Day 2: Law and Political Development in Asia Session IV: Ensuring the Rule of Law in Asia "The Rule of Law in Indonesia"

journal or publication title	Proceedings of the Roundtable Meeting Law, Development and Socio-Economic Changes in Asia II
volume	11
page range	231-242
year	2002
URL	http://hdl.handle.net/2344/00015135

SESSION IV
Ensuring the Rule of Law in Asia

THE RULE OF LAW IN INDONESIA

by

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I. The Rule of Law in Indonesia

1. Rule of Law vs. Legalism in General

"Rule of law", in plain words, means that government and political power should be limited by rules published and known in advance and applied equally impartially to all and, secondly, that the law once made should be obeyed even by those who disagree with it on moral grounds[1]. In its historical context, as originated in feudalistic England in the Middle Ages, the rule of law is understood as depriving tyrannical political powers and controlling the abuse of powers by means of law in order to protect people's rights and freedom. This notion even in its historical sense forms a contrast to the contrary notion of "rule by law". However, in the United States, it showed a further development and changed its meaning to a new dimension, coupled with the development of democratic ideas, to include people's participation in the law making process to decide their own rights and duties through law. Rule of law, a principle that originated in England, developed and spread through many common law countries. Supremacy of constitution, inviolable individual human rights, due process of law, and the role of courts to control powers are some of the major principles included in the rule of law. This American type went so far as to include judicial review in its most developed notion of the rule of law.[2]

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[1] John Alder. *Constitutional & Administrative Law*, Macmillan, 1989, p. 42. According to the classic doctrines on the rule of law by Dicey, who published the *Law of the Constitution* (first published in 1885), the absolute supremacy or predominance of 'regular law', equality before the law, and the constitution as the means of the ordinary law of the land (*ibid*. p. 43).

[2] Nobuyoshi Ashibe. *Constitution* (*Kenpo*, new edition), Iwanami-shoten, 1997, pp. 13-15.; Nagao Kazuhiro. *Constitutional law of Japan* (*Nihonkoku-kenpou*), Sekai-shisousha, 1997, pp. 22-27.

In Germany, however, which affected Meiji period Japan in its establishment of constitutional principles, a completely different conceptual theory has developed to control political powers. The ”Rechtsstaat” theory or the law state theory, if translated literally, was born in Germany before WW II in order to constitutionalize political powers. As it did not encounter the development of democracy during this period, the rechtsstaat theory required only formal rationalism, and such conditions as the substantive fairness and justice of law were not considered. Of course, the concept of rechtsstaat gradually changed and expanded in scope after WW II to include major principles already developed in the notion of rule of law. In the present German theory of “rechtsstaat”, such general principles as separation of powers, supremacy of constitution, guarantee of fundamental rights, constitutionality, protection of rights at court and so on are included. Both rule of law and rechtsstaat are aimed at controlling the abuse of political powers; however, the concept of rule of law that emerged in England affected the US and other common law countries, while on the other hand, the rechtsstaat theory that was born in Germany exerted an influence that reached past Japan and other civil law countries in a modified manner as these are a historical product.

2. Integralism vs. Decentralism

Such principles as “negara hukum” (law state), “supremasi hukum” (supremacy of law), or “penegakan hukum”(enforcement of law) are popularly accepted as the guiding principles in Indonesia. Mulya Lubis[3] explains that the past history of Indonesia was ruled by law and not by the rule of law, while Lindsay Timothy explains[4] in his article that the rule of law has repeatedly lost (in) the battle against integralism in Indonesia. Negara hukum, which literally means “law state”, is an Indonesian translation of the Dutch rechtsstaat. The expression of rule of law is used in its General Elucidation to the 1945 Constitution of Indonesia (5.I); however, no apparent definition is provided.[5] The founding fathers of the Constitution of Indonesia, who introduced the idea of negara hukum as its state principle, were

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3 T. Mulya Lubis and Mas Achmad Santosa. *Economic Regulation, Good Governance and the Environment: An Agenda for Law Reform in Indonesia, Reformasi: Crisis and Change in Indonesia*, Monash Asia Institute, 1999, p. 344.

4 Timothy Lindsey, *Indonesia's Negara hukum: walking the tightrope to the rule of law*, Monash Asia Institute, 1999, p. 369.

5 *Ibid.* p. 363.

influenced by the Dutch legal philosophies before WW II. So, it could be concluded that the Indonesian concept of rule of law in that nation's Constitution was based primarily on the rechtsstaat concept before WW II swept through the Netherlands and Germany.

Looking at the present democratization process in Indonesia and the law reform process, Indonesia has long been challenged by the debates on which type of government it should adopt, that is, the integrated unitary style government or the decentralized style government. There is a question whose type of government is most suitable to the Indonesian political climate. The current 1945 Indonesian Constitution clearly declares in its Article 1(1) that it has adopted a centralized unitary state as the state principle. It is generally understood that an Indonesian integralistic notion was influenced by the totalitarianism that flourished in Europe during the WW II period. The well-known communal value of Indonesia called "Gotong Royong" (mutual help) merged with totalitarianism. Dr. Supomo, one of the most influential Constitutional drafters, upheld adoption of the unitary state principle as integralism was most adaptable to the Indonesian cultural climate. He also emphasized that European democracy based on individualism and liberalism was not in harmony with traditional Indonesian values.

II. Past Challenges in Unifying Laws in Indonesia

1. Unity in Diversity

Such terms as "hukum nasional" (national law) or "hukum formal" (formal law) or "integrasi hukum" (integration of law) are frequently used to indicate that unification of laws throughout Indonesia is an imminent national task for the Indonesian people. However, this task has not yet been achieved since its independence. Discussions related to these terms include the fact that the Indonesian legal system has long been diversified and is not yet fully integrated at a national level, and that informal laws still exist in parallel with the national law throughout Indonesia. However, the recent situation during the past few years in Indonesia is quite different.

Another phrase called “Bhinneka Tunggal Ika“ (Unity in Diversity) symbolizes the most commonly accepted philosophy in Indonesia to take a harmonized direction in order to unify its diversified cultural values and different racial groups. If its geographical conditions are examined, Indonesia is an archipelagic country composed of more than 16,000 islands, with more than half of them uninhabited. There still exist more than 200 different customary laws called “adat laws” at local levels throughout Indonesia. Different laws have been applied to different racial groups in each region. Such diversified conditions as multi-racial, multi-lingual and multi diversified values provide the cultural basis for such an un-unified legal climate in Indonesia. What should be questioned is the way to harmonize the different values and interests of the different groups in the process of law reforms and its unifying process of laws in Indonesia.

2. Un-unified Colonial Rule by the Netherlands

The first challenge Indonesia had to face during its colonial period was the ruling method of the then Netherlands. The Netherlands intended to impose western colonial laws impartially all over Indonesia. The famous Professor Van Vollenhoven and his followers from Leiden University stood against the Netherlands’ colonial policy imposed by the then Governor-General’s Office. Van Vollenhoven and his school insisted that the Indonesian legal culture was quite different from that of European countries and that the exact situation of adat laws in Indonesia was not at all surveyed by them[6]. Eventually, Indonesia had to introduce western laws partially and discriminately, depending on certain conditions.

It is not an exaggeration to say that adat laws successfully protected the Indonesian legal culture. It suspended the intrusion of imperialistic colonial rule into Indonesia by means of law. But, at the same time, it could be said that integration of laws throughout Indonesia was not achieved, and various adat laws have survived as their living laws up to the present. This situation means that the national task of integration of laws throughout Indonesia has been handed down to the present

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[6] Terr Har. *Adat law in Indonesia*, ed. by Adamson Hoebel and A. Arthur Schiller, Bharatara, 1962, Jakarta. For details, *see* Naoyuki Sakumoto “Modernization of Indonesian law and its pluralistic structure,” in *Ajia Shakai no Kanshu to Kindaika*, Keibundo, 1992, pp. 285-286.

generation.

3. Federalism imposed by the Netherlands

The next challenge to the governmental structure of Indonesia was the revisit of the Netherlands in 1949 after the retreat of Japanese occupation in 1945. The Netherlands plotted to re-colonize Indonesia and did not approve the Indonesian proposal to become independent. Eventually, at the Hague Roundtable Conference on August 12, 1949, an agreement to end the war was signed between the Netherlands and Indonesia, and, the Netherlands agreed to transfer its sovereignty to Indonesia by December 30, 1949; however, the Netherlands requested the application of a federal system to Indonesia against Sukarno's integralistic ideas.

On December 14, 1949, Indonesia was forced to accept the Provisional Federal Constitution of the United States of Indonesia. This Constitution went into force on the 27th of that December. This lengthy Constitution included about 200 articles. Not only the adoption of federalism as the governmental style but also 35 articles related to human rights were included in Part 5 of Chapter 1. Fully 93 articles related to the governmental structure were also provided in Chapter 3 and Chapter 4. On August 15, 1950, this federal-type Constitution was suspended when Indonesia plunged into economic and political turmoil. This federal Constitution was replaced by another, provisional, Constitution, and, finally, with President Sukarno's strong leadership and his advocacy, Indonesia returned again to the integralistic 1945 Constitution on July 5, 1959.

What was advocated by then President Sukarno was the need to "Return to the 1945 Constitution" as expressed in his frequent political speeches to the public. He emphasized to "correct all kinds of errors, wrong policies and derailments since 1950 in order to realize guided democracy in Indonesia", as found in his speech entitled "Rediscovery of My Revolution" on August 17, 1959[7]. He also stressed in his speech entitled "The Year of Decision" on August 17, 1957, that "we need to correct our political system, which we imitated from abroad, and to realize our disciplined

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[7] Nihon-Indonesia Kyokai, *Compilation of President Sukarno's Speeches; Development of Indonesian Revolution*, 1965, p. 315.

guided democracy for the construction of a fair and socialistic society based on a disciplined democracy that is in harmony with the Indonesian manner of living, that is, a type of democracy in harmony with the Gotong Royong communal values"[8]. Here, we can see again both the traditional communal values in Indonesia and the integralistic political stance were matched to their own interests.

III. Law Reform

1. No Active Law Reform after Independence

During the period spanning the governments of former Presidents Sukarno and Suharto, they concentrated their political powers into their own hands under the protection of the 1945 Constitution[9] and politicized the legal system under "Pancasila" ideologies (five founding principles for nation-building). It is not an exaggeration to say that no active law reform except a few cases was conducted by these two Presidents. The initial impact on law reform was given by the speech made by Dr. Supomo in 1947 who emphasized the need of arrangement of economic laws in the process of law reform. He also discussed that the integration of family laws would need more time for Indonesia.

In the 1960s there came out some new laws such as the Basic Agrarian Act of 1960 and investment related laws. In 1961, with the advice of the Indonesian Law Experts Association (Perhimpunan Ahli Hukum Indonesia) and the Association of Indonesian Lawyers (Ikatan Sardjana Hukum Indonesia), the Indonesian Law Development Institute (Lembaga Pembinaan Hukum Indonesia) was established in 1961 to support legal development in Indonesia. Later, the name was changed to the present National Law Development Center (Badan Pembinaan Hukum Nasional, BPHN). BPHN started its national law program, however, without much success despite their efforts. The second REPELITA (National Five-year Development Plan), which started in the 1970s, emphasized the need to start law reform in Indonesia in its

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[8] *Ibid.* p. 237.

[9] For the concentration of powers under the present Constitution, *see* Naoyuki Sakumoto, "Constitutional Structure in Indonesia," in Ajia-shokokuno Kenpo-seido, 1997 (Institute of Developing Economies).

Chapter 27, and stressed the need to codify and unify certain areas of laws along with the development of legal awareness in the society. But, politicization of laws covered major areas of law under such Pancasila ideologies. As a result, no enthusiastic law reform was conducted even though both the 1980s and the 1990s were designated as take-off periods in the above-mentioned REPELITA II. Nothing active related to law reform in Indonesia can be seen during the period of these two Presidents for 53 years.

2. Present Law Reform

Various law reforms have been undertaken, especially after former President Habibie. President Habibie took over from President Suharto in 1998. As can be seen in Table I as attached, a number of laws and regulations including two Governmental Regulations in lieu of Act were made and provided for in Indonesia in a very short period. More than 300 new laws were passed almost every year; however, many of them were passed at the initiative of "Secretariat Negara" (National Secretariat). This means that these laws were not prepared by the parliament but by the leadership of the National Secretariat. Constitutional amendments to the 1945 Constitution were made by MPR on October 19, 1999 and on August 18, 2000. The first constitutional amendment included the curtailment and decentralization of the excessively concentrated presidential powers, the empowerment of DPR functions as well as DPR members in order to process legislations. The second constitutional amendment focused on human rights protection, the decentralization of central government powers to local governments, the empowerment of making law functions of DPR, and defense and security. Among human rights provisions, such a new right to the environment was also included.

3. Unchanged MPR Superior Basic Structure

Here, let me compare two Decisions of MPR regarding the Indonesian legal system and the sources; Provisional Decision of MPR No.20 of 1966 and Decision of MPR No.3 of 2000. MPR is regarded as the most superior state organ in its powers and positions in relation to other constitutional bodies. MPR Decisions are to be provided for at MPR in order to realize the sovereignty of the people (Art. 3(2), MPR Decision of 2000). There are explicit provisions such as Article 2 and Article 3 in

this MPR Decision of 2000 stating that the Constitution ranks first. Contradictorily, however, hierarchal position of the MPR's decisions are always regarded as equal with the Constitution or above. In practice, the present Constitution has been amended by MPR Decisions. Actually in the other Article of this Decision of 2000, the MPR is provided with the powers to examine the 1945 Constitution and the MPR Decisions (Art. 5(1), MPR Decision of 2000). The Supreme Court of Indonesia is given the supreme power to review the constitutionality of Acts (Art. 5(2), MPR Decision of 2000).

During the period of former Presidents Sukarno and Suharto, political powers were concentrated in the hands of the Presidents under the protection of the 1945 Constitution. It can be said that no radical structural change of the government has been made even after the "Reformasi" period. State organs such as Supreme Court, Auditor's Office, DPR, President, and the Supreme Advisory Committee are under the same supreme national organ of MPR. MPR is the source of political powers even if they are technically divided to different state organs. Even after the downfall of former President Suharto who had been in office for 32 years, its basic constitutional structure has not been changed much, and the source of powers still resides with MPR. This is because MPR is regarded as a supreme state organ entrusted by the Indonesian people under the principle of sovereignty of the people. Those powers to appoint and impeach the President derive from MPR and not directly from the Constitution.

This all-powerful MPR governmental structure gives us an ambiguous image about the function of checks and balances among the governmental bodies. Indonesia is a constitutional state and the political powers are being decentralized, but the problem is that this process is not based on the separation of powers principle.

4. All-powerful MPR vs. Independence of Judiciary

Under such a constitutional structure, what will happen with the independence of the judiciary in Indonesia? The Supreme Court as well as the subsidiary courts in Indonesia are all positioned as part of the executive branch and could be controlled by the Ministry of Justice even if there were some delegation of powers to the Supreme

Court. Diagnosis study[10] on Indonesia was conducted by BAPPENAS and the World Bank in 1997, where legal experts all over Indonesia cooperated and recommended a new action plan in a prioritized manner. However, the goodwill of BAPPENAS is said to have evaporated because then President Suharto gave no signs of support[11]. Funding by USAID also failed in February 1998, and US experts concluded that "there was insufficient political will to implement the action plan"[12]. This diagnosis study also pointed out that the amendment of Act No. 14 of 1970 on the Supreme Court, Act No. 5 of 1986 on Administrative Courts and Act No. 2 of 1986 on the General Courts should be called into question. Article 11(2)1 of Act No. 14 of 1970 provided that the powers related to the organizational framework, administration and finance of such courts as General Courts, Administrative Courts, Religious Courts, and Military Courts belong to the ministries of executive power. The Supreme Court, as an exception, could have its own organization, administration and powers. Article 11 of the newly amended Act No. 35 of 1999 on the Supreme Court provides that all the courts are subject to the Supreme Court, and the organization, administration and finance of each court shall be stipulated by respective specific Acts. The official General Elucidation of this Act explains that there arose a need to separate judicial powers from administrative powers, and, for this purpose, such amendments were made to transfer powers to the Supreme Court. The Elucidation states that the executive branch interfered with court practices. This new amendment is scheduled to go into force by 2004 at the latest.

A similar type of governmental structure as that in Indonesia can be found in other socialist or semi-socialist countries such as China, Vietnam and so on. Of course, we must admit that there are diversities in the constitutions of the different countries that are based on their own cultural and socio-political conditions[13]. The problem, however, is that such diversities can create conflicts with the universally accepted

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10 Studi Diagnostik Pembangunan Hukum di Indonesia, BAPPENAS, 1997.

11 *Ibid*. 4, p. 344.

12 *Ibid*. 4, p. 344 and p. 347. This article explains four minimum principles that are widely accepted criteria for judicial independence based on the Code of Minimum Standards of Judicial Independence of the International Bar Association, *i.e*., personal judicial independence, internal judicial justice, collective judicial independence, and substantive judicial independence.

13 Professor Yasuo Hasebe poses a question to readers regarding the extent to which cultural diversity can be admitted and accepted in terms of different types of contemporary constitutionalism. He quotes from J. Tully's book entitled *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge University Pr., 1995.(*The Maze in Incomparable Values*, Todai shuppan, 2001, p. 51.)

legal principles of the developed countries. Is it safe to say that MPR Indonesia is a type of constitutional diversity or a polity with peculiarities in a rapid transitional process?

How could the independence of judiciary be secured under such a power concentrated system where all the state powers derive from MPR? Under such a judiciary system, how can human rights be protected? In its entire legal framework, MPR can source all the powers because it is regarded as the supreme organ representing the sovereignty of the people. There are no constraints upon its legislative power as the MPR's legislative power ranks equal with the Constitution and it can also amend the Constitution. As for the executive power, MPR can ask the most powerful President to resign, or impeachment him under certain conditions. As for the Supreme Court, it is still subject to the Ministry of Justice and MPR. It can hardly be said that the powers of the Supreme Court are fully assured and that the independence of the Judiciary is fully guaranteed. From the western way of thinking, unless the entire state's organizational framework including MPR were changed or unless MPR were abolished, it would not be possible to coexist together with such a principle as the separation of powers or the independence of judiciary.

5. Decentralization

Further, the decentralization process is under way along with the democratization process. There is heated discussion about the direction of the governmental structure of Indonesia, whether they should take a federal style or not. There are independence movements in Ache and West Papua (Irian Jaya) regions. Act No. 14 of 1999 regarding the Structure of MPR, DPR, and Local Governments, provides that parliaments at local levels are the apparatus for realizing democratization (Art. 34(1)). As a result, powers that were concentrated in the central state organ are now being delegated to local governments. Local people can elect their own mayors and can propose his resignation directly to the President of the land. Some of the powers permitted to the local governments by Article 34(2) of this Act are; filing their budget, stipulating local ordinances, formulating local government policy on regional development in line with national development policy, implementing international cooperation at local levels, and proposing their own opinions and judgments to the

central government regarding international treaties if they find some interests in the treaties. Law Act No.25 of 1999 provides for the balancing of budget between the central government and the local governments.

Generally speaking, it is understandable that the decentralization process can assist in accelerating the democratization process throughout Indonesia. However, there have arisen some vacuum-like phenomena at local levels as the local governments cannot cope fully with such a rapid decentralization process. Some problems included at local levels are insufficient organizational framework, lack of experience in managing projects by themselves, untrained human resources, and lack of financial sources. The extension of support from the central government, international organizations or NGOs to the local governments is urgently needed to escape from such a vacuum-like situation.

IV. Conclusion

Law reform in Indonesia is under way, but this has been pushed by international organizations such as the IMF and World Bank. Major areas of law reform targeted in the beginning stage are economy-related laws, as insufficiencies in these areas are regarded as obstructing their immediate economic recovery. Included areas for example are insolvency, antimonopoly, intellectual property and consumer protection. Now it is expanding to other areas such as political reform, administrative reform, and judicial reform. As for political law reform, human rights, ombudsman, governance, parliamentary system, empowerment of legislature, curtailment of presidential powers, political party, general election, and local autonomy are targeted. As for administrative law reform, capacity-building of public officials, corruption prevention, and taxation are being taken up. In addition, judicial reform, due process, independence of judiciary, judicial review, special court, and legal education are also being discussed.[14]

[14] Recommended prioritized areas for law reform by the diagnosis study are reform of the judiciary system and the development of legal education in Indonesia. On the other hand, Mulya Lubis suggests 5 areas of law reform in order to implement good governance; good representative system, independence of Judiciary; strong, professional bureaucracy; strong and participatory civil society; democratic decentralization; and redefinition of the social function of the Indonesian military.

The roles of law presently most anticipated in Indonesia are: (1) to establish a unified system of national law to integrate the country through law, but in harmony with local adat laws; (2) to build a good governance system through participatory systems; (3) to support human capacity building; (4) to secure the independence of the Judiciary from any governmental organ; (5) to introduce the separation of powers principle in its organizational structure; and (6) to restore people's confidence in the Government.

Table I: Total number of laws and regulations during the Indonesian law reform period

	Act(UU)	Governmental Regulation(PP)	Presidential Decision(KPS) etc	Presidential Instruction(IP)	Total
1996 Jan-Jun	5	43	50	5	103
1996 Jul-Dec	4	31	49	-	84
1997 Jan-Jun	21	18	26	4	69
1997 Jul-Dec	12	30	27	1	70
1998 Jan-Jun	4	57	90	16	167
1998 Jul-Dec	10+2 (Perpul)*	21	112	14	159
1999 Jan-Jun	29	62	64	6	161
1999 Jul-Dec	28	37	113	9	187
2000 Jan-Jun	15	47	88	4	154
2000 Jul-Dec	23	108	93	5	229
2001 Jan-Jun	13	54	83	6	156

Source: Compiled by the author from the annual compilation of Indonesian laws and regulations "Himpunan Praturan Perundang-undangan Republik Indonesia", CV Eko Jaya, Jakarta.

* Governmental Regulations in lieu of Acts (Peraturan Pemerintah Pengganti Undang-Undang)