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Emergency powers and the rule of law in Indonesia

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Abstract

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Emergency powers and the rule of law in Indonesia

NADIRSYAH HOSEN

I. Introduction

While Indonesia has had experience in dealing with the use of emergency powers for more than fifty years, it has had to face severe problems that have challenged its goals of national resilience, development and, more importantly, the absence of the rule of law. The focus of my chapter is the tensions inherent between emergency powers and the rule of law in Indonesia, particularly in the post-Suharto era.

From 1998 Indonesian politics has progressed to a fully functional democratic system: all political parties can easily participate in general elections for the Parliament and for the office of the President. There is no restriction placed on establishing new political parties. Contrary to previous years, the military, at least ostensibly, is not involved in the political realm. The 2004 General Election in Indonesia was illustrative. The Indonesian people exercised their constitutional rights to rotate elites, to select leaders and to express grievances and desires, in free and fair elections.

Despite Indonesians' willingness to embrace the processes of democracy, as the biggest Muslim country in the world Indonesia has also faced the problems of terrorism, such as in the Bali bomb blasts of 12 October 2002, the attack on the JW Marriott hotel in Jakarta in 2003, and the further one against the Australian embassy in 2004.¹ Indonesians were shocked when they found that foreign tourists had become the targets of terrorism. At the time there was general incredulity that the people

I am grateful to Victor V. Ramraj, Simon Chesterman and Arun K. Thiruvengadam for their insightful comments on an earlier draft.

¹ S. Sherlock, 'The Bali Bombing: What it Means for Indonesia', (2002-3) 4 *Current Issue Brief*, www.aph.gov.au/Library/Pubs/cib/2002-03/03cib04.pdf; D. M. Jones and M. L. Smith, 'The Changing Security Agenda in Southeast Asia: Globalization, New Terror, and the Delusions of Regionalism' (2001) 24 *Studies in Conflict and Terrorism* 271.

unanimously re-elected Suharto to the presidency.⁷ Although the outcome might be similar, the method of election was different.

During his presidency, Suharto employed extensively the 1963 Anti-subversion Law, which had been issued by the previous president, Sukarno, originally as a Presidential Decree in the context of the period of confrontation with Malaysia. This Decree was eventually ratified, and formally incorporated into law in 1969, by the Suharto regime. The Anti-subversion Law is considered as the harshest of the repressive legislation available in the history of Indonesia to silence a government's alleged opponents. This law contained provisions for the death penalty, for arrest and imprisonment for peaceful expression of opinion, detention for up to one year without charge or trial, the imprisonment of witnesses, an absence of the obligation to inform detainees of the charges against them, the denial of legal representation, prohibition of family visits to prisoners, denial of defence lawyers' access to court documents, and the widespread use of torture.⁸

President Suharto and the military held the 1945 Constitution essentially sacred, not least because it granted broad powers and tremendous flexibility to the President and created a weak legislature and judiciary, thereby facilitating the authoritarian project of the military and President. Proposals to amend the Constitution were considered tantamount to treason and all political and social organisations were required to include loyalty to the Constitution in their charters.⁹

Following the economic crisis which hit Indonesia in mid-1997, mass demonstrations and student demands for reform, along with international pressures, were critical in the fall, after thirty-two years, of the Suharto government. Before he stepped down, however, Suharto issued a Presidential Decree which empowered General Wiranto to employ emergency measures. However, Wiranto hesitated to follow the order, since he was aware that by following the order, he would be declaring martial law, and clashes between the security forces and the people would take place. The

⁷ The MPR under the Suharto regime had 1,000 members, which consisted of the 500 members of Parliament and another 500 representatives of different functional groups and of Indonesia's 27 provinces. The appointment of these 500 delegates, together with that of the 100 appointed members of the military faction of Parliament, was in the hands of the President. In practice, Suharto controlled the appointment of 60 per cent of the delegates in the assembly which elected him. But Suharto managed to get 100 per cent support.

⁸ See Amnesty International, 'Indonesia: The Anti-subversion Law: A Briefing', London (1 February 1997); ASA 21/003/1997; see G. Simons, *Indonesia: The Long Oppression* (London: Macmillan, 2000).

⁹ See H. Thoolen (ed.), *Indonesia and the Rule of Law: Twenty Years of 'New Order' Government* (London: Frances Pinter, 1987).

situation would become worse. Therefore he decided not to implement the Decree.¹⁰

Habibie, as Vice-President, replaced Suharto. While his government revoked the Anti-subversion Law, the most controversial issue of Habibie's tenure as President was the status of East Timor. On 26 January 1999, Habibie raised the option of giving the province independence if it refused a special autonomy package. Thus he laid the seeds for the horrific events which broke out there following the 30 August referendum. In his mind, the offer of independence was the most sensible solution to a two-decade-old problem. The territory was both a drain on scarce resources and a foreign-policy millstone.

However, unlike Suharto, who had been a five-star general, Habibie, a civilian president, could not control the military effectively. He then declared martial law in East Timor in an effort to restore peace. Militias in the former Portuguese colony had been on the rampage for three days. The declaration of martial law meant the military had the power to arrest anyone suspected of causing a disturbance.¹¹ However, the declaration of martial law failed. This rule by martial law was then abolished by Habibie, through Presidential Decree No. 112 of 1999 and subsequently Habibie accepted the presence of an international peacekeeping force in East Timor.

General Wiranto proposed to Habibie the draft law concerning state security (*Undang-Undang tentang Keselamatan dan Keamanan Negara*). Afterward, on 6 September 1999, the Parliament changed the title of the law to 'A Law Concerning Emergency Situations' (*Undang-Undang tentang Keadaan Bahaya*).¹² However, the passage of the law ignited the most violent turmoil. Students objected to both the content of the law, which they said would grant sweeping new powers to the military to impose martial law, and the way it was approved, in a hastily arranged vote on the next-to-last day of the parliamentary session. Four people were killed and more than one hundred were injured, leading Habibie to refuse to sign the bill, despite the fact that Parliament had already passed it. To date, the national security law currently operating in Indonesia is the old 1959 law, which was created under Sukarno. Any attempt to issue a law such as the above-mentioned Emergency Situation law would be considered against

¹⁰ A. F. Azhari et al., *Dari Catatan Wiranto Jenderal Purnawirawan Bersaksi di Tengah Badai* (Jakarta: IDE Indonesia, 2003), p. 35.

¹¹ More information can be found in J. Purnawanty, 'Various Perspectives in Understanding the East Timor Crisis' (2000) 14 *Temple International and Comparative Law Journal* 73.

¹² 'Jakarta Delays Security Bill as Riots Rage', *New York Times*, 25 September 1999.

the Suharto government.¹⁸ However, since 1998, Indonesia has amended its Constitution four times. There existed a school of thought that the Amendments would convert Indonesia into a *negara hukum* (literally, a nation of law), which is based on the rule of law, not the law of the ruler. But, is it true that Indonesia now is a *negara hukum*?

A. *Negara hukum in Indonesia*

The term *negara hukum*, or *rechtsstaat*, is used in Indonesia as a practical equivalent of the Western notion of the rule of law. According to Lindsey, the rule of law 'is a highly charged notion that has played a central role in Indonesian political and legal thinking'.¹⁹ However, as Lindsey has correctly pointed out, 'the use of common law traditions of "the rule of law" to understand *negara hukum* is problematic' since no consensus has been reached on the exact meaning of *negara hukum*.²⁰ The literal meaning of *rechtsstaat* was stipulated in the Elucidation of the 1945 Constitution. However the Elucidation did not explain the notion of *rechtsstaat*. It said only that 'Indonesia is a state based on law (*rechtsstaat*), not merely based on power (*machtstaat*).'. In other words, the spirit of the 1945 Constitution is that Indonesia is based on right rather than might. The constitutional amendments in 1999–2002, however, abolished the Elucidation, and did not make any attempt to define the concept of *negara hukum*.

The debate over the meaning of *negara hukum* in Indonesian legal history is reflected in the writings of (to name but a few):²¹ Sunaryati Hartono, who interpreted *negara hukum* in the light of the rule of law;²² Oemar Seno Adji, who opined that *negara hukum* has its own Indonesian characteristics, based on the family principle;²³ Padmo Wahyono, who

¹⁸ T. M. Lubis, 'The *Rechtsstaat* and Human Rights', in T. Lindsey (ed.), *Indonesia: Law and Society* (Sydney: Federation Press, 1999), p. 172.

¹⁹ T. Lindsey, 'From Rule of Law to Law of the Rulers – to Reformation?', in Lindsey (ed.), *Indonesia: Law and Society*, p. 13.

²⁰ T. Lindsey, 'Indonesia: Devaluing Asian Values, Rewriting Rule of Law', in R. Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S.* (London: RoutledgeCurzon, 2004), p. 299.

²¹ Other views can be read in H. Feith and L. Castles (eds.), *Indonesian Political Thinking (1945–1965)* (Ithaca: Cornell University Press, 1970) and D. S. Lev, *Legal Evolution and Political Authority in Indonesia: Selected Essays* (Boston: Kluwer Law International, 2000).

²² S. Hartono, *Apakah Rule of Law Itu?* (Bandung: Alumni, 1982), chap. 5.

²³ O. S. Adji, *Peradilan Bebas negara hukum* (Jakarta: Erlangga, 1980), pp. 24–58; and O. S. Adji, 'An Indonesian Perspective on the American Constitutional Influence', in L. W. Beer (ed.), *Constitutionalism in Asia: Asian Views of the American Influence* (Berkeley: University of California Press, 1979), pp. 102–10. His view is supported by T. Azhary, *negara hukum* (Jakarta: Bulan Bintang, 1992), p. 99.

related the concept of *negara hukum* to the political philosophy of organic statism (integralism or *integralistik*);²⁴ Ismail Suny, who adhered to the literal meaning of *negara hukum* as *rechtsstaat*;²⁵ and Hartono Mardjono, who took the view that the elements of *negara hukum* are the supremacy of the law, equality before the law and the due process of law.²⁶ This debate reflects a similar controversy in German legal theory over the concept of *rechtsstaat* in the early nineteenth century. Some have tried to distinguish the rule of law from *rechtsstaat* by stressing that the former is a theoretical ideal while the latter is concerned with actual obedience to the law.²⁷ However, the concept of *rechtsstaat* has evolved over time in Europe to incorporate democracy and fundamental human rights.

Recent debates in Asia juxtapose competing 'thin' and 'thick' versions of the rule of law. The 'thin' version focuses on the formal or procedural aspects 'that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or a non-democratic society, capitalist, liberal or theocratic'.²⁸ The civil law *rechtsstaat* is often described, by Peerenboom²⁹ and Lindsey³⁰ for example, as a 'thin' version of the rule of law. A more apt label for this version might be 'rule by law', for it entails no connotation of legal limitations. The idea of rule by law is that law is a means by which the state operates in the conduct of its affairs; 'that whatever a government does, it should do through laws'.³¹ Another theoretical version of the rule of law is the 'thick' (substantive) concept.³² It consists of the basic elements of the formal rule of law, and then goes further by adding content requirements in various combinations of 'particular economic arrangements... forms

²⁴ P. Wahyono, *Guru Pinandita: Sumbangsih untuk Prof. Djokosoetono, SH* (Jakarta: Lembaga Penerbit Fakultas Ekonomi Universitas Indonesia, 1984).

²⁵ I. Suny, *Mekanisme Demokrasi Pancasila* (Jakarta: Aksara Baru, 1978), pp. 10–12.

²⁶ H. Mardjono, *negara hukum yang Demokratis* (Jakarta: Yayasan Koridor Pengabdian, 2001), p. 139.

²⁷ See R. Grote, 'Rule of Law, *Rechtsstaat* and *Etat de Droit*', in C. Starck (ed.), *Constitutionalism, Universalism and Democracy – A Comparative Analysis* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), p. 270; R. Peerenboom, 'Varieties of Rule of Law' in Peerenboom (ed.), *Asian Discourses*, p. 2.

²⁸ Peerenboom, 'Varieties of Rule of Law', p. 2. ²⁹ *Ibid.*, *passim*.

³⁰ T. Lindsey, 'Legal Infrastructure and Governance Reform in Post-Crisis Asia: The Case of Indonesia' (2004) 18 *Asian Pacific Economic Literature* 1 at 17.

³¹ N. B. Reynolds, 'Grounding the Rule of Law' (1989) 2 *Ratio Juris* 1 at 3.

³² Whilst Peerenboom has classified the rule of law into the 'thick' and the 'thin', Paul Craig has used the terms 'formal' and 'substantive'. See P. Craig, 'Formal and Substantive Conceptions of the Rule of Law' (1997) *Public Law* 467.

of government... or conceptions of human rights'.³³ That is what makes this conception of the rule of law 'thicker' than the formal version.

Although the concepts of *negara hukum*, *rechtsstaat*, and the rule of law have different meanings,³⁴ I take the position that they share the common view that the government and the State apparatus should be subject to the law, that areas of discretionary power should be defined and limited, and that citizens should be able to turn to the courts to defend themselves against the State and its officials.³⁵ The rule of law entails equal protection of the human rights of individuals and groups, as well as equal punishment under the law. It protects citizens against arbitrary state action. It ensures that all citizens are treated equally and are subject to the law rather than to the whims of the powerful. The law should also afford vulnerable groups protection against exploitation and abuse. In this context, it is important to highlight that the rule of law should be recognised as an essential element of constitutional government in general, and of representative democracy in particular.³⁶

B. Implementing the rule of law: economic and political pressures

Debates over the meaning of *negara hukum* and the rule of law will continue, but all Indonesian jurists agree that Indonesia needs law reform as a basis for becoming a *negara hukum*.³⁷ However, history has shown that such an ideal is not easy to achieve. Both the Sukarno (1945–66) and the Suharto (1966–98) governments used the notion of *negara hukum* in their rhetoric. Neither government created appropriate institutions and frameworks, nor did they establish basic infrastructure. Legal frameworks are necessary for creating a predictable and secure living and working environment for ordinary citizens, and for entrepreneurs and investors. Those legal frameworks have long been absent in Indonesia.

³³ Peerenboom, 'Varieties of Rule of Law', p. 4.

³⁴ See Lindsey, 'From Rule of Law to Law of the Rulers – to Reformation?', p. 13; See also G. Dietze, *Two Concepts of the Rule of Law* (Indianapolis: Liberty Fund, 1973).

³⁵ Stern distinguishes the following elements of the *rechtsstaat* principles: the constitutional state, liberty and equality, the separation and control of government authority, legality, judicial protection, a system of reparation and the prohibition of the excessive use of government authority. See F. Venter, *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (Cape Town: Juta & Co., 2000), p. 49.

³⁶ J. N. Shklar, 'Political Theory and the Rule of Law', in A. C. Hutchinson and P. Monahan (eds.), *The Rule of Law: Ideal or Ideology* (Vancouver: Carswell, 1987), p. 14.

³⁷ In the remainder of this chapter, I use both terms (*negara hukum* and the rule of law) interchangeably.

In the Suharto era, Indonesia was a complex web of corrupt deals and political pay-offs. Suharto's New Order government focused mainly on economic development, in order to provide steadily improving standards of living for Indonesians. However, the economic performance was built on debt. It was not from a convergence of expectations based on commonly understood and enforced legal rules, but from a system of hierarchical relationships: unlimited state power, control and authority, in which orders flowed down from the 'top' with little input from the 'bottom'. This is one explanation as to why Indonesia, under Suharto, was quite successful in economic development terms, even though there was little regard for the state of its laws and legal system.³⁸ Both political and legal systems were engineered to support the development strategy of the nation, but this also explains why Indonesia was so fragile when it was hit by the economic and political crises. Unlike other Asian countries, and without the support of the rule of law, Indonesia faced chaos and riots.

What went wrong with Indonesia's choice of development rather than the rule of law? It was an economic crisis, not an economic achievement, which launched Indonesia into its transition. In other words, the Suharto legacy suggests that legal flaws were an important element of the economic and political crisis which hit Indonesia during 1997–8, and therefore legal reform is considered essential for a stable future.

The transition which took place immediately after the resignation of Suharto begins with the assumption that law reform is an inherently political process, i.e. one that is explicitly rooted in the give-and-take of mundane conflicts over the distribution of power. Apart from an economic crisis, it was politics which opened the window for the law reform movement to develop. Law reform is not only political, but also a struggle between the status quo and change for the better. As Gary Goodpaster observes, '[s]imply put, Indonesia will find that it cannot manage and function effectively in the global economy, nor continue strong economic growth, without the rule of law and widespread rule-based behaviour'.³⁹ A lesson to be learned from the Suharto era, then, is that the centralisation of power in the hands of Suharto damaged the idea of the rule of law. Suharto's intervention in the military, the courts, political parties and

³⁸ M. McGillivray and O. Morrissey, 'Economic and Financial Meltdown in Indonesia: Prospects for Sustained and Equitable Economic and Social Recovery', in A. Budiman, B. Hatley and D. Kingsbury (eds.), *Reformasi: Crisis and Change in Indonesia* (Clayton: Monash Asia Institute, 1999).

³⁹ G. Goodpaster, 'The Rule of Law, Economic Development and Indonesia', in Lindsey (ed.), *Indonesia: Law and Society*, p. 24.

Parliament was against the concept of the rule of law. Suharto's power was reflected in the corrupt behaviour of many military officers, much of government apparatus and judges. There was neither transparency nor a system of checks and balances.

After Suharto's resignation, Indonesia had to deal with economic, political and legal crises. Accordingly, during the economic, political and legal crisis, Indonesia adopted the neo-liberal adjustment policies imposed by the International Monetary Fund. Despite the fact that not all aspects of the reform agenda pursued in the post-Suharto era were driven by the IMF, it was clear that this drive led the Indonesian government to revisit the connection between the rule of law and economic development. It is in this context that the idea of a 'thick' version of the rule of law was proposed. For instance, during the Habibie period (May 1998 to October 1999), the Indonesian government was required to sign no less than sixteen Letters of Intent to the International Monetary Fund, indicating its agreement to act in accordance with several reform programmes.⁴⁰ Some of the agreements required the cancellation of huge industrial projects and trading cartels at the heart of the Suharto regime. Moreover, the two crucial IMF demands were those relating to the recapitalisation of Indonesia's banks and the decentralisation of administrative authority (*otonomi daerah*). In these areas, the IFIs (international financial institutions) played a very active role in 'helping' the Indonesian government to draft the required bills.

The basic assumption of the 'thick' version of the rule of law can be traced back to the new law and development movement, now frequently couched in terms of the rule of law and good governance. In the 1990s, the World Bank and the International Monetary Fund required loan and aid recipients in the developing world to adopt Western-style commercial law as a *condition* of receiving help.⁴¹ This emphasis on Western-style

⁴⁰ See the official documents of Indonesia and the IMF at www.imf.org/external/country/idn/index.htm?pn=9.

⁴¹ In October 1999, Kaufmann, Kraay and Zoido-Lobaton provided 'new empirical evidence of a strong causal relationship from better governance to better development outcomes such as higher per capita incomes, lower infant mortality, and higher literacy'. They claim that their analysis is based on more than 300 governance indicators compiled from a combination of sources. See D. Kaufmann, A. Kraay and P. Zoido-Lobaton, 'Governance Matters', World Bank Policy Research Working Paper 2196, October 1999, <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/govmatrs.pdf>. The data and methodology used to construct the indicators are described in 'Governance Matters III: Governance Indicators for 1996–2002', World Bank Policy Research Working Paper 3106, 25 July 2003, www.worldbank.org/wbi/governance/govdata2002/.

commercial law contains assumptions about the importance of establishing the rule of law in developing countries, in the light of the pressures exerted by global economic and capital markets.

In this sense, one of the criticisms which have been advanced relates to the use of legal transplants.⁴² The IFIs often suggest importing foreign legislative schemes or institutional models to developing countries. Critics assert that one of the most significant reasons for the failure of IFI programmes is the naive belief that the Western legal system, particularly the American model, can easily be transplanted to recipient countries.⁴³ Gunther Teubner has examined the difficulty of legal transplants, preferring to describe a foreign legal element as an 'irritant' rather than a transplant. According to Teubner, the transfer of a legal concept from one system to another will have unpredictable effects, because structural coupling will change.

When a foreign rule is imposed on a domestic culture... it is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events... 'Legal irritations' cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.⁴⁴

There is little agreement among scholars on transplant feasibility and the conditions for successful transplants, or even how to define 'success'.⁴⁵ Those who oppose legal transplants generally point out that it is a form of colonial imposition and, as such, contrary to the principles of democratic governance. It interferes substantially with the sovereignty of the

⁴² Some problems of legal transplants in the context of East Asian states can be seen in A. H. Y. Chen, 'Emergency Powers, Constitutionalism and Legal Transplants: The East Asian Experience' (Chapter 3), this volume.

⁴³ See J. R. Thome, 'Comment on McAuslan's "Law, Governance and the Development of the Market: Practical Problems and Possible Solutions"', in J. Faundez, *Good Governance and Law: Legal and Institutional Reform in Developing Countries* (New York: St Martin's Press, 1997).

⁴⁴ G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 12.

⁴⁵ See A. Watson, *Legal Transplants* (Edinburgh: Scottish Academic Press, 1974); O. Kahn-Freund, 'On Use and Misuse of Comparative Law' (1974) 37 *Modern Law Review* 1; W. Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 *American Journal of Comparative Law* 489.

recipient country and clashes with the concept of local ownership of the reform process, as the process does not originate in a home-grown product, but is externally imposed. From this perspective, the rule of law promoted by IFIs is seen as a form of economic, legal, cultural and political hegemony.⁴⁶

Another significant criticism is that the donor community is imposing neo-liberal models of governance on the developing world. Ohnesorge labels the model as 'the neoliberal rule of law of the 1990s'.⁴⁷ It is often seen as synonymous with the phrase 'Washington Consensus', coined by Williamson in 1990,⁴⁸ which focuses on privatisation, deregulation, trade liberalisation, and so on. The phrase 'Washington Consensus' has become a lightning rod for dissatisfaction among anti-globalisation protesters, developing-country politicians and officials, trade negotiators, and numerous others.

The critics also claim that most of the reforms that President Habibie made as the successor of Suharto were driven not by government commitment to change, but rather by the pressure of the IMF or 'IMF conditionalities'.⁴⁹ It appears that President Habibie's interest in legal reform was geared primarily toward meeting the minimum requirements for the continuation of international financial assistance, including a US\$ 43 billion IMF financial assistance package, tied to an economic reform programme. The World Bank, and over thirty countries comprising the Consultative Group on Indonesia, pledged another \$7.9 billion in aid to Indonesia. For instance, the Habibie government received technical assistance from donors in preparing for the June 1999 general election and in the voting process concerning the East Timorese conflict.⁵⁰

⁴⁶ See B. M. Hager, 'The Rule of Law: Defining It and Defending It in the Asian Context', in *The Rule of Law: Perspectives from Pacific Rim* (Mansfield Centre for Pacific Affairs, 2000), www.mcpa.org/programs/program/pdfs/03chap1.pdf. It should be noted, however, that Hager's article defends the notion of rule of law.

⁴⁷ J. K. M. Ohnesorge, 'The Rule of Law, Economic Development, and the Developmental States of Northeast Asia', in C. Antons (ed.), *Law and Development in East and Southeast Asia* (London: RoutledgeCurzon, 2003), pp. 91–127.

⁴⁸ See J. Williamson, 'What Should the World Bank Think about the Washington Consensus?' (2000) 15 *World Bank Research Observer* 251.

⁴⁹ See T. Lindsey, 'Introduction', in D. Duncan and T. Lindsey (eds.), *Indonesia after Suharto: Reformasi and Reaction*, International Colloquium Proceedings (Victoria, BC: Centre for Asia-Pacific Initiatives, 1999), p. 1.

⁵⁰ See A. M. Clear, 'Democracy and Donors in Indonesia', unpublished PhD thesis, Columbia University (2002).

C. Toward rule of law in Indonesia

Despite the criticisms above, it is worth noting that, after assuming office, President Habibie began the release of political prisoners.⁵¹ In total, during its sixteen months in office, President Habibie's government released 213 political prisoners.⁵² In order to deal with the protection of human rights, President Habibie issued Presidential Decree No. 129 of 1998, on the National Human Rights Plan. The Decree states that Indonesia, as a member of the international community, holds in high esteem the Universal Declaration of Human Rights and the 1993 Vienna Human Rights Declaration and Programme of Action. On 23 September 1999, a month before the presidential election, President Habibie signed Law No. 39 of 1999 on Human Rights. This law implemented MPR Decree XVII on Human Rights, which had been adopted by the MPR at its session in November 1998. Law No. 39 of 1999 sets out a long list of internationally recognised human rights which Indonesia is obliged to protect.

Significant reforms were also undertaken in the area of press freedom. Habibie signed Law No. 40 of 1999 on the Press. This law is broadly acceptable to the media in Indonesia and forms the basis for meaningful legal protection for the Press for the first time in Indonesia's history. The stampede into publishing began as soon as Suharto stepped down. In the year following his resignation, the government granted 718 new press licences, quite a leap from the 289 issued in the fifty-three years since the country's independence. The proof is on the streets, as broadsheet newspapers compete for public attention with saucy entertainment magazines, racy tabloids and a host of full-colour magazines.

In addition, in April 1999, the Anti-subversion Law, which had carried a maximum penalty of death and made it a crime to engage in acts which could distort, undermine or cause deviation from the state ideology, or the broad outlines of state policy, or which could disseminate feelings of hostility, or arouse hostility, or cause disturbances or anxiety amongst the population, was repealed by the Parliament.⁵³ The excessive vagueness of this law made it possible to prosecute

⁵¹ See Presidential Decree Nos. 80, 81, 82, 105, 123, 124 and 125 of 1998.

⁵² US Department of State, 'Indonesia Country Report on Human Rights Practices for 1998', 26 February 1999, www.state.gov/www/global/human_rights/1998_hrp_report/indonesi.html.

⁵³ See Asian Human Rights Commission, 'Indonesia: Plea to Repeal Anti-subversion Law', www.hrsolidarity.net/mainfile.php/1998vol08no06/1486/.

persons merely for peaceful expression of views contrary to those of the government.⁵⁴

Another significant step in Indonesian law reform is the reform of the 1945 Constitution. When Suharto was in power, he did not permit any attempt to propose amendments to the 1945 Constitution since this Constitution gave him greater authority than the legislative and judicial bodies. However, since the end of his presidency in 1998, Indonesia has amended the Constitution four times (1999–2002).⁵⁵ This achievement is notable for a number of reasons. First, it has broken 'the sacred statement' of former President Suharto that people must not change their Constitution. Second, constitutional reform is a critical aspect of Indonesia's transition, for the original form of the 1945 Constitution was an inadequate foundation for democracy. Third, the amendments have altered the basis of the political structure. For instance, the First Amendment limits presidential tenure to two terms.⁵⁶ There is a new Chapter comprising ten Articles regarding human rights.⁵⁷ The structure and the power of three bodies (executive, legislative and judiciary) are reformed.⁵⁸ In fact, thirty-one articles (84 per cent) have been amended or modified and only six articles (16 per cent) have not been changed.

Despite some significant achievements, noted above, all the governments in the post-Suharto era have been unable to punish perpetrators of human rights abuses involving top military officers, and to bring Suharto to justice, as demanded by the reform movement. The changing of the Press paradigm has not led to professionalism in the Press. Corruption is still a common practice. What we see today is the product of the overcrowded

⁵⁴ Indonesia's National Human Rights Commission (Komnas HAM) commented on the anti-subversion law, 'The Anti-subversion Law can be used to punish people whose ideas are different from those of the government. It allows prosecutors and judges to act as if they can read the accused's mind.' See *Jakarta Post*, 9 April 1996.

⁵⁵ See N. Hosen, *Shari'a and Constitutional Reform in Indonesia* (Singapore: ISEAS, 2007); G. F. Bell, 'Obstacles to Reform: The 1945 Constitution' (2001) 3(6) *Van Zorge Report on Indonesia – Commentary and Analysis on Indonesian Politics and Economics*, 7. See also T. M. Lubis, 'Constitutional Reforms', in Hadi Susatro (et al.), *Governance in Indonesia: Challenges Facing the Megawati Presidency* (Singapore: ISEAS, 2003); T. Lindsey, 'Indonesian Constitutional Reform: Muddling Towards Democracy' (2002) 6 *Singapore Journal of International and Comparative Law* 244; B. A. King, 'Empowering the Presidency: Interests and Perceptions in Indonesia's Constitutional Reforms, 1999–2002', unpublished PhD thesis, Ohio State University (2004).

⁵⁶ See Article 7 of the First Amendment of the 1945 Constitution: 'The President and the Vice-President hold their office term for five years, and afterwards, can be re-elected for the same position, for only one office term.'

⁵⁷ See Chapter XA, Articles 28A–28J of the Second Amendment of the 1945 Constitution.

⁵⁸ See the Third and Fourth Amendments of the 1945 Constitution.

reform agenda, hurried through in a very short time. For instance, the draft bill on the Press was discussed for only thirteen working days. On the other hand, every time Indonesia has a new government and Parliament as a result of a general election, it always proposes and then issues a new electoral law.⁵⁹ This shows not only that Indonesia is still in the process of finding the right direction, but also that Indonesian elites are in a battle to gain benefit from the new electoral laws. These problems have occurred mainly because of huge problems left by the Suharto government, and the fact that all parties, such as students, new political parties and non-governmental organisations (NGOs), including the IMF, World Bank and other international donors, required the government to reform the economic, political and legal systems *simultaneously*.

Suharto made himself the fulcrum between civilians and soldiers, Christians and Muslims, indigenous Indonesians and ethnic Chinese. He was the only effective institution for thirty-two years. When he fell from power, the balance was shattered. Its components, including the reform group, were left to battle each other. This means that the 1998 reform movement did not sweep aside the political forces nurtured by the New Order government. In such circumstances, through the networks, power, money and political machinery they had developed in the past, they could take advantage of the opening-up of political space. This partly explains why the Golkar party and the military still play a significant role in the post-Suharto era.⁶⁰ In Lindsey's words, 'the compromises inherent in the political process... are often the only way effective reform can be achieved from a *realpolitik* perspective'.⁶¹

So far I have examined the shifting focus of the discourse on the rule of law in Indonesia. Under Suharto the focus was on economic development with little attention to the rule of law, whereas in the post-Suharto era the focus was more on a 'thick' version of the rule of law (formal rule of law plus human rights protection and economic development). I have also mentioned several problems faced by the reform movement: corruption, human rights protection, lack of effective institutions, political battles between old and new forces, and so on. It is time to move to the period after the 2002 Bali bombing, wherein Indonesia faces a dilemma between maintaining the rule of law and maintaining its national security. One thing never changes: Indonesia is under pressure from the political and

⁵⁹ Electoral laws in the post-Suharto era: Law No. 10 of 2008, Law No. 12 of 2003 and Law No. 3 of 1999.

⁶⁰ Tan, Chapter 6. ⁶¹ Lindsey, 'Legal Infrastructure and Governance Reform', at 36.

economic power of foreign governments. Ignoring such pressure would be impossible, given the importance of Indonesia's strategic location, its size and also the significant fact that it is the world's most populous Muslim country, which is still in search of a path to constitutionalism.

IV. Post 9/11 and Indonesia's dilemma

Post-9/11 concerns over terrorism have brought attention to the rule of law as a means to hold terrorists accountable and to legitimise their capture and punishment, often through the promulgation of national defence and anti-terrorist laws. The question then is the extent to which the 'thick' rule of law in Indonesia has to support this 'war on terror'? First, before assessing whether the anti-terrorism and emergency powers regime is compatible with a 'thick' concept of the rule of law, I need to examine the international and domestic pressure to facilitate the use of emergency powers. Second, I answer the main question posed in this chapter by specifically focusing on the use of the Perpu as a legal instrument to deal with emergency situations. As has been shown earlier, the Indonesian government has used this instrument extensively. In the context of constitutionalism and the rule of law, I argue that the use of the Perpu is problematic. Finally, I examine several cases in order to illustrate my point that the anti-terrorism and emergency powers regime has in fact undermined Indonesia's attempt to uphold the rule of law in the post-Suharto era. More importantly, Indonesia *would step back* from a 'thick' version of the rule of law discussed above to what I call a 'stick' version of the rule of law – a combination of formal and substantive elements of the rule of law, and when necessary the use of the stick – any means at all to protect national security.

A. Under pressure

While Indonesia is clearly in need of US and Australian assistance in terms of military and economic support, Western governments also need Indonesia's full support in the 'war on terror'. The potential and centrality of Indonesia has long been noted: 'the outcome of how Indonesia deals with the future will almost certainly have a ripple effect in other, smaller countries in the region facing similar economic and political situations'.⁶² Given its size and importance, including its strategic location, Indonesia is critical to stability in Southeast Asia.

⁶² D. M. Snow, *Cases in International Relations: Portraits of the Future* (New York: Longman, 2003), p. 157.

While Singapore and Malaysia still use their Internal Security Acts (ISA) to deal with terrorists, prior to the Bali bombing in 2002, Indonesia no longer had an Anti-subversion Law. Reinstating draconian laws like the Anti-subversion Law would not be an option since the Indonesian people would reject it, whereas using the ordinary penal code would not impress the US and Australian governments, who had constantly been asking Indonesia to issue an anti-terrorism law, even before the Bali bombing occurred. The Bush administration's framing of Southeast Asia as the second front in the 'war on terror'⁶³ led the Asian region to revisit the discourse on the rule of law – this time in the context of emergency powers. It seems that after 9/11 the focus has no longer been on either the 'thin' or the 'thick' concept of the rule of law, but rather on the limits of legality, particularly as the concept of 'emergency' is becoming very powerful.

The Asian financial crisis of 1997–8 and the increase in terrorism across the region are separated, but highly connected, in explaining the designation of Southeast Asia as the second front. With the Taliban in Afghanistan having apparently been routed, Southeast Asia – home to radical Islamist groups such as the Jemaah Islamiah (JI), Abu Sayyaf and the Kumpulan Mujahideen Malaysia (KMM) – was starting to seem like the new home base for the terrorist movement that had brought down the World Trade Center. Across Southeast Asia there are thousands of remote islands and expanses of jungle ideal for extremist groups to hide and train.⁶⁴ Co-operation among Singapore, Malaysia, the Philippines and the United States has led to the arrests of dozens of suspected JI members, including several top leaders. In August 2002, the United States and all ten members of ASEAN signed an agreement to co-operate in counter-terrorism activities.⁶⁵ It seems that the intent of these agreements was to block terrorist financing, enhance intelligence exchange and improve border controls.⁶⁶ Another sign of increased attention given to terrorism occurred in July 2003, when the Southeast Asia Regional Centre for Counter-Terrorism opened in Kuala Lumpur. The centre houses researchers and hosts training sessions for regional officials.

⁶³ A. Acharya and A. Acharya, 'The Myth of the Second Front: Localizing the "War on Terror" in Southeast Asia' (2007) 30 *The Washington Quarterly* 75.

⁶⁴ C. S. Bond, 'Indonesia and the Changing Front in the War on Terrorism', Heritage Foundation, www.heritage.org/Research/AsiaandthePacific/hl875.cfm

⁶⁵ B. Pereira, 'ASEAN Countries Benefit from Anti-Terror Pact', *Strait Times*, 3 August 2002; see also Declaration on Terrorism by the 8th ASEAN Summit, www.aseansec.org/13154.htm.

⁶⁶ K. W. Chin, 'Southeast Asia in 2002: From Bali to Iraq – Co-operating for Security', in D. Singh and Chin Kin Wah (eds.), *Southeast Asian Affairs 2003* (Singapore: ISEAS, 2003), pp. 3–23.

However, it is important to note that the 1997 economic crisis in South-east Asia generated grievances among groups that development has left behind. In both Indonesia and Malaysia, which have Muslim majorities, as well as in Singapore, the southern Philippines and southern Thailand where there are sizeable Muslim minorities, these grievances have combined to produce Islamist movements.⁶⁷ Although poverty alone cannot explain the existence of transnational terrorist networks such as the JI, poverty and inequality have contributed to popular discontent and thus encouraged support for such groups as Laskar Jihad and Abu Sayyaf. Long-standing economic grievances have also created support for secessionist groups in southern Thailand, Indonesia and the Philippines. At their January 2007 summit, ASEAN leaders reiterated their concern over 'the grave danger posed by terrorism to innocent lives, infrastructure and the environment, regional and international peace and stability, as well as to economic development'.⁶⁸

In the context of Indonesia, the wider pattern of human insecurity derives not just from high-profile acts of horror such as the Bali bombing.⁶⁹ Day-to-day economic insecurity, communal violence, sporadic riots and violence, unresolved conflict in Papua, plus unfinished democratic and decentralisation transitions, are in fact greater dangers to national and regional development. The combination of economic crises from 1997, governmental transition reform since 1998 and the 'war on terror' from 2001 generated a renewed sense of crisis through 2002–3 which has begun to wane only slowly through 2003–9. However, in the wider context, this challenge remains. With some 50 million Indonesians living in dire poverty, the potential for growing radicalism and terrorism is very real in Indonesia. From this perspective, it can be stated safely that terrorist groups have used Indonesia's fragile political and economic transition to attack the Indonesian government and 'Western' interests.

The Megawati government was aware of the delicate balance between its position in the international community and domestic reactions to it. When Megawati announced support for the US 'war on terror', the United States pledged financial aid in return for that support. However, this was met with scepticism in Indonesia in radical Islamic circles and the

⁶⁷ A. Collins, *Security and Southeast Asia: Domestic, Regional and Global Issues* (Singapore: ISEAS, 2003).

⁶⁸ 'ASEAN Convention on Counter Terrorism', 31 January 2007, www.aseansec.org/19250.htm.

⁶⁹ A. Azra, 'Contemporary Islamic Militant Movements: Challenges to Democracy in Indonesia', paper presented at the International Conference on *The Future of Islam, Democracy, and Authoritarianism in the Muslim World*, International Centre for Islam and Pluralism, Jakarta, 6–7 December 2004.

public was angered, resulting in mass demonstrations against the USA in several cities. As the protests intensified, Megawati bowed to pressure and revised her position to issue criticisms of the US-led military campaign in Afghanistan.⁷⁰

B. Emergency response

Without it being known by the Indonesian public, the Indonesian government drafted the Anti-terrorism Law in April 2002 in response to the events of 11 September 2001. However, the Bali bombing on 12 October 2002 forced President Megawati, six days after the attack, to issue Perpu No. 1/2002 and Perpu No. 2/2002. This was because of US allegations that Indonesia was one of the most important headquarters of terrorist organisations, especially that of Jemaah Islamiah, an affiliate of al Qaeda. The Australian government was also not happy with the Bali bombing, with the killing of 202 people and injury to a further 209, most of whom were Australian. Both US and Australian governments asked the Megawati government to take the problems of terrorism seriously, and to provide the necessary legal framework to deal with the attack. It was clear then that the Indonesian government treated the attack as an emergency matter and therefore took over the debate within Parliament on the Anti-terrorism Bill.

According to the Constitution, a Perpu must obtain the approval of Parliament during its next session. The Indonesian parliament approved the two Perpu on terrorism. Perpu No. 1 was adopted by the DPR through Law No. 15 of 2003 on 4 April 2003, whereas Perpu No. 2 of 2002 was adopted in the form of Law No. 16 of 2003. Perpu No. 2 of 2002 (or Law No. 16 of 2003) merely states that Perpu No. 1 of 2002 can be used retrospectively with respect to the Bali bombings. The two anti-terrorism laws were used as the basis for the arrest, prosecution and conviction of twenty-five of the now infamous Bali bombers. Given that the laws were enacted only after the bombings had occurred, the suspects were tried and punished for a crime which, according to law, was not strictly a crime at the time it was committed.⁷¹

Masykur Kadir was found guilty under Article 13(a) of Law No. 15 of 2003 of assisting the Bali bombers. Lawyers for Kadir claimed that he had

⁷⁰ See R. Sukma, 'Indonesia and 9–11: Reactions and Implications', in Han Sung-Joo (ed.), *Coping With 9–11: Asian Perspectives on Global and Regional Order* (Tokyo: JCIE, 2003).

⁷¹ See H. Juwana, 'Indonesia's Anti-Terrorism Law', in V. V. Ramraj, M. Hor and K. Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), pp. 295–306 at p. 304.

been investigated, charged, prosecuted and convicted under an unconstitutional law (Law No. 16 of 2003). They argued that Article 28I(1) of the Indonesian Constitution provides citizens with a right not to be prosecuted under retrospective laws. The Constitutional Court agreed, exercising its powers of constitutional review to declare Law No. 16 of 2003 to be invalid.⁷² The decision of the Indonesian court was reached by a majority of five justices to four. The decision demonstrates the potential dilemma faced by the court. On the one hand, the majority displayed their commitment to upholding the Constitution,⁷³ but on the other they were criticised for providing an unjust outcome, particularly for victims of the bombings and their families, both Indonesian and Australian.

The dilemma continues: should all the convicted Bali bombers use the Constitutional Court's decision and the constitutional invalidity of the law as a basis for an appeal? Butt and Hansell report:

Apparently fearing that the convictions would be lost, Justice Minister Yusril Ihza Mahendra and Constitutional Court Chief Justice Professor Dr Jimly Asshiddiqie announced their own interpretation of the decision to the press. They claimed that the bombers would remain in jail because the Constitutional Court's decision itself could not operate retrospectively. In other words, the decision, whilst binding, only prevents future investigations, prosecutions and convictions being carried out retrospectively. It would not, therefore, impact upon convictions that have already been obtained. This statement, particularly from Asshiddiqie, constitutes an inappropriate politicisation of the court. That Asshiddiqie's statement and that of the Justice Minister were announced at around the same time, and conveyed the same view, gives the impression that Asshiddiqie may have collaborated with the government, even though he might not actually have done so.⁷⁴

Specifically, the dilemma is this. Do we want to keep the terrorists in jail, although they were convicted under an unconstitutional anti-terrorism

⁷² S. Butt and D. Hansell, 'The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013' (2004) 6 *Australian Journal of Asian Law* 176.

⁷³ Under international law an exception is sometimes allowed to permit trial or punishment for any act (or omission) which, at the time it was committed, was criminal according to the general principles of law recognised by civilised countries. This expression is drawn directly from the statute of the International Court of Justice. However, the Indonesian Constitution states in Article 28I: 'The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.'

⁷⁴ Butt and Hansell, 'The Masykur Abdul Kadir Case', at 181.

law, which is basically against the principles of human rights and the rule of law; or to let them go free, which puts the country at higher risk from the bombers themselves, and also from the criticism of foreign countries, including the USA and Australia, which certainly will not be happy to see the convicted terrorists walk free? As has been stated above, Justice Minister Mahendra and Constitutional Court Chief Justice Asshiddiqie take the view that the court's decisions affect only the application of the law in the future, and therefore Masykur Kadir and other convicted bombers should remain in jail. This is a clear example of Indonesian potentially moving toward a 'stick' version of the rule of law, when the court bows to international pressure and pressure from the government.

Apart from the matter of retrospectivity, the use of the Perpu itself as a legal instrument to deal with emergency power remains questionable. Under Indonesia's Constitution the President is given emergency powers to issue a Perpu in situations where the government must take swift and decisive action to guarantee security. Before a Perpu is formalised, the President is required to outline the threat to security which has prompted its introduction. It is still open to interpretation in what types of emergency situation the state must be deemed to be for a President to have the right to issue a Perpu.

I have mentioned earlier that the Megawati government also issued a Perpu (No. 1/2004) on 11 March 2004, which amends the Forestry Law. The Parliament then approved this Perpu. NGOs unhappy with this decision requested the Constitutional Court to review the validity of that Perpu. One of their arguments was that the government did not explain the emergency situation which led to the President issuing this Perpu. Moreover, Article 22 of the Constitution, which has been used frequently to issue Perpus in emergency cases, must be related to Article 12 ('The President may declare a state of emergency') and Law No. 23 of 1959 on National Security. In Perpu No. 1 of 2004, President Megawati did not refer to them. The question of whether such a condition existed in relation to mining in protected areas consumed hours of hearings and pages of the court's decision. To the great concern of civil society, the Constitutional Court found that whether there is a pressing crisis is not measured objectively by reference to whether there exists a national emergency which cannot be dealt with by Parliament. Instead it is a subjective measurement at the discretion of the President. The court cited as precedents previous Perpus, most of which date from the time of Suharto's New Order regime. The court did not even refer to the Perpu on terrorism to illustrate its point.

There were allegations that the government's hand was forced primarily by pressure from the Australian government, which held twelve closed-door meetings with high-ranking officials before the regulation was issued. Australian Embassy spokesperson Elizabeth O'Neill told the *Jakarta Post* that several meetings between Australian and Indonesian representatives had indeed taken place, but dismissed the allegation that they were not transparent.⁷⁵ She said Australia had been concerned for some time about the impact of the 1999 Forestry Law on Australian mining firms operating in Indonesia, as many of them had signed contracts with the government prior to 1999 to develop mineral resources and had already made significant investments.⁷⁶ This suggests that the neo-liberal approach to the rule of law remains influential in Indonesia.

Meanwhile, NGOs alleged that several legislators took bribes prior to the start of the House plenary session to vote on the Perpu, when several State Secretariat officials had been seen lobbying the legislators. The judges considered evidence (including testimony from a member of parliament) that parliamentarians received bribes of US\$5,000 to \$15,000 in order to ratify the Perpu but concluded that the Constitutional Court was unable to consider the bribery issue until it was proven in a criminal court. Once again, this illustrates the difficulties in Indonesia of prosecuting cases involving allegations of corruption, which is inconsistent with the idea of both 'thin' and 'thick' rule of law.

According to NGOs, the thirteen companies had demonstrated very bad performance in environmental management in Indonesia, as could be seen from the disposal of their industrial waste into the environment. The NGOs were upset that the government ignored these violations.⁷⁷ The Director-General of Geological and Mineral Resources, Simon Sembiring, also told the *Jakarta Post* that the regulation was expected to spur new investment of about US\$17 billion for the next three years.⁷⁸ The Constitutional Court responded to the issue by stating:

Although this Court shares the opinion of all the experts brought by the appellants regarding the danger and negative impacts of open-pit mining in protected forests, nevertheless this Court also understands the reasoning for the need for a transitional regulation which continues the rights or legal status gained by mining companies before the advent of the Forestry Law (1999).⁷⁹

⁷⁵ 'NGOs Up Pressure on Forest Mining', *Jakarta Post*, 17 July 2004. ⁷⁶ *Ibid.*

⁷⁷ Bachriardi, 'The Forestry Law Has Not Stopped Mining in Indonesia's State Forests'.

⁷⁸ 'NGOs Up Pressure on Forest Mining'.

⁷⁹ See Constitutional Court Decision No. 008/PUU-III/2005 [2005] IDCC 16 (19 July 2005), www.asianlii.org/id/cases/IDCC/2005/16.html

The court took the view that the subjective discretion of the President to measure the threat to national security becomes objective once it is ratified by Parliament. It seems that this decision allows the government to maintain the legal fiction of an emergency in order to justify its policy. Even the judges themselves seemed uncomfortable with this unclear definition of 'emergency' in the Constitution, ambiguously recommending that, in future, the President must consider more objective conditions before issuing a further Perpu.⁸⁰ In other words, the Constitutional Court failed to outline the criteria for the government in issuing a Perpu to deal with an emergency situation.

V. Conclusion

I have examined how Indonesia has attempted to revisit the discourse on the rule of law and emergency powers. Arguably, Indonesia has moved from the 'thin' to the 'thick' concept of the rule of law since 1998. However, the 2002 Bali bombings have tested whether Indonesia's counter-terrorism agenda will have a negative impact on the efforts aimed at upholding the rule of law. The rule-of-law tensions and ambiguities (retrospective law, etc.) discussed in this chapter arguably support what Victor Ramraj calls the 'emergency powers paradox'.⁸¹ Ramraj explains, with reference to examples in Southeast Asia, that countries in democratic transition may in some circumstances be justified in using emergency powers in their initial phase as this may help in establishing legality in the long run for legal, political and economic reforms to take hold. Indonesia's experience in maintaining a balance between upholding the rule of law and using emergency powers to deal with terrorist attacks is illustrative in understanding such a paradox.

In the context of Indonesia, I suggest, first of all, that we might question the unclear definition of 'emergency' in the Constitution and how the Constitutional Court is ready to accept any conditions or criteria provided by the government as long as the Parliament accepts it. As has been demonstrated, the subjective criteria might operate practically at two levels: political and/or financial emergencies. Theoretically, the two levels can be traced back to the phenomenon of 'legal transplant' and to the neo-liberal agenda. I should clarify that I use the paradox of emergency powers above as an explanation rather than as a justification.

In Indonesia, the paradox therefore begins with the vagueness of emergency powers stipulated in the Constitution and its failure to set out the

⁸⁰ *Ibid.* ⁸¹ V. V. Ramraj, 'The Emergency Powers Paradox' (Chapter 2), this volume.

criteria or the time-frame within which the powers may be exercised. This failure, in turn, facilitates the justification and use of these powers. The only limitation is Parliament's ability to approve or disapprove the Perpu. However, this is exactly the second concern of this paradox: the unstable nature of political alignments, the weakness of party structures, economic crisis, along with international pressures, all contribute to a pragmatic and politically oriented rule of law. For instance, the basis of discretion in establishing Perpu may be questioned if it is seen as derogating from the tenets of the rule of law. This has resulted in more emphasis being placed on empowering the state, rather than limiting its powers. It seems the finality of discretionary power would rest with the primary decision-maker.

Third, Indonesia's experience of the inability of Parliament and the courts to limit emergency powers is dissonant to the Gross-Dyzenhaus debate.⁸² Dyzenhaus retains some faith in the ability of the courts (or specialised administrative tribunals under judicial supervision) to uphold the rule of law in emergency situations, while, for Gross, the solution lies outside the courts (it should involve a political check on abuses of power). The debate assumes either Parliament or the courts can provide adequate checks and balances – a function that has not been fully exercised by either institution in Indonesia because of its choice of pragmatic rule of law in some cases.

Fourth, while I share the concerns expressed by Anil Kalhan and Vasuki Nesiah on the risks of using emergency powers and the premises of liberal constitutionalism, respectively,⁸³ I take the view that Indonesia's experience shows how constitutionalism and the rule of law do matter in a normative sense. Given the vagueness of emergency powers and the Perpu stipulated in the Constitution and the very fact that the national security law currently operating in Indonesia is the old 1959 law, I suggest that constitutional reform in this sense remains unfinished. The 2002 Bali bombings and other terrorist attacks should not interrupt this process.

A hard lesson to be learned from Indonesia is that gradualism and long-term planning are critical to the agenda of a reformist government. Understanding the paradox above, together with the challenges from international and domestic pressures, would assist us to acknowledge that there

⁸² See the debate in V. V. Ramraj (ed.), *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press, 2008).

⁸³ See, in this volume, A. Kalhan, 'Constitution and "Extraconstitution": Colonial Emergency Powers in Postcolonial India and Pakistan' (Chapter 4) and V. Nesiah, 'The Princely Impostor: Stories of Law and Pathology in the Exercise of Emergency Powers' (Chapter 5).

can be no shortcuts in establishing a meaningful 'rule-of-law' state. If Indonesia does not succeed in limiting the use of emergency powers and upholding the rule of law, what we will see is not 'thin' or 'thick' but the 'stick' version of the rule of law, in which the government will not only use any means to protect national security, but also set its own criteria for dealing with emergency situations. The struggle for *negara hukum* is still a long way from success in Indonesia.