# THE DEVELOPMENT OF ISLAMIC CONSTITUTIONAL THOUGHT OF THE MASYUMI AND ITS INFLUENCE IN THE FORMULATION OF THE INDONESIAN CONSTITUTION 1956-2002

#### **THESIS**

By:
Amirul Haidaruddin
NIM. C95215047



State Islamic University of Sunan Ampel Surabaya
Faculty of Sharia and Law
Public Law Department
Study Program of Constitutional Law
Surabaya
2019

#### PERNYATAAN KEASLIAN

Yang bertanda tangan di bawah ini:

Nama : Amirul Haidaruddin

NIM : C05215032

Fakultas/Jurusan/Prodi : Syariah dan Hukum / Hukum Publik Islam /

Hukum Tata Negara

Judul Skripsi : The Development of Islamic Constitutional

Thought of the Masyumi and its Influence in

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Surabaya, 8 Juli 2019

Dosen Pembimbing

<u>Dr. Sri Warjiyati, S.H., M.H.</u> NIP. 196808262005012001

#### PENGESAHAN

Skripsi ditulis oleh Amirul Haidaruddin NIM. C95215047 ini telah dipertahankan didepan sidang Majelis Munaqosah Skripsi Fakultas Syariah dan Hukum UIN Sunan Ampel pada hari Rabu 24 Juli 2019 dan dapat diterima sebagai salah satu persyaratan untuk menyelesaikan program sarjana strata satu dalam Ilmu Syari'ah dan Hukum.

#### Majelis Munaqosah Skripsi

Penguji I

<u>Dr. Sri Warjiyati, S.H., M.H.</u> NIP. 196808262005012001 Penguji II

Dr. Savuri, S.Ag., M.Fil.I. NIP. 197601212007101001

Penguji III

Nabiela Naily, S.Si., M.HI., M.A.

NIP. 198102262005012003

Penguji IV

Zakiyatul Ulya, M.HI.

NIP. 199007122015032008

Surabaya, 12 September 2019

Mengesahkan,

Fakultas Syariah dan Hukum

Universitas Islam Negeri Sunan Ampel

MHOMasruhan, M.Ag.

NIP. 195904041988031003

## an

#### KEMENTRIAN AGAMA UNIVERSITAS ISLAM NEGERI SUNAN AMPEL SURABAYA PERPUSTAKAAN

Jl. Jend. A. Yani 117 Surabaya 60237 Telp. 031-8431972 Fax. 031-8413300 E-mail: perpus@uinsby.ac.id

#### LEMBAR PERNYATAAN PERSETUJUAN PUBLIKASI KARYA ILMIAH UNTUK KEPENTINGAN AKADEMIS

Sebagai sivitas ak	ademika UIN Su	nan Ampel Surabaya,	yang bertanda tanga	ın di bawah ini,						
saya:										
Nama	: Amirul Haidaruddin									
NIM	: C95215047	: C95215047								
Fakultas/Jurusan	: Syariah dan Hukum/Hukum Tata Negara									
E-mail	: Am3haidar@gmail.com									
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#### ABSTRACT

The thesis entitled "the development of Islamic constitutional thought of the masyumi and its Influence in the Formulation of the Indonesian Constitution 1956-2002" aims to answer the question about what is the formulation of the Indonesian constitution 1956-2002 and what is the influence of the development of Islamic constitutional thought of the Masyumi in the formulation of the Indonesian constitution 1965-2002.

Data of the research collected by library research study then processed and analyzed qualitatively and presented in descriptive form. data collected in the form of primary and secondary materials that discuss the main problem

The results of the study concluded that first, Improvements to the constitution are always carried out in order to bringing Indonesia towards a democratic and constitutional state through the Konstituante in 1965 to 1959, but the Konstituante was made to fail, then continued to the MPR in 1999 to 2002 in which it bringing fundamenal change to the 1945 Constitution where 46 items were changed and about 25 items were not changed, there also 174 additional provisions that has been made. Second, in the formulation of the Indonesian constitution, the Masyumi faction in the Konstituante (1956-1959) has the idea of a more modern body of constitution and in accord to the principles of constitutionalism. The basis of the state according to the Masyumi is a very fundamental things in the formulation of the constitution. In this case Masyumi insisted that the foundation of the state is Islam. But in its development, the basis of the Islamic state has not become important, it is seen in the thinking of the successor of the Masyumi, the Crescent and Star Party in the MPR (1999-2002) which no longer touches on the basis of the state, but still wants to reinserting the seven words in the Jakarta Charter.

In accord with the conclusion above, further development of the Islamic constitutionalism thought by the Masyumi are needed, considering that the Masyumi party was the first and largest modernist party, not only in Indonesia but in the world. Modernization in the field of Islamic law should have been encouraged, especially relating to Islamic constitutional law, which at the moment does not develop and tends to stagnate, so it is no longer relevant if it is connected to modern problems. By referring to the thoughts of the Masyumi and its figures, it is expected to encourage renewal in the field of *fiqh siyāsah*.

#### ABSTRAK

Skripsi yang berjudul "Perkembangan Pemikiran Konstitusional Islam tentang Masyumi dan Pengaruhnya dalam Perumusan Konstitusi Indonesia 1956-2002" bertujuan untuk menjawab pertanyaan tentang bagaimana rumusan konstitusi Indonesia tahun 1956-2002 dan bagaimana pengaruh dari perkembangan pemikiran konstitusional Islam Masyumi dalam perumusan konstitusi Indonesia 1965-2002.

Data penelitian dikumpulkan dengan studi pustaka penelitian kemudian diolah dan dianalisis secara kualitatif dan disajikan dalam bentuk deskriptif. data dikumpulkan dalam bentuk bahan primer dan sekunder yang membahas masalah utama

Hasil penelitian menyimpulkan bahwa pertama, Perbaikan konstitusi selalu dilakukan untuk membawa Indonesia menuju negara yang demokratis dan konstitusional melalui Konstituante pada tahun 1965 hingga 1959, tetapi Konstituante digagalkan, kemudian dilanjutkan ke MPR di 1999-2002 yang mana membawa perubahan fundamenal ke UUD 1945 di mana 46 item diubah dan sekitar 25 butir tidak diubah, ada juga 174 ketentuan tambahan yang telah dibuat. Kedua, dalam perumusan konstitusi Indonesia, faksi Masyumi dalam Konstituante (1956-1959) memiliki gagasan tentang badan konstitusi yang lebih modern dan sesuai dengan prinsip-prinsip konstitusionalisme. Dasar negara menurut Masyumi adalah hal yang sangat mendasar dalam perumusan konstitusi. Dalam hal ini Masyumi bersikeras bahwa dasar negara adalah Islam. Namun dalam perkembangannya, dasar negara Islam tidak menjadi penting, hal ini terlihat dalam pemikiran penerus Masyumi, Partai Bulan Bintang dalam MPR (1999-2002) yang tidak lagi menyentuh atas dasar negara, tetapi masih ingin memasukkan kembali tujuh kata dalam Piagam Jakarta.

Sesuai dengan kesimpulan di atas, diperlukan pengembangan lebih lanjut dari konstitusionalisme Islam yang dipikirkan oleh Masyumi, mengingat bahwa partai Masyumi adalah partai modernis pertama dan terbesar, tidak hanya di Indonesia tetapi di dunia. Modernisasi di bidang hukum Islam semestinya didorong, terutama yang berkaitan dengan hukum tata negara Islam, yang saat ini tidak berkembang dan cenderung mandek, sehingga tidak lagi relevan jika dikaitkan dengan masalah modern. Dengan merujuk pada pemikiran Masyumi dan tokoh-tokohnya, diharapkan mendorong pembaruan di bidang fiqh siyā sah.

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#### CHAPTER I

#### INTRODUCTION

#### A. Background of the Study

The idea of the nation-state is perhaps the most challenging theme that confronts the modern Muslim world. A great number of political and religious discourses have arisen among modern Muslim thinkers as to whether Islam can legitimately tolerate such concepts of territorial boundaries, state sovereignty, or even citizenship. The modernist and reformers have shown that Islam not need to remain a petrified system, to be regarded as a mere incumbrance to the progress of thought, and that the old theological limitations of the frontiers of knowledge can be set aside.

The reformist spirit of Islam affected religious ritual as well as politics and society. This process of adaptation of Islamization would characterize much of development of Islam. While Islam rejected some beliefs and institutions and introduced others, the more common method was to reformulate or adapt existing practices to Islamic norms and values.<sup>3</sup> The only way to reconcile these competing imperative for change in the public law of Muslim countries is to develop a version of Islamic public law which

<sup>&</sup>lt;sup>1</sup> Arskal Salim, *Challenging The Secular State: The Islamization of Law in Modern Indonesia* (Honolulu: University of Hawaii Press, 2008), 25.

<sup>&</sup>lt;sup>2</sup> H.A.R Gibb, *Modern Trends in Islam* (Chicago: The University of Chicago Press, 1947), 65.

<sup>&</sup>lt;sup>3</sup> John L. Esposito, *Islam: The Straight Path* (New York: Oxford University Press, 1991), 1.

is compatible with modern standards of constitutionalism, criminal justice, international law, and human rights.<sup>4</sup>

Public law that regulates the government of a state called constitution. The constitution is a political agreement that stipulated as an option based on its own perspective, both good and rational. K.C. Wheare also argues that constitution is a *resultante* or known as political agreement of nation through the makers according to the situation of a particular place and time. Actually, the quality of constitution becomes high when its constitution-making process traversed by a sharp debates. Constitution is a crystallization of many political interest. So, the form of constitution reflected the will of political interest at the time of the constitution was made. Moreover, well-known proverbial constitutional law's adegium stated "Constitutional law is a skeleton of the politics".

Islamic politics is a form of instrumentalization of Islam by individuals, groups, and organizations to pursue political objectives.<sup>8</sup> Bernard Lewis argues that there are two very common misapprehensions concerning Islamic Political thought and government, the one perceiving them as theocratic, the

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<sup>&</sup>lt;sup>4</sup> Abdullahi Ahmed An-Nai'm, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (New York: Syracuse University Press), 9.

<sup>&</sup>lt;sup>5</sup> Moh. Mahfud MD, *Konstitusi dan Hukum dalam Kontroversi Isu* (Jakarta: Rajawali Pers, 2010), 114.

<sup>&</sup>lt;sup>6</sup> Ibid., 115.

<sup>&</sup>lt;sup>7</sup> J. Barents, *De Wetenschap der Politiek, een Terreinverkenning* (Gravenhage: A.A.M. Stols, 1952), 83.

<sup>&</sup>lt;sup>8</sup> Mohammed Ayoob, *The Many Faces of Political Islam: Religion and Politics in the Muslim World* (Michigan: The University of Michigan Press, 2008), 2.

other as despotic or even dictatorial.<sup>9</sup> Perhaps these misconceptions could be understandable due to experience in the political history of Islam, especially in the Middle East,<sup>10</sup> which has often giving negative pictures of Islamism. Instead, having political behavior that contradict with constitutionalism.

Under the classical law of Islam, the problems of democracy and human rights are deeply intertwined and inseparable. According to Gudrun Kramer, the limited concept of Islamic democracy lies in freedom and equality. full political rights, religious and intellectual freedom and equality between men and women before the law as clearly as their equality before the creator.<sup>11</sup>

Olivier Roy also argues that the contemporary Islamic political movements can be traced to two religious movements and organizations: first, the Society of Muslim Brotherhood (*Al-Ikhwān Al-Muslimūn*), established by schoolteacher Hassan Al-Banna in 1928, and Second, the Jamaat-i-Islami Pakistan, founded by Abu al-A'la al-Maududi in 1941. Otherwise, different from Roy's opinion. Masyumi's political thought can be said that has different types compared to another model of Islamic politics on the rest of the world. Masyumi party is categorized as a modernist Islamic

<sup>&</sup>lt;sup>9</sup> Bernard Lewis, *The Political Language of Islam* (Chicago: The University of Chicago Press, 1988), 29-30.

See further, Olivier Roy, *The Failure of Political Islam* (Cambridge: Harvard University Press, 1996); John L. Esposito and John O. Voll, *Islam and Democracy* (New York: Oxford University Press, 1996); Nadirsyah Hosen, *Islam Yes, Khilafah No!: Doktrin dan Sejarah Politik Islam dari Khulafa ar-Rasyidin hingga Umayyah* (Yogyakarta: UIN Sunan Kalijaga Press, 2018).

<sup>&</sup>lt;sup>11</sup> Gudrun Kramer, "Teknik dan Nilai: Debat Muslim Kontemporer tentang Islam dan Demokrasi" in *Islam dan Barat: Demokrasi dalam Masyarakat Islam*, edited by Ulil Abshar Abdalla (Jakarta: Paramadina, 2002), 25.

<sup>&</sup>lt;sup>12</sup> Olivier Roy, *The Failure of Political Islam* (Cambridge: Harvard Univesity Press, 1996), 35.

political party.<sup>13</sup> Their political movement always in line with constitutionalism, although as Strong said that the roots of political constitutionalism lie deep in the history of the western world. <sup>14</sup> Masyumi were able to conform both of western and Islamic conceptions for their national purposes.

It was in November 1945 that the Indonesian Muslims at congress in Yogyakarta founded party called "Masjumi". All important Muslim social and educational organizations affiliated with the party. They pledged that the Masyumi would be the only political party for Muslims. The Masyumi party was for a long time the main political formation in Indonesia and apparently also the largest Muslim party in the world. Within Masyumi was spelt out and defended the ideal a Muslim democracy, one that substituted the simple demand of an Islamic state for political and parliamentary struggle. This project was initially undertaken jointly the traditionalist of Nahdlatul Ulama, but later formed their own political organization from 1952 onwards and Masyumi remained essentially the representative of reformist Islam. Islam.

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<sup>&</sup>lt;sup>13</sup> See, Yusril Ihza Mahendra, *Modernisme dan Fundamentalisme dalam Politik Islam: Perbandingan Partai Masyumi (Indonesia) dan Partai Jamā'at-i-Islāmī (Pakistan)* (Jakarta: Paramadina, 1999).

<sup>&</sup>lt;sup>14</sup> C. F. Strong, *A History of Modern Political Constitution* (New York: G. P. Putnam's Sons, 1963), 12.

<sup>&</sup>lt;sup>15</sup> M.B. Hooker, *Islam in South-East Asia* (Leiden: E.J. Brill, 1988), 185.

<sup>&</sup>lt;sup>16</sup> Masyumi party even considered as the largest muslim party in the world, see, Andree Feillard and Remy Madinier, *The End of Innocence?: Indonesian Islam and the Tempations of Radicalism* (Singapore: NUS Press, 2011), 17; Remy Madinier, *Islam and Politics in Indonesia: The Masyumi Party Between Democracy and Integralism* (Singapore: NUS Press, 2015), 1.

Despite there was Islamic fundamentalism movement led by one of the Masyumi member, S. M. Kartosuwiryo who founded *Darul Islam* (House of Islam) that rebelled to the republic after proclaimed the Indonesian Islamic State (Negara Islam Indonesia). The Masyumi preferred to use constitutional way to pursue their goals through the Konsituante (Indonesian Constituent Assembly) to inserting Sharia principles to the constitution and demanding Islam as the constitutional foundation of the state. Masyumi was in the forefront concerning the demands for application of Islamic norms in Indonesia.

Harun Nasution, in 1965, devoted his MA thesis at McGill University to examining the question of an Islamic state in Masyumi's ideology. He argues that the theory of the Islamic state (at least as it is articulated by the Masyumi leaders) differs very little from the theory of the state as it is now being practiced by the Republic of Indonesia, except for the provision that Islamic social principles as embodied in the Quran and Sunnah must be supreme.<sup>18</sup>

Masyumi's constitutional thought was devoted to the session of constitution-makinf in the Konstituante which began in 1956, In the debates on Indonesia's Constitution, the Masyumi proposed Islam as the basis of the state, Masyumi politicians strongly supported the "Jakarta Charter", the

<sup>17</sup> For further information about DI/TII, see, C. Van Dijk, *Rebellion Under the Banner of Islam* (The Hague: Martinus Nijhoff, 1981).; For compilation of the works of S.M. Kartosuwiryo see, Al-Chaidar, *Pemikiran Politik Proklamator Negara Islam S.M. Kartosuwirjo: Fakta dan Sejarah Darul Islam* (Jakarta: Darul Falah).

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<sup>&</sup>lt;sup>18</sup> Harun Nasution. "The Islamic State in Indonesia: The Rise of Ideology, the Movement for its Creation, and the Theory of Masjumi" (M.A. Thesis--McGill University, Montreal, 1965).

formula that was meant to enshrine sharia in the Preamble of the Constitution.<sup>19</sup> At least before the Konstitutante was unconstitutionally dissolved by Presidential Decree in 1959.<sup>20</sup>

Based on their constitutionalism viewpoints, Masyumi emerged as political party that strictly opposed the Presidential Decree and the President conception's Demokrasi Terpimpin, Nasakom and Manipol USDEK. While their counterparts (NU and PSII) slowly and surely follows the will of the President. There was a price to pay for Masyumi's rejection to the new unconstitutional government that had been established. At last, President Soekarno found a reason to ban Masyumi when their three prominent leaders, Mohammad Natsir, Sjafruddin Prawiranegara and Burhanuddin Harahap who involved in PRRI (Revolutionary Government of Republic of Indonesia)<sup>21</sup> was being black goats for President's reason to sabotage Masyumi party.

After the fall of the Old Order Indonesia and President Soekarno got impeached by MPRS (Provisional People's Consultative Assembly) Masyumi political leaders have a great hopes to rehabilitate their party.<sup>22</sup>

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<sup>20</sup> More information regarding the Constituent Assembly debates can be found in Adnan Buyung Nasution, *The Aspiraton of Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956-1959* (Jakarta: Pustaka Sinar Harapan, 1992).

<sup>&</sup>lt;sup>19</sup> Martin van Bruinessen, *Contemporary Developments in Indonesian Islam* (Singapore: ISEAS, 2003), 31.

PRRI was an opposition government that arose against Soekarno and the rising of Communist Party which located in West Sumatra in 1958, issued an ultimatum demanding that the Djuanda Cabinet resign within five days, President Soekarno assign Hatta and Hamengkubuwono to form a national business cabinet to replace Cabinet Karya, and President Soekarno resume constitutional positions, for insightful works regarding regionalist movements, see, R. Z. Leirissa, *PRRI-PERMESTA: Strategi Membangun Indonesia tanpa Komunis* (Jakarta: Pustaka Utama Grafiti, 1991); Barbara S. Harvey, *Permesta: Pemberontakan Setengah Hati* (Jakarta: Pustaka Utama Grafiti, 1995).

<sup>&</sup>lt;sup>22</sup> MPRS had impeached President Soekarno due to his involvement in the Communist putsch of September 30, 1965. See, for futher information, Hamdan Zoelva, *Impeachment Presiden:* 

Unfortunately the new regime under Soeharto still could not allow the reestablishment of the party. Instead, Masyumi former leaders deterred for doing such political activity.

Towards the end of the New Order and after Soeharto's resignation, there were various attempt to re-establish the Masyumi as a Political Party. In the beginning of reformation era in 1999, several parties have claimed to be bearers of Masyumi's legacy emerged, such as the Crescent and Star Party (Partai Bulan Bintang, PBB), the New Masyumi Party (Partai Masyumi Baru), and Masyumi Indonesian Muslim Political Party (Partai Politik Indonesia Masyumi). Nevertheless, the results of 1999 general elections, only the Crescent and Star Pary (Partai Bulan Bintang, PBB) won seats and able to form their faction in the MPR (The People's Consultative Assembly).

Martin van Bruinessen argues that the most credible of these was the Crescent and Star Party (Partai Bulan Bintang, PBB) named after the symbol of the Masyumi and affiliated institutions. The PBB appealed to those who remained most loyal to the Masyumi Heritage.<sup>23</sup> In the constitution amendment process in 1999-2002, the famous seven words of the Jakarta Charter emerged again in the constitutional debates, proposed by PBB which are their outlook have similarity with Masyumi's primary political struggle when its in the Konstituante before.

Alasan Tindak Pidana Pemberhentian Presiden Menurut UUD 1945 (Jakarta: Konstitusi Press, 2005), 91-99

<sup>&</sup>lt;sup>23</sup> Martin van Bruinessen, *Contemporary Developments in Indonesian Islam* ..., 31.

As mentioned above, the continuity of Masyumi's Islamic constitutional thought is always exist. Their Islamism and constitutional notion is always contested to provide good constitution for Indonesia. However, Islamism could still play a leading role in formulating Indonesian constitution. This thesis entitled "The Development of Islamic Constitutional Thought of the Masyumi and its Influence in the Formulation of the Indonesian Constitution 1956-2002" will further analyze how Masyumi's constitutional thought contribute in every constitution-making process in Indonesia.

#### B. Identification and Limitation of the Study

Based on the background of the study that have been elaborated. There are several case studies that could be identified:

- 1. Reformation of Islamic thought in the Muslims world.
- 2. Intellectual connections between Masyumi's and its successor;
- The struggle of Masyumi and its successor in inserting the Jakarta
   Charter in every constitutional opportunity in order to creating the Indonesian constitution;
- 4. The formulation of the Indonesian Constitution 1956-2002
- 5. The influence of Islamic constitutional thought in the modern Indonesian constitution
- 6. The development of Islamic constitutional thought of the Masyumi and its influence on the formulation of the Indonesian constitution.

A more specific discussion in discussing the problem is carried out to obtain a complete and clear explanation and does not expand by limiting the problem to be studied follows:

- 1. The formulation of the Indonesian Constitution 1956-2002.
- 2. The development of Islamic constitutional thought of the Masyumi and its influence on the formulation of the Indonesian constitution.

#### C. Research Questions

In relation to the background of the study previously outlined above, the question of the study can be formulated follows:

- 1. What is the formulation of the Indonesian Constitution 1956-2002?
- 2. What is the influence of the development of Islamic constitutional thought of the Masyumi in the formulation of the Indonesian 1956-2002?

#### D. Literature Review

Review of related literature are conducted to elaborate several previous studies which has the same object. In this study, regarding the Masyumi Party, their intellectual lineage and constitution-making. Related to this research, several previous studies which has already conducted are follows:

 A Master's thesis entitled "The Islamic State in Indonesia: The Rise of Ideology, The Movement for its Creation and the Theory of the Masjumi" written by Harun Nasution in 1965. This thesis is tracking the development of the idea of the Islamic state in Indonesia and see, through the development, the place it occupies in the political life of Indonesia. Highlighting the theory made by Masyumi leaders, the Masjumi leaders in forming their theory of the Islamic state, unlike the Muslims in the Middle East and those of the subcontinent of India, the Muslims of Indonesia have no Islamic past, of which they could be proud. If they looked back to their own history, they would only come across the great Hindu Kingdoms of Sriwidjaja and Madjapahit, which the Islamists, of course, could not take as models for their Islamic state. Whereas the Islamists in the Middle East and Pakistan have the tendency to look into their past, the Indonesian Islamists look to the future.<sup>24</sup>

2. A Master's thesis entitled "A House Divided: The Decline and Fall of Masyumi (1950-1956)" written by Robert E. Lucius in 2003. Examined the dynamics of Masyumi political struggle in parliamentary democracy era and thier failure in Indonesian politics. Using political analysis, this thesis traced Masyumi political activity in every Indonesian Cabinets in parliamentary democracy era and argued that much of the political history of Indonesia during the period of parliamentary democracy revolved around attempts by other political actors to weaken Masyumi. Much of Masyumi's failings can instead be traced back to its own doorstep and to a string of bad choices made in the context of the political discourse peculiar to this era. When one looks at the broad sweep of Indonesian political history during this period, one can easily identify

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<sup>&</sup>lt;sup>24</sup> Harun Nasution, "The Islamic State in Indonesia: The Rise of Ideology, the Movement for its Creation, and the Theory of Masjumi" (M.A. Thesis--McGill University Montreal, 1965).

- four factors that negatively influenced not only Masyumi.s political fortunes, but the fortunes of the whole democratic system as well.<sup>25</sup>
- 3. A thesis entitled "Upaya Para Nasionalis Islami dalam Memperjuangkan Konstitusi Negara Republik Indonesia" written by Achmad Zaini in 1998. Mainly, this thesis explaining Islamism efforts in the BPUPKI (briefly) and the Konsitutante. Highlighting in Constituent Assembly, the turning point began when all of Islamic parties were united to propose Islam as a basis of the state while at the same time secular parties resisting and still maintaining Pancasila as a state ideology. At glance, in the eyes of the Government such situations could endangered the state, so they stipulated the Presidential Decree to dissolve the Konstituante and to return to the Constitution of 1945. However, lack of constitutionalism point of view, this thesis seems to be hasty to supported Presidential Decree and dissolution of the Konstituante, moreover, its still cannot anayze distinction of main arguments among secular nationalist and islamist nationalist.
- 4. A thesis entitled "Metamorfosis Partai Politik Islam Masyumi: Studi Terhadap Partai-Partai Politik Islam dalam Pemilu 1999" written by Kholil Fathul Umam in 2007. This thesis write extensively about the relationships of Islamic political parties that born after the fall of New Order Indonesia (or precisely in the general elections of 1999) with the

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<sup>&</sup>lt;sup>25</sup> Robert E. Lucius, "A House Divided: The Decline and Fall of Masyumi" (Master's Thesis-Naval Postgraduate School Monterey, 2003).

<sup>&</sup>lt;sup>26</sup> Achmad Zaini, "Upaya Para Nasionalis Islami dalam Memperjuangkan Konstitusi Negara Republik Indonesia" (Thesis--IAIN Sunan Ampel Surabaya, 2008).

Islamic political party "Masyumi". Explaning that after ex-Masyumi's failure to founded Parmusi. After Soeharto step down in 1998, political parties was actually born and grow rapidly. So the remnants of Masyumi activists and supporters by bringing the Masjumi's ideological struggle have founded several parties which contains Masyumi's outlook, this can be seen from its principles, ideologies, platforms, figures, mass base, objectives, names, and party signs in the elections of 1999..<sup>27</sup>

Perjuangan Politik Pasca Orde Baru 1998-2004" written by Zainatul Rohmah in 2009. This thesis examined PBB ideological backdrop of the party's foundation. Partai Bulan Bintang (the Crescent Star Party) or abbreviated as PBB is the party born after the New Order Indonesia collapsed. PBB was established on July 17, 1998. the background of birth of PBB due to dissatisfaction with former Masyumi figures who joined the *forum ukhuwah islamiyah* (FUI). The former Masyumi hopes that the PBB can continue the ideology and struggle of Masyumi. PBB major struggle was to fight for Islamic Sharia in Indonesia and amending Article 29 paragraph (1) which stated "a state based on divinity with the obligation to carry out Islamic Sharia for its adherents". However, PBB's political struggle to inserting seven words of Piagam Jakarta came into

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<sup>&</sup>lt;sup>27</sup> Kholil Fathul Umam, "Metamorfosis Partai Politik Islam Masyumi: Studi Terhadap Partaipartai Politik Islam dalam Pemilu 1999 (Thesis--UIN Sunan Kalijaga Yogyakarta, 2007).

failure due to vast majority of political factions resisting to it, finally this thesis came into conclusion that PBB is a successor of the Masyumi.<sup>28</sup>

Based on review of related literature above, the difference from a number of works briefly explain above is that this study will explain political backdrop in constitution-making process, using constitutionalism point of view. Normative, legal, comparative, political and historical approach will be used to analyse the development of Islamic constitutional thought of the Masyumi in formulating the Indonesian constitution, so the result of this study could provide more insightful works regarding the development of Islamic constitutional thought in Indonesia and its contribution to the Indonesian constitution.

#### E. Objectives of the Study

This research is aimed to:

- 1. Find out the formulation of the Indonesian constitution.
- 2. Find out the development of Islamic constitutional thought of the Masyumi and its influence in the formulation of the Indonesian constitution 1956-2002.

#### F. Significance of the Study

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The findings of this study explain how Masyumi and its intellectual lineage in formulating the Indonesian constitution. They can be used as

<sup>&</sup>lt;sup>28</sup> Zainatul Rohmah, "Partai Bulan Bintang (PBB) di Indonesia: Ideologi dan Perjuangan Politik Perjuangan Politik Pasca Orde Baru 1998-2004" (Thesis--IAIN Sunan Ampel Surabaya, 2009).

beneficial input for the other researchers and even the politicians or lawmakers. This research is conducted in hope for providing significance contribution. The significance of the study is divided into two which include theoretical benefits and practical benefits:

#### 1. Theoretical Benefits

This study is expected to be able providing benefits in the form of contributing ideas for constitution-making based on universal Islamic principles also political history of Indonesian Islam especially the Masyumi Party. Instead, the researcher hopes this study could be an impetus to creating a new form of Indonesian constitutionalism and also as a trigger to modernizing Islamic constitutional thinking for the next global context.

#### 2. Practical Benefits

The results of this study are expected to not only concerning constitution, furthermore, is to inspire the legislators to create any kind of legislation products based on Islamic values by consideration. For political parties (Muslim parties in particular), that they could take historical lessons to not being trapped in statistical thinking, at least "compromise" in every difficult hindrance in achieving their goals, as long as not violating religious values it will fully understandable. Moreover for the executives, the most important things is to make sure that every single decisions will be going to take are not contradict with constitutional barrier. Additionally, for the public society this study is

expected can giving an constitutional insight to understand that a good constitution could have affection to a good governmental systems.

Above all, the researcher hopes that next researcher of constitutional law would be also have interest to study on Islamic constitutional law discourses.

#### G. Definition of Key Terms

In this study researcher provides definition of some key terms, to help the reader understand easily. They are described as follows:

#### 1. Development

The process in which someone or something grows or changes and becomes more advanced. In this study, terms of "Development" meaning continuity and change. All kind of idea (particularly great idea) always been has continuer, from generation to generation. Not only continuity but also modify or change to contextualize the notion with modern times.

#### 2. Islamic Constitutional Thought

An Islamic legal understanding regarding governmental system as an interpretation of Islamic principal values. Islamic constitutional thought lie in combination of Islamism and constitutionalism which aimed to establish a good relationship between the government and the governed.

#### 3. The Masyumi

Council of Indonesian Muslim Associations (*Majelis Syuro Muslimin Indonesia*). Modernist Islamic political party, founded in 1945 later on emerge as the largest political party in Indonesia until it was banned by President Soekarno in 1960.

#### H. Research Method

This research using several methods and techniques that are used by the researcher in conducting the research for collecting and processing the data, in order to establishing the relationship between the data and unknown facts, and evaluating the accuracy of the results obtained. The types, approaches, sources and analysis techniques elaborated as follows:

#### 1. Types of Research

The type of research in this study is socio-legal, this interdisciplinary study is a 'hybrid' of a large study of law and the sciences of law from a community perspective that was born before. Socio-legal is a study of law using the approach of law and social sciences. The non-doctrinal approaches represent a new approach of studying law in the broader social and political context with the use of a range of other methods taken from disciplines in the social sciences and

<sup>&</sup>lt;sup>29</sup> Sulistyoawati Indrianto et al., *Kajian Sosio-Legal* (Denpasar: Pustaka Larasan, 2012), 1-2.

humanities.<sup>30</sup> In this study, the researcher using legal studies combined with history and politics.

#### 2. Research Approach

The research approach that used in this study is historical approach. This approach is carried out within the framework of understanding the philosophy of the law products from time to time, as well as understanding the changes and developments in the philosophy that underlie in a legal rules.<sup>31</sup> The method of this approach is carried out by examining the background and development of regulations regarding the legal issues faced.

#### 3. Source of the Data

Sources of the data or information are often categorized as primary, secondary, or tertiary material. These classifications are based on the originality of the material and the proximity of the source or origin. By identifying the sources of law and relevant legal materials, source of the data in this study consist as follows:

#### a. Primary data

Primary data is the data that collected by a researcher from first-hand sources, using methods like surveys, interviews, experiments.

However, law studies have other explanation concerning this sources.

Primary sources could be an authoritative legal material, it means the

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Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007), 5.

<sup>&</sup>lt;sup>31</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2010), 166.

authority.32 They are **from** sources has the time period involved and have not been filtered through interpretation or evaluation. Regarding primary data, the researcher will take the data from interview and also from authoritative materials. authoritative materials to use in this research as follows:

- 1) Mohammad Natsir, *Capita Selecta* (Bandung: W. Van Hoeve Ltd., 1954).
- 2) Osman Raliby, *Documenta Historica*, Vol. I (Jakarta: Bulan Bintang, 1952).
- 3) Sjafruddin Prawiranegara, *Sejarah Sebagai Pedoman untuk Membangun Masa Depan* (Jakarta: Yayasan Idayu, 1976).
- 4) Sjafruddin Prawiranegara, *Aspirasi Islam dan Penyalurannya*.

  Jakarta: Korps Mubaligh Indonesia, 1987).
- 5) Mohammad Roem, *Bunga Rampai Dari Sejarah* (Jakarta: Bulan Bintang, 1988).
- 6) Z.A. Ahmad, Membentuk Negara Islam (Jakarta: Widjaja, 1956).
- 7) Z.A. Ahmad, *Islam dan Parlementarisme* (Jakarta: Pustaka Antara, 1952).
- 8) Anwar Harjono, *Perjalanan Politik Bangsa: Menoleh ke Belakang Menatap Masa Depan* (Jakarta: Gema Insani Press, 1997).
- 9) T. M. Hasbi Ash-Shiddieqy, *Falsafah Hukum Islam* (Jakarta: Bulan Bintang, 1993).

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<sup>&</sup>lt;sup>32</sup> Peter Mahmud Marzuki, *Penelitian Hukum...*, 181.

- 10) T. M. Hasbi Ash-Shiddieqy, 1999. Islam dan HAM: Dokumen Politik Pokok-pokok Pikiran Partai Islam dalam Sidang Konstituante 5 Februari 1958 (Semarang: Pustaka Rizky Putra, 1999).
- 11) T. M. Hasbi Ash-Shiddieqy, *Islam dan Politik Bernegara* (Semarang: Pustaka Rizky Putra, 2002).
- 12) Yusril Ihza Mahendra, *Modernisme dan Fundamentalisme dalam*Politik Islam: Studi Perbandingan Partai Masyumi (Indonesia) dan

  Partai Jama'at-i-islami (Pakistan) (Jakarta: Paramadina, 1999).

#### b. Secondary data

Secondary data is type of the data which indirectly giving the data information to the researcher. Secondary data implies second-hand information which has already collected and recorded by any person other than the user for a purpose. In this research, secondary data which used as follows:

- 1) Deliar Noer, *The Modernist Muslim Movement in Indonesia* (Kuala Lumpur: Oxford University Press, 1973).
- 2) Adnan Buyung Nasution, *The Aspiration of Constitutional*Government in Indonesia: A Socio Legal Study of the Indonesian

  Konstituante 1956-1959 (Jakarta: Pustaka Sinar Harapan, 1992).
- 3) Remy Madinier, *Islam and Politics in Indonesia: The Masyumi*Party Between Democracy and Integralism (Singapore: NUS

  Press, 2015).

- 4) Herbert Feith, *The Decline of Constitutional Democracy in Indonesia* (Ithaca: Cornell University Press, 1973).
- 5) Herbert Feith and Lance Castles (eds), *Indonesian Political Thinking 1945-1965* (Ithaca and London: Cornell University Press, 1970).
- 6) Nadirsyah Hosen, *Shari'a & Constitutional Reform in Indonesia* (Singapore: Institute of Southeast Asian Studies, 2007).
- 7) Arskal Salim, Challenging the Secular State: The Islamization of Law in Modern Indonesia (Hawaii: University of Hawaii Press, 2001).
- 8) Masdar Hilmy, *Islamism and Democracy in Indonesia: Piety and Pragmatism* (Singapore: Institute of Southeast Asian Studies, 2010).
- 9) Mahkamah Konstitusi RI, Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indoesia Tahun 1945:

  Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002

  (Jakarta: Sekertariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010).
- 10) Muh. Yamin, *Naskah Persiapan Undang-Undang Dasar 1945* (Jakarta: Yayasan Prapantja, 1960).
- 11) R. Soepomo, *Undang-Undang Dasar Sementara Republik Indonesia* (Jakarta: Noordhoff-Kolff N. V., 1950).

- 12) A. K. Pringgodigdo, *Tiga Undang-Undang Dasar* (Jakarta: Pembangunan, 1954).
- 13) Kementrian Penerangan RI, *Kembali Kepada Undang-Undang Dasar 1945* (Jakarta: Kementrian Penerangan, 1959).
- 14) Kementrian Penerangan RI, *Kepartaian di Indonesia* (Jakarta: Kementrian Penerangan, 1951).
- 15) Kementrian Penerangan RI, *Kepartaian dan Parlementaria di Indonesia* (Jakarta: Kementrian Penerangan, 1954).

#### 4. Data Analysis

Data analysis of this research are using analytical descriptive method then analyzed with deductive reasoning. Deductive reasoning works from the more general to the more specific. Sometimes this reasoning informally called a "top-down" approach. Using deductive reasoning, this study came from general variables, that is concerning "Islamic constitutional thought of The Masyumi" then applied to the specific variables for analysis of "In formulating the Indonesia constitution" then the data is analyzed qualitatively in accordance with the research questions and based on the existing theoretical framework.

#### I. Thesis Outline

To facilitate understanding of the thesis, it is necessary to describe clearly and thoroughly about the systematics writing. Systematics of thesis writing is a big part to provide an overview of contents of the thesis and facilitate the way of thinking in understanding the overall thesis. The systematic writing is arranged as follows:

Chapter I, contains an introduction that covers the background of the study, Identification and limitation of the study, research questions, literature review, objective of the study, significance of the study, definition of key terms, research method, and thesis outline.

Chapter II, provides brief profile of the Masyumi including its genesis, foundation and the end of the Masyumi. This chapter provide the Islamic constutitonal thought of the Masyumi and its continuity after the Masyumi dissolved.

Chapter III, Provides the context or focus of the study, that is, the formulation of the Indonesian constitution since its enactment in 1945, constitution-making in the Konstituante 1956-1959 and constitutional reform in the MPR 1999-2002.

Chapter IV, is devoted to analyze the research questions. This chapter deals with two main issues: first, the formulation of the Indonesian constitution; and second, the development of Islamic constitutional thought of the Masyumi and its influence in the formulation of the Indonesian constitution.

Chapter V, contains conclusions that discusses findings or answers to the research questions of this research and suggestions relating to the topic of discussion of this thesis.

#### **CHAPTER II**

### THE DEVELOPMENT OF ISLAMIC CONSTITUTIONAL THOUGHT OF THE MASYUMI

#### A. The Masyumi Party

#### 1. Genesis of Modernism in the Masyumi

The 1920s and early 1930s might be called the "ideological decade". Genesis of thoughts that developed in the modern Indonesian can be traced from this period. Various theory had been expounded the advent of Islam in the Indonesian archipelago such Gujarat theory invented by C. Snouck Hurgronje, Mecca theory by Hamka, Persian theory by Hosein Djajadiningrat, Chinese theory by Slamet Muljana, maritime theory by N.A. Baloch<sup>2</sup> and much else. In the book edited by A. Hasymy, on seminars of the coming and the development of Islam in Indonesia concludes that Islam was come directly from Arabia by the traders and the *muballigh* (preachers).<sup>3</sup>

According to J.C. van Leur, Islam was used as political weapon against Calvinism of the Dutch company. Spread process of Islam in Indonesia was determined by political motives.<sup>4</sup> The rulers of fourteenth and fifteenth century had adopted Islam believing that Islamic Political

<sup>&</sup>lt;sup>1</sup> Taufik Abdullah, *Islam dan Masyarakat: Pantulan Sejarah Indonesia* (Jakarta: LP3ES, 1987), 15.

<sup>&</sup>lt;sup>2</sup> Ahmad Mansur Suryanegara, *Api Sejarah*, Vol. I (Bandung: Surya Dinasti, 2015), 99-104.

<sup>&</sup>lt;sup>3</sup> A. Hasymy, *Sejarah Masuk dan Berkembangnya Islam di Indonesia* (Bandung: Alma'arif, 1993).

<sup>&</sup>lt;sup>4</sup> J.C. van Leur, *Indonesian Trade and Society: Essays in Asian Social and Economic History* (Bandung: Sumur Bandung, 1960), 117.

thinking reflected rather than undermine their political ideology.<sup>5</sup> Azyumardi Azra argues, Islamic renewal began in Malay-Indonesia world as early seventeenth century, rather than at the beginning of nineteenth century or early twentieth century, as maintained by some scholars. Like Hamka and Federspiel, believe that Islamic reform or renewal began in Archipelago only with the rise of Padri movement in West Sumatera at the beginning of nineteenth century.<sup>6</sup> The Dutch saw these modernist Muslim were antithetical to their own interest and attempted to keep such influence from penetrating Indonesia.<sup>7</sup>

Many pioneers of Islamic modernism in Indonesia are started, and developed in the land of Sumatera. Propounded by *kaum muda*, "young" (*muda*) was defined as symbol of progress. In its secular form of conflict occurred between progressive and conservative, while in religious aspect, it was struggle between modernist and traditionalist. These young reformers were influenced by Muhammad Abduh, the *kaum muda* propagated *ijtihad*, striving to attain truth by using *akal*, reasoning. The influence of Muhammad Abduh was very significant in Indonesia. According to Alfian, the birth and development of Islamic modernism in

<sup>&</sup>lt;sup>5</sup> M.B. Hooker, *Islam in South-east Asia* (Leiden: E.J. Brill, 1988), 48.

<sup>&</sup>lt;sup>6</sup> Azyumardi Azra, *The Origins of Islamic Reformism in Southeast Asia: Networks of Malay-Indonesian and Middle Eastern 'Ulama' in the Seventeenth and Eighteenth Centuries* (Sydney and Honolulu, HI: Allen & Unwin, University of Hawaii Press, 2004), 109.

<sup>&</sup>lt;sup>7</sup> Howard M. Federspiel, "The Persatuan Islam (Islamic Union)" (Ph.D. Thesis--McGill University, Montreal, 1966), 10.

<sup>&</sup>lt;sup>8</sup> Taufik Abdullah, "School and Politics: The Kaum Muda Movement in West Sumatera" (Ph.D. Thesis--Cornell University, Ithaca New York, 1970), 19-20.

Indonesia was a direct reaction against the decadence of Islam and the backwardness of its followers.<sup>9</sup>

Van der Kroef mention, the influence of Western ideas and education has turned a younger generation of potential Muslim toward a non-Islamic worldview.<sup>10</sup> Karel Steenbrink concludes at least there are four objectives of reformist movement in order to create a new structure of Indonesian Islam, first, rejection to *taqlid* (blindly believe), secondly, nationalism against Dutch colonialism, thirdly, national awareness on social-economic matters, fourthly, renewal in Islamic education.<sup>11</sup>

Deliar Noer asserts, Indonesian modernist maintained that the gate of *ijtihad* is still open and rejected the idea of *taqlid* (blindly believe). But this doesn't mean that they condemned the founders and other imam or madzab, the opinions of these imam are subject to further examination. According to Deliar, Indonesian modernist readily adopted the organizational and educational method and ideas of the West. Including those of Christian missionaries, as long as these were not in violation of the principles of Islam.<sup>12</sup>

Most renowned Indonesian modernist figure was Hadji Agus Salim.

Agus Salim became one of the first Indonesian Islamic Modernist. In this

<sup>&</sup>lt;sup>9</sup> Alfian, *Muhammadiyah: The Political Behavior of a Muslim Organization under Dutch Colonialism* (Yogyakarta: Gadjah Mada University Press, 1989), 86.

<sup>&</sup>lt;sup>10</sup> J.M. van der Kroef, *Indonesia in the Modern World*, Vol. I (Bandung: Masa Baru, 1954), 73.

Karel Steenbrink, *Pesantren, Madrasah, Sekolah: Pendidikan Islam dalam Kurun Modern* (Jakarta: LP3ES, 1986), 155.

<sup>(</sup>Jakarta: LP3ES, 1986), 155.

Deliar Noer, *The Modernist Muslim Movement in Indonesia 1900-1942* (Kuala Lumpur: Oxford University Press, 1973), 306.

capacity he came to play an influential role in Indonesian life.<sup>13</sup> He probably become the first Indonesian Muslim who was able to write clearly and to speak confidently in defense of Islam.<sup>14</sup> However, at the same time, Agus Salim also encourages the Indonesian intelligentsia to break away from Western domination.<sup>15</sup>

At political levels, Indonesian modernist political movement were deeply rooted to Sarekat Islam (Islamic Association). <sup>16</sup> The characteristic of modernism in the movement of Sarekat Islam reflects on how SI concerns about social, economic and political matters, while traditional movements were basically orientated towards only religious values. <sup>17</sup>

The opponents of Sarekat Islam, Javanese-centred nationalist generally held unsympathetic views of more reformist Islam and tended to look back upon pre-Islamic Majapahit as a golden age. Javanese nationalism and Islamic reform clashed when an article appeared in the Surakarta newspapers *Djawi Hisworo* by Budi Utomo in 1918 which slandered Prophet Muhammad as a drunkard and opium smoker. Muslims were incensed, then Sarekat Islam set up Tentara Kandjeng Nabi Muhammad (Army of Prophet Muhammad) demanding apology of the

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<sup>&</sup>lt;sup>13</sup> Robert van Niel, *The Emergence of the Indonesian Elite* (Leiden: KITLV, 1984), 118-119.

<sup>&</sup>lt;sup>14</sup> Alfian, *Muhammadiyah*..., 117.

<sup>&</sup>lt;sup>15</sup> Taufik Abdullah, Aswab Mahasin and Daniel Dhakidae, *Manusia dalam Kemelut Sejarah*, (Jakarta: LP3ES, 1983), 123.

<sup>&</sup>lt;sup>16</sup> Sartono Kartodirdjo, *Protest Movement in Rural Java: A Study of Agrarian Unrest in the Nineteenth Century and early Twentieth Century* (Kuala Lumpur: Oxford University Press, 1978), 146-148.

<sup>&</sup>lt;sup>17</sup> Ibid., 147.

writer and to retract his words. <sup>18</sup> Primarily, Budi Utomo consist of *kejawen* people, limiting their membership only for peoples of Java and Madura. Instead, in their congress in Solo held in 1928 they rejected the clause "...towards implementing the ideals of Indonesian unity", which mean did not open opportunity for outside Java and Madura (Sumatera, etc.) to joini its membership. <sup>19</sup>

Clifford Geertz in his *Religion of Java*, examining the streams in Javanese society, Geertz had found distinction between three groups, those are the *abangan*, *santri* and *priyayi*. The *abangan*, represents the animistic aspects of the overall Javanese syncretism; the *santri*, represents of Islamic syncretism; and the *priyayi*, represents the Hinduist aspect and the bureaucratic element.<sup>20</sup>

Nonetheless, on the other hand, the Dutch colonial government also has cynical views towards political Islam, their policy were based on the advice of Snouck Hurgronje. Hamid Algadri refers Snouck as a giant orientalist, a "God of Pantheon" from Leiden, <sup>21</sup> Snouck was the one who invented the *adat* law and *receptie* theory in countering *receptio in complexu* (the law of society follows religion) of Solomon Keizer and L.W.C van den Berg so that the influence of Islamic law in Netherland-

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<sup>&</sup>lt;sup>18</sup> M.C. Ricklefs, *A History of Modern Indonesia since c. 1200*, 3<sup>rd</sup> Edition (London: Palgrave MacMillan, 2001), 221-222.

<sup>&</sup>lt;sup>19</sup> A.K. Pringgodigdo, *Sedjarah Pergerakan Rakjat Indonesia* (Jakarta: Dian Rakjat, 1970), 44.

<sup>&</sup>lt;sup>20</sup> Clifford Geertz, *The Religion of Java* (Glencoe: The Free Press, 1960), 5-6.

<sup>&</sup>lt;sup>21</sup> Hamid Algadri, *C. Snouck Hurgronje: Politik Belanda terhadap Islam dan Keturunan Arab* (Jakarta: Sinar Harapan, 1984), 17.

Indies could be eliminated.<sup>22</sup> His theory has a strong impact to the Dutch colonial policy towards Islam during 1920s-1930s, *receptie* theoretical concept has its foundation in Art. 134: 2 of IS 1919 (*Wet op de Indische staatsinrichting*/Dutch Indies Constitution).<sup>23</sup> That is why Hazairin called on *receptie* theory as a "*teori Iblis*" (theory from the demon).

According to Natsir, Snouck advisor to the Dutch government, at least there are three points of Snouck's recommendations to the Dutch colonial policy towards Islam, first, in terms of *ubudiyah* affairs the government must fairly give widest extent of its freedom, secondly, Islamic *muamalah* affairs should be respected by the government and give them opportunity to gradually moving towards us (the Dutch government), and thirdly, in terms of Islamic political affairs, the government must strongly refuse and annihilate it.<sup>24</sup> Snouck Hurgronje, believes that an Islam would be tamed if deprived for its political content.<sup>25</sup>

Several Western-educated students who have commitment in Islam such Muhammad Natsir, Jusuf Wibisono, Mohamad Roem, Kasman Singodimedjo and Prawaoto Mangkusasmito (who later on became

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<sup>&</sup>lt;sup>22</sup> See further Supomo and Djokosutono, *Sedjarah Politik Hukum Adat 1848-1928*, Vol. II (Jakarta: Djambatan, 1954), 82.; Van Vollenhoven, *Penemuan Hukum Adat* (Jakarta: Djambatan, 1987), 143.

<sup>&</sup>lt;sup>23</sup> Muhamad Hisyam, *Caught Between Three Fires: The Javanese Pangulu Under the Dutch Colonial Administration* (Leiden: Universiteit Leiden, 2001), 80.

Mohammad Natsir, Capita Selecta, Vol. I (Bandung, 'S-Gravenhage: W. Van Hoeve, 1954), 155.; Mohammad Natsir, Islam dan Kristen di Indonesia (Bandung: Peladjar-Bulan Sabit, 1969), 104.

<sup>&</sup>lt;sup>25</sup> Karel Steenbrink, *Dutch Colonialism and Indonesian Islam: Contacts and Conflicts 1956-1950* (Atlanta, GA: Rodopi B.V., 1993), 97.

leaders of Masyumi party) under supervision of "the grand old man" Hadji Agus Salim, was the mentor to these future leaders of Masyumi party, had joined to *Jong Islamieten Bond* (JIB). According to Deliar Noer, this organization had succeed in hold up some Indonesian Muslims pupils and students for ran away from their own religion.<sup>26</sup> There were four aims JIB had adopted in 1925: *first*, the study and promotion of the observation of Islam; *secondly*, The cultivation and promotion for sympathy for Islam and its followers, while giving positive tolerance with regard to those who think otherwise; *thirdly*, The cultivation and promotion of contacts among the intellectuals and with the people through Islam and *fourthly*, the promotion of physical and spiritual development of its member through self-training (education) and self-activity.<sup>27</sup>

In 1930's *Polemik Kebudayaan*, Prominent Indonesian scholar, Sutan Takdir Alisjahbana when countering Sutomo's opinion, has argued that there is no *toevallig* (coincidence), that all of recent Indonesian leaders were a product of Western education who have been accused for disuniting the society. Because of Western education teach them to independent thinking, teach them to criticize and to refute the *kiyai* (traditional Islamic scholar) and encourage themselves to throw out every

<sup>&</sup>lt;sup>26</sup> Mohammad Roem, *Mohamad Roem 70 Tahun: Pejuang Perunding* (Jakarta: Bulan Bintang, 1978), 240.

<sup>&</sup>lt;sup>27</sup> Alfian, Muhammadiyah..., 124.

adat (traditional customs) and tradition that shackled them to compete with other nations.<sup>28</sup>

### 2. The Formation of the Masyumi

The Masyumi was founded in 1943 to be an umbrella organization for various Indonesian Islamic groups serving the interests of mobilization under the Japanese occupation. Under such an organizational rather than an ideological rubric, Masjumi had originally brought together Muslims of a wide variety of orientations, ranging from traditionalists to modernists. With the defeat of the Japanese and the Indonesian declaration of independence in 1945, Masjumi transformed itself into a political party.<sup>29</sup>

Masyumi party was founded on 7 November 1945, which was pledged as the one and only Islamic political party in Indonesia,<sup>30</sup> in which within a year was to surpass PNI in the size and became the largest political party in Indonesian Republic, because of huge support from nonpolitical Islamic social organizations and almost religious leader of Java, Madura and Sumatera which supported Masyumi. Similarly like all republican parties, national independence was the chief aim of the Masyumi. Next to that, it was dedicated to the organization of the state

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<sup>&</sup>lt;sup>28</sup> Sutan Takdir Alisjahabna, "Didikan Barat dan Didikan Pesantren; Menuju ke Masyarakat yang Dynamisch" in *Polemik Kebudayan* Edited by Achdiat K. Mihardja, (Jakarta: Putaka Jaya, 1977), 65.

<sup>&</sup>lt;sup>29</sup> R. Michael Feener, *Muslim Legal Thought in Modern Indonesia* (New York: Cambridge University Press, 2007), 82.

<sup>&</sup>lt;sup>30</sup> H. Aboebakar Atjeh, *Seajarah Hidup KH. A. Wahid Hasyim* (Jombang: Pustaka Tebuireng),

according to Islamic principles.<sup>31</sup> In early of its foundations, the aims of Masyumi are:

- a. Maintaining the state sovereignty and the religion of Islam.
- b. Implementing Islamic ideals on the statehood affairs.And the effort of Masyumi as constituted in its statute are:
- a. Evoking and spreading the knowledge, and ability of Islamic societies in political struggle.
- b. Arranging and strengthening Islamic societies frontline for struggle in order to maintain religion and state sovereignty.
- c. Implementing society's life depends on faith and piety, humanity, social, brotherhood, and equality of rights in accordance to Islamic teachings.
- d. Cooperating with another groups in order to maintain the state sovereignty.<sup>32</sup>

On 1952, NU as the largest Islamic organization, the main supporter of the Masyumi, broke away from the party. According Greg Fealy, main leader of the NU who reminds of these dangers is Wahid Hasyim. He very concerned about the political prospects that diverted NU from its social and religious responsibilities.<sup>33</sup> On the other hand, Wahab Hasbullah says "if someone is able to separate sugar from its sweetness, he will able separate Islam and politics".<sup>34</sup>

<sup>34</sup> Ibid., 119.

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<sup>&</sup>lt;sup>31</sup> George McTurnan Kahin, *Nationalism and Revolution in Indonesia* (New York: Cornell University Press, 1955), 156-158.

<sup>&</sup>lt;sup>32</sup> Kementerian Penerangan Republik Indonesia, *Kepartaian di Indonesia* (Jakarta: Kementerian Penerangan, 1951), 15.

<sup>&</sup>lt;sup>33</sup> Greg Fealy, *Ijtihad Politik Ulama: Sejarah NU 1952-1967* (Yogyakarta: LKiS, 2003), 118.

## 3. End of the Masyumi

During the period 1950-1957, one Soekarno's major political preoccupations was with what he conceived to be the very real threat of Islamic political order. The fact that Masyumi was never able to settle upon a definition of an Islamic State did not diminish the concern of Soekarno and other secular nationalist. For although the top Masyumi leaders could not agree among themselves on the attributes of an Islamic state should have. While perfectly true that the ideas of such Masyumi leaders as Mohammad Natsir, Dr. Sukiman, and Mohamad Roem were not in themselves likely to cause great alarm to the non-Islamic communities in Indonesia, there was no firm assurance that these moderates would be able to withstand pressures from the more extreme elements in the party.<sup>35</sup>

Since 1957, many unconstitutional maneuvers made by President Soekarno and the Army. Soekarno espoused his "Guided Democracy" conception, Muhammad Natsir, as the chairman of Masyumi, strongly disagree with Soekarno's idea. For Natsir, guided democracy was a hiding dictatorship. On 1958, three Masyumi leading figures, Muhammad Natsir, Sjfaruddin Prawiranegara, Burhanuddin Harahap and also PSI figure, Soemitro Djojohadikusumo had joined PRRI. The involvement of these three senior Masyumi leaders brought very serious consequence for the

<sup>&</sup>lt;sup>35</sup> George McTurnan Kahin (ed), *Major Governments of Asia* (New York: Cornell University Press, 1965), 599.

party.<sup>36</sup> Barbara Sillars Harvey noted that one of the main characteristics of the PRRI/Permesta rebellion was that basically the movement demanded changes in national policies rather than movements that demand separation from the state. PRRI is an alternative government not an alternative state.<sup>37</sup>

Actually, as Ahmad Syafii Maarif said that the presence of guided democracy was not only opposed by the Masyumi and the PSI. Even though these two parties were the most persistent opposition. Some political figures from parties also opposed it, including two NU leaders, KH M. Dahlan and Imron Rosadi. Nonetheless, they have not succeeded in pulling the party (NU) to their political line. Thus, their resistance to guide democracy ultimately became a personal responsibility but they were still worthy of being recorded as heroes of democracy.<sup>38</sup>

Seven years after the dissolution of the Masyumi party, in a congress of legal experts, there was a surprising resolution. The legal experts agreed to urge the New Order government (which had toppled President Sukarno's power) to rehabilitate Masyumi and PSI. The reason for the disbandment of these two parties are contrary to law and justice. It was also stated that the party had been the victim of political abuse in the Old Order era. Surprisingly, the one who signed the resolution was Mr.

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<sup>&</sup>lt;sup>36</sup> See Further in Suswanta, *Keberanian untuk Takut; Tiga Tokoh Masyumi dalam Drama PRRI* (Jakarta: Avyrouz, 2008).

 <sup>&</sup>lt;sup>37</sup> Barbara Sillars Harvey, *Permesta: Pemberontakan Setengah Hati* (Jakarta: Grafiti, 1984), 204.
 <sup>38</sup> Ahmad Syafii Maarif, *Islam dan Politik di Indonesia pada Masa Demokrasi Terpimpin* (Yogyakarta: UIN Sunan Kalijaga Press, 1988), 64.

Wirjono Prodjodikoro, former head of the Supreme Court who had issued a fatwa to dissolve Masyumi and PSI.<sup>39</sup>

## B. Islamic Constitutional Thought of the Masyumi

### 1. Fundamentals of Constitutionalism

Constitutionalism is a term that often emerge in many constitutional discourses. Many modern constitutional issues could be solved by using constitutionalism viewpoints. Constitutionalism contains a set principles that must be followed by the state that claimed to be constitutional state. Including this study in which examining about constitution-making process, it doesn't mean the states that having constitution is always in line with constitutionalism. However, many legal experts have different opinion in defining what constitutionalism is. G.W. Paton in his renowned *A Textbook of Jurisprudence* explains that the law is a living thing, moving with the times and not a dead creature of moribund ways of thought.<sup>40</sup>

According to Hamdan Zoelva, a word "constitutionalism" have no single meaning. This word can be used for different purposes.<sup>41</sup> Sheldon Wollin, as quoted by Adnan Buyung Nasution, said "The main aim of a constitutional form of government is to limit the exercise of

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<sup>&</sup>lt;sup>39</sup> Sabar Sitanggang, Maulana Muladi, and Agus Salam, *Catatan Kritis dan Percikan Pemikiran Yusril Ihza Mahendra* (Jakarta: Bulan Bintang, 2001), 227.

<sup>&</sup>lt;sup>40</sup> George Whitecross Paton, *A Textbook of Jurisprudence* (Oxford: Oxford University Press, 1972), 222.

<sup>&</sup>lt;sup>41</sup> Hamdan Zoelva, *Mengawal Konsitusionalisme* (Jakarta: Konstitusi Press, 2016), 31.

political power to prevent its being abuse. These purpose can be achieved without sacrificing the ends of peace order which are essential to any type of political system, Constitutionalism requires both a certain organization of public offices and a strictly prescribed method of handling business..."<sup>42</sup>

Albert van Dicey gives three guiding principles in which suitable to the study of the law of the constitution. Firstly, the legislative sovereignty of parliament; secondly, the universal rule or supremacy throughout the constitution of ordinary law; and thirdly, the dependence in the last resort of the conventions upon the law of the constitution. However, the last one, according to Dicey are more doubtful and speculative ground.<sup>43</sup>

N.W. Barber in his *The Principles of Constitutionalism* classified constitutionalism principles into six elements: 1) sovereignty; 2) the separation of powers; 3) the rule of law; 4) civil society; 5) democracy; 6) subsidiarity.<sup>44</sup> While Louis Henkin classifies constitutionalism as constituting the following elements: 1. Government according to the constitution; 2. Separation of power; 3. Sovereignty of the people and democratic government; 4. Constitutional review; 5. Independent judiciary; 6. Limited government subject to a bill of individual rights;

<sup>&</sup>lt;sup>42</sup> Adnan Buyung Nasution, *Arus Pemikiran Kontitutsionalisme: Tata Negara* (Jakarta: Kata Hasta, 2007), 132.

A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*. 10<sup>th</sup> Edition (New York: MacMillan, 1967), 35.

<sup>&</sup>lt;sup>44</sup> N.W. Barber, *The Principles of Constitutionalism* (New York: Oxford University Press, 2018).

7. Controlling the police; 7. Civilian control of the military; 8. No state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire constitution.<sup>45</sup>

John McIlwain argues that the two fundamental correlative elements of constitutionalism are the legal limits to arbitrary power and political responsibility of the government to the governed. The more important things in applying the principles of constitutionalism is comprehensiveness in order to create connections among the principles. Because the principles come as packages. As N.W. Barber asserts that a failure by the state to apply one principle will impact on the application of other principles.

# 2. The Islamic Constitutional Thought of the Masyumi

As a party organization, certainly, in side the Masyumi party there were various concept among its members, Islamic constitutional thought of Masyumi broadly circled and based among three main Masyumi's theorists that reflected the Masyumi's major political agenda such as Mohammad Natsir, Zainal Abidin Ahmad, and T. M. Hasbi Ashiddiqie. Their idea concerning statehood had a strong influence to the party's notion and Indeed, Many works which has

<sup>&</sup>lt;sup>45</sup> Nadirsyah Hosen, "In Search of Islamic Consitutionalism", *The American Journal of Islamic Social Sciences*, No. 21, Vol. 2 (July-December, 2004), 2.

<sup>&</sup>lt;sup>46</sup> Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, New York: Cornell University Press, 1975), 146.

<sup>&</sup>lt;sup>47</sup> N.W. Barber, *The Principles...*, 219.

written by those figures still become primary reference of *fiqh siyasah* nor *siyasah syariyyah* books in Indonesia at the present time.

In the work of Masyumi's grand theorist, Zainal Abidin Ahmad entitled *Membentuk Negara Islam*, published in 1956, a year when the Indonesian Konstituante getting started to formulate the Indonesian Constitution. Ahmad structures the theory of Islamic State in detail and more comprehensive way. Denying the form of Islamic state is a monarch or sultanate, the nature of Islamic State consist of 1) State's sovereignty should be held by the hand of the peoples who believe in God; 2) Religiosity should has roots in the state, neither in the government nor in the society; 3) All kind feelings of fears and worries shall be exterminated in order to create peacefulness; 4) Freedom of religion in worshipping God are applicable to the broadest extent; There's no compulsion, pressure nor all kind of inducement to remove free and sincere feelings.<sup>48</sup>

According to MB Hooker, Z.A. Ahmad "place islamic state idea in the context of the postwar creation of the new states with muslim population".<sup>49</sup> Ulil Abshar Abdalla noted that Zainal Abidin has an interesting view which certainly reflects the political situation in his time.<sup>50</sup> However, this idea is a big concept by single person of the Masyumi's leading figure. The Masyumi already create official draft of

<sup>&</sup>lt;sup>49</sup> M.B. Hooker, *Indonesian Syariah: Defining a National School of Islamic Law* (Singapore: ISEAS, 2008), 59.

<sup>&</sup>lt;sup>50</sup> Ulil Abshar Abdalla, *Menyegarkan Kembali Pemikiran Islam* (Jakarta: Nalar, 2007), 140.

the (Islamic) Republic of Indonesia, this draft has drawn up by constitutional drafting committee of the Masyumi, led by Zainal Abidin Ahmad and have 10 members consisting Mohammad Natsir, Mr. Sjafruddin Prawiranegara, Osman Raliby, Mr. Mohamad Roem, K.H. Ahmad Azhary, H.M. M. Saleh Fuady, Mr. Abdul Hakim, Dr. Ali Akbar, Tengku Maimum Habsyah, Mr. Sudjono Hardjosudiro.

Following this are the broad notion of Islamic constitutional thought of the Masyumi regarding primary prescedent of the constitution.

### a. State philosophy (national principle)

Ideology is foundation of the state (either republic or monarch), the state without ideology would lead to its own destruction.<sup>51</sup> Masyumi insisted on the application of public Islamic Law by mentioning Sharīa in the Preamble of the constitution.

According to Natsir, historically, the Islamic movement was the one who first opened the political path of independence in Indonesia. Which first planted the "seeds" of Indonesian unity, removed ethnocentrism, plant fraternity among people who in the same boat beyond the boundaries of Indonesia with Islamic-ties. <sup>52</sup> The Masyumi wants to apply the teachings of Islam in state affairs. In this matter, George McTurnan Kahin asserts:

<sup>&</sup>lt;sup>51</sup> Ibid 153

<sup>&</sup>lt;sup>52</sup> Ajip Rosjidi, *M. Natsir: Sebuah Biografi* (Jakarta: Girimukti Pasaka, 1990), 126.

"With regard to the question of Islamic state, there has been so much confusion and misunderstanding among outsiders as well as Indonesian, that it seems to me important that Natsir's stand on this matter be better understood. He sees the concept of an Islamic state as an ideal, something yet to be achieved and still very far removed from the reality of the present. In the meantime, Indonesian Muslims should strive for a democratic political order; for 'as far as the Muslims are concerned, democratic come first, because Islam can only prosper in a democratic system.' Through it they will ultimately have the opportunity for putting through legislation consistent with Islamic precepts." <sup>53</sup>

Natsir saw that the Masyumi is an instrument of struggle to serve the Muslim community of Indonesia in upholding the teachings of Islam as the guiding principles in all aspect of private life, in all aspects of social relationships, and in the conduct of affair of state.<sup>54</sup> Natsir guarantee that Islam will not enforce people of other religions to comply towards Islam, even Islam expects good cooperation to establish belief in God. The Masyumi wants to incorporate Islamic teachings and implement them on behalf of the fatherland and the nation.<sup>55</sup> According to Yusril Ihza Mahendra, Natsir's modernism view on Islamic Ideology lead to the formation of nation-state, but based on Islamic Principles.<sup>56</sup>

Another the Masyumi theorist, Zainal Abidin Ahmad, in his Membentuk Negara Islam stated: "Ideals or ideology of Islamic state

<sup>54</sup> Herbert Feith and Lance Castles, *Indonesian Political Thinking 1945-196* (Ithaca and London: Cornell University Press, 1970), 214-215.

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<sup>&</sup>lt;sup>53</sup> Jusuf Abdullah Puar, *Muhammad Natsir: 70 Tahun Kenang-Kenangan Kehidupan dan Perjuangan* (Jakarta: Pustaka Antara, 1978), 333.

Mohammad Natsir, "Djangan Heran, Bentji, Naik Darah dalam Perlombaan Ideologi sekarang, Masjumi bukan mau Miliki R.I. akan tapi mau Memberi Isi", *Abadi* (26 Maret 1955).

<sup>&</sup>lt;sup>56</sup> Anwar Harjono et al., *M. Natsir: Sumbangan dan Pemikirannya untuk Indonesia*(Jakarta: Media Dakwah, 1995), 137.

is not merely bear upon the name of 'Islam' entitled in each states, or title of the Head of State. Islamic State ideology is not merely a question of formality".<sup>57</sup> Giving example of the states which using "Islam" as their state-badges (Yemen, Saudi Arabia, and Egypt), according to Ahmad, it still cannot be accepted as being in accord to Islamic ideology.<sup>58</sup>

Islam as a basis of the state. In article 1 on draft of the constitution of the (Islamic) Republic of Indonesia reads as follows:

- 1) Article 1: "The State of Islamic Republic of Indonesia based upon belief in The One Almighty God".
- 2) Article 1: "The State of Republic of Indonesia based on Islam".

  (optional)

# b. Democracy and human rights

Democracy and human rights are humanitarian conception and social relation which born from history of human civilizations. Democracy and human rights can be interpreted as a results of human struggle in maintaining their dignity. Regarding democracy in Islam, John L. Esposito and O. Voll mentions, "Like all of major worldviews and religious traditions, Islam has a full spectrum of potential symbols and concepts of absolutism and hierarchy, as well as foundations for

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<sup>&</sup>lt;sup>57</sup> Z.A. Ahmad, *Membentuk Negara Islam...*, 17-18.

<sup>&</sup>lt;sup>58</sup> Ibid., 18.

<sup>&</sup>lt;sup>59</sup> Jimly Ashiddiqie, *Hukum Tata Negara dan Pilar-pilar Demokrasi* (Jakarta: Rajawali Pers, 2014), 36.

liberty and equality".<sup>60</sup> Perhaps it could be true, one the one hand, Islamic history have shown that the practice of political Islam is far away from modern concept of democracy and human rights,<sup>61</sup> and the other hand are in harmony with modern idea such democracy and human rights.

It is safe to say that Masyumi could be considered as modernist Islamic political party.<sup>62</sup> They did not reject anything which is coming from the West, as long as it doesn't violate the basic principles of Islam (Sharīa).

Leading figure and the chairman of Masyumi (1952-1959), Mohammad Natsir, ever opposing President Soekarno's idea that the political parties should be buried in order to solve the state problems quickly. Natsir strongly condemn, for him, it would lead the state setback to the age of colonialism.<sup>63</sup> He quotes the saying of Franklin

- D. Roosevelt that the true democracy is guarantee for:
- 1) Freedom of expression
- 2) Freedom of religion
- 3) Freedom from want

<sup>&</sup>lt;sup>60</sup> John L. Esposito and John O. Voll, *Islam and Democracy* (New York: Oxford University Press, 1999).

<sup>&</sup>lt;sup>61</sup> See further, Nadirsyah Hosen, *Islam Yes! Khilafa*, 2 volumes (Yogyakarta: UIN Sunan Kalijaga Press, 2018).; Marshall G.S. Hodgson, *The Venture of Islam, Volume 1: The Classical Age of Islam* (Chicago: University of Chicago Press, 1974), 280.

<sup>&</sup>lt;sup>62</sup> See for Futher Information, Yusril Ihza Mahendra, *Modernisme dan Fundamentalisme dalam Politik Islam: Perbandingan Partai Masyumi (Indonesia) dan Partai Jama'at-i-Islami (Pakistan)* (Jakarta: Paramadina, 1999).

Mohammad Natsir, "Kebebasan Berbitjara Lenjap: Zaman Pendjajahan Kembali", Abadi (1 March 1957).

## 4) Freedom from fear

In this matter, he points out that the Masyumi *berjihad* (holy war) in maintaining the Republic of Indonesia, Masyumi is one-blood and flesh with the Republic of Indonesia. Masyumi wanted to contribute its strength and devotion to the Republic, so democracy in Indonesia will emerge as democracy with pure morality. <sup>64</sup> According to Natsir, "democracy is the way of life", democracy is not a tool which can be easily replaced anytime following the situations. The politics should stay away from the things that not in line with democracy. <sup>65</sup> Natsir anmed democracy in Islam as "Theistic Democracy". <sup>66</sup> Democracy itself, as had been mentioned before, walk together with the idea of human rights.

Universally, human rights doctrine accepted as a moral, political and legal framework and as a guideline. The guarantee of human rights considered as an absolute characteristic that should be existed and explicitly written in the constitution of constitutional democracy state. Human rights is important subject in the body of constitution.<sup>67</sup> However, the notion of human rights in Islam influenced by Western idea of human rights, as Ann Elizabeth Mayer points out, "Islamic

Mohammad Natsir, "Masjumi tak pernah Absen dalam Hadapi Kesulitan-Kesulitan Negara, ikut Rasakan Pahit Getir Republik Indonesia", Abadi (9 July 1957).

Mohammad Natsir, "Apabila Partai-Partai sampai dikubur, Demokrasipun turut Keliangnja", Abadi (30 October 1957).

Mohammad Natsir, "Islam Mempunyai Sifat-Sifat yang Sempurna untuk Dasar Negara", Abadi (12 November 1957).

<sup>&</sup>lt;sup>67</sup> Jimly Ashiddiqie, *Pengantar Ilmu Hukum Tata Negara* (Jakarta: Rajawali Press), 343.

human rights concepts developed after Western and international human rights models had been produced".<sup>68</sup>

The Masyumi as modernist Islamic political party, equal protection is guaranteed in their struggle program and in the draft of the (Islamic) Republic of Indonesia.

### c. Rule of law

According to Ahmad, Islamic state should be a constitutional state, the constitution of the Islamic state must contain articles on the principles of religion and divinity, also all the laws and regulations in the instructions and decisions there must not be anything that is contrary to God's eternal law. Z.A. Ahmad constructed, that in the Islamic state there are thus two bodies of laws:

- 1) The eternal laws (*hukum abadi*), a body of never changing and absolute laws, which later on become source of all laws in the state.
- 2) The basic laws (*hukum dasar*), a body of man-made laws, which he calls (*hukum azari*). This laws are made by *ulil amri* (the leader of the state/government) and the representatives (parliament) in each hierarchies.<sup>69</sup>

Mohammad Natsir, *hudūd* must be supreme, but in Natsir's view, *hudūd* is not punishment systems like in Islamic Criminal

<sup>&</sup>lt;sup>68</sup> Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Boulder: Westview Press, 1995), 40.

<sup>&</sup>lt;sup>69</sup> Z.A. Ahmad, *Membentuk Negara Islam...*, 96-97.

Law,<sup>70</sup> as had been interpreted by traditional Islamic scholars. *Hudūd* is a universal morals principles that have vision to establish the noble values of humanity. According to Yusril, Natsir's view is similar to the concept of natural law by Thomas Aquinas.<sup>71</sup>

Moreover, Natsir's view on *hudūd* is in resemblance with the concept of *hudūd* proposed by modern Islamic intellectuals such Ashgar Ali Engineer and Mohamad Shahrour. For example, Ashgar Ali Engineer mention that *hudūd* laws are based on the Quranic pronouncements but are as much the result of human interpretations and human reasoning. While in Shahrour's conception, *hudūd* is rule of law which no more as a result from vicinity of absolutism (authority belongs only to the *ulamā*), but rule of law as an outcome of democratic process without violating the divine command.

### d. Sovereignty

Popular sovereignty is become primary concern, it reflect that Masyumi did not recognize the classical concept that God is running the state mechanism in which it is still vague and seemed unconstitutional, like had been happened in the caliphal era, as Bassam Tibi points out:

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<sup>&</sup>lt;sup>70</sup> Further information about Islamic Criminal Law can be found in, Topo Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syariat dalam Wacana dan Agenda* (Jakarta: Gema Insani, 2003).

<sup>&</sup>lt;sup>71</sup> Yusril Ihza Mahendra, *Modernisme Islam...*, 143.

Ashgar Ali Engineer, *Islam in Contemporary world* (New Delhi: New Dawn Press, 2007), 109.
 Muhyar Fanani, *Fiqh Madani: Konstruksi Hukum Islam di Dunia Moden* (Yogyakarta: LKiS, 2000), 238.

"The fact is that rulers in Islamic History was either charismatic (the "rashidun/rightly guided" caliph Abu Bakr and Omar), autocratic (most of Umayyad rulers), or traditional. Some of the rulers of the traditional type projected considerable charisma (Harun Al-Rashid), but most caliphs were basically tyrants (most of Abbasid), none of them was a legal ruler in the modern constitutional sense."<sup>74</sup>

Primary executive and legislative organs is elected by the people. Therefore, the draft of (Islamic) Republic of Indonesia determine that political principles should be based on:

- 1) Popular sovereignty.<sup>75</sup>
- 2) General elections.<sup>76</sup>
- 3) Deliberation by elected members of Parliament.<sup>77</sup>

It means, President is elected, legislators (members of the parliament) and councils are elected. Harun Nasution asserts:

"Sovereignty, as understood by the Masjumi leaders, is thus not Hobbes absolute sovereignty, which is limited only by the power of the sovereign himself. Their sovereignty is rather the sovereignty of Bodin, who considered that the sovereign was bound by the law of God and the law of nature. Like the author of the Vindiciae contra tyrannos they consider that God and the people are superiors in the state. Like the Levellers of seventeenth century England they conceive that the legislature has no indefinite power. The Levellers thought that parliament's legislative power should be limited by the Agreement of the

<sup>75</sup> Article 11 Paragraph (1) of the constitution draft of the (Islamic) Republic of Indonesia reads

follows. "The will was stated in honest periodic elections, which were carried out according to general and equal suffrage. By secret ballot or in a manner that guarantees freedom of voting, which is regulated by law."

Bassam Tibi, Challenge to Fundamentalism: Political Islam and the World Disorder (California: University of California Press, 1998), 160.

as follows, "People's will is fundamental power of the state, conducted by government and House of Representatives or Regional Councils." <sup>76</sup> Article 11 Paragraph (2) of the constitution draft of the (Islamic) Republic of Indonesia read as

<sup>&</sup>lt;sup>77</sup> Article 11 Paragraph (3) of the constitution draft of the (Islamic) Republic of Indonesia read as follows. "The House of Representatives and the Regional Council elected, convened according to the basis of deliberation.'

People, which expressly laid down the rule that certain enumerated rights of the citizens must not be touched."<sup>78</sup>

## e. Separation of powers

### 1) Executive powers

### a) Tenure

Tenure is most important things in order to avoid authoritarianism. Article 50 paragraphs (1) through (3) of the Constitution draft of (Islamic) Republic of Indonesia reads as follows:

- (1) Paragraph (1): "The term of office for the President and Vice President is 4 years. Each may be re-elected for his position."
- (2) Paragraph (2): "One must not assume the office of President and Vice President more than twice in a row for consecutive terms, for the same position."
- (3) Paragraph (3): "The positions of President and Vice President may not be summed up by carrying out any public office inside or outside the (Islamic) Republic of Indonesia."

# b) Impeachment

T.M. Hasbi mention that postition of the Head of State is not sacred, <sup>79</sup> it means position of the Head of State possibly

<sup>&</sup>lt;sup>78</sup> Harun Nasution, *The Islamic State...*, 154.

changed. Z.A. Ahmad goes further, he argue that the Head of State can be sacked out (impeach) if he had violated the law. But Ahmad asserts that impeachment cannot be based merely on the will of the parliament. Special commission should be formed to investigate violation committed by the Head of State. The draft of the constitution of the (Islamic) Republic of Indonesia Article 51 Paragraph (4) determined that:

"The House of Representatives may dismiss, President or Vice President, if approved by two-thirds of the total members."

Therefore, Article 54 draft of the constitution of the (Islamic) Republic of Indonesia sets forth as follows:

- (1) Paragraph (1): "The President and Vice President cannot be contested, unless they violate the Constitution, or commit an illegal act in violation of public decency"
- (2) Paragraph (2): "In the case referred to in paragraph (1) above, the House of Representatives and/or the Regional Council have the right to submit a lawsuit."
- (3) Paragraph (3): "If a lawsuit occurs as mentioned in paragraph (2) then Article 51 paragraph (4) applies"

<sup>&</sup>lt;sup>79</sup> T.M. Hasbi Ash-Shiddieqy, *Ilmu Kenegaraan dalam fiqh Islam* (Jakarta: Bulan Bintang, 1978)

<sup>&</sup>lt;sup>80</sup> Z.A. Ahmad, *Membentuk Negara Islam...*, 193-194.

# 2) Legislative powers

House of Representative as the place of deliberation ( $Sh\bar{u}ra$ ) in which has a law-making function. T.M. Hasbi Ash-Shiddieqy, calls the legislative body as  $hai\bar{a}h$   $siy\bar{a}siyah$ , <sup>81</sup> its members must know about what is happening in society and political developments at their time. <sup>82</sup> Hasbi maintained that older decisions based on consensus should be reviewed and that new legally binding decisions can continue to be made by a body of legislators. According to R. Michael Feener, Hasbi combined his nationalist understanding of  $ijtih\bar{a}d$  with contemporary reformulation of  $sh\bar{u}ra$ , hoping thereby to establish a more well-defined place for Islamic law in the modern Indonesia nation-state. Hasbi envisioned this to be the work of the body of authorities, which he reffered to as ahl al-hall wa'l-'aqd. <sup>83</sup> Hamid Enayat

Z.A. Ahmad called the legislative body as the  $\bar{u}lil$  amri,<sup>84</sup> as usually, Z.A. Ahmad has more detail theory, he espouse that power of the  $\bar{u}lil$  amri (parliament) classified into two functions:

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<sup>&</sup>lt;sup>81</sup> Generally, the term of parliament in *fiqh siyāsah* called as *Ahlul Halli wal Aqdi*, but Hasbi found that this term would lead to confusion due to in *uṣhūl fiqh*, this term refers to the *mujtahid*. He propose *haiāh siyāsiyah* in the field of *fiqh siyāsah* and *haiāh tasyrī'iyah* in the field of *uṣhūl fiqh*.

<sup>82</sup> T.M. Hasbi Ash-Shiddieqy, *Ilmu Kenegaraan...*, 68.

<sup>&</sup>lt;sup>83</sup> R. Michael Feener, Muslim Legal Thought in Modern Indonesia..., 67.

Regarding this term used by Ahmad, Harun Nasution stated "It is interesting to note that Ahmad's interpretation of 'obey the *ulil amri*' greatly differs from the *ulama*'s usual interpretation of the phrase. Whereas the *ulama*' interpret the *ulil amri* to mean the Muslim rulers and the ulama', Ahmad is of the opinion that the *ulil amri* could not be, but the representatives of the people, whether they are men of religion or not. As will be seen, he, furthermore, thinks that the non-Muslim can also become *ulil amri*." See, Harun Nasution, *The Islamic State...*, 153.

- (a) As an absolute representation of the peoples, they running the highest sovereignty of the state. In Ahmad's opinion, the position of *ulil amri* is higher than the Head of State. Its powers consist of:
  - (1) To make and change the constitution.
  - (2) To choose (inaugurate) the Head of State.
- (b) As legislative body of the state, whereas its position alongside to the Head of State in making the Law and supervise the governmental activities. Alongside with the Head of State, they jointly discussed concerning Law-making process, oversight towards political *beleid* (policy) and the governmental activities, oversight towards security and war, and oversight towards judiciary and courts.<sup>85</sup>

Using Dutch terms rather than Arabic, Z.A. Ahmad stipulate the rights of the House of Representatives as legislative body has authorities or functions, namely:

- (1) Het recht van amendment: the right to change the draft of the Law (undang-undang) which proposed by government (executive).
- (2) *Het budget recht*: the right to propose bills (*wets-ontwerp*).
- (3) Het recht van interpellatie: the right to call one or several body of the Government, or even all governmental body to

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<sup>85</sup> Z.A. Ahmad, Islam dan Parlementarisme (Jakarta: Pustaka Antara, 1952), 26.

give responsibility regarding the policy (*beleid*) or actions had been made by Government.

- (4) Het vragen recht: the right to raise a question toward governmental body.
- (5) Het rech van enquete: the right of inquiry concerning particular condition of governmental things.

In contrast to classical Islamic political thought, Z.A. Ahmad recognize existence for the opposition factions in the parliament. Masyumi does not restrict the opposing parties.

# 3) Judicial powers

Judicial power is the third pillar in the powers system of a modern state. Judicial powers have been intended as branch of power separate from executive institutions. In this issue, the Masyumi proposed an idea in the elucidation on Article 127 of the Constitution draft of (Islamic) Republic of Indonesia reads as follows:

"The court exercises its power free from all interference of state equipment which is not the equipment of court, except if permitted by law."

There are three judicatures stipulated in the draft as regulated in Article 131 are as follows:

"The court levels in Indonesia are: 1. Supreme Court; 2. Court of Appeal; 3. District Court"

# C. Continuity of Islamic Constitutional Thought of the Masyumi: the Partai Bulan Bintang (Crescent and Star Party)

The political lineage of the Masyumi not merely go to the Partai Bulan Bintang, PBB (Crescent Star Party) led by Yusril Ihza Mahendra. After post-New Order Indonesia, at the beginning, at least there were three other parties that had adopted the intellectual spirit of the Masyumi in their political thinking. They were the New Masyumi Party (Partai Masyumi Baru) led by Ridwan Saidi; Indonesian Islamic Political Party Masyumi (Partai Politik Indonesia Masyumi) led by Abdullah Hehamahua, and perhaps, Islamic Nation Party (Partai Ummat Islam, PUI) led by Deliar Noer. 86

The Partai Masyumi Baru led by Ridwan Saidi, the inclusion of name "Masyumi" in "Masyumi Baru" is different with the Masyumi Party which is abbreviation of *Majelis Syuro Muslimin Indonesia*. Name "Masyumi" used by this party is abbreviation of *Masyarakat Muslimin Indonesia* (Indonesian Muslim Community). Although it is different, Ridwan apparently cannot deny that the new party he is chairing in, is actually hope to returning glory of the past Masyumi.<sup>87</sup>

Indonesian Islamic Political Party Masyumi (Partai Politik Indonesia Masyumi) led by Abdullah Hehamahua, this current Masyumi is a "duplicate" of the Masyumi which founded on 7 November 1945. This party was

<sup>87</sup> Nazir Amin et al., *Profil 48 Ketua Umum Parpol RI* (Jakarta: NIAS & Kreasi Karya Wiguna, 1999), 318.

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<sup>&</sup>lt;sup>86</sup> Although Islamic Nation Party (Partai Ummat Islam, PUI) was not using symbol or name that associated with the Masyumi, its leader, Deliar Noer is renowned writer of two monumental books. The Modernist Muslim Movement in Indonesia 1900-1942 and Partai Islam di Pentas Nasional (based on his M.A. thesis regarding Masyumi Party).

established with three targets, one of them is for continue the struggle of previous Masyumi leaders, who seemed to be increasingly well informed both substantial-ideologically, principles, examples, and operational patterns.<sup>88</sup>

Party (Partai Ummat Islam, PUI) led by Deliar Noer, Deliar Noer ever pioneered Partai Demokrasi Islam Indonesia/PDII (Indonesian Islamic Democratic Party) together with Hatta in 1966-1967, the PDII was an attempt of the Masyumi exponent, Amal Muslimin and former Vice President Moh. Hatta. Nonetheless, President Soeharto rejects the establishment of the PDII. <sup>89</sup> Deliar founded PUI on 26 June1998, according to him Islam is a detailed religion, covering all spheres of life, from social, political, economic, and so on. Through Islam, PUI intended to realizing *Baldaţun thayyibatun wa rabbun ghafūr*. <sup>90</sup>

From the four parties mentioned above, only the Partai Bulan Bintang and Indonesian Islamic Political Party Masyumi succeeded in entering the parliament. However, Indonesian Islamic Political Party Masyumi could not forming their factions, only the Partai Bulan Bintang which succeeded in forming the faction within the MPR.

### 1. Profile of the Partai Bulan Bintang

The Partai Bulan Bintang (Crescent Star Party) or abbreviated as PBB, founded on 17 July 1998, aimed to becoming a place for the

<sup>88</sup> Ibid., 354-358.

<sup>&</sup>lt;sup>89</sup> Deliar Noer, *Mohamamd Hatta: Biografi Politik* (Jakarta: LP3ES, t.th.), 633-649.

<sup>90</sup> Nazir Amin, et al., *Profil 48 Ketua Umum...*, 302-309.

struggle of Indonesian Muslims and the Indonesian peoples in general, to realize Indonesian society based on the ideals of the Proclamation of Indonesian independence on 17 August 1945. The purpose of the PBB, when compared with the goals of the Masjumi, there is a common vision. Masyumi aims, "implementation of Islamic teachings and law in the Republic of Indonesia", while the PBB's goal is "to realize Indonesian society in accordance with the ideals of the proclamation of Indonesian Nation's Independence on 17 August 1945".

For the PBB, the ideals of the Proclamation of independence lie not in the Opening of the 1945 Constitution which was ratified on 18 August 1945, but in the Jakarta Charter which was ratified on 22 June 1945 which metions "Belief in the One supreme God with the obligation to carry out Sharia for adherents of Islam.".

## 2. Islamic constitutional thought of the Partai Bulan Bintang

### a. State philosophy

Unlike their predecessors, PBB does not struggling to propose Islam a basis of the state. PBB believe in Pancasila, on the MPR sessions Hamdan Zoelva as representation of PBB fraction mention:

"Actually, so far there has been no problem, that about the absence of writing this basic Pancasila in the body, all this time in our state's life, all understand that Pancasila is the basis of the state."

<sup>91</sup> Tumpal Daniel S. (Ed), *Masa Sulit Mengibarkan Panji Bulan Bintang: Dilema Partai Islam Ideologis* (Ciputat: Tusdikalam, 2005), 49.

<sup>&</sup>lt;sup>92</sup> Mahkamah Konstitutsi Republik Indonesia, Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Book II (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), 131.

Whereas Abdul Qadir Djaealani consider that the true Pancasila is accordance to the first interpretation of the Pancasila which was formed in the Jakarta Charter 22 June 1945. For PBB, the laying of the Pancasila-Charter Jakarta June 22, 1945, is not only the best alternative to the failure of the Pancasila-Nasakom and Pancasila-p4 and PMP, but it is also the best opportunity for Muslims to practice Islamic law, which is adhered to by 86% of the Indonesian population. Only a state that carries out Islamic law in full or in other words "faith and piety" which obtains blessing from heaven and earth as referred to by the Quran, verse: 7 (Al-'Araf: 96).

## b. Democracy and human rights

In principle, Islamic teachings assert that humans must submit to God and seeing to other humans in a perspective of equality. Justice is a basic principle of Islamic Sharia. There will be no legal norms obeyed by humans if the legal norms is far from the basic principle of justice. Justice is to give someone what is his right, and revoke from someone what is not his right. The PBB believe that human rights are natural rights inherent in human beings, therefore this right is not given by the authorities or not given by the government but in the constitution it is necessary to emphasize that

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<sup>&</sup>lt;sup>93</sup> Abdul Qadir Djaelani, *Anak Rakyat Jelata Berjuang menegakkan Islam* (Jakarta: YPI Madinah Al-Munawwarah), 199-201.

Yusril Ihza Mahendra, Mewujudkan Supremasi Hukum di Indonesia: Catatan dan Gagasan Pemikiran Prof. Dr. Yusril Ihza Mahendra (Jakarta: Sekretariat Jenderal Departemen Kehakiman dan Hak Asasi Manusia, 2002), 173.

these human rights are guarantees given by the constitution not grants but guarantees because of human rights is a natural right, a basic right inherent in human beings from birth.

### c. Rule of law

The Partai Bulan Bintang want the state of Indonesia is a state based on rule of law, not based solely on power (*machstaat*). It can be seen on the opinion of PBB faction, PBB proposed Chapter I of the constitution "Form and Sovereignty". Article 1, "The State of Indonesia is a unitary state based on laws in the form of a republic."

### **CHAPTER III**

# THE FORMULATION OF THE INDONESIAN CONSTITUTION 1956-2002: DEMOCRATIC CONSTITUTION-MAKING IN INDONESIA

# A. Preliminary Formulation of the Indonesian Constitution

The issue of the Jakarta charter<sup>95</sup> in the first period of making the constitution is interesting to note because this discourse will still continue in the next constitution-making process. Mr. Maramis stated that in the Preamble all bases have been established. Also supported by Mr. Wongsonegoro who stated that the 1945 Constitution was prepared on the basis of the Preamble (Jakarta Charter). Nonetheless, afternoon after the proclamation of independence, there was *kaigun* officer came to Hatta, He informed that Protestant and Catholics representatives in the region which controlled by Japanese Navy had objected to the part in the preamble of Indonesian Constitution, in phrase "Belief in the One supreme God with the obligation to carry out sharia for adherents of Islam".

Wahid Hasyim did not attend the session, he's on a trip in East Java. <sup>98</sup>
Kasman said at that time, the Indonesian people were in a pinch, because the
Dutch wanted to return to colonize Indonesia and Japan had to surrender

More information regarding the Jakarta Charter can be found in Endang Saifuddin Anshari, "The Jakarta Charter of June 1945: A History of the Gentleman's Agreement between the Islamic and the Secular Nationalist in Modern Indonesia" (M.A. Thesis--McGill University, Montreal, 1976).

<sup>&</sup>lt;sup>96</sup> RM. A.B. Kusuma, Lahirnya Undang-Undang Dasar 1945: Memuat Salinan Dokumen Otentik Badan Oentoek Menyelidiki Oesaha Persiapan Kemerdekaan (Jakarta: Badan Penerbit FH UI, 2004), 25.

<sup>97</sup> Mohammad Hatta, Sekitar Proklamasi (Jakarta: Tintamas, 1970), 63.

<sup>&</sup>lt;sup>98</sup> Prawoto Mangkusasmito, *Pertumbuhan Historis Rumus Dasar Negara dan Sebuah Projeksi* (Jakarta: Hudaya, 1970), 39.

everything to the allies, including the Dutch. This condition makes it impossible for the Islamic group to defend their opinion, so they accepted Soekarno's promise to them.<sup>99</sup>

The grand design of the 1945 Constitution meets the constitutional theory both in its structure and function, what needs to be improved is in the systematics. The structure of the 1945 Constitution consists of: 1) Preambule, 2) governance structure that determines the power of each state institution, relations between state institutions and relations of the state and its people, 3) rights and obligations of citizens based on human rights, 4) the procedure to change or amend the Constitution. According to A.B. Kusuma, all constitutional functions are provided in the 1945 Constitution, i.e.:

- 1. The limitative function, limiting the state power;
- 2. The integrative function, in the form of a unitary state, Indonesian as the language of unity, the red and white (*Sang Merah Putih*) and the national anthem of Indonesia Raya;
- 3. The protection function, there are human rights in the constitution;
- 4. The function of protecting minorities, whether racial, religious and minority groups that are different from the majority (majority rule, minority rights)
- 5. The transformative function or social engineering, although Javanese speakers are the majority, the founders of the state choose Malay as the language of unity in order to create democratic Indonesian society. 100

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<sup>99</sup> Kasman Singodimedjo, *Hidup Itu Berjuang* (Jakarta: Bulan Bintang, 1982),

### B. The Konstituante 1956-1959

1. Intention to Create a New Constitution

During the first time the 1945 Constitution came into force, from 18 August 1945, until the enactment of the Constitution of the United States of Indonesia on 27 December 1949, all the energies and thoughts is devoted to the physical struggle against the colonial power that wants to reign in Indonesia again.<sup>101</sup>

Additional regulation stipulated in the Constitution of 1945 reads as follows:

- a. Within six months after the termination of the Greater East Asia war the president of Indonesia Shall regulate and prepare everything stipulated by the constitution.
- b. Within six months after the election of the People's Consultative Assembly, the Assembly shall assemble to enact the constitution.

These provisions could not be realized. Physical struggle against invaders does not enabling the realization of the provisions of the constitution according to the 1945 Constitution during the first period of enactment of the 1945 Constitution. After the enactment of the 1950 Constitution on 17 August 1950, in order to realize the provisions regarding the stipulation of the constitution according to the 1950

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RM.A.B. Kusuma, Sistem Pemerintahan Pendiri Negara versus Sistem Peresidensiel Orde Reformasi (Jakarta: Badan Penerbit FH UI, 2011), 158-159.

J.C.T Simorangkir, Penetapan UUD dilihat dari Segi Ilmu Hukum Tata Negara Indonesia
 (Jakarta: Gunung Agung, 1984), 91.
 Ibid

Constitution. The Konstituante was formed through general elections in 1955 which was the first general election in Indonesia based on Law Number 7 Year 1963.

### 2. The Political Parties

Herbert Feith classifies the results of the election of 1955 into four groups. Among these 22 are the four major parties, the six medium-sized organizations and 12 of the 18 smaller bodies which obtained seats in parliament (12 of the 24 which obtained Constituent Assembly seats). One can then make the following four-fold classification as follows:

- a. Major parties consist, of: PNI (Indonesian Nationalist Party),
   Masyumi (Consultative Council of Indonesian Muslims), Nahdlatul
   Ulama (Ulama Association), PKI (Communist Party);
- b. Medium-sized parties, consist of: PSII (Islamic Association Party)
   Parkindo (Christian Party), Partai Katolik (Catholic Party), PSI
   (Socialist Party), Perti (Islamic Education Party), IPKI (League for the holding of Indonesian Independence);
- c. Small groups of Nations-wide significance, consist of: PRN (National People's Party), Partai Buruh (Labor Party), GPPS (Movement to Defend the Pancasila), PRI (People Party), PPPRI (Police Employees' Association), Partai Murba (Proletarian Party), Baperki (Citizenship Consultative Council), PIR-Wongsonegoro (Greater Indonesian Union), Permai (Proletarian People Union), PIR-Hazairin (Greater

Indonesian Union), PPTI (Tharikah Unity Party), Acoma (Young Generation Communist);

d. Small group of regional significance consist of: Gerinda-Yogyakarta,
Partai Persatuan Dayak (Dayak Unity Party)-West Kalimantan,
AKUI-Madura, PRD (Village People's Party)-West Java, PRIM (Party
of The People of Free Indonesia)-West Java, R. Soedjono
Prawirosoedarso and Associates-Madiun, Gerakan Pilihan Sunda
(Sundanese Election Movement)-West Java, Partai Tani Indonesia
(Peasant's Party)-West Java, Radja Kabrabonan and AssociatesCirebon West Java, Gerakan Banteng (Buffalo Movement) West Java
PIR Nusa Tenggara Barat (Greater Indonesian Union of West Nusa
Tenggara)-Lombok PPPLM Idrus Effendi Association of Supporters
of the Candidature of LM Idrus Effendi)-Southeast Sulawesi. 103

### 3. Achievements of the Konstitutante

Debating for nearly 3 years, the Constituent Assembly had succeeded in formulating a number of articles, but was unable to reach agreement concerning of ideological foundation of the state (*Dasar Negara*). There were three competing ideologies propounded as the *Dasar Negara*. Voting conducted three times shows the same results. 5/9 members of the Konstituante approve the *Dasar Negara* as approved by PPKI, without clauses "with the obligation to carry out sharia for

Harbert Feith, *The Indonesian Elections of 1955*, (Ithaca, New York: Modern Indonesia

Project, Cornell University, 1957), 61.

See for Further Information, Ahmad Syafii Maarif, *Islam dan Pancasila sebagai Dasar Negara:*Studi tentang Perdebatan dalam Konstituante (Jakarta: Mizan, 2017).

adherents of Islam". 4/5 members agree on the *Dasar Negara* as designed by BPUPK, which reads: "with the obligation to carry out sharia for adherents of Islam".<sup>105</sup>

The deadlock caused most members walk out, did not want to attend the session of the Konstituante. Seeing a situation that endangered national unity and safety, President Soekarno issued a decree to return to the 1945 Constitution with consideration that "The Jakarta Charter animates the 1945 Constitution and forms a unity with the constitution". According to A.B. Kusuma, that consideration emphasized that the 1945 Constitution was based on the Jakarta Charter, not on "integralistic state ideals". The consideration also shows that the law must pay attention to Islamic sharia. 106

However a lot of controversies surrounding emergence of the Decree 5 July 1959 stipulated by President Soekarno. His former Vice President, Mohammad Hatta, asserts that President Soekarno had committed *coup d'état* and it would lead to dictatorship government, according to Hatta, it is form of "anti-constitutionalism" action. Before the decree was stipulated, on 19 February 1959, the Djuanda Cabinet

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<sup>106</sup> Ibid., 50.

<sup>109</sup> Ibid., 5.

<sup>&</sup>lt;sup>105</sup> A.B. Kusuma, "Keabsahan UUD 1945 Pasca Amandemen", *Jurnal Konstitusi*, No. 1, Vol. 4 (March, 2007), 49.

The Presidential Decree of 5 July 1959 contains: 1. The dissolution of the Konstitunte; 2. Enforce the 1945 Constitution; 3. The establishment of the Provisional People's Consultative Assembly, which consists of members of the People's Representative Council plus representatives from regions and groups and the formation of a Provisional Supreme Advisory Council.

<sup>&</sup>lt;sup>108</sup> Mohammad Hatta, "Demokrasi Kita" *Pandji Masjarakat*, No. 22 (May, 1960), 3.

decide unanimously regarding implementation of guided democracy in order to return to the Constitution of 1945. Guided democracy is Sukarno's conception issued in the early 1957s. The initial concept of guided democracy was to bury all parties, because they were regarded as the source of instability. This concept has been opposed by democrats such Natsir, Natsir declared that "if the parties are buried, democracy will be buried automatically."

The Constitution of 1945 gives more guarantee to implementation of the principle of guided democracy. It is very understandable, because almost all clauses of the 1945 Constitution deal with the power and authority of the President. Adnan Buyung Nasution argue "In its formulation, the 1945 Constitution contains many loopholes and provides little space for democratic infrastructure". With such concentration of power, is very difficult to control the President, let alone demand his accountability in the exercise of power. In accord with Adnan, Sutan Takdir Alisjahbana criticize on guided democracy, he said:

"Sukarno's position as President and as the Great Leader of the Indonesian Revolution, who in fact unites his hands the power of the executive, the legislative and the judiciary, is little different from those of absolute king in the past, who claimed to be incarnation of God, or God's representative in the world". 114

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<sup>&</sup>lt;sup>110</sup> Ismail Suny, *Pergeseran Kekuasaan Eksekutif* (Jakarta: Aksara Baru, 1977), 192.

Herbert Feith, *The Decline of Contitutional Democracy in Indonesia* (Ithaca and London: Cornell University Press, 1962), 518.

Kementerian Penerangan R.I., *Kembali Kepada Undang-Undang Dasar 1945* (Jakarta: Kementerian Penerangan R.I., 1959), 5.

William R. Liddle, *Crafting Indonesian Democracy* (Jakarta: Mizan, 2001), 77.

<sup>&</sup>lt;sup>114</sup> S. Takdir Alisjahbana, *Indonesia: Social and Cultural Revolution* (Kuala Lumpur: Oxford University Press, 1966), 173.

However, the Presidential Decree is a form of revolutionary action, its legitimation depend on its *post-factum*, success or fail/win or lose. If it succeed, the perpetrator will be considered as a hero. If it failed, the perpetrator will be accused of being a traitor and could be jailed, even sentenced to death. 115

The Konstituante, although in the discovery of Adnan Buyung Nasution, was made to fail in creating the new constitution. In his *The Aspiration of Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956-1956*, Adnan Buyung Nasution concludes the achievement of the Konstituante are as follows:

## a. On democracy

The whole enterprise of the Konstituante manifested a truly democratic spirit, a complete freedom of expression and a fundamental commitment to a constitutional form of government on the part of majority of its members. The enterprise of the Konstituante can rightly be appreciated as the peak of Indonesia's efforts to achieve constitutional government.<sup>116</sup>

## b. On human rights

The chairman of Konstituante, Wilopo, stated that the chapter on human rights would be one of the most important chapters of the constitution. For constitutional government aspired by the Indonesian

Sabar Sitanggang, Maulana Muladi and Agus Salam, Catatan Kritis dan Percikan Pemikiran Yusril Ihza Mahendra, Edited by (Jakarta: Bulan Bintang, 2001), 195.

Adnan Buyung Nasution, *The Aspiration of Constitutional Government in Indonesia: A Socio Legal Study of the Indonesian Konstituante 1956-1959* (Jakarta: Sinar Harapan, 1992), 407.

people was essentially a government limited by law and human and civil rights. There were the following formulations adopted by Konstitutante as follows:

- 1) The right to life, liberty, and security of the person;
- 2) The right of each individual to be respected as a person before the law;
- 3) The right of equal treatment and protection by law;
- 4) The right of each individual to a remedy by competent tribunals authorized by law;
- 5) The right not to be held in slavery, servitude, and not to be enslaved;
- 6) The right not to be subjected to torture and/or cruel, inhumane or degrading punishment;
- 7) The right not to be subjected to arbitrary arrest, detention, and exile;
- 8) The right to have one's rights and obligations determined in an equal and fair trial by an impartial tribunal;
- 9) The right not to be separated from the tribunals to which access has been guaranteed by law;
- 10) The right to be presumed innocent until proven guilty according to law in a public trial and the right to have all guarantees necessary for one's defence;

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Konstituante Republik Indonesia, *Risalah Perundingan Tahun 1957*, Vol. V (Bandung: Konstituante RI, 1957), 7.

- 11) The right not to be prosecuted and not to be punished except for a penal offence prescribed by law;
- 12) The right of an accused to be tried under the most favourable legal provision for him in case of a change in the law;
- 13) The right not to be punished by a penalty of confiscation of one's property
- 14) The right not to be subjected to arbitrary interference with one's privacy, family, home, or correspondence, and not to be offended in one's honour and reputation, also protected by law, except by the order of a tribunal or other legally authorized power;
- 15) The right not to be subjected to intrusion of one's residence;
- 16) The right that no one enter a person's court-yard or home against their will, except in cases prescribed by law;
- 17) The original list i of 24 rights unanimously agreed by the preparatory committee provided:
  - a) Freedom of religion, thought and conscience;
  - b) The right of those entering an educational institution not to be subjected to any other religious prescriptions or ceremonies then those of their religion and conviction.

This right was not put to the vote;

- 18) The right to rest and leisure;
- 19) The right to receive compensation for any property which has to be demolished for the sake of public interest;

- 20) The right to submit complaints or petitions to the government, either orally e in written form, together with others or alone;
- 21) The right to have the confidentiality of telegrammes and telephone conversations respected;
- 22) The right to exercise and promote one's religion;
- 23) The right to receive compensation for any unlawful arrest or detention;
- 24) The right of asylum.
- c. On recognition of the problem of power

The majority of the Konstituante recognize that state power should be limited by human rights and the rule of law, and the government should be accountable for its use of power. In 1959 the Government agreed to the concerted demands of the Konstituante that amendments to the 1945 Constitution limiting government power should be included in the Bandung Charter and that this charger should have the same legally binding force as the provisions of the constitution itself. Power should be tamed, but the constitution is not supported by the existing social powers would be doomed to remain ineffective. Socjadmoko stated this very well, he said:

"All limitation (of power), all proclamation of rights, all stipulation of the task of government in the constitution, would

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<sup>&</sup>lt;sup>118</sup> Adnan Buyung Nasution, *The Aspiration of Constitutional Government...*, 408.

not be other that merely empty words if the constitution is not supported by the existing powers in society"<sup>119</sup>

The main point stressed here is the Konstituante's has clear understanding that the way government power was exercised was chronical problem and that therefore legal provisions were needed to regulate the legitimate use of power. Back to human rights, Adnan Buyung said "This understanding was evident especially during the debate on human rights, when the articulation of human rights was related to the struggle and protection of citizen against arbitrary power". The Konstituante almost unanimously forwarded amendments preventing dictatorship. The constitution being drafted by the Konstituante was based on this assumption of the ubiquitously problematic nature of power, therefore, it contained provisions to control this power in order to prevent its abuse. 121

# C. The MPR and Constitutional Reform 1999-2002

# 1. Struggle for Reform

Historically, there is continuity between General Sudirman, A.H. Nasution, and Soeharto in playing politics vis-a-vis the political leadership of the country. Military was very much aware of its political role, they were apparently very much aware of which function they

<sup>121</sup> Ibid., 410.

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<sup>&</sup>lt;sup>119</sup> Konstituante Republik Indonesia, *Risalah Perundingan Tahun 1959*, Vol. II (Bandung: Konstituante RI), 598.

<sup>&</sup>lt;sup>120</sup> Adnan Buyung Nasution, *The Aspiration of Constitutional...*, 409.

should play at which time.<sup>122</sup> Military dominance has a long term characteristic of Indonesian politics.<sup>123</sup> At the downfall of the Old Order regime, the army emerge as the only primary political power.<sup>124</sup> The 1945 Constitution have a strong legal base for the Dual Function of the military.<sup>125</sup> It contains several key points which deal directly with the implementation of the Dual Function of the military, as follows:

- a. Article 1 paragraph (2): "Sovereignty is in the hands of the people and is fully executed by the People's Consultative Assembly.";
- b. Article 2 paragraph (1): "The People's Consultative Assembly consist of the members of Parliament augmented by representatives of regions and groups as described by law.";
- c. Article 10: "The President holds the final power over the Army, Navy and Air Force.";
- d. Article 27 paragraph (1): "All citizens have equal rights before the law and the government is obliged to uphold the law and govern without any exceptions."
- e. Article 30 paragraph (1): "Every citizen has the right and the obligation to participate in the defense of the state.";
- f. The decisions of the People's Consultative Assembly starting from decision number TAP MPRS Number II/MPRS/1960, Number

<sup>&</sup>lt;sup>122</sup> Salim Said, *Genesis of Power: General Sudirman and the Indonesian Military in Politics 1945-49* (Jakarta Sinar Harapan, 1995), 199.

<sup>&</sup>lt;sup>123</sup> Ibid., 146.

Arbi Sanit, Sistem Politik Indonesia: Kestabilan, Peta Kekuatan Politik dan Pembangunan (Jakarta: Rajawali Pers. 1981). 75.

<sup>(</sup>Jakarta: Rajawali Pers, 1981), 75.

Salim Said, Legitimizing Military Rule: Indonesian Armed Forces Ideology, 1958-2000 (Jakarta: Sinar Harapan, 2006), 118.

XXIV/MPRS/1966, Number XLII/MPRS/1968 and Number IV/MPRS/1978 are justifications of the Dual Function.

The leaders of the New Order never promise about democracy and freedom. The leaders, the New Order government was able to promote a sustained period of economic growth. Three decades of economic development have produced an increasing number of educated people who make up the new middle class. By contrast, political systems in New Order era are too monolithic and repressive. A lot of Muslim student activists were captured as political prisoners. Democracy and human rights were at stake.

The renowned opposition to the government that emerged in 1980 was launched by what is widely known as the *Petisi 50*, began as a petition group of fifty signatories consisting of retired senior military generals, respected politicians, preachers and student activist. They get attracted a great deal of attention because the group consisted of influential voices such as Mohammad Natsir, Kasman Singodimedjo, Burhanuddin Harahap, Sjafruddin Prawiranegara (Masyumi), Manai Sophian, Slamet Bratanata (PNI), A.H. Nasution, Ali Sadikin, A.Y.

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<sup>&</sup>lt;sup>126</sup> R. William Liddle, *Pemilu-pemilu Orde Baru: Pasang Surut Kekuasaan Politik* (Jakarta: LP3ES, 1992), 118.

<sup>&</sup>lt;sup>127</sup> R. William Liddle, *Crafting Indonesian Democracy* ..., 83.

<sup>&</sup>lt;sup>128</sup> Hartono Mardjono, *Reformasi Politik Suatu Keharusan* (Jakarta: Gema Insani, 1998), 69.

<sup>&</sup>lt;sup>129</sup> See, TAPOL, *Indonesia: Muslims on Trial* (London: Tapol, 1987).

Mokoginta, Aziz Saleh, Hoegeng (from the military), Chris Siner Key Timu, Judiheril Justam and Ibrahim G. Zakir (a student activist). 130

The *Petisi 50* group compose a petition and deliver it to the parliament. They strongly criticized president Soeharto for adopting narrowly self-serving interpretation of *Pancasila*, and for promoting the collaboration of the military with Golkar, when the military should stand above all social forces.<sup>131</sup> But, President Soeharto strongly disagree with them. In his autobiography *Soeharto: Pikiran, Ucapan dan Tindakan Saya*, He calls them as Western-style opposition, he said:

"What had been done by a group so called the *Petisi* 50, I don't like it... In *Demokrasi Pancasila* there is no place for the Western-style opposition... Opposition such as is Western country is not known here. Opposition just for the sake of opposing, just of being different, is not known here" 132

The New Order demonstrated the real face of the military and became the full version of military regime. The civilian arm of the military, the functional group, was totally converted into a political party of some sort that competed strongly with other political parties. <sup>133</sup> In 32 years, national elections had been engineered solely to maintain the status quo of the regime. The military (ABRI) and government were not neutral. They supported Golkar. This could be seen in existence of three channels (ABG) consist of: A (ABRI), B (Bureaucracy) and G (Golkar). They

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Todung Mulya Lubis, In Search of Human Rights: Legal-Political Dillemas of Indonesia's New Order, 1966-1990 (Jakarta: Gramedia, 1993), 192.

<sup>&</sup>lt;sup>131</sup> Yudi Latif, "The Muslim Intelligentsia of Indonesia: A Genealogy of its Emergence in the 20<sup>th</sup> Century" (Dissertation--The Australian National University, 2004), 344.

G. Dwipayana and Ramadan K.H., *Socharto: Pikiran, Ucapan dan Tindakan Saya* (Jakarta: Citra Lamtoro Gung Persada, 1989), 87.

<sup>&</sup>lt;sup>133</sup> R. William Liddle, *Crafting Indonesian Democracy* (Jakarta: Mizan, 2001), 70.

secure the victory of the ruling party through so called "tri-fraction" (the functional group fraction, the ABRI fraction, and the regional delegates fraction) in the MPR. This tri-fraction responsible to secure the New Order political and economical policy.<sup>134</sup>

Demands for reform escalated as the economic crisis deepened and the regime confirmed it was unable to reform itself. By early May the students were on the streets of major cities. On 12 May, ABRI marksmen shot dead four demonstrating students at Trisakti University in Jakarta, their deaths coming on top of economic collapse. Massive riots broke out in many places, the worst being in Jakarta and Surakarta. As the chaos in Jakarta continued, ABRI of the MPR were ready to support special session to elect the new president. Students occupied the MPR building and no one tried to eject them. <sup>135</sup> On 21 May 1998, President Soeharto announced his resignation. His Vice-President, B.J. Habibie, immediately sworn in as Indonesia's third President.

Yusril Ihza Mahendra asserts that there will be no reformation without amendment of the constitution. Without constitutional amendments, the upcoming regime will only be a repetition of the previous regime. The formulators of the 1945 Constitution from the beginning realized that the 1945 constitution was temporary and far from perfection. The 1945 Constitution was intended to take effect only twice

<sup>&</sup>lt;sup>134</sup> Ibid., 105-13.

<sup>&</sup>lt;sup>135</sup> M.C. Ricklefs, A History of Modern Indonesia since C. 1200, 3<sup>rd</sup> edition (London: Palgrave MacMillan, 2001), 405-406

six months from the end of the Greater East Asia War on 15 August 1945. But, the rulers of both the Old Order and the New Order deliberately covered up the provision. The 1945 Constitution, which is concise and flexible, does indeed benefit any regime in power. They can interpret it according to their own tastes to maintain the status quo of power. 136

Mahfud MD argues that the weakness of the 1945 Constitution is too pampered the executive power. Since the Old Order in 1959, the 1945 Constitution is not eligible for being constitution which limiting the executive power. Proven by during the 1945 Constitution came into force, the Republic never for being democratic state. Emergence of democracy in first period of the 1945 Constitution (1945-1949) precisely due to inapplicability of the 1945 Constitution by Vice-Presidential Decree No. X in 1945, followed by shifting of cabinet's system, from presidential to parliamentary. Authoritarianism builds through the loop holes that exist in the 1945 Constitution. There are 4 doors to establish authoritarian power in the 1945 Constitution, as follows:

- a. "Executive heavy" political system provided by the 1945 Constitution to the executive institution (President), without check and balance system;
- b. Important clauses in the body of the constitution are multi interpretable;

<sup>137</sup> Ibid., 302.

Gouzali Syadam, *Dari Bilik Suara ke Masa Depan Indonesia: Potret Konflik Politik Pasca Pemilu dan Nasib Reformasi* (Jakarta: Rajawali Pers, 1999), 329-331.

- Too many attribution to the legislative to regulate important things through the Law (*Undang-Undang*);
- d. Put more trust of the state organizers' ardor without a strong balancing system. 138

In line to Mahfud, Harun Alrasid argue that the 1945 Constitution lead to concentration of power to the President. In Harun's opinion, the new constitution must integrate several principles such as constitutionalism, check and balance, judicial review and separation of power. 139

# 2. The Political Parties

After the downfall of the New Order regime, the Indonesian people prepared for their first free elections in 44 years. He april 1999 total of 48 parties had been registered. Islamic parties in particular, Azyumardi Azra categorized that there were two streams of Islamic parties in the reform era. First, Islamic parties which adopted Islam as their ideological basis, such United development party (Partai Persatuan Pembangunan); the Crescent and Star Party (Partai Bulan Bintang, PBB); the United Party (Partai Persatuan, PP); Indonesian Islamic Political Party Masyumi (Partai Politik Indonesia Masyumi); Indonesian Islamic Association Party (Partai Syarikat Islam Indonesia, PSII); Indonesian Islamic Association

Mahfud MD, *Perdebatan Negara Pasca Amendemen Konstitusi* (Jakarta: Rajawali Pers, 2013),

<sup>&</sup>lt;sup>139</sup> Gouzali Syadam, *Dari Bilik Suara ke Masa Depan Indonesia* ..., 329-331.

<sup>&</sup>lt;sup>140</sup> M.C. Ricklefs, A History of Modern Indonesia..., 416.

See, Nazil Amin et al., *Profil 48 Ketua Umum Parpol RI* (Jakarta: NIAS & Kreasi Karya Wiguna, 1999).

Party of 1905 (Partai Syarikat Islam Indonesia 1905, PSII 1905); Islamic Nation Party (Partai Ummat Islam, PUI); and New Masyumi Party (Partai Masyumi Baru).<sup>142</sup>

Secondly, Islamic parties that had retained *Pancasila* and Islam as their basis. The parties included in this group are the National Awakening Party (Partai Kebangkitan Bangsa, PKB); the National Mandate Party (Partai Amanat Nasional, PAN); Fathers Orphans Party (Partai Abul Yatama); New Indonesia Party (Partai Indonesia Baru, PIB); United Indonesia Party (Partai Solidaritas Uni Indonesia, SUNI); the Peace-Loving Party (Partai Cinta Damai, PCD); Democratic Islam Party (Partai Islam Demokrasi, PID), Indonesian Muslim Nation Party (Partai Umat Muslimin Indonesia, PUMI); Nation Awakening Party (Partai Nahdlatul Ummat, PNU) and Nation Awakening Party (Partai Kebangkitan Ummat, PKU). 143

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<sup>143</sup> Ibid., 16.

<sup>&</sup>lt;sup>142</sup> Azyumardi Azra, *Indonesia, Islam and Democracy: Dynamics in a Global Context* (Jakarta: Solstice Publishing, 2006), 15.

Table. 3.1
Factions and Composition of the 1999-2002 MPR

	Party	Political Base	Seats
1	PDIP (Indonesian	Secular	153
	Democratic Party of		
	Struggle)		
2	Golkar (Functional Groups)	Secular: some Muslim	120
		support	
3	PPP (United Development	Traditional and	58
	Party)	Modernist Muslim	
4	PKB (National Awakening	Traditionalist Muslim	51
	Party)		
5	TNI-Polri (Non-party,	Secular	38
	Reserved Seats)		
6	PAN (National Mandate	Secular: modernist	34
	Party)	Muslim support	
7	PBB (Crescent and Star	Modernist Muslim	13
	Party)		
8	Other Parties		33
	TOTAL		500

# 3. Achievements of the MPR

Despite the weaknesses in the 1945 constitution as the basis for democracy, it was explicitly, or implicitly, accepted by most major political forces as the framework for the transition in Indonesia, beginning in 1998. As a result, during the 1999-2002 constitutional amendments, thirty-one articles (83.79 per cent) were amended or modified and only six articles (16.21 per cent) were unchanged.<sup>144</sup> Here

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<sup>&</sup>lt;sup>144</sup> Nadirsyah Hosen, "Promoting Democracy and Finding a Right Direction: A Review of Major Constitutional Development Indonesia" in *Constitutionalism in Asia in the Early Twenty-First Century*, edited by Albert H.Y. Chen (Cambridge: Cambridge University Press, 2014), 324.

the achievements of constitutional amendments summarized by Sri Soemantri, <sup>145</sup> from the First to Fourth Amendments:

#### a. The first amendment

Before the amendment of the 1945 Constitution, the position and power of the President was very dominant. Especially in the practice of state administration. In fact, in the period 1959 to 1967 and the period 1967 to 1998, MPRS which according to the 1945 Constitution is the highest state institution, can be controlled by the president. During the new order, The DPR which according to the 1945 Constitution can submit a bill, cannot exercise their rights. All of the bills derived from the government. That is why in the first amendment, the changes consist of:

- 1) Reduce/control the President's power;
- 2) The right to form a law rests to the DPR (the House of Representative), while the President has the right to submit a bill to the DPR.

# b. The second amendment

Many articles were amended in the Second Amendment to the 1945 Constitution, essentially, this Second Amendment consisting:

- 1) Regional government;
- Parliament, both regarding membership, functions, rights, and regarding how to fill it;

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<sup>&</sup>lt;sup>145</sup> Sri Soemantri, *Hukum Tata Negara Indonesia* (Jakarta: Rosdakarya, 2014), 168.

- 3) Territory of the
- 4) Human rights
- 5) Defense and security of the state
- 6) Flag, Language, lambang negara dan National Anthem.

#### c. The third amendment

The Third Amendment was made, in accordance to constitutional theory, on the fundamental state structure. In fact, there is a substance which is normative explanation included to the body of the 1945 Constitution. The Third Amendment consisting:

- 1) Position and power of the MPR;
- 2) The State of Indonesia is a state of law;
- 3) Tenure of President and Vice President, pertains to:
  - a) Election procedures
  - b) Direct election of the President and Vice President by the people;
    - (1) The formation of new state institutions, such as the Constitutional Court, the Regional Representatives' Council, the Judicial Commission;
    - (2) Additional provision of the Audit Board;
    - (3) General election.

From this Third Amendment, it is clearly seen that the governmental system adopted is a presidential. The characteristics of a presidential governmental system are evident in this third

Amendment. The president and vice president are elected in one pair, directly from the people. In addition, the president is not responsible to the MPR, because this state institution is no longer the executor of people's sovereignty, because the president is no longer responsible to the MPR. 146

# d. The fourth amendment

The Fourth Amendment of the 1945 Constitution is the latest amendment using Article 37 (before being changed), these changes consisting:

- 1) Membership of the MPR;
- 2) Second stage of presidential and vice presidential elections;
- 3) The possibility of the president and vice president being unable to remain;
- 4) About presidential authority;
- 5) Terms of state finance and the Central Bank;
- 6) Education and culture;
- 7) National economy and social welfare;
- 8) Additional rules and transitional rules;
- 9) The position of explanation of the 1945 Constitution. 147

The First, Second, Third, And Fourth Amendments to the 1945 Constitution covered an extremely extensive and fundamental range of substance. The provisions in the 1945 Constitution of the

<sup>&</sup>lt;sup>146</sup> Ibid., 170. <sup>147</sup> Ibid., 171.

proclamation of independence consisted of 71 points formulated in 37 articles. With the First Amendment to the Fourth Amendment, the formulation of the provisions inherited from 1945 was amended or added, so that there were only 25 points in the original provisions not amended, while the other 46 points were amended and added with new provisions, totaling 199 points of provisions. Therefore, there are 174 substantive new provision formulated in the 1945 Constitution, compared to the 25 points which have not been amended, accordingly, the amendments to the 1945 Constitution covered more than 300% of the contents of 1945 Constitution. 148

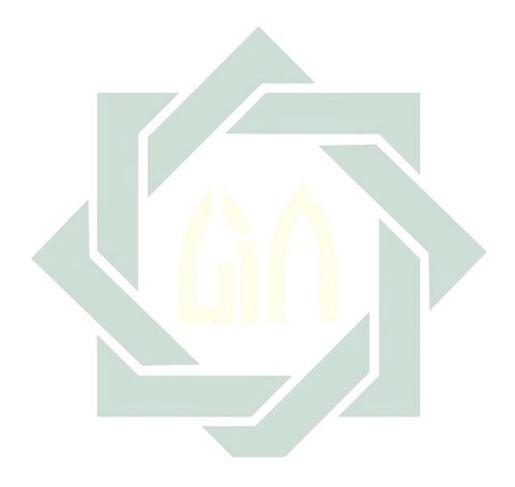
The 174 new points of substance which are contained in the first four amendment can be considered as covering a wide range of substance. The substance included therein related to:

- The provisions on human rights, citizens' rights and obligation, as well as the relationship mechanism between citizens and the state and all procedures for defending those rights when impaired;
- 2) The fundamental principles of democracy and the rule of law, and the mechanism for their realization and implementation, such as through general elections, etc.;

<sup>148</sup> Jimly Ashiddieqie, *The Constitutional Law of Indonesia* (Selangor: Sweet and Maxwell Asia, 2009), 90.

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3) The format of state institution and the relationship mechanism between state organs as well as the accountability system of officials. 149



<sup>149</sup> Ibid.

#### CHAPTER IV

# THE DEVELOPMENT OF ISLAMIC CONSTITUTIONAL THOUGHT OF THE MASYUMI AND ITS INFLUENCE IN THE FORMULATION OF THE INDONESIAN CONSTITUTION 1956-2002

# A. Overview on the Formulation of the Indonesian Constitution 1956-2002

The constitution is the result of the resultant or political agreement of the institution that has the right to determine it in accordance with the political, social, cultural situation when the constitution was made. Therefore the constitution can be changed. There is no constitution that cannot be changed.

The first constitution of the Republic of Indonesia is the 1945 Constitution. In general, this constitution fulfills the elements to be considered as the constitution of a country but one of the weaknesses of the 1945 Constitution is the heavy executive, multiple interpretations and too much attribution of authority. The historical fact during the enactment of the 1945 Constitution was that the political system in Indonesia became authoritarian.

In 1955 the first general election was held to elect members of the DPR and the Konstituane. The Konstituante is the constitution-making institution. The Kontituante results convened in Bandung since March 1956 to discuss the constitution which would be established as a permanent constitution for Indonesia. However, the Konstituante considered deadlock by President Soekarno, for this reason President Soekarno issued Presidential Decree 5

July 1959 which contained *first*, dissolution of the Konstituante, *second*, revoked the enactment of the 1950 Constitution and re-enacted the 1945 Constitution, *third*, the formation of the MPRS and DPAS.

Actually, refers to Adnan Buyung Nasution's findings in his doctoral study, *The Aspiration of Consitutional Governmet in Indonesia: A Socio Legal Study of the Indonesian Konstituante*, the Konstituante has almost succeeded in completing its work in drafting the Constitution. The Konsituante adopts many human rights provisions, al least there are at least about 35 formulations regarding human rights adopted by the Konstituante.

However, the 1945 Constitution can legally apply not by constitutional viewpoint but on the view that the presidential decree of 15 July 1959 was supported by political and military powers. From a constitutional perspective the re-enactment of the 1945 Constitution is a form of coup. But if the coup's won, it will become a new law, but, although it was using subjective point of view, the Presidential Decree of 1959 can legitimate in using the principle of salus populi suprema lex based on staatsnoodrecht<sup>1</sup> (emergency law) situation.

After amendment, the important thing is that the formulation of the 1945 Constitution of the State of the Republic of Indonesia confirm that Indonesia has chosen the path of constitutional democracy as the system for state. Article 1 paragraph (2) of the 1945 Constitution read as follows:

<sup>&</sup>lt;sup>1</sup> More information about Emergency Constitutional Law can be found in Herman Sihombing, Hukum Tata Negara Darurat di Indonesia (Jakarta: Djambatan, 1996).; Jimly Ashiddiqie, Hukum Tata Negara Darurat (Jakarta: Rajawali Pers, 2008).

"Sovereignty shall be in the hands of the people and shall implemented in accordance with the constitution" this if the principle commonly reffered to as constitutional government. The amendment bringing fundamenal change to the 1945 Constitution where 46 items were changed and about 25 items were not changed, there also 174 additional provisions that has been made.

# B. The Development of Islamic Constitutional Thought of The Masyumi and its Influence on The Formulation of The Indonesian Constitution 1956-2002

Which will be elaborate here is the primary formulation that must be fulfilled, the formulation that must exist in a state's constitution, namely formulations relating to the principle of constitutionalism. In which without this formulation the state would be unlegitimate referred to as a constitutional state. Every constitutional system is highly determined by following paramaters: 1) there are arrangements regarding the protection of human rights and citizens, 2) basic constitutional arrangement, and 3) — limitation and division of constitutional tasks. AB Kusuma provides an explanation of the main ideas of democratic governance, namely:

- 1. That government power comes from the people being governed;
- 2. That power must be limited;
- That the government must be sovereign means that the power of the government must be strong enough so that the government can run effectively and efficiently.

The development of Islamic constitutional thought of the Masyumi can be seen in two periods of democratic constitution-making in Indonesia, that is, in the Konstituante and the MPR (the People's Consultative Assembly) during the amendment of the 1945 constitution.

#### 1. The Konstituante 1956-1959

The debates concerning basis of the state is the primary problem which caused deadlock in the Konsituante. There were three factions at there, Islam, Pancasila and Socio-economic. Saifuddin Zuhri noted, when talking about the *Dasar Negara*, differences began to arise increasingly sharp and widening. The debate arises the desires of each group about the *Dasar Negara*:

- a. The basis of Islam proposed by Masyumi, NU, PSII, Perti.
- b. The basis of the Pancasila proposed by the PNI, PKI, PSI, Catholic, Christian.
- c. The socio-economic basis proposed by the mainstream party.

Each group displays their greatest spokesman among them. PNI presented, Suwiryo, Ruslan Abdul Gani, Arnold Mononutu, Karkono Partokusumo. Masyumi displays, Muhammad Natsir, Mr. Kasman singodimedjo, Hamka, Zainal Abidin Ahmad, Osman Raliby, Prof. Kahar Muzakir, Isa Anshari. NU featured, K.H.A. Wahab Hasbullah, K.H. Masykur, H. Zainul Arifin, K.H. Syukri Ghozali, Ali Manshur, and Saifudin Zuhri. PKI displays, among others, Ir. Sakirman, Wikana and also well-known figures from the other parties such as Sutan Takdir

Alisjahbana PSI soedjatmoko PSI Prof. Mr. Suhardi Catholic Mr. Wongsonegoro pir Asmara Hadi defender of Pancasila Sujiono Joyo Prayitno murba and others.<sup>2</sup>

Deliar Noer asserts, regarding Pancasila, the three Islamic parties (NU, PSII, Perti) are in line with Masyumi's opinion. That is also why the four parties could face other factions in the Konstituante's forum with strong and unity. KH Masykur from NU stated in the Konstituante that both Islam and Pancasila wanted:

- a. A prosperous and happy state;
- b. Democratic government;
- c. Anti-capitalism and imperialism;
- d. the world economic life is arranged in a kinship way;
- e. Nation's domestic life is happy and has a high moral value.<sup>3</sup>

However, at that time NU strongly insisted on making Islam the basis of the state.<sup>4</sup> For the masyumi, designation of an Islamic state is a secondary problem. Mohammad Roem, said that the primary issue in the relationship between Islam and the state was how to make the teachings of Islam animate the life of the state even though it was not called an "Islamic state".

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<sup>&</sup>lt;sup>2</sup> Saifuddin Zuhri, *Berangkat dari Pesantren* (Jakarta: Gunung Agung, 1987), 488.

<sup>&</sup>lt;sup>3</sup> Deliar Noer, *Partai Islam di Pentas Nasional* (Jakarta: Grafiti, 1987), 144.

<sup>&</sup>lt;sup>4</sup> Deliar Noer once asked kyai Wahab Hasbullah about what the purpose of the NU was founded. Kyai Wahab quickly answered that NU was founded with the intention to establishing an Islamic state. See, Deliar Noer, *Aku Bagian Ummat Aku Bagian Bangsa* (Jakarta: Mizan, 1996), 398-399.

As had been mentioned in Chapter III, although the Kontituante was incomplete to formulate the Indonesian Consitution, Adnan Buyung Nasution in his work has discover three achievements of the Konstituante i.e.: 1) confirmation of the commitment to democracy, 2) confirmation of the commitment to human rights, 3) confirmation of the problem of power. Based on three points proposed by Adnan, the Islamic constitutional thought of the Masyumi's contribute to the formulation of the Indonesian Constitution in the Konstituante are as follows:

# a. On democracy and human rights

Human rights constitute the core subject matter in the text of the constitution of modern state. In the official draft made by Masyumi there are 21 articles on human rights, the idea of adopting protection of human rights has been the objective of continuous struggle by the Masyumi, on the draft constitution made by Masyumi, Article 28 which is first Article concerning Human Rights regulates as follows:

- 1) Every person is a noble creature created by God, is recognized as a human being by the Law. He is entitled to all the rights and freedoms set forth in the verses and subsequent chapters in this Section with no exceptions whatsoever.
- 2) Everyone has the right to receive and demand equal treatment and protection by the Law. He has the right to demand equal protection from all changes in any field and against incitement to make that difference.
- 3) Everyone has the right to receive legal assistance from the judge who assigned to do so. To fight all actions that are contrary to the rights and freedoms allowed for him to demand the law.

Especially on fundamental issues that throughout Indonesian history have often been a problem between the government and its citizens, namely regarding freedom of opinion. In the draft constitution made by Masyumi, Article 39 regulates as follows:

- 1) Everyone has the right to freedom of opinion and expression;
- 2) Everyone has the right to freedom of association and association;
- 3) The right to demonstrate and strike, regulated by law;
- 4) Everyone has the right to establish trade unions to protect and fight fo their interests.

These clauses were also adopted by the Konstituante in the decision of the Preparatory Committee of the Constitution No. 26/K/PK/1958 concerning the formulation of the draft articles of Basic Human Rights and the Rights and Obligations of Citizens which will be presented before the Plenary Meeting of the Konstituante in clauses number III, VII, and XXIX, as follows:

- 1) Clause number III: "Every citizens has the right to freedom of assembly, association, meeting and demonstration".
- 2) Clause number VII: "Every citizens has the right to form and join trade unions for the protection of his interest".
- 3) Clause number XXIX: "Every citizen is entitled to freedom of expression orally or in written form".

# b. On the problem of power

One of function of the constitution is to limit the ruler's power. There is a famous saying (*adagium*) spoken by Lord Acton that says "power tends to corrupt, absolute power corrupt absolutely". The Masyumi really aware about the possibilities by the ruler (government) to conduct abuse of power, Thus, on Article 50 the draft

of the constitution mad by Masyumi, from paragraph (1) to paragraph (3) stipulate as follows:

- 1) The term of office for the President and Vice President is 4 years. Each may be re-elected for his position;
- 2) One must not assume the office of President and Vice President more than twice in a row for consecutive terms, for the same position
- 3) The positions of President and Vice President may not be summed up by carrying out any public office inside or outside the (Islamic) Republic of Indonesia.

Nonetheless, official provision regarding limitation of power by the Konstituante was not stipulated yet, but constitutional thought regarding this problem has been voiced in the assembly, such Prawoto Mangkusasmito (Masyumi), Yap Thiam Hien (Baperki) and Abidin (Labor Party).

Until the end of 1958 according to the Chairman of the Constituent Assembly, Wilopo, the Assembly had completed 90% of its duties in drafting a constitution. But Prime Minister Djuanda and President Soekarno decided to reinstate the 1945 Constitution to implement Guided Democracy. In Prawoto Mangkusasmito's view, The Provisional Constitution of 1950 is far better than the Constitution of 1945. Hamka aware that the President conception's Guided Democray will lead to totalitarian state. For Hamka, it kills

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Konstituante Republik Indonesia, *Risalah Perundingan Tahun 1959*, Vol. II (Bandung: Konstituante RI), 601.

the concept of *trias politica*.<sup>6</sup> In this regard, Adnan Buyung Nasution also mention:

"Masyumi members opposing the return to the 1945 Constitution referred to its inherent potential for dictatorship. This concern was articulated most fluently by Djamaluddin Datuk Singomagkuto. According to him, Guided Democracy based on the 1945 constitution relied upon a leader who was at the same time head of state and chief executive, and who exercised the consensus of the people by the guidance of wisdom and consultation. Thus, the centre of gravity power in Guided Democracy was 'at the top', with one leader holding three powerful positions, and this reminded him of the *Fuhrerprinzip*. The acclaimed flexibility of the Constitution of 1945, which contained only 37 articles compared with the 147 articles of the Constitution of 1950, facilitated presidential abuse of power."

# 2. The MPR and Consitutional Reform 1999-2002

The PBB does not specifically specify the articles in the body of the 1945 Constitution that need to be amended, but it does provide an overview of the trends that are developing in the community regarding amendment material. by the PBB, the tendency was elaborated so that it became a number of amendment material i.e.: limitation of executive power; expanding the role of the DPR and BPK MPR; the realization of the independence of the Supreme Court and consideration of the ideas of the Constitutional Court; DPA review; general election; independence of Bank Indonesia; expansion of the meaning of human rights; social Security; education and human resources; territory of the country; state

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<sup>&</sup>lt;sup>6</sup> Ibid., 874.

<sup>&</sup>lt;sup>7</sup> Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia: A Sociolegal Study of the Indonesian Konstituante 1956-1959* (Jakarta: Sinar Harapan, 1992), 366.

ministry; the country's economic system; regional autonomy and regional center relations. Prominent Indonesian Islamic scholar, Nurcholish Madjid note that constitutionalism is important in reform era, it is about to uphold the democratic constitution, with possibility to perfect the constitution through amending process.<sup>8</sup> Here will elaborate concerning primary elements of constitutionalism proposed by the Partai Bulan Bintang.

# a. Democracy and human rights

Several factions in the MPR expressed agreement on the importance aspects of human rights adopted in the amendment to the 1945 Constitution. The PBB faction through Hamdan Zoelva said that

"... For our faction the issue of Human Rights should be contained in this Constitution as should be done by other modern democratic states."

According to Hamdan Zoelva, human rights are natural rights inherent in human beings, therefore this right is not given by the authorities or not given by the government but in the constitution it is necessary to emphasize that these human rights are guarantees given by the constitution not grants but guarantees because of human rights is a natural right, a basic right inherent in human beings from birth.

<sup>8</sup> Nurcholish Madjid, *Cita-Cita Politik Islam Era Reformasi* (Jakarta: Paramadina, 1999), 154.

<sup>9</sup> Mahkamah Konstitutsi Republik Indonesia, Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Book VIII (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010),

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#### b. Rule of law

PBB has a strong commitment on the rule of law. On the rule of law, PBB faction strongly encourage in adding words "berdasarkan hukum" (based on law) and wants to elevate the status of the rule of law from the explanation into the Body of the 1945 Constitution so that the rule of law becomes stronger and within the framework of the rule of law. The people's sovereignty adopted will be strengthened by the rule of law. They agreed to the word and discarded it as proposed earlier. The formula is "Indonesia is a unitary state in the form of a law based on a republic". Hamdan Zoelva said that PBB faction proposed Chapter I regarding "Form and Sovereignty". Article 1, "The State of Indonesia is a unitary state based on laws in the form of a republic."

# c. Sovereignty

Article 2, Sovereignty is in the hands of the people and is carried out with a system of representation elected through a general election process which is held once every five years. <sup>12</sup> This shows that for the PBB the sovereignty is belong to the hands of the people, not God. However, according to Jimly, the 1945 constitution has unique concept of sovereignty. The 1945 Constitution combines the concepts

Mahkamah Konstitutsi Republik Indonesia, Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Book II (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), 195.

<sup>&</sup>lt;sup>11</sup> Ibid., 229-230.

<sup>&</sup>lt;sup>12</sup> Ibid., 420.

of the sovereignty of the people, of law, and of God in one single concept.<sup>13</sup>

# d. Seven words of the Jakarta Charter

The PBB is the most fluently party in the MPR session which trying to insert the seven word of the Jakarta Charter into the constitution. Just like its predecessor, the Masyumi party. The PBB also wants to insert seven words of the Jakarta Charter into the constitution, not at the preamble of the constitution but into Article 29. Hamdan Zoelva said that the aspects relating worship should not and was not needed by the state to interfere. But, there is a part of Islamic Sharia concerning public aspects, *muamalah* and *jinayah* that cannot be enforced without the state being obliged to participate in enforcing them.<sup>14</sup>

MS Kaban stated that the enactment of Islamic Shari'a was only aimed at those who are Muslims and not for those who are not Muslims. MS Kaban's statement arise new question, in Indonesian constitutional law system, legal diversity in private law matters has been recognized in Indonesia but in the case of public law, the Indonesian state must has a legal unification, if the PBB means the implementation of Sharia in public aspect, then there will be more

<sup>13</sup> Jimly Ashiddiqie, Gagasan Kedaulatan Rakyat dalam Konstitusi dan Pelaksanaannya di Indonesia (Jakarta: Ichtiar Baru W. Van Hoeve, 1994), 64.

<sup>15</sup> Ibid., 586.

<sup>&</sup>lt;sup>14</sup> Mahkamah Konstitutsi Republik Indonesia, Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Book IV (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), 581.

division between Muslims and non-Muslims. Everyone must became as equal as citizens of the state.

The rejection of the proposal to insert the seven words in the Jakarta Charter into Article 29 paragraph (1) of the 1945 Constitution, came from the Nahdlatul Ulama and Muhammadiyah. Two of the largest religious organizations in Indonesia. Although the attitude about it is not an organizational decision, but the statements of several figures of these Islamic organizations are seen as representing and reflecting the attitudes of most NU and Muhammadiyah communities.<sup>16</sup>

Nadjih Ahjad stated the constancy of his faction to continue to choose the second alternative from Article 29 Paragraph (1). That is an alternative that includes 'seven words' in the Jakarta Charter. He emphasized that if all factions rejected the PPB proposal and wanted to return Article 29 Paragraph (2) as before, members of the PBB faction did not take part in the decision.

Nonetheless, Nurcholish Madjid mentions, "If there is a thought to amend the Constitution, the Preamble of the Constitution should not be touched, and that means all articles interpreted by the Preamble are also not touched, such as Article 29 paragraph (1) and so on". According to Madjid, touching it is like opening a "Pandora's

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<sup>&</sup>lt;sup>16</sup> Umar Basalim, *Pro-Kontra Piagam Jakarta di Era Reformasi* (Jakarta: Pustaka Indonesia Satu, 2002), 160.

box".<sup>17</sup> Nadirsyah Hosen argue that the phrase "dengan kewajiban menjalankansyariat Islam bagi pemeluk-pemeluknya" (with the obligation to carry out sharia for adherents of Islam) is vague, the phrase does not state clearly that it is the state that has an obligation to implement Islamic law.<sup>18</sup> Donald L. Horowitz noted, Indonesia should be a state that is both Islamic and democratic. But Indonesia is a religiously plural society, and many Muslim thinkers and politicians, even some in the Masyumi stream, reject the idea of an Islamic state for such a society.<sup>19</sup>

Ismail Sunny asserts that with the provisions of these seven words, it does not at all mean the formation of an Islamic state by the Jakarta charter.<sup>20</sup> Still related to the issue of constitutional reform, Yusril proposed the idea of Islamic sharia as a source of law. According to Yusril, Sharia could be the highest legal source in the state. Sharia as a source of law is different from sharia as a law. If as a source of law, Sharia becomes a source of national law formation. Its principles can be transformed into national law.<sup>21</sup>

<sup>&</sup>lt;sup>17</sup> Ramlan Mardjoned and Lukman Fatullah Rais, *Amandemen UUD 1945 tentang Piagam Jakarta* (Jakarta: Media Dakwah & DDII), 86.

<sup>&</sup>lt;sup>18</sup> Nadirsyah Hosen, *Sharia and Constitutional Reform in Indonesia* (Singapore: ISEAS, 2007), 213.

Donald L. Horowitz, Constitutional Change and Democracy in Indonesia (New York: Cambridge University Press, 2013), 248.

<sup>&</sup>lt;sup>20</sup> Ismail Suny, *Jejak-Jejak Hukum Islam dalam Sistem Ketatanegaraan Indonesia (Sebuah Bunga Rampai)* (Jakarta: Konstitusi Press, 2005), 55.

<sup>&</sup>lt;sup>21</sup> Kholid Novianto and Al Chaidar, *Era Baru Indonesia: Sosialisai Pemikiran* (Jakarta: Rajawali Pers, 1999), 161.

From the explanation above, actually the Partai Bulan Bintang uses at the same time two approaches, formal sharia and substantive sharia. The Partai Bulan Bintang uses formal sharia when they propose the seven words of the Jakarta charter into Article 29. On the other hand, they have understanding that sharia is not a law, but as a source of law. The law was made by humans, sharia is the guiding

### **CHAPTER V**

#### CONCLUSION

# A. Conclusion

Based on the description of the results of the research that has been presented from the previous chapter, conclusions can be given, as follows:

- 1. The formulation of the Indonesian constitution in 1956 until 2002 shows that improvements to the constitution are always carried out in order to bringing Indonesia towards a democratic and constitutional state, such as through the Konstituante in 1965 to 1959, but the Konstituante was made to fail, then continued to the MPR in 1999 to 2002 in which it bringing fundamenal change to the 1945 Constitution where 46 items were changed and about 25 items were not changed, there also 174 additional provisions that has been made.
- 2. Influence of the development of Islamic constitutional thought of the Masyumi on the formulation of the Indonesian constitution are always in line with modern constitutionalism. Although the basis of the state (Islam) according to the Masyumi is a very fundamental thing in the formation of the constitution. But in its development, the basis of the Islamic state has not become important, it is seen in the thinking of the the Partai Bulan Bintang no longer touches on the basis of the state, but still wants to re-inserting the seven words in the Jakarta Charter.

# B. Suggestion

Based on the results of the research that has been presented, there are a number of suggestions are as follows:

- 1. For academics: Further development of the Islamic constitutionalism thought by the Masyumi party are needed, considering that the Masyumi party was the first and largest modernist party, not only in Indonesia but in the world. Therefore Masyumi's thoughts must be developed immediately. Because of the books of the masyumi figures, it is still used as the main source of *fiqh siyāsah* studies in Indonesia.
- 2. For Islamic scholar: Modernization in the field of Islamic law should have been encouraged, especially those relating to constitutional law, particularly Islamic constitutionalism, which at the moment does not develop and tends to stagnate, so it is not relevant if it is connected to modern problems. By referring to the thoughts of the Masyumi party and its figures, it is expected to encourage renewal in the field of Islamic state law.

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