

# Adnan Buyung Nasution Papers on Southeast Asian Constitutionalism



## Towards Constitutional Democracy in Indonesia

**Professor Dr Iur Adnan Buyung Nasution**

## Adnan Buyung Nasution Papers on Southeast Asian Constitutionalism



Professor Dr Iur Adnan Buyung Nasution is widely regarded as Indonesia's leading advocate and trial lawyer. He is a pioneer of legal aid and law reform, as well as being a key figure in the development of human rights law and constitutionalism in Indonesia.

In 2010, he was appointed as Honorary Professorial Fellow in the Melbourne Law School, in recognition of his huge contribution to constitutional studies and scholarship on Indonesian law, and his commitment to building the rule of law in his home country.

### Adnan Buyung Nasution Papers on Southeast Asian Constitutionalism

The *Adnan Buyung Nasution Papers on Southeast Asian Constitutionalism* have been established to honour Professor Nasution's contribution to constitutional studies in Southeast Asia.

The Series seeks to provide a considered analysis of important issues relevant to constitutionalism in Southeast Asia.

The Series is distributed widely amongst government, business, academic and community organisations. Please contact the Asian Law Centre at [law-alc@unimelb.edu.au](mailto:law-alc@unimelb.edu.au) if you would like to receive future editions of the Series. Copies of papers can also be downloaded from the Asian Law Centre website at:

<http://alc.law.unimelb.edu.au>

ISSN 1839-6469 (Print)  
ISSN 1839-650X (Online)  
2011

All information included in the *Adnan Buyung Nasution Papers on Southeast Asian Constitutionalism* is subject to copyright. Please obtain permission from the original author or the Asian Law Centre ([law-alc@unimelb.edu.au](mailto:law-alc@unimelb.edu.au)) before citing from the Papers. The Papers are provided for information purposes only. The Asian Law Centre does not guarantee the accuracy of the information contained in these papers and does not endorse any views expressed or services offered therein.

The cover shows Professor Nasution as a student at the University of Melbourne in the 1950s, and on the day of his inauguration as an Honorary Professorial Fellow in 2010. Photo: Kathryn Taylor

# INAUGURAL PROFESSORIAL LECTURE Towards Constitutional Democracy in Indonesia 20 October 2010

**Professor Dr Iur Adnan Buyung Nasution<sup>1</sup>**

Ladies and Gentlemen, Distinguished Guests, allow me to express my thanks for your attendance. I am extremely moved to be here tonight, because it was 50 years ago that I first stepped foot on this campus as a law student. Today, half a century later, it is a source of great pride to me to return as a law professor.

In 1958, I received instructions to study law overseas from Soeprapto, then Attorney General of the Republic of Indonesia, and Prof. Moeljatno, then Minister of Justice. A Colombo Plan scholarship allowed me to depart for Australia with the intention of investigating in depth the concept of a democratic constitutional state, the rule of law, and the honouring of human rights.

From the beginning I had wanted to study at Melbourne, because I knew this Law School is the oldest and most prestigious in Australia, with many famous lawyers amongst its instructors and alumni. Of the prominent intellectuals at the Melbourne Law School in the 1950s, the one whom I most admired was the legendary Prof. George Paton. His book *A Textbook of Jurisprudence* was often cited by Prof. Djokosoetono, my lecturer when I was a student in the Law Faculty of the University of Indonesia.

I was already acquainted with other Australian academics, however, particularly in the fields of jurisprudence, social science and political science, as result of the Australian Volunteer Graduates Scheme. Young men and women who later became famous scholars of Indonesia (like Herbert Feith, Jamie Mackie, John Legge and Harold Crouch) came to Indonesia to generously donate their time, energy and ideas to the advancement of my new country, then barely a decade old.

My determination to further my studies at the Melbourne Law School was also the product of a meeting with five Melbourne University students who came to Indonesia in the 1950s under the Indonesia-Australia Student Exchange Plan to study the conditions here. One of them stayed at my home, and I took advantage of many

---

<sup>1</sup> This paper was translated and edited by Faye Chan and Professor Tim Lindsey. Thanks also to Tom Bray and Kathryn Taylor. Faye Chan and Tom Bray are Researchers in the Asian Law Centre. Kathryn Taylor is the Centre Manager.

opportunities to exchange ideas with him. Murray Clapham, the Melbourne Law School student who led that delegation eventually became my close friend. We still meet frequently, and I am moved that he is here tonight.

I will never forget valuable lessons I received at the Melbourne Law School, nor will I forget Prof. Zelman Cowen, Dean of the Melbourne Law School while I was there, nor Prof. Johannes (Hans) Leyser, my lecturer in public international law studies, particularly extradition. My pride in being a Melbourne Law School student was only added to by the fact that the Australian Prime Minister at the time, Sir Robert Menzies, was also an alumnus of the Melbourne Law School.

In Australia, I did not confine my studies to campus. I also studied social and cultural life, as well as the legal system and government of Australia, observing democracy in action in the daily life of an open and egalitarian society. I was lucky to be able to take part in an internship programme at the Supreme Court of Victoria, where I could make a close study of how Australian law is practised. Watching this court in action gave me a better understanding of what a free and impartial tribunal should be like. I also had an opportunity to participate in an advanced detective training course with the Victoria Police, seeing Australian police work firsthand. Last but not least, I give thanks to God for the opportunity I had to learn about legal aid in Australia. Because I was extremely eager to understand how legal aid worked, I made a request (which was finally granted) to learn about legal aid at the public solicitor's office in Sydney.

I had high hopes that all these opportunities would increase my skills and knowledge, and give me much that I could take back to Indonesia to use to my country's benefit. I was determined to dedicate all my ideas and energy to strengthening the life of constitutional democracy in Indonesia, and especially the law enforcement process and human rights. I looked forward to doing all this through the Attorney General's Office and the Ministry of Justice where I worked.

## I. THE END OF INDONESIA'S DEMOCRATIC SPRING

When I left for Australia in 1958, Indonesia was undergoing a kind of democratic spring. It was still a constitutional democracy based on the Provisional Constitution of 1950. In fact, a democratic system had been imposed early in the life of the Republic, within just three months after the 1945 proclamation of independence on 17 August that year. This happened in response to the urgent requests of young leaders who did not agree with aspects of the Presidential Cabinet government originally set up under the Soekarno-Hatta leadership on the basis of the (Initial) 1945 Constitution, which they regarded as authoritarian, even biased in favour of fascism. They criticised the concentration of governmental powers in the hands of President Soekarno. Using a Japanese term, they called his government the “*Bucho* [or ‘Big Boss’] cabinet”,<sup>2</sup> because its ministers consisted of former collaborators with the Japanese occupation, and it was true that government was originally formed under Japanese auspices. Indeed, the international community had initially refused to acknowledge Indonesian independence because they suspected the new Republic was a Japanese puppet.

Vice-Presidential Declaration No. X of 16 October 1945 was therefore the first significant political change since the founding of the Republic. It marked the moment when Indonesia began trying to put into practice the principles of constitutional democracy under a parliamentary cabinet system. Prime Minister Sutan Sjahrir led the first cabinet and was accountable to the parliament. The Central Indonesian National Committee [*Komite Nasional Indonesia Pusat*, KNIP], which had previously functioned as an advisory body to the President, was now transformed to become the first Parliament. This transformation was not a coup d’état, but a constitutional change, carried out through a constitutional convention process.

Although the Presidential 1945 Constitution remained valid, Indonesia now implemented a parliamentary system. This continued until the short-lived government of the federal Republic of the United States of Indonesia [*Republik Indonesia Serikat*, RIS] was formed in 1949. It had a new constitution, the Constitution of the Republic of the United States of Indonesia. This was, however, replaced a month later by the unitary state of the Republic of Indonesia [*Negara Kesatuan Republik Indonesia*, NKRI], based on another new constitution, the Provisional Constitution of 1950.

Despite these changes to the form of the state, the governments that ruled under these three constitutions all applied essentially the same principles of constitutional democracy. The President was Soekarno but government was largely in the hands of Prime Ministers, who remained accountable to parliament. Herb Feith, an Australian scholar well-known for his account of Indonesian politics between December 1949 and 1957, designated this the period of constitutional democracy. He said it was marked by six characteristics: (i) civilians played a dominant role; (ii) parties were of very great importance; (iii) the contenders for power showed respect for “rules of the game” which were closely related to the existing constitution; (iv) most members of the political elite had some sort of commitment to symbols connected with constitutional

---

<sup>2</sup> *Bucho* is Japanese, and means “departmental head” but the term as used at the time had a negative connotation. It referred to “big bosses” or leaders who claimed authority, even though in reality the Japanese military government had complete power over them.

democracy; (v) civil liberties were rarely infringed; and (vi) governments used coercion sparingly. Together these principles formed a foundation for the building of a vibrant constitutional democracy.<sup>3</sup>

While I was still studying in Australia, an extraordinary political transformation occurred in Indonesia that ended all this. With Soekarno's notorious Decree of 5 July 1959, the system of government was changed back to what it had been in the first three months of independence prior to the publication of Vice-Presidential Declaration No. X of 1945. In other words, Indonesia reverted to an authoritarian system where power was concentrated in the hands of the President. Supporters of democracy in Indonesia criticised the Decree for destroying the essential mechanisms of a constitutional democracy, especially *trias politica* [the separation of powers], and guarantees of human rights. They feared that the Decree of 5 July would pave the way for the emergence of a repressive authoritarian regime.

Sadly, these fears were realised. The democratic spring in Indonesia ended immediately with the issue of the Decree of 5 July 1959. Political freedom and judicial independence no longer existed. Soekarno, backed by the military, became a dictator and his Guided Democracy period began. All law enforcement institutions, including the police, the Office of the Public Prosecutor and even the Supreme Court, were placed under the President. They became ministers accountable directly to the President, who served concurrently as Head of State and Head of Government. The Chiefs of Staff of the Army, Navy and Air Force also served concurrently as Ministers for their respective forces. They were likewise accountable only to the President.

After the Decree of 5 July 1959, Soekarno's popularity declined further, and his power weakened. One reason for this was Indonesia's rapidly worsening economic position, with widening gaps developing between the centre and the regional areas. The backing of the armed forces for the government was also no longer unanimous, as rivalry between high-ranking officers and military commanders in the regions led to widespread factionalism. The result was severe tension and instability and, at its height, Soekarno was accused of masterminding the attempted coup carried out by the Indonesian Communist Party [*Partai Komunis Indonesia*, PKI] in late September 1965.

When a leadership vacuum in the armed forces occurred after the coup attempt led to the deaths of senior officers, Soeharto as the Commander of the Army Strategic Command [*Komando Strategis Angkatan Darat*, Kostrad] quickly took power. He dissolved the Indonesian Communist Party and arrested officials and military chiefs whom he accused of being involved in the failed coup attempt. Soeharto then pressured Soekarno until the Letter of Command of 11 March [1966] [*Surat Perintah Sebelas Maret*, Supersemar] was issued, transferring effective power to Soeharto. At a Special Session of the Provisional People's Consultative Assembly [*Majelis Permusyawaratan*

---

3 See Feith's study, *The Decline of Constitutional Democracy in Indonesia* (Ithaca, NY: Cornell University Press, 5th printing, 1978). Feith stated that the political process deteriorated in a drastic fashion after 1957. In my opinion, however, the ruin of constitutional democracy really only took place after the Decree of 5 July 1959. Before then, the country's political leaders – particularly those in the *Konstituante*, the Constitutional Assembly – were still rigorously endeavouring to realise aspirations for constitutional democracy.

*Rakyat Sementara*, MPR(S)], Soeharto was referred to as “acting president”, and from that moment onwards he held all executive powers. Although Soekarno remained in office as President de jure, Soeharto banned him from showing his face in public. Having no intention of allowing Soekarno to regain public support, Soeharto tightly restricted his movements, making him practically a prisoner in his own home. Then, a Special Session of the MPR(S) formally rejected Soekarno’s accountability speech (*Nawaksara*), and from that moment Soeharto and his New Order were all-powerful.

In the early stages of his rule, Soeharto emphasised his commitment to correcting the mistakes of the Old Order and to upholding democracy. He became a focus of hope in the midst of worsening economic conditions. History proved these hopes futile, however, and the new President instead became the tyrant of the New Order authoritarian regime for the next three decades.

## II. THE LEGAL AID SERVICE [LBH]: OPPOSING THE AUTHORITARIANISM OF THE NEW ORDER

My experiences in Australia had created in me a deep hope that as prosecutor I could be not just an instrument of law enforcement, but could also help reform the Indonesian legal system. Returning from Australia, however, I found conditions in the Office of the Public Prosecutor had drastically changed — and very much for the worse.

Prosecutors had previously been a collegial corps, bound together by their profession as lawyers. Now they had become a hierarchical corps like the military, with uniforms and ranks. The prosecutor's job in that environment became extremely unattractive to me,<sup>4</sup> and I found myself frequently protesting against the attitudes and actions of prosecutors I considered to be acting abusively. As a result, I was soon seen as opposing the leadership of the Office of the Public Prosecutor, and as being anti-*Manipol* and *Usdek* (that is, anti-revolutionary). I was soon sanctioned. Initially suspended in 1964, I was finally dismissed in 1969.

Although I had been sacked, I was more determined than ever to carry on the struggle to realise the rule of law in Indonesia. In order to make that a reality, I decided to establish my own institution as a vehicle for the struggle to oppose Soeharto's authoritarian regime and help poor, oppressed and marginalised Indonesians. The activities of legal aid workers in Australia had inspired me and opened my eyes to a way I could achieve these aspirations. I soon explained my idea of establishing a legal aid service [*Lembaga Bantuan Hukum*, LBH] to senior barristers and comrades-in-arms, whom I believed would share my vision of instigating change in Indonesian politics to realise constitutional democracy, the rule of law, limitations on power, and protection of human rights.

My colleagues responded positively and the Association of Indonesian Advocates [*Persatuan Advokat Indonesia*, Peradin] facilitated the establishment of LBH. I also sought the support of a number of state officials whom I believed to be progressive and pro-democracy, for example, Ali Sadikin, the Governor of the Jakarta Special Capital Region [*Daerah Khusus Ibukota Jakarta*, DKI Jakarta] at the time. "Bang Ali"<sup>5</sup> immediately agreed. He provided finance and facilities and issued a Directive [*Surat Keputusan*, SK] confirming the establishment of LBH. He even appointed me its director at an event that he convened as if it were an official state ceremony.

In addition, I sought rapprochement Javanese style (*kulonuwun*) with Ali Moertopo, the Deputy Head of the State Intelligence Coordination Agency [*Badan Koordinasi Intelijen Negara*, BAKIN]). BAKIN was greatly feared at this time, and hated by pro-

---

4 The only valuable experience I can recall from the period after my return from Australia and prior to my dismissal was in 1961, when I was one of the liaison officers accompanying US Attorney-General Robert Kennedy during his visit to Indonesia.

5 Ali Sadikin was one of the central figures in the establishment of the Legal Aid Service. He preferred to be called "Bang Ali" ("Brother Ali") because it sounded more egalitarian than "Pak" or "Bapak" (Mr).



democracy activists.<sup>6</sup> But Moertopo not only accepted the establishment of LBH but he even donated 10 motorbikes to help us function. Unfortunately, this later was shown to be just part of the regime's "cosmetic politics", intended to persuade the international community that the New Order regime supported democracy, the rule of law and human rights. This was conclusively proven to be a lie in 1974, when Moertopo had me arrested during the *Malari* disturbances of that year. What is more, Moertopo established a rival Legal Aid Service, namely the Legal Service and Information Agency (*Lembaga Pelayanan dan Penyuluhan Hukum*, LPPH) of *Golongan Karya* [Functional Group, Golkar], the government's political vehicle. As its head, he appointed Albert Hasibuan, the former Secretary-General of our legal aid service (LBH).

Despite these obstacles, our new independent LBH went to work as soon as it was established, focusing on helping *orang kecil*, the "little people". The earliest cases we handled therefore involved poor people who had been intimidated by the military and whose lands had been expropriated for the Simprug and TMII [Taman Mini Indonesia Indah (Beautiful Indonesia in Miniature)] projects.

The Simprug case was important for us because here LBH was not just legal counsel. It also fought side by side with the people against the government's development of the land in dispute. When bulldozers and heavy machinery arrived, escorted by armed military personnel, LBH lawyers stood with the people to block them. LBH also facilitated the founding of a People's Defence Committee [*Komite Pembelaan Rakyat*], a forum for the people to gather and discuss resistance strategies. The strength of popular resistance in the Simprug Case, combined with LBH's effective advocacy in court, forced developers and the government to engage in dialogue and meet many of the people's demands.

From our experiences in the Simprug Case, LBH began to develop the notion of Structural Legal Aid [*Bantuan Hukum Struktural*, BHS], that is, providing legal assistance by building the awareness of the people and empowering them. The Structural Legal Aid concept consisted of a number of programmes aimed at implementing change through advocacy in court and by other means, in order to replace unfair relationship patterns with relationship patterns that were more parallel and emancipatory. This, we believed, was a prerequisite for making justice accessible to the majority of the poor in Indonesia.<sup>7</sup>

In defending cases, Legal Aid Service public defence attorneys routinely faced aggressive challenges from industrialists, government officials, and even the military. Attempted

---

6 Bakin stands for *Badan Koordinasi Intelijen Negara* [State Intelligence Coordinating Agency]. Opsus [*Operasi Khusus*, Special Operations] was the other key intelligence mechanism that the Soeharto regime used to crush or muzzle various political organisations. The demise of the Indonesian Muslim Party [*Partai Muslimin Indonesia*, Parmusi] was an example of how Opsus worked. After Opsus intervened in Parmusi's Congress I in Malang, Mohd. Roem (a leading moderate Muslim figure with widespread public support) was defeated by Haji Jojn Naro (known to be close to Opsus).

7 See Adnan Buyung Nasution, "The Legal Aid Movement in Indonesia: Towards the Implementation of the Structural Legal Aid Concept", in H. Scoble and L. Wiseberg (eds), *Access to Justice: Human Rights Struggles in South East Asia* (London: Zed Books, 1985).

bribery by bureaucrats and industrialists was easily overcome. Terror, intimidation and threats of violence, particularly from the military, were, however, much more serious problems.

Our public defence attorneys soon became accustomed to threats, particularly in the handling of major cases such as the Tanjung Priok Case, the HR Dharsono Case, the Taman Mini Indonesia Indah (TMII) [Beautiful Indonesia in Miniature] Development Case, the Buku Putih ITB [ITB White Book] Case, and the Kedungombo Dam Case, among others. Our attorneys were entered onto a government blacklist and were continuously under surveillance by the intelligence apparatus. They were also frequently threatened with arrest and detention, or simply terrorised. Our offices, homes and even vehicles were frequently broken into, ransacked or vandalised.<sup>8</sup> I myself was arrested and detained without judicial process for nearly two years. As mentioned, I was accused of masterminding the rioting and arson associated with the *Malari* political crisis of 1974, and was officially labelled a member of the Indonesian Socialist Party [*Partai Sosialis Indonesia*, PSI] movement, accused of seeking to launch a revolt against the government.

Nevertheless, LBH activists did not falter in their struggle. On the contrary they became even more active in defending students, activists and others involved in the pro-democracy movement. In the “Bandung Institute of Technology White Book” [*Buku Putih ITB*] Case from 1978 to 1980, for example, LBH, together with lawyers from the Association of Indonesian Barristers [Peradin], led the defence of student council administrators from various universities in 8 cities (Medan, Palembang, Jakarta, Bandung, Jogja, Surabaya, Malang, Makassar). In doing so, every one of them suffered threats, intimidation and state terrorism. Despite this, LBH continued to take notorious high-risk cases for many years afterwards. These included the Tanjung Priok Case, the Sanusi Case, the Fatwa Case, the Dharsono Case, the Kedungombo Case, the Marsinah Case, and so forth.

In response, the New Order regime became increasingly oppressive. I, for example, was continuously under close surveillance by the military and intelligence agencies. Eventually, I was charged with contempt of court and my barrister’s licence revoked. This was officially intended to last one year, but its impact was far-reaching. It meant, for example, that clients were afraid to use the services of my office — to the point that, with a heavy heart, I finally had to close it and dismiss more than 70 employees. As a result, I decided to further my studies in the Netherlands. Apart from avoiding threats against me (which were becoming increasingly dangerous), I also felt the need to reflect on my activities and deepen my comprehension of theory and concepts of jurisprudence, particularly concerning democracy, the rule of law, constitutionalism, and human rights.

In 1993, I returned to Indonesia after seven years of self-exile in the Netherlands. I rejoiced to find that resistance against the oppressive and authoritarian regime of Soeharto’s New Order had revived and was even beginning to grow, with LBH taking

---

8 As, for example, in the case of vandalism of the house and car of Djamaluddin Datuk Singomangkuto of LBH.

a leading role as the first and oldest NGO in Indonesia. While I was studying in the Netherlands it had succeeded in building itself to become a major NGO, active in a wide variety of fields, including law, politics, culture, the environment, gender and so forth.

Upon my return, I immediately jumped back into the resistance struggle, hoping to strengthen it with the fruit of my studies in the Netherlands, a dissertation entitled “The Aspiration of Constitutional Government in Indonesia”. This book offered a clear message that Indonesia needed constitutional reform as soon as possible, and that this had to be done by amending the 1945 Constitution. These ideas, however, again brought me into direct conflict with the Soeharto government, which for 30 years had sanctified the 1945 Constitution to the point where anyone who suggested its amendment would face charges of subversion.<sup>9</sup> As a result, upon publication my dissertation was immediately banned by a radiogram sent to all Indonesian universities by General Susilo Sudarman of the Command for the Restoration of Security and Order [*Komando Pemulihan Keamanan dan Ketertiban*, Kopkamtib] and the Coordinating Minister for Political and Security Sectors [*Menteri Koordinator Bidang Politik dan Keamanan*, Menkopolkam]. This meant that no university dared use my book, and not a single publisher or bookstore was brave enough to sell it. The firm Penerbitan Sinar Kasih, which published the English version of my dissertation, eventually simply stopped circulating it to bookstores altogether.

This led me to adopt a new strategy. I would travel to the major cities in Indonesia to deliver lectures, using clandestine discussions to convey the ideas in my dissertation, while building up networks in student and NGO activist circles. Mulyana W. Kusumah coordinated these activities and accompanied me on these trips. The New Order regime regarded my trips as a direct threat, and my discussion groups met with plenty of obstacles. My programme at Manado’s Sam Ratulangi University was, for example, closed down by the University President who showed me a ban notice issued by the local Kopkamtib branch. My programme was then relocated to a restaurant, but was closed down again. The same thing happened at Jember University, where my discussion programme was again banned by Kopkamtib. At Petra University in Surabaya the University President received a notice banning my discussion programme. All invitations were promptly withdrawn and the programme cancelled. At Andalas University in Padang, a Kopkamtib ban was already in place, so the University President, the Dean and the campus officials were too afraid to attend. Fortunately, the programme went ahead regardless. When my programme at the Bogor Agricultural Institute [*Institut Pertanian Bogor*, IPB], with Sri Bintang Pamungkas as a speaker, was banned from the university auditorium, we simply relocated to the middle of a nearby field.

Of course, the New Order authorities were motivated to ban my discussion programmes because I always criticised the deep and widespread corruption of the regime. What caused them the most consternation, however, was my determination to pioneer an

---

9 For example, the Association of Indonesian Advocates [Peradin] was charged with subversion in the 1980s when they suggested an amendment to the 1945 Constitution in order to establish a “Constitutional Court” that would have the authority to carry out judicial review of legislation against the Constitution.

open and public discourse of constitutional amendment in Indonesia.

In addition to the campus programmes, LBH and I also organised a wide range of seminars and workshops in Indonesia attended by international activists and intellectuals in order to engage in comparative studies. These were convened through cooperation with the International Commission of Jurists (ICJ), the National Democratic Institute (NDI), the United Nations Observer, Human Rights Watch (HRW), the *Friederich Ebert Stiftung* (FES), the *Friederich Naumann Stiftung* (FNS), and various other international organisations. At these seminars and workshops, important themes associated with the democratisation project were discussed, including the election system, the party system, constitutional democracy, the rule of law, human rights, gender perspectives, military and state, and religion and state.

All these activities were convened with the realisation that, for the struggle to instigate change in Indonesia to succeed, it would be necessary to rebuild the basic ingredients for a more democratic Indonesia from the beginning again. It was therefore not surprising that in the periods when the reformation movement was strong, LBH became a key gathering point for human rights activists, students, workers, women, and other components of the pro-democracy community. The opposition process during the New Order period was thus the precursor of the post-Soeharto *Reformasi* [Reformation] Movement, and that is why LBH has so often been referred to as the 'Locomotive of Democracy' in Indonesia.

As this suggests, the history of LBH cannot, in fact, be separated from the struggle to achieve genuine constitutionalism in Indonesia. Indeed, Professor Dan Lev has stressed that LBH represented a form of "intelligent constitutionalism" because it was not confined to providing formal legal aid but was also engaged in a much wider movement for political change. As Lev has said:

Private lawyers are a particularly important group in the history of constitutionalism ... because they become the most articulate rationalizers of constitutionalist ideas ... In Indonesia professional advocates, who suffered economically and ideologically under Guided Democracy, became the most fervent promoters of rule of law ideas in the New Order. And when it became clear that the New Order would not differ politically and institutionally all that much from the old, they prepared in effect for a longer struggle by creating the LBH ... [which] represents a highly sophisticated constitutionalist movement. Not limiting itself to formal legal assistance, it has conceived its work more broadly as the cutting edge of political, social, and even cultural reform.<sup>10</sup>

10 Daniel S. Lev, "Social Movements, Constitutionalism and Human Rights: Comments from the Malaysian and Indonesian Experiences" in Douglas Greenberg et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford: Oxford University Press, 1993), pp. 145-146.

### III. THE REFORMATION ERA: THE RISING MOMENTUM OF DEMOCRACY IN INDONESIA

The success of the *Reformasi* movement in finally bringing down Soeharto in May 1998 triggered a sudden and massive transition towards democracy. Soeharto's resignation offered the long-awaited opportunity to correct the corruption of constitutional practice institutionalised since 1959 by both the Old Order of Soekarno and the New Order of Soeharto.

Mirroring the experiences of other nations, Indonesia's transition towards democracy took place in a series of critical phases. If any of these had failed, the authoritarian regime would almost certainly have wrested back power.<sup>11</sup> Reform efforts therefore had to be carefully executed, and somehow had to reach all the way down to the deep roots of the problems Indonesia faced.

#### *Fighting the Integralistic State Idea*

From my study of constitutionalism in Indonesia, I had concluded that Professor Soepomo's concept of the "Integralistic State" was the root of authoritarianism in Indonesia, and represented the main threat to democracy. His thinking contained totalitarian ideas that have proved extremely dangerous for democracy in my country.

Soepomo put forward his concept of the Integralistic State for the first time in a speech he gave on 31 May 1945 at a meeting of the Indonesian Independence Preparations Investigative Assembly [*Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (Dokuritu Zyunbi Tjoosakai)*, BPUPKI]. His views were based on the notion that any system of government or state structure depended upon the idea of a state (*Staatsidee*). He then presented three alternative accounts of state and society by referring to European philosophers. The first was the individualistic perspective advocated by Thomas Hobbes, John Locke, Jean Jacques Rousseau, Herbert Spencer and J. Laski. According to this school of thought, Soepomo argued, the state is a legal society that is organised between individuals in society (social contract). The second perspective was the class theory advocated by Marx, Engels and Lenin, which sees the state as a class tool for oppressing other classes with weaker positions. On this view, the capitalist state is a bourgeois tool for oppressing workers. The third perspective Soepomo offered was what he described as that "Integralistic perspective" advocated by Spinoza, Adam Muller and Hegel. According to Integralism, Soepomo argued, the state does not guarantee individual or class importance, but guarantees the importance of society in its entirety as a unit.

Soepomo regarded this Integralistic perspective as the ideal choice for the Indonesian people. He said:

The state is the fabric of society which is integral, all classes, all parts, all of its members tightly connected with each other and is a unification of society which is organic. That

11 See Guillermo O'Donnell, Philippe C. Schmitter and Laurence Whitehead, *Transitions from Authoritarian Rule: Comparative Perspectives* (vol. 3) (Baltimore: Johns Hopkins University Press, 1986).

which is most important in a state based on the integral school of thought is the life of the nation as a whole. The state does not side with the class which is the strongest or the biggest, it does not consider the importance of an individual as central, but the state does guarantee the safety of the life of the nation in its entirety as a community which cannot be separated.<sup>12</sup>

Soepomo argued that the individualism applied in the Western European states had given rise to imperialism and a system of exploitation (*Uitbuitingsysteem*) that had upset the world. As for Russia, he said that the proletarian dictatorship system was compatible with the social conditions of the Russian state but would be in conflict with the nature of authentic Indonesian society. He was, however, far more positive about the German and Japanese examples. He cited Nazi Germany thinking concerning *Ganze der politischen Einheit des Volkes* (the people's political unity in its entirety), *Führung als Kernbegriff eines totalen Führerstaat* (the state under totalitarian leadership) and *Blut-und-Boden-Theorie* (Blood and Soil ideology, the idea of an essential link between racial identity and territory). He then concluded that these principles were compatible in their entirety with what he called "the Eastern way of thinking".

In fact, although he cited Hegel and other philosophers, Soepomo's way of thinking was more strongly influenced by the Japanese.<sup>13</sup> He had on a number of occasions openly stated his support for the Japanese military occupiers of Indonesia and had even acted as a conveyor of Japanese messages to the meetings of the BPUPKI. He explained that Japan was formed on the basis of an ideology of complete unity between *Tenno Heika* (the Emperor), the state, and the people. Within that one unity, the Emperor was the spiritual focus for the entire populace, and the imperial family, referred to as *Koshitsu*, was the highest family. Soepomo was of the opinion that a unity based on this "family principle" can also be found in Indonesian society and that the Japanese model was therefore suitable for the Indonesian state.

As an argument for strengthening his views, Soepomo, an expert on traditional customary law, also drew attention to what he said were resemblances between the principle of the Integralistic State and traditional village societies in Java. He stressed that:

authentic Indonesian social structure is none other than a creation of Indonesian culture, is the school of thought or spiritual soul of the Indonesian nation as a spiritual structure of the Indonesian people heading towards the unity of life, the unity between servant

12 Mohammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945*, vol. 1, (Jakarta: Jajasan Prapantja, 1959), p. 111.

13 Unlike Marsilam Simanjuntak, who sees Hegel's way of thinking as essential to Soepomo's Integralistic State concept, I view Soepomo as simply "philosophising" his Integralistic State concept by citing Hegel and other philosophers. Soepomo basically affirmed ideas and viewpoints "entrusted" to him by the Japanese armed forces. See and compare my dissertation concerning the Constitutional Assembly (Adnan Buyung Nasution, "The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956-1959", Doctoral Dissertation, Utrecht University, 1992) with Marsilam's thesis, later published as *Pandangan Negara Integralistik: Sumber, Unsur, dan Riwayatnya dalam Persiapan UUD 1945* [The Integralistic State Concept: Its Sources, Particulars and History in the Preparation of the 1945 Constitution] (Jakarta: Pustaka Utama Graffiti, 1997).

and master (*manunggaling kawulo lan gusti*), between the physical and spiritual worlds, between microcosmos and macrocosmos, and between the people and their leadership.

According to him, “totalitarian” or “integralistic” concepts that still existed in rural societies in Indonesia had also been present in the structure of ancient Indonesian states. He then said:

If we want to build an Indonesian State which is compatible with the special nature and features of the Indonesian people, then our state must be founded on the school of thought (*staatsidee*) of an integralistic state, a country which is united with its entire populace, and which surpasses all of its classes in any and every field.<sup>14</sup>

Soepomo’s argument was based, however, on a series of fatal generalisations. He had, for example, conflated the diverse character of the Indonesian population with the character of the Javanese ethnic group, of which he himself was a member. Soepomo also overlooked the complexity of Javanese society itself, which is, in fact, divided into many territories marked by both great diversity and a long history of conflict.

Soepomo’s Integralistic State theory contained even bigger problems, however. It suggested, for example, that state and society are identical, and the state cannot be seen aside from society and society cannot be seen aside from the state. The state, for him, was thus no more than a society that is organised, its order preserved. Therefore, the state is truly totalitarian because it encompasses all areas of social life, without exception. Soepomo said:

According to the understanding of a “state” which is integralistic, as a nation which is regulated, as an association of people which is ordered, then fundamentally the dualism of “state and individual” would not exist, conflict between state structure and individual legal structure would not exist, the dualism “*staat und staatsfreier Gesellschaft*” would not exist.<sup>15</sup>

The state must therefore be given unreserved trust, he argued. There was no need for concern about the potential for abuse of power by the state. It was simply inconceivable that the state could use its power in an improper manner. There was thus no need for any limitations on state power, let alone human rights.

For the same reasons, the Integralistic State idea rejected the need to guarantee human rights because such guarantees were considered to be excessive and were imagined to have a negative impact. The rights of the individual were therefore placed below joint interests, which were seen as more important. Soepomo clarified this:

The guarantee of *Grund-und-Freiheitsrechte* (fundamental and human rights) will not be needed from the individual against the State, because the individual is none other than an organic part of the state, which maintains the glory of the state ...<sup>16</sup>

Soepomo’s rhetoric unfortunately greatly influenced Soekarno and others among the

14 Yamin, 1959, p. 113.

15 Yamin, 1959, p. 114.

16 Yamin, 1959, p. 114.

founders of our republic. They assumed that provisions on human rights need not be included in the draft Indonesian constitution, because individual rights and freedoms were in conflict with the freedom of action inherent in a sovereign state as seen from an Integralist perspective. They also believed that disputes between the individual and the state would give rise to conflicts, upheavals, class disputes, and wars, as in the European nations and America.

Nevertheless, not all the founders of the Indonesian republic affirmed Soepomo's ideas as did Soekarno. Hatta and Yamin, for example, raised strong objections to Soepomo's integralism and argued for guarantees of individual freedom. Hatta represented supporters of democratic principles and he stressed his concept of a state, which, while certainly a "managing" state, did not go so far as to become totalitarian or oppressive. Thanks to Hatta's strenuous crusade, the right to associate eventually received acknowledgement and protection in the 1945 Constitution. Soepomo, however, not only rejected the need to guarantee human rights, he also opposed the notion of democracy in its entirety. As he saw it, this was a necessary consequence of accepting the Integralistic State idea:

It is hoped that all of you gentlemen are conscious of the consequences of the position on rejecting the basis of individualism. Rejecting the basis of individualism means rejecting also the parliamentary system, the Western system of democracy, rejecting the system which equates humans with each other just like figures with the same value.<sup>17</sup>

Soepomo therefore also rejected general elections where the people choose their head of state as in a western democracy. The notion of forming a People's Consultative Assembly [*Majelis Permusyawaratan Rakyat*] arose from here. Soepomo considered this institution able to "feel the people's sense of justice" and their aspirations, and thus realise the power of a sovereign people sufficiently for the purposes of justice.

For Soepomo the most important issue was, however, the charismatic character of the leader:

The head of state must be capable of leading the entire populace, the head of state must surpass all classes and have the quality of unifying the people and the state. ... as a King or President, or as an Adipati like in Burma, or as a Führer ... he must be one in spirit with the entire populace. If the head of the Indonesian state has that nature, then the Head of State will have the nature of a Just King, such as that which is greatly desired by all people of Indonesia.<sup>18</sup>

It was thus clear that the system of government proposed by Soepomo ultimately turned entirely on the ruler, and, in particular, the ruler's role as head of state. Soepomo in fact believed that there should be a "concentration of responsibility and power in government."<sup>19</sup> Further, he said that "we desire a constitution which

---

17 Yamin, 1959, p. 119.

18 Yamin, 1959, pp. 119-120.

19 Soepomo repeated the term in English "concentration of responsibility and power in government" on two occasions. See Yamin, 1959, pp. 119-120.



is accountable to the government, particularly to the head of state”, and not the other way around.

It should be obvious that the Integralistic State idea came later to greatly influence the ideology and leadership style of the New Order and Soeharto. Soepomo's concept of the Integralistic State in fact became the ideological formula that the regime used to stifle civil society in the interests of preserving power. Soeharto's authoritarian regime closed all channels for independent expression and used its agencies to enter into the innermost crevices of social life, actively monitoring the lives of individual citizens. At the time, freedom became a vocabulary that had lost its meaning. It was as if the media was a choir monotonously giving voice to the government's policies. Discordant voices were gagged through censorship mechanisms and restraints [*breidel*]. Political life was castrated and “as if” democracy appeared in its place, a manipulated system set up just for show.<sup>20</sup> Political and ideological opponents were stigmatised as enemies of the state and treated as second-class citizens. Limits were tightly imposed and efforts at circumventing them were classed as subversive. In short, the New Order systematically stripped away individual rights.

To do this, Soeharto's leadership was based on his being the protector of the entire Indonesian nation, which he said was based on the principle of “family”. He, in fact, appointed himself as “Father of the Nation”, presenting himself as father and leader of a nuclear family, where all family members had to obey him, and criticism of the father was considered taboo. Soeharto thus perfectly put into practice Soepomo's Integralistic State concept, using Javanese cultural hegemony to legitimise his political patronage. Javanese cultural domination in fact became a hallmark of Soeharto's leadership style and the New Order.<sup>21</sup> The result was that branches of the state authorities were stripped of all independence and were rendered ineffective in performing their functions. Soeharto was truly like a king and everybody had to bow down and humble themselves before him. The legislative body and the executive body became mere ornaments of his absolute power.

We can thus conclude that Soepomo's Integralistic State idea, manifested as the New Order regime, was exactly the opposite of the constitutionalism that should have been the reference point for a modern democratic state in Indonesia. In summary, there are three basic contradictions between the Integralistic State idea

---

20 The term “as if” democracy was used to refer to the fact that while procedural democracy was present it was full of official trickery. For example, general elections were convened, but the political parties that could participate were limited. The elections were, in any case, always carried out with military involvement and intimidation, to the point that their results were always deeply corrupted.

21 Niels Mulder, “Ideologi Kepemimpinan di Jawa” [The Ideology of Leadership in Java] in Hans Antlöv and Sven Cederroth (eds); P. Soemitro (translator), *Kepemimpinan Jawa: Perintah Halus, Pemerintahan Otoriter* [Javanese Leadership: Indirect Order, Authoritarian Government] (Jakarta: Yayasan Obor Indonesia; 1st edn, 2001), p. 83. This was published in English as Hans Antlöv and Sven Cederroth (eds), *Leadership on Java: Gentle Hints, Authoritarian Rules* (Richmond, Surrey: Curzon Press, 1994).

and the principle of constitutionalism: *First*, constitutionalism emphasises the limitation of power in order to prevent despotism. The Integralistic State idea, however, views the leader as an individual without flaws, so he is given great authority – almost without limits – to the point where even if there are controls they cannot work effectively. *Second*, constitutionalism considers it important that there should be a guarantee of protection for human rights, whereas the Integralistic State idea considers that there is one unity between the state and the people, to the extent that there is no need for protection of human rights, which are, in fact, considered a bad thing. *Thirdly*, constitutionalism strongly upholds the rule of law and democracy. The Integralistic State idea, however, places the state and the leader above all else, and strenuously rejects both the substance and procedure of democracy.

Soepomo's Integralistic State idea took root early in the founding of the Republic and was then put into practice by the authoritarian regime of the New Order, as proven by its extraordinarily destructive attacks on constitutionalism, the rule of law and democracy. At every opportunity I therefore constantly endeavour to explain to my fellow Indonesians the importance of desanctifying the concept of the Integralistic State. This is very important and must be made a central theme of the reformation of Indonesia now underway. So long as Soepomo's Integralistic State idea remains alive and exerts influence in Indonesia, then democracy, the rule of law, protection of human rights and constitutionalism will always remain under grave threat.

### ***The General Elections: Mending the Democratic Process***

The first important step to be undertaken in the post-Soeharto Reformation era was the transfer of power, and it had to proceed in a democratic and peaceful manner. For that, general elections were expedited, and improvements made to both implementation mechanisms and supervision. In addition, the political faucet was opened so that much wider, and deeper political participation became possible.

From the founding of the Republic to the end of the New Order Indonesia had experienced seven general elections but only those of 1955 were acknowledged internationally as democratic.<sup>22</sup> They involved the election of a representative legislature and a Constitutional Assembly, and more than 30 political parties took part. There were also more than 100 group registrations and individual candidates.<sup>23</sup> Voter participation was extremely high, with more than 39 million Indonesian people exercising their right to vote, approximately 90% of registered voters at the time.<sup>24</sup>

---

22 See Herbert Feith's excellent study of the 1955 General Election. *The Indonesian Elections of 1955* (Ithaca, N.Y.: Modern Indonesian Project, Southeast Asia Program, Dept. of Far Eastern Studies, Cornell University, 1957).

23 See the list of participants for the 1955 General Election at the official website of the Indonesian General Elections Commission [*Komisi Pemilihan Umum*, KPU]. <[http://www.kpu.go.id/index.php?option=com\\_content&task=view&id=39](http://www.kpu.go.id/index.php?option=com_content&task=view&id=39)>.

24 Herbert Feith, 1957, p. 50.

The General Election of 1971 was the second in the history of the Republic and the first of the New Order era. Golkar contested these elections, fully supported by the authorities, and it won. From 1975 onwards, the number of political parties was limited by a forced merging of political parties imposed by the New Order regime, with the result that in all other general elections of the New Order era (1977, 1982, 1987, 1992, 1997) the only political party contestants were the United Development Party [*Partai Persatuan Pembangunan*, PPP] and the Indonesian Democracy Party [*Partai Demokrasi Indonesia*, PDI]. The third contestant was the so-called “Functional Work Group”, that is, Golkar—officially not a party, but operating entirely as though it was. All these elections involved a lot of dirty tricks, with the military, the bureaucracy, and Golkar colluding in all kinds of illegal and improper methods to preserve Soeharto’s power.

Civil society opposition to the dirty general elections was expressed largely through the so-called “White Group” [*Golongan Putih*, Golput], which advocated that citizens not vote at all, as a protest. One of the leaders of Golput was Arief Budiman, until recently a professor at this university. The New Order sought to repress the White Group movement and its supporters both directly and by complicating various administrative matters for them.

The first general election of the Reformation period was successfully undertaken in 1999. Unlike previous general elections, it was organised by an independent General Election Commission [*Komisi Pemilihan Umum*], of which I was appointed Vice-President. To encourage democratic revival, political participation was opened as widely as possible: political contestants had been limited to only two political parties and Golkar during the New Order, but some 48 political parties ran in the 1999 General Election. I was proud that these elections were acknowledged by local and international general election observers<sup>25</sup> to be clean and peaceful, with a very high level of voter participation.

The ballot count in the 1999 elections showed that only six parties met the two per cent electoral threshold necessary to run in the next election.<sup>26</sup> Most, however, were still able to participate in the 2004 General Election, simply by changing

---

25 KIPP, UNFREL, The Forum of University Presidents [*Forum Rektor*], and JAMMPI, were among the general election observer agencies in the country at the time, as well as international groups. Jimmy Carter, a former president of the United States of America, also took part as an observer.

26 The regulation concerning the two per cent Electoral Threshold limit can be found in Article 39 Paragraph (3) of Law No. 3 of 1999 concerning the General Elections. The political parties which passed the Electoral Threshold were: the Indonesian Democratic Party – Struggle [*Partai Demokrasi Indonesia – Perjuangan*, PDI-P], Functional Group [*Golongan Karya*, Golkar], United Development Party [*Partai Persatuan Pembangunan*, PPP], National Awakening Party [*Partai Kebangkitan Bangsa*, PKB], National Mandate Party, [*Partai Amanat Nasional*, PAN], and Star and Crescent Party [*Partai Bulan Bintang*, PBB].

their name. The result was that some 24 parties competed in 2004.<sup>27</sup>

Since 2004, elections have also been held for members of the new national Regional Representative Assembly [*Dewan Perwakilan Daerah*, DPD], as well as direct presidential and vice-presidential elections [*Pemilihan presiden*, Pilpres].<sup>28</sup> Direct elections for governors, district heads and mayors (and their deputies) [*Pemilihan kepala daerah*, Pilkada] have also been held.<sup>29</sup>

38 political parties took part in the 2009 General Elections,<sup>30</sup> and six local political parties contested the elections for the Regional Assembly in the province of Nangroe Aceh Darussalam.<sup>31</sup> Again, a two and a half per cent threshold limit was stipulated, which nine political parties met, taking seats in the People's Representative Assembly [*Dewan Perwakilan Rakyat*, DPR]. The direct presidential elections of the same year were completed in a single round because the Susilo Bambang Yudhoyono / Boediono ticket won 60.8% of the votes. The 2009 General Elections unfortunately attracted much criticism, including allegations of fraud in the vote counting.

Despite this, the three legislative general elections and two direct presidential elections of the Reformation Era must be counted a happy improvement on what went on under Soeharto. By contrast, the direct regional-head elections at the local level have been very problematic, dirtied by money politics. As a result, they have triggered horizontal conflict in some regions, leading even to riots. As Schiller has said:

This notion of failed parties and irrational or dependent voters is common in the

27 For example, although the Justice Party [*Partai Keadilan*, PK] had failed to satisfy the two per cent requirement, it was able to take part in the 2004 General Election by changing its name to the Prosperous Justice Party [*Partai Keadilan Sejahtera*, PKS] and slightly altering its party logo.

28 See Article 22E Paragraph (2) of the 1945 Constitution, the result of the 4th Amendment.

29 See Article 18 Paragraph (4) of the 1945 Constitution, the result of the 2nd Amendment. This only stipulated that the Governor, the Regent and the Mayor be elected in a democratic fashion. Direct Regional-Head Elections are simply left to be "stipulated further in the Law". See Law No. 32 of 2004 concerning Regional Governments, Law No. 22 of 2007 concerning the Convening of General Elections.

30 Earlier on, the General Election Commission had approved 34 political parties to take part in the 2009 General Elections. The Constitutional Court, however, took into consideration Article 316(d) of Law No. 10 of 2008, a provision that treats the issue very differently and which had caused legal uncertainty and injustice in the 2004 General Election: See Constitutional Court Decision No. 12/PUU-VI/2008. The State Administrative Court in Decision No. 104/VI/2008/PTUNJKT also accepted claims made by four political parties that took part in the 2004 General Election to a right to run again in the 2009 General Election. In the end, the General Election Commission therefore approved 38 political parties to run in the 2009 General Election. See General Election Commission Decision No. 208/SK/KPU/2008.

31 See Law No. 11 of 2006 concerning the Governance of Aceh, particularly Chapter XI concerning Local Political Parties. See also Government Regulation No. 20 of 2007 concerning Local Political Parties in Aceh.

opinion pieces of Indonesian newspapers. If you assume that the voters are just going to vote on the basis of public image, money payments or primordial ties, then it makes sense for parties to choose candidates who are public figures and can bankroll a campaign.<sup>32</sup>

The direct regional-head elections have also resulted in poor quality leadership in many districts, with a large number of the governors, mayors and regents elected being incompetent or even involved in criminal acts of corruption.<sup>33</sup> Worse still, in order to increase their popularity and ensure their re-election, leaders in many districts have supported ultra-conservative and sectarian regional regulations that are extremely discriminatory towards women and minorities, and which blatantly violate human rights. Clearly the current model of direct regional-head elections needs to be reviewed.

### ***Constitutional Amendments***

In the New Order era, constitutional amendment was prohibited. On many occasions Soeharto stressed his desire for the entire nation to implement the 1945 Constitution in what he called “a pure and consequential manner”. In order to further obstruct any attempt to amend a constitution that he found easy to manipulate, Soeharto’s administration stipulated – quite unconstitutionally – that if the MPR wished to amend the 1945 Constitution, it must first obtain popular support through a referendum.<sup>34</sup> The New Order was thus able to turn the 1945 Constitution, fundamentally an emergency constitution (*revolutie grondwet*), into a rigid text, closing the door to amendment and thus political change.<sup>35</sup>

The referendum requirement was quickly abolished early in the Reformation Era,<sup>36</sup> and once a new government was formed after the 1999 General Election, constitutional amendment became a dominant national discourse. Three groups held differing views on this issue. The *First Group*, represented by NGO activists, called for a new constitution altogether. The *Second Group*, driven by retired generals and nationalist politicians, vigorously rejected constitutional amendment, seeking to prevent any change at all to the 1945 Constitution - not

---

32 Jim Schiller, “Electing District Heads in Indonesia: Democratic Deepening or Elite Entrenchment” in Maribeth Erb and Priyambudi Sulistiyanto (eds), *Deepening Democracy in Indonesia? Direct Elections for Local Leaders (Pilkada)* (Singapore: ISEAS, 2009), p. 156.

33 Concerning corruption and the size of the expenditure on regional-head elections, see Maribeth Erb & Sulistiyanto Priyambudi (eds), *Deepening Democracy in Indonesia: Direct Elections for Local Leaders (Pilkada)* (Singapore: Institute of Southeast Asian Studies, 2009); also Henk Schulte Nordholt & Gerry van Klinken (eds), *Renegotiating Boundaries: Local Politics in Post-Suharto Indonesia* (Leiden: KITLV Press, 2007).

34 See People’s Consultative Assembly Resolution No. IV/MPR/1983 concerning the Referendum, Article 2.

35 Concerning the differences between a rigid constitution and a flexible constitution, see C.F. Strong, *Modern Political Constitution* (London: Sidgwick & Jackson Ltd., 1960), pp. 128-162.

36 See People’s Consultative Assembly Resolution No. VII/MPR/1998 concerning the Abolition of People’s Consultative Assembly Resolution No. IV/MPR/1983 concerning Referenda.

even full-stops or commas! The *Third Group*, endorsed by intellectuals, religious figures and activists, took a moderate position between these two extreme positions. On the one hand, they rejected the anti-amendment idea. On the other hand, they did not see the need for an entirely new constitution. Instead, they proposed that the constitution be renewed through amendment of the articles of the 1945 Constitution, provided, however, that the explanatory memorandum or elucidation attached to the Constitution was dropped entirely. In their view the elucidation, which was written by Soepomo, was not an authentic explanation of the constitution, but rather a manipulative Integralistic intervention.

In my opinion, constitutional amendment was an absolute condition (*conditio sine qua non*) of any efforts at betterment in any field, because the original 1945 Constitution was conceptually defective and full of serious flaws.<sup>37</sup> It did not sufficiently stipulate limitations on the power of the administrator of the state, nor did it explicitly guarantee or protect human rights. Worst of all, it was greatly influenced by Soepomo's Integralistic way of thinking, which breathed totalitarianism and anti-diversity.

Observing the socio-legal conditions in Indonesia I took the moderate position of the third group.<sup>38</sup> It has to be admitted that the efforts of the New Order at sanctifying the (Initial) 1945 Constitution had already gone far, and the idea that it was sacred was now stuck fast in the collective consciousness of the Indonesian nation. The military and nationalist circle considered the 1945 Constitution to contain both historical and symbolic values that must be preserved, and many ordinary Indonesians saw it as virtually "holy". Taking the extreme path of throwing out the initial 1945 Constitution and replacing it with a new document was therefore bound to be met with vigorous opposition. I was very worried that this could cause the whole constitutional amendment process to fail, and so I supported amendment rather than repeal.

As we know, the MPR did, in fact, succeed in carrying out four rounds of amendments from 1999 to 2002. Dr Denny Indrayana in his doctoral thesis written here at the Melbourne Law School – which I examined – noted that these amendments covered a lot of material, to the point that the final document produced comprised more than thrice the content of the original 1945 Constitution. The original manuscript of the 1945 Constitution contained 71

---

37 I much prefer the term 'initial 1945 Constitution', and not 'original 1945 Constitution'. "Original" gives the impression that the amended Constitution is somehow "false".

38 Franz Magniz Suseno, Syafii Ma'arif and Sholahudin Wahid were also in this third group. I had, in fact, long taken the amendment position because it was more feasible than a wholesale constitutional replacement, as can be seen in the recommendations in my dissertation: Adnan Buyung Nasution, "The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956-1959", Doctoral Dissertation, Utrecht University, 1992.

provisions, but after the four amendments it totalled 199 provisions.<sup>39</sup>

The success of the amendment process was, as Tim Lindsey has said:

‘against expectations’, because the issues decided by the amendment – including whether Islamic law would be mandatory for Muslims; whether the president would be directly elected; how membership of the legislature would be determined; and whether the military would retain a formal role in politics – go to the very nature of the Indonesian state.<sup>40</sup>

Despite its shortcomings the success of the constitutional amendment process must therefore be seen as a huge achievement. Just suppose that the opportunity for change at the precious moment of transition was simply let go of. We would probably still be enslaved by the myth of the sacredness of the 1945 Constitution, and thus by the Integralism that saturated it.

### *The Constitutional Court*

Prior to the amendment of the 1945 Constitution, the Supreme Court was the sole summit of judicial authority. This changed after the Third Amendment of the 1945 Constitution. Article 24 Paragraph (2) now stipulates that judicial authority is exercised by a Supreme Court and the judiciary that exists beneath it (the general courts system, the religious courts system, the military courts system, and the state administrative courts system), and by a Constitutional Court. Article 24 thus created two summits of judicial authority in Indonesia, something that continues to be problematic.

This issue aside, however, the formation of the Constitutional Court should be seen as one of the key improvements delivered by the constitutional amendments. It consists of nine constitutional judges tasked with the noble duty of being guardians of the Constitution. In order to do this, the new Court was given the first and final jurisdiction to make final decisions to:

1. review legislation for compliance with the Constitution of the Republic of Indonesia of 1945;
2. decide on conflicts of interest between state institutions whose powers are given by the Constitution of the Republic of Indonesia of 1945;
3. decide on the dissolution of political parties; and
4. decide on disputes over general election results.<sup>41</sup>

---

39 See Denny Indrayana, “Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution Making in Transition” (Ph.D. thesis, University of Melbourne, Melbourne Law School, 2005). One of his conclusions is that even though the amendment process was chaotic, its results were democratic.

40 See Tim Lindsey (ed.), *Indonesia: Law and Society* (Sydney: The Federation Press, 2008), pp. 23.

41 See Article 10 Paragraph (1) of Law No. 24 of 2003 concerning the Constitutional Court.

The Constitutional Court is also tasked with delivering decisions on opinions of the DPR regarding impeachment, that is, whether a President or Vice-President has committed violations of the law in the form of treason against the state, corruption, bribery, or other serious crimes or improper acts, or was no longer able to fulfil the role of President or Vice-President.

By reason of all these powers, the Constitutional Court occupies a very strategic and influential position. Its legislative review power,<sup>42</sup> for example, allows the Court to declare a portion of articles in a particular law invalid, or even repeal the entire law. In this capacity, the Court is said to be “the sole interpreter of the Constitution”. This is very significant because it allows the Court to annul legislation produced by agreement between the legislative body and the executive body, the other two branches of government.<sup>43</sup>

Professor Jimly Asshiddiqie, the first Chief Justice of the Constitutional Court has explained that the “constitutional review” concept, which is based on the idea of the constitutional state (rule of law), the principle of separation of powers, and the protection of fundamental rights, consists of two basic tasks, namely:

1. guaranteeing the functioning of the democratic system in relations between branches of state authority: executive, legislative, judicative. Constitutional review is intended to prevent domination and/or abuse of power by those branches of state authority.
2. protecting citizens from abuse of power by state institutions in violation of the fundamental rights guaranteed by the constitution.<sup>44</sup>

In my view, however, the Constitutional Court is insufficiently progressive. Occasionally, it even seems in some of its more controversial decisions to be more interested in extending its own authority.<sup>45</sup> This is because “many of the problems

---

42 This constitutional review power is often referred to in Indonesia as “judicial review”, but they are not exactly the same thing, as the latter term was being used much earlier on in the state administrative courts system. Nevertheless, the terms are often used interchangeably.

43 Debate on a law must be carried out by the executive and the legislative. A bill cannot become a legal product which is valid and effective as positive law without the involvement of the Executive. Article 20 Paragraph (2) of the 1945 Constitution – the result of the First Amendment – stipulates this: “Every bill is debated by the People’s Representative Assembly and the President in order to obtain a joint consensus.”

44 Jimly Asshiddiqie, “The Authorities and Functions of the Constitutional Court in the Democratic Rule of Law” in Veronica L Taylor & Dan Fenno Henderson (eds), *Current Issues in Indonesian Law: In Honor of Emeritus Professor Daniel S. Lev* (unpublished conference proceedings, 2007), pp. 382-383. See also Asshiddiqie’s essay, “Model-model Pengujian Konstitusional di Berbagai Negara” [Models of Constitutional Review in Various Countries] (Jakarta: Konstitusi Press, 2005).

45 This issue can be seen, for example, from the recent Constitutional Court decisions that rejected a petition for a judicial review of Law No. 44 of 2008 concerning Pornography, and a petition for a judicial review of Law No. 1/PNPS/1964 concerning the Prevention of Misuse And/Or Defilement of Religion. See Decision No. 10-17-23/PUU-VII/2009; and Decision No. 140/PUU-VII/2009.



raised by judicial review derive from the discretionary character of interpretation. Constitutional texts are often open-ended, and the act of interpretation will be highly discretionary.”<sup>46</sup>

“Having a constitution by itself does not solve anything, unless an apparatus of interpretation and enforcement is in place”.<sup>47</sup> The Constitutional Court will only be progressive when its judges have the ability to render the basic law as a living constitution and are able to go beyond the trap of superficial interpretation. A Constitutional Court judge must therefore understand that:

Constitutionalism is broader than the constitution as law also allows us to realize that constitutional law cannot provide everything that is necessary for its own existence. The legal constitution has contributed to constitutionalism. It has helped maintain the limits of government, and it has been used to create and strengthen the popular sovereign. Nonetheless, although constitutional rules have been responsive to the need to bolster the reality of popular government, the legal constitution cannot and has not itself ensured that reality.<sup>48</sup>

As Soedjatmoko once explained to a meeting of the Constitutional Assembly (*Konstituante*):

... constitutional limits to power and all constitutional guarantees for human rights would become empty words if the constitution itself is not supported by social powers. Genuine political guarantees only exist in the consciousness, conviction and bravery of the citizens, if the people understand the meaning of the aforesaid articles and aspirations; and bravery to fight for their implementation; more than that, if the people are brave enough to defend the articles of the constitution every time there is a threat or a violation by those who hold power.

Constitutional Court judges therefore should not use “blinkers” when interpreting the constitution. Interpretation of a constitution must always refer to principles of democracy, the rule of law, human rights and constitutionalism, and must show a strong understanding of the pluralistic conditions of the Indonesian nation. In this way, Ely has argued, judicial review can become a kind of “antitrust measure designed to ensure the appropriate functioning of pluralist politics”.<sup>49</sup>

In this view, courts do and should intervene into majoritarian politics when the political process is defective – either because minorities are systematically excluded from participation or because some right having to do with political participation has been abridged.<sup>50</sup>

---

46 Cass Sunstein, *The Partial Constitution*, p. 336.

47 Jon Elster, *Judicial Review as a Countermajoritarian Device*, p. 128.

48 Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Kansas: University Press of Kansas, 1999), p. 218.

49 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1981).

50 Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy: Studies in Rationality and Social Change* (Cambridge: Cambridge University Press, 1988), p. 337.

Constitutional Court decisions are, as mentioned, final and binding<sup>51</sup> to the point that there is no means of challenging them. Constitutional Court judges do, however, sometimes make mistakes – they are human too! There therefore needs to be a mechanism that enables the appeal of Constitutional Court decisions. I also see a need to supplement the functions of the Constitutional Court. Powers to deal with constitutional complaints and professional questions could greatly enhance the Constitutional Court's capacity to give justice to society at large.

Finally, under our new system the future of democratic progress, the rule of law, protection of human rights and constitutionalism itself rests upon the shoulders of just nine Constitutional Court judges. We must therefore be absolutely confident that the men and women who take on that role truly possess the qualities of statesmen and women. For that, we need a selection process for appointing Constitutional Court judges that is more transparent, participatory and accountable than the one currently in place.

### *Human Rights*

Johan Galtung has explained that in order to delve deeply into discourse on human rights, we need to look at legal tradition through two approaches, that is, both actor-oriented and structure-oriented. Both perspectives are needed to capture a full perspective because if we rely on just one, we are effectively 'colour-blind'.<sup>52</sup> From this point of departure, I will trace the broad outlines of discourse on human rights in Indonesia from the founding of the Republic to now.

In the early debates between our founders concerning human rights there was a tug-of-war between those who rejected guarantees of human rights in the Constitution and those who fought for their inclusion. Thanks to the vigorous efforts of Hatta and Yamin, the 1945 Constitution finally included several articles that guaranteed the protection of human rights. Those guarantees were, however, far from sufficient.

In the meetings of the *Konstituante* (the Constitutional Assembly) from 20 May to 13 June 1957 the question of protection of human rights in the Constitution was again prominent, and the debate that ensued was very interesting. Although there were differences, the substance of universally acknowledged human rights was nevertheless agreed upon. This was, in fact, considered to be the most important result of all the work of the Constitutional Assembly, and it revealed that our leaders were well aware of the vital importance of human rights for any society.<sup>53</sup> The Constitutional Assembly succeeded in agreeing 90 formulations for 24 basic provisions on human rights, supplemented by 18 citizen rights, 13 basic rights that had been returned to the Independence Preparations Committee, and 14

---

51 See Law No. 24 of 2003 concerning the Constitutional Court, Article 10(1) and its elucidation.

52 Johan Galtung, *Human Rights in Another Key* (Cambridge: Polity Press, 1994), pp. 26-55.

53 Debates in the Constitutional Assembly concerning human rights are described in greater detail in my dissertation, pp. 131-246.

basic rights that were newly-proposed. When all had been agreed upon, there were 69 articles concerning human rights proposed for the new Constitution at that time. In the estimate of Wilopo, the proposed Constitution as a whole consisted of 170 articles, so that more than a third of its text comprised articles on human rights.<sup>54</sup>

During the New Order era, however, human rights issues were abandoned by the state and became a kind of “ideology” of resistance for civil society against the authoritarian regime. Soeharto who was extremely allergic to democratic ideas and openness considered this human rights discourse a threat, and stigmatised it as a product of “foreign culture” or “liberal ideology”.

Indonesian human rights defenders, supported by the international community, were, however, tenacious. They finally succeeded in pressuring Soeharto to take action on human rights, as seen by the formation of the Human Rights Commission [*Komisi Nasional Hak-Hak Asasi Manusia*, Komnas HAM]. Komnas HAM was initially proposed by civil society, and then emerged as a recommendation from a Workshop Concerning Human Rights convened by the Foreign Affairs Department [*Departemen Luar Negeri*, Deplu] and the United Nations, in Jakarta on 22 January 1991. The workshop’s recommendation was then implemented through Presidential Decision No. 50 of 1993, and former Chief Justice Ali Said was appointed to set up the body of the Human Rights Commission and choose its members.

The birth of the Human Rights Commission as a state institution initially created both new hope and uncertainty. The uncertainty arose because of popular distrust in a state that was then the main offender in human rights violations. The hope arose because the Human Rights Commission had wide authority, enough, many expected, to allow it to play a major role in improving the protection of rights for ordinary people. In the end, this Commission tried hard but never quite lived up to these high hopes.

During the transition to the Reformation Era, human rights violations were common. The shooting of student activists, riots, illegal imprisonment, and the rapes and murders of ethnic Chinese were among a number of human tragedies that forced the Indonesian nation to think again about how important it was to respect human rights. In the wake of these events, MPR Decision No. XXVII of 1998 concerning Human Rights was published. It contained an assignment to the President and People’s Representative Assembly to ratify various UN instruments concerning human rights.<sup>55</sup> It also contained drafts of a document entitled “Outlook and Attitude of the Indonesian Nation towards Human Rights” and a Human Rights Charter. Although still far from perfect, these were important

---

<sup>54</sup> See Circular 1958/VI: 3167. This achievement was, of course, lost by Presidential Decree of 5 July 1959, which dissolved the Constitutional Assembly and reimposed the 1945 Constitution.

<sup>55</sup> That assignment for ratification was subject to the reservation that the relevant UN instruments were not in conflict with the Pancasila and the 1945 Constitution. See MPR Decision No. XVII of 1998 concerning Human Rights.

steps forward.

The position of the Human Rights Commission was further strengthened by the enactment of Law No. 39 of 1999 Concerning Human Rights. Article 1 item 7 provides that the Human Rights Commission is “an autonomous body, its position is on the same level as other state institutions, which carries out studies, research, information, observations, and human rights mediations”. In addition, its powers were broadened to include the authority to subpoena witnesses.

Soon after that, the focus of the international world on the demands of the East Timorese to decide their own fate led to heavy pressure being placed on Indonesia regarding both human rights violations committed by the New Order generally, and violations committed by Indonesian authorities in East Timor. As result, an ad hoc Human Rights Court was formed, based on Law No. 26 of 2000 Concerning the Human Rights Court.

There were many criticisms levelled at the ad hoc human rights judicial process in the East Timor Case. Some considered it incapable of producing decisions that would satisfy victims, because Law No. 26 of 2000 contained so many weaknesses (especially when compared with the Statute of Rome). A decision was therefore quickly made to establish a Truth and Reconciliation Commission (TRC) to deal with human rights violations in the past, based on the Truth and Reconciliation Commissions of South Africa, Argentina and Chile. Efforts to form the TRC were, however, obstructed when the Constitutional Court received a petition for judicial review from NGO groups. In response, the Court declared that Law No. 27 of 2004 Concerning the Truth and Reconciliation Commission was in conflict with the Constitution to such an extent that the Law had to be repealed in its entirety.<sup>56</sup>

There was a lesson to be learnt here, namely that exploiting opportunities that arise during a transition period requires a thorough and detailed understanding of the political situation and elite configuration. Once momentum is lost, it is difficult to regain. One piece of good news for human rights was, however, the introduction of human rights norms in the Constitution through the Second Amendment. There are now approximately 25 human rights guarantees in Chapter XA (Article 28A to Article 28J). There are problems associated with redundancy and legal drafting, as well as a number of other weaknesses, but these can be fixed in further amendments. The introduction of this charter of rights remains a major achievement.

There is much still to be done in the area of human rights reform. For example, it must be understood that main problems in the enforcement of human rights in Indonesia now are different to those in the past. During the New Order period the military apparatus was the dominant actor. Is that still true today? Are forced disappearances still a modus operandi of human rights violations? Are the victims of human rights violations still mainly political groups that oppose

---

56 See Decision No. 006/PUU-IV/2006.

the government? These are questions must be answered, and to do so we need a mapping of the situation of human rights in Indonesia that is more accurate and up-to-date than the data currently available.

In addition, efforts must also be made to better understand the various structural obstacles that obstruct the enforcement of human rights, including in the legal system and legislation. Structural obstacles perpetuate various forms of human rights violations, both as regards civil and political rights and economic, social and cultural rights.

Research carried out by Hernando de Soto provides an interesting picture concerning structural obstacles, for example, concerning the weak guarantees developing nations offer for ownership rights of the poor. Soto noted, among other things, bad data collection on home ownership, the difficulty of business licensing, and difficulties relating to the formal domicile of industry locations. He illustrated this in a satirical way:

If you take a walk through the countryside, from Indonesia to Peru, and you walk by field after field – in each field a different dog is going to bark at you. Even dogs know what private property is all about. The only one who does not know it is the government.<sup>57</sup>

This is certainly very different to the conditions in most Western nations, which typically possess an integrated system of property registration. Creating such a system in non-western states can, however, be extremely complicated, perhaps even impossible. De Soto has explained why this is so:

Extralegal property arrangements are dispersed among dozens, sometimes hundreds, of communities, rights and other information are known only to insiders or neighbours. All the separate, loose extralegal property arrangements characteristic of most Third World and former communist nations must be woven into a single system from which general principles of law can be drawn. In short, the many social contracts “out there” must be integrated into one all-encompassing social contract.<sup>58</sup>

De Soto has also emphasised the importance informal economic sector, the key area of economic activity by the poor in many countries but one that is usually incapable of supporting national economic development on its own. This is very significant for human rights violations, especially those relating to the weak social, economic and cultural rights that are the roots of the problem of poverty in Indonesia. In the midst of a torrent of capital flowing from outside, it is obvious that some citizens are forced to the margins, often helter-skelter with law enforcers on their heels.

Because of this, if law is to be effective as a tool for social change in Indonesia it

---

57 Interview with Hernando de Soto in *Reason Magazine*. <<http://reason.com/archives/2006/02/22/heraldo-de-soto-interview/1>>

58 Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (London: Black Swan, 2001), p. 170.

must be capable of overcoming the problem of structural poverty. As mentioned earlier, Indonesia's LBH developed the concept of Structural Legal Aid in the 1970s to fight for justice in ways that went far beyond the usual formal legal channels. It still carries out these extra-legal activities, conducting community empowerment and monitoring the exercise of power so as to support the ideal of a constitutional state capable of guaranteeing social justice. It is, however, the government that should be doing this.

Adnan Buyung  
Nasution  
Papers on  
Southeast Asian  
Constitutionalism

# 1

## IV. EFFORTS TO UPHOLD DEMOCRACY IN INDONESIA: WILL DEMOCRACY SURVIVE?

Reformation has been ongoing for more than a decade and many changes have been introduced. Sadly there are also still many problems to be solved.

### *Eradication of Corruption*

Corruption is a chronic disease that has afflicted Indonesia for a very long time. Efforts at elevating economic growth and alleviating poverty are still obstructed by corrupt practices that have spread like wildfire from the centre to the regions. Corrupt practices have damaged the attitudes of bureaucrats to the point that service for the public has become very bad. Corruption is the biggest obstacle to reformation projects in Indonesia today.

Eradicating corruption is not a simple matter, especially when the parties charged with this task are themselves involved in repugnant and dangerous crimes. As Susan Rose Ackerman has said, the shift of an authoritarian regime towards democracy is no guarantee that corruption will eliminate itself.<sup>59</sup> Although democracy offers a set of values that limits the abuse of power by power-holders, a strategy is still needed to eradicate practices of power abuse that are deeply-rooted in our system as a consequence of long-standing state criminality during the era of authoritarian rule.

Indonesia, mirroring the experiences of other nations, decided that its corruption eradication strategy should be based around the formation of an independent body. As one of those who helped draft the Law Concerning Corruption that established the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*, KPK), I considered this to be an essential step. Law enforcement bodies had become increasingly ineffective and many were, in fact, heavily engaged in corrupt practices: they were the problem not the solution.

The Corruption Eradication Commission quickly proved itself. In a relatively short time, many corruption cases involving state officials were successfully tried and the offenders punished with severe penalties. The Corruption Eradication Commission thus became the focus of public hopes, promising a future Indonesia free of corruption. Perhaps because of this, the Corruption Eradication Commission has encountered serious problems. First, Antasari Azhar, the Head of the Commission, was convicted of involvement in a murder. Then Bibit Samad Rianto and Chandra M. Hamzah, two deputy leaders of the Corruption Eradication Commission, found themselves facing serious charges concerning their involvement in a corruption case. This evolved into the famous “Gecko vs. Crocodile” drama, triggered by the reactionary attitude of a high-ranking Indonesian police officer. When Bibit and Chandra were arrested, a

---

59 Susan Rose Ackerman, “Lessons from Italy for Latin America”, *Journal of Public and International Affairs*, Fall 1998, pp. 447-469; also Jeremy Pope, *Strategi Pemberantasan Korupsi: Elemen Sistem Integritas Nasional* [Strategy for Eradicating Corruption: Elements of the National Integrity System] (Jakarta: Yayasan Obor Indonesia, 2003).

massive, nation-wide scandal erupted. Accusations that these “geckos” had been “framed” by police were soon heard, along with claims that the corruptors, the “crocodiles”, were “fighting back”. Millions of people immediately took action via social networks in the virtual world to support them. The President responded by forming the “Independent Team for Verification of Facts and Legal Process in the Case of Messrs. Chandra M. Hamzah and Bibit Samad Rianto” (Team 8), and I was appointed its Head.

Team 8 had to complete its huge mission within a short space of time, that is, within 14 working days. Fortunately, we were able to meet this tight deadline, producing a final report, with conclusions and recommendations for the President. Team 8 declared that there was insufficient evidence to bring the Bibit-Chandra case to trial and recommended that the legal process against them be dropped. After studying Team 8’s report, the President said that it would be best for the Bibit-Chandra case to be resolved through an ‘out-of-court settlement’. He did not, however, concur fully with Team 8’s report. He appeared also to agree with the very unconvincing conclusions of the police and the prosecutor’s office that the Bibit-Chandra charges were, in fact, based on sufficient evidence.

The President’s incoherent attitude soon became a major controversy in itself, and was made worse by his indecisiveness. This, in turn, encouraged the next controversy, namely the release of a SKPP (a *nolle prosequi*, or order to cease prosecution of Bibit and Chandra) based on so-called “sociological” reasons, not legal ones. The SKPP itself then became the main obstacle to a proper resolution of the Bibit-Chandra case, and there the matter still stands today.

Given these developments, it is not surprising that many have concluded that corruption eradication in Indonesia has little political support, and the government is half-hearted about it at best.

### *System of Government*

Tensions in the relations between the parliament (DPR, Dewan Perwakilan Rakyat or People’s Representative Assembly) and the government that might lead to deadlock are always a possibility in Indonesia today. This is because the current system grants dual legitimacy to the President and the DPR, because both are directly elected. These difficulties increase when the party that backs the president does not control the majority vote in parliament, as is now the case. Thought should also be given to the potential for friction in a pairing of a President and Vice-President from different political parties, as happened during Yudhoyono’s first term (2004-2009).

These problems are not new, and have been viewed for a long time as a weakness



typical of the juxtaposition of a presidential system with a multiparty system.<sup>60</sup> The mismatch between presidential and a multiparty systems is extremely acute. What is more, if rationalisation of the number of political parties cannot be effectively managed by electoral threshold or even parliamentary threshold systems, or if political and ideological factionalism become rife, then any coalition mechanism will struggle to succeed.<sup>61</sup> A clean, stable, effective and just presidential system has therefore been very difficult to establish in Indonesia. The same goes for the parliamentary system, which historically has seen the rapid rise and fall of governments in Indonesia. From our constitutional history, it is also obvious that it was the presidential system that led to the authoritarian systems that prevailed from 1959 to 1998.

I therefore believe we should consider another alternative: the 'semi-presidential' system applied in France, and in various other countries, including South Korea.<sup>62</sup> For the record, this semi-presidential system is an alternative system of government to the parliamentary and presidential systems, it is not a hybrid system or "gado-gado system"<sup>63</sup>, as is often wrongly claimed.

The superiority of the semi-presidential system derives from the fact that it has a mechanism for cohabitation (mixture of power) between the prime minister and the president if the elected president obviously does not control the majority support in parliament. In practice, the semi-presidential system has proven to be capable of guaranteeing political stability and smooth operation of the government. In a semi-presidential system, power is not unipersonal in nature, that is to say, it does not rest solely with the president. The other superiority of this system is that it allows for the possibility of a leadership model that is more collegial in nature — to the point of even being able to even include leaders from the regional areas.

More study is needed, but the semi-presidential system may one day provide a solution to Indonesia's long-running political problems.

---

60 Scott Mainwaring argues that in presidential systems, multiparty democracy is more difficult to sustain than two-party democracy. Only one country -- Chile -- with a multiparty system and a presidential system has achieved stable democracy: Mainwaring, Scott P, "Presidentialism, Multipartism, and Democracy: The Difficult Combination", *Comparative Political Studies*, 1993, vol. 39, no. 2, pp. 198-228.

61 According to Maurice Duverger (1952), social forces were the driving force behind the multiplication of parties. See also William Roberts Clark and Matt Golder, "Rehabilitating Duverger's Theory: Testing the Mechanical and Strategic Modifying Effects of Electoral Laws", *Comparative Political Studies*, 2006, vol. 39, no. 6, August, pp. 679-708.

62 Concerning semi-presidentialism in France, see Maurice Duverger "A New Political System Model: Semi-Presidential Government" in Arend Lijphardt (ed.), *Parliamentary Versus Presidential Government* (Oxford: Oxford University Press, 1992, reprinted 2004), pp. 142-149.

63 *Gado-gado* is the traditional Indonesia salad made of a wide range of ingredients, mixed with peanut sauce.

## ***Reformation of Law Enforcement Institutions***

Indonesia's post-Soeharto efforts to reform its security system succeeded in abolishing the "dual function" of the Armed Forces of the Republic of Indonesia [*Angkatan Bersenjata Republik Indonesia*, ABRI], which had guaranteed the military a role in politics. These reforms also removed the institution of the police from its place as part of the military. While the army's power was significantly reduced, the police won greater powers. Unfortunately, however, the police's new powers and responsibilities were insufficiently regulated, as were police relations with other institutions.

The position of the police in the constitutional order of Indonesia must now be reconsidered. In addition to performing their function as a state instrument to maintain law and order, the police must also function as law enforcers in the interests, and for the protection, of society. In other words, they must be officers of justice as well as just enforcers of the law.

The police are currently answerable directly and solely to the president. This should be corrected. Just as in the case of the Indonesian National Army (TNI, *Tentara Nasional Indonesia*), which is now responsible to the Defence Department, so the Police should be situated under a department, for example the Department of Internal Affairs [*Departemen Dalam Negeri*] or the Department of Justice and Human Rights [*Departemen Hukum dan HAM*].

In fact, more comprehensive studies are needed of the institutions of the police, the prosecutor's office and the judiciary in general (including the law of criminal procedure), so that an integrated criminal justice system can be developed. A careful study of the Law concerning the Prosecutor's Office, the Law concerning the Police, the Law concerning Judicial Powers, and the Criminal Procedure Code, must be undertaken to sort out the confusion caused by Presidential Decree of 5 July 1959, which resulted in the compartmentalisation of the police, the prosecutor's office and the courts. This compartmentalisation changed these agencies' orientation towards power, and rendered them increasingly distant from their primary duty — to serve the public interest.

In addition, it is also important to reform the supervision of the law enforcement institutions. It should be acknowledged that the Police Commission, the Commission of the Prosecutor's Office, and the Judicial Commission<sup>64</sup> are simply not capable of realising their supervisory tasks, partly because the authority of each is too limited. I am of the opinion that these diverse supervisory institutions should now be combined into a single institution and given much broader powers.

## ***Fundamentalism Versus Democracy***

Indonesian democracy continues to be tested by serious problems. Religious fundamentalism has become one of the most dangerous of all these. In addition to engaging in brutal acts of global terror, fundamentalist groups persist in

---

64 Of these commissions, only the Judicial Commission is mandated by the Constitution.

intimidating, and even using violent means to attack, minority faiths, and marginalised "little people" (*orang kecil*), as well activists fighting for religious freedom.

Fundamentalist groups have now been able to hijack democratic procedure, to the point that a "creeping sharia" syndrome has emerged, marked by the introduction of various regional regulations based on Islamic law that are highly discriminatory and blatantly contravene human rights principles. Fundamentalist groups have even succeeded in pushing deep into the centre of power to force the passing of the Law concerning Pornography. This Law is extremely anti-woman (misogynist), and does not protect the rights of children. In fact, in my view it threatens the very survival of the Republic.<sup>65</sup>

Unfortunately, some *ulama* (Islamic religious leaders) are not capable of acting as proper models for their followers, as their religion prescribes. Instead, they have actually approved, and even encouraged, discriminatory acts and human rights violations. The Indonesian Council of Religious Scholars [*Majelis Ulama Indonesia*, MUI], for example, has published a number of fatwas (or legal opinions) that have triggered violent actions against minority groups.

This is extremely worrying for supporters of democracy in Indonesia. Although the constitutional amendments confirmed the existence of an Indonesian constitutional state and have formalised much stronger guarantees for human rights and the freedom of citizens, serious problems arise in the course of their implementation. Even worse, many statutes drawn up after the amendments are obviously in conflict with the new rights conferred by the Constitution, which they seem simply to ignore.

This confusion was primarily caused by "procedural democracy", which gave political room to religious fundamentalist movements that had not been available to them under Soeharto. These groups speedily adapted to democracy, using this new space for non-democratic purposes. Democratic procedures have been misused to unleash fundamentalist aspirations.

The weaknesses of procedural democracy are obvious when it faces fundamentalist groups. They use claims of majority support and have effectively exploited majoritarian thinking in the democratic procedure of the regional legislatures [*Dewan Perwakilan Rakyat Daerah*, DPRD] to produce regional legislation that reflects deeply undemocratic values. Consider too, their demand for the dissolution of the *Jemaat Ahmadiyah Indonesia* (JAI), an unorthodox minority Muslim sect. The main argument made by the fundamentalists is that the religious views of the Ahmadis are not the same as those held by mainstream Muslims in Indonesia. The same goes for the Law concerning Pornography, which imposed the morals of the majority as interpreted by the fundamentalists on the entire

---

<sup>65</sup> Data concerning cases of violence committed by fundamentalist groups in Indonesia can be found in the Wahid Institute Annual Report of 2008 on religious pluralism and faiths in Indonesia, *Indonesia: Menapaki Bangsa yang Kian Retak* [Indonesia: Becoming a Splintered Nation].

nation in the form of a conservative interpretation of Islamic sharia.

Unfortunately, the branches of state authority (executive, legislative and judicative) appear to have lost their grip, and are ineffectual in curbing fundamentalist aspirations. The Department of Internal Affairs, which should strike out regional regulations that contravene the principles of forming good laws, is obviously unable to do this in an effective manner. Likewise, the government and the national legislature were as one in approving the Law concerning Pornography, which is so hugely problematic that it has potential to ruin the integrity of the nation. In the case of the Joint Decree [*Surat Keputusan Bersama*, SKB] concerning the Ahmadiyah, which prevented the Ahmadis from promoting their beliefs but did not actually ban them outright, I had to work hard with the drafters of this instrument to curb the fundamentalist influences in government from achieving the issue of an even more oppressive decree.

I am afraid that most of our politicians have now slipped into an erroneous understanding of democracy. It is as though expressions such as *vox populi vox dei* (the voice of the people is the voice of God) have become the official formula for democracy in Indonesia: If the majority want it, then let it be thus. This is utterly wrong. Majority rule is only one of the rules applying in a democracy. Democracy is not solely majority rule, as explained by MacIver:

Does democracy then mean that the majority on every occasion, instead of some minority, gives effect to its will? Any such description of the nature of democracy would be grossly mistaken. A majority, even if it attained control by the most approved devices of democracy, could still flagrantly abuse and even overthrow the democratic principle. Sometimes a demagogue or a ruthless totalitarian wins out in the contest for votes, and then destroys the democratic institutions through which he rose to power.<sup>66</sup>

Basing democracy on majoritarianism alone will inevitably give rise to serious problems. This was accepted early in the development of democracy in America, as acknowledged by James Madison in a letter that he wrote to his friend, Thomas Jefferson:

In our Government the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which Government is the mere instrument of the major number of constituents.<sup>67</sup>

Madison even stressed: "In all cases where a majority are united by a common interest or passion, the rights of the minority are in danger."<sup>68</sup>

66 R.M. MacIver, *The Web of Government* (New York: Macmillan, 1947, reprinted 1954), p. 197.

67 Marvin Meyers (ed.), *The Mind of the Framers* (Indianapolis: Bobbs-Merrill, 1973), p. 206.

68 Jon Elster, "Majority Rule and Individual Rights" in Obrad Savić (ed.), *The Politics of Human Rights* (London/New York: Verso, 1999), p. 124.

It must therefore be clearly understood that democracy is not merely about procedure. Democracy must also contain substance, namely basic principles that must be enforced in national and state life. Democracy must be based on a principle of constitutionalism that is intended to limit the arbitrariness of power, including prevention of the tyranny of the majority.

## V. CONCLUSION

In conclusion, a huge number of laws and other regulations have been passed at many levels of government since the Reformation Era began in 1998. Many more are in draft form, sitting in long queues awaiting deliberation. This reminds us that legal systems have a tendency to respond to social complexities by making new legal rules. Given that existing rules are already many, with most yet to be enforced, then if new ones continue to be produced at a similar rate as in the past, a state of hyper-regulation or “legal inflation” could be the result. This is a problem that stems from the weakening of law in relation to the ability to regulate within a legal system.

Meanwhile, various threats continue to shadow democracy, the rule of law, human rights and constitutionalism. One of these is rampant corruption, both at the centre and in the regional areas, and it is driven by officials, bureaucrats and law enforcers. Another threat is the desire among those still influenced by the Integralistic State idea to find a way of returning to the (initial) 1945 Constitution and thus Soepomo’s Integralist State. A further dangerous threat originates from fundamentalist groups that frequently seek to impose their very conservative and backward-looking values, with some even determined to create a state based on religion — by violence if necessary.

Legal reformation in Indonesia must therefore now be slowed. We must not keep on continuously producing new legislation, but must now consolidate and concentrate on efforts to overcome the problems just mentioned. The pressing issues that must be immediately acted upon are: *First*, revisiting the constitutional amendment process to create a more solid foundation for Indonesia’s legal system; *second*, synchronising existing laws with the Constitution; *third*, synchronising existing laws with international conventions that have already been ratified; *fourth*, upholding the principles of constitutionalism in an effort to realise an Indonesian constitutional state; and *fifth*, upholding and enforcing all laws in a more precise and fair manner so that all citizens of the state are protected, without any exception.

## REFERENCES

- Susan Rose Ackerman, "Lessons from Italy for Latin America", *Journal of Public and International Affairs*, Fall, 1998, pp. 447-469.
- Jimly Asshiddiqie, *Model-model Pengujian Konstitusional di Berbagai Negara* [Models of Constitutional Review in Various Countries] (Jakarta: Konstitusi Press, 2005).
- Jimly Asshiddiqie, "The Authorities and Functions of the Constitutional Court in the Democratic Rule of Law" in Veronica L Taylor and Dan Fenno Henderson (eds), *Current Issues in Indonesian Law: In Honor of Emeritus Professor Daniel S. Lev* (unpublished conference proceedings, 2007).
- William Roberts Clark and Matt Golder, "Rehabilitating Duverger's Theory: Testing the Mechanical and Strategic Modifying Effects of Electoral Laws", *Comparative Political Studies*, vol. 39, no. 6, August, 2006, pp. 679-708.
- Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (London: Black Swan, 2001).
- Hernando de Soto, Interview with Hernando de Soto in *Reason Magazine*. <<http://reason.com/archives/2006/02/22/heraldo-de-soto-interview/1>>
- Maurice Duverger, "A New Political System Model: Semi-Presidential Government" in Arend Lijphardt (ed), *Parliamentary Versus Presidential Government* (Oxford: Oxford University Press, 1992, reprinted 2004).
- Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy: Studies in Rationality and Social Change* (Cambridge: Cambridge University Press, 1988).
- Jon Elster, "Majority Rule and Individual Rights" in Obrad Savić (ed), *The Politics of Human Rights* (London/New York: Verso, 1999).
- John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1981).
- Maribeth Erb and Sulistiyanto Priyambudi (eds), *Deepening Democracy in Indonesia: Direct Elections for Local Leaders (Pilkada)* (Singapore: Institute of Southeast Asian Studies, 2009).
- Herbert Feith, *The Indonesian Elections of 1955* (Ithaca, N.Y.: Modern Indonesian Project, Southeast Asia Program, Dept. of Far Eastern Studies, Cornell University, 1957).
- Herbert Feith, *The Decline of Constitutional Democracy in Indonesia* (Ithaca, NY: Cornell University Press, 5th printing, 1978).
- Johan Galtung, *Human Rights in Another Key* (Cambridge: Polity Press, 1994).
- Denny Indrayana, "Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution Making in Transition" (Ph.D. thesis, Melbourne Law School, University of Melbourne, 2005).

- Daniel S. Lev, "Social Movements, Constitutionalism and Human Rights: Comments from the Malaysian and Indonesian Experiences" in Douglas Greenberg et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford: Oxford University Press, 1993).
- Tim Lindsey (ed.), *Indonesia: Law and Society* (Sydney: The Federation Press, 2008).
- R.M. MacIver, *The Web of Government* (New York: Macmillan, 1947, reprinted 1954).
- Scott Mainwaring, "Presidentialism, Multipartism, and Democracy: The Difficult Combination", *Comparative Political Studies*, vol. 39, no. 2, 1993, pp. 198-228.
- Marvin Meyers (ed), *The Mind of the Framers* (Indianapolis: Bobbs-Merrill, 1973).
- Niels Mulder, "The Ideology of Leadership in Java" in Hans Antlöv and Sven Cederroth (eds), *Leadership on Java: Gentle Hints, Authoritarian Rules* (Richmond, Surrey: Curzon Press, 1994).
- Niels Mulder, "Ideologi Kepemimpinan di Jawa" [The Ideology of Leadership in Java] in Hans Antlöv and Sven Cederroth (eds); P. Soemitro (translator), *Kepemimpinan Jawa: Perintah Halus, Pemerintahan Otoriter* (Jakarta: Yayasan Obor Indonesia; 1st edn, 2001).
- Adnan Buyung Nasution, "The Legal Aid Movement in Indonesia: Towards the Implementation of the Structural Legal Aid Concept" in H. Scoble and L. Wiseberg (eds), *Access to Justice: Human Rights Struggles in South East Asia* (London: Zed Books, 1985).
- Adnan Buyung Nasution, "The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian *Konstituante* 1956-1959" (Doctoral Dissertation, Utrecht University, 1992).
- Henk Schulte Nordholt & Gerry van Klinken (eds), *Renegotiating Boundaries: Local Politics in Post-Suharto Indonesia* (Leiden: KITLV Press, 2007).
- Guillermo O'Donnell, Philippe C. Schmitter and Laurence Whitehead, *Transitions from Authoritarian Rule: Comparative Perspectives* (vol. 3) (Baltimore: Johns Hopkins University Press, 1986).
- Jeremy Pope, *Strategi Memberantas Korupsi: Elemen Sistem Integritas Nasional* [Strategy for Eradicating Corruption: Elements of the National Integrity System] (Jakarta: Yayasan Obor Indonesia, 2003).
- Jim Schiller, "Electing District Heads in Indonesia: Democratic Deepening or Elite Entrenchment" in Maribeth Erb and Priyambudi Sulistiyanto (eds), *Deepening Democracy in Indonesia? Direct Elections for Local Leaders (Pilkada)* (Singapore: Institute of Southeast Asian Studies, 2009).
- Marsilam Simandjuntak, *Pandangan Negara Integralistik: Sumber, Unsur, dan Riwayatnya dalam Persiapan UUD 1945* [The Integralistic State Concept: Its Sources, Particulars and History in the Preparation of the 1945 Constitution] (Jakarta: Pustaka Utama Graffiti, 1997).



C.F. Strong, *Modern Political Constitution* (London: Sidgwick & Jackson Ltd., 1960).

Cass R. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1993).

WAHID Institute Annual Report 2008 on Belief and Religious Pluralism in Indonesia [Laporan Tahunan The WAHID Institute 2008 Pluralisme Beragama/Berkeyakinan di Indonesia], *Menapaki Bangsa yang Kian Retak* [Indonesia: Becoming a Splintered Nation]. <[http://www.wahidinstitute.org/files/\\_docs/Laporan%20Pluralisme%202008%20WahidInstitute.pdf](http://www.wahidinstitute.org/files/_docs/Laporan%20Pluralisme%202008%20WahidInstitute.pdf)>.

Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999).

Mohammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945*, vol. 1, (Jakarta: Jajasan Prapantja, 1959).

### **Websites**

Indonesian General Elections Commission [Komisi Pemilihan Umum, KPU]. <[http://www.kpu.go.id/index.php?option=com\\_content&task=view&id=39](http://www.kpu.go.id/index.php?option=com_content&task=view&id=39)>.

### **Legislation**

1945 Constitution

Circular 1958/VI: 3167.

Constitutional Court Decision No. 12/PUU-VI/2008.

Decision No. 006/PUU-IV/2006.

Decision No. 104/VI/2008/PTUNJKT

Decision No. 10-17-23/PUU-VII/2009; Decision No. 140/PUU-VII/2009.

General Election Commission Decision No. 208/SK/KPU/2008.

Government Regulation No. 20 of 2007 concerning Local Political Parties in Aceh.

Law No. 1/PNPS/1964 concerning the Prevention of Misuse And/Or Defilement of Religion.

Law No. 3 of 1999 concerning the General Elections.

Law No. 24 of 2003 concerning the Constitutional Court.

Law No. 32 of 2004 concerning Regional Governments.

Law No. 11 of 2006 concerning the Aceh Government.

Law No. 22 of 2007 concerning the Convening of General Elections.

Law No. 44 of 2008 concerning Pornography.

People's Consultative Assembly Resolution No. IV/MPR/1983 concerning the Referendum, Article 2.

People's Consultative Assembly Resolution No. VII/MPR/1998 concerning the Abolition of People's Consultative Assembly Resolution No. IV/MPR/1983 concerning the Referendum.

People's Consultative Assembly Resolution No. XVII of 1998 concerning Human Rights.

Presidential Decree of 5 July 1959.

## NOTES

1

Adnan Buyung  
Nasution  
Papers on  
Southeast Asian  
Constitutionalism

1

**Adnan Buyung Nasution Papers on  
Southeast Asian Constitutionalism**

C/- Asian Law Centre  
Melbourne Law School  
The University of Melbourne  
Tel: +61 3 8344 6847  
Fax: +61 3 8344 4546

**[law-alc@unimelb.edu.au](mailto:law-alc@unimelb.edu.au)  
<http://alc.law.unimelb.edu.au>**