the President.<sup>210</sup> F-PDIP proposed that ordinary court justices shall also be recruited by the Judicial Commission.<sup>211</sup>

Previously, F-PG argued that the DPR should appoint and dismiss Supreme Court justices, while the MPR should appoint and dismiss the chairman and the vice chairman. An honorary council of justices is needed to uphold discipline and the justices' code of ethics.<sup>212</sup> Since the judicial power is not only the Supreme Court's power, F-PPP urged further elaboration. The judicial power is the authority to adjudicate, which is done by

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204 As stated by Soewarno (F-PDIP). *Ibid.*, pp. 266, 267. See also VI.2.3.1.

205 As stated by Asnawi Latief (F-PDU). *Ibid.*, p. 268.

206 As stated by A.M. Lutfi (F-Reformasi). *Ibid.*, p. 269.

207 As stated by Agun Gunandjar Sudarsa (F-PG). *Ibid.*, p. 270.

208 As stated by Zain Bajeber (F-PPP). *Ibid.*, pp. 279-281.

209 As argued by Hamdan Zoelva (F-PBB). *Ibid.*, p. 282.

210 As stated by I Ketut Astawa (F-TNI/Polri), Sutjipto (F-UG) and I Dewa Gede Palguna (F-PDIP) *Ibid.*, pp. 305, 306, 310.

211 As proposed by Harjono (F-PDIP). *Ibid.*, p. 318.

212 As argued by Agun Gunandjar Sudarsa (F-PG). *Ibid.*, pp. 298, 299.

the institutions that uphold justice, the Supreme Court, and other judicial bodies, which are in four spheres. While the Supreme Court adjudicates the application of law (*judex juris*), lower judiciatures adjudicate the facts (*judex facti*).

Further, F-PPP asserted that all judicial bodies are integrated in the judicial authority. However, in upholding justice, they are not subordinate to the Supreme Court. There are special courts, e.g., the court for corruption crimes and the tax court. There are quasi-judicial bodies, e.g., the Maritime Court and Tax Dispute Settlement Agency. These decisions can be contested in a state administrative court. Therefore, F-PPP reminded all not to be hasty in formulating the judicial power.<sup>213</sup>

In the end, while many aspects of judicial power remained undecided in this third stage, the discussions became focused on two issues. The first one concerned constitutional review and a constitutional court. The second issue related to the Judicial Commission.

### VII.3.5 Constitutional review and the Constitutional Court

This section details the extensive debate about the meaning of judicial review and the institutions responsible for it.

From the beginning, judicial review had been discussed by MPR members. Factions agreed that laws should be tested against the Constitution but differed on which institution should hold the authority to conduct the review. Some argued for the MPR to conduct it, while others proposed the judiciary, either the Supreme Court or a Constitutional Court. Yet, while PAH I was working on this topic, PAH II drafted an MPR decree that asserted that the MPR holds the constitutional review authority. The decree was subsequently approved by the MPR plenary meeting as MPR Decree No. III/2000.<sup>214</sup>

Thus, in the first MPR Working Body meeting on 5 September 2000, there was a proposal to assign the constitutional review authority to the MPR Working Body, as stipulated by Assembly Decree No. III/2000.<sup>215</sup> In response, a member argued that the authority should be in the hands of the MPR, not the MPR Working Body.<sup>216</sup> Another member argued that

213 As stated by Zain Bajebber (F-PPP). *Ibid.*, pp. 301-303.

214 Initially, members of the MPR did not distinguish between a judicial review and a constitutional review.

215 Proposed by Ali Hardi Kiaidema (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 16. On 18 August 2000, the MPR ratified MPR Decree No. III/2000 on the Source of Law and the Hierarchy of Legislations, which was prepared by PAH II. The decree stipulates among others the hierarchy of legislations, the authority of the MPR to conduct a judicial review, and the authority of the Supreme Court to conduct a judicial review of legislations below the law.

216 As argued by Hamdan Zoelva (F-PBB). *Ibid.*, p. 24.

constitutional review should be the authority of a Constitutional Court, which was being discussed by PAH I. He argued that if this authority was mandated to a political institution such as the MPR, it would be a “political accident”.<sup>217</sup> However, it turned out that besides preparing the 1945 Constitution amendment, the MPR Working Body indeed decided to assign PAH I to conduct judicial review.<sup>218</sup> Thus, during the MPR Working Body meeting on 6 September 2000, the PAH I chairman conveyed that besides preparing the 1945 Constitution’s draft amendment, PAH I was also tasked with conducting judicial review of the law against the 1945 Constitution and the MPR decrees.<sup>219</sup>

In response, a member argued that the MPR Working Body could conduct judicial review before the Constitutional Court was established.<sup>220</sup> However, because judicial review forms part of the checks and balances in which the judiciary holds legal control over a product produced jointly by the DPR and the president, the MPR would not comply with the separation of power if it held this authority. The member continued by asking why PAH II drafted MPR Decree No. III/2000 and why the MPR plenary approved it, since it was in contradiction with the separation of powers principle.<sup>221</sup> In response, another member suggested that the MPR should cancel MPR Decree No. III/2000.<sup>222</sup>

#### VII.3.5.1 *Debate: People’s Sovereignty and Judicial Review*

Since the ideas on judicial review and the constitutional court were not sufficiently clear among the committee’s members, the PAH I chairman suggested a thorough discussion to clarify the terms and reach a comprehensive understanding of judicial review principles.<sup>223</sup> For the purpose, the chairman proposed inviting PAH II to explain the idea behind MPR Decree No. III/2000 and J. E. Sahetapy, among others, to explain the concept of judicial review.<sup>224</sup> In a PAH I meeting on 18 September 2000, Sahetapy explained among others that judicial review presupposes the adoption of the *trias politica* principle of the functional separation of powers. Judicial review needs an independent highest court. In the United States of America, this is the Supreme Court, while in European civil law countries, it is the Constitutional Court.<sup>225</sup>

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217 As asserted by Asnawi Latief (F-PDU). *Ibid.*, pp. 26, 50.

218 As disclosed by Amien Rais, MPR Speaker and MPR Working Body Chairman. *Ibid.*, p. 28.

219 As conveyed by the PAH I chairman. *Ibid.*, p. 39.

220 As stated by Valina Singka Subekti (F-UG). *Ibid.*, p. 54.

221 As stated by Valina Singka Subekti (F-UG). *Ibid.*, p. 71.

222 As asserted by Soedijarto (F-UG). *Ibid.*, p. 73.

223 *Ibid.*, p. 85.

224 *Ibid.*, p. 91. J.E. Sahetapy is (emeritus) professor of law at the University of Airlangga in Surabaya and at the time was a PAH I member for F-PDIP.

225 *Ibid.*, p. 102.

In a comment, a member stated that there are objections against judicial review, arguing that it violates people's sovereignty. Judicial review should only review the legislation below a parliamentary statute, such as a president's or governor's decision. However, a law that is created by representatives who are elected by the people should not be reviewed by individual judges, such as those adopted in a constitutional court concept. The legislative body reflects people's sovereignty and should be supreme over other powers and cannot be subject to a judicial decision. MPR Decree No. III/2000 was derived from that understanding, confirming the MPR as the supreme institution holding authority to review the law's constitutionality. Therefore, it should be the MPR who holds judicial review authority.<sup>226</sup>

Another member argued that the MPR should embrace a clear philosophy. The parliamentary supremacy principle in the European continental system does not recognize judicial review. Alternatively, the civil law system in the USA recognizes the judicial review authority that is exercised by the Supreme Court. Further, judicial review is solely for maintaining the purity of the constitution's implementation and ensuring the law's constitutionality. It is a legal action. One should understand judicial review in the context of checks and balances, and so hand it to a judicial institution, rather than a political body such as the MPR.<sup>227</sup> Another member explained that the *toetsingsrecht* (judicial review authority) in the USA is assigned to the Supreme Court, while in the European continental system, such as in Germany, it is assigned to the *Bundesverfassungsgericht* (The Federal Constitutional Court), which consists of independent statesmen.<sup>228</sup>

Responding to these comments, the meeting's chairman reminded members that PAH I could only revise the stipulation in MPR Decree No. III/2000 if it finalized the formulation of a Constitutional Court.<sup>229</sup> A F-Reformasi member reacted by stating that since the MPR holds the authority to "review" the constitution, it should also have authority to conduct judicial review. Therefore, the MPR Decree No. III/2000 stipulation was correct and would not further increase public scepticism over the MPR's existence.<sup>230</sup> Alternatively, another member contended that judicial review should be conducted by an independent Constitutional Court, which exists outside of the Supreme Court. Its judges should be appointed by the MPR, as the state supreme institution which distributes its power to the Constitutional Court.<sup>231</sup> Another member reminded PAH I not to confront the MPR's decisions and complained about the lack of coordination between PAH I and PAH II which led to MPR Decree No. III/2000.<sup>232</sup>

226 As argued by Happy Bone Zulkarnaen (F-PG). *Ibid.*, pp. 104-105.

227 As argued by I Dewa Gede Palguna (F-PDIP). *Ibid.*, p. 107.

228 As stated by Sutjipno (F-PDIP). *Ibid.*, p. 109.

229 The meeting was led by Slamet Effendy Yusuf (F-PG), the Vice PAH I chairman. *Ibid.*, p. 110.

230 As argued by Patrialis Akbar (F-Reformasi). *Ibid.*, p. 110.

231 As stated by Harun Kamil (F-UG). *Ibid.*, p. 112.

232 As reminded by Agun Gunandjar Sudarsa (F-PG). *Ibid.*, p. 114.

The meeting's chairman asserted that, despite the MPR decree being ratified, PAH I could still include provisions on constitutional review in the Constitution.<sup>233</sup> Another member warned that PAH I should not give up on a *fait accompli* and comply with the MPR decision that is not consistent with PAH I's opinion. Therefore, PAH I should suspend the assignment and discuss it later.<sup>234</sup> Looking for a way out, another member argued that the discussion seemed to be more about semantics. The MPR could conduct a constitutional or political review without intervening in the legal arena, while the Supreme Court could conduct a judicial review without intervening in politics. The member submitted a paper to PAH I, which included citations of Mauro Capelletti.<sup>235</sup>

On 16 January 2001, PAH I decided to address judicial review as tasked by MPR Decree No. III/2000 as an additional assignment after finalizing the drafts of the third amendment as specified in the MPR Decree No. IX/2000 enclosure.<sup>236</sup>

On 29 March 2001, in a MPR Working Body's plenary meeting, the PAH I chairman reported that PAH I would discuss legislative review and judicial review as assigned by MPR Decree No. III/2000 while discussing the judicial branch. PAH I would possibly assign the task to the Constitutional Court.<sup>237</sup> Further, in a PAH I meeting on 24 April 2001, the Team of Experts contended that the authority to conduct judicial review should be given to the Supreme Court, following the Supreme Court's political function of resolving conflicts.<sup>238</sup> In that regard, an expert reiterated that the Supreme Court cannot conduct judicial review if the 1945 Constitution still adopts the principle of the distribution of powers instead of the separation of powers. As long as the MPR is still the highest institution, the judicial review authority could not be delegated to another institution.<sup>239</sup> The fact that the 1945 Constitution does not embrace the principle of the separation of powers, the expert continued, also explains why Soepomo flatly refused Muhammad Yamin's idea to give authority to the Supreme Court to conduct judicial review on the substances of law (See II.3).<sup>240</sup>

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233 The meeting was led by Slamet Effendy Yusuf, the Vice PAH I chairman. *Ibid.*, pp. 114-115.

234 As asserted by Pataniari Siahaan (F-PDIP). *Ibid.*, p. 115.

235 As argued by Happy Bone Zulkarnaen (F-PG). *Ibid.*, pp. 117, 118. Previously Zulkarnaen asserted that judicial review undertaken by the Supreme Court concerns legislation below the law. Mauro Capelletti was professor of law at the University of Florence, Italy and Stanford University, USA.

236 MPR Decree No. IX/2000 attaches a list of materials for the third amendment. See Attachment VI.4.

237 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 384.

238 As stated by Afan Gaffar of the Team of Experts. *Ibid.*, p. 395. On 27 February 2001 PAH I formed a Team of Experts, which consisted of 30 experts.

239 As stated by Jimly Asshidiqie of the Team of Experts. *Ibid.*, p. 401.

240 Soepomo and Mohammad Yamin were members of *Dokuritsu Zyunbi Tjoosakai*, BPUPK (*Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan* - Body for Investigation of Efforts for Preparation of Independence) from 29 April 1945 – 7 August 1945. See also Sekretariat Negara Republik Indonesia, *op.cit.*, pp. 183, 295, 299, 305 – 306.



Further, in the 14<sup>th</sup> PAH I meeting on 10 May 2001, the same expert proposed forming a Constitutional Court, different from the one proposed by PAH I. The Constitutional Court must be outside but at the same level as the Supreme Court, since there is the possibility that the Supreme Court becomes engaged in a dispute involving other state institutions. Therefore, the Team of Experts proposed that the Constitutional Court should hold the authority to perform a final review of law and lower legislation to resolve a contradiction or dispute between state institutions. This could involve disputes between the central and regional governments or between regional governments in implementing the laws. Furthermore, the expert affirmed that the judicial review authority is passive.<sup>241</sup>

Regarding the recruitment of the nine Constitutional Court judges, the Team of Experts proposed that the DPR selects the judges from among the Supreme Court's nominations. Regarding the Supreme Court, the Team of Experts supported the PAH I draft, which stated that the *Mahkamah Agung* (the Supreme Court) is a cassation court.

Then, the PAH I chairman asserted that PAH I wanted the amended constitution to become a strong anchor for an integrated judiciary system. Further, the chairman affirmed that the Constitutional Court should be within the judicial domain but not subordinate to other bodies, "although what matters most is that the Constitution should assert its authority."<sup>242</sup> However, based on the perception that state power should comprise of three bodies (i.e., the executive, legislature, and the judiciary), a member argued that judicial power should be embodied in the Supreme Court and that the Constitutional Court should form part of the Supreme Court. It is difficult to comprehend a Constitutional Court that is outside of the Supreme Court and higher than the Supreme Court.<sup>243</sup>

Another member suggested that a "domain" approach could be applied. There would be constitutional, regulatory, and corrective powers. In that way, the Constitutional Court would be in the Supreme Court community, although not subordinate to, but alongside the Supreme Court.<sup>244</sup>

In the PAH I meeting on 15 May 2001, the Team of Experts stated that it concurred with this "domain" approach.<sup>245</sup> Further, the Supreme Court should be relieved from the function of conducting judicial review. It should give the authority to conduct judicial review of law and all lesser legislations to the Constitutional Court.<sup>246</sup> On the purview of the judicial

241 As stated by Jimly Asshidiqie. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 462-464. Later, Sri Soemantri Martosoewignjo (Team of Experts) proposed that the Constitutional Court should also hold the authority to resolve any dispute over election results and dissolve political parties. See *Ibid.*, p. 684.

242 As asserted by the PAH I chairman. *Ibid.*, pp. 473-474.

243 As argued by Agun Gunandjar Sudarsa (F-PG). *Ibid.*, p. 499.

244 As elucidated by Sutjipto (F-PDIP). *Ibid.*, p. 501.

245 As conveyed by Jimly Asshidiqie. *Ibid.*, p. 525.

246 As conveyed by Maria S.W. Sumarjono. *Ibid.*, p. 544.

review, the Team of Experts agreed that the object of judicial review was all legislations below the Constitution, assuming that there would be no new MPR decrees and that the existing MPR decrees would be categorized as statutes.<sup>247</sup> On the other hand, the experts proposed that a bill could be judicially reviewed before being ratified as a statute.<sup>248</sup> Further, the experts proposed that the Constitutional Court should also hold the authority to resolve a dispute over an election result.<sup>249</sup>

Then, in a PAH I meeting on 29 May 2001, an expert stated that the difference between the Supreme Court and the Constitutional Court lies in its core purpose. The Supreme Court is the court of cassation for cases relating to justice for citizens. The Constitutional Court is made to uphold the law, ranging from the constitution to all laws and regulations below it. Therefore, the hierarchy of legislation needs to be determined. The first level forms the Constitution and the amendments to the Constitution. The second level consists of the laws or statutes and the government regulations as substitution for the laws and statutes. The third level consists of all legislation underneath.<sup>250</sup>

Subsequently, in the PAH I meeting on 5 July 2001, F-PDIP and F-UG asserted that a Constitutional Court is important for upholding the constitutionality of laws.<sup>251</sup> Further, F-TNI/Polri affirmed that the judicial power should be exercised by the Supreme Court and the Constitutional Court. In that regard, the Constitutional Court has the authority to try the case at the first and last level and to test the substance of the laws and lower legislations. It can also adjudicate on conflicts or disputes between state agencies, between central and local governments, and between local governments in implementing legislations and in exercising other authorities granted by the law.<sup>252</sup>

Regarding presidential impeachment, on 5 September 2001, factions, including F-PG, F-PDIP, F-TNI/Polri, F-KB, and later F-UG and F-KKI, argued that the decision should be preceded by a judicial process conducted by the Constitutional Court to decide whether the president violated the provisions of the law as indicted.<sup>253</sup> Likewise, F-PPP would confirm later in a Commission A meeting on 5 November 2001 that the MPR cannot impeach

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247 Ibid., p. 545. Zain Bajeber (F-PPP) argued that the object of the judicial review is all legislations below the Constitution.

248 As stated by Ramlan Surbakti. Ibid., p. 610.

249 As conveyed by Sri Soemantri Martosoewignjo. Ibid., P. 684.

250 As stated by Jimly Asshidiqie. Ibid., pp. 706-707.

251 As stated by Katin Subiyantoro (F-PDIP) and Soedijarto (F-UG). Ibid., p. 730.

252 As conveyed by Affandi (F-TNI/Polri). Ibid., p. 760.

253 As affirmed by Theo Sambuaga (F-PG), I Dewa Gede Palguna (F-PDIP), Affandi (F-TNI/Polri), Yusuf Muhammad (F-KB), and later by Soedijarto (F-UG) and Anthonius Rahail (F-KKI). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 193, 198, 200, 208, 248, 250.



a president without the DPR's prior indictment being approved by the Constitutional Court.<sup>254</sup>

In a PAH I meeting on 25 September 2001, the Vice Chairman who led the meeting reminded the committee that regarding judicial review's purview, the Expert Group recommended that the Constitutional Court judicially review all legislation, from the statute down to lower legislations, while PAH I wanted to limit this to statutes. Further, the Expert Group recommended that the Constitutional Court should be outside the Supreme Court, while some PAH I members thought it should be within the Supreme Court.<sup>255</sup>

Several factions contested the recommendation. Considering the powerful authority of the Constitutional Court, being able to determine whether the MPR can or cannot impeach the president, F-Reformasi expressed suspicion and stated that it is *overbodig*, superfluous, since the MPR is a legitimate body, elected by the people.<sup>256</sup>

On the other hand, F-UG stated that they accepted the recommendation of the Expert Group to establish a Constitutional Court as an institution outside the Supreme Court but within the domain of the judiciary.<sup>257</sup> F-UG proposed that the Constitution should explicitly stipulate the existence of the Constitutional Court besides the Supreme Court, because the jurisdiction of the Constitutional Court is to ensure that the provisions of the Constitution not be violated.<sup>258</sup> Further, F-PBB argued that the purview of judicial review of the Constitutional Court should be limited to statutes only.<sup>259</sup> In that regard, F-PDIP endorsed the formulation proposed by the Team of Experts that the Constitutional Court hold the authority to judge a case in the first and final stage in reviewing the substances of the law and the legislation.<sup>260</sup> Then, another F-PDIP member added that the Constitutional Court should hold the competence over problems that the Supreme Court is not able to handle. Such problems would include judicial review, a dispute of competence between state institutions, the dissolution of a political party, and a conflict related to election(s). Regarding the Constitutional Court judges, the member confirmed that the court should have nine justices, and that the Supreme Court, the DPR and the President appoint three justices each.<sup>261</sup>

254 As affirmed by Lukman Hakim Saifuddin (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 116.

255 The meeting was led by Harun Kamil (F-UG), who was the Vice PAH I chairman. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 264.

256 As stated by A.M. Luthfi (F-Reformasi). *Ibid.*, p. 269.

257 As affirmed by Sutjipto (F-UG). *Ibid.*, p. 278.

258 As argued by Soedijarto (F-UG). *Ibid.*, p. 290.

259 As stated by Hamdan Zoelva (F-PBB). *Ibid.*, p. 282.

260 As affirmed by Hobbes Sinaga (F-PDIP). *Ibid.*, p. 292.

261 As stated by Frans Matrutty (F-PDIP). *Ibid.*, pp. 295, 296.

F-PG argued that the Constitutional Court does not need to conduct judicial review on legislation below the law, because this could be handled by a panel of the Supreme Court. The member also proposed that the Constitutional Court judges should be nominated by the Supreme Court and appointed and dismissed by the MPR, which should be regulated further by law. Furthermore, the member proposed that the Constitutional Court should be established by and within the Supreme Court, as a special court which conducts judicial review, resolves disputes, and judges the DPR's indictment to impeach a president.<sup>262</sup>

F-PPP disagreed, asserting that the judicial power is not the authority of the Supreme Court alone. Further, F-PPP emphasized that those courts are one entity and of the same level in the sense that the other court is not subordinate to the Supreme Court. One should carefully consider the benefit of having a Constitutional Court inside or outside the Supreme Court. Thailand for instance, the member said, is one of the countries, which has a Constitutional Court outside the Supreme Court.<sup>263</sup>

F-TNI/Polri contended that it is better if the authority to perform judicial review includes the review of lower legislation. For this purpose, a separate entity which serves to conduct the judicial review of the law could be formed.<sup>264</sup> F-PDIP and F-UG asserted that, due to its special functions, it would be more appropriate if the Constitutional Court was formed as a separate institution.<sup>265</sup> In contrast, F-Reformasi insisted that the Constitution should state explicitly the existence of a Constitutional Court within the Supreme Court's realm.<sup>266</sup>

In the subsequent PAH I meeting on 26 September 2001, addressing how a Constitutional Court should be organised, a F-PDIP member elucidated that in a country which adopts *trias politica* principles consistently, such as the United States of America, the articles of the constitution ascribe powers to the executive, judicial, and legislative; there the power to review the law lies with the peak of the judicial power, which is the Supreme Court. However, following another model, such as employed in Italy and France, judicial review is in the hand of the ordinary judicial authority. For Indonesia, which does not implement the *trias politica* strictly, because of the presence of the BPK (Audit Board) and MPR, it is not befitting to place the authority of judicial review with the ultimate institution of judicial power. The Constitutional Court is a special court because it does not execute the ordinary law but upholds the constitutionality of laws. The object in this regard is a *regeling*, a regulation of general application, not a *beslissing*, a decision in an individual case. The court for decisions is the State Administrative Court, which in France is the *Conseil d'Etat*, whereas the *Conseil Constitutionnel* regards the

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262 As stated by Agun Gunandjar Sudarsa (F-PG). Ibid., p. 298.

263 As argued by Zain Bajeber (F-PPP). Ibid., pp. 301, 304.

264 As argued by I Ketut Astawa (F-TNI/Polri). Ibid., p. 305.

265 As stated by I Dewa Gede Palguna (F-PDIP) and Sutjipto (F-UG). Ibid., pp. 308, 309.

266 As stated by Patrialis Akbar (F-Reformasi). Ibid., p. 310.

*regeling*. Therefore, F-PDIP argued that the position of the Constitutional Court should be within the judiciary, but not in a functional relationship, let alone in a hierarchical relationship with the Supreme Court. Further, F-PDIP argued that a Constitutional Court justice needs different qualities. Wisdom, political knowledge, and experience with state affairs and not just legal affairs in general are required. Regarding the number of justices, F-PDIP argued that it should be an odd number, nine for instance, whereby the DPR, the Supreme Court, and the President each appoint three.<sup>267</sup>

Then F-PDU repeated the functions of the Constitutional Court that hitherto had been discussed, which were (1) to decide a dispute between state institutions in implementing the laws, (2) to test the constitutionality of the law and the subordinate legislation, (3) to resolve disputes about elections, and (4) regarding impeachment, and (5) to decide on the dissolution of a political party.<sup>268</sup>

However, once again F-PG argued that the Constitutional Court should be attached to the position, the function, and the authority of the Supreme Court, in such a way that the Constitutional Court is a function of the Supreme Court, either as an ad-hoc or a permanent entity within the Supreme Court. Because they are in one building, the chairman of the Supreme Court is also the chairman of the Constitutional Court. Further, F-PG asserted that the judicial review conducted by the Constitutional Court is limited by the law. Therefore, F-PG argued that the Supreme Court does not merely implement judicial functions. The Supreme Court, as an independent institution, F-PG argued, should hold five functions, which are (1) an ideological function, to guard the Constitution, (2) a political function, to provide legal considerations to other state institutions, (3) a judicial function, to perform judicial review, (4) a sociological function, as the apex of the legal process, so that the process will end in the Supreme Court, as opposed to somewhere else, and (5) an administrative function to manage the administration, finances, and so forth of the Supreme Court.<sup>269</sup>

Likewise, F-Reformasi contended that the Constitutional Court should be within the Supreme Court so that the judicial power is conducted by the Supreme Court and by other courts in its realm. These would include the Constitutional Court, the ordinary court, the religious court, the military court, and the state administrative court.<sup>270</sup>

F-PDIP, considering the special responsibilities of the court, reminded the committee that the Constitutional Court justices require special qualities. He or she does not have to be a lawyer, the speaker stated, but he or she must be a wise person, one with integrity. From *pewayangan*<sup>271</sup> (shadow puppet) shows, the speaker reminded the committee, one should learn that it is

267 As conveyed by Harjono (F-PDIP). *Ibid.*, pp. 317, 318.

268 As underlined by Asnawi Latief (F-PDU). *Ibid.*, p. 319.

269 As emphasized by Agun Gunandjar Sudarsa (F-PG). *Ibid.*, p. 321.

270 As stated by Patrialis Akbar (F-Reformasi). *Ibid.*, p. 325.

271 Traditional Javanese, Sundanese and Bali puppet drama, which usually performs Hindu epics.

very difficult to find a noble character like *Abiyasa*, a person without any mundane self-interest, while there are many deceitful *Sengkuni* and *Durna*.<sup>272</sup> Regarding recruiting justices, the member proposed that the DPR, the Supreme Court and the President respectively appoint three justices to be endorsed either by the MPR or by the President. Further, the member underlined that the Constitutional Court should hold the authority to perform judicial review on the law and the subordinate legislation.<sup>273</sup>

Then, the PAH I chairman asserted that the topic about forming a Constitutional Court was something monumental in regard of building Indonesia's legal system. It had been confirmed that Indonesia's political system is a system of the supremacy of law, a system based on the constitution's authority. It is the constitution that distributes the authority, so that the constitution takes on a central position, and thus the constitutionality of everything else becomes central as well. Previously, he continued, the MPR tasked the MPR Working Body with conducting the judicial review, assuming that the MPR holds the authority to carry out judicial review. However, PAH I should consider that, although a law is a product of a political process, judicial review of a law should not be conducted in a political process. Overseas comparative studies showed that many countries have that judicial review function, although unique and in different appearances. In regard of the scope of the judicial review, the PAH I chairman argued that the purview of the judicial review should also cover the legislation below the law. Further, he contended, as a developing country, development of the legal system is urgent and large in scale; the regional autonomy system which Indonesia is adopting will bring forward issues that are related to the integrity the Unitary State of the Republic of Indonesia, such as that regional legislation should not deviate from higher legislation, and so forth. Therefore, the magnitude of the problems and the tasks is enormous, not to mention the responsibility to establish a rule of the game, such as conducting impeachment of a president, resolving the dispute of competences between state institutions, deciding on disputes regarding election results, and dissolving political parties. Regarding impeachment, the PAH I chairman reminded the committee that, even though it is the Constitutional Court that decides about the indictment of the DPR, it is the MPR which, based on the decision of the Constitutional Court, should determine whether to dismiss the charged president or not. Thus, one should be aware, the chairman emphasized, that the auxiliaries, the supplemental constructions, should not deviate from the main structure of the system. Further,

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272 *Abiyasa*, a figure in *Mahabharata* Hindu's epic, is by nature and disposition clever, very intelligent, wise, pious, devout, authoritative, and prophetic. He has various other extraordinary qualities, among others being an ascetic expert, astrologer, healer, possessing supernatural power, and being long-lived. *Sengkuni* and *Durna* are the characters in *Mahabharata* epic which symbolize the sneaky, cunning, foul-minded and trouble-making figures.

273 As described by Soewarno (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 330.

the chairman stated that the composition of the judges of the Constitutional Court should reflect an equilibrium, the balanced of *jagad cilik* – the micro cosmos – of the state system, which is the atmosphere of the environment of the state powers. Regarding the qualifications of the Constitutional Court justices, he accentuated the statesmanship of the judges.<sup>274</sup>

Whether the Constitutional Court should be separated from or should sit inside the Supreme Court, F-PPP asserted, depends on the need of the state. However, by staying outside the Supreme Court, it can be expected that the Constitutional Court is not contaminated by other authorities of the Supreme Court.<sup>275</sup> Likewise, F-KB affirmed that the Constitutional Court should be independent, particularly because the court holds both legal and political authorities.<sup>276</sup>

Then, in the following small team meeting on 26 September 2001 to formulate the conclusions, F-PDIP and F-PG underlined that formulating the provision on the judicial power should cover the Supreme Court and the Constitutional Court.<sup>277</sup> F-PDIP proposed that the formulation should state that the judicial power shall be implemented by a Supreme Court, the judicial bodies underneath it, and a Constitutional Court.<sup>278</sup> This was supported by F-PDU, F-UG, F-Reformasi, F-KB, F-TNI/Polri, F-PG,<sup>279</sup> F-PPP,<sup>280</sup> and F-PDKB.<sup>281</sup>

In the subsequent discussions about the Constitutional Court's authorities, F-PG proposed applying a clearly defined approach to avoid the Supreme and Constitutional Courts' authorities overlapping. The proposal asserted the principle that the Constitutional Court uphold the Constitution and the Supreme Court uphold the law and lower legislation.<sup>282</sup> In this regard, F-PPP questioned the status of the existing MPR Decree, which was now classified as a rule higher than the law.<sup>283</sup> On the other hand, F-PBB reaffirmed that the Constitutional Court's judicial review authority should be limited only to laws and that the Supreme Court conduct judicial review

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274 As stated by the PAH I chairman. The state system is likened to *jagad cilik* (microcosmos) as a subsystem of the *jagad raya* or the universe (macro-cosmos) which is a balanced system. Ibid., pp. 332-335. See also MPR Decree No. III/2000, which declares that the MPR holds the authority to conduct constitutional review.

275 As stated by Zain Bajeber (F-PPP). Ibid., p. 338.

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

277 As emphasized by Katin Subiyantoro and Pataniari Siahaan, both from F-PDIP and Agun Gunandjar Sudarsa (F-PG). Ibid., pp. 357, 369, 371. Small team, chaired by the Secretary of PAH I, if needed, formed to prepare the draft of the conclusion(s) of the meeting of PAH I. See VI.2.1.

278 As stated by Harjono (F-PDIP). Ibid., p. 385.

279 As confirmed by Asnawi Latief (F-PDU), Soedijarto (F-UG), A.M. Luthfi (F-Reformasi), Erman Suparno (F-KB), Affandi (F-TNI/Polri), Amidhan (F-PG). Ibid., pp. 386, 389, 390, 392, 394, 395.

280 As stated by Ali Hardi Kiaidemak (F-PPP). Ibid., p. 391.

281 As stated by Gregorius Seto Harianto (F-PDKB). Ibid., p. 404.

282 As proposed by Andi Mattalatta (F-PG). Ibid., p. 406.

283 As asked by Ali Hardi Kiaidemak (F-PPP). Ibid., p. 408.

of all other legislation. Otherwise, an alleged violation of legislation being processed in the Supreme Court could be postponed on the grounds that the legislation is being tested by the Constitutional Court.<sup>284</sup> F-PDIP held a different view and affirmed that the Constitutional Court should hold the authority to judicially review law and all subordinate legislation. They reminded the committee that the Supreme Court can halt a trial through injunction on the grounds that the charged legislation belongs to the Constitutional Court's jurisdiction. Further, under the *coute que coute* principles, the Constitutional Court should try alleged constitutional violations. However, under the Bill of Rights,<sup>285</sup> human rights violations should be prosecuted in an Ad-Hoc court for human rights, even though they also violate the Constitution. Therefore, the Constitutional Court's authority applies if the violation is in the form of a law or regulation that the Constitutional Court can nullify. If the violation is an action, then it becomes a crime.<sup>286</sup> F-PBB flagged the implications of the Constitutional Court judicially reviewing all levels of legislation. A case would not end at the Supreme Court or in the courts within its realm but rely entirely on the Constitutional Court.<sup>287</sup>

#### VII.3.5.2 Preliminary Agreement

Hitherto, PAH I failed to achieve a conclusion about the Constitutional Court. For that reason, in a meeting on 1 October 2001, PAH I decided to hold further consultations. Then, in a consultation meeting between the leadership of PAH I and the leaders of the factions in PAH I, PAH I managed to reach a preliminary agreement on the Constitutional Court's core substances, including proposed alternatives.<sup>288</sup> The following was reported to the MPR Working Body plenary meeting on 2 October 2001:

- 1) The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of general courts, religious affairs courts, military courts, and administrative courts, and by a Constitutional Court.
- 2) The Constitutional Court shall possess the authority to try a case as final and binding and shall have the final power of decision in reviewing laws (and the legislations below the law) against the Constitution, determining disputes over the authorities/competences of the (state) institutions, deciding over the dissolution of a political party (which is based on legitimate indictment), and deciding over disputes on the results of a general election.

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284 As stated by Hamdan Zoelva (F-PBB). *Ibid.*, p. 410.

285 Law No. 39/1999 on Human Rights.

286 As asked by Harjono (F-PDIP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 411, 412.

287 As stated by Hamdan Zoelva (F-PBB). *Ibid.*, p. 432.

288 *Ibid.*, p. 465.



- 3) The Constitutional Court is obliged to give a legal opinion upon request from the DPR (and/or the Regional Representative Council) regarding the alleged violations of law by the President and/or the Vice President as stipulated in the Constitution.<sup>289</sup>

Then, in the subsequent PAH I meeting on 10 October 2001, F-PBB, F-PPP and F-UG added that the membership of the Constitutional Court should be clearly regulated in the Constitution, because the law governing the Constitutional Court could review its own membership rules.<sup>290</sup> A F-UG speaker then argued that the Constitutional Court should have nine judges: three justices from the executive, three from the DPR, and three from the Regional Representative Council.<sup>291</sup> Further, F-UG and F-PG proposed that the Constitutional Court's chair should be filled by the Supreme Court chairman, but without voting rights.<sup>292</sup> F-PG suggested the Supreme Court propose Constitutional Court justices to the MPR, which would appoint them.<sup>293</sup>

According to F-PDIP, the President, the DPR, and the Supreme Court should each publicly recruit three Constitutional Court justices. The President would decide and inaugurate the nine judges. The judges would then elect the Court's chairman and the vice chairman from among themselves. Furthermore, the Constitutional Court should be separate from the Supreme Court.<sup>294</sup>

On the other hand, F-TNI/Polri argued that Constitutional Court justices should be selected in the same way as selecting Supreme Court justices, i.e., the Judicial Commission recruits, the DPR selects, and the President confirms.<sup>295</sup> A F-PDIP member explained that the recruitment's intentions must be balanced and objective decision-making.<sup>296</sup> Another member added that judicial review's purview covers not only the law, but all legislations below the law.<sup>297</sup> A F-KB member affirmed that the courts' leadership should be separated.<sup>298</sup>

F-PDU agreed that the Constitutional Court is separate from the Supreme Court, although part of the same community. Therefore, it was surprising that F-PG still ranked the Supreme Court as more powerful than the Constitutional Court.

289 Ibid., p. 484.

290 As stated by Hamdan Zoelva (F-PBB), Zain Bajebber (F-PPP) and Soedijarto (F-UG). Ibid., pp. 503, 504, 505.

291 As stated by Soedijarto (F-UG). Ibid., p. 505.

292 As proposed by Soedijarto (F-UG) and Agun Gunandjar Sudarsa (F-PG). Ibid.

293 As proposed by Agun Gunandjar Sudarsa (F-PG). Ibid., p. 509.

294 As proposed by Harjono (F-PDIP). Ibid., p. 510.

295 As stated by Affandi (F-TNI/Polri). Ibid., p. 516.

296 As stated by Pataniari Siahaan (F-PDIP). Ibid., p. 520.

297 As argued by Soewarno (F-PDIP). Ibid., p. 524.

298 As asserted by Yusuf Muhammad (F-KB). Ibid., p. 538.



### VII.3.5.3 *Establishing a Constitutional Court*

Subsequently, PAH I systematized the opinions regarding the Constitutional Court and reported the outcome to the MPR Working Body meeting on 23 October 2001. PAH I reported that:

- (1) The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of general courts, religious courts, military courts, and administrative courts, and by a Constitutional Court.
- (2) The Constitutional Court shall possess the authority to try a case as final and binding and shall have the final power of decision in reviewing laws (and the legislations below the law) against the Constitution, determining disputes over the authorities/competences of the (state) institutions, deciding over the dissolution of a political party (which is based on legitimate indictment), and deciding over disputes on the results of a general election.
- (3) The Constitutional Court is obliged to give its legal opinion upon a request from the DPR (and/or the Regional Representative Council) regarding the alleged violations of law by the President and/or the Vice President as stipulated in the Constitution.
- (4) *Alternative (1):*  
The Constitutional Court has nine justices, comprising of three justices nominated by the President, three by the Supreme Court and three by the DPR.  
*Alternative (2):*  
The Constitutional Court justices are appointed and dismissed by the MPR based on the proposal of the Supreme Court, whereby its composition and number of justices should be further regulated by law.
- (5) *Alternative (1):*  
To become a Constitutional Court justice, one should be a person with statesmanship who has a command of the Constitution and state affairs, is a person with integrity and a personality beyond reproach and does not concurrently function as a state official.  
*Alternative (2):*  
A Constitutional Court justice is a person with statesmanship who has a command of the Constitution and constitutional law, be a person with integrity and a personality beyond reproach and should not concurrently function as a state official.
- (6) *Alternative (1):*  
The appointment and the dismissal of and other requirements for the justices of the Constitutional Court shall be further regulated by law.  
*Alternative (2):*  
(This clause is not necessary).<sup>299</sup>

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299 Ibid., pp. 558-560.

Additionally, PAH I reported that:

- (1) Any proposal for the removal of the President and/or the Vice President may be submitted by the DPR to the MPR only by first submitting a request to the Constitutional Court to investigate, bring to trial, and issue a decision on the petition of the DPR either that the President and/or the Vice President has violated the law through an act of treason, corruption, bribery, or other serious criminal offence, or through moral turpitude, and/or that the President and/or the Vice President no longer meets the qualifications to serve as President and/or Vice President.
- (2) The Constitutional Court has the obligation to investigate, bring to trial, and reach the most just decision on the petition of the DPR at the latest 90 (ninety) days after the request of the DPR has been received by the Constitutional Court.
- (3) If the Constitutional Court decides that the President and/or the Vice President is proved to have violated the law through an act of treason, corruption, bribery, or other serious criminal offence, or through moral turpitude, and/or that the President and/or the Vice President no longer meets the qualifications to serve as President and/or Vice President, the DPR shall hold a plenary session to submit the proposal to remove the President and/or the Vice President to the MPR.<sup>300</sup>

The MPR Working Body approved the suggested alternatives and reported them to the MPR plenary meeting on 4 November 2001. In the plenary meeting, factions agreed to establish the Constitutional Court.

F-PDKB and F-PBB urged that the Constitutional Court provisions could be accomplished during the MPR 2001 annual session.<sup>301</sup> Other factions were also keen that the provisions be concluded during the session.<sup>302</sup>

Subsequently, the MPR Working Body's works were discussed by Commission A, which was formed to finalize the draft amendment. Eventually, in a Commission A plenary meeting on 6 November 2001, all factions affirmed their agreement to establish a Constitutional Court.<sup>303</sup> F-PDIP reiterated that forming a Constitutional Court supports establishing a state governance system based on the Constitution. This objective could only be achieved with a substantive Constitution and an institution to check the

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300 Ibid., pp. 549-550.

301 As conveyed by K. Tunggul Sirait (F-PDKB) and Muchtar Naim (F-PBB). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 27, 33.

302 As stated by Paiman (F-TNI/Polri), TB. Soenmandjaja (F-Reformasi), Syarif M. Alaydrus (F-KB), Nurdahri Ibrahim Naim (F-PPP), Sulasmi Bobon Tabroni (F-UG), Baiq Isvie Rufaeda (F-PG) and Pataniari Siahaan (F-PDIP). See *Ibid.*, pp. 34, 42, 47, 52, 55, 58, 62.

303 *Ibid.*, p. 337. All factions, except F-PDKB were present at the MPR Working Body meeting on 6 November 2001.

constitutionality of governance practices and the provision of adequate process.<sup>304</sup>

However, factions differed about the Constitutional Court's position in relation to other state institutions. Almost all factions thought the Constitutional Court should be separate from the Supreme Court, but within the realm of judicial power. However, a F-PDIP member argued that as a quasi-judicial institution, the Constitutional Court should function as a separate body and not fall within the Supreme Court's remit, being publicly accountable to the MPR.<sup>305</sup> Another F-PDIP member stated that the Constitutional Court should be part of the MPR, not the judiciary, because there is a basic difference between the *Mahkamah Agung* (Supreme Court) and *Mahkamah Konstitusi* (Constitutional Court). The Supreme Court is *rechtspraak* (an adjudication body), while the Constitutional Court is *quasi-rechtspraak* (a quasi-adjudication body).<sup>306</sup>

Subsequently, all factions agreed that the Constitutional Court could judicially review the law, but some contended that this authority should cover all legislations, from statutes to all lower legislation. They argued that the Constitutional Court should actively exercise its authority.<sup>307</sup> Other members argued that reviewing the lower legislation belonged to the Supreme Court's jurisdiction.<sup>308</sup> F-Reformasi still even argued that the Constitutional Court should focus on state governance matters and should not have the authority to review the constitutionality of laws and other legislation.<sup>309</sup> To reach a conclusion, a consultation meeting followed.<sup>310</sup> However, that also failed to resolve the outstanding issues.<sup>311</sup>

#### VII.3.5.4 Agreement

In the subsequent Commission A meeting on 7 November 2001, a F-PDIP member insisted that with its extraordinary power, the Constitutional Court should be placed under the MPR, but he found no support.<sup>312</sup> Hereafter, no more was said about the Constitutional Court. A drafting team was formed to summarise the results.<sup>313</sup>

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304 As stated by Harjono (F-PDIP). *Ibid.*, p. 317.

305 As stated by Amin Aryoso (F-PDIP). *Ibid.*, p. 303.

306 As argued by Dimiyati Hartono (F-PDIP). *Ibid.*, p. 307.

307 As argued by Nursyahbani Katjasungkana (F-UG) and I Ketut Astawa (F-TNI/Polri). *Ibid.*, pp. 305, 338.

308 As stated by Ali Hardi Kiaidemak (F-PPP) and Nadjih Ahjad (F-PBB). *Ibid.*, pp. 324, 332.

309 As asserted by Patrialis Akbar (F-Reformasi). *Ibid.*, p. 329.

310 *Ibid.*, p. 548.

311 As reported by Slamet Effendy Yusuf, the Vice Chairman of Commission A. *Ibid.*, p. 550.

312 As argued by Dimiyati Hartono (F-PDIP). *Ibid.*, p. 571.

313 *Ibid.*, p. 608.

Finally, Commission A reached an agreement and reported the outcomes to the MPR plenary meeting on 8 November 2001, which were as follows:

- (1) The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of general courts, religious courts, military courts, and administrative courts, and by a Constitutional Court.
- (2) The Constitutional Court shall possess the authority to try a case as final and binding and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities/competences of state institutions which authority is given by the Constitution, deciding over the dissolution of a political party, and deciding over disputes on the results of a general election.
- (3) The Constitutional Court is obliged to give legal opinion upon request from the DPR regarding the alleged violations of law by the President and/or Vice President as stipulated in the Constitution.
- (4) The Constitutional Court has nine justices who are endorsed by the President, which comprise of three justices nominated by the President, three by the Supreme Court and three by the DPR.
- (5) The Constitutional Court's chairman and the vice chairman are elected from and by the Constitutional Court justices.
- (6) To become a Constitutional Court justice, one should be a person with statesmanship who has a command of the Constitution and state affairs, be a person with integrity and personality beyond reproach, and not concurrently function as a state official.
- (7) The appointment and the dismissal of and other requirements for the Constitutional Court's justices shall be further regulated by law.

Finally, all factions approved the draft. F-PBB stated that the Constitutional Court's formation may well solve disputes over the Constitution's interpretation that had inspired exhausting debates.<sup>314</sup> In the plenary meeting on 8 November 2001, the MPR decided to incorporate the Constitutional Court provisions into the Constitution.<sup>315</sup>

### VII.3.6 The Judicial Commission

This section details the debates regarding the Judicial Commission, concluding with the ratified amendment that the Judicial Commission is responsible for proposing and dismissing Supreme Court justices.

During the previous session, PAH I had agreed that the Constitution should form a Judicial Commission. According to the MPR draft, the MPR would appoint and dismiss Supreme Court justices, while reviewing the

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314 As underlined by Hamdan Zoelva (F-PBB). *Ibid.*, p. 654.

315 *Ibid.*, p. 682.

Judicial Commission's considerations.<sup>316</sup> The draft stated that the Judicial Commission is independent, but provides few other details, except that "its composition, status, and membership shall be further regulated by law." Commenting on the draft, in a PAH I meeting on 24 April 2001, the Team of Experts recommended that the President should propose the Supreme Court members, vice chairman, and chairman to the DPR for approval. Such a procedure establishes checks and balances, with the Supreme Court resolving conflicts between the DPR and the President and between the people and the state. That is the basis for delegating the judicial review authority to the Supreme Court.<sup>317</sup>

The Team of Experts endorsed PAH I's idea to form a Judicial Commission. One expert stated that it was important for future law reform and warranted serious attention from the mass media. To complete the PAH I draft, the expert agreed that the Judicial Commission would propose, the DPR would elect, and the President would appoint and dismiss the Supreme Court justices. The Team of Experts also described the Judicial Commission as an independent commission, comprising nine members with sufficient legal experience, integrity, and a flawless personality. In the PAH I meeting on 10 May 2001, the expert proposed that the Judicial Commission should accommodate and gather information about the judges and prospective candidates and propose their appointment or dismissal to the President.<sup>318</sup>

The PAH I members agreed that the Constitution should detail the Judicial Commission's formation procedure and membership requirements.<sup>319</sup> A member proposed that the Judicial Commission supervise the Supreme Court and the Constitutional Court.<sup>320</sup> Another member noted that the Judicial Commission should be independent from the DPR and the President.<sup>321</sup>

The Team of Experts argued that the Supreme Court should recruit other judges. One expert admitted that although the idea of a Judicial Commission was captivating, the Team of Experts had not fully discussed its membership recruitment and tended to assign the process to the DPR.<sup>322</sup>

In the 25 September 2001 meeting, a F-PDIP member argued that the MPR should appoint and dismiss Supreme Court justices based on a Judicial Commission proposal.<sup>323</sup> On 26 September 2001, a member argued that the Judicial Commission should also recruit the ordinary court justices.<sup>324</sup>

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316 See the draft of Article 24B in the enclosure of MPR Decree no. IX/2000. See also Attachment VI.4.

317 As argued by Affan Gaffar. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 395.

318 As proposed by Jimly Asshidiqie. *Ibid.*, p. 465.

319 As endorsed by Lukman Hakim Saifuddin (F-PPP) and the author. *Ibid.*, pp. 479, 482.

320 As proposed by Agun Gunandjar Sudarsa (F-PG). *Ibid.*, p. 500.

321 As reminded by Harjono (F-PDIP). *Ibid.*, p. 518.

322 As argued by Maria S.W. Sumarjono. *Ibid.*, p. 543.

323 As stated by Soewarno (F-PDIP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 266, 267.

324 As argued by Harjono (F-PDIP). *Ibid.*, p. 318.

F-PDU expressed its support for establishing an independent Judicial Commission with all the functions and responsibilities.<sup>325</sup>

However, F-Reformasi disagreed with the Judicial Commission recruiting the Supreme Court and Constitutional Court judges, which would complicate the recruitment process. Such recruitment would be problematic while the Judicial Commission's formation itself was still in question. Instead, the DPR should recruit Supreme Court justices.<sup>326</sup>

The PAH I chairman, considering the judiciary's decisive role in realizing the law's supremacy, emphasized that a judge should not only hold professional capabilities, but also be accountable to their integrity. A judge is a state official, including the judge of a *Pengadilan Negeri* (district court), issuing judgments on behalf of their conscience. Therefore, recruitment crucially ensures judicial reliability. Thus, the Judicial Commission should recruit all judges and conduct fit-and-proper tests for positions at all levels. It should be a permanent body populated by legal seniors, such as retired judges, lawyers, prominent legal scholars, and prominent regional figures. Further, the political process should not interfere in judicial recruitment or in any aspect of law enforcement.<sup>327</sup>

Members argued that the DPR should recruit Supreme Court justices on the Judicial Commission's recommendations, who the President would then inaugurate.<sup>328</sup>

Another member argued that the DPR should appoint and dismiss Supreme Court justices, while the MPR would appoint and dismiss the chairman and the vice-chairman. Instead of the Judicial Commission, an honorary council of justices should uphold discipline and the justices' code of ethics.<sup>329</sup>

Another member added that an independent commission needed to scrutinize the Supreme Court and ordinary court justices' behaviour. Internal bodies, such as an honorary council of judges or a Supreme Court, would be insufficient.<sup>330</sup>

PAH I did not discuss a Judicial Commission until the subsequent MPR Working Body meeting on 2 October 2001, in which PAH I reported its works.<sup>331</sup>

The Judicial Commission was next discussed during a PAH I meeting on 10 October 2001. A member reiterated that the Judicial Commission should be incorporated in the Constitution, being crucial to ensuring judicial competency and professionalism. However, the MPR should appoint

325 As endorsed by Asnawi Latief (F-PDU). *Ibid.*, p. 320.

326 As argued by Patrialis Akbar (F-Reformasi). *Ibid.*, p. 326.

327 As emphasized by the PAH I chairman. *Ibid.*, pp. 334, 335.

328 As stated by I Ketut Astawa (F-TNI/Polri), Sutjipto (F-UG) and Palguna. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 305, 306, 310.

329 As argued by Agun Gunandjar Sudarsa (F-PG). *Ibid.*, pp. 298, 299.

330 As responded by Hamdan Zoelva (F-PBB). *Ibid.*, p. 344.

331 *Ibid.*, pp. 470-485.

Constitutional Court justices proposed by the Supreme Court, rather than the Commission.<sup>332</sup>

A member argued that the DPR should determine Supreme Court justices.<sup>333</sup> Another member proposed that the President appoint and dismiss Supreme Court justices with the DPR's approval, based on a Judicial Commission proposal.<sup>334</sup>

Another member even supported the Judicial Commission recruiting judges and the President simply endorsing them.<sup>335</sup>

F-PDIP proposed that the Judicial Commission should comprise of 11 members: 2 active lawyers, 2 active prosecutors, 2 professors of law, 3 DPR members, and 2 elected regional representatives.<sup>336</sup>

### VII.3.6.1 *President Appoints Supreme Court Justices*

Eventually, PAH I conducted an informal meeting to formulate the conclusion about the Judicial Commission. Subsequently, it reported to the MPR Working Body meeting on 23 October 2001 that:<sup>337</sup>

- (1) The Supreme Court justices are appointed and dismissed by the President based on a proposal by the Judicial Commission and by considering the DPR's considerations.
- (2) The Judicial Commission is independent and holds the authority to propose the appointment or the dismissal of the Supreme Court justices and other justices (paying regard to the input from society).
- (3) *Alternative 1:*  
Judicial Commission members are selected from former Supreme Court justices, legal practitioners, public figures, religious figures, and academics.  
*Alternative 2:*  
Judicial Commission members are selected from lawyers, prosecutors, professors of law, and members of the DPR.  
*Alternative 3:*  
Judicial Commission members should have experience in a legal profession, should be a person with integrity and a flawless personality.
- (4) The Judicial Commission's composition and membership shall be further regulated by law.
- (5) [Upholding the honour and maintaining the judge's dignity and behaviour is the Judicial Commission's responsibility.]<sup>338</sup>

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332 As reiterated by Agun Gunandjar Sudarsa (F-PG). *Ibid.*, pp. 508, 527.

333 As argued by Fuad Bawazier (F-Reformasi). *Ibid.*, p. 515.

334 As proposed by Affandi (F-TNI/Polri). *Ibid.*, p. 516.

335 As asserted by Harjono (F-PDIP). *Ibid.*, p. 510.

336 As conveyed by Pataniari Siahaan (F-PDIP). *Ibid.*, p. 521.

337 *Ibid.*, pp. 558-559.

338 Brackets mean that factions agreed with the idea but had not fully agreed on the formulation.



The Working Body approved the report.<sup>339</sup> In the subsequent MPR plenary meeting on 4 November 2001, all factions underlined that the Judicial Commission was necessary.<sup>340</sup> In a Commission A meeting on 6 November 2001, F-PDIP, F-PPP, F-PBB, F-TNI/Polri and F-UG endorsed this draft.<sup>341</sup> Certain members asserted that the DPR should approve (rather than merely consider) Supreme Court judicial candidates that the Judicial Commission proposes to the President.<sup>342</sup> Another member stated that consideration would be sufficient.<sup>343</sup> Conversely, certain members contended that since the Constitution requires the Judicial Commission, the DPR's involvement is unnecessary.<sup>344</sup> Another member argued that the Judicial Commission should also propose Constitutional Court justice candidates.<sup>345</sup> One member proposed delaying the topic since opinions still differed.<sup>346</sup>

### VII.3.6.2 *Third Amendment Ratified: Judicial Commission*

The discussion resumed during the Commission A meeting on 8 November 2001. It was intended to help prepare the report for the subsequent MPR plenary meeting. The Commission A chairman noted that the MPR Working Body had discussed the Judicial Commission recruiting judges and being the honorary council of judges.<sup>347</sup> Factions did not discuss the topic further. In the subsequent informal meeting, Commission A drafted the final report about the Judicial Commission and submitted it to the MPR plenary meeting.<sup>348</sup>

In the report to the MPR plenary meeting on the same day, Commission A stated that:

- (1) Candidates for the position of Supreme Court justice shall be proposed by the Judicial Commission to the DPR for approval and shall subsequently be formally appointed to office by the President.
- (2) The Judicial Commission is independent and holds authority to propose the appointment or the dismissal of the Supreme Court justices and other authorities to maintain and to uphold the justices' honour, dignity, and good conduct.

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339 See *Ibid.*, p. 572.

340 As stated by, among others, K. Tunggul Sirait (F-PDKB) and Pataniari Siahaan (F-PDIP). Majelis Per-musyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 27, 62.

341 As stated by I Dewa Gede Palguna (F-PDIP), Ali Hardi Kiaidemak (F-PPP), Nadjih Ahjad (F-PBB), I Ketut Astawa (F-TNI/Polri) and Sutjipto (F-UG). *Ibid.*, pp. 303, 325, 332, 338.

342 As argued by I Dewa Palguna (F-PDIP), Nadjih Ahjad (F-PBB) and I Ketut Astawa (F-TNI/Polri). See *Ibid.*, pp. 303, 332, 338.

343 As argued by Sutjipto (F-UG). *Ibid.*, p. 341.

344 As argued by Markus Daniel Wakkary (F-UG) and Agun Gunandjar Sudarsa (F-PG). *Ibid.*, pp. 308, 322.

345 As proposed by L.T. Sutanto (F-TNI/Polri). *Ibid.*, p. 317.

346 As proposed by Mashadi (F-Reformasi). *Ibid.*, p. 314.

347 *Ibid.*, p. 564.

348 *Ibid.*, p. 608.

- (3) Judicial Commission members should have knowledge of and experience in the legal profession and be persons with integrity and a flawless personality.
  - (4) Judicial Commission members are appointed and dismissed by the President with the DPR's approval.
  - (5) The Judicial Commission's composition and membership shall be further regulated by law.<sup>349</sup>
- Finally, in the MPR plenary meeting on 9 November 2001, the MPR approved the draft as the third amendment of the 1945 Constitution.<sup>350</sup>

### VII.3.7 Presidential election

This section sets out the debate leading to the presidential election provision's ratification on 9 November 2001, postponing discussions of second-round presidential elections to the MPR 2002 annual session. The debate concerned who would nominate candidates (individuals, political parties, or the MPR), who could vote for candidates (the people or the MPR), and when voting would occur (alongside or after DPR elections). The ratified provisions stated that the President and Vice President would be jointly elected by the people, nominated by political parties that had participated in the previous election, winning by a simple majority of 50% plus 1 of total votes, garnering at least 20% of the votes in more than 50% of Indonesia's provinces.

From the amendment process' beginning in October 1999, factions had expressed their desire for direct presidential elections. Although members differed on the election procedures, all factions agreed that people should have a decisive role in the presidential election.

#### VII.3.7.1 *Previous Discussions*

Until this point, several issues regarding the presidential election had been discussed (See VI.2.3.6). F-Reformasi had proposed that the people should elect the president from two pairs of candidates, selected by the existing MPR before the election. F-KB, F-PG and F-PPP affirmed that the president should be elected directly by the people. F-PDIP and F-PBB argued that the people should directly elect the candidates in the first round. If no candidate won, the MPR would elect the president and the vice president from the first round's top two choices. Following this approach, the second round would reduce the financial burden and avoid prolonged political tension in society.

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349 Ibid., p. 626.

350 Ibid., p. 682.

### VII.3.7.2 *Team of Experts and PAH I Debate*

In a discussion with the Team of Experts on 20 March 2001, the Law Sub-Team disagreed with the Politics Sub-Group. A Politics Sub-Group expert stated that the Team of Experts prefers a direct presidential election, an option mentioned in MPR Decree IX/2000.<sup>351</sup> However, a Law Sub-Group expert reminded the committee that this form will not be easy, especially if no candidate wins more than half of the votes.<sup>352</sup> In response, a PAH I member stated that the legal and the political systems seemed to depend on how the president is elected. If the president is elected directly by the people, it would automatically change the functions of the MPR and other representative institutions.<sup>353</sup>

Subsequently, in a PAH I meeting on 29 March 2001, a Politics Sub-Group expert stated that the Team of Experts recommended the alternative in the attachments of MPR Decree No. IX/2000, which states that the president and the vice president should be elected on one ticket directly by the people.<sup>354</sup> Further, the winner is the candidate who obtains an absolute majority of votes and wins in at least 2/3 of all provinces with at least 20% of the votes in those respective provinces. If no candidate satisfies this requirement, the top two choices run again and the pair who gains the majority or popular vote wins. If the president is elected directly by the people, the MPR does not need to assess the president's accountability. Furthermore, if the MPR could not agree with the popular vote, it could consider an alternative, stating that the president and vice president shall be elected by a *Dewan Pemilihan* (electoral college).

A PAH I member noted the consequences of two presidential election rounds, as this would be time consuming and can cause prolonged political instability.<sup>355</sup> Another member noted the discrepancy between the June 1999 general election outcome and the October 1999 MPR-led presidential election outcome.<sup>356</sup> However, the Team of Experts argued that since this would

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351 As argued by Maswadi Rauf. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 306. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *Putusan MPR-RI, Sidang Tahunan MPR-RI, 7 – 18 Agustus 2000*, Sekretariat Jenderal, 2000, p. 116.

352 As argued by Sri Soemantri Martosuwignyo. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 307.

353 As stated by Andi Mattalatta (F-PG). *Ibid.*, p. 336.

354 As argued by Nazaruddin Syamsuddin. *Ibid.*, pp. 345, 346.

355 As reminded by Andi Mattalatta (F-PG). *Ibid.*, p. 361.

356 As reminded by Pataniari Siahaan (F-PDIP). *Ibid.*, p. 365. Megawati Soekarnoputri, the Chairwoman of PDI-P, the first winner of the 1999 elections (33.74% of the vote) was defeated in the presidential election in the MPR by Abdurrahman Wahid from PKB, the fourth winner (12.61% vote), who was supported by a coalition of political parties known as *poros tengah* (the central axis).

be a procedural democracy, as legitimate as a normative democracy, such a mechanism was not a problem.<sup>357</sup>

One member pointed out a PAH I deliberation principle that the presidential election system should not significantly diverge from society's political configuration.<sup>358</sup> Another PAH I member, considering that Indonesian society is parochial and primordial, urged the Team of Experts to consider whether a direct presidential election is concurrent with the political culture. Direct presidential elections could result in totalitarian leadership.<sup>359</sup> Quoting Raden Mas S. Soeriokoesoemo's article in Herbert Feith's "Indonesian Political Thinking", this is why there should be a council of wise persons who elect the wisest person as president. According to Soeriokoesoemo, the people do not know who is the most qualified to become a president.<sup>360</sup> Although the American, French, and German systems already existed, the Indonesian Founding Fathers placed a council system in the Constitution.<sup>361</sup>

Furthermore, an expert suggested that the presidential election should be preceded by DPR, provincial DPRs, and district DPR member elections. The presidential candidates could be limited to two pairs, nominated by the political parties (or a coalition) who have won the most DPR and Regional Representative Council seats. The outcomes will then be congruent with the people's aspirations, minimizing the chances of needing a second election round.<sup>362</sup> That the people are unable to elect a wise president is inconsistent with their right to elect DPR and Regional Representative Council members.<sup>363</sup> The expert further reiterated that a constitution does not merely reflect the ongoing situation but also serve as a social and political instrument to spread certain norms and values. Implementing a direct presidential election is a matter of timing and should begin in 2009.<sup>364</sup> Another expert added that maintaining the presidential system should involve a direct election to maintain consistency.<sup>365</sup>

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357 As stated by Afan Gaffar. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 396.

358 As stated by Jakob Tobing (F-PDIP). *Ibid.*, p. 480.

359 As stated by Soedijarto (F-UG). *Ibid.*, p. 506.

360 Herbert Feith and Lance Castels (eds.), *Indonesian Political Thinking 1945-1965*, Cornell University Press, 1970, p. 187.

361 As elaborated by Soedijarto (F-UG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 685. Later, Soedijarto referred to several Latin American countries which adopted direct presidential elections which saw the rise of tyrants such as Peron and Pinochet. Citing Giovanni Sartori, Soedijarto further stated that in a society in which the majority is poor and destitute, democracy will bring forward oligarchy which eventually gives birth to tyranny. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 180.

362 As elucidated by Ramlan Surbakti. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 541.

363 *Ibid.*, p. 688.

364 *Ibid.*, p. 542. The first direct presidential election was conducted in 2004.

365 As stated by Suwoto Moeljo Soedarmo. *Ibid.*, p. 693.

Regarding the presidential election's timing, one member argued that it took place after the DPR elections, it could distort the political configuration in the eyes of the public.<sup>366</sup> Another member stated that the presidential candidates should be nominated before the legislature's elections, so that it is already clear which presidential candidate one is supporting when choosing a political party.<sup>367</sup> Alternatively, the MPR should elect the President and Vice President from the two candidate pairs with the winning general election vote.<sup>368</sup>

One member insisted that direct presidential elections are incompatible with Indonesia's democratic politics culture.<sup>369</sup> However, he found little support, as others dismissed concerns surrounding socio-cultural hindrances. They held that the president should be elected directly, under the Team of Experts' conditions.<sup>370</sup> An expert asserted that the people should directly elect the president through a presidential (rather than overall) election. If the president's or vice president's position became vacant, the MPR could refill the positions until the end of the respective tenures.<sup>371</sup>

Next, a PAH I member insisted that the direct presidential elections and the MPR's status, should be determined in the 2001 MPR annual session.<sup>372</sup> However, another member added that in a presidential system, the president does not have to be directly elected by the people. Instead, the election system must be compatible with the entire political system.<sup>373</sup> F-UG suggested that, accordingly, the MPR should elect the president from two pairs of candidates nominated by the political parties that placed first and second in the preceding general election.<sup>374</sup> A F-PDIP member offered an alternative proposal. He pointed out that the issue of democracy and democratization in the 1945 Constitution's reform context should not be reduced to the election's form. Previously, PAH I had agreed to uphold the presidential system, but this does not mean that this system is more democratic than an indirect presidential election. What is pertinent is whether a presidential system's requirements are satisfied. Therefore, compatibility between each

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366 As stated by Jakob Tobing (F-PDIP). *Ibid.*, p. 481. Given the number of contesting political parties, a coalition of small parties, with a broad range of different political platforms, may defeat the larger political entity.

367 As argued by Pataniari Siahaan (F-PDIP). *Ibid.*, p. 628.

368 As suggested by Katin Subiyantoro (F-PDIP) and Soedijarto (F-UG). *Ibid.*, pp. 725-726, 747.

369 As argued by Soedijarto. *Ibid.*, p. 748.

370 As stated by Happy Bone Zulkarnain (F-PG), Zain Bajebur (F-PPP), Asnawi Latief (F-PDU), Andi Najmi Fuady (F-KB) and Affandi (F-TNI/Polri). See *Ibid.*, pp. 737, 741, 743, 754, 759. The Team of Experts proposed that a pair of candidates wins the presidency if they win an absolute majority and at least 20% of the votes in at least 2/3 of the provinces. See, *Ibid.*, p. 346.

371 As asserted by Maswadi Rauf. *Ibid.*, p. 788.

372 As urged by Asnawi Latief (F-PDU). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 17.

373 As stated by Hobbes Sinaga (F-PDIP). *Ibid.*, p. 178.

374 As stated by Soedijarto (F-UG). *Ibid.*, p. 180.

part of the system is important. Further, the member questioned whether the MPR as a joint session could dismiss a directly elected president.<sup>375</sup>

In the same context, another member proposed that the political parties should nominate the pairs of president and vice president before the election. This would encourage the political parties' systems merging and simplifying in a reasonable and natural way.<sup>376</sup> As an alternative, a F-KB member suggested that the people should first choose their candidates, and that the MPR should finalize the remainder of the process. Regarding the people's capacity to elect their president, since they were born in different eras, one should 'teach your children according to their era' (*fainnahum khuliquu fii zamaanen ghaira zamaanikum*). Give the people their sovereignty now and let them elect the president. Then, if a candidate obtains more than 50% of the nationwide vote in the first round, distributed as required in the regions, the president should then be directly determined as the winner.<sup>377</sup> F-Reformasi proposed yet another alternative. The MPR should first choose two pairs of candidates and then let the people choose between these two pairs. In that way, it is the people who decide. Besides, this procedure is faster and more efficient since the election can be conducted alongside the DPR member elections. For that purpose, the existing MPR could choose the two pairs of presidential candidates to be elected by the people.<sup>378</sup>

The PAH I chairman concluded that all factions agreed that the president should be elected directly by the people. The difference lay in whether to give a role to the MPR.<sup>379</sup> F-TNI/Polri reaffirmed their stance that the presidential election should be conducted directly by the people from the two pairs of MPR-selected candidates.<sup>380</sup> One F-PG member reminded the committee that a direct presidential election without the MPR's involvement would bear a huge financial cost. Also, implementing the popular vote – one-person-one-vote – would cause discrepancy between Java and out-of-Java (*Jawa dan luar Jawa*). Therefore, these problems could be overcome if the people elect the president from the two pairs of MPR-selected candidates. However, unlike what F-Reformasi proposes, the MPR should be the newly elected MPR.<sup>381</sup>

At this point, F-KB expressed doubt about the MPR's composition, saying that he was not sure it would consist of society's wise men. Therefore, the faction argued in favour of a system without any MPR involvement, where one is elected by the people as directly as possible (*langsung selangsung-langsungnya*).<sup>382</sup> However, a F-PDIP member warned the other

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375 As argued by I Dewa Gede Palguna (F-PDIP). *Ibid.*, p. 200.

376 As stated by Soewarno (F-PDIP). *Ibid.*, pp. 204-205.

377 As stated by Yusuf Muhammad (F-KB). *Ibid.*, p. 207. The candidate should win at least certain percentage of votes in, for instance, more than half of the provinces.

378 As argued by Fuad Bawazier (F-Reformasi). *Ibid.*, pp. 209-210.

379 As stated by the PAH I chairman. *Ibid.*, pp. 210-211.

380 As reaffirmed by Affandi (F-TNI/Polri). *Ibid.*, p. 220.

381 As stated by Rully Chairul Azwar (F-PG). *Ibid.*, p. 225.

382 As argued by Ali Masykur Musa (F-KB). *Ibid.*, p. 235.



members against the same drastic political leap as the Khmer Rouge. The change should not happen too quickly, because social change is transformative. The political parties and the representative institutions play significant roles in a democracy, so the national leadership's selection process could be undertaken in a forum such as the MPR. In case of a conflict from, e.g., population imbalances (i.e., most people live on Java), the MPR could function as a conflict management and conflict resolution forum. Thus, it is the MPR that should undertake the presidential election.<sup>383</sup>

### VII.3.7.3 *No Agreement – Small Team Formed*

Following the MPR's working schedule, PAH I was allocated time until mid-September 2001 to prepare the draft amendments (See Attachment VII.1). However, until 10 September 2001, PAH I could not agree on how to elect the president and vice president.<sup>384</sup> PAH I formed a small team where the debates continued. Here, factions also discussed whether only one or several political parties, or individuals, should be eligible to nominate the presidential candidates. A F-PDIP member stated that a democratic presidential election should also improve the political system and reform the political parties. Therefore, the president and vice president should be nominated by a political party, but the political party should not only be able to nominate a member, but also a capable and popular non-member.<sup>385</sup> Other members agreed.<sup>386</sup> In this context, F-PDKB argued that an independent candidate should be allowed if he or she receives at least 5% of the total vote.<sup>387</sup>

Factions contended that the DPR, local DPR, Regional Representative Council, and presidential elections should occur simultaneously. In that regard, F-PG proposed that the pairs of candidates for the presidential election should be nominated by the political party or the combination of political parties, before the parliamentary election.<sup>388</sup> Commenting on this idea, a member pointed out that not all political parties are eligible to participate in the election. Hence, only eligible parties should be able to nominate candidates for president and vice president.<sup>389</sup> Eventually, a F-PDIP member proposed a new idea that differed from their previous stance. Political parties should nominate presidential candidates *before* the election, and the

383 As stated by Pataniari Siahaan (F-PDIP). *Ibid.*, p. 253.

384 At the end of PAH I meeting on 11 September 2001, PAH I formed a small team that consisted of one representative from each faction, to sharpen the substances discussed in that meeting. See *Ibid.*, p. 301.

385 As stated by Pataniari Siahaan (F-PDIP). *Ibid.*, pp. 340, 341.

386 As stated by Happy Bone Zulkarnaen (F-PG), Soedijarto (F-UG) and I Dewa Gede Palguna (F-PDIP). *Ibid.*, pp. 341-343.

387 As argued by Gregorius Seto Harianto (F-PDKB). *Ibid.*, p. 344.

388 As stated by Slamet Effendy Yusuf (F-PG). *Ibid.*, pp. 346, 349.

389 As asserted by Pataniari Siahaan (F-PDIP). *Ibid.*, p. 352.



elections for the five different positions should occur simultaneously.<sup>390</sup> The candidates with more than 50% of the national vote with at least 20% in at least 50% of the provinces should be declared and inaugurated by the MPR as the elected president and vice president.<sup>391</sup> Eventually, most factions accepted this idea.<sup>392</sup>

Next, the small team discussed what should happen if no presidential candidate won a first-round majority. Several members proposed that the MPR should conduct the second round.<sup>393</sup> However, others insisted that it should also be a popular vote.<sup>394</sup> Yet, F-Reformasi insisted that the MPR should conduct the first election stage before a direct people's election. If the MPR's candidates failed to satisfy the requirements in the people's direct election, then candidate pairs should compete again before the MPR, who would elect the winner.<sup>395</sup>

At the end of the small team meeting, two options were clear. First, as proposed by F-Reformasi, the MPR chooses the presidential candidates before they compete in a direct election. Second, adopted by all other factions, the political parties participating in the election nominate the candidates.

In the second alternative, all agreed that the first round should be conducted directly by the people and simultaneously alongside the DPR, provincial DPR, district DPR, and Regional Representative Council elections. The candidate with more than 50% of the national vote with at least 20% in at least 50% of the provinces would be declared elected and inaugurated by the MPR. If no candidate met the requirements, a second round would be conducted.

There were two alternatives for the second-round elections. First, the MPR would conduct the second round and declare and inaugurate the winner. Alternatively, the top two election winners should compete again in a direct election by the people. The pair of candidates with the majority vote would be determined and inaugurated by the MPR as the new President and Vice President.<sup>396</sup>

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390 The Central Board of PDI-P decided that the presidential election should be undertaken directly by the people and does not have to involve the MPR.

391 As conveyed by Soewarno (F-PDIP). *Ibid.*, p. 353. Later this principle was reiterated by Hamdan Zoelva (F-PBB) and Affandi (F-TNI/Polri) as an important principle to ensure the national legitimacy of the elected president. See also *Ibid.*, pp. 363, 365, 393.

392 As affirmed by Happy Bone Zulkarnaen (F-PG), Soedijarto (F-UG), Asnawi Latief (F-PDU), Lukman Hakim Saifuddin (F-PPP), Hamdan Zoelva (F-PBB), A.M. Luthfie (F-Reformasi), Yusuf Muhammad (F-KB), Affandi (F-TNI/Polri) and later Gregorius Seto Harianto (F-PDKB). *Ibid.*, pp. 354-365, 371.

393 As argued by Soedijarto (F-UG), Katin Subiyantoro (F-PDIP) and Hamdan Zoelva (F-PBB). *Ibid.*, pp. 356, 362, 385. Pataniari Siahaan (F-PDIP) asserted that the second-round election is not the objective of the process, but merely a back-up option, in case no candidate would win the first round of elections.

394 As insisted by Asnawi Latief (F-PDU), Gregorius Seto Harianto (F-PDKB), Fuad Bawazier (F-Reformasi) and Happy Bone Zulkarnaen (F-PG). *Ibid.*, pp. 372, 375, 387.

395 As stated by A.M. Luthfi (F-Reformasi). *Ibid.*, p. 367. Therefore, this method will consist of three rounds.

396 *Ibid.*, pp. 399-400.

#### VII.3.7.4 Progress – No MPR Election Power

In the PAH I plenary meeting on 12 September 2001, the meeting chairman affirmed that PAH I had abandoned the idea of the MPR electing the president. However, discussions about the MPR's role in the direct presidential election would continue.<sup>397</sup>

In that regard, F-PDIP emphasized that in a democracy, the president's election should meet the principles of accountability, representation, and acceptability. Therefore, there should be a fair and open competition, and any censorship of candidates should be eliminated. Let the candidates emerge freely from the people through the political party mechanism. The MPR's involvement is merely an emergency exit, a safety valve, in case no candidate meets the requirements in the first round. A second direct election is quite costly, both economically and socio-politically.<sup>398</sup>

F-PPP disagreed. It stated that the second-round election by the MPR would reduce the people's aspirations. It is possible that the MPR elects a pair of candidates who did not win the popular vote.<sup>399</sup> However, F-PBB and F-UG reiterated that seeing the vastness of Indonesia's territory and the cost and energy that must be spent, a second round of elections organised by the MPR would be proper, since the people's MPR representatives are elected themselves.<sup>400</sup>

However, F-TNI/Polri concurred with F-PDIP that the people should nominate the candidates and elect the president. Further, the presidential candidate nominations should be conducted alongside the DPR and Regional Representative Council elections, whereby the political parties (or coalition) introduce and campaign for their respective candidates. The candidates presented by a political party or coalition that has won the first- and second-most DPR seats will compete in the presidential election. The pair that wins the highest number of votes should be declared as the President and the Vice President. In that way, there is no need to consider the distribution of votes in the provinces, since its principle and objective are inherent in the number of DPR seats won by the political parties who put forward the candidate.<sup>401</sup>

In that regard, a F-PDIP member reiterated the importance of a simpler political party system to ensure the direct presidential election would meet the people's aspirations and interests, while not being too complicated and expensive, both financially and socio-politically.<sup>402</sup> Further, the PAH I chair-

397 The meeting was chaired by Harun Kamil (F-UG), the vice PAH I chairman. *Ibid.*, p. 403.

398 As emphasized by Harjono (F-PDIP). *Ibid.*, pp. 407-408.

399 As stated by Lukman Hakim Saifuddin (F-PPP). *Ibid.*, p. 414.

400 As argued by Hamdan Zoelva (F-PBB) and Zacky Siradj (F-UG). *Ibid.*, p. 417.

401 As asserted by Affandi (F-TNI/Polri). *Ibid.*, p. 419.

402 As reiterated by Soewarno (F-PDIP). *Ibid.*, p. 422. Previously, Anthonius Rahail (F-KKI) and A.M. Luthfie (F-Reformasi) also stated the need for a simplification of the political party system, in which Luthfie referred to the bi-party system introduced by General H.R. Darsono in 1966. See *Ibid.*, p. 410.

man emphasized that the establishment of political parties is a fundamental right. Therefore, there may be hundreds of political parties. However, only a few political parties become substantively effective, as in the USA, UK, or Australia. In that regard, the development of a democratic mechanism should also be directed towards the system's maturity.<sup>403</sup>

Subsequently, PAH I reported the outcomes to the MPR Working Body's fifth plenary meeting on 23 October 2001. At this stage, the factions had reached a basic agreement to revoke one of the MPR's important authorities as the highest state institution: the absolute authority to elect the president and the vice president, regardless of how the election procedure should be further regulated.

#### *VII.3.7.5 Agreement – Direct Election by the People*

Regarding the presidential election, factions agreed to report to the MPR Working Body that:

- (1) The President and the Vice President shall be elected jointly directly by the people.
- (2) The pairs of candidates for President and Vice President shall be nominated by the political party or combination of political parties, which had contested in the previous election.
- (3) The pair of candidates for President and Vice President which obtains more than 50% of the votes with at least 20% votes in each of more than 50% of the provinces in Indonesia, will be determined and inaugurated as the President and the Vice President.

(4) *Alternative 1:*

If no pair of candidates for President and Vice President is elected as mentioned above, then the two pairs which obtain the first and the second largest number of votes in the election shall compete against each other in the MPR and the pair which obtains most votes from MPR is declared and inaugurated as the President and the Vice President.

*Alternative 2:*

*Variant 1:*

If no pair of candidates for President and Vice President is elected as mentioned above, then the two pairs which obtain the first and the second largest number of votes in the election shall compete in a direct election by the people and the pair which obtains the most votes shall be declared and inaugurated as the President and the Vice President.

*Variant 2:*

If no pair of candidates for President and Vice President is elected as mentioned above, then the two pairs which obtain the first and the second largest number of votes in the election shall compete in a direct

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403 Ibid., p. 432.

election by the people and the pair which obtains the most *electoral* votes shall be declared and inaugurated as the President and the Vice President.

- (5) The provisions implementing the President and Vice President's election shall be further regulated by law.<sup>404</sup>

Factions expressed their respective opinions on the report in the subsequent MPR plenary meeting on 4 November 2001. All factions reiterated their agreement on the presidential election's first round. However, if a second round was necessary, several members asserted that this should also be a direct election, determined based on the number of votes.<sup>405</sup> However, others reaffirmed that the second round should be conducted by the MPR.<sup>406</sup> In this regard, a F-TNI/Polri member questioned whether the people are ready for a direct presidential election. The member noted the state's condition, characterized by primordialism, as an archipelago with an uneven distribution of people and level of education, which does not support objective and rational political participation. The member stated further that F-TNI/Polri had carefully noted the political and social risks of a direct presidential election, which should be considered in formulating the Constitution's articles.<sup>407</sup>

In that MPR plenary meeting, F-PDU did not explicitly state their stance, while F-Reformasi stated that they were ready to finalize the topic during this session.<sup>408</sup>

#### VII.3.7.6 First Round Procedures Agreed – Second Round Disagreements Persist

During the subsequent Commission A meeting, formed to finalize the MPR Working Body's works, the factions maintained their positions, which was reported to the MPR plenary meeting on 8 November 2001. In their respective final views on the presidential election, factions agreed to ratify the presidential election provisions and postpone the second-round provisions to the MPR 2002 annual session. F-KB and F-PDU called the introduction of a direct presidential election a historic and monumental political decision in reforming the political system.<sup>409</sup> F-TNI/Polri added once again that the

404 Majelis Permusyawaratan Rakyat republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 544-561.

405 As stated by K. Tunggul Sirait (F-PDKB), S. Massardy Kaphat (F-KKI), Mochtar Naim (F-PBB), Syarif M. Alaydrus (F-KB), Nurdahri Ibrahim Naim (F-PPP), Baiq Isvie Rufaeda (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat., Edisi Revisi, Sekretariat Jenderal, 2010, pp. 29, 31, 33, 44, 48.

406 As argued by Sulasmi Bobon Tabroni (F-UG) and Pataniari Siahaan (F-PDIP). *Ibid.*, pp. 54, 60.

407 As conveyed by Paiman (F-TNI/Polri). *Ibid.*, p. 36.

408 As conveyed by Hartono Mardjono (F-PDU) and TB. Soenmandjaja (F-Reformasi). *Ibid.*, pp. 28, 40.

409 As expressed by Erman Suparno (F-KB) and Asnawi Latief (F-PDU). *Ibid.*, p. 646.

second round should be conducted by the MPR, because a second direct election would be too costly and create too long a transitional period.<sup>410</sup> F-PBB agreed with this suggestion. Further, the faction appealed for the committee not to rejoice excessively in welcoming democracy and reform, because it would make them oblivious to the severity of the people's economic and welfare problems that must also be addressed.<sup>411</sup>

The MPR ratified the Constitutional amendment on the presidential election in the plenary meeting on 9 November 2001. It postponed the provisions on the presidential election's second round and early presidential elections until the MPR 2002 annual session.<sup>412</sup>

### VII.3.8 The requirements for the presidential candidate

This section sets out the debate regarding a presidential candidate's requirements, including whether they should be a native Indonesian.

Along with the discussion on the procedure of the presidential election, PAH I also debated the requirements to become a president. The original text of the 1945 Constitution states that the President should be a native Indonesian (*Presiden ialah orang Indonesia asli*).<sup>413</sup> In the enclosures of MPR Decree No. IX/2000, the term *asli* (native) from the original text had been omitted and replaced by a phrase, stating: "Indonesian citizen from his/her birth and never having accepted another citizenship out of his/her own will."

Several members asserted that the term *asli* is discriminative and violates several human rights whilst Indonesia is developing a modern nation state. There should be no more debates on the term *asli*.<sup>414</sup> Instead, the Constitution should stipulate other presidential requirements, such as the minimum age, clean criminal record (except for political crimes), and mental and physical health.<sup>415</sup> Another member asserted that in principle all factions agreed that the term *asli* causes problems. Thus, the MPR Working Body's draft requirements were accepted, as they were, moreover, similar to the Team of Experts' recommendations.<sup>416</sup>

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410 As asserted by Ishak Latuconsina (F-TNI/Polri). *Ibid.*, pp. 650, 658.

411 As stated by Hamdan Zoelva (F-PBB). *Ibid.*, pp. 653-654.

412 In the event that both the positions of president and vice president would be vacant simultaneously, the MPR did not manage to come up with a solution, and left the options as described in the enclosures of MPR Decree No. XI/2001 to be resolved in the next MPR 2002 annual session. See Attachment VII.6.

413 Article 6, section (1) UUD 1945 before amendment.

414 As asserted by I Dewa Gede Palguna (F-PDIP), Asnawi Latief (F-PDU) and Sutjipto (F-UG). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 279, 281. As also asserted by Frans F. H. Matrutty (F-PDIP). *Ibid.*, p. 289.

415 As stated by Sutjipto (F-UG). *Ibid.* p. 281.

416 As argued by Lukman Hakim Saifuddin (F-PPP). *Ibid.*, p. 282.

In the discussion, several committee members argued that the Founding Fathers used the term *asli* to prevent a foreigner from suddenly becoming president at a time when Indonesia was still under foreign rule. Nevertheless, the discriminatory connotation should be eliminated.<sup>417</sup> Another member reiterated that the term *asli* is not relevant and discriminative, as even Gus Dur had admitted he is of Chinese descent. Regarding the health requirement, the member reminded that Roosevelt ran for president while in a wheelchair. Hence, one should be careful in determining the requirements.<sup>418</sup> Correspondingly, other members proposed that it be sufficient if the Constitution require citizenship, whereas other requirements may be governed by law.<sup>419</sup>

In the small team meeting on 11 September 2001, one member proposed that other presidential requirements could be better stipulated by law, since they are abstract and lack a clear delineation.<sup>420</sup> However, another disagreed, since the requirements of age, mental and physical health, a clean criminal record, and no acts of treason should be included in the Constitution. The committee should not give too much space to the law, because it could easily be manipulated, as had happened in the past.<sup>421</sup> Likewise, another member emphasized that the presidency is a high state institution, but also a position that the Constitution should regulate as clearly as possible.<sup>422</sup>

In accordance with the agreement in the previous amendment stage,<sup>423</sup> the factions agreed to amend Article 6 to become “Presidential candidates and vice-presidential candidates shall be an Indonesian citizen as of his/her birth and shall have never accepted another citizenship due to his/her own accord”. Furthermore, they added the requirement that the candidate should have never committed an act of treason against the state and be mentally and physically capable of executing the duties and obligations as President and Vice President.<sup>424</sup>

On 9 November 2001, new constitutional provisions regarding the criteria for presidential candidate were ratified as the Constitution’s Article 6.

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417 As explained by Andi Najmi Fuady (F-KB). *Ibid.*, p. 283.

418 As stated by J.E. Sahetapy (F-PDIP). *Ibid.*, p. 285. Gus Dur (Abdurrahman Wahid) claimed that he is the descendant of a Chinese. Sahetapy also said that Franklin D. Roosevelt contracted the paralytic illness since 1921 at the age of 39. *Ibid.*

419 As proposed by Affandi (F-TNI/POLRI) and Lukman Hakim Saifuddin (F-PPP). *Ibid.*, p. 291.

420 As reiterated by Lukman Hakim Saifuddin (F-PPP). *Ibid.*, p. 317.

421 As argued by Soedijarto (F-UG). *Ibid.*, pp. 319, 323.

422 As emphasized by Sutjipno (F-PDIP). *Ibid.*, p. 325.

423 See Enclosures of MPR Decree no. IX/2000, 18 August 2000.

424 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 560, 617.

### VII.3.9 Elections and political parties as constitutional instruments for the circulation of power

During the second amendment stage, factions discussed the role of political parties in presidential and general elections. Factions agreed that political parties are the participants of the elections for members of the People's Representative Council and Regional People's Representative Council. Regarding presidential election, in general, factions agreed that the presidential candidates should be proposed by political parties. They also agreed that the elections should be held every five years in a direct, general, free, confidential, honest, and fair manner.<sup>425</sup>

Then, at the beginning of the 3rd amendment stage, PAH I asked the opinion of the Team of Experts. On 10 May 2001, the Team of Experts recommended simplifying the draft enclosed to MPR Decree no. IX/2000 (see Attachment VI.4) and affirming that the elections are held every five years in a direct, general, free, confidential, honest, and fair manner. Further, an expert proposed that regional heads should also be elected directly by the people to prevent fraudulent politics in the regional DPR.

Further, the Team of Experts proposed that individual candidates should also be allowed to compete for the legislative institutions at the national and regional levels besides political party candidates.<sup>426</sup> An expert, who chaired the drafting team for the Ministry of Home Affairs election laws, stated that it was feasible.

However, the proposal was not accepted well by F-TNI/Polri, which stated that individual candidates do not correspond with the principles of representation and reduce the function of political parties.<sup>427</sup>

Subsequently, the Team of Experts stated in a PAH I meeting on 22 May 2001 that it had changed its position on individual candidates and affirmed that individual candidates could only run for the Regional Representative Council, whereas the election of members of the DPR and the Regional DPRs would be for political parties only.<sup>428</sup>

In the PAH I Small Team meeting on 12 September 2001, PAH I confirmed that the candidates for president and vice president are nominated by political parties or coalitions of political parties participating in the elections before the election.<sup>429</sup> Subsequently, the Commission A meeting on

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425 See Attachment VI.4. Enclosures of MPR Decree no. IX/2000, 18 August 2000.

426 As conveyed by Maswadi Rauf. Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 472. The Ministry of Home Affairs formed a team to draft the new law for elections which was chaired by Ramlan Surbakti, a member of PAH I's Team of Experts.

427 As stated by Affandi (F-TNI/POLRI). *Ibid.*, p. 496.

428 As stated by Maswadi Rauf. *Ibid.*, p. 606.

429 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p.p. 337 – 400.



5 November 2001 agreed. Besides, no one objected that the participants of DPR and DPRD members' elections are political parties and participants in DPD members' election are individuals.<sup>430</sup>

Subsequently, Commission A's meeting on 7 November 2001 agreed that political parties can be participants in the elections for members of the People's Representative Council and the Regional People's Representative Council. Regarding the presidential election, all factions contended that the presidential candidates should be proposed by political parties. They also agreed that the elections be held every five years in a direct, general, free, confidential, honest, and fair manner.

The agreement was then reported to People's Consultative Assembly's plenary meeting on 8 November 2001.<sup>431</sup> On 9 November 2001, MPR plenary meeting agreed and ratified it as amendment to the Constitution.<sup>432</sup>

### VII.3.10 Checks and balances

This section sets out the debate concerning checks and balances, focusing on the Executive Branch, the Supreme Advisory Board, the Audit Board, and cabinet ministers. Most of the members of the Team of Experts argued that the establishment of checks and balances between the Supreme Court, DPR, and President was necessary to create a more democratic and credible system with a higher level of public accountability. For that reason, most experts preferred the first alternative MPR draft, which abolishes the Supreme Advisory Board (DPA – *Dewan Pertimbangan Agung*), since its existence violates the concept of branches of government and is useless.<sup>433</sup> Only one expert argued that the Supreme Advisory Council should be retained.<sup>434</sup> Further, the Team of Experts recommended the Audit Board (BPK – *Badan Pemeriksa Keuangan*) become a DPR instrument instead of an independent body. To create good governance and prevent nepotism, the President should have the DPR's approval to recruit cabinet ministers, ambassadors, the military commander, the military chief of staff, and the national police chief.<sup>435</sup> Regarding appointing cabinet ministers, the Constitution should stipulate that the President should take the DPR's

430 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 229 – 255.

431 *Ibid.*, pp. 617 – 618; 624.

432 *Ibid.*, p. 682.

433 As stated by Afan Gaffar of the Team of Experts. Likewise, Asnawi Latief (F-PDU) reiterated that even in France, the country which had the council that is cited in the Elucidation of UUD 1945, *Conseil d'État* had been abolished. See, *Ibid.*, p. 475. Factually, the Council d'Etat is alive and kicking.

434 As argued by Ismail Suny of the Team of Experts. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, pp. 547-548

435 As conveyed by Afan Gaffar. *Ibid.*, p. 394.

considerations into account. Previously, an expert had stated that if people elect the president, it will change the concept of presidential accountability. It would abolish the elements of the parliamentary system and introduce the presidential system. Further, it would strengthen the implementation of the separation of powers principle since state institutions are in an equal position and will offset each other.<sup>436</sup>

Commenting on this idea, several PAH I members asserted that requiring the DPR's consideration when appointing ministers is pointless, would complicate matters, and does not follow the presidential system.<sup>437</sup> Another member reminded the committee that a president in a presidential system has *freies ermesen* (discretionary power) and that the stipulation could lead to a legislative tyranny.<sup>438</sup> In response, the expert explained that what he proposed was a mechanism for recruiting ministers, not implementing their duties as in a presidential system, where the responsibility for carrying out tasks rests entirely with the President.<sup>439</sup> However, a member argued that the proposed procedure was too binding and inhibiting.<sup>440</sup> Another expert clarified that the initial proposal (that the President should have the DPR's approval when recruiting cabinet members) had been changed to taking into account the DPR's considerations, so that the President retains authority but its use is transparent.<sup>441</sup>

Previously, PAH I had drafted that the President exercises state governance under the Constitution as the head of state and government.<sup>442</sup> The Team of Experts, however, recommended that the chapter title be changed to "Executive Power". Within a presidential system there should be no division of authority between the President as the head of state and the head of government.<sup>443</sup> However, under the original Article 4, the president's government authority should be implemented according to the Constitution, which means that the President's authority is limited by the Constitution.<sup>444</sup> One PAH I member expressed his agreement with the Team of Experts' recommended phrase, arguing that separating the president's authorities as the head of state and government only occurs in a parliamentary system.

Further, he proposed that the Constitution's authority classification should follow the common terms introduced by Montesquieu (i.e., the exec-

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436 As conveyed by Jimly Asshidiqie. *Ibid.*, pp. 462 and 405.

437 As argued by Lukman Hakim Saifuddin (F-PPP), Affandi (F-TNI/Polri) and Ali Masykur Musa (F-KB). *Ibid.*, pp. 479, 496, 507.

438 As emphasized by Sutjipno (F-PDIP). *Ibid.*, p. 500.

439 As argued by Riswanda Imawan of the Team of Experts. *Ibid.*, p. 554.

440 As emphasized by Yusuf Muhammad (F-KB). *Ibid.*, p. 622

441 As elaborated by Suwoto Moeljo Soedarmo of the Team of Experts. *Ibid.*, p. 694.

442 As attached to MPR Decree No. IX/2000, in Chapter III on *Kekuasaan Pemerintahan Negara* (The Governing Powers of the State). See Attachment VI.4.

443 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 258.

444 As argued by Hobbes Sinaga (F-PDIP). *Ibid.*, p. 29.

utive, the judicial, and the legislative powers).<sup>445</sup> Other members asserted that the separation of powers is not as strict as envisaged by Montesquieu, because the president also has a role in the legislative and judicial branches, such as the granting of clemency, amnesty, rehabilitation, and abolition of certain laws.<sup>446</sup> Further, one of them reminded the committee to listen critically to the expert opinions because these contained political overtones.<sup>447</sup> In that regard, another member assumed that the Team of Experts followed the paradigm of the three branches of government, contending that the MPR should be categorized as a bicameral legislative institution.<sup>448</sup> In response, the PAH I chairman affirmed that the original phrase, *Kekuasaan Pemerintahan Negara* (The Governing Powers of the State) has a deeper meaning than the proposed changes, because the president also holds the right to grant clemency and propose a bill (especially a bill on the state budget), but that the Constitution regulated and restricted these rights.<sup>449</sup>

Eventually, PAH I agreed to keep the original title, *Kekuasaan Pemerintahan Negara* (The Governing Powers of the State), for Chapter III and the original Article 4.<sup>450</sup>

In a meeting on 5 November 2001, Commission A continued discussing the existence of the Supreme Advisory Board, but there remained differences of opinion whether to abolish the Supreme Advisory Board or maintain the Board with some revisions.<sup>451</sup> The meeting also discussed whether the formation or conversion of state ministries shall be regulated by law.<sup>452</sup> In the end, the Commission A meeting on 8 November 2001 agreed that the regulation is necessary and reported this on 9 November 2001 to the MPR Plenary meeting. Then, the MPR plenary meeting ratified the paragraph as an amendment to the Constitution.<sup>453</sup>

As for the Financial Audit Board, it was agreed and reported to People's Consultative Assembly plenary meeting on 8 November 2001 that the Audit Board should be an independent institution and the only state financial supervisory and audit agency.<sup>454</sup>

445 As proposed by Asnawi Latief (F-PDU). *Ibid.*, p. 260.

446 As stated by Baharuddin Arifonang (F-PG) and J.E. Sahetapy (F-PDIP). *Ibid.*, pp. 269, 270.

447 As reminded by J.E. Sahetapy (F-PDIP). *Ibid.*, pp. 269, 270.

448 As stated by Harjono (F-PDIP). *Ibid.*, p. 271.

449 *Ibid.*, pp. 309, 311.

450 *Ibid.*, pp. 313, 314.

451 In the enclosures of MPR Decree no. IX/MPR/2000 there were 2 alternatives on the Supreme Advisory Board. First was to abolish it and the second was to maintain it with revisions. See enclosures of MPR Decree no. IX/MPR/2000

452 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 144 – 177.

453 *Ibid.*, p. 688.

454 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 625.

### VII.3.11 The Regional Representative Council or DPD (Dewan Perwakilan Daerah)

This section sets out the debate on the role and powers of the Regional Representative Council (DPD), which were eventually ratified as including the following actions within the House of Representatives (DPR): proposing bills relevant to regional matters, discussing financial bills relevant to regional matters, and supervising and implementing laws regarding regions.

The Team of Experts differed on the draft detailing the provisions for The Regional Representative Council (DPD), which had been prepared by PAH I and was attached to MPR Decree No. IX/2000. The Group considered that it suggested a weak bicameral system. As shown in the Team of Experts proposals from 7 March 2001, the group regarded The Regional Representative Council as part of the bicameral legislative institution, a system that must be viewed critically because of the history of regional upheavals (see VII.3.1). Thus, in a PAH I meeting on 29 March 2001, the Team of Experts again detailed their recommendations on various alternatives in the Enclosures of MPR Decree No. IX/2000. The Team recommended that the MPR should be an incidental forum of the DPR and the Regional Representative Council within a strong bicameral system.<sup>455</sup>

In this context, one PAH I member stated that, although the Regional Representative Council might be understood as a weak bicameral system, a Regional Representative Council member is part of the MPR, which holds high authorities. Further, he questioned why the Expert Group highly recommended a Regional Representative Council with power equal to that of Parliament in a strong bicameral system. The fact that strong bicameralism is adopted by federal states is not a coincidence.<sup>456</sup> Another argued that a strong bicameral system would lead to a federal system.<sup>457</sup> Further, a strong Regional Representative Council seemed to imitate the system of the United States of America and it seemed that the Team of Experts wanted to change the state's form.<sup>458</sup>

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455 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 393.

456 As argued by the PAH I chairman as a F-PDIP member. *Ibid.*, p. 480. The weak bicameral system is defined as a two-chamber representative system, in which the power of the second chamber, the Regional Representative Council, is less than the power of the House of Representatives. The term 'bicameral system' does not apply to Indonesia in the strictest sense, being a dissection country with a unitary system, whereby there is need for representation of regionally specific interests at the national level. A monocalameral system is probably more appropriate with the people's representation in the hands of the DPR. In this context, members of the Committee as well as the Team of Experts referring to weak or strong bicameral system or 'pure' to 'revised' monocalameral system show the variety of opinions on this issue.

457 As stated by Hobbes Sinaga (F-PDIP). *Ibid.*, p. 489.

458 As stated by Ali Hardi Kiaidemak (F-PPP). *Ibid.*, p. 491.

By contrast, a F-PG member argued in support of the Team of Experts that a bicameral system could empower the regions, given that the unitary state is necessary for a highly heterogeneous society. The Regional Representative Council would then serve as a national institution to absorb regional aspirations. Indeed, the DPR holds legislative power and the Regional Representative Council holds certain limited authorities,<sup>459</sup> so the positions of the DPR representing the people and the Regional Representative Council representing the regions are unequal.<sup>460</sup>

One member of the Team of Experts clarified that the Regional Representative Council in a strong bicameral system is a representation-in-presence of the regional aspirations when making operational policies.<sup>461</sup> Another expert stated that during their regional visits, a strong Regional Representative Council was often demanded. Indonesia is a highly heterogeneous country, the expert continued, which led the Dutch colonial government to conclude that the right government system for the Netherlands Indies was a federal system. Since the federal system was used by the Dutch to divide the country, this system is still perceived as weakening the nation. However, the more heterogeneous a country, the more important it is to have a strong Regional Representative Council to accommodate regional interests.<sup>462</sup> Yet, another expert stated that 'weak bicameralism' belongs to a monocameral system, since it refers to two bodies with different tasks, while a bicameral system simply relates to two different chambers that undertake the same task.<sup>463</sup>

In response, the PAH I chairman reminded the Team of Experts to consider the original intent of establishing the Regional Representative Council. The Regional Representative Council, as discussed in PAH I, is not based on the academic concept of bicameralism. Instead, it is based on the comprehension that Indonesia is a nation-in-building, whereby the form of a unitary state creates and provides a *lebensraum* (common living space) for the heterogeneous nation. However, the chairman further asserted, the unitary form needs checks and balances and a mechanism to project the diverse aspirations of the regions, space, mountains, and lakes into the decision-making process at the national level. That is a political approach, and it differs from the theoretical approach in academic literature. However, if it is academically categorized as a weak bicameral system, the system must be adjusted to the theoretical bicameral system's requirements.<sup>464</sup>

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459 As argued by Agung Gunandjar Sudarsa (F-PG). *Ibid.*, p. 498. For example, the appointment of members of the Audit Board of Indonesia and to propose a bill on regional matters

460 As stated by Katin Subiyantoro (F-PDIP) and Yusuf Muhammad (F-KB). *Ibid.*, pp. 511, 621.

461 As argued by Ramlan Surbakti of the Team of Experts. *Ibid.*, p. 687.

462 As conveyed by Maswadi Rauf. *Ibid.*, p. 690.

463 As stated by Suwoto Moeljo Soedarmo. *Ibid.*, p. 696.

464 As stated by the PAH I chairman. *Ibid.*, p. 697.

One member added that the Regional Representative Council members are elected by the people, an enhancement of the Regional Delegations in the previous MPR who were elected by the provincial DPR. Previously, diversity was suppressed in the name of national unity. As a result, the sense of togetherness was violated. The unitary state has been associated with suppression and injustice. The amendment should lead to improvement based on the unitary state concept, providing one living space that is shared by the pluralistic Indonesian people. In that respect, the Regional Representative Council would strengthen regional autonomy and build checks and balances between the executive, legislative, and judiciary, the central and regional government, and the people and state. The Regional Representative Council would also confirm the unitary state and people's sovereignty principles, in which the source and the holder of the sovereignty are the people, not the territory.<sup>465</sup> Likewise, another member asserted that the Team of Experts wanting to change the second amendment outcomes was irrelevant. The priority was developing good governance for supporting regional autonomy and democratization in the context of the Unitary State of the Republic of Indonesia.<sup>466</sup>

The Team of Experts, however, preferred to implement a strong bicameral system because of Indonesia's heterogenous society. A strong bicameral system is not identical to a federal state. The Netherlands and the United Kingdom are two unitary states with a strong bicameral system.<sup>467</sup> The Regional Representative Council should represent local interests and politics, while the DPR represents national insights and politics. Therefore, the DPR's and Regional Representative Council's law-making functions should not be differentiated.<sup>468</sup> Strong bicameralism could be perceived as an attempt to strengthen the unitary state. Experiences during *Orde Baru* (New Order) show that the central government's domination led to serious regional turbulences, the consequences of which persist to this day.<sup>469</sup> There are two philosophies behind the promotion of strong bicameralism: a checks and balances philosophy to control the law-making process and the degree of representativeness philosophy to absorb the aspirations of a highly fragmented society. In this system, each institution can veto each other.<sup>470</sup>

Likewise, another expert argued that to ensure the just and effective representation of the people and regions in political decision-making, a people's representation system should be implemented in a bicameral

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465 As stated by Katin Subiyantoro (F-PDIP). Ibid., p. 729.

466 As asserted by Happy Bone Zulkarnain (F-PG). Ibid., p. 738.

467 As stated previously by, among others, Soewoto Moeljo Soedarmo and Maswadi Rauf that a unitary state can apply strong bicameralism. Ibid., pp. 529, 530-531.

468 As stated by Soewoto Moeljo Soedarmo. However, Maswadi Rauf admitted that the national council is still an idea that has not been agreed. See Ibid., pp. 529-532.

469 As stated by Maswadi Rauf. Ibid., p. 531.

470 As argued by Afan Gaffar. Ibid., p. 534.



system, with both chambers holding an equal position. Further, according to the latest trends, its empirical (not formal) form is relevant in viewing a federal or unitary state. The formal form could be a unitary state with a spirit of federalism with broad autonomy. What is important is the need for representing regional interests. Geopolitically, Indonesia needs a unitary state. Socio-culturally, Indonesia needs federalism, i.e., broad autonomy.<sup>471</sup>

During the 25th PAH I meeting on 6 September 2001, a member reiterated that no unitary state in the world, whether Japan, the United Kingdom, or Canada, applies a strong bicameral system. A political system should be congruent with the political culture, another member emphasized.<sup>472</sup> Another member argued that the term 'representatives' is associated with a bicameral system.<sup>473</sup>

In the following PAH I meeting on 7 September 2001, a member reminded the committee that the basic idea of the Regional Representative Council reflects the agreement that the People's Consultative Assembly consists of elected DPR and Regional Representative Council members. The representation system is based on bicameralism principles, where the bicameral system provides clear assurances of existing checks and balances between the institution representing the people's interests and the institution representing the regional interests. On those grounds, the Team of Experts' recommendations were acceptable. For example, the Regional Representative Council should also be entitled to propose bills to be processed to become law and not only to propose the draft of bills to the DPR. However, the Regional Representative Council's legislative authority is limited to the areas explicitly mentioned in the MPR Working Body's draft.<sup>474</sup> Regarding the Regional Representative Council's role in the law-making process, the Regional Representative Council should not only hold the right to extend considerations to the DPR relative to the bills, but also participate in the debates. Thus, the Regional Representative Council's role should expand, e.g., it should have the right to propose the dismissal of the MPR's president. In the current drafts, the Regional Representative Council's law-making authority was limited.<sup>475</sup>

471 As argued by Ramlan Surbakti. *Ibid.*, pp. 539-540.

472 As stated by Soedijarto (F-UG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 179.

473 *Ibid.*, p. 251. As proposed by Frans Matrutty (F-PDIP), the DPD (*Dewan Perwakilan Daerah* – The Regional Representative Council) should be replaced by the DUD (*Dewan Utusan Daerah* – Regional Delegations Council). However, most PAH I members refused the abbreviation of 'DUD', because it sounds like 'dude' (dandy). What is important, the members asserted, are the contents and meaning, not the name.

474 These limited areas included regional autonomy, the relationship between the central government and the regions, the formation, division, and merging of a region, the management of natural and other economic resources, and the financial balance between the central government and the regions.

475 As stated by Theo L. Sambuaga (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 83-85.



Another member reminded the committee that although the Regional Representative Council's authority is not equal to the DPR's, the differences are not too obvious.<sup>476</sup> A F-PPP member stated that the DPR and Regional Representative Council have essentially the same function, with the Regional Representative Council also holding legislative, budgeting, and controlling functions. Therefore, it should have the right to propose bills. However, the Regional Representative Council should not be able to submit a petition to dismiss the president.<sup>477</sup>

A F-KB speaker stated that the MPR Working Body draft was adequate.<sup>478</sup> In addition, a F-PDIP member asserted that the question was not whether Indonesia has a bicameral representation system, whereby the Regional Representative Council is like a Senate. A senator holds broad authorities because the state is the source of sovereignty, a small portion of which is delegated to the federal government. The amendment is based on the agreement to uphold the unitary state. In previous MPR Working Body discussions, the term bicameral was never raised until it appeared in the Team of Experts manuscript.<sup>479</sup> Furthermore, F-TNI/Polri contended that the formulation, drafted by the MPR Working Body, had considered the balance between the unitary state and regional interests, in which the DPR forms the system's core. From its birth, Indonesia has been a unitary state where the Regional Representative Council balances the regional interests for the sake of the unitary state.<sup>480</sup>

Likewise, a F-PDIP speaker pointed out that forming a Regional Representative Council starts from DPR and Regional Delegations members in the MPR, since the delegations of functional groups and the Armed Forces and Police would cease to exist. To prevent the regional delegations from becoming idle and to give them weight,<sup>481</sup> the delegation is transformed into a state institution that holds specific tasks, whereby its members also become MPR members. PAH I never talked about a bicameral system. Whereas the Regional Representative Council's name is misleading, the Team of Experts indeed started from the bicameral idea. PAH I should keep up the idea that had been developed. In the first amendment stage, PAH III had positioned the DPR as the cornerstone in the law-making process. For that reason, the Regional Representative Council could submit bills to the DPR, but its role should be limited to consultation.<sup>482</sup> Likewise, a F-PDU

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476 As stated by Sutjipto (F-UG). *Ibid.*, p. 86.

477 As stated by Lukman Hakim Saifuddin (F-PPP). *Ibid.*, p. 91. According to the first amendment, Article 20 section (1) of UUD 1945 stipulates that DPR shall hold the authority to establish laws and section (2) stipulates that each bill shall be discussed by DPR and the President to reach joint approval.

478 As stated by Erman Suparno (F-KB). *Ibid.* p. 88.

479 As argued by I Dewa Gede Palguna (F-PDIP). *Ibid.*

480 As stated by Affandy (F-TNI/Polri). *Ibid.*, p. 92.

481 Originally, they only worked when there was an MPR session.

482 As argued by Harjono (F-PDIP). *Ibid.*, pp. 97-99.

member stated that, in law-making, the Regional Representative Council may give its opinion but has no voting right.<sup>483</sup>

However, another member denied that the bicameral topic was never raised before. F-PG had proposed that the MPR's structural basis consist of the DPR and Regional Representative Council, based on bicameralism. That members disagreed with or contradicted the notion does not mean that the idea was never discussed. Furthermore, it does not have to be labelled a 'bicameral' system. It is wrong to assume that the bicameral concept must reflect the system in the United States, the UK, or the Netherlands. Therefore, when discussing a bicameral system, one should not immediately associate it with particular group interests (the "Trojan horse") and especially not with the idea of a federal state.<sup>484</sup>

In that regard, another member argued that the idea indeed reflected bicameralism, so the next question was whether a strong or weak bicameral system was intended.<sup>485</sup> However, a F-PDIP member urged reference to the original intention to empower the MPR's Regional Delegations and to accommodate regional aspirations properly at the national level. In that respect, the MPR Working Body draft was adequate and had shown significant progress.<sup>486</sup> Another F-PDIP member pointed out that, under the first amendment, the president and the DPR can initiate bills. With that in mind, the Regional Representative Council could also propose a bill.<sup>487</sup> Eventually, it became clear that all factions rejected strong bicameralism but differed on the Regional Representative Council's authority.

### *VII.3.11.1 Disagreement Persists – Small Team Discussions*

At that point, the meeting's chairman suggested to PAH I to continue the discussion in a small team to try and formulate a conclusion.<sup>488</sup> In the small team meeting, F-PBB argued that the Regional Representative Council should be given the right to submit bills and participate with voting rights in the law-making process. However, F-PDU and F-PDIP disagreed because the Regional Representative Council would then be equal with the DPR, which holds legislative authority.<sup>489</sup> By contrast, F-KB and F-PPP argued that the Regional Representative Council should hold the right to submit bills (on natural and other economic resources) since the DPR is not a superior body and both the Regional Representative Council and DPR are elected by the people.

483 As stated by Asnawi Latief (F-PDU). *Ibid.*, p. 101.

484 As stated by Theo Sambuaga (F-PG). *Ibid.*, pp. 102-103.

485 As stated by Patrialis Akbar (F-Reformasi). *Ibid.*, p. 105.

486 As stated by Katin Subiyantoro (F-PDIP). *Ibid.*, p. 107.

487 As stated by Harjono (F-PDIP). *Ibid.*, p. 108.

488 The meeting was chaired by Slamet Effendy Yusuf, vice PAH I chairman. *Ibid.*, p. 109.

489 As argued by Hamdan Zoelva (F-PBB), Asnawi Latief (F-PDU) and Katin Subiyantoro (F-PDIP). *Ibid.*, pp. 112, 113.

F-PG wondered what the Regional Representative Council could do if they disagreed on certain issues, and whether appealing to the MPR as a joint session between the DPR and the Regional Representative Council would be a solution. Another member asserted that this limited Regional Representative Council authority should include the rights related to the discussion of that legislation.<sup>490</sup> Likewise, F-TNI/Polri and F-PDU argued that the Regional Representative Council should have the right to vote on draft legislation, although this should be stipulated in law, not in the Constitution.<sup>491</sup> However, F-PDIP disagreed, since the DPR holds law-making authority and this would change its foundation.<sup>492</sup>

Regarding concerns that the Regional Representative Council could gain special autonomy (e.g., as in Nanggroe Aceh) or in the more extreme case, ask for secession, a member guaranteed that this is unlikely to happen because the people's regional representatives would fight for local interests within the national political framework. Furthermore, the political parties would not propose Regional Representative Council candidates who do not defend the unitary state.<sup>493</sup> However, another member warned that Regional Representative Council elections are on an individual basis, so a non-political party candidate with relatively more funding could win a seat.<sup>494</sup> Nevertheless, worries should be assuaged, since the total Regional Representative Council membership should not exceed 1/3 of the MPR membership, and every province will have MPR representation through the DPR and Regional Representative Council.<sup>495</sup> However, if aspirations became uncontrollable, PAH I must return to the Regional Representative Council's original intention, namely to substitute the Regional Delegations in the old-style People's Consultative Assembly.<sup>496</sup>

### *VII.3.11.2 Article 22D – Initially Not Approved*

It soon became clear that PAH I members had not agreed on whether the Regional Representative Council should have voting rights in the law-making process.<sup>497</sup> Factions in PAH I preferred broad autonomy and the regional devolution of effective authorities coupled with a weak type of bicameralism rather than a strong bicameral system.

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490 As stated by Theo Sambuaga (F-PG) and Amidhan (F-PG). *Ibid.*, pp. 119, 121.

491 As stated by Affandi (F-TNI/Polri) and Asnawi Latief (F-PDU). *Ibid.*, p. 122.

492 As stated by I Dewa Gede Palguna (F-PDIP). *Ibid.*, pp. 115, 120.

493 As stated by Theo Sambuaga (F-PG). *Ibid.*, pp. 128-129. Later, following the Peace Agreement signed in Oslo on August 15, 2005, Nanggroe Aceh was granted special autonomy status and ended the long rebellion in Aceh that had taken lots of casualties.

494 As reminded by Soedijarto (F-UG). *Ibid.*, p. 131.

495 As stated by Lukman Hakim Saifuddin (F-PPP). *Ibid.*, p. 130. The MPR is assumed to hold the authority with regard to the changes of the Constitution.

496 As stated by Katin Subiyantoro (F-PDIP). *Ibid.*, p. 131.

497 Soedijarto (F-UG) for instance affirmed that the Regional Representative Council has no voting rights, but on the contrary Lukman Hakim Saifuddin (F-PPP) asserted that the Regional Representative Council should have voting rights. *Ibid.*, p. 134.

Eventually, in the MPR Working Body meeting on 23 October 2001, PAH I reported that the following article regarding The Regional Representative Council was not yet confirmed.<sup>498</sup>

On Article 22D:

(1) The Regional Representative Council may propose bills to the DPR which are related to regional autonomy, the relationship between central and local governments, formation, expansion and merging of regions, management of natural resources and other economic resources, and which are related to the financial balance between the centre and the regions.

(2) *Alternative 1:*

The Regional Representative Council gives its considerations to the DPR on the bills which are related to regional autonomy, the relationship between central and local governments, formation, expansion and merging of regions, management of natural resources and other economic resources, and the financial balance between the centre and the regions.

*Alternative 2:*

The Regional Representative Council participates in discussions on the bill of the State Budget, and the bill related to taxation, education, religion, regional autonomy, relationship between central and local governments, formation, expansion and merging of regions, management of natural resources and other economic resources, and the financial balance between the centre and the regions and to give considerations to the DPR on the bills on the State Budget and the bills related to taxation, education and religion.

(3) *Alternative 1:*

The Regional Representative Council may conduct supervision of the implementation of laws regarding regional autonomy, formation, expansion and merging of regions, the relationship between central and local governments, management of natural resources and other economic resources, the State Budget, taxation, education, and religion and to convey the result of the supervision to the DPR for consideration and follow-up.

*Alternative 2:*

The Regional Representative Council may conduct supervision of the implementation of laws regarding regional autonomy, formation, expansion and merging of regions, the relationship between central and local governments, management of natural resources and other economic resources, the State Budget, taxation, education, and religion.

(4) –

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498 Ibid., pp. 555-556.

(5) *Alternative 1:*

The Regional Representative Council may submit a proposal on the dismissal of the President and the Vice President to the People's Consultative Assembly based on the violation of laws, treason, corruption, bribery, moral turpitude, or if he/she no longer qualifies as the President and the Vice President.

*Alternative 2:*

(This section is not necessary).

(6) *Alternative 1:*

The petition for dismissal of the President and the Vice President requires the approval from at least 2/3 of the members attending the meeting, which requires a quorum of at least 2/3 of the members.

*Alternative 2:*

(This section is not necessary).

The MPR Working Body approved the report and submitted it to the MPR's plenary meeting. In the MPR plenary meeting of 4 November 2001, factions stated their respective views on the report. F-KKI suggested that the change from a unicameral to bicameral system should be studied further. F-KKI thought that if people directly elected the DPR and Regional Representative Council members, then the Regional Representative Council is not only a complementary part to the DPR.<sup>499</sup> F-TNI/POLRI reminded the committee that changes should be examined seriously, to avoid confusion in the governance system.<sup>500</sup> F-PDU and F-UG did not have any further comments on this topic.<sup>501</sup>

In a Commission A meeting on 5 November 2001, F-KKI defended the old MPR concept by reiterating that including regional delegations and functional groups in the People's Consultative Assembly means that all people and interest groups are represented.<sup>502</sup> On the other hand, some factions affirmed that the Regional Representative Council should only present its views but not participate in the discussions of bills. Accordingly, it should not have the right to propose an impeachment of the president and vice president.<sup>503</sup> However, other factions again argued that the Regional Representative Council should participate in law-making discus-

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499 As conveyed by S. Massardy Kaphat (F-KKI). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat., Edisi Revisi, Sekretariat Jenderal, 2010, p. 31.

500 As stated by K. Tunggul Sirait (F-PDKB), Mochtar Naim (F-PBB), Paiman (F-TNI/Polri), Soenmandjaja (F-Reformasi), Syarif M. Alaydrus (F-KB), Nurdahri Ibrahim (F-PPP), Baiq Isvie Rufaeda (F-PG) and Pataniari Siahaan (F-PDIP). *Ibid.*, pp. 32, 52, 56, 61.

501 *Ibid.*, pp. 27-29, 53-56. However, F-UG stated that the MPR should not consist only of people's representatives which are elected by the people such as the DPR, but should also include the delegations of interest groups. See *Ibid.*, p. 54.

502 As asserted by F.X. Soemitro (F-KKI). *Ibid.*, p. 191.

503 Soedijarto (F-UG), Rodjil Gufron (F-KB), Ishak Latuconsina (F-TNI/Polri), L.T. Soetanto (F-KKI). *Ibid.*, pp. 191, 192.

sions, while F-TNI/Polri questioned the Regional Representative Council's formation's impact on the MPR's form.<sup>504</sup> F-PDIP added that the Regional Representative Council's job descriptions should be clear.<sup>505</sup> A F-PG member from Papua expressed appreciation for the Regional Representative Council as a new strategy to reorganize the nation and state with all its heterogeneity.<sup>506</sup> Further, one F-PDIP member<sup>507</sup> stated that the Regional Representative Council could try to solve the problem's symptoms and actual root, supporting the devolution of governance authorities. However, the committee should consider the problems holistically, recognizing all implications.<sup>508</sup> On the other hand, F-PDIP reiterated that the Regional Representative Council represents regions and should strive for regional (not political) interests, since it is the DPR that is the manifestation of people's sovereignty.<sup>509</sup>

A F-PG member reminded the committee that the draft amendment, including the presence of the Regional Representative Council, had been discussed and agreed by the MPR Working Body, where all factions were represented. Introducing the Regional Representative Council and DPR members as MPR members could balance the political system's proportional representation. The past imbalance had led to a sense of injustice and frustration, with some regions trying to secede from the Unitary State of the Republic of Indonesia. This was an attempt to overcome the challenges that had also been addressed through efforts of autonomy and decentralization. Therefore, the member asserted, the Regional Representative Council should participate in the discussions of bills.<sup>510</sup>

After this meeting concluded, factions were still divided over the establishment of the Regional Representative Council. To resolve the differences, Commission A agreed to hold an informal meeting.<sup>511</sup>

### VII.3.11.3 *Agreeing to form the Regional Representative Council*

As reported to the ensuing Commission A meeting on 8 November 2001, the informal meeting managed to agree on introducing the Regional Representative Council. The Commission A chairman asserted that the Regional Representative Council's existence does not represent a territory as a sovereign

504 As stated by Ahmad Sanoesi Tambunan (F-Reformasi), Amidhan (F-PG) and Suwitno Hadi (F-TNI/Polri). *Ibid.*, p. 193.

505 As stated by Harjono (F-PDIP). *Ibid.*, p. 211.

506 As stated by Ruben Gobay (F-PG). *Ibid.*, p. 206.

507 This member was from Papua and the former faction of Regional Delegations (F-UD).

508 As stated by Rodman Waba (F-PDIP). In the MPR 2000 annual session, F-UD was dissolved and its members were free to join other factions. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 207-208.

509 As stated by Hobbes Sinaga (F-PDIP). *Ibid.*, p. 213.

510 As insisted by Theo Sambuaga (F-PG). *Ibid.*, p. 215.

511 *Ibid.*, p. 226.

entity, but rather that sovereignty is in the people's hands. The Regional Representative Council will help absorb the diversities, heterogeneities, and local wisdoms in the national political process through a collectively owned national (rather than regional) institution. Further, the chairman reported that Commission A concluded that the Regional Representative Council may propose and participate in the discussions on bills related to the relationship between the central and local governments, the financial balance between the centre and the regions, and so forth. It would also be entitled to give its views on other bills, such as on the State Budget and taxation. This arrangement fits in the DPR's law-making authority context, so that the Regional Representative Council's participation should be perceived as a complement to the main structure.<sup>512</sup>

Subsequently, a small team was formed to conclude the Commission A meeting. Eventually, most of the factions accepted the draft produced by the small team, but questions remained. In the end, the process could not be brought to a rapid conclusion. F-TNI/Polri proposed that it should be clarified whether individuals or political party nominees are elected in the Regional Representative Council's election.<sup>513</sup> Then, a F-PDIP member noted that the new Regional Representative Council was confusing. It was neither weak, nor strong, nor quasi-bicameral. Therefore, the Regional Representative Council should be excluded from the draft. Instead, the Indonesian Armed Forces should again participate in the MPR.<sup>514</sup> Likewise, other members from F-KKI and F-PDIP urged to postpone the change and wait for the people's consent through a referendum, considering that Chapters I, II, and III contain the fundamental topics of the state's form and governance system.<sup>515</sup> A senior F-PDIP member explained that the 1945 Constitution's government system was a monocameral system through the MPR, one thoroughly considered by the Founding Fathers. The suggested changes altered the state governance system, while an amendment is intended to merely revise the articles.<sup>516</sup> Similarly, a F-UG member proposed that only fully agreed topics should be resolved, while topics still under discussion should be postponed until the grand design of systemic changes was completed.<sup>517</sup>

#### *VII.3.11.4 Agreement*

The remainder of the Commission A session saw continued debates on several topics. Eventually, the chairman called an informal meeting to find a solution.<sup>518</sup> The informal meeting was attended by Commission A's

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512 Ibid., p. 562.

513 As stated by Suwignyo Adi (F-TNI/Polri). Ibid., p. 572.

514 As stated by Dimiyati Hartono (F-PDIP). Ibid., p. 569.

515 As stated by F.X. Soemitro (F-KKI) and Amin Aryoso (F-PDIP). Ibid., pp. 573, 575.

516 As stated by Abdul Madjid (F-PDIP). Ibid., p. 579.

517 As proposed by Santoso Kismodihardjo. (F-UG) Ibid., p. 587.

518 Ibid., p. 608.



leadership and the factions' representatives, who successfully agreed on the following articles:<sup>519</sup>

- (1) The Regional Representative Council may propose bills to the DPR which are related to regional autonomy, the relationship between central and local governments, formation, expansion and merging of regions, management of natural resources and other economic resources, and which are related to the financial balance between the centre and the regions.
- (2) The Regional Representative Council participates in discussions on bills on the State Budget, and the bills related to taxation, education, religions, regional autonomy, relationship between central and local governments, formation, expansion and merging of regions, management of natural resources and other economic resources, and the financial balance between the centre and the regions and to give its views to the DPR on bills on the State Budget and bills related to taxation, education and religion.
- (3) The Regional Representative Council may conduct supervision of the implementation of laws regarding regional autonomy, formation, expansion and merging of regions, the relationship between central and local governments, management of natural resources and other economic resources, the State Budget, taxation, education, and religion and to convey the result of the supervision to the DPR for consideration and further actions.

Commission A reported the draft to the MPR plenary meeting on 9 November 2001. In the final statements, factions accepted the draft on the grounds that, as expressed by F-TNI/Polri, the Regional Representative Council represents the regions and strives for regional interests at the national level. Further, since the related provisions firmly and clearly distinguish the assignments of the DPR and the Regional Representative Council, addressing matters of legislation and the State Budget, the Regional Representative Council's presence will strengthen the Unitary State of the Republic of Indonesia.<sup>520</sup>

Ultimately, the MPR approved the draft as part of the third amendment of the 1945 Constitution.<sup>521</sup>

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519 Ibid., p. 623. Other parts of Chapter VIIA on the Regional Representative Council had been agreed earlier in the meetings of the Working Body of the MPR and the Commission A.

520 As conveyed by Ishak Latuconsina (F-TNI/Polri). Ibid., p. 650.

521 Ibid., p. 682. Later, in May 2002, a former member of the Politics Sub-Group of the Team of Experts, Nazaruddin Sjamsuddin, published a booklet *Mengapa Indonesia Harus Menjadi Negera Federasi* (Why Indonesia Ought To Be A Federal State), Penerbit Universitas Indonesia (UI-Press), May 2002. In this book, Sjamsuddin states that in general the form of a federal state may well fit Indonesia. Although some regions are satisfied with the unitary form, there are regions which desire to become a state. Therefore, the academic asserted, options should be open to the regions to choose unitarianism or federalism for the welfare of the people.

### VII.3.12 On Article 29 and the obligation to implement Islamic Sharia

This section sets out the debate on Article 29, which focused on the meaning of *kepercayaan*, whether the Constitution should affirm beliefs systems ‘outside’ mainstream religions, and whether there should be an obligation to implement Islamic Sharia on Indonesian Muslims through ‘the seven words’. It concludes that the third amendment stage could not agree on this topic, postponing it to the 2002 MPR annual session.

PAH I’s discussions on Article 29 were no different from the previous process. However, it is worth noting the idea of including a new section in Article 29: “The operation of the state must not be contradictory to the values, norms, and religious law”.<sup>522</sup> This idea implies that there is a level of obscurity, if not a conception, among the elites and political circles, where religion is positioned as part of the state’s formal-legal system.<sup>523</sup>

In that regard, K.H. Sahal Mahfudh, then the *Rois Am* (the Supreme Advisor) of the *Nahdlatul Ulama*, rejected formalizing Islamic law (*sharia*) and asserted that *sharia* should not be perceived as positive law.<sup>524</sup> For Kiai Sahal, Islamic law was not a standardized package, implemented from above in any situation and at any time. Kiai Sahal perceived Islamic Sharia as *fiqh*, comprehension that is always the result of *ijtihad*, independent reasoning, which is not rigid and sacred, but rather flexible and contextual.<sup>525</sup>

Similarly, prominent Islamic figures asserted their rejection of a formalistic and exclusive Islam during the 2000 amendment process. These included Abdurrahman Wahid, former chairman of *Nahdlatul Ulama* (NU) and the fourth president of Indonesia, Hasyim Muzadi, chairman of NU, Ahmad Syafii Maarif, chairman of Muhammadiyah, and Nurcholish Madjid. Further, they affirmed that Pancasila follows Muslim aspirations and is final.<sup>526</sup>

However, although the number of people in favour of inserting the *tujuh kata* (‘seven words’) in Article 29 was smaller than those against, and although the proposition was ready for balloting, the majority did not force the decision and opted for solution by deliberation.<sup>527</sup>

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522 As proposed by Komaruddin Hidayat from the Team of Experts and Rosnaniar (F-PG). See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2001, Buku Satu, p. 792.

523 This denotes that for some, the diversity of norms and laws exists in society.

524 See *Iftitah* speech of Rois Am KH. MA. Sahal Mahfudh at the opening of the National Conference of *Nahdlatul Ulama*, Surabaya, 27 July 2006.

525 See also, Akhmad Sahal, *Kiai Sahal dan Realisme Fikih*, *TEMPO Magazine*, edition of 24/2/2014.

526 *Suara Pembaruan*, newspaper, 7 August 2000. See also T.B. Simatupang, *Harapan, Keprihatinan, dan Tekad. Angkatan '45 Merampungkan Tugas Sejarahnya*. Inti Idayu Press, Jakarta, 1985, p. 114. T.B. Simatupang, a prominent Christian figure, former Chief of Staff of the Indonesian Armed Forces, stated that in a Pancasila-based country, religions are the source of the moral, spiritual, and ethical values of state operations.

527 As asserted by, among others, Lukman Hakim Saifuddin (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, op.cit., Tahun Sidang 2000, Buku Lima, pp. 444-445.

PAH I resumed discussions on Article 29 on 29 March 2001 with the Team of Experts. On this topic, the experts proposed maintaining section (1) and deleting the term *kepercayaan* (the belief) from section (2). They argued that the term *kepercayaan* is often misinterpreted and confusing.<sup>528</sup> On that proposal, none of the factions moved from their respective positions as expressed during the second amendment stage (see VI.2.3.9). F-PDIP, for example, appealed to maintain the term *kepercayaan* because of its historical value. F-PDIP reminded the committee not to neglect the millions of people who adhere to some sort of belief that cannot be classified as a certain religion.<sup>529</sup> However, F-KB believed that *kepercayaan* should be understood as beliefs held in religion, not as beliefs that are outside of religion.<sup>530</sup> A F-PG member argued that the debate on *kepercayaan* was not about language ambiguity, but about controversial content. He argued that *kepercayaan* is a splinter group of a religion, which is not equal to and should not be recognized as a religion, but rather as a cultural phenomenon. Accordingly, the government should facilitate a return for these splinter groups to their respective original religions.<sup>531</sup>

Responding to these views, an expert stated that omitting the term *kepercayaan* from Article 29 (2) was not intended to eliminate these groups. The new Article 28E (2) would serve as an umbrella to their existence as well as Articles 28J (1) and (2). The change in Article 29 (2) was solely intended to clarify the formulation.<sup>532</sup> Yet, a F-PDIP member asserted that the original Article 29 should be maintained. The member warned that any change to Article 29 would bear serious and direct consequences to the cohesiveness of the nation and nation-state.<sup>533</sup> However, F-PG, F-PPP, F-PDU, and F-UG argued that the term *kepercayaan* should be removed from the second section of Article 29, so that section (2) becomes “The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to

528 As stated by Azyumardi Azra. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 342.

529 As reminded by I Dewa Gede Palguna (F-PDIP). *Ibid.*, p. 428.

530 As stated by Andi Najmi Fuady (F-KB). *Ibid.*, p. 427.

531 As argued by Amidhan (F-PG). *Ibid.*, pp. 434-435.

532 As conveyed by Nasaruddin Umar. *Ibid.*, p. 443. Article 28E (2) states “Every person shall have the right to be free to adhere his/her faith (*kepercayaan*), and to express his/her views and thoughts, in accordance with his/her conscience.” Article 28J (1) states “Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state.” Article 28J (2) states “In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.”

533 As asserted by Katin Subiyantoro (F-PDIP). *Ibid.*, p. 731.

his/her religion.”<sup>534</sup> Conversely, F-KB proposed that Article 29 (2) should state “The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to the belief (*kepercayaan*) of his/her religion.”<sup>535</sup>

An expert then pointed out that Indonesia was not established as a theocratic state. The state’s role is to protect and facilitate, rather than regulate individual religious behaviour. The Team of Experts agreed with that formulation of the state’s role. Further, it proposed adding a third clause, stating “State operations must not contradict the values, norms, and religious laws.”<sup>536</sup>

This issue attracted serious public attention during the second amendment stage.<sup>537</sup> There were communities who supported including the “*tujuh kata*” (the ‘seven words’) in the Constitution,<sup>538</sup> while others rejected this.<sup>539</sup> As stated by Madjid, to return to the ‘seven words’ in the Jakarta Charter meant confirm a formalistic and exclusive Islam.<sup>540</sup> Meanwhile, certain regions stated that they would secede from Indonesia if the ‘seven words’ were included in the Constitution.<sup>541</sup>

This situation was exploited by those who are anti-amendment. They blamed the amendments for reopening the sensitive ‘seven words’ issue that could divide the nation. Under these circumstances, the pressure strengthened to cease the amendment efforts and reactivate the original 1945 Constitution.

However, although the number of people in favour of inserting the *tujuh kata* (‘seven words’) in Article 29 was smaller than those against, and

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534 As stated by Happy Bone Zulkarnain (F-PG), Zain Bajeber (F-PPP), Asnawi Latief (F-PDU) and Soedijarto (F-UG). *Ibid.*, pp. 738, 742. The original text of Article 29 (2) is “The State guarantees all persons the freedom to embrace his/her religion and to worship, each according to his/her religion or belief.”

535 As stated by Andi Najmi Fuady (F-KB). *Ibid.*, p. 755.

536 As conveyed by Komaruddin Hidayat. *Ibid.*, p. 792.

537 In the society, there are still those who want to put back the “*tujuh kata* (‘seven words’) – the obligation to implement Islamic law for its adherents”, as stated in the Jakarta Charter and written in the draft Article 29 of the Constitution which was discussed at the PPKI meeting on 18 August 1945. As discussed at the beginning of the PPKI meeting, PPKI agreed to replace “*tujuh kata* – the seven words”, with “Belief in One and Only God (*Ke-Tuhanan yang Maha Esa*)” (see II.2. above).

538 This included DDI (*Dewan Dakwah Indonesia* - Indonesian Da’wah Council), HMI (*Himpunan Mahasiswa Islam* – The Islamic Student Association), FMI (*Front Mahasiswa Islam* – Islamic Students Front), FPI (*Front Pembela Islam* – Islam Defender Front), PII (*Pelajar Islam Indonesia* - Indonesian Islamic Students), GPPI (*Gerakan Pemuda Islam Indonesia* – The Indonesian Islamic Youth Movement), *Hizbuth Tahrir* (Liberation Party) and others.

539 This included Nurcholish Madjid, the Rector of the University of Paramadina, K.H. Hasyim Muzadi, the Chairman of *Nahdlatul Ulama*, Ahmad Syafii Maarif, the Chairman of *Muhammadiyah*, and Gunawan Muhammad, a prominent cultural figure.

540 See above p. 182. See also *Media Indonesia*, newspaper, 7 August 2000.

541 *Suara Pembaruan*, newspaper, 10 August 2010.

although the proposition was ready for balloting, the majority did not force the decision and opted for solution by deliberation.<sup>542</sup>

Until the end of the 2001 annual session, PAH I did not force drawing any conclusions regarding Article 29. Accordingly, in the report to the MPR Working Body meeting on 23 October 2001, PAH I did not include any proposals on Article 29. Thus, Article 29 was not discussed in the subsequent Commission A meetings or in the MPR plenary meeting at the end of the MPR 2001 annual session. Eventually, the MPR postponed Article 29 discussions until the MPR 2002 annual session through MPR Decree No. XI/2001, stipulating that the amendment process will be continued and completed during the 2002 session.

### VII.3.13 Education – the discussion on Article 31

On 27 February 2001, the Team of Experts was formed.<sup>543</sup> Then, from March to July 2001, PAH I discussed the draft amendments with the Groups of Experts, including Chapter XIII on Education.<sup>544</sup> An expert stated that, in defining the goals of national education, we should adhere to the foundation of a national state and a welfare state. It should also be clear the difference between teaching and education. Further, this chapter needs to contain the rights of citizens to obtain education and government's obligation to organize a national education system regulated by law. Furthermore, the implementation of the education system must be based on the principles of plurality, non-discrimination, democracy, and national unity.<sup>545</sup>

In response, a member of PAH I from F-UG underlined that it is the government who is fully responsible for organizing and financing education.<sup>546</sup> Another member from F-UG added that the budget allocation for education should be pegged at 20% of the state budget.<sup>547</sup>

Responding to the opinion, an Expert stated that he agreed with F-UG, that there should be no dichotomy between education and teaching. The two are complementary to each other. The Expert also agreed with F-UG regarding the government's responsibility towards the education budget. The Expert also understood F-UG's opinion on uniting culture and education, but with the understanding that culture is the umbrella for education and the basis for implementing education.<sup>548</sup>

542 As asserted by, among others, Lukman Hakim Saifuddin (F-PPP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Lima, pp. 444-445.

543 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 272.

544 See VI.2.2.1.

545 Stated by Dr. Willy Toisuta. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op. cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p.p. 315, 343.

546 Stated by Soedijarto (F-UG). *Ibid.*, p. 358.

547 Stated by Sutjipto (F-UG). *Ibid.*, p. 367.

548 Stated by Prof. Dr. Wuryadi of Team of Experts. *Ibid.* p. 791.

Due to time constraints, PAH I had not had time to discuss this topic further and reported it as it was at the Commission A meeting on 8 November 2001.<sup>549</sup>

However, Commission A also did not have time to discuss further the education draft reported by PAH I.<sup>550</sup>

### VII.3.14 Pancasila as the foundation of the state

This section sets out the debate on whether to include Pancasila in the Constitution, with no agreement being reached during the third amendment stage.

The Team of Experts stated that after in-depth discussions, they supported incorporating Pancasila in the Constitution's articles without detailing its principles, particularly because the term Pancasila is not used in the Preamble. However, they acknowledged that if it would be included in the articles, Pancasila could become an object of alteration.<sup>551</sup>

In response, a F-PBB member reminded the committee that the topic had been debated at length in PAH I (see VI.2.3.10). If Pancasila should not be an object of change, it should remain in the Preamble.<sup>552</sup> However, a member of the Team of Experts reiterated in the PAH I meeting on 24 April 2001 that since the term Pancasila is never mentioned in the Constitution, it must be incorporated in the body of the Constitution.<sup>553</sup> To prevent alterations, the Team of Experts suggested that amending the term Pancasila could be made more difficult by requiring a referendum. However, because the issue involves a complex ideology and philosophy, people who do not understand the term Pancasila might not be in favour of it. Therefore, it is up to PAH I to make the political decision on this issue.<sup>554</sup>

Accordingly, a F-PDU member affirmed that incorporating the state's foundation in a Constitutional article would be a setback, since it would make Pancasila an object for future revision.<sup>555</sup> However, F-UG argued that one should not worry about inserting the foundation of the state in the articles. It would not become an object of change because it is embedded in the unchangeable Preamble.<sup>556</sup> Likewise, F-PDIP confirmed that Pancasila should be included in a Constitutional article with the assertion that the state's foundation cannot be changed.<sup>557</sup>

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549 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 553.

550 *Ibid.*, pp. 615 – 627.

551 As conveyed by Jimly Asshidiqie. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 348.

552 As argued by Hamdan Zoelva (F-PBB). *Ibid.*, p. 360.

553 As stated by Afan Gaffar. *Ibid.*, p. 390.

554 As stated by Jimly Asshidiqie. *Ibid.*, p. 459.

555 As stated by Asnawi Latief (F-PDU). *Ibid.*, p. 476.

556 As argued by Sutjipto (F-UG). *Ibid.*, p. 510.

557 As stated by Soewarno (F-PDIP). *Ibid.*, p. 503.



Subsequently, in the PAH I meeting on 5 July 2001, the factions expressed their respective stances towards the opinion of the Team of Experts. F-PDIP and F-UG maintained that Article 1 (2) of UUD 1945 should contain a stipulation that the foundation of the state is *Pancasila*.<sup>558</sup> Conversely, F-PG, F-PDU, and F-TNI/Polri stated that Pancasila should not be in a Constitutional article, so that it remains a value inherent in the Preamble that cannot be changed.<sup>559</sup>

An expert then stated that F-PDIP's stance on including Pancasila in the articles contradicted its initial stance on maintaining the Preamble. The expert stated that incorporating the principles of Pancasila in the articles would mean revising the Preamble. The expert stated on that, on second thought, the Team of Experts agreed not to include Pancasila in the articles, so that the arrangement of the state's foundation is not subject to the Constitution's amendment rules.<sup>560</sup>

However, F-PDIP was not so easily convinced. One F-PDIP member reiterated that Pancasila as the state's foundation should be incorporated in the Constitution's articles.<sup>561</sup> Another F-PDIP member proposed preventing Pancasila from becoming an object of future change by categorizing it as a non-amendable article.<sup>562</sup> F-TNI/Polri changed its position by proposing a new clause in Chapter I, which states "The foundation of the state that is embodied in the fourth section of the Preamble of UUD 1945 is called Pancasila, the foundation of the state of the Republic of Indonesia."<sup>563</sup> Likewise, F-UG and F-PDKB insisted that the term Pancasila should be incorporated in a Constitutional article.<sup>564</sup>

Hereafter, the PAH I chairman remarked that the debate was neither about determining the state's foundation because all accepted that as inherent in the Constitution's Preamble. It was also not about incorporating the state's foundation in the Constitution's article, but about the desire of those who consider it important that Pancasila be not only ratified by history and the revolution, but also by incorporating it in an article of the Constitution.<sup>565</sup>

558 As expressed by Katin Subiyantoro (F-PDIP) and Soedijarto (F-UG). *Ibid.*, pp. 723-724, 746. Pancasila includes *Ketuhanan Yang Maha Esa* (Belief in One and only God), *Kemanusiaan Yang Adil dan Beradab* (Just and civilized humanity), *Persatuan Indonesia* (The unity of Indonesia), *Kerakyatan Yang Dipimpin oleh Hikmat Kebijaksanaan, dalam Permusyawaratan Perwakilan* (Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives), and *Keadilan sosial bagi seluruh Rakyat Indonesia* (Social justice for all of the people of Indonesia).

559 As conveyed by Happy Bone Zulkarnain (F-PG), Asnawi Latief (F-PDU) and Affandi (F-TNI/Polri). *Ibid.*, p. 736, 743, 758.

560 As stated by Suwoto Moeljo Soedarmo. *Ibid.*, p. 782.

561 As asserted by Frans Matrutty (F-PDIP). *Ibid.*, p. 807.

562 As proposed by Soewarno (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 96.

563 As conveyed by Affandi (F-TNI/Polri). *Ibid.*, p. 101.

564 As stated by Soedijarto (F-UG). *Ibid.*, p. 115.

565 *Ibid.*, p. 116.



PAH I did not manage to conclude this discussion and no further discussions on this topic took place during the third amendment stage.

#### VII.4 THE CONSTITUTIONAL COMMISSION

This section sets out the debate regarding establishing a Constitutional Commission, whose suggested roles ranged from assisting the MPR, taking over from the MPR and writing a new Constitution, and reverting to the original 1945 Constitution. Ultimately, Commission A deferred the decision for further discussion to the MPR Working Body.

As discussed previously, after the New Order's collapse, the debate heated up between those who wanted to replace the 1945 Constitution with a new constitution and those who wanted to reform the 1945 Constitution through amendment. The first group was mainly composed of students, university activists, and NGOs. The second group generally consisted of political parties, the military, and police as well as various mass organizations and students.

There was a third group who wanted to maintain the original 1945 Constitution. They consisted of conservative nationalists, certain retired military and police officers, and those who embraced totalitarian ideas or who were enchanted by the myth of the 1945 Constitution. They assumed that the 1945 Constitution was President Soekarno's most important legacy.<sup>566</sup> In their view, revising the 1945 Constitution should be limited only to editorial aspects, while its substance should be maintained (See VI.4.1).

Various NGOs and individuals, proponents of replacing the constitution, demanded that the MPR's ongoing amendment process be suspended.<sup>567</sup> They argued that MPR members could not make a democratic constitution, that they were not earnest and were concerned only with their respective short-term political interests. They noted that the two-year amendment process had not led to any significant changes. Therefore, an independent constitutional expert commission should draft a new constitution and submit it to the MPR for ratification. The MPR could only approve or reject the draft, and if rejected, a referendum should seek the people's opinion.

The third group found the opposite. They assumed that the amendment process had crossed a line. Moreover, F-PPP and F-PBB's proposal to insert *tujuh kata* ('the seven words')<sup>568</sup> in Article 29 convinced them that the amendment process should stop. The constitutional commission should

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566 *Tempo Online*, 3 November 1998.

567 See V.2.1.1.

568 The *tujuh kata* ('the seven words') come from the phrase "*dengan kewajiban menjalankan syariat Islam bagi pemeluk-pemeluknya*" (with the obligation to implement Islamic Sharia for its adherents).

undo the agreed-on changes, slow the process, and eventually stop the amendment. Notably, several members of F-PDIP, F-UG, F-KB, and other factions belonged to this group.<sup>569</sup> There were also factions that maneuvered around the issue for practical political purposes. Their support of establishing an independent commission was aimed at gaining sympathy from certain circles of society.

However, establishing a constitutional commission could have completely disrupted the amendment process.

Meanwhile, against the backdrop of the dispute between Gus Dur and several political parties, early on 23 July 2001, President Gus Dur issued a Presidential Decree declaring the dissolution of the MPR, DPR, and the Golkar Party.<sup>570</sup> However, the MPR opposed the decree and continued to convene on 23 July 2001. The MPR declared President Abdurrahman Wahid's Decree invalid. Further, the MPR dismissed President Abdurrahman Wahid and appointed vice-president Megawati Soekarnoputri as the new President.<sup>571</sup>

In her State of the Nation Address on 16 August 2001, President Megawati Soekarnoputri announced that a constitutional commission should be formed to prepare a comprehensive amendment draft to the 1945 Constitution, arranged systematically and based on expertise, to be reviewed and decided on by the MPR's general session. However, then President Megawati changed her position and agreed that the amendment process should continue as before.<sup>572</sup>

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569 Later on, a large number of Assembly members from F-PDIP, F-UG and F-KB, but none from F-TNI/Polri, voted against abolishing of appointed members of the MPR. See, Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2002, Buku Lima, Edisi Revisi, Sekretariat Jenderal, 2010, p. 735.

570 The special committee (Panitia Khusus – PAHSUS) of the DPR, on 21 July 2001, reported to the MPR that President Abdurrahman Wahid had violated the Outlines of the State Policy (GBHN) for embezzled welfare funds for employees of the Logistics Affairs Agency, known for the Bulog-gate issue, and funds donated by the Sultan of Brunei. This was a serious report that could lead to the dismissal of the President. Based on the report, the MPR planned to convene on 23 July 2001. It was very likely that the MPR would dismiss President Abdurrahman Wahid. Immediately, early on 23 July 2001, at 01.00 a.m., President Abdurrahman Wahid issued a presidential decree, declaring the dissolution of the MPR, DPR, and the GOLKAR party. But the MPR continued to convene on that same day. On 23 July 2001, MPR dismissed President Abdurrahman Wahid and appointed Vice President Megawati as the new president.

571 See MPR Decree no. I/2001, MPR Decree no. II/2001 and MPR Decree no. III/2001.

572 The State of the Nation Address of President Megawati Soekarnoputri, 16 August 2001. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 9. The state speech was written by her staff who were previously also the staff persons of President Abdurrahman Wahid (Gus Dur). It seems that President Megawati was directed to continue the policies of her predecessor, Gus Dur, who did want to form a constitutional commission. However, after consulting with the chairman of PAH I, President Megawati changed her stance and agreed to continue with the amendments as before. See VII.4.

In relation to these developments, PAH I reported to the MPR Working Body on 29 August 2001 that if the constitutional commission intended to enhance the public's involvement, PAH I was already working on this. PAH I was absorbing public aspirations at the provincial, district and municipal levels and conducting public hearings with experts, universities, and non-governmental organizations, both in Jakarta and in the regions. Furthermore, PAH I explained that it had organized seminars and conducted comparative studies on constitutions with academic associations, either through literature studies or by visiting other countries. No matter how the 1945 Constitution was amended, the process should occur within the Constitution's framework, which asserts that the MPR holds amendment authority, as per Article 37.<sup>573</sup> Still, one member added separately that one should not diametrically oppose a constitutional commission.<sup>574</sup>

Then, in the following weeks, the amendment process continued as before.<sup>575</sup> Meanwhile, the Team of Experts had come to the end of its assignment. During the PAH I meeting on 3 September 2001, F-PDIP proposed establishing a constitutional commission, so that PAH I could focus on finalizing the drafts in the enclosures of MPR Decree No. IX/2000. F-PDIP also suggested that the president propose the commission's candidates to the MPR.<sup>576</sup> Other factions immediately called for the proposal's clarification. A F-PG member assumed that the commission's role would be similar to that of the Team of Experts.<sup>577</sup> Further, F-KB stated that the MPR (not the president) could form a constitutional commission, noting that the amendment should be completed in 2002.<sup>578</sup>

In addition, F-UG disagreed with F-PDIP's stance, which was perceived as deviating from the Constitution. F-UG noted that the spirit of establishing a constitutional commission resembled wanting a new constitution. In short, it did not want the constitutional commission.<sup>579</sup> Another PAH I member asked for clarity, stating that the president can propose an idea but that F-PDIP's proposal interrupted the agreed-upon ongoing working mechanism. PAH I should complete the amendment as scheduled.<sup>580</sup>

Responding to the reactions, F-PDIP affirmed that it maintained the MPR factions' five fundamental agreements. Everything should follow the Constitution, which affirms that the MPR hold amendment authority and

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573 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 9. Reported by Slamet Effendy Yusuf, the vice PAH I chairman.

574 As asserted by Andi Mattalatta (F-PG). *Ibid.*, p. 22.

575 *Kompas Daily*, 30 August 2001.

576 As stated by Hobbes Sinaga (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 24.

577 As stated by Happy Bone Zulkarnaen, Agun Gunandjar Sudarsa and Amidhan (F-PG). *Ibid.*, pp. 25-27.

578 As conveyed by Ali Masykur Musa (F-KB). *Ibid.*, p. 28.

579 As stated by Soedijarto (F-UG). *Ibid.*, pp. 29-30.

580 As urged by Theo Sambuaga and Agun Gunandjar Sudarsa, both from F-PG. *Ibid.*, p. 34.

outsider may only submit input and assist.<sup>581</sup> A PAH I member urged the committee to continue its duty as instructed by MPR Decree No. IX/2000.<sup>582</sup> Likewise, another PAH I member stated that F-PDIP could propose an MPR decree to establish a constitutional commission or an amendment to Article 37 in the subsequent MPR 2001 annual session. However, the ongoing amendment process had to continue, otherwise the MPR 2001 annual session would not finalize the Constitution's amendment.<sup>583</sup>

Previously, the PAH I chairman had already noted the urgency of completing the amendments as scheduled as several laws (e.g., election laws) depended on the amendment's completion.<sup>584</sup>

Another member reminded the committee that PAH I was tasked with conducting the amendment and should prioritize the assignment.<sup>585</sup>

In response, F-PDIP affirmed that any constitutional commission should begin work after the MPR 2001 annual session and should refer to MPR Decree No. IX/2000. Further, it should not disrupt what PAH I had agreed on.<sup>586</sup> Another member reiterated that a constitution is not an academic work that should be perfectly systematic, but rather a product of history and a political work.<sup>587</sup> The debate was sharp. Only F-PDIP agreed to form the commission, while other factions rejected the suggestion.

#### VII.4.1 Proposing the Commission while Continuing Amendments

Eventually, the PAH I chairman continued the meeting by discussing the amendment's substance with reference to MPR Decree No. IX/2000's enclosures, proposing that the constitutional commission topic be postponed until the MPR Working Body started to prepare the MPR 2001 annual session.<sup>588</sup> In the meantime, pressure on the MPR to stop the amendment process increased. A well-known human rights defender and activist Todung Mulya Lubis denounced PAH I as deceiving the people and urged them to hand over the process to an independent constitutional commission.<sup>589</sup> After a lengthy discussion, PAH I agreed to a PDIP proposal to report to the MPR Working Body meeting on 2 October 2001 that:

581 As stated by Soewarno (F-PDIP). *Ibid.*, p. 36.

582 As insisted by Andi Mattalatta (F-PG) and Lukman Hakim Saifuddin (F-PPP). *Ibid.*, pp. 48, 50.

583 As proposed by Lukman Hakim Saifuddin (F-PPP) and Soedijarto (F-UG). *Ibid.*, p. 51.

584 *Ibid.*, p. 16.

585 As emphasized by I Ketut Astawa (F-TNI/Polri). *Ibid.*, p. 52.

586 As stated by Hobbes Sinaga (F-PDIP). *Ibid.*, p. 90.

587 As stated by Soedijarto (F-UG). *Ibid.*, p. 85.

588 *Ibid.*, pp. 93-94, 164.

589 As stated by Todung Mulya Lubis. *Merdeka Daily*, 5 September 2001.

- 1) The proposal to form a constitutional commission is to accelerate the process and maintain the integrity of the changes to the 1945 Constitution.
- 2) The proposal should be submitted in the MPR Working Body meeting as, if so agreed, an item on the agenda for the MPR 2001 Annual Session.
- 3) While waiting for the decision of the MPR Working Body on the formation of a constitutional commission, PAH I will proceed preparing the draft of the amendment to the 1945 Constitution.<sup>590</sup>  
Surprisingly, F-PPP also submitted a draft MPR decree on forming a constitutional commission,<sup>591</sup> signalling a change in its position.<sup>592</sup> The draft suggested that:
  - 2) The MPR should form a constitutional commission to exercise the authority of the MPR as stipulated in Article 37 of the 1945 Constitution.
  - 3) Members of the MPR Working Body will function as the resource persons in the constitutional commission without voting rights.
  - 4) The constitutional commission functions to change the 1945 Constitution and should report its work to the MPR's leadership on 1 October 2002 at the latest.
  - 5) The Assembly will then ratify or reject the results of the constitutional commission.
  - 6) In case the MPR rejects the draft, people will decide to approve or to reject the draft through a referendum.<sup>593</sup>

In response, F-PDIP asked PAH I to draft an MPR decree on establishing a constitutional commission, stipulating that such a commission assists the MPR Working Body in amending the 1945 Constitution, since the MPR holds amendment and enactment authority.<sup>594</sup> F-PDIP's submitted draft stated that:

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590 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 471. Reported by the PAH I chairman.

591 As conveyed by Lukman Hakim Saifuddin (F-PPP). Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kesatu, Jilid 1, Sekretariat Jenderal MPR-RI, Tahun 2001, p. 193. This part is not included in the 2010 revised version of the minutes in the Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010.

592 According to Zain Bajebber, the Vice Chairman of Commission A representing F-PPP, although realizing that the idea could not be accepted by others, F-PPP changed its position as a political move to accommodate the aspiration of the NGOs and to maintain communication with the public. Interview, 17 April 2014.

593 Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kesatu, Jilid 2, Sekretariat Jenderal MPR-RI, Tahun 2001, pp. 123 - 125. Ditto.

594 As stated by Pataniari Siahaan (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 485.

- 1) The MPR should form a constitutional commission, which is under the MPR Working Body to assist the MPR Working Body in improving the drafts of amendments to the 1945 Constitution.
- 2) The constitutional commission is accountable to the MPR Working Body.<sup>595</sup>

Just as F-PPP had done, F-KB changed its position and proposed forming a constitutional commission.<sup>596</sup> F-KB regretted that many draft amendments agreed in PAH I were questioned by the same factions represented at PAH I at a later stage. Hence, it worried about the constitutional reform's fate if left entirely to the MPR. Therefore, a constitutional commission had to reform or, if necessary, draft a new constitution. Further, F-KP suggested that 75% of the constitutional commission should comprise of experts, professional organizations, and regional representatives, and 25% should consist of MPR members. Finally, the MPR should decide if the commission's work is final and if so, ratify it.<sup>597</sup>

In response, a F-PG member considered that it was more important that the MPR should recognize the desire to reform the constitution and commit to accomplishing this in 2002. The debate should not switch from substantial issues to the amendment mechanism.<sup>598</sup> F-UG proposed reactivating the Team of Experts and including them in the process until the end of the 2001 Annual Session.<sup>599</sup> Another F-UG member asserted that a constitutional commission is usually established if the constitution does not have a revision or redrafting mechanism. However, the 1945 Constitution has Article 37, which affirms that the MPR holds the authority to conduct changes. Therefore, a constitutional commission has no significance.<sup>600</sup>

The MPR Working Body's chairman offered a middle way. The constitutional commission could be formed if it was subject to the MPR and the amendment would be completed in 2002 at the latest.<sup>601</sup> However, the PAH I chairman asserted that whether there was a commission or committee, they were both subject to the MPR, as stipulated by the 1945 Constitution.

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595 See Majelis Permusyawaratan Rakyat Republik Indonesia, *Buku Kesatu, Jilid 2, Sekretariat Jenderal MPR-RI, Tahun 2001*, p. 131. This part is not included in the 2010 revised version of the minutes in the Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, *Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010*.

596 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, *Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010*, p. 487.

597 As proposed by Yusuf Muhammad (F-KB). Majelis Permusyawaratan Rakyat Republik Indonesia, *Buku Kesatu, Jilid 2, Sekretariat Jenderal MPR-RI, Tahun 2001*, pp. 135-141.

598 As asserted by Slamet Effendy Yusuf (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, *Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010*, p. 488.

599 As proposed by Sutjipto (F-UG). *Ibid.*, p. 489.

600 As conveyed by Soedijarto (F-UG). *Ibid.*, pp. 490, 491.

601 As stated by Amien Rais, the Chairman of the MPR Working Body. *Ibid.*, p. 491.

It was already agreed that the amendment must be finalized in 2002, so that was not an issue.<sup>602</sup>

Subsequently, several members proposed postponing a decision on a constitutional commission.<sup>603</sup> One member reminded the committee that 90% of the amendment had been completed and that only three chapters were left. It was unclear whether a new mechanism would complete the three remaining chapters or reshape what had already been completed.<sup>604</sup> Another member proposed delegating the commission decision to PAH I. To not deviate from the Constitution, changes to Article 37 of the Constitution should be made.<sup>605</sup> In the end, PAH I did not discuss the constitutional commission any further. It did not include it in the working report to the MPR Working Body meeting on 23 October 2001. Instead, it was PAH II which reported its discussions about the constitutional commission.<sup>606</sup>

Subsequently, in Commission A's first meeting on 5 November 2001, during which it discussed its work schedule, members again debated the urgency of establishing a constitutional commission. According to the draft working schedule, that discussion was the last agenda item, but a F-PDIP member urged prioritizing this discussion before continuing the amendment process. Such a commission should not be delayed by the MPR Working Body's work on the draft constitutional amendments.<sup>607</sup>

Other factions disagreed with the proposal and reiterated that Commission A's assignment was to pursue amendments before forming a constitutional commission.<sup>608</sup> However, another member argued it would be a constitutional commission's responsibility to finalize the amendment in the best possible way.<sup>609</sup> Finally, the Commission A chairman noted that prioritising this discussion could disrupt or derail the amendment process. Commission A would work according to the schedule.<sup>610</sup> The topic would be discussed last.

In the subsequent meeting on 7 November 2001, a F-PPP member reminded that F-PPP had submitted a draft MPR decree on forming a constitutional commission. It would have 50 members, with 1 representative

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602 Ibid., p. 491.

603 As proposed by Patrialis Akbar (F-Reformasi), I Gde Sudibya (F-PDIP) and Theo Sambuaga (F-PG). Ibid., pp. 491, 492.

604 As stated by A.M. Luthfi (F-Reformasi). Ibid., p. 493.

605 As argued by Yusuf Muhammad (F-KB). Ibid., p. 495.

606 Ibid., pp. 544-561. See also Majelis Permusyawaratan Rakyat Republik Indonesia, *Buku Kesatu, Jilid 1, Sekretariat Jenderal MPR-RI, Tahun 2001*, pp. 269-270. This again shows the mismatches between PAH I and PAH II in the amendment process.

607 As stated by Bambang Pranoto (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 74.

608 As argued by Agun Gunandjar Sudarsa (F-PG), Patrialis Akbar (F-Reformasi) and Hartono Mardjono (F-PDU). See Ibid. pp. 75, 76, 83.

609 As stated by F.X. Soemitro (F-KKI). Ibid.

610 Ibid., pp. 84-85.



per province, proposed by the MPR Working Body and elected by the province's DPR and experts.

A F-PDIP member reiterated that the amendment process needed broad public participation. However, the people's aspirations should be accommodated in a constitutional way, without contradicting Article 37. Therefore, the constitutional commission would assist the MPR Working Body with the amendments, being part of and accountable to the MPR Working Body.<sup>611</sup>

F-KB proposed a constitutional commission of 99 members: 25 MPR members, 20 university experts, 20 interest group members, and 34 provincial members. The commission would be part of and responsible to the MPR. The commission should complete its work before the MPR 2002 annual session and submit its work to the MPR for enactment.<sup>612</sup>

F-PG argued that the commission should be named the National Committee for Amendment of the 1945 Constitution, because the assignment was not to make a new constitution. It should comprise of 55 members: 15 experts, 10 NGO members, and 30 provincial members. Further, Article 37 meant that the MPR could reject the national committee's work.<sup>613</sup>

Another member questioned whether the commission could nullify the previous amendment if the MPR held amendment authority and an amendment had almost been completed.<sup>614</sup> A F-PDIP member added that since the final decision is in the MPR's hands, it should be clear that the commission should be independent and populated by non-partisan experts.<sup>615</sup> F-PDKB suggested that a constitutional commission could be a legal drafting group of 15 experts, drafting and reporting comprehensive changes to the MPR.<sup>616</sup>

However, some factions continued to reject the establishment of a constitution commission altogether. F-PDU reiterated that the MPR held amendment authority, with its Working Committee already having received input from experts and the public and having conducted comparative studies. If the MPR agreed to form a constitutional commission, it would imply that MPR members doubted their own capabilities. Thus, the proposal was misleading.<sup>617</sup> Likewise, F-TNI/Polri asserted that the constitutional commission should be constitutional, with a clear legal foundation. It should not be an extra-constitutional or extra-parliamentary body. It was not easy for political parties to reach a coherent and complete agreement. Hence, the commission should not hamper the process since it could eliminate the MPR Working Body's comprehensive work.<sup>618</sup>

611 As argued by I Dewa Gede Palguna (F-PDIP). *Ibid.*, p. 496.

612 As proposed by Andi Najmi Fuady (F-KB). *Ibid.*, p. 497.

613 As stated by Agun Gunandjar Sudarsa (F-PG). *Ibid.*, p. 500.

614 As questioned by Abdullah Ali (F-Reformasi). *Ibid.*, p. 501.

615 As argued by Dimjati Hartono (F-PDIP). *Ibid.*

616 As stated by Gregorius Seto Harianto (F-PDKB). *Ibid.*, p. 507.

617 As asserted by Sayuti Rahawarin (F-PDU). *Ibid.*, p. 504.

618 As emphasized by Affandi (F-TNI/Polri). *Ibid.*, p. 505.

#### VII.4.2 No Agreement – Delegating to the MPR Working Body

The discussion about the constitutional commission continued until 8 November 2001 without a conclusion. Commission A was still divided into factions who agreed with forming a constitutional commission or a national committee and factions who did not. At the meeting's end, factions agreed to conduct an informal consultation to resolve the differences, but the meeting failed. In the MPR plenary meeting on 8 November 2001, Commission A reported the following, based on the F-PDIP, F-PPP, and F-KB proposals to form a constitutional commission and a F-PG proposal to form a national commission on changes of the 1945 Constitution:

- (1) Commission A has not fully agreed about the idea of forming a constitutional commission or state commission, notably about its status and authority, its establishment and membership, the duration of works, and the time limit for the completion of the task of conducting the amendment.
- (2) In that regard, Commission A is of the opinion that it should hand over the matter to the MPR Working Body for further deliberation, including to find out the possibilities of establishing commissions to finalize the changes to the 1945 Constitution.

To the above conclusions, F-PPP and F-KB objected that the conclusion was not firm enough, because "the MPR should definitely form a constitutional commission to improve the changes to the 1945 Constitution."<sup>619</sup> At the plenary meeting's end, the MPR's chairman stated that if the constitutional commission was established, it would be subject to, assist, and enlighten the MPR Working Body's constitutional functions.

At this stage, proposals to form a constitutional commission served three different objectives: 1) to assist the MPR in accomplishing the amendments as proposed by most factions; 2) to take over the process from the MPR and make a new constitution as proposed by NGOs; and 3) to stop the process and return to the original 1945 Constitution, as proposed by some members of F-PDIP and F-UG, and endorsed by certain retired military officers and societal groups. Eventually, discussions on this topic were postponed.

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619 Ibid., p. 628.

## VII.5 PUBLICIZING THE 1ST AND 2ND AMENDMENT STAGE OUTCOMES

During the visits to regions and in the meetings with State Secretariat officials, PAH I members discovered that the public at large, including the State Secretariat,<sup>620</sup> was unaware that the last amendment had been effective since its ratification on 18 August 2000.<sup>621</sup> Thus, PAH I decided to send 10 teams to the provinces and districts to publicize the amendment's outcomes. However, most of the people they met were more interested in practical matters, such as forestry and irrigation problems, rather than constitutional matters.<sup>622</sup> A member proposed starting with informing DPR and DPRD members. In response, another member pointed out that amendment misinformation regarding the issues discussed, such as regional autonomy, could lead to extreme regional egoism, the emergence of small regional kings or warlords, and ensuing corruption, collusion, and nepotism.<sup>623</sup> However, it is very unfortunate that the MPR did not make programs that could disseminate the Constitutional changes. As the PAH I chairman stated, since there was no longer a Ministry of Information or special agency to publicize the constitution, it was unclear who was responsible for this task.<sup>624</sup> A member proposed arranging specific programmes to disseminate the amendment outcomes through mass-media, special discussions with the political elite, real-time media coverage, and publishing decisions in the state gazette, in addition to the regional socialization programmes.<sup>625</sup>

## VII.6 SYNCHRONIZATION OF PAH I AND PAH II IN THE MPR AND BETWEEN THE AMENDMENTS AND THE LAW-MAKING PROCESS IN THE DPR

Since PAH I and PAH II's work often overlapped and sometimes contradicted (see VII.3.5), a PAH I member stressed the importance of PAH I and PAH II coordination. Both PAH I and PAH II had expert groups, with some overlaps. Nonetheless, PAH I and PAH II came to different conclusions following expert recommendations on certain issues, which complicated the amendment process.<sup>626</sup>

620 State Secretariat (Sekretariat Negara) of the Republic of Indonesia is a government ministry responsible for providing technical, administrative, and analytical support to the President and Vice President in the exercise of their state powers.

621 As disclosed by Slamet Effendy Yusuf (F-PG). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 93.

622 As reported by among others, Soedijarto (F-UG) and Zainal Arifin (F-PDIP). *Ibid.*, p. 133.

623 As reminded by Sutjipno (F-PDIP). *Ibid.*, p. 152.

624 As stated by the PAH I chairman. *Ibid.*, p. 180. BP-7 was a state agency of the previous regime which was tasked with publicizing the state ideology *Pancasila* and UUD 1945 to the government officials and the public in general.

625 As proposed by Baharuddin Aritonang (F-PG). *Ibid.*, p. 181. The proposals were agreed and carried out.

626 As stated among others by Soewarno (F-PDIP). *Ibid.*, p. 263.

Another member highlighted the importance of synchronizing the MPR's amendment and the law-making process. The new law on local government (Law No. 22/1999), enacted before amending the Constitution, was not compatible with the amended Constitutional article on local government (Article 18), completed during the second amendment in 2000. Further, the DPR was to reform various political laws regarding the 2004 elections, while the related Constitutional amendment changes had not yet been completed.<sup>627</sup> In that regard, another member contended that since 500 of the 695 MPR members were also DPR members, synchronization between the two institutions should not be a problem. Regarding political laws, the amendment should be completed in 2002, with enough time for adjustments before the 2004 elections.<sup>628</sup> However, there were new MPR Decrees that were immediately enforced, which also required legislation for their implementation, leading to further complications.<sup>629</sup>

PAH I and PAH II eventually agreed to synchronize their respective terms of reference before their implementation.<sup>630</sup>

## VII.7 THE OUTCOMES

### VII.7.1 Significant outcomes

Eventually, during the MPR 2001 annual session's plenary meetings, the MPR significantly, democratically, and fundamentally changed the 1945 Constitution by adopting the third amendment. The MPR's supremacy ended, replaced by the Constitution's supremacy. The factions agreed that sovereignty, in the people's hands, would be implemented according to the Constitution. Further, the MPR agreed that Indonesia is a state based on the rule of law. The authority of the once omnipotent MPR became limited to amending and enacting the Constitution, inaugurating the elected president and vice president, and dismissing the president or vice president under the Constitution's stipulations. The amendment also stipulated that the president and the vice president should be elected as a pair directly by the people.

A new Regional Representative Council (DPD – *Dewan Perwakilan Daerah*) was established. Alongside the DPR, this created a *sui generis* (unique) representative system of the unitary state of Indonesia and implemented the devolution and autonomy principles to ensure equitable development in all regions.

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627 As stated by Valina Singka Subekti (F-UG). *Ibid.*, p. 275.

628 As conveyed by Zain Bajebur (F-PPP). *Ibid.*, p. 277.

629 *Ibid.*, p. 278.

630 In a coordination meeting on 20 February 2001 between the leaderships of the MPR Working Body, PAH I, PAH II and Special PAH, it was decided that activities related to legislative review were the task of PAH I. See *Ibid.*, p. 271.

The amendment also confirmed that a general election commission should conduct general, free, confidential, honest, fair, direct, and periodic elections of the DPR, Regional Representative Council, and president and vice president. The commission would be national, permanent, and independent. Moreover, the MPR revoked the requirement that a president/vice president be a native Indonesian (*orang Indonesia asli*), this being incompatible with the concept of Indonesian nationhood and the human rights defined in the Constitution. The MPR replaced this requirement with a stipulation that he or she should be Indonesian from birth and shall never have acquired another citizenship by his or her will. Furthermore, the MPR determined that judicial power should be independent, with a Supreme Court as the cassation court, organizing the judicial bodies beneath it and conducting judicial review of legislation below the law. The amendment also established a Constitutional Court that could undertake constitutional review, and a Judicial Commission to maintain and ensure the honour, dignity, and behaviour of judges.

Deliberations on several topics were either cancelled or postponed. These topics included the MPR's status in the political system, MPR membership, the existence of the Supreme Advisory Board (DPA – *Dewan Pertimbangan Agung*), amendments to articles on culture and the economy, and the establishment of a constitutional commission. Factions agreed to carry over the unfinished topics and to resolve them in the subsequent MPR 2002 annual session. Subsequently, the MPR updated Decree No. IX/2000 with MPR Decree No. XI/2001<sup>631</sup>, which instructs the MPR Working Body to finalize the amendment by using the unfinished materials in the enclosures of MPR Decree No. IX/2000. From the beginning of the amendment process in October 1999, the draft changes continued to expand until they reached their final form in the MPR's plenary session.

Eventually, the third amendment was ratified by the MPR plenary meeting on 9 November 2001.<sup>632</sup>

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631 See Attachment VII.6. Enclosures of MPR Decree No. XI/2001, 9 November 2001.

632 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 679.

## VII.7.2 The third amendment

Article	Original (After the 1st and 2nd Amendment)	Third Amendment
CHAPTER I		
	<p>(1) The State of Indonesia is a unitary state in the form of a republic.</p> <p>(2) Sovereignty is in the hands of the people and is exercised in full by the People Consultative Assembly.</p>	<p>(1) (Remained).</p> <p>(2) Sovereignty shall be vested in the hands of the people and be executed according to the Constitution.</p> <p>(3) The state of Indonesia is a state based on law.</p>
3	<p>The People Consultative Assembly shall determine the constitution and the guidelines of the policy of the State.</p>	<p>(1) The People Consultative Assembly has the authority to amend and to stipulate the Constitution.</p> <p>(2) The People Consultative Assembly inaugurates the President and/or the Vice President.</p> <p>(3) The People Consultative Assembly can only discharge the President and/or the Vice President during his/her term of office according to the Constitution.</p>
6	<p>(1) The President shall be a native Indonesian.</p> <p>(2) The President and the Vice-President shall be elected by the People Consultative Assembly by a majority vote.</p>	<p>(1) The Candidate President or the Candidate Vice President shall be respectively an Indonesian citizen as of his/her birth and shall have never accepted another citizenship due to his/her own accord, shall have never committed an act of treason against the state, and shall be mentally and physically capable to execute the duties and obligations as President and Vice President.</p> <p>(2) The requirements to become President or Vice-President shall be further regulated by laws.</p>
6A	(none)	<p>(1) The President and the Vice-President shall be elected in one pair directly by the people.</p> <p>(2) The candidate President and Vice-President shall be proposed by political parties or combination of political parties' participants to a general election prior to the execution of such general election.</p>

		<p>(3) The candidate President and Vice President pairs acquiring votes more than fifty percent of the ballots cast at a general election with a minimum of at least twenty percent of the votes in a minimum more than one half of the provinces scattered in more than one half of the total of provinces in Indonesia, shall be inaugurated to become the President and the Vice President.</p> <p>(5) The procedure for the execution of the election of the President and the Vice President shall be further regulated by laws.</p>
7A	(none)	<p>The President and/or the Vice President can be discharged during his/her term of office by the People's Consultative Assembly at the proposal of the People's Representative Council, either if proven to have committed a violation of law in the form of treason against the state, corruption, bribery, other felonies, or disgraceful acts or if proven that he/she no longer qualifies as President and/or Vice-President.</p>
7B	(none)	<p>(1) A proposal for the discharge of a President and/or a Vice President may be submitted by the People's Representative Council to the People's Consultative Assembly only by first submitting a request to the Constitutional Court to examine, to adjudicate, and to judge on the petition of the People's Representative Council that the President and/or the Vice President has committed a violation of law by an act of treason against the state, corruption, bribery, or other felonies, or disgraceful acts, and/or the petition that the President and/or the Vice President no longer meets the qualifications as President and/or Vice President.</p>



		<p>(2) The petition of the People's Representative Council that the President and/or the Vice President has committed the said violation of law or has no longer met the qualifications as President and/or Vice President shall be in the execution of the supervisory function of the People's Representative Council.</p> <p>(3) The submission of the petition of the People's Consultative Assembly to the Constitutional Court can only be conducted by the support of at least 2/3 of members of the sum of the People's Consultative Assembly present at a plenary session attended by at least 2/3 of the sum of members of the People's Representative Council.</p> <p>(4) The Constitutional Court shall examine, adjudicate, and judge on the said petition of the People's Representative Council ninety days at the longest as of the said petition of the People's Representative Council is received by the Constitutional Court.</p> <p>(5) If the Constitutional Court judges that the President and/or the Vice President is proven to have committed a violation of law in the form of treason against the state, corruption, bribery, or other felonies, or disgraceful acts; and/or is proven to have committed that the President and/or the Vice President no longer meets the qualifications as President and/or Vice President, the People's Representative Council shall convene a plenary session to forward the proposal to dismiss the President and/or the Vice President to the People's Consultative Assembly.</p> <p>(6) The People's Consultative Assembly shall convene a session to resolve on the said proposal of the People's Representative Council at thirty days at the latest as of the People's Consultative Assembly has received the said proposal.</p>
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		(7) The resolution of the People's Consultative Assembly on the proposal to dismiss the President and/or the Vice President shall be drawn up in a plenary meeting of the People's Consultative Assembly attended by at least $\frac{3}{4}$ of the sum of the members and approved by at least $\frac{2}{3}$ of the sum of the members present, subsequent to the President and/or the Vice President is given the opportunity to convey an explanation in a plenary meeting of the People's Consultative Assembly.
7C	(none)	The President cannot freeze and/or dissolve the People's Representative Council.
8	If the President passes away, resigns or is unable to perform his duties during his term of office, he shall be replaced by the Vice-President until the expiry of that term of office	(1) If the President passes away, resigns, is discharged, or is not able to conduct his/her obligations during his/her term of office, he/she shall be replaced by the Vice President up to the expiry of his/her term of office. (2) In the event of vacancy of the Vice President, within a period of sixty days at the latest, the People's Consultative Assembly shall convene a session to elect a Vice President from the two candidates proposed by the President.
11	The President, with the agreement of the DPR, may declare war, make peace and treaties with other countries.	(1) (Remain) (2) The President when concluding other international treaties that give rise to extensive and fundamental consequences to the life of the people related to the financial burden of the state, and/or compelling amendment or enactment of laws shall be with the approval of the People's Representative Council. (3) Further provisions regarding international treaties shall be regulated by law.
CHAPTER V	CHAPTER V STATE MINISTERS	CHAPTER V STATE MINISTERS
17	(none)	(4) The formation, conversion, and dissolution ministries of state shall be regulated by laws.

CHAPTER VIIA	(none)	CHAPTER VIIA THE REGIONAL REPRESENTATIVE COUNCIL (DEWAN PERWAKILAN DAERAH)
22C	(none)	<ol style="list-style-type: none"> <li>(1) The members of the Regional Representative Council are elected from every province through general election.</li> <li>(2) The sum of the members of the Regional Representative Council from every province shall be the same and the sum of the Regional Representative Council shall not exceed one-third of the sum of the members of the People's Representative Council.</li> <li>(3) The Regional Representative Council shall convene at least once a year.</li> <li>(4) The structure and position of the Regional Representative Council shall be regulated by laws.</li> </ol>
22D	(none)	<ol style="list-style-type: none"> <li>(1) The Regional Representative Council may submit bills to the People's Representative Council related to regional autonomy, relations between the central and the regional governments, formation and expansion as well as merger of regions, management of natural resources and other economic resources, as well as those related to financial balance between the central and the regional governments.</li> <li>(2) The Regional Representative Council participates in the discussion on bills related to regional autonomy, relations between the central and the regional governments, formation, expansion, and merger of regions; management of natural resources and other economic resources, as well as financial balance between the central and the regional governments; and rendering consideration to the People's Representative Council on bills regarding the state budget of income and expenditure and bills related to taxation, education, and religion.</li> </ol>

		<p>(3) The Regional Representative Council may conduct supervision over the execution of laws regarding regional autonomy, formation, expansion and merger of regions, relations between the central and the regional governments, management of natural resources and other economic resources, execution of the state budget of income and expenditure, taxation, education, and religion as well as to convey the result of its supervision as such to the People’s Representative Council as consideration materials for follow-up.</p> <p>(4) A member of the Regional Representative Council can be discharged from his/her office, the conditions and procedures of which shall be regulated by laws.</p>
CHAPTER VIII	(none)	CHAPTER VIII GENERAL ELECTIONS
22E	(none)	<p>(1) General elections shall be executed in a direct, public, free, confidential, honest, and just manner once every five years.</p> <p>(2) General elections are conducted to elect the members of the People’s Representative Council, the Regional Representative Council, the President and the Vice President, and the Regional People’s Representative Council.</p> <p>(3) Participants to the general elections to elect the members of the People’s Representative Council and the members of the Regional People’s Representative Council shall be political parties.</p> <p>(4) Participants to the general elections to elect the members of The Regional Representative Council shall be individuals.</p> <p>(5) General elections are conducted by a commission of general elections having a national, permanent, and autonomous character.</p> <p>(6) Further provisions regarding general elections shall be regulated by laws.</p>

	<i>CHAPTER VIII FINANCIAL MATTERS</i>	<i>CHAPTER VIII FINANCIAL MATTERS</i>
23	<p>(1) The revenues and expenditures budget shall be stipulated every year by law. If the DPR does not approve to the budget proposed by the Government, the Government shall apply the budget of the previous year.</p> <p>(2) Types and values of the currency shall be prescribed by law.</p> <p>(3) Further matters regarding State finance shall be regulated by law.</p> <p>(4) In order to audit the accountability for state Finances, the State Audit Board shall be established, the regulations of which shall be prescribed by law. The result of such audit shall be notified to the People's Representative Council</p>	<p>(1) The state budget of income and expenditure as a form the management of state finances shall be stipulated every year by a law and shall be executed transparently and responsibly for the optimal welfare of the people.</p> <p>(2) The bill on the State Budget shall be submitted by the President for joint consideration to the People's Representative Council, whose consideration shall consider the opinions of The Regional Representative Council.</p> <p>(3) In the event that the People's Representative Council fails to approve the proposed bill on the State Budget submitted by the President, the Government shall implement the State Budget of the preceding year.</p>
23A	(none)	Taxes and other levies of compelling character for purposes of the state shall be regulated by laws.
23B	(none)	The denomination and value of currency shall be stipulated by laws.
23C	(none)	Other matters regarding state finances shall be regulated by laws.
<i>CHAPTER VIII VIII A</i>	(none)	<i>CHAPTER VIII THE FINANCIAL AUDIT BOARD (BADAN PEMERIKSA KEUANGAN)</i>
23E	(none)	<p>(1) In order to examine the management and responsibility regarding state finance, a free and autonomous Financial Audit Board shall be established.</p> <p>(2) The result of examination of the state finance shall be submitted to the People's Representative Council, the Regional Representative Council, and the Regional People's Representative Council in accordance with their authority.</p> <p>(3) The result of examination shall be followed up by the representative institution and/or board in accordance with the laws.</p>

23F	(none)	<p>(1) The members of the Financial Audit Board shall be chosen by the People's Representative Council, by having regard to the consideration of The Regional Representative Council and formalized by the President.</p> <p>(2) The leadership of the Financial Audit Board shall be elected from and by its members.</p>
23G	(none)	<p>(1) The Audit Board shall be domiciled in the capital city of the state and shall have representation in every province.</p> <p>(2) Further provisions regarding the Financial Audit Board shall be regulated by laws.</p>
<i>CHAPTER IX</i>	<i>CHAPTER IX JUDICIAL POWER</i>	<i>CHAPTER IX JUDICIAL POWER</i>
24	<p>(1) The judicial authorities shall be exercised by a Supreme Court and other judiciary bodies in accordance with the law.</p> <p>(2) The structure and authorities of those judiciary bodies shall be regulated by law.</p>	<p>(1) The judicial power shall be an independent power in order to perform the judiciary to enforce law and justice.</p> <p>(2) The judicial power shall be conducted by a Supreme Court and the subordinated judicial bodies in the realm of general judiciary, the realm of religious judiciary, the realm of military judiciary, the realm of state administrative judiciary, and by a Constitutional Court.</p>
24A	(none)	<p>(1) The Supreme Court shall have the authority to adjudicate at the level of cassation, to review statutory rules and regulations below the laws against the laws, and shall have other authorities granted by the laws.</p> <p>(2) A Supreme Court justice shall have integrity and shall be of impeccable personality, just, professional, and be experienced in the field of law.</p> <p>(3) A candidate supreme court justice shall be proposed by the Judicial Commission to the People's Representative Council in order to acquire approval and furthermore to be designated as supreme court justice by the President.</p>

		<p>(4) The chief justice and the deputy chief justice of the Supreme Court shall be elected from and by the Supreme Court justices.</p> <p>(5) The structure, position, membership, and procedural law of the Supreme Court and their subordinated judicial bodies shall be regulated by laws.</p>
24B	(none)	<p>(1) The Judicial Commission is autonomous and has the authority to propose the appointment of Supreme Court justices and shall have other authorities for the sake of safeguarding and upholding the honour, dignity, and behaviour of judges.</p> <p>(2) A member of the Judicial Commission shall have the knowledge and experience in the field of law and shall have integrity with an impeccable personality.</p> <p>(3) A member of the Judicial Commission is appointed and discharged by the President with the approval of the People's Representative Council.</p> <p>(4) The structure, position and membership of the Judicial Commission shall be regulated by laws.</p>
24C	(none)	<p>(1) The Constitutional Court has authority to adjudicate at the first and final instance, the judgement of which is final, to review laws against the Constitution, to judge on authority disputes of state institutions whose authorities are granted by the Constitution, to judge on the dissolution of a political party, and to judge on disputes regarding the result of a general election.</p> <p>(2) The Constitutional Court shall render a judgement on the petition of the People's Representative Council regarding an alleged violation by the President and/or the Vice President according to the Constitution.</p>



		<p>(3) The Constitutional Court shall have nine members of constitutional court justices to be designated by the President, respectively three people to be promoted by the Supreme Court, three people by the People’s Representative Council, and three people by the President.</p> <p>(4) The Chief Justice and the Deputy Chief Justice of the Constitutional Court shall be elected from and by the constitutional court justices.</p> <p>(5) A constitutional court justice shall have integrity and impeccable personality, be just, be a states-man/stateswoman mastering the Constitution and constitutionalism, and does not concurrently hold a public office.</p> <p>(6) The appointment and discharge of a constitutional court justice, the procedural law as well as other provisions regarding the Constitutional Court shall be regulated by laws.</p>
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### VII.7.3 Enclosures of MPR Decree No. XI/2001

At the end of the 2001 annual session, the MPR issued MPR Decree No. XI/2001 as a provision to finalize the amendments to the 1945 Constitution. A draft amendment that was not completed during the third amendment was attached to the Decree.<sup>633</sup>

## VII.8 ANALYSIS AND COMMENTS

### VII.8.1 The process

This section summarises the third amendment stage’s process and compares it to the prior stages. It describes increased public engagement, an increased consensus-oriented approach, ongoing criticisms of delays and insufficient outcomes, an overarching debate on whether the process should be diverted or reversed through a constitutional commission, successful decentralization of regional involvement, and postponement of discussing Islamic sharia. Overall, it shows how PAH I solicited increased external input while finding internal compromises to move forward.

<sup>633</sup> See Attachment VII.6.

Unlike the second phase, the third stage's amendment process began with a formal agreement from all MPR factions in the form of MPR Decree No. IX/2000, to continue and accomplish the Constitutional amendment during the MPR 2002 annual session. Moreover, despite the discernible differences between factions' stances towards various issues, the Decree's Enclosure reveals that all factions agreed the amended Constitution should be a democratic constitution based on the rule of law.<sup>634</sup> Similarly, the previous Constitutional changes from the MPR 1999 and 2000 annual sessions show that the amendments increasingly provided the Constitution with *negara hukum* characteristics (a state based on the rule of law).<sup>635</sup> By 2001, almost all Constitutional amendment topics had been discussed, although many were not (yet) resolved.

Publicizing the first and the second amendment outcomes was also a concern. Publicity efforts had been kept to a minimum, so the public's responses to constitutional issues were minimal as well. For that reason, PAH I tried to expand public participation, conducting more public hearings, seminars, and comparative studies. It set up a Team of Experts to assist and continued to employ a deliberative and consensus approach. To obtain more information about the Constitution and its problems, PAH I also sent teams abroad to conduct comparative studies and received guests from abroad (see VI.2.2).

Ultimately, PAH I's managed to attract the public's attention on and participation in the amendment process, with MPR discussion topics increasingly reflecting those discussed in public. Thus, various latent and hidden political aspirations came to the fore.

The third stage discussions also showed that factions did not merely accept or reject the ideas in question, but instead discussed proposals and often attempted to find consensus aimed at building compromises. It appeared that the MPR's code of conduct, which does not allow conclusions by voting at this stage, alongside the desire for constitutional reform urged the factions to seek compromises.<sup>636</sup>

Regarding the process, the PAH I chairman reminded the committee that the 1945 Constitution is a respected and mythical constitution, with the amendment process being as important as the actual outcome.<sup>637</sup>

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634 See MPR Decree No. IX/2000 on Assignment of the MPR Working Body to prepare the draft of the changes to the 1945 Constitution.

635 These changes included the limitation of presidential tenure to two consecutive terms, and the adherence to the fundamental rights of the people and the democratic law-making process. See the second amendment to the 1945 Constitution.

636 MPR Decree No. I/1999 on the Code of Conduct and Standing Procedure of the MPR.

637 As stated by the PAH I chairman. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 295-297.

However, the process was perceived by many as piecemeal and too slow. Groups of student activists, scholars, and NGOs were not satisfied with the MPR's work. They blamed the MPR for achieving too little, working too slowly and without a clear direction, and allowing the process to become subject to short-term political interests. They argued that the process should be restarted, with a comprehensive draft being prepared and completed in one go, instead of through amendment stages.<sup>638</sup> Many campaigned actively, demanding that the MPR halt the process and hand it over to an independent constitutional expert commission.<sup>639</sup>

In January 2001, President Abdurrahman Wahid proposed establishing such an independent and expertise-based state commission to prepare a complete amendment draft of the 1945 Constitution.<sup>640</sup> This proposal was ignored due to political turmoil, which eventually led to his dismissal on 23 July 2001. However, his successor, President Megawati Soekarnoputri, adopted the idea in her State of the Nation Address on 16 August 2001. Law experts from the Team of Experts also strongly recommended forming an independent constitutional commission.<sup>641</sup>

There were also political elements, including political groupings in F-PDIP, F-UG, and F-KB, who argued that the discussion outcomes and direction of further changes did not meet their expectations. For them, attempts to revoke the MPR's power and the MPR's appointed delegates, and to insert the *tujuh kata* ('the seven words') are betrayals of the struggle of the country's founding fathers. These groups regarded the constitutional commission as a potential instrument to reconsider the results and the amendment process. Some of them even aimed at using it to stop and eventually reverse the process.

There were elements in F-PDIP who argued that proposed amendments had deviated from the Constitution's original foundations, who insisted first discussing the establishment of a constitutional commission before resuming the amendment process. The MPR should not be trapped by a draft amendment that PAH I had prepared.<sup>642</sup>

Thus, various political interests converged when debating a constitutional commission. Some hoped to use the commission to fully renew the 1945 Constitution. Others wanted to stop the process and revive the original

638 As, among others, stated by Ismail Suny. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 780.

639 *Merdeka Daily*, 5 September 2001.

640 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 185. As reported by Andi Mattalatta (F-PG).

641 As stated by Jimly Asshiddiqie. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 353.

642 As argued by, among others Bambang Pranoto (F-PDIP). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 74.

1945 Constitution. Still others expected that the commission would help the MPR in improving the Constitutional amendments. Since a commission seemed to have popular support, certain political parties kept manoeuvring around the idea.<sup>643</sup> The constitutional commission thus became a potential disruption to the amendment process. Even prioritizing the discussion on its establishment impacted the process.<sup>644</sup>

Despite such pressure, PAH I managed to push back the issue to the end of its agenda, so as to not further hamper the amendment process. Eventually, PAH I factions contended that Article 3 resolutely affirms that the MPR is the constitutional body for changing the Constitution, while Article 37 provides the reform procedure.<sup>645</sup> Besides, factions argued that after three years of work, with almost every topic having been discussed, it was not worth starting all over again.<sup>646</sup> Thus, at the end of the third amendment process, PAH I did not report on this topic to the MPR Working Body. Subsequently, the MPR postponed further discussions on this topic.<sup>647</sup>

However, meanwhile, PAH II also discussed establishing a constitutional commission and reported on this matter to the MPR Working Body,<sup>648</sup> which once again showed a lack of synchronization between PAH I and PAH II. Both committees had formed a team of experts, with certain experts overlapping. Nonetheless, PAH I rejected certain expert ideas that PAH II accepted.<sup>649</sup> Eventually, PAH I and PAH II agreed to synchronize their respective terms of references, including the proceedings, prior to their implementation.<sup>650</sup>

The amendment process was not free from short-term or strategic interests of the parties involved. For instance, although previously all factions in PAH I had agreed that the MPR is no longer the highest political institution,

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643 As revealed by Zain Bajebur in an interview on 14 April 2014. Bajebur argued that F-PPP supported the idea because it wanted to bridge the concern of certain NGOs and other groups in society and the process in the MPR, although F-PPP was aware that the then political constellation in the MPR was against the idea.

644 See e.g., Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 74.

645 Articles 3 and 7 of the original 1945 Constitution.

646 As stated by, among others A.M. Luthfie (F-Reformasi). See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 493.

647 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 628.

648 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 544-561. See also Majelis Permusyawaratan Rakyat Republik Indonesia, Buku Kesatu, Jilid 1, Sekretariat Jenderal MPR-RI, Tahun 2001, pp. 269-270. This again showed the mismatches between PAH I and PAH II regarding the amendment process.

649 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 263.

650 *Ibid.*, p. 280.

F-Reformasi still attempted to maintain that this was the case.<sup>651</sup> Likewise, elements in F-UG and F-TNI/Polri assumed that their existence in the MPR would only be meaningful if the MPR remained the supreme political body that determined the Broad Outlines of State Policy.<sup>652</sup>

These developments also demonstrate the relationship between the MPR amendment process and society's political dynamics, which contributed to the amendment's acceptance. The achieved changes that underwent an actual political process faced less resentment and more opportunity to become instrumental legislations and policies. The amendment process that was open and involved the community is expected to have built a link between the dynamics of the community and the future process of making laws and regulations that refer to the Constitution. Thus, the process formed a symbiotic relationship between the Constitution's text and how it would be practiced in the future.<sup>653</sup>

On the other hand, since the amendment process was constitutional and peaceful, many existing political terms remained the same. This made the difference between the original and post-reform institutions, such as the MPR, not immediately understandable.<sup>654</sup>

As mentioned before, discussion on improving the relationship between the central government and regions, and the insertion of the "*tujuh kata*" into Article 29, show that the amendment process corresponded with society's latent and hidden aspirations. On the first issue, PAH I managed to emphasize the matter's substance and subsequently reached a resolution through decentralization, regional autonomy, and forming The Regional Representative Council. It managed to resolve a debate on concepts such as strong bicameralism or federalism, which would have brought broader political consequences.

Unlike in the previous stage, PAH I did not extensively discuss Article 29 during the third amendment. Therefore, it did not report these discussions, stating that this would be revisited in the MPR 2002 session. Although the proponents of the *tujuh kata* ('the seven words') were in the MPR's minority, factions did not push for an immediate solution through voting. This was to prevent the impression that the majority had oppressed

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651 The strategic position of Amien Rais, the Chairman of the National Mandate Party or PAN (Partai Amanat Nasional), a member of F-Reformasi, as the People's Consultative Assembly Speaker seemed, for some time, to form the stance of F-Reformasi to maintain the position of the MPR as the highest state institution which holds people's sovereignty in full, as argued by Imam Addaruqutni (F-Reformasi), see Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 87, 95, 130. F-Reformasi comprised of members of the MPR from the National Mandate Party (Partai Amanat Nasional – PAN) and the Justice Party (Partai Keadilan – PK).

652 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 149, 222.

653 Edward Schneier, *op.cit.*, p. 2.

654 Many still perceive the MPR as the highest state institution with unlimited power.

or humiliated ‘the seven words’ supporters, which could have been interpreted as tyranny to those who struggle to establish Islam. This impression can foster radicalization in society. Thus, this matter was brought to the next annual MPR session. The discussions show that it was important to consciously prevent overheated and emotional clashes, seeking and maintaining a peaceful situation so that the participants could express their opinions, pursuing mutual understanding. Likewise, it was useful to refrain from fully deciding a controversial topic. Rather, PAH I postponed such topics while looking for ones that were easier to agree on.<sup>655</sup>

Ultimately, this inclusive approach and the prioritization of open discussions enabled members to overcome impasses while maintaining togetherness in completing the amendment process. These were the pillars in this amendment process, avoiding an “all-or-nothing” approach. In this respect, consistency, perseverance, patience, and mutual respect were the defining factors.

## VII.8.2 The substance

The MPR’s plenary meeting on 9 November 2001 passed new amendments to the Constitution. Most fundamental concepts associated with the rule of law were agreed during this stage,<sup>656</sup> thereby fundamentally changing the 1945 Constitution.

Along with the amendments agreed during previous stages,<sup>657</sup> the changes signalled a further move toward constitutionalism, where the constitution constitutes government, defines its institutions and constraints, and restricts the scope of its powers.<sup>658</sup>

In total, during the third stage, 68 sections in 23 articles were amended or added. This included the addition of 3 new chapters, namely Chapter VIIA on The Regional Representative Council or DPD (*Dewan Perwakilan Daerah*), Chapter VIIB on General Elections (*Pemilihan Umum*), and Chapter VIIIA on the Financial Audit Board (*Badan Pemeriksa Keuangan*).<sup>659</sup>

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655 The similar approach was also used for other issues such as the completion of Article 31 on education.

656 These included concepts such as the Constitution’s supremacy, an independent judiciary power, and democratic and periodic circulation of powers.

657 The previously agreed on amendments included the limitation of the presidential term, the adherence to human rights, the separation of powers, and the democratic law-making process.

658 See Edward Schneier, *op. cit.*, p. 2.

659 The second amendment altered or added 59 paragraphs in 25 articles. Two new chapters, namely Chapter IXA on State Territory, Chapter XA on Human Rights were added.

Amending Article 1(2) revoked the MPR's supremacy, replacing it with the Constitution's supremacy. Article 1(2) originally read, "*Kedaulatan adalah di tangan rakyat, dan dilakukan sepenuhnya oleh Majelis Permusyawaratan Rakyat*" (The sovereignty shall be vested in the people's hands and be exercised by the MPR in full). The amendment read, "*Kedaulatan berada di tangan rakyat dan dilaksanakan menurut Undang-Undang Dasar*" (The sovereignty shall be vested in the hands of the people and be executed according to the Constitution).<sup>660</sup>

This change affirmed that people's sovereignty and the people's elected representatives must respect certain substantive limitations on their authority. In other words, the stipulation asserts the subjugation of state power to the Constitution.<sup>661</sup> Thus, the amended Constitution adopts a democracy that complies with the provisions of the Constitution, resulting in a constitutional democracy that has similarities as well as differences with a majority democracy. Similar to a majoritarian democracy, decisions are made by elected representatives of the people, either by majority vote or by acclamation. But in a constitutional democracy, the decision must be in accordance with the provisions of the Constitution, including the country's fundamentals, such as the state's basis and form. To this end, the amended 1945 Constitution establishes a Constitutional Court which is equipped with the authority to conduct constitutional reviews of laws. During previous stages, factions started to shift from supporting the MPR's supremacy to supporting the Constitution's supremacy. Some argued that the MPR's hold on people's sovereignty in full should be revised and limited to accommodate certain democratic ideas, such as the separation of powers, checks and balances, and a direct presidential election.<sup>662</sup> At the same time, this group wanted to maintain the MPR as a permanent body.<sup>663</sup> Another side argued that if the presidential system would be maintained, the proposal to grant authority to the MPR to determine the Broad Outlines of State Policy and to evaluate the accountability of the president at the end of his/her tenure was discordant and should be removed.<sup>664</sup>

660 See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 558.

661 See Walter F. Murphy, *Constitutional Democracy, Creating and Maintaining a Just Political Order*, John Hopkins University Press, Baltimore, 2007, p. 10. It is noteworthy that ultimately PAH I came to this conclusion and gave up the supreme power of the MPR voluntarily, while PAH II still worked on the assumption that the MPR was the highest state institution with unlimited power.

662 As recommended by Jimly Asshiddiqie of the Team of Experts. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 401.

663 Among others, Katin Subiyantoro (F-PDIP) and Affandi (F-TNI/Polri) stated that the MPR should be retained, whereas its authorities and functions should be adjusted. See *Ibid.*, p. 724.

664 As argued by Soewoto Mulyo Soedarmo of the Team of Experts. See *Ibid.*, p. 783.



Gradually, factions started to change their positions.<sup>665</sup> Eventually, factions accepted F-PDIP's formulation from the previous stage:<sup>666</sup> "Sovereignty shall be vested in the hands of the people and be executed according to the Constitution."<sup>667</sup> The conclusion affirms that the 1945 Constitution is the supreme law of the land and that all subordinate legislation falls under the Constitution.

With the Constitution having been asserted as the state's highest law, the factions deliberated how to guarantee the law's constitutionality and the legislation's hierarchy.<sup>668</sup> One of the issues involved was MPR Decree No. III/2000, which stipulates that the MPR holds the authority to conduct constitutional review.<sup>669</sup> Thus, while PAH I was discussing how to build a constitutional review mechanism People's Representative Council, the MPR Working Body allocated constitutional review of the existing laws to PAH I.<sup>670</sup>

This was justified by certain members who argued that constitutional review does not reflect the 1945 Constitution. The legislative body reflects people's sovereignty, which holds supremacy over other powers, so it should not be subject to a judicial decision. In that regard, the MPR should conduct judicial review as the holder of people's sovereignty.<sup>671</sup> However, another member argued that judicial review needs to be established by a Constitutional Court, similar to the Supreme Court in the United States of America or constitutional courts in European civil law countries.<sup>672</sup>

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665 Frans Matruty (F-PDIP) asserted that even though the MPR is the highest institution, the supremacy of the MPR should be subject to the supremacy of the Constitution. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, p. 151.

666 Reiterated by Soewarno (F-PDIP), see *Ibid.*, p. 96.

667 As stated by, among others, Lukman Hakim Saifudin (F-PPP), Happy Bone Zulkarnaen (F-PG), Asnawi Latief (F-PDU), A.M. Luthfi (F-Reformasi) and Gregorius Seto Harianto (F-PDKB). *Ibid.*, pp. 95-127. Previously, Affandi (F-TNI/Polri) had asserted that sovereignty is in the people's hands but it should be exercised following the process regulated in the Constitution. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 814.

668 As argued by Jimly Asshiddiqie of the Team of Experts. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 706. See also Hans Kelsen, *op.cit.*, p. 221-224.

669 On 18 August 2000, the MPR ratified MPR Decree No. III/2000 on The Sources of Law and The Hierarchy of Legislations, which was prepared by PAH II. The decree stipulates among others the hierarchy of legislations, the authority of the MPR to conduct judicial review of law, and the authority of the Supreme Court to conduct judicial review of legislations below law. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 16, 28.

670 As stated by Amien Rais, the chairman of MPR. See *Ibid.*, p. 28.

671 As argued by Happy Bone Zulkarnain (F-PG), who further said that a law that is created by representatives who are elected by the people may not reviewed by individual judges such as adopted in a constitutional court concept. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 104-105.

672 As elucidated by J.E. Sahetapy (F-PDIP), speaking as a resource person. *Ibid.*, p. 102.

Eventually, PAH I concluded that constitutional review would be solely a legal action for maintaining the “purity” of the Constitution’s implementation, to ensure the law’s constitutionality. The law should be created by a political process and reviewed by a judicial institution.<sup>673</sup> Regarding the precise assignment for conducting constitutional reviews, PAH I concluded that it would carry out the task after completing the discussion about the future constitutional review mechanism.<sup>674</sup>

Another constitutional review issue was the relation between a Constitutional Court and the Supreme Court.<sup>675</sup> Eventually, PAH I concluded that judicial power would be exercised by a Supreme Court and the judicial bodies beneath it, and by a permanent and independent Constitutional Court.<sup>676</sup> Thus, in the Commission A plenary meeting on 6 November 2001, despite certain faction members objecting,<sup>677</sup> all factions eventually agreed with establishing a Constitutional Court.<sup>678</sup> Based on the PAH I draft, Commission A also concluded that the Constitutional Court could render judgment on the DPR’s petition alleging a violation of the law by the president and/or the vice president according to the Constitution.<sup>679</sup>

The above provisions further confirm the characteristics of *negara hukum* (a state based on the rule of law), where the Constitution sets limits that must be followed in applying democracy’s rules. As such, the President and/or the Vice President could not be impeached without the Constitutional Court judicially determining his or her indictment of Constitutional

673 As emphasized by the PAH I chairman. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 334.

674 As stated by, among others, Pataniari Siahaan (F-PDIP). Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 102. Eventually, in a plenary meeting of the MPR Working Body on 29 March 2001, the author, as the PAH I chairman reported that PAH I would discuss the legislative review and judicial review as assigned by MPR Decree No. III/2000 together with the discussion on the judiciary and possibly would assign the task to the Constitutional Court. See *Ibid.*, p. 384.

675 As argued by Sutjipno (F-PDIP), the Constitutional Court should be in the realm of the Supreme Court although not *untergeordnet* (subordinate) but *neben ein ander* (next to each other). *Ibid.*, p. 501.

676 As proposed by Harjono (F-PDIP) and endorsed by Asnawi Latief (F-PDU), Soedijarto (F-UG), A.M. Luthfi (F-Reformasi), Erman Suparno (F-KB), Affandi (F-TNI/Polri), and Amidhan (F-PG); see Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 385.

677 Amin Aryoso and Dimiyati Hartono, both from F-PDIP insisted that with its extraordinary power, the Constitutional Court should become part of the MPR. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 303, 571. On the other hand, Patrialis Akbar (P-Reformasi) insisted that the Constitutional Court should not have the authority to conduct constitutional review. See *Ibid.*, p. 329.

678 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 337.

679 Article 24C, paragraphs (1) and (2) of the 1945 Constitution after amendments.

violations.<sup>680</sup> Accordingly, the MPR decided to add Article 1(3), which stated that “*Negara Indonesia adalah Negara Hukum*” (Indonesia shall be a state based on the rule of law).

Since all factions agreed that the Constitution should confirm Indonesia as a *negara hukum*, deliberation was focused on the concept’s substance. Notably, the question was raised whether “*negara hukum*” guaranteed the principles of democracy. If not, the term “democratic” should be added. It was concluded that the phrase “*Indonesia adalah negara hukum*” (Indonesia is a state based on the rule of law) was sufficient, since the term *negara hukum* contains a constitutional system’s principles, such as people’s sovereignty, the supremacy of law, and adherence to human rights.<sup>681</sup>

Since the rule of law had been adopted, the Constitution now distributed and limited authority, becoming central, with the law’s constitutionality becoming central as well.<sup>682</sup> Law became a reference for all things. With that, judicialization was to occur in all areas, including politics and economics. Accordingly, independent judicial power gradually turned into a great and decisive power. However, the law’s application cannot be separated from human involvement. With that involvement, certain judicial motives or individual interests may undermine judicial independence.<sup>683</sup> Therefore, following the idea of democracy, judicial power that goes deep into every sphere of life requires accountability.

In this context, PAH I concluded that the Constitution should establish an independent Judicial Commission with the duty and authority to safeguard and uphold the honour, dignity, and behaviour of judges<sup>684</sup> without interfering in their independence.

The Constitution also included a direct election system for the President and Vice President, the DPR’s National and Local members, and The Regional Representative Council’s members. It stipulates that, except for candidates for the Regional Representative Council, all candidates shall be nominated by political parties. In this way, democratic and periodic circulation of powers was embedded in the Constitution. Elections and political

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680 While the draft of the provision was being discussed in PAH I, on 23 July 2001 President Abdurrahman Wahid was impeached by the MPR based on political considerations. The initial 1945 Constitution rules that the MPR holds the people’s sovereignty in full and that the president and vice president are elected by and accountable to the MPR. See paragraph (2) Article 1 of the initial 1945 Constitution and its Elucidation.

681 As argued by, among others Sutjipno (F-PDIP), Soewarno (F-PDIP), Sutjipto (F-UG), Hamdan Zoelva (F-PBB), and Ishak Latuconsina (F-TNI/Polri). See *Ibid.*, pp. 502, 804, 805, and Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Empat, Edisi Revisi, Sekretariat Jenderal, 2010, p. 89.

682 As stated by the PAH I chairman. See *Ibid.*, p. 334.

683 See Brian Z. Tamanaha, *op. cit.*, pp. 123-125.

684 During the discussion, PAH I members emphasized that the stipulations applied to all kinds of *hakim* (judge) except *hakim garis* (linesman in football game). This means it includes the Constitutional Court justice as well.

parties became the constitutional instruments of the new multi-party political system.<sup>685</sup>

To ensure the national character of the elected president and to eliminate the possibility that the presidential election would be dominated by the densely populated areas, the factions agreed that a pair of candidates for president and vice president must win in an absolute ballot, obtaining at least 20% of the vote in at least half of the provinces.<sup>686</sup>

Further, PAH I argued that to avoid political deception and encourage political parties to build political cooperation from the outset, the presidential candidate should be determined before the legislative elections.<sup>687</sup> Furthermore, factions concluded that elections of the president and vice president, the DPR, regional DPRs, and members of The Regional Representative Council should happen simultaneously.<sup>688</sup> However, the Team of Experts contended that the president should be elected directly by the people in an election conducted especially for this purpose.<sup>689</sup> Eventually, factions agreed that in the first round, the presidential candidate should be elected directly by the people. PAH I could not resolve disagreements on whether a second-round election should be conducted by the MPR or again directly by the people, proposing to postpone this topic to the MPR's next annual session.<sup>690</sup>

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685 The original 1945 Constitution does not contain any stipulation regarding general elections and political parties.

686 As proposed by Soewarno (F-PDIP), Hamdan Zoelva (F-PBB) and Affandi (F-TNI/Polri) as a mechanism to ensure the national legitimacy of the elected president. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 353, 363, 365, 393. At first, this idea, with a slightly different formula, was proposed by Ramlan Surbakti of the Team of Experts. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 541.

687 The author, as a F-PDIP member, argued that the presidential election after the election of DPR members may distort the political configuration in society and tended to be a public deception. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 541. See also the arguments of Soewarno (F-PDIP) and Slamet Effendy Yusuf (F-PG) that this rule would naturally simplify the political party system. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 204-205, 346, 349.

688 As proposed by, among others Soewarno (F-PDIP). See *Ibid.*, p. 353. However, the laws regarding legislative elections separate the general elections from the election of the president and vice president. See Law No. 8/2012 on General Election of Members of the DPR, Regional Representative Council and Regional DPR and Law No. 42/2008 on the General Election of President and Vice President.

689 As proposed by Maswadi Rauf. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 788.

690 Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2001, Buku Dua, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 399-400.

Regarding requirements for presidential candidacy, the amendment substituted “the President shall be a native Indonesian” with “The Presidential candidate and the Vice Presidential candidate shall be Indonesian citizens as of his/her birth and shall have never accepted another citizenship on his/her own accord”.<sup>691</sup> Since a political party is the constitutional instrument of a democratic system, political parties should be entitled to nominate and determine the candidates in the elections for both presidency and the DPR.<sup>692</sup>

Regarding the heads of regions, the Constitution states that the governor, district head (*bupati*), and the mayor (*walikota*) should be elected democratically. Yet, considering the peculiarities of certain regions whose existence is recognized by the Constitution (e.g., Yogyakarta and Papua), the Constitution does not require that local elections should be conducted directly by the people.<sup>693</sup>

Regarding Article 29, as discussed above, although the number of people in favour of inserting the *tujuh kata* (‘seven words’) in Article 29 was smaller than those against, and although the proposition was ready for balloting, the majority did not force the decision and opted for solution by deliberation.<sup>694</sup>

PAH I also failed to conclude the discussion on the proposal to include the name of Pancasila as the foundation of the state in the Constitution, and this topic was no longer discussed.

Following the devolution of power to regional governments enacted during the previous stage, a *sui generis* Regional Representative Council was established.<sup>695</sup> This was to ensure that the multiple diversities of Indonesia and the unity of Indonesian nationality could support each other in bringing development across the entire country. Although the proposal to

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691 I Dewa Gede Palguna (F-PDIP) asserted that the term *asli* (native) injures the principles of human rights. Likewise, Lukman Hakim Saifuddin (F-PPP), Andi Najmi Fuady (F-KB), Asnawi Latief (F-PDU), Sutjipto (F-UG) and others agreed to eliminate the discriminatory provision. See Majelis Permusyawaratan Rakyat Republic Indonesia, op.cit., Tahun Sidang 2001, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, pp. 279 - 283.

692 A political party should have the authority to rank the candidates and to determine the winners in a closed list system. However, Law No. 8/2012 on General Election stipulates that a political party is entitled to draw up a list of candidates, but that the electability of a candidate is determined by the majority of votes obtained by the candidates in an open list system.

693 Article 18A of the 1945 Constitution stipulates that the state shall recognize and respect the units of local government that are special or unique in nature as regulated by law; (2) The State recognizes and respects units of customary law and their traditional rights, all still alive and in accordance with the development of society and the principle of the unitary Republic of Indonesia, which is regulated by law. Further, Article 28I (3) on human rights states that the cultural identity and the rights of traditional communities be respected in line with the times and civilization.

694 See VII.3.12.

695 Chapter VIIA of the 1945 Constitution.

establish a strong bicameral system was discussed,<sup>696</sup> this council was based on and within the unitary state concept.<sup>697</sup> In this system, the autonomous region derives from the unitary state, so all regulations regarding autonomy should be consistent with and subject to the unitary state's fundamentals.<sup>698</sup> Hence, all factions rejected strong bicameralism. In fact, the original intention of establishing the Regional Representative Council was to replace the Regional Delegates of the old-style MPR.<sup>699</sup>

In a unitary state, only the people (and not the regions) are the source of sovereignty. In that sense, as in any unitary state, regional authority is derived from the state's authority, which is managed by the national government and devolved to the regions through legislation.

However, there is a gap between the desire to achieve fair and equitable progress and the fact that not all people and not all regions have similar access and potential. Due to demographic reasons – 58% of 238 million Indonesians live in 6 provinces in Java, a mere 7.7% of the total Indonesian land area<sup>700</sup> – the democratic principle of a one-person-one-vote representation creates an unequal distribution that must be levelled out.

Therefore, an additional instrument was deemed necessary to ensure that distinct interests of people in poor and marginalized regions could be guaranteed without violating the basic principles of the unitary state's representation system. Appointing MPR representatives from among these people, as during the old era, had been proven ineffective and unjustifiable.

PAH I agreed that there should be four Regional Representative Council members from each province, elected by the people on an individual basis.<sup>701</sup> As Regional Representative Council members, they can propose and participate in the discussion of certain bills with the DPR. This includes bills related to regional autonomy, the relationship between central and local governments, formation, expansion and merging of regions, management of natural resources and other economic resources. It also includes bills related to the financial balance between the centre and the regions. Moreover, the Regional Representative Council may oversee the implementation of the above matters and submit the result of the oversight to the

696 As, among others, proposed by the Team of Experts, see Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Satu, Edisi Revisi, Sekretariat Jenderal, 2010, p. 467. Hobbes Sinaga (F-PDIP) and Ali Hardi Kiaidemak (F-PPP) pointed out that strong bicameralism would lead to federalism and noticed that the Expert Group seemed to want to change the form of the state. See *Ibid.*, pp. 489, 491.

697 I Dewa Gede Palguna (F-PDIP) pointed out that amendment is based upon the agreement to uphold the unitary state and that in the MPR Working Body's previous discussions, the term of bicameralism was never raised, until it appeared in the manuscript of the Expert Group. See Majelis Permusyawaratan Rakyat Republik Indonesia, *op.cit.*, Tahun Sidang 2000, Buku Tiga, Edisi Revisi, Sekretariat Jenderal, 2010, p. 88.

698 See K.C. Wheare, *op.cit.*, pp. 14-19.

699 As reminded by Katin Subiyantoro (F-PDIP). See *Ibid.*, p. 131.

700 2010 National Census.

701 Despite of their misfortune, all eligible people hold the right to vote.

DPR for further action.<sup>702</sup> By having four Regional Representative Council members from each province in the MPR, which can amend the constitution and impeach the president, the number of members from Java island and from the outer islands would be better balanced.<sup>703</sup> In other words, regional aspirations and interests, including grievances, would have a rapid channel into the national political process.

The third amendment stage also empowered checks and balances by enlarging the role of the independent Financial Audit Board or BPK (*Badan Pemeriksa Keuangan*) and granting it the authority to check the management of state finances.<sup>704</sup>

Reviewing the compiled amendments, it can be concluded that the amended Constitution increasingly demonstrated the characteristics of an effective normative constitution to control and govern the country's political process, rather than containing just nominal or semantic statements (see IV.1).

At this point, it seemed that a system of institutional arrangements to both empower and limit the government was established, renowned as constitutionalism and an institutional foundation for the rule of law.<sup>705</sup>

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702 Articles 22C and 22D of UUD 1945 after the third amendment.

703 The DPR has 560 members and since there were 33 provinces, the DPD has 132 members. It makes up 692 members of the MPR. In the 2014 elections, 306 DPR members and 24 DPD members were elected in Java. This means that 330 members of the MPR are from Java and 372 members are from other parts of Indonesia.

704 Chapter VIIIA of the 1945 Constitution.

705 See Bo Li, *op.cit.*



