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## Policy Paper



### Recrowning Negara Hukum: A New Challenge, A New Era

Professor Todung Mulya Lubis



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**ISSN 2202-1604 (PRINT)**  
**ISSN 2202-1612 (ONLINE)**  
**2014**

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## PROFESSOR TODUNG MULYA LUBIS



Professor Todung Mulya Lubis is one of Indonesia's leading human rights lawyers and most influential legal thinkers. He completed his undergraduate Law degree at the University of Indonesia (1974); his LLM at the University of California, Berkeley; a second LLM at Harvard Law School; and his JSD at the University of California, Berkeley. He has been a senior Adjunct Member of the Faculty of Law, University of Indonesia since 1990, where he was first appointed in 1975. From 1980-1983, he was Director of Indonesia's famous dissident NGO, the Legal Aid Foundation, where he worked for many years. His influential 1983 scholarly book *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order 1966-*

*1990* played an important role in defining democratic thinking about human rights in Indonesia. Professor Lubis is also Founding and Senior Partner of a prominent law firm in Jakarta, Lubis Santosa & Maramis Law Firm, and has been lead counsel in a number of major human rights cases, often on a pro bono basis. These include acting for the Bali Nine in an attempt to convince Indonesia's Constitutional Court to abolish the death sentence and against President Soeharto. He has also held a series of senior government appointments. In 2014, he was appointed as Honorary Professor at the Melbourne Law School, the University of Melbourne.

# RECROWNING NEGARA HUKUM: A NEW CHALLENGE, A NEW ERA<sup>1</sup>

## ABSTRACT

*The elections of 2014 are a critical juncture in Indonesian history. Fifteen years after the end of the authoritarian New Order, and after ten years of democratic rule under Yudhoyono, Indonesians must decide whether to consolidate the democratic reforms introduced after the fall of Soeharto, or dismantle them. This choice has polarised Indonesians and many feel confused by events this year. This paper looks at the increasingly divisive debate over democracy and Reformasi in Indonesia to assess whether his country will move backward or forward after the new administration is sworn in on 20 October. It then focuses on human rights and other key areas of law reform that need attention, as well as the threats they face, to set out an agenda for getting Indonesian Reformasi back on track.*

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1 This paper is an edited version of the Public Lecture by Professor Todung Mulya Lubis at the Melbourne Law School, the University of Melbourne on 8 October 2014. A video recording of the lecture is available at: <http://youtu.be/5eDRlwch16s>

# RECROWNING NEGARA HUKUM: A NEW CHALLENGE, A NEW ERA

PROFESSOR TODUNG MULYA LUBIS

*The state of Indonesia shall be a state based on the Rule of Law*

Article 1(3), the 1945 Constitution

The Indonesian Constitution was adopted on 18 August 1945, one day after Indonesia proclaimed Independence, and declared Indonesia to be a state based on law or what is termed in the Indonesian language, *negara hukum* - in Dutch, the *rechtsstaat*, usually translated in English as 'rule of law'. It is a sad truth that a *negara hukum* has never actually existed in Indonesia, even though every Constitution we have had has provided that the state is based on law (*rechtsstaat*), not merely power (*machtsstaat*). On the surface there has never been any disagreement with this principle but below the surface intense ideological struggle has always taken place between those seeking to implement rule of law, and the many who oppose it.

It is not surprising that the Constitution has long been interpreted differently depending on who is making the interpretation. President Soekarno, a strong and charismatic leader, sought to contain the struggle between the supporters of the *negara hukum* and its opponents but ultimately failed. In doing so, he subjected *negara hukum* to what he termed the 'unfinished revolution', thus subordinating law to the revolution. President Soeharto, on the other hand, considered stability and order essential for the existence of the state, and prioritised that over rule of law. Under his authoritarian government from 1965 to 1998, the 1945 Constitution was treated as a sacred document not to be amended or replaced, and no criticism of it or its destructive interpretation and implementation by the state was tolerated.

When Soeharto's government finally collapsed in 1998, paralysed by a deep economic crisis, a new government came to power. Habibie, who was Soeharto's Vice President, constitutionally became the new President. Habibie initiated a series of bold policies to restore the confidence of the people, build a new and more transparent and accountable system, restore democracy and freedom of press, and revive the *negara hukum*. Habibie was ousted in 1999 but in his one year as President, he managed to promulgate various laws and regulations that paved the way for a new Indonesia where democracy, human rights, rule of law, regional autonomy and the eradication of corruption were officially adopted as the agenda for the future. Habibie contributed greatly to changing the authoritarian state to a more open and democratic one.

Laws enacted during Habibie's government that related to the revival of *negara hukum*, laid the foundations for the reinstallation of *negara hukum* or, rather, its 'recrowning'. There were around 50 pieces of legislation promulgated in the dramatic period between May 1998-October 1999, and among those there are a few that may be considered central to reviving and strengthening the notion of *negara hukum*, such as Law No 35 of 1999 amending Law No 14 on Judicial Power; Law No 31 of 1999 on Corruption Eradication; Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution; Law No 28 of 1999 on Clean Government Free from Corruption, Collusion and Nepotism; Law No 26 of 1999 on the Revocation of Law No 11/PNPS/1963 on Subversive Acts; and Law No 27 of 1999 on the Amendment to the Criminal Code with regard to Crimes against State Security. In addition, important pieces of legislation were passed concerning ratification of certain international human rights instruments, such as the Convention against Torture, Cruel, Inhuman and Degrading Treatment, the Convention on Forced Labour, and the Convention concerning Discrimination in Respect of Employment and Occupation (ILO Conventions).<sup>2</sup>

Although reform was not complete, the mere fact of the promulgation of these important laws must be considered a huge achievement, given that the government itself was fragile and unstable, and under constant political pressure (Persahi, 1989: 9-46).

There have now been more than 300 pieces of legislation enacted by Parliament, including a substantial number relating to legal institutions, substance and enforcement.<sup>3</sup> Important legal institutions like the Constitutional Court, Judicial Commission, Ombudsman, Corruption Eradication Commission and others have been established. Likewise, legal agencies such as the judiciary, the police and the prosecution service have been forced to improve their organisational and professional capability to better meet the needs of a system based on rule of law.

Under Soeharto's government, economic development placed Soeharto at the centre of all power. After 1998, however, the law was treated as supreme, at least in theory. Everybody must be treated equally, and no one is above the law. Legal compliance is, therefore, now obligatory for every action and transaction, be it by government or the business community. The President and all high-ranking government officials pledge to uphold the law, guarantee the independence of the judiciary, not interfere in legal proceedings, and support legal institutions in their roles as law enforcers. All parties and political actors claim to have a commitment to good governance.

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2 Law No 5 of 1998 on the Ratification of the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment; Law No 19 of 1999 on the Ratification of the ILO Convention No 105 of 1957 concerning the Abolition of Forced Labour; and Law No 21 of 1999 on the Ratification of the ILO Convention No 111 of 1958 concerning Discrimination (Employment and Occupation).

3 See Friedmann, 1959: 17-44. The first chapter describes the development of law in interactions of legal and social change.

True *negara hukum*, however, requires more than this. There are other elements that must be present. As the founding Chief Justice of Constitutional Court, Jimly Asshiddiqie, has stated, there must be:

(1) an institutional element; (2) an instrumental element; and (3) subjective and cultural elements. The three elements include law making, law administering and law adjudicating. The law adjudicating element has been referred to as law enforcement in the narrow sense, namely, law enforcement by the police, prosecutors, advocates and judges. But aside from that, one must not forget about the socialization of law and legal education, and law information management as supporting elements (Asshiddiqie, 2008: 201).

Since *Reformasi* began in 1998 (Hadiz, 2003: 109-16), thousands of laws and regulations have, been introduced at central and regional levels and a large range of international instruments have also been ratified. Additionally, around 200 'state auxiliary agencies' have been established<sup>4</sup> to provide checks and balances and open more space for people's participation. In addition to those already mentioned, these new agencies include the Election Commission, the Financial Transaction Reporting and Analysis Center, the Witness and Victim Protection Agency, the Press Council, the Broadcasting Commission, the National Human Rights Commission, and many others<sup>5</sup>.

Unfortunately, there have not been sufficient budget increases to support the new law enforcement agencies (Lubis, 2014a). There is, in fact, little more than 10 per cent of the state budget allocated to cover all of the Supreme Court, the Ministry of Law and Human Rights, the Attorney General, the Constitutional Court, the Judicial Commission and the Corruption Eradication Commission, combined.

In fact, rather than the *negara hukum* being strengthened, it seems to have begun to weaken in recent years. Despite all the new laws and agencies, the law has not functioned as it should. There have been so many irregularities, overlaps and conflicts between laws and regulations, vertically and horizontally. There have even been unhealthy rivalries between law agencies. Human resources have also not been adequately professionalised, due to inadequate recruitment and poor training programs.

The public are well aware of these shortcomings, as they are the ones who suffer the most from them, so it was not surprising that during the recent Indonesian election campaigns (both legislative and presidential), the promise to 'recrown' *negara hukum*

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4 See Asshiddiqie, 1987: 242-46. Asshiddiqie does not use the term 'state auxiliary agencies'. The term is used by other experts of constitutional law and I agree with the term.

5 Some of these 200 Commissions, Agencies, Institutions or Councils formed after *Reformasi* overlap with one and another, and some do not function well. All these agencies are funded by the state budget, and most have not that productive. It has been proposed that they all be evaluated to determine which are really needed.

was frequently reiterated. But promises are one thing – implementation is quite another. Whether the new government succeeds in recrowning *negara hukum* depends on whether it genuinely considers it a priority. There are number of programs could help create a reasonably solid foundation for a renewed *negara hukum*. I will now describe some of the most important of these.

#### INDEPENDENT AND IMPARTIAL JUDICIARY

One basic principle of *negara hukum* is an independent and impartial judiciary that enables formal and substantial legality, and recognition and protection of fundamental human rights (Butt, 1999: 247). The Rule of Law Index published by the Indonesian Legal Roundtable lists five principles and indicators of *negara hukum*, namely, (i) a government based on law; (ii) independent judiciary; (iii) recognition and protection of human rights; (iv) access to justice; and (v) transparent and clear legislation (Indonesian Legal Roundtable, 2013: 8-9). When *Reformasi* began, demands that an independent judiciary be restored were loudly voiced by various elements of society, including intellectuals, professionals, business communities and political parties, and these had significant political impact (Butt, 1999: 247-55; Mackie, 1998: 200-07).

Since 1998 constitutional and legislative changes have created a relatively strong judicial authority with guaranteed independence and impartiality. Under Soeharto's regime, the judicial authority was managed and tightly controlled by both the executive and the Supreme Court, making independence and impartiality unattainable. However, after amendment of the 1945 Constitution, the judicial authority was separated from the executive (Lubis, 1993: 86-126; Thoolen, 1987: 59-62). The Supreme Court is now the only institution managing the judiciary. Constitutionally, judicial authorities have all the power needed to uphold the law and do justice without any interference from the government, business communities, political parties, military or any other groups. The constitutional power vested in the judiciary has become a source of independence and impartiality.<sup>6</sup>

Law in the books and law in action are, however, two entirely different things. While independence and impartiality in day-to-day practice is guaranteed by the constitution, the absence of such independence and impartiality is very easy to find. There have been blatant violations of justice in so many police and prosecutorial investigations, in court proceedings, and in a wide range of executive actions since the amendment of the Constitution. Most of these have been committed against poor and marginalised people. It is no surprise, therefore, to hear people argue that the law seems to be effective against the poor but paralysed against the rich. Many perceive the legal apparatus, including the judiciary, as having become an instrument of those who have

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6 See Mahkamah Konstitusi Republik Indonesia, 2008: 25-130. This book contains the complete minutes of deliberations on amendment of 1945 Constitution, particularly in relation to judicial authority and the independence of the judiciary.



the means to buy its support. Justice for all as a principle has no bearing at all.

The Rule of Law Index found that most of people believe that Indonesian judges are not free from bribery or undue interference, be it from the government, political parties and business people. In addition, the selection and appointment of judges seems to still be tainted by corruption, collusion and nepotism, while their remuneration and facilities are evidently far from adequate.<sup>7</sup> It is not uncommon, therefore, to read reports of the miscarriage of justice in verdicts rendered by courts at all levels. And it is not only the poor and the marginalised who are the victims. Many others who are not well-connected, including companies, have also fallen victim to apparently arbitrary decisions by the judiciary. It is not surprising, therefore, to see scepticism growing in many circles, and society at large is concerned once again about the deterioration of the judiciary.

This is not to say that there have been no improvements in strengthening the independence and impartiality of the judiciary. Obviously, there have been a series of actions taken to reform the judiciary at all levels, led by the Supreme Court and Judicial Commission (Komisi Yudisial Republik Indonesia, 2010: 3-130). The Supreme Court, for example, has made all its decisions accessible through a designated website, and many district courts also have installed their own websites, where information regarding ongoing cases and decisions can be accessed. Additionally, the selection of judges has been more transparent, involving the well-regarded Judicial Commission. Improvements have also been made in terms of training, remuneration, facilities and supervision (Budiardjo, Ali; Nugroho; and Reksodipuro, 1999). With a free press closely watching the judiciary, one would think that its independence and impartiality should no longer be an issue.

Unfortunately, all these improvements have not significantly changed the perception of the public of the judiciary. It is still viewed as the weakest point in our constitutional architecture. This is not to say that there have been no enlightened court decisions produced but there are many that affront the popular sense of justice. Let us not forget that there have been many judges who have been caught red-handed receiving bribes to deliver judgments favourable to the bribers. The arrest of Chief Justice of the Constitutional Court, Akil Mochtar, by the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*) for receiving bribes from various parties who were themselves either plaintiffs or defendants (Pratama, 2014) was just the tip of the iceberg.

This deterioration of the judiciary must be stopped. If democracy and economic development is to succeed, the paramount role of an independent and impartial judiciary must be secured. Sustainability of democracy and economic development depends a great deal on a well-functioning independent and impartial judiciary. The strengthening of the judiciary and other law enforcement agencies must therefore be

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7 See Indonesian Legal Roundtable, 2013: 27-31. To compare with the condition under Soeharto's regime, see Thoolen, 1987: 61-62; and Lubis, 1993: 86-126.

one of the highest priorities for any Indonesian government (Pompe, 2005: 471-77).

## **CORRUPTION ERADICATION**

Corruption is not a new phenomenon. It is as old as human civilisation and can be found in almost every country in the world. But there are countries that are relatively free from corruption, and others where corruption is systemic, endemic and widespread. Transparency International, an international NGO specialising in combating corruption, releases its annual survey with what is termed its 'corruption perception index'. According to the latest survey Indonesia's position remains close to the bottom, meaning that it is still seen as one of the world's most corrupt countries.<sup>8</sup> Relying on scores ranging from 0-100 where 0 is considered free from corruption and 100 the most corrupt, Indonesia's corruption perception index was 32 in 2013. In 2012, Indonesia's corruption perception index was also 32. This means that in the last two years corruption persists and not much progress has been made on its eradication.<sup>9</sup>

Given that corruption is not new and is still prevalent in so many countries, it must be recognised that systematic efforts to fight corruption are imperative. Frank Vogl who spent many years with Transparency International has written that:

All governments are vulnerable to corruption and no government can claim that it does not harbor officials who abuse their office for personal gain. While it is almost certainly true that corruption in government will never be ended, it is equally true that much can be done to reduce its prevalence. (Vogl, 2012: 12)

Corruption is not a simple thing. It is a result of political, social and economic issues that interact with one another. There is room to abuse power for personal gain, and in many instances those opportunities have been provided by inadequacy of laws and regulations, or *Lex Imperfecta* (Nelken and Levi, 1996: 10). This is because almost every regulation passed in Indonesia is the product of political compromises or deals, and it is therefore no surprise that there are many loopholes encountered. They are the price of compromise and transactional politics. Historically, it is part of an endless political process and can only be minimised once democracy is mature and rule of law is observed.

Interestingly, Indonesia has a relatively complete set of laws and regulations dealing with corruption eradication, such as laws on anti-corruption, money laundering, protection of whistle blowers, the judicial commission and public information, for instance. In addition,

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8 See Transparency International, 2012. Corruption Perception Index of Indonesia is 32, 118th out of 174 countries.

9 Interview with Abraham Samad, 17 May 2013; interview with Bambang Widjoyanto, 10 April 2013; and interview with Busro Muqoddas, 15 May 2013. Samad, Widjoyanto and Muqoddas are Chairman and Deputy Chairmen of KPK respectively.

ratification of the UN Convention against Corruption has also been concluded.<sup>10</sup> In terms of laws and regulations, it is fair to say that Indonesia has more than sufficient to deal with corrupt behaviour at all levels, be it petty or grand corruption.<sup>11</sup> To what extent the laws and regulations are implemented remains, however, to be seen. This is the real challenge.

From an institutional point of view, the legal institutions necessary to combat corruption are also already in place. They include the Corruption Eradication Commission (KPK), the State Audit Agency (BPK), the Financial and Development Audit Body (BPKP), the Financial Transaction Reports and Analysis (PPATK), the Judicial Commission (KY), and the Witness and Victim Protection Agency (LPSK). These agencies complement the work of traditional legal apparatus like the Police and Prosecution service in combating corruption as an extraordinary crime (Lubis, 2014b). They were set up in order to convince the public that combating corruption is a high priority, because that is clearly what they demand of their rulers.

The new government of Joko Widodo (Jokowi) will officially assume power on 20 October 2014. Throughout his campaign, Jokowi reiterated his strong commitment to fight corruption. His vision, mission and action program listed no less than 42 initiatives for strengthening the *negara hukum* and among them at least 8 initiatives dealing with corruption eradication (Jokowi, Jusuf Kalla, 2014: 23-28). These include creating a “fear of corruption” culture; providing public service free from corruption through transparent information technology; promulgating supportive anti-corruption laws and regulations; strengthening the independence of the KPK; promoting working synergy between police, prosecutor and the KPK; focusing on corruption in law enforcement agencies, politics, customs, tax and mining; preventing corruption through implementation of a National Integrity System; and encouraging public participation and mass media to monitor the handling of corruption cases.

Prior to the presidential election, the KPK published a book recommending eight action agenda items for the new government in combating corruption. These recommendations were formulated on the basis of its experience in going after corrupt officials and politicians since 2004, and they assume that corruption is endemic, systemic and widespread. The eight action agenda items are bureaucratic and administrative reform; management of mineral resources and revenues; food sovereignty; infrastructure improvement; strengthening of law enforcement agencies; support for education focusing on integrity;

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10 See <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>. Indonesia signed and ratified the UN Convention against Corruption on 18 December 2003 and 19 September 2006 (Law No 7 of 2006) respectively.

11 There are a few more laws needed, such as legislation dealing with asset recovery and non-cash transactions for instance. See Jokowi, Jusuf Kalla, 2014. This is a publication issued for the Presidential Campaign.

improvement of political party institution; and social welfare betterment (KPK, 2014: 29-82). Needless to say in these 8 sectors corruption seems prevalent and corrosive, and is, unfortunately, still an integral element in the governance structure of the country.

It is perhaps inappropriate to conclude that not much has been done to advance corruption eradication, given 402 corrupt officials and politicians have been convicted in the last 10 years by the KPK. There have been also hundreds of corrupt individuals sent to prison by the police and prosecutors. But corruption still persists. Data from the Corruption Perception Index of 2013 shows that the corruption ranking of Indonesia (114) is only slightly better than Vietnam (116), Bangladesh (136), Nigeria (144), Myanmar (157), Zimbabwe (157) and Cambodia (160).<sup>12</sup> For the record, the number of countries surveyed by Transparency International in 2013 is 175. Therefore, a ranking of 114<sup>th</sup> out of 175 countries is far indeed from satisfactory. From this perspective, corruption eradication in Indonesia has not had much impact, despite all the arrests and convictions of recent years and all the controversy they have sparked.

The pace of the anti-corruption fight must be accelerated. Political will is a must for which the involvement of all stakeholders is required. Jokowi's new government must attempt to combine powerful forces of robust civil society organisations, promulgate a set of national and international anti-corruption laws, and exploit the rapid development of new information and media technologies, in addition to raising support from philanthropic foundations and academic researchers (Vogl, 2012: 14).

The new government has only one option and that is to continue combating corruption in order to provide justice to the people. Former UN Secretary-General Kofi Annan was right when he said that,

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distort markets, erodes the quality of life, and allows organized crime, terrorism, and other threats to human security to flourish (Annan, 2004: 1).

Enforcement of anti-corruption policies will, however, require the right man in the right place, someone with a proven track record on anti-corruption, someone with courage and determination. Getting its senior law enforcement appointments right at the start will therefore be of vital importance to the success of Jokowi's administration.

### **PRO-BUSINESS, PRO-PEOPLE**

The new government has indicated it would like high economic growth of 7 per cent

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<sup>12</sup> Corruption Perception Index of Indonesia 2013 is 32. Compare that with Vietnam 31, Bangladesh 27, Nigeria 25, Myanmar 21, Zimbabwe 21, Cambodia 20. See Transparency International, 2013.

per annum. This sounds too optimistic, given the global economy has still not yet fully recovered from series of crisis in various part of the world.<sup>13</sup> Luckily, Indonesia's economy managed to maintain a modest growth around 5 per cent per annum despite the crisis, due to significant domestic consumption and earnings from the export of oil and gas, mineral resources and manufacturing goods. There has therefore been a steady increase in the size of the middle class with substantial capacity to support the economy, in addition to new investment from both domestic and foreign companies. According the World Bank, the per capita GDP of Indonesia has grown steadily in recent years: US\$ 2,272 in 2009; US\$ 2,947 in 2010; US\$ 3,470 in 2011; to US\$ 3,551 in 2012 (World Bank, 2013).

Unfortunately, however, economic growth of 5 per cent is not sufficient to create the job opportunities necessary to meet the demand of the large numbers of unemployed or underemployed. The result is poverty, created by a widening income gap of between the rich, the new rich, the so-called middle class and the poor, as well as the near poor. Jokowi therefore wants 7 per cent economic growth in order to create 3 million jobs per year (Sambijantoro, 2014). The Association of Indonesia's Employers (Apindo) has argued, however, that to be able to create 3 million jobs per year at least 8 per cent economic growth per year is necessary (Apindo, 2014). To what extent this is possible remains to be seen but it is highly unlikely that 8 per cent can be achieved. The global economy is still sluggish and an unexpected downturn cannot be dismissed (OECD, 2014). Political tensions with unintended consequences may also cause slowdown, not to mention other forms of regional or national crisis.

In order to meet the basic needs of the people and provide services to them it is understood that economic development must be directed to the fulfilment of food and energy self-sufficiency; the expansion of basic infrastructures; and the socially responsible exploitation of all resources, on-shore and off-shore. It is the primary obligation of government to eradicate poverty gradually and for this reason a flow of investment, domestic and foreign, small, medium and large, must be encouraged by making available all the incentives that can possibly be offered. At the moment Indonesia is not considered a favourable investment destination due to the many and various disincentives consciously or unconsciously placed in the way of investors.<sup>14</sup>

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13 For example, the United States, the United Arab Emirates, Europe, Greece, Cyprus and now Argentina. To some extent Indonesia's economy has also been affected. Indonesia's economic growth according to Asia Development Bank in 2014 is modest enough, at 5.7 per cent, while in 2015 it is predicted to reach 6.0 per cent.

14 As a legal consultant I have come across investment disputes where foreign investors complain that Indonesia has imposed too many restrictions in addition to the lack of guarantee of legal certainty. Criminalisation of civil matters is major issues nationally and

Emerging economic nationalism and legal uncertainty have been regarded as the main hurdles of investment especially for new incoming investors. Other countries in ASEAN, for instance, offer more incentives and guaranteed long-term security of investment, and are therefore becoming more competitive. The challenge for our new government is to create a better and conducive investment climate in order to convince investors to think again about Indonesia, which, for period under Soeharto, was once seen as a paradise for investors. Admittedly, this will require not only strong determination but also an ability to reconcile the need to strengthen small- and medium-sized businesses on one hand, while facilitating big business on the other. A new and growing democracy demands an inclusive economic policy.

Legal certainty is central to investment, however, and this is the weakest point. One of the biggest problems is overlapping and conflicting laws and regulations at the vertical (national) and horizontal (local) levels (Apindo, 2014). As we all know, there is a hierarchy of laws and regulations that includes the constitution, statutes, government regulations, presidential decree, ministerial regulations and regional or municipal regulations, in which no conflict may arise between the lower ranked and higher ranked laws.<sup>15</sup> If there is a conflict, then the inferior regulation must be revoked, and that can be done through judicial review to either the Supreme Court or the Constitutional Court, depending on the type of law in question. At the horizontal or local levels, conflicts can be found between many laws and regulations in fields like forestry and agriculture, or industry and foreign investment, among others. These conflicts must be resolved. To not do so will certainly discourage investment, as it will create a lot of hurdles and unjustifiable costs. Likewise, all laws and regulations that overlap must be dealt with in the sense that the overlaps must be resolved. There should not be overlapping laws and regulations to confuse those considering investing.

Harmonisation and synchronisation of laws and regulations must be a priority of the new government if it is to provide a better and conducive investment climate. In the next five years, a special task force should be commissioned to identify all laws and regulations that overlap or are in conflict with one another. If the policy is to attract more investment, it is imperative that streamlined and simplified investment procedures be in place. A plan to introduce e-commerce, e-tender, e-transaction and e-procurement, for instance, would require transparent and clear laws and regulations. Only by doing all

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internationally. See [data.worldbank.org/indicator/IC.BUS.EASE-XG](http://data.worldbank.org/indicator/IC.BUS.EASE-XG). In this Ease of Doing Business Index (World Bank Group, 2014), Indonesia ranks 120 (2014) and 116 (2013). Ease of doing business ranks economies from 1 to 189, with first place being the best. A high ranking (a low numerical rank) means that the regulatory environment is conducive to business operation. The index averages the country's percentile rankings on ten topics covered in the World Bank's Doing Business. The ranking on each topic is the simple average of the percentile rankings on its component indicators.

<sup>15</sup> See Law No 12 of 2011 concerning the Formation of Legislative Rules (*Pembentukan Peraturan Perundang-undangan*), art 7.

these things can a better and conducive investment climate can be built, and Indonesia become competitive again.

Aside from streamlining and simplifying laws and regulations, investment incentives must be offered through various laws and regulations. Tax holidays, land ownership, profit remittance, ease of investment, a less stringent negative list of investments, increased equity foreign participation and security of long term investment are among the things that need to be regulated in such a way as not to discourage foreign investment from staying and, if possible, expanding their business ventures. Those who invest in the eastern parts of Indonesia should be offered additional incentives from regional municipalities to act as pioneers in transforming the local economy (Triyono, 2014). And, of course, all courtesies afforded to foreign investment must also be available to domestic investors partnering with foreign investors, with the objective of combining resources in order to be globally competitive.

One problem that remains troublesome is the status of existing business contracts. Indonesia's Civil Code stipulates that a contract is binding upon the parties as law<sup>16</sup> but lately too many contracts have been changed unilaterally or through government regulation or executive decision.<sup>17</sup> The argument put forward by government in these cases is that the insertion of new provisions is allowed where mandated by law or regulation, especially if it relates to natural resources which, according to Article 33 of the 1945 Constitution, are considered 'national wealth that must be fully used for the welfare of the people' (Albari, 2014). This may be a valid reason but it is clear that any amendment to any existing contract must be mutually agreed by the parties concerned. Attempts to change, revise or modify contracts unilaterally is similar to a breach of contract and may be brought before courts or arbitration for resolution. The point is not that there is no legal resolution available but that disrespect for the sanctity of contract is a serious threat to investment security, especially for international corporations. Jokowi's new government must therefore commit itself to respect the sanctity of contracts.<sup>18</sup>

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16 Article 1338 of the Indonesian Civil Code.

17 See Government Regulation No 79 of 2010 concerning the Cost Recovery and Provisions on Income Tax in Upstream Oil and Gas Activities, which essentially stipulates that production sharing contracts can be amended unilaterally through insertion of new provisions mandated by laws and regulations where the insertions are not stipulated in the respective contract. This is clearly contrary to the notion of the sanctity of contract. This is not to say that contracts cannot be amended but the amendment must be mutually agreed by the parties concerned.

18 President Jokowi made a statement that his new government will respect existing contracts until they expire but renegotiation will be conducted to come to new terms, provided the parties agree.

Another problem that needs mentioning is the phenomenon of criminalisation of business or administrative disputes. In recent years, there have been a number of business and administrative cases investigated and tried as criminal offenses, such as the Chevron, Merpati, and IM2 cases, among others.<sup>19</sup> There are alarming signals that criminalisation of business and administrative disputes is continuing, with both the police and prosecutors investigating several large companies (Widodo, 2014). It is not an overstatement to say that a feeling of uncertainty now hovers over the business community. In turn, plans to expand businesses have been postponed until business leaders feel that there is assurance from the government that they will not be criminalised for their business activities unless there is *prima facie* evidence that a criminal offence has, in fact, been committed. In some cases there is a fine line between civil and criminal matters but most of the time civil and criminal matters can easily be distinguished. The new government must do its utmost not to cause additional pain and uncertainty to the business community.

In addition, the problem of enforcement of court or arbitration awards needs to be underlined, as the majority of these are not enforced. Legally, the court should respect binding court decisions or arbitration awards but they seem reluctant to do so, even though there is no proper reason for this (Lubis, Santosa & Maramis, 2012). Opposition – and improper influence - by losing parties is one reason for this reluctance, and there is also ambiguity on the part of the government. This is another factor that has led Indonesia to be perceived as an unfriendly country by the international investor community.

These are just some of the legal hurdles faced by the business community, and needless to say that the new government must urgently do something to address them if investment is to be welcomed and protected. The target of 7 per cent economic growth to create 3 million job opportunities per year, alleviate poverty and be globally competitive will require a firm commitment to transform Indonesia into a legally safe and attractive place for investment.

### **RECROWNING NEGARA HUKUM?**

It is true that economically it will not be easy to meet the target of 7 per cent economic growth. Indonesia is competing with other emerging economies, many of which are ahead in a number of respects. But since the elections, there is a now a new momentum in Indonesia – a strong desire to move forward to build the country anew – and in some ways, it resembles the enthusiasm for change that dominated the brief period of Habibie's rule, with all the hope that entailed.

Certainly, Jokowi's new government will have a golden opportunity in its first year, with all the endorsement it needs, and the people will be willing to accept the costs necessary

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<sup>19</sup> For the Chevron case, see Hirmen Hirmen, n.d. See also, Melani, 2014.



to pave the way for renewed reform. One of the institutions essential to guaranteeing such progress is the existence of *negara hukum*, which has long been neglected. Only by recrowning *negara hukum* will we be able to guarantee the sustainability of economic growth as promised. This is the single biggest challenge for Indonesia's incoming administration.

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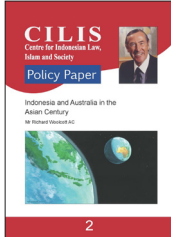

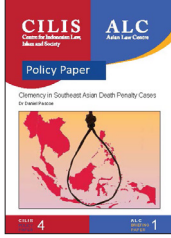
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**Author/s:**

Lubis, TM

**Title:**

Recrowning Negara Hukum: A New Challenge, A New Era

**Date:**

2014

**Citation:**

Lubis, T. M. (2014). Recrowning Negara Hukum: A New Challenge, A New Era. Centre for Indonesian Law, Islam and Society, University of Melbourne.

**Persistent Link:**

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