

A Realistic Perspective to Transitional Justice: A Study of Its Impediments in Indonesia

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Abstract

Indonesia is one of the most democratized countries in Asia. There have been some improvements both in political and legal aspects; the most powerful legal reform was the amendments of the 1945 Constitution. In the context of civil and political rights, Indonesian people have exercised their constitutional rights to select political leaders, rotate elites and to enjoy greater civil liberty, even though there are still many rooms for improvements. One of the most vital hurdles is the failure of the reformed governments to settle gross-violation of human rights cases happened in the past. Suharto's authoritarian regime had exercised repressive actions toward oppositions and civil society movements, including universities' students, activists and minorities. The *ad hoc* Court of Human Rights had failed to reveal the truth for some prominent cases, let alone providing remedy and reconciliation. It was highly believed that the trials were conducted only as safeguards to prevent international intervention on Indonesia's past unlawful violations.

Keywords: *Transitional Justice, Human Rights, Multiculturalism, Populism*

I. INTRODUCTION

On 20th May 2020, Indonesian activists celebrated *reformasi's* 20th anniversary. *Reformasi* is known as a transitional phrase, or a starting point from the past authoritarian military-supported Suharto's administration to the reformed anti-authoritarian governments. The *reformasi* has taken place up until recently. *Reformasi* has created some legal improvements; the most powerful legal reform was the amendments of the 1945 Constitution. In the context of civil and political rights, Indonesian people have exercised their constitutional rights to select political leaders, rotate elites and to enjoy greater civil

liberty.¹ Freedom of expression has been promoted, at least on paper. Indonesian reformed governments have also agreed to separate the army and the police, aiming to lessen the military hegemony.² Nevertheless, there are still many rooms for improvements.³ Recently, active police apparatus have strategic posts in state institutions, this appointment prone to abuse of power from police.⁴ The current Indonesian politics is a mixture of developmentalism and strong oligarchy which through state apparatus penetrates public expression and freedom. As a result, they are a shrinking public space.

One of the most vital hurdles is the failure of the reformed governments to settle gross violation of human rights cases happened in the past. Suharto's authoritarian regime had exercised repressive actions toward oppositions and civil society movements, including universities' students, activists and minorities.⁵ The 1999 Act of Human Rights and the 2000 Act of Human Rights Court have been established to answer public demands. Nevertheless, the *ad hoc* Court of Human Rights had failed to reveal the truth for some prominent cases, including Tanjung Priok in 1984,⁶ Semanggi I and II,⁷ and

1 Usman Hamid, Indonesia's Human Rights After 20 Years of Reformasi, *The Diplomat*, <<https://thediplomat.com/2018/05/indonesias-human-rights-after-20-years-of-reformasi/>>.

2 Damien Kingsbury, *Power Politics and the Indonesian Military* (Routledge, 2005) p. 43. See also, Douglas Webber, 'A Consolidated Patrimonial Democracy? Democratization in Post-Suharto Indonesia', *Democratization* 13 (3) (2006), 396-420. "Thirty-one of the 37 provisions of the 1945 Constitution were affected by the new constitutional amendments."

3 Herlambang P Wiratraman, New Media and Human Rights: The Legal Battle of Freedom of Expression in Indonesia, (Paper presented for the 11th Annual Student Human Rights Law Conference at Nottingham University, 20 - 21 March 2010).

4 Perwira Polisi Merebut Jabatan Startegis, *Tempo*, <<https://koran.tempo.co/read/berita-utama/454819/perwira-polisi-merebut-jabatan-strategis>>.

5 Chris Kline, Suharto: One of the greatest mass murderers of the 20th century, *Independent* <<https://www.independent.co.uk/news/world/asia/suharto-one-of-the-greatest-mass-murderers-of-the-20th-century-777103.html>>.

6 Stop Impunity in Indonesia! 1984 Killing Tanjung Priok, <<https://stopimpunity.org/documentation/events/99-1984-killings-tanjung-priok>>. This killing escalated from a riot from Islamic protesters who against the sole interpretation of Pancasila (Indonesian state ideology). The state interpretation was too secular and could potentially damage the sacredness of Islamic teaching. The state's respond was overly repressive. They indiscriminately shot at civilians, killing dozens. Fifteen were forcibly disappeared, 98 tortured, 96 arbitrarily arrested and detained and 58 experienced unfair judicial processes.

7 ELSAM, *Pilihan Rekonsiliasi Kasus Trisakti, Semanggi I dan II: Bukti Semakin Jauhnya Realisasi Janji Penyelesaian* (Trisakti and Semanggi I and II Cases Reconciliation: Far from Promised) <<http://elsam.or.id/2017/02/pilihan-rekonsiliasi-kasus-trisakti-semanggi-i-dan-ii-bukti-semakin-jauhnya-realisasi-janji-penyelesaian/>>. The first riot escalated from university students demonstration that aimed to reject Bacharuddin Jusuf Habibie's administration. The students demanded a 'vetting-agenda' to eradicate all Soeharto's cronies including BJ. Habibie and his ministers. The second riot also escalated from students demonstration rejected to the government plan for applying state emergency law. Hundreds of students killed, injured and missed, yet the perpetrators were unidentified until know.

East Timor,⁸ let alone providing remedy and reconciliation.⁹ It was highly believed that the trials were conducted only as safeguards to prevent international intervention on Indonesia's past unlawful violations. In this regard, the Indonesian government could be considered fail to exercise its legal obligation under international Human Rights system to prosecute gross violation of human rights. As a result of these 'kangaroo court' created impunities and unjust for victims.

The failure to reveal the truth through legal mechanism or prosecution is a strong evidence that the constitutional reform through the 1945 amended Constitution is insufficient for transitional justice. The reason of failure is because the constitutional reform does not provide direct instruments to remedy gross-violation of human rights happened in the past, let alone through the government policies. This happened mainly because the post-authoritarian governments did not establish a vetting-agenda policy; dichotomizing old regime politicians with the reformists, as a result the consecutive governments are not fully secure from former authoritarian regime apparatus.¹⁰ Some of former Suharto's cronies, especially from the military still have strong influences in the legislative and executive bodies. They managed to insert a constitutional provision supporting of non-retroactive law enforcement, which they used to protect their past false conducts. The provision states: "... the rights not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances."¹¹ The constitutional changes could not spontaneously provide justice and human rights protection for Indonesian people. Rather, the legal text is often used to mask and protect the perpetrators of human rights violation in the past.¹²

This paper argues that what happen today are rational consequences of the failure of the reformed governments to settle its past, because the present governments' conducts are inter-related with and affected by the past authoritarian draconic policies. The main challenge of Indonesia's democracy is to reveal its past through a responsive and participatory mechanism

8 Tirto, *Tragedi Santa Cruz dan Sejarah Kekerasan Indonesia di Timor Leste* (Tragedy in Santa Cruz and History of Violence in Timor Leste), <<https://tirto.id/tragedi-santa-cruz-dan-sejarah-kekerasan-indonesia-di-timor-leste-b4FM>>. There were many violence and repressive Indonesia army (used to called ABRI) actions in the Province of Timor Timor. One of them was Santa Cruz killing on 12 November 1991. Pro-independence groups gathered in Santa Cruz funeral to commemorate their fellow protesters who killed and tortured by unidentified person. The army acted overly-repressive, shot hundreds of protesters.

9 Geoffrey Robinson, *East Timor 1999 Crimes Against Humanity* (A Report Commissioned by the United Nations Office of the High Commissioner for Human Rights, 2003), p. 1-279. See also, Suparman Marzuki, *Robohnya Keadilan! Politik Hukum HAM Era Reformasi* [Justice Collapses! Human Rights, Law and Politics in *Reformasi* Era], (Pusham UII, 2011).

10 Gaboi Halmai, *The Role of Constitutionalism in Transitional Justice Processes in Central Europe* <<https://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Halmai/Constitutions-and-TJ.pdf>>.

11 Article 28I (1), the 1945 Constitution (Amended).

12 Marzuki, *supra* note 9, 11.

This paper argues that transitional justice is continuing political processes, rather than mere procedural changes. Theoretically speaking, there are ‘four windows of transitional justice’, including truth-findings, prosecution, reparation and institutional reform.¹³ However, most of the ‘windows’ depend on political will and there have been relatively failed. This paper contemplates on approaches to make transitional justice works in a realistic perspective. Firstly, assessments are needed to scrutinize to what are the most significant impediments for transitional justice in Indonesia? And then, to what extent transitional justice can be exercised in a setting of current challenges from power-concentrated government in Indonesia? First, this essay starts by giving a context of Indonesian political and rule of law dynamics, how those dynamics has becoming serious obstacles for transitional justice project in Indonesia

II. A CONTEXT: INDONESIA’S IMPEDIMENTS

This paper uses realistic lens to elaborate the Indonesia’s impediments on transitional justice. The past history of Indonesia’s authoritarianism and its genealogy will be presented aiming to find out the core of impediments. This genealogy encompasses historical and political sphere of Indonesia’s politics, for patrimonial heritage to sultanistic-oligarchy to ethnic-religious populism. Both these aspects diminish the quality of democracy and become serious threats for the future of Indonesian rule of law, democracy and transitional justice.

1. Democracy Retrogression: Patrimonial to Sultanistic-Oligarchy

Historically, in pre-colonial era, Indonesia had been labeled as a patrimonial state. This claim can be evidenced by the practice of native rulers, mostly in Java who secured their authority by granting their officials some revenues from lands: they could exploit the lands, but not purchase and own them.¹⁴ In other word, patron-client relationship has been the traditional style of government. Thus, it was worsened by the colonial power, the Dutch colonial which politically preserved, maintained and used patrimonial culture for its sake.¹⁵

Despite being persuaded by the Dutch, to be part of the Dutch-Indo federalism in 1940, post-colonial Indonesia government, known as the Old Order regime, was keen to be a unitary state, a fully sovereign and independent country.¹⁶ Sukarno, the first president of the Republic had challenges in constructing its newly born republic. The

13 The United Nations, Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (2010).

14 Benedict Anderson, ‘The Idea of Power in Javanese Culture’ in Benedict Anderson, *Language and Power: Exploring Political Culture in Indonesia* (Ithaca, NY: Cornell University Press, 1990) 46-48.

15 Brian McCormack, Fifty Years of Indonesian Development: “One Nation”, Under Capitalism, *Journal of World-System Research* <<http://jwsr.ucr.edu/>> 5 48-73, 51.

16 Sukarno, Di *Bawah Bendera Revolusi* [*Under the Revolution Flag*] (Panitia Penerbit, 1964).

government tried to lessen colonial influences. Nevertheless, not all policies were successful and not all colonial influences were detrimental, for instance in legal aspect, until recently the Dutch civil law system has been adopted and practiced by the governance and Indonesian jurists.¹⁷

Despite having a crucial role in founding the state's structure, the Old Order regime was short-lived, due to the harsh conflict between the army, the communists and the President.¹⁸ The next successor was the New Order regime led by General Suharto. Indonesia under the New Order regime was a militaristic authoritarian. Suharto through his manipulative legal-political engineering led the country for more than 32 years.

In Suharto's administration, patrimonial politics reached its pinnacle, because Suharto used his traditional Javanese background as a justification for privileges that were enjoyed by his families and cronies. In other word, Suharto was convinced that his families, particularly his children were culturally deserved certain degree of privileges, because he was a mega-sultan of Indonesia.¹⁹ This policy of the government was merely benefited to personal and/or groups' interests rather than 'universalistic-public' ends. This was the genealogy of Indonesia's current oligarchy. Disproportionate wealth creates privileges which makes possible a mode of political influence unavailable to other members of the polity.²⁰ By having these materials, political groups are consolidated because they are simply the same interests: to gain political position and wealth.²¹ The triangle relations between the concentration of wealth, privileges and power consolidation are the core materials of oligarchy.

Winters, in his study on oligarchy dichotomizes oligarchy into 4 (four) entities: First, warring oligarchy is also known as pragmatic oligarchy. A political cohesion is not too strong in this type of oligarchy. Second, ruling oligarchies, this is a well-consolidated or collectively institutionalized oligarchy. Third, sultanistic oligarchy, a type of oligarchy which is formed from heredity. It does not aim to create an institutionalized system, but rather to aim family or group interests. Lastly, the lesser evil oligarchy or civil oligarchy, it has political-pragmatic interests, but it is guarded by a relatively strong rule of law institutions.²²

Soeharto era has a trait of sultanistic oligarchy which was strengthened by his patrimonial culture. Soeharto was considered as the last sultan of Indonesia.²³ Corruption

17 Satjipto Rahardjo, 'Between Two Worlds: Modern State and Traditional Society in Indonesia' (1994) 28 *Law & Society Review*, 493, 495.

18 Herbert Feith, 'President Soekarno, the Army and the Communists: The Triangle Changes Shape', *Asian Survey* Vol 4 (1964), 969-980, 979.

19 Lee Kuan Yew, *From Third World to First* (Singapore: Time Editions, 2000) 313.

20 Jeffrey A. Winters, *Oligarchy* (Cambridge: Cambridge University Press, 2011).

21 Francois Bourguignon and Thierry Verdier, "Oligarchy, Democracy, Inequality and Growth," *Journal of Development Economics*, 62 (2), 285-313.

22 Winters, *supra* note, 69.

23 Keith Loveard, *Suharto, Indonesia's Last Sultan*, (New York: Horizon Books, 1999).

and nepotism was consequences of this type of oligarchy, these practices transmitted from central to local and even village governments.²⁴

Suharto's sultanistic oligarchy in some degree is close (but not identically) to ethnic-based politics because it gave some privileges to certain ethnicity, while excluding of others. This claim can be evidenced by the government policy on transmigration when the central government arbitrarily issued land certificates to Javanese outsiders in outside-Java regions (Sumatera, Kalimantan and Sulawesi), without undergoing consent mechanism from native inhabitants.²⁵ This policy then provoked several communal conflicts between outsider (mostly Javanese) and local or indigenous inhabitant in transmigration areas.

Furthermore, historically speaking, since the communal riot at Tanjung Priok, where several Muslims were targeted by the army,²⁶ Suharto's political movement then mingled to conservative Islamic side, in order to balance public perception on him as syncretic and anti-Muslim leader. This political maneuver also aimed to counterweight the military power. Suharto created an organization of conservative Muslim intellectuals, namely ICMI (Indonesian Association of Muslim Intellectuals).²⁷ Webber states that this strategy demonstrably failed because ICMI seemed inferior compared to two biggest moderate Muslim organizations: *Nahdlatul Ulama* (NU) and *Muhammadiyah*.²⁸ However, nowadays, ICMI has relatively strong basis in campuses and academia. Judging from these two political practices, it is true that cultural (ethnic and religious) cleavages are very crucial to political mobilization in Indonesia.

In the current Indonesian politics, the characteristic of authoritarianism has not totally faded. Democratization is still in a slow progress. According to Linz and Stepan, the degree of democratic consolidation is determined by how strong the previous leader was. Suharto was indeed a strong leader. Some said that he was an authoritarian, and not a totalitarian leader, because he did formally set an opposition mechanism and scheduled elections. However, the opposition mechanism was very weak because the elections themselves were manipulative. Suharto has some traits of Sultanism, as he totally ruled all aspects of governance.²⁹ This argument may be one of the reasons why Indonesia is still struggling in reforming itself until recently.

24 *Ibid* 54.

25 Phillip M. Fearnside, 'Transmigration in Indonesia: Lessons from Its Environmental and Social Impacts', *Environmental Management* 21 (4) 553-570, 557.

26 Fedina S. Sundaryni, 'Massacre Victim' Families Demand Justice, *Jakarta Post*, September, 14, 2015 < <http://www.thejakartapost.com/news/2015/09/14/massacre-victims-families-demand-justice.html> >.

27 Douglas Webber, 'A Consolidated Patrimonial Democracy? Democratization in Post-Suharto Indonesia', *Democratization* 13 (3) (2006), pp. 396-420, 340.

28 *Ibid*.

29 Juan Linz and A. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America and Post-Communist Europe* (Baltimore, MD: Johns Hopkins University Press, 1996), 5.

Moreover, the post-authoritarian Indonesian government cannot entirely neutralize military from the government. Massive political turmoil masked with cultural and religious sentiments mostly has happened in the civil-background Presidents, including in this current President Joko 'Jokowi' Widodo's administration. On contrary, in a military-background President, for instance in Susilo Bambang Yudhoyono (SBY)'s administration, the political tensions were not as high as today.

The aspiration of justice lay down in the shoulder of the seventh Indonesian current President Jokowi, a non-military background leader. In his first political campaign as a presidential candidate in 2014, Jokowi promised to settle past human rights violations. However, due to a strong challenge from opposition parties which led by a former military general, Prabowo Subianto, a former son in law of Suharto, Jokowi has become pragmatist. Approaching the 2019 Presidential Election, Jokowi's administration has recruited some former military generals who involved in Suharto's regime as his inner circle. The stronghold party of Suharto, Golkar Party has also announced its support to Jokowi for his second term as a President in the 2019 Presidential Election. It is true that politics is never black and white.³⁰

Post 2019 Election, Jokowi's administration has consolidated its political power. The former rival in the election, Prabowo and his supporting parties received ministerial positions in the government. The 2019 election was a meaningless election, because political or oligarchy 'harmony' is far important than creating democratic state mechanism through opposition parties and free civil society. The aim of this pragmatic 'harmony' is surely to confront opposition coalition and to hinder democratization. This concentration power could potentially jeopardize democracy by weakening political oppositions and depressing civil society and freedom of expression. It is hard to denied that *reformasi* is history in the hand of Jokowi.³¹ Judging from the current slide back, it is reasonable to argue that the current Indonesia government has failed to defend transitional democracy, let alone to deliver justice for past human rights violations.

This current political condition is alarming because the government and its oligarchies have consolidated its powers. This oligarchies' consolidation creates a strong regime of ruling or well-consolidated and institutionalized oligarchy which can potentially jeopardize Indonesia's democracy and rule of law. Indonesia needs to learn from other countries' experiences dealing with democracy and constitutional retrogression.³² In this setting, legal instruments are ineffective in controlling the government, let alone to punish

30 Mirza S Buana, 'Indonesia's Multicultural Democracy at Stake: The Rise of Ethnic-Religious Populism in Approaching the 2019 Presidential Election' (Paper presented at International Conference on Multicultural Democracy at Kyushu University, 10 -13 May 2018), 3.

31 A Requiem for '*Reformasi*' as Joko Widodo Unravel Indonesia's Democracy Legacy, *Jakarta Post* <<https://www.thejakartapost.com/academia/2019/10/18/a-requiem-for-reformasi-as-joko-widodo-unravels-indonesias-democratic-legacy.html>>.

32 Aziz Huq dan Tom Ginsburg, "How to Lose a Constitutional Democracy," *University of Chicago Law School, Chicago Unbound*, 2018 (65), 1-34.

illicit practice of oligarchies. Ineffectiveness of legal instruments is worsened by ethnic-religious populism sentiments used by the leader to oppress minorities and civil societies.

2. Ethnic-Religious Populism

A precise example of the rise of ethnic-religious populism in Indonesia was the case of Ahok, a Christian believer and former Governor of Jakarta, can be. He was persecuted and prosecuted due to his outspoken speech regarding a tendency of Muslims to choose a Muslim as their leader in the election based on Holy Quran's provision.

Ahok's statement saying that "Don't be fooled by people who (politically) used Al-Maidah 51" was considered as a blasphemy of religion (Islam) by conservatism groups.³³ Prior to his judgment in the Jakarta District Court, several demonstrations took place in Jakarta. These series of actions gained support from numerous conservative Muslims.³⁴ Because of his 'slip of the tongue', Ahok was defeated in the second round of the election. Since the 2014 election and up until today, religious tolerance and minorities' rights have been threatened. This condition confirms Bruinessen's hypothesis stating that the post authoritarian government in Indonesia was followed by the rise of 'the conservative turn' and radical Islam.³⁵ This condition has been predicted to escalate until the 2019 elections.

Mudde defines populism as 'an ideology' which is based on a subjective assumption that the majority is being threatened by the minority (either politically or economically). Thus, in order to save a majority from persuasive domination of the minority, the minority's activities should be limited and prosecuted particularly in public spaces. Populism, however, is not 'an ideology' in the strict sense, as it does not strictly regulate social, economic and political arenas, but it has a 'fluid' meaning in depicting injustice in society.³⁶

With regards to the context of Islamic society, Hadiz defines Islamic populism as a movement which incorporates religious (Islamic) symbols for the sake to accomplish political agendas. Elites have made assumption that Muslim people (*Ummah*) have gradually lost their sovereignty in their own country, due to progressive minority elites

33 Verse 51, Al-Maidah, Holy Quran. "O you who believe! Do not take friends from the Jews and the Christians, as they are but friends of each other. And if any among you befriends them, then surely, he is one of them. Verily, Allah guides not those people who are the wrongdoers." However, this essay argues that this verse should be interpreted contextually, and should not be politicized.

34 Greg Fealy, Bigger than Ahok: Explaining the 2 December Mass Rally, <<http://indonesiaatmelbourne.unimelb.edu.au/bigger-than-ahok-explaining-jakartas-2-december-mass-rally/>>.

35 Martin van Bruinessen, "Overview of Muslim Organizations, Associations and Movements in Indonesia" in Martin van Bruinessen, ed, Contemporary Development in Indonesian Islam: Explaining "Conservative Turn" (Singapore: ISEAS-Yusof Ishak Institute, 2013), 3.

36 Cas Mudde, "Populist Zeitgeist", *Government and Opposition*, 39.4 (2004): 542-563, 543.

hegemony.³⁷ In this regards, Islamic populism has inter-linked with Islamic conservatist who aims to eradicate some deviance practices in Islamic teaching. They aim to have a sole (textual) interpretation of Islam, which is impossible. Zizek interprets populism as a failure to determine who is friend and who is enemy. Rather than rationally examine the core problem of injustice, populists take a simplistic action by creating their own ‘imagined enemy’.³⁸

Populism as a psycho-political phenomenon has turned Indonesia’s democracy to the side of ethnic-religious democracy in general, lessened previous legal reforms and transitional justice processes in particular, because the practice and implementation of the Constitution and human rights Acts are hindered by this ideology. The United Nations Special Rapporteur on Contemporary Forms of Racism has reported this phenomenon “[P]olitical agenda are increasingly focused on protecting the ‘national identity’ ‘defending the national interest’ safeguarding the ‘national heritage’, and combating ‘illegal foreign immigrants’ ... the rhetoric becomes the new political expression of discrimination and xenophobia (fear to other group).”³⁹

However, the religious populism was not only in the side of opposition parties. The 2019 Election surprised Jokowi’s supporters when he declared Ma’ruf Amin, a chairman of Islamic organization and a conservative Islamic leader, as his candidate for Vice-President.⁴⁰ The appointment shows the massive penetration of ‘old regime’ and Islamic conservatism to Jokowi’s circle. Also, Jokowi wanted to glue his political ties to Nahdatul Ulama (NU), the biggest and traditional-modern Muslim organization, and to tackle Communist and Anti-Islam hoaxes and propagandas. It has strengthened the hypothesis that Jokowi’s administration is pragmatic and opportunistic.

Reformasi is history in the hand of Jokowi, when the opposition leader and parties who have strong affinity with religious conservative movement joined Jokowi’s administration. The 2019 Presidential Election was meaningless because both parties eventually joined in the same system of government. This power-concentrated government eradicates opposition and checks and balances mechanism. In this kind political setting, this paper argues that religious populism was a mere tool of oligarchy aiming to bargain its political position to the government. Unfortunately, the government also pragmatically accepted this unholy alliance.

The politics of ‘harmony’ which consolidates the executive with its former foe and religious populism groups creates overly powerful government. As a consequence, the

37 Vedi Hadiz, *Islamic Populism in Indonesia and the Middle East* (Cambridge: Cambridge University Press, 2016).

38 Slavoj Zizek, “Against Populist Temptation”, *Critical Inquiry*, 32.3 (2006): 551-574, 555.

39 The United Nations Special Rapporteur on Contemporary Forms of Racism, *Political Platforms Which Promote or Incite Racial Discrimination*, 8-10.

40 Greg Fealy, Ma’ruf Amin: Jokowi’s Islamic Defender or deadweight? *New Mandala* <<https://www.newmandala.org/maruf-amin-jokowis-islamic-defender-deadweight/>> Accessed 12 December 2018.

legal system, particularly law-making processes then becomes merely 'legalism', in a sense that it can easily be moved and used for non-democratic purposes. This is called autocratic legalism.⁴¹ The fusion between legalism regime and ethnic-religious populism abuse the law for their own political sake. In other words, legitimacy is still rooted in constitutionalism. However, important decisions and policies are collusively arranged through elites, parapolitics of factions and interested groups. This type of government negates to the idea of constitutional government. The government took the power through democratic election which is a liberal instrument, but then exercise illiberal policies.⁴² In this non-democratic setting, it is hardly impossible to force the government to exercise its promises on transitional justice. This essay contemplates transitional justice through a realistic lens.

III. ON TRANSITIONAL JUSTICE: DEMOCRACY AND JUSTICE

The discourse of transitional justice has spread around the globe mostly due to end of totalitarian and authoritarian regimes in several countries. It represents the new era of the nations, in which the citizens demand for 'justice', but not necessarily for 'law'. In a universal observation, 'justice' is philosophically pivotal than 'law' because when a corrupt country collapses, most likely its fundamental law and derivative Acts have also been rotten by manipulative, discriminative and biased provisions.

In post-authoritarian context, the legal-formal mechanisms are mostly fragile and even defect. The legal system itself should be remedied first before it can be functionally enforced. Thus, 'justice' and other substantive principles including democracy need to be well-consolidated before constructing the 'law'. Democracy's level would significantly affect the implementation of transitional justice. Theoretically, according to Dahl, matured democracy must comprise six political institutions: "(1) elected officials; (2) free, fair and scheduled elections; (3) freedom of expression, including criticism of officials, the government, the regime the socio-economic order, and the prevailing ideology; (4) access to alternative sources of information; (5) associational autonomy; (6) inclusive citizenship."⁴³

If these requirements are taken as the touchstones, Indonesia may be considered democracy.⁴⁴ However, those requirements are merely set of procedural rules. Indonesia has exercised direct elections since 2004, nevertheless vote-buying practice and political dynasty which strengthen oligarchy both in local and national context are still exist. Democracy in Indonesia does not practice as a substantive way of living yet. This kind of

41 Kim L Scheppele, "Autocratic Legalism," *The University of Chicago Law Review*, (2018), 85. "Autocratic legalism is when electoral mandates plus constitutional and legal change are used in the service of an illiberal agenda."

42 David Landau, "Abusive Constitutionalism," *UC Davis Law Review*, (2013) 47, 112-123.

43 Robert A Dahl, *On Democracy* (Yale University Press, 1998), 84-91.

44 Paul J. Carnegie, Democratization and Decentralization in Post-Suharto Indonesia: Understanding Transition Dynamics, *Pacific Affairs* 81 (4) 2008, 515-525, 520.

‘minimalist’ or ‘procedural’ democracy has been practiced in Indonesia since 1998, with some weaknesses and refinements, but it does not take Indonesia into a consolidated nation.⁴⁵ This paper elaborates several important aspects of transitional justice under the light of ‘justice’ and institutionalization of democracy.

1. Transitional Justice Through Prosecution

Clearly, ‘justice’ has several meanings, but in the context of transitional justice, material or substantive justice is more relevant than formal justice. This assertion is cored on the debate between positivism and natural law. Conceptually, transitional justice can be understood as following:

“the set of judicial and non-judicial measures implemented by societies to redress legacies of massive human rights abuse.”⁴⁶

“the full range of processes and mechanism associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”⁴⁷

“distinctive conceptions of justice associated with periods of radical political change following past oppressive rule.”⁴⁸

The concepts of ‘past’ and ‘legacy’ on transitional justice are controversial, particularly under legal positivism jurisprudence. It would deliver argument based on legality principle saying that: “acts or conducts may be punished only if they were defined by a law as criminal offences prior the acts or conducts were exercised (*nullum crimen, nulla poena sine praevia lege poenali*).”⁴⁹ This is a prominent and universally accepted positivist’s doctrine.

Nevertheless, practically speaking, legality principle was undermined in the context of human rights violations. The Nuremberg Trials of 1945 had shown progressive yet controversy *ex post facto* judgment. Ex-Nazi and military personnel were convicted on the basis of criminal provisions which the Act were enacted after the conducts had been exercised. Nevertheless, the Federal Court of Justice held:

“A ground of justification assumed at the time of the offence may be disregarded ... if it expresses an obvious gross violation of basic principle

45 Louay Abdalbaki, ‘Democratization in Indonesia: From Transition to Consolidation’, *Asian Journal of Political Science* 16 (2) August 2008, 151-172, 155.

46 Clara Ramirez-Barat and Roger Duthie, *Education and Transitional Justice: Opportunities and Challenges for Peacebuilding* (ICTJ and UNICEF, 2015).

47 Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice, (United Nations, 2010).

48 Ruti G. Teitel, ‘Transitional Justice in a New Era’, *Fordham International Law Journal* 26 (4) 2002, 893.

49 Iulia Crisan, *The Principles of Legality “nullum crimen, nulla poena sine lege” and their roles*, *Effectius* 5 (2010), 1-3.

of justice and humanity, the violation must be so grave that it infringes the legal opinions common to all people and being related to the value and dignity of a man ... the law as false law has to give way to justice.”⁵⁰

Karpen has referred this court’s decision as natural law reasoning, mostly because the sentence “basic principle of justice and humanity” and “the value and dignity of a man” are closely related to ‘material or substantive justice’ and ‘human rights principles’. Nevertheless, positivists may argue what are the parameters of ‘justice’, ‘humanity’ and ‘dignity of a man’?

International law has provided an answer for that, despite the fact the answer is still debatable until recently. The violation of human rights conducted by ex-Nazi and military personnel had disregarded the legality principle because their conducts were considered as a breach of *jus cogens* or the peremptory norms of international law. Vienna Convention on the Law of Treaties states:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁵¹

Despite the fact that the Convention uses the term “a treaty” rather than ‘conducts’ or ‘acts’, it is generally accepted that *jus cogens* should be interpreted broadly. Verdross has elaborated three aspects of *jus cogens*, such as: (1) principles that involve common interest of international community; (2) principles that aim to reach noble principle of humanity; and (3) principles enacted by the United Nations to tackle inhumane practices in international relations.⁵² These aspects rely on ‘double consents principle’ meaning that *jus cogens* should be generally accepted (universality) and has formed as a compelling law. In its concrete forms, *jus cogen* can include several prohibitions of human rights violations: genocide,⁵³ crimes against humanity,⁵⁴ prohibition of war crimes and use of force,⁵⁵ and the right to humane treatment.⁵⁶

Transitional justice which is often manifested through *ex post facto* judgment inspired many ad hoc tribunals and hybrid courts to prosecute gross violation of human

50 Trial of the Major War Criminals before the International Military Tribunal (International Military Tribunal, 1947), 110.

51 Article 53, Vienna Convention on Laws of Treaties (1986)

52 Alfred Verdross, “*Jus Dispositivum* and *Jus Cogens* in International Law”, *American Journal of International Law* 60 (1966), 59.

53 Article 1, Convention on the Prevention and Punishment of the Crime of Genocide.

54 Article 7, Statute of the International Criminal Court.

55 Article 146 and 149, Geneva Convention IV.

56 Article 7, International Covenant on Civil and Political Rights (ICCPR).

rights, including the International Criminal Tribunals for the former Yugoslavia (ICTY), the International Criminal Tribunals for Rwanda (ICTR), Special Court for Sierra Leone (SCSL), Extraordinary Chambers in the Courts of Cambodia (ECCC), and many more hybrid courts. These courts carry on the legacy of Nuremberg to uphold transitional justice through prosecution.⁵⁷

Additionally, the spirit of transitional justice can also be transmitted through judicial activism. The first precedent was in the jurisprudence of the European Court of Human Rights which utilized ‘the wide margin of appreciation doctrine.’⁵⁸ The wide margin of appreciation provides the more flexible interpretation on human rights violations to appreciate public interests and to balance country’s sovereignty and public demand on the cases. The judgments are socially constructive rather than legally-static.

Nevertheless, transitional justice in the strictest term through prosecution faced strong criticism. The criticism argues that post-conflict situation needs more constructive rather than punitive measures.

2. Transitional ‘Constructive’ Justice

Criminal prosecution is not perfect. It is argued that it cannot create a constructive future on its own, because the legal system often looks back ‘for retaliation’, and the system of trials, prosecution and conviction has its limits. Trials mostly focus on a narrow set of violation but fail to address and fulfil victims’ rights and impacted communities, particularly their economic and social rights.⁵⁹ This liberal justice mechanisms are needed for rule of law, but not effectively provide ‘justice’ and reach the cause of conflicts. In transitional justice, liberal justice is not always the endpoint. Liberal justice is ‘justice from above’ and state-led processes. It has sourced from civil-political rights paradigm, because government’s abuse of power and arbitrary conducts is considered as a result of greater interest.⁶⁰ Thus, liberal justice strongly emphasizes on mere formalistic justice measures. Moreover, liberal justice mechanism through criminal courts and trial are prone to political manipulation and instrumentalization of law.⁶¹ This last argument finds its context in ad hoc courts in Indonesia.

To fill the gap on prosecution, transitional justice in its constructive sense comes to offer a more humane and effective settlement. Theoretically, ‘justice’ is a material of

57 Brianne M. Leyh, Nuremberg’s Legacy within Transitional Justice: Prosecutions are here to Stay, *Washington University Global Studies Law Review*, 15 (4) (2016), 559-574, 563.

58 See, Council of Europe, < [https://www.coe.int /t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp](https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp)>.

59 Dustin N. Sharp, Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice, *Fordham International Journal of Law*, 35 (2012), 780.

60 Paul Gready and Simon Robins, “From Transitional Justice to Transformative Justice: A New Agenda for Practice”, *The International Journal of Transitional Justice*, 8 (2014), 339-361, p.341.

61 Leyh, *supra* note 57, 568 (citing M. Cherif Bassiouni, Introduction to International Criminal Law, (2013), 418-419.)

morally driven law.⁶² However, justice as an abstract nature, it should be concreted through actions that could constructively change structural flaws of human kind. In transitional setting, the success story was in South Africa, when a post-apartheid government established a Truth and Reconciliation Commission (TRC) to cope with South African's trauma on the past apartheid government. This settlement mechanism used the paradigm of constructive justice aiming to 'construct' a new, fair and humane social structure in a post-conflict setting.

The aims of TRC were: "... to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation."⁶³ This institution (TRC) was a concrete manifestation of constructive justice which aimed at endorsing to establish reconciliation by banning apartheid's practices and cultures, and addressing inequalities and unjust treatment posed by offenders and victims.⁶⁴ This constructive institution (TRC) invited everyone involved in the conflict to tell the truth, rewards those who repent and made some prospective recommendation to empower the victims and the poor, to support social and economic justice, and to create equal opportunities.⁶⁵ Amnesties are an acceptable feature of this mechanism.

Additionally, telling the truth and admitting false conducts are also supported by a freedom of information. In transitional 'constructive' justice setting, post-authoritarian government must be willing to reveal secret information public knowledge so the truth is conveyed instead of prejudiced. The government should support the historical, political, and legal recording of the past, as a part of national reconciliation. Thus, the citizens enable to undergo a process of re-learning.⁶⁶

The degree of 'success' in transitioning is determined by the country's domestic factors. The Indonesia's *ad hoc* human rights court had failed to prosecute the perpetrators.⁶⁷ The Indonesia's Truth Commission also had been abolished by the Constitutional Court as it may violate the principle of legality. Optimistic tone is in Aceh, where Aceh TRC has survived until recently. The establishment of Aceh TRC was the direct mandate from Helsinki Memorandum of Understanding (MoU) between the Indonesian Government and the Free Aceh Movement. It aims as a peace agreement, reconciliation and reparation mechanism. Nevertheless, there is no perfect practice of

62 Lon L. Fuller, 'Positivism and Fidelity to Law: A reply to Professor Hart', *Harvard Law Review* 71 (4), (1958), 630-672, 631.

63 Law No 34 of 1995 on Promotion of National Unity and Reconciliation (South Africa).

64 Christopher J. Colvin, 'We are still Struggling': Storytelling, Reparations and Reconciliation after the TRC, (Research Report, Centre for The Study of Violence and Reconciliation, 2000),12.

65 *Ibid* 13.

66 *Ibid* 14.

67 Marzuki, *supra* note 9, 81.

transitional justice. The Aceh TCR suffers from institutional constraints and inaccessibility for victims.⁶⁸

Political and legal mechanisms on transitional justice in Indonesia are mostly unsuccessful. The momentum of transitional justice has passed; the ideal timing would be in early years of *reformasi*. The post-authoritarian governments, particularly in B.J. Habibie's administration failed to establish a 'vetting agenda' which aims to dichotomize authoritarian officials from reformists and also to prevent old elites interfering and mingling with the reformed political and legal systems. Moreover, political rotation mechanism (elections) with the old authoritarian system were conducted prior to the amendments of the Constitution, resulting the House of Representative (DPR) was still controlled by some pragmatic politicians.

Old elites have remained untouchable and they have evolved into political oligarchy. The ideal method of transitional democracy demonstrated in some Latin America countries are based on 'vetting agenda' as their conducted the changes of 'rule of the game' (Constitution) prior to the elections, and then excluded old authoritarian officers from the new reformed system of government.⁶⁹ Unfortunately, as previously stated, the current government and political elites have consolidated their power making it almost impossible to demand transitional justice. Considering these drawbacks, this essay contemplates on security reform through human security paradigm.

IV. SECURITY REFORM FOR TRANSITIONAL JUSTICE: HUMAN SECURITY OVER STATE - IS IT POSSIBLE ?

Transitional justice is indeed an idealistic aim which is hardly achieved, particularly in the context of democracy and constitutional retrogression in Indonesia. However, in normative stance, transitional justice should always be discussed and worked relentlessly. This essay argues that almost all rule of law programming has been carried out in attempt to remedy Indonesia's rule of law. The attempts encompass constitutional reform from the first stage to the fourth stage of constitutional amendment (1999-2002), legislative reform by changing election law and exercise direct election, and judicial reform. However, none of these attempts are fully effective to elevate transitional justice.

One of the reasons of this ineffectiveness might lay in state's paradigm on security and order. The post-authoritarian state tends to divorce security and order from human or citizens perspective. As Teitel says that state preserves a minimalist rule of law associated with the preservation of a threshold order in conditions of heightened political violence.⁷⁰ To counter this legalism perspective on security and order, the government's

68 Herlambang W. Wiratraman, Sri L. Wahyuningroem, Manunggal K. Wardaya, Dian P. Simatupang, 'Taking Policy Seriously: What Should the Indonesian Government Do to Strengthen the Aceh Truth and Reconciliation Commission?' *Petita* 5(1), (2020), 14-30.

69 Halmai, *supra* note 10.

70 Teitel, *supra* note 48.

understanding on security and order should not just state-centric,⁷¹ and merely aiming to protect state interest from enemies (the concept of ‘enemies’ can also be made or manipulated by the government itself).

Kofi Annan described this new paradigm as Human Security which “... encompasses human rights, good governance, access to education, and healthcare and ensuring that each individual has opportunities and choices to fulfill his or her own potential. Every step in this regard is also a step towards reducing poverty, achieving economic growth and preventing conflict. Freedom from want, freedom from fear ...these are the interrelated building blocks of human - and therefore national security.”⁷² This paper stands differently with conventional perspective of human security that emphasizes merely on individuals and civil society’s engagement, this essay argues that the government still play important role to impose human-based security to its policies. In other words, human security discourse needs to complement state security perspective. The government, as a duty bearer in human rights principles and should promote the livelihoods and well-being of its people, because security issues are state’s responsibility. In this sense, security reform through human security is a rule of law project, not an *ad hoc* donor-based project.

It is noteworthy that security is inseparable to post-authoritarian and transitional development. The post-authoritarian must endeavor to recreate accountable security system, without discrimination (sensitive to the different security needs of all parts of the population) and with full respect for democratic, rule of law and human rights control.⁷³ In this sense, an accountable security system is prerequisite for sustainable peace and development, as security and development are mutually reinforcing factors. Nevertheless, requirements are easier to say than done. There should be a counterbalance for the government in enforcing this project.

The balance should come from civil society movement through direct and indirect participation and democratic control. In this setting, the government should open its security policies from civil society’s perspectives and aim for inclusion of most vulnerable groups and victims of the past tragedy. Public democratic culture would trigger an ongoing activism for change, because it aims for emancipatory from below, with context specific, participatory, driven by the local and victim centered.⁷⁴ In this regard, there are at least two access on inclusive development for victims, first is access to the truth of past history and second is development through reparations processes. In developing country’s setting, local population more intrigues with economic and social rights because

71 Riccardo Trobbiani, How Should National Security and Human Security Relate to Each Other? (2013) < <https://www.e-ir.info/pdf/36454> >.

72 Definition of Human Security, United Nations Definitions, <https://www.gdrc.org/sustdev/husec/Definitions.pdf>.

73 Gready, *supra* note 60, 347.

74 *Ibid*

it can address the root causes of inequality.⁷⁵ Economic and social rights could provide insights for reparations including both corrective and distributive justice. It looks at violence done and the structure supporting such violence. It also could transform victim's circumstances and identify the injustice.

This rule of law project links to transitional justice. The transitional justice's pivotal aspects: legal accountability, guarantees of non-repetition, reconciliation work and reparations can only be achieved when the security and order issues reformed. However, this security and justice reform needs crucial supporting factors. First, democratic attitude, which is still inherently absent. Indonesia seems to ignore the indivisibility of all rights and lacks of a crucial 'substantive' precondition, which is a public democratic culture.⁷⁶ Ideally, a strong democratic culture can significantly elevate democratization and fasten the democratic transition to proceed steadily. Second is leadership political willingness which is still unsupportive to transitional justice agenda.

V. CONCLUSION

Transitional justice is a process, rather than an outcome. Thus, there is no absolute measurement for its success, as it all depends on country's political context. Indonesia has experienced failures and successes in transition. The truth finding mechanism had been abolished, mainly because of political pressure from the remnants of authoritarian elites in the governments. The remnants yet powerful authoritarian elites have deconsolidated by creating political oligarchy in the current government. Vetting agenda has lost its momentum now. Despite Indonesian post-authoritarian governments have initiated constitutional and institutional reform, judiciary has relatively unchanged. Prosecution attempts failed in *ad hoc* human rights court. This liberal justice only limits activities of corrupt elites, but fail to transform justice into society. A room of improvement could be found in security and justice reform and reparation aspect by capitalizing economics, social and cultural rights of people in general and victims in particular. Both state-centric and human security mechanisms have their own flaws. The government would use both mechanisms based on contexts and needs. This rule of law project is more sustainable and realistic to gradually change the legal system and then demand for transitional justice.

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