JUDICIAL AUTHORITY AND THE STRUGGLE FOR AN INDONESIAN RECHTSSTAAT

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The place of law in the state is largely the result of political struggle, which can be understood better by looking at social and political rather than cultural variables. Informed by Weberian models of legitimacy and political structure and by Marxist concepts of class conflict, the article analyzes efforts to establish an Indonesian "law state" in the context of middle-class assaults on patrimonial assumptions of political order. It concentrates primarily on issues that arose in the consideration of a new law on judicial organization and authority. Groups that favored fundamental political and legal change focused on the judiciary as a means of gaining access to and influence in the state and of imposing limits on the exercise of political power. They failed, but the struggle goes on, complicated by strains within the growing middle stratum of the population.

In 1970 the government of Indonesia promulgated a new law on the principles of judicial organization. The debates over this law gave rise to a significant and enduring conflict between various forces over the Indonesian constitution—not the formal constitution, but the "real" constitution in the old sense of the term. In this conflict, the key issue for some groups was establishing the rule of law in the Indonesian state. My purpose in this article is to analyze the political dimensions of this conflict, the reasons why it occurred and continues, and its meaning for the place of law in the governance of Indonesia. The discussion is divided into four parts: 1) a consideration of theoretical issues, 2) an analysis of the sources of support for an Indonesian "law state," 3) a discussion of the chief areas of contention in Law 14/1970, and 4) a brief speculation on class structure and law in Indonesia.

I. CULTURE, CLASS, AND LAW IN NEW STATES

There are probably very few students of law in new states who have not been stopped, for at least a moment, by the paralyzing question of how seriously to take it. The institutions left over from the age of imperialism seldom seem to work as intended, and the role of law in the state itself seems, at best, awkwardly peripheral to politics and the exercise of authority.

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Functionalist approaches get around this problem by focusing on more narrowly defined institutional issues, where the important thing is how institutions actually work and not how they are supposed to work (see, e.g., Rudolph and Rudolph, 1967; Engel, 1978). Asking questions about law and authority in new states is more difficult, because we have barely begun to form useful perspectives on the matter (Trubek, 1972; Trubek and Galanter, 1974). By and large, we conceive of legal evolution outside the European cultural ring in one of two ways: either law is utterly meaningless, or it is bound eventually to develop just as it did in Europe.

Perhaps the major problem with studying law in the new state is the inevitable background of European legal experience—or, what is worse, European legal myth—which hovers about as a stern and brooding presence by which all legal phenomena must be judged. There is no intrinsic reason why comparisons between Asian states, say, and European states should be avoided, but the emphases in the most prominent interpretations of the foundations of the European "law state" make comparison very hard. Of the two variables, class and culture, that are generally regarded as critical to the rise of law in Europe, culture is the most intractable. Economic and social changes that promoted legal ideology in Europe may in some measure recur elsewhere, though never, of course, under quite the same conditions. But there exists nowhere else the pillar of natural law securely imbedded, as Unger has recently argued again, in a transcendental religious order (Unger, 1976: 76-83; but also Weber, 1954: 287-300; and Neumann, 1957). On these grounds alone the possibility of an Asian "law state" is often dismissed, without a moment's glance at other variables that promote what I shall call, for the sake of convenience, law-movements. Explaining these with the quick answer of "westernization," while obviously true in one historical sense, is hopelessly inadequate.

The point of these comments is not to dismiss culture as a relevant influence on the role of law, but only to rein it in. Any approach, whether simple liberal or simple Marxist, that is either oblivious to cultural differences or considers them to be beside the point, cannot say much of interest about the qualities distinguishing local patterns of organization and ideology. But a view of culture as causal bedrock is also seriously limiting. Most of all, it stands in the way of understanding changes that directly challenge basic cultural assumptions themselves (cf. Moore, 1966).

So it is very often with law-movements, by which I mean persistent demands to subject political authority and common social and economic processes to limits defined by a body of conceptually autonomous rules and applied by a similarly autonomous legal system. Demands of this sort inevitably give rise to ideological conflict over values; but the values are no more fundamental than the interests they legitimate, for at bottom it is the changing relationships of social interests that promote social and political change. Law-movements do not arise out of thin air by a kind of cultural parthenogenesis. They develop among groups that are disadvantaged by existing patterns of political, economic, and social regulation and have begun to regard old authoritative relationships in the state as morally bankrupt. In law they see an appropriate means of improving their lots and redefining the ethical dimensions of order in the state. (In states where law is already critically important to definitions of order, movements for change may well be cast in anti-law terms.)

None of this is meant to imply that, once begun, law-movements must emerge victorious. The law-state is neither inevitable nor impossible anywhere it does not now exist. All that can be said is that there are groups here and there committed to such a vision, and they may or may not develop enough power to effectuate parts of it. It is also unnecessary to argue that "law" is the best thing that can happen to everybody. For some it may be disastrous. It is enough to try to understand efforts to make legal process more important in one state or another without insisting *a priori* that such efforts are natural, bound to succeed, and in and of themselves morally virtuous. What is involved, above all, is a political struggle over the way in which state authority is conceived and political power is exercised.

From this slightly liberated perspective, two questions arise. The first has to do with what it is that law-movements are challenging—the character of organized authority and its modes of governance that are no longer acceptable. The second concerns the social origins of the challenge for which law seems the most appropriate instrument. For an answer to the first question I draw on two of Max Weber's categories of the forms of domination, the patrimonial and the rational-legal, representing different conceptions of legitimate authority *and* the different political structures that fit with them (Weber, 1947: 324-358; Roth, 1968). Briefly, the relevant part of Weber's model of patrimonialism assumes the personal centrality of political leadership, implying a great deal of discretionary leeway for a

leader and his officials to manage the affairs of society. Patrimonial legitimacy assures a leader preeminent recognition as the sole authoritative source of political standards and justice. He is the keystone of bureaucratic structure, for all officialdom is conceived to be in service to the patrimonial apex, the father writ large, from whom they draw their own legitimate authority. By contrast, legal conceptions displace authority from the person of the ruler to autonomous institutions founded normatively in impersonal law. Political and bureaucratic discretion, it follows, is limited by a legal definition of boundaries guarded by institutions of the law. Of course, these are ideal-types and do not exist in pure form anywhere. In the reality of political systems, patrimonial and legal elements are mixed, though all societies have patrimonial traces while some have only a few legal ones. We can nevertheless distinguish, for example, between basically legal political orders with stronger (Germany, Japan) or weaker (United States) patrimonial influences, or essentially patrimonial political orders with stronger (India) or weaker (Indonesia) legal influences. This is not merely an exercise in labeling, but an attempt to understand the terms by which elites govern, which determines the kinds of institutions they use. Law-movements seek to change these terms from a mix that favors patrimonial authority to one that favors legal authority.

With respect to the second question, Marxist analyses have always focused on the historical emergence of new middle classes as the generator of fundamental change in old Europe. In one form or another, the "law state" was always important to these middle classes, for in no other way could their political power achieve legitimacy or their economic interests gain the advantages of procedural certainty and uniformity (Neumann, 1957). In many new states too the demand for law has come most prominently from middle-class groups. They have not been paid a great deal of attention as middle classes, but only indirectly and in a fragmentary way as intellectuals, students, professional groups, and the like. It has long been taken for granted that in most new states the middle classes are too small and ineffective to merit the same attention accorded elites and peasant majorities. But in the two to three decades that have passed since independence in Asia and Africa, old class structures have begun to bulge oddly as the result of economic growth, education, and upward and downward social mobility. While elites talk about stability and "development," and lower-class millions appeal for substantive social justice,

the growing middle adds to this list security, personal rights and liberties, and political participation via legal and constitutional routes to change. There is, however, an enormous difference between these middle classes in new states and those of old Europe. The former are often without substantial property or a great deal of influence over their economies. Economic power is held by governing elites and state bureaucracies in a loud echo of Marx's Asian mode of production (Melotti, 1977).

But in all states, the strength of middle classes and the influence of law are variables. For simplicity's sake we can distinguish two general patterns, both more or less working towards a different mix of patrimonial and legal forms. In the first, for example post-Meiji Japan or, perhaps, present-day Malaysia, political elites who are either closely connected with middle-class groups or are actually creating middle classes, may co-opt legal process as a means of consolidating and legitimating their own authority. In the second, for example Indonesia or Thailand, the spread between political-bureaucratic elites on the one hand and local middle-class groups on the other is very wide. Here strong law-movements are likely to emerge when a crisis of legitimacy almost inevitably develops between evolving middle strata and political elites whose patrimonial appeals are no longer honest or convincing and whose coercive drift—particularly where political armies have marched into power—is bound to alienate people. Under these conditions law is not primarily an offensive, consolidating instrument for middle-class interests, though it might become that in time, but rather a defensive shield against governments over which these groups have little influence of any other kind. The difference is that between established middle classes, already powerful in their own right, and relatively weak middle groups, as I will call them later, which are seeking footholds and protection. One consequence of this difference is that, unlike the propertied middle classes of modern Europe, the rising but economically insecure middle-class groups of many new states often seem to be on the political left, and their demand for law emits revolutionary overtones against the conservative institutions and values of existing regimes.

The pockets, or sometimes fronts, of ideological dissonance represented by demands for legality should not be dismissed as mere cultural deviations, vestiges of colonialism, or superficial imitations of western style, any more than they should be regarded as waves of the future. That these demands and the influence they may develop are conditioned by the prior terms

of local culture—for example, by strong patrimonial values in political organization and social process—is, of course, true, though this says little more than that every political system and its legal instruments are conditioned by local history and culture (Pekelis, 1943; Dahrendorf, 1963). The influence of liberal legal values in Europe and North America is also variable in precisely these terms, and this becomes obvious the moment we distinguish between German *rechtsstaat* and English rule of law, or between English and North American variations on the rule of law (Neumann, 1957; Kirchheimer, 1967; Pekelis, 1943; Dahrendorf, 1963).[1] In Asian states the mix of patrimonial and legal vectors differentially favors the patrimonial,[2] but legal tendencies exist with what appears to be enduring political and social support.

These tendencies, here weaker and there stronger, and the political struggles they imply, require an ideological rationale that does not inhere in the law itself. In most Asian states the oldest myths of legitimacy have had to do, not with law, but with interactional understandings of social obligation, reciprocity, and moral virtue (See, e.g., Hahm, 1967; Eberhard, 1967). Such understandings have begun to break down

[1] Because the distinction between *rechtsstaat* and rule of law is relevant to later discussion, it may be useful to call attention to some differences too often buried under a vague notion of "western law." Basically, rule of law ideology took form historically in England under the influence of a strong middle class which controlled Parliament and a relatively weak royal bureaucracy, while continental *rechtsstaat* principles evolved in the domain of powerful central bureaucracies whose doors the bourgeoisie could not tear down but had to knock at for concessions. Consequently, common law procedural biases tend relatively to favor private parties while those of the civil law tend to favor the state (Merryman, 1969). To simplify, common law is more liberal than civil law. In a different perspective, following Weber, patrimonial assumptions are more influential in civil law than in common law ideology. Because of the patrimonial emphasis of civil law doctrine on the preeminence of bureaucratic institutions and state interests, the political leaders of Japan, Thailand, Turkey, and Ethiopia, for example, invariably turned to the Continent, not England, when seeking to "modernize" their legal systems by borrowing European legal forms. Conversely, as will be indicated later in my discussion of Indonesia, liberal groups in new states tend to look to Anglo-American practice for institutional and doctrinal models.

[2] In the terms used by Unger (1976: 48-58) bureaucratic (or regulatory) law predominates over legal order. Unless I have missed something in it, however, Unger's concept of bureaucratic law does not add much to, and lacks the richness of, Weber's patrimonialism. In this article, I will normally use the term "liberal law" or some variation of it in much the same way that Unger uses "legal order," a term which seems in any case to follow from basically liberal assumptions about state organization. By "liberal," all I mean is any ideological tendency to favor private rights and interests, on the one hand, and institutional limits and controls over governmental authority, on the other. No other implication is intended for the label, and I assume that the dimensions of liberalism vary from country to country; Japanese and Indonesian liberalism, for example, may share something in common with one another and with French or English liberalism, but must be understood primarily in their own political and cultural contexts.

wherever old aristocratic elites and values have faded under pressure from the formation of new and socially diverse states, the expansion of new classes and counter-elites, and the consequent emergence of new visions of social and political order (cf. Scott, 1976). Among these visions are different versions of the old and still appealing but basically defunct patrimonial moral codes, new revolutionary programs on the left, coercive authoritarianism on the right, and constitutional legality in the center. Legality, in whatever form, is not at all the easiest to justify; its promises are neither self-evidently realistic from historical experience nor obviously compatible with traditional ethical assumptions about social action and social justice.

Developing a rationale is therefore no simple task. Occasionally the promoters of law in some new states have tried to mine local cultural lodes for support, but they are seldom convincing. The appropriate history is missing, though it may be happening now. Increasingly, however, intellectual contrivances are being set aside in favor of arguments directly to the point of whatever advantages legal process seems to offer, an indication that the battle joined over such issues has become serious. Maybe it is a false analogy, but a functional equivalent to natural law may exist in the idea of the *rechtsstaat* (or rule of law) itself. Concepts of constitutional order and legality are, after all, inherent in the idea of nation-state that diffused outwards from Europe. As the idea of the state has become rooted, so has the concept of legality as one among several possible legitimating ideologies. It may have limited appeal, but is not unfamiliar. There are many, and not lawyers alone, who appeal to liberal *rechtsstaat* and rule of law principles—of individual rights, judicial autonomy, and institutional controls over political authority—with all the passion of ideological commitments that cannot be treated lightly. For support, legal practitioners, scholars, and intellectuals in Indonesia, for example, draw upon the idea of law and the logical implications of rule by law in the modern state in much the same way that similar groups used natural law in support of fundamental change in old Europe (Hartono, 1968; Rahardjo, 1976, 1977). But the work would have no meaning, and probably would not be done, were it not for the impetus provided by perpetual conflict over fundamental political and social issues.

II. SUPPORT FOR AN INDONESIAN LAW-STATE

In Indonesian discussions of legal ideology three terms are used for what its protagonists are getting at: *rechtsstaat*, rule of

law, and *negara hukum*—"law state" or "state based on law," a translation of *rechtsstaat*, the German and Dutch formulation. Different meanings attach to these terms, particularly *rechtsstaat* and rule of law, and their concurrent use reflects something more than interchangeability. Generally I will use *negara hukum*, partly because it is the Indonesian term, but also because it connotes an Indonesian variation on the theme.

As an issue of national debate, the *negara hukum* has had its ups and downs. During the parliamentary years (1950-1957) it served as the legitimating ideology of the constitutional republic, but many of its symbols were attached conservatively to Dutch colonial institutions, procedures, and codes carried over into independence. Under Guided Democracy (1958-1965) it was submerged and nearly drowned by the explicit patrimonialism of the regime and its radical-populist ideology, which emphasized substantive rather than procedural justice. With the New Order which emerged under military domination after the coup of October 1965, *negara hukum* arguments revived rapidly, partly in reaction against Guided Democracy, though more articulately and pervasively than ever before. During the early New Order period, until about mid-1971, *negara hukum* advocates were relatively optimistic; this, however, changed as coercive features of the regime grew more pronounced. The promulgation of Law 14/1970 was a marker on the way from optimism to pessimism among supporters of the *negara hukum* in the New Order. Yet the idea remains very strong and is a symbolic focus for much criticism of the present Government.

Why the *negara hukum* has become a salient theme of political discourse in Indonesia and why it gives rise to the issues highlighted in the debates over Law 14/1970 requires some explanation. While the colonial heritage and the influence of western models are not unimportant, neither are they fundamental, and they are mentioned now merely to pay them their due before setting them aside as not particularly enlightening. My analysis will emphasize three related sources of support for *negara hukum* ideology—ethnic and religious pluralism, changing class structure, and the problem of political legitimacy.

The extraordinary ethnic and religious diversity of Indonesia encourages legal definitions of state and society (Lev, 1972). Barring some other non-sectarian revolutionary principle, legality alone symbolically avoids the exclusive political and cultural transcendance of any single ethnic or religious group. It is analogous in this respect to the adoption of a national language—Indonesian, for example—which is not the exclusive

property of any single group and requires some adaptation and compromise by all. The inevitable domination of Indonesia by the ethnic Javanese, approximately 50 percent of the population, has never excluded other major ethnic forces from participation. Still, raw political influence is roughly proportional to population size, as well as economic and other factors, and non-Javanese opportunities are necessarily limited. Consistent and predictable norms therefore have an obvious appeal, though more at national than local levels. This point should not be exaggerated, because legal norms are not the only source of predictability. But family connections, ingroup contacts, and informal ethnic obligations clearly do not work as well for the ethnic periphery as for the ethnic center. Non-Javanese ethnic groups consequently tend to see advantage in a *negara hukum* that promotes public rather than subterranean bureaucratic norms, institutional rather than political processes, and acquired skills rather than ascriptive attributes. Particularly is this true of ethnic Chinese, who, unlike indigenous minorities, have no territorial base to lend them security and inadequate social legitimacy to give them political bargaining power. All this applies less to the elite classes of ethnic minorities than to their social and economic middle-groups, who have little direct access to national political and bureaucratic leadership and are not wealthy enough to buy it consistently.

Religious pluralism is even more sensitive than ethnicity, and religious conflict is endemic in Indonesia. Minority Catholics and Protestants, a disproportionately influential six percent of the population, have always been fearful of the Islamic majority. They have been exceedingly strong supporters of the *negara hukum*, in which they see the promise of protection against persecution and normative guarantees of their right to participate politically and economically. Since independence, Christian newspapers and journals have paid especially close attention to legal issues.[3] Christian theology itself may promote legal ideology, but the minority position of Christians in an Islamic sea probably has more to do with it.

Islam too has produced strong support for *negara hukum* conceptions, mainly from its urban, commercial, and "modernist" segment, once represented in the political party Masyumi

[3] These newspapers include, at present, the Jakarta dailies *Kompas* (Catholic) and *Sinar Harapan* (Protestant). Socialist intellectual and "modernist" Islamic newspapers—among them *Pedoman*, *Indonesia Raya*, and *Abadi*, all banned within the last few years—were similarly oriented. So were the two post-coup student journals, the daily *Harian Kami* and the weekly *Mahasiswa Indonesia*, both also extinct now.

and now in the Partai Muslimin Indonesia (*Parmusi*).[4] This support derives from a combination of entrepreneurial interests and political disability. Despite its apparent numbers, Indonesian Islam has forever been politically and socially subordinated by old aristocracies (and their successors) who are superficially Muslim but often, in fact, hostile to Islamic religious values and political claims. Devout Muslims thus constitute a kind of political minority, with powerful defensive but more limited offensive capabilities. What they see in the law-state is a corrective to their limited influence over and access to the inner chambers of national political power. More than that, the *negara hukum*, in whose definition articulate Islamic spokesmen put heavy emphasis on social equality, is counterposed to the implicit principles of hierarchy and privilege that have always governed the political and social life of Java, most other societies throughout the archipelago, and the Indonesian state (Prawiranegara, 1968: 16-17). In this respect the *negara hukum* quietly bears the same mild revolutionary objective that much of urban and commercial Islam has always pursued in Indonesia.

For religious and ethnic minorities, then, the *negara hukum* has implications both of favorable change and conservative defense. On the one hand, it promises more political influence than they can exercise from existing power bases. On the other, it holds out the hope to each group that the aggressive intentions of all other groups, and of government itself, will be contained. One evolving dimension of *negara hukum* ideology implies that religious and ethnic interests will be insulated by principles of political neutrality on significant cultural issues (Lev, 1972: 360; Emmerson, 1976; Lev, 1972a, Ch. VII).

The problem of changing class structure is more complex than religious and ethnic pluralism. The expansion of social middle-groups in Indonesia, as elsewhere, has generated increasing, though ambivalent, support for concepts of equality and legality. But the term "middle-groups" is used here to avoid any suggestion that they have coalesced into a conscious middle class. They are socially disparate and politically divided; Islamic issues alone, which Governments have been able

[4] Since 1973 Indonesia's political parties have been consolidated, under dictation from army leaders of the regime, into two "fused" umbrella parties, one consisting of Islamic parties (PPP) and the other of "secular"—that is to say, non-Islamic—parties (PDI). The regime organization, *Sekber Golkar* (Combined Secretariat of Functional Groups), dominates Parliament and the People's Consultative Assembly (MPR), with about 70 percent of the vote in the last two national elections.

to manipulate at will, are enough to scatter them in all directions. In common, however, they are suspended between an enormous peasant majority and a relatively small political elite, consisting now in Indonesia of a military officer corps and its civilian periphery, over whom the middle-groups have distinctly limited influence.

The most dramatic, though almost unnoticed, growth of these middle-groups began during the Guided Democracy period, but in different ways.[5] One was the result less of new growth than of the transformation of existing power groups into outsiders, not only during the years of Guided Democracy, when political parties and labor unions were drastically weakened, but under the New Order as well, when peasant and other mass organizations were obliterated and new student associations controlled out of existence. Domestic enterprises were damaged by the economic conditions of Guided Democracy, but then were, in some cases, literally destroyed by New Order economic policies that favored foreign capital over Indonesian entrepreneurs. From one perspective, these successive demotions represented the decline of the elite and middle-groups of the parliamentary system and Guided Democracy, but from another they contributed to the rapid expansion of a political stratum of people who had been squeezed out of authority and reduced to the rank of spectators. If once they had regarded the state with favor and ambition, they now had reason to be resentful and suspicious of its intentions.

New growth in the middle sector came from the populist tendencies of Guided Democracy, which gave rise to a huge educational expansion that accelerated mobility into and within the urban middle-groups, but failed to expand the economic opportunities that might have begun to transform these groups into a more or less recognizable bourgeoisie. Trickle-down benefits from the economic boom of the New Order years may have had something of this effect, but the evidence for it is obscure. In any event, the enlarged student mass, many of whom participated actively in bringing down the old order of Guided Democracy, did not fare exceedingly well in the New Order. Their political influence was soon restricted. Urban job opportunities increased, but not in proportion to the number of graduates. Most important, perhaps, was that neither government policies nor the behavior of political and bureaucratic

[5] I am grateful to Benedict Anderson for his criticism on several points in this paragraph, but he cannot be held responsible for how I may have mangled his clear comments.

leaders inspired confidence that Indonesia was at the dawn of a new age. By the late 1960's and 1970's, students, supported by young intellectuals and professionals, were demonstrating against corruption, official abuse of power, and government economic policies. Many students and recent graduates moved leftwards, not to the point of radical revolutionary views— because their own social mobility and questionable relationship with the peasantry worked against this—but toward a strong reform perspective that stressed wider political participation, honesty in government, recruitment by merit, fairer economic distribution, and more effective control over bureaucratic institutions (Buku Putih, 1978). For educated young people the *negara hukum* has come to mean all this— little of which it can actually guarantee—and some protected leeway for the critical attitudes towards authority that have become common among them since the mid-1960's (Emmerson, 1973). An ethnic factor is also involved here: since the beginning of the New Order, non-Javanese students and professionals have exercised political leadership far out of proportion to their number, yet have remained outsiders in a political system dominated substantially by Javanese interests and perspectives.

The problem of legitimacy arises at this point, as the political maturation of an expanding stratum of the educated, many of whom were joining a growing professional stratum as well, came at a time when the national political elite itself was undergoing drastic change. In some respects Guided Democracy represented the last gasp of the lower aristocratic elite that had dominated Indonesian politics since the 1920's. However threatening it had seemed to many groups, and however much Sukarno was suspected by them, Guided Democracy's legitimacy and his popular appeal were not seriously questioned.

As the army ascended unequivocally to power in the New Order, however, it did so with only ambivalent civilian support—gratitude for the obliteration of the Communist threat, but doubt that army leaders had any rightful claim to authority beyond their weaponry. The chief problem lay not with the peasantry, who, with the Communists gone, could be controlled more or less coercively as they always had been, but with the diverse middle-groups. They too could be dealt with coercively, and were, but at much higher costs in domestic tranquility and international opinion. General (now President) Suharto's initial policies might have been expected to generate support among these groups, and for a time they did. For one thing,

new emphasis was placed on economic development; and the relative urban prosperity that resulted from foreign investment did work in the Government's favor, though it also soon raised serious issues about international dependency, maldistribution of fruits, and corruption. For another, Suharto leaned heavily on promises of constitutionalism and a *negara hukum*, which distinguished the regime from Guided Democracy and promised a kind of generalized legitimacy divorced from the military base on which it rested.

But this was a policy of "constitutionalism so far as possible." Army leaders would not go very far towards meeting demands for institutional fulfillment of constitutionalist promises. Nor could they have done so easily without weakening those structural characteristics of the regime that were most important to them—above all, the army's special position as the primary political estate, but also the tacit alliance between army and central bureaucracy that had begun to evolve under Guided Democracy. Within this structure of power there was little room for the institutional restraints that supporters of a *negara hukum* wanted to impose. Moreover, no combination of liberal forces had enough power to impose them against the will of the army and the central bureaucracy it now possessed. Without an adequate economic base in a self-sustaining private economy, relatively independent of the bureaucracy, the bargaining power of the middle-groups rose and fell sporadically according to political changes over which they had no control.

III. LAW 14/1970 ON JUDICIAL AUTHORITY

These interests and pressures were translated into the debates over Law 14/1970, which recorded the outcome of the struggle over the *negara hukum* to that time. The starting point of the debates was a widespread demand for the rescission of Law 19/1964.[6] Under Guided Democracy the courts had caused President Sukarno some irritation, partly because a few judges refused dictation; but also because he supposed, quite rightly, that, on the whole, judges and private lawyers did not support the regime enthusiastically. The principles of judicial independence and separation of powers—the *trias politica*,

[6] Actually, two laws were involved: Law 19/1964, Fundamental Provisions of the Judicial Authority, Lembaran Negara (Gazette) 107, with elucidation in Tambahan Lembaran Negara no. 2699, 1964, and Law 13/1965, on the organization of the civil judiciary and Supreme Court, LN 70, TLN 2767, 1965. Law 19/1964 was the heart of the matter, however. Law 13/1965 remains in effect. There is a confusion of legislation that applies to judicial organization and procedure (Damian and Hornick, 1972).

revered by lawyers and jeered by Sukarno—in which judges found a measure of significance went against the grain of Guided Democracy's emphasis on unity built around the central figure of Sukarno himself. They also stood as a grating reminder of the parliamentary order which Sukarno, under pressure from the army, was committed to obliterating. Law 19/1964 completed the formal patrimonialization of Guided Democracy, stunning judges, advocates, and liberal intellectuals by providing in article 19 that the President could interfere at will in any stage of judicial process for the sake of the ongoing revolution or national interests. In other provisions, the new statute was rather innovative, setting out fuller guarantees of litigants' rights, at least in theory. But article 19 condemned it as a symbol, for many, of Guided Democracy's evils (Amin, 1967). It was the most unguarded assertion by Sukarno and his ministers of the President's unlimited authority— a final, formal, and contemptuous dismissal of the parliamentary *negara hukum* and all of its European and colonial roots.

If little more had been at issue than restoring the statutory status quo ante 1964, some version of Law 14/1970 would have sailed through much earlier. More was at stake, however, because various groups had turned towards the judiciary as a tentative focus of demands for fundamental constitutional and political change. This point should not be overdone, because few people supposed that courts were politically that important; and only a small crowd, led by judges and private lawyers, was intensely interested in what happened to them. Common political cognitions and experience pointed to executive authority and the general bureaucracy as key locations of the power required for accomplishing anything at all, for better or worse, and even in formal legal terms the civil law tradition inherited from the colony provided no doctrinal grounds for pinning political hopes to the judiciary. This is what makes the prominence of judicial issues during the early New Order period so interesting. Courts suddenly began to receive more attention than ever before in the history of independent Indonesia, mainly as a symbol of an evolving version of the *negara hukum*, one that laid considerable stress on guaranteeing private rights and restraining political authority and one that could not be linked to any other institution.[7] This vision of the courts was the essence of the debate over Law 14/1970, and

[7] The early New Order period witnessed a remarkable outpouring of new books, pamphlets, and articles on rights issues, partly in reaction against the conditions of Guided Democracy, but also out of a combination of optimism and anxiety about the future under the New Order (See *inter alia* Yudana and

explains why the most elaborate discussion of the constitutional issues in the New Order actually centered on the judiciary. The debate could only have occurred fairly early in the New Order period, however, probably before the general elections of 1971, when political conditions still seemed fluid enough for such systemic issues to be raised (Crouch, 1978).

The pro-judiciary forces were not tied together very well. They suffered from a particularly serious, though not always evident contradiction, between the perspectives of public officials and private interests. Much of the support for strengthening the constitutional position of courts came from private groups, led prominently by professional advocates but including students, liberal intellectuals, various political parties, and commercial circles without close connections to the army elite. All were political "outs," and their interest in stronger courts grew partly from this reality. The initiative, however, was taken by judges, who were "outs" only in the sense that they felt deprived of status within the government, but for the rest were clearly official "ins," whose constitutional objectives were inextricably mixed with bureaucratic interests. The contradiction stood out in the spread between judges and advocates, amounting to rather different versions of the *negara hukum* both wanted.[8] While the arguments of advocates, like those of private organizations generally, tended towards a liberal-oriented revision of patrimonial modes and concepts, this was not at all consistently true of judges. Advocates, for example, were constantly attentive to private rights issues, which many judges regarded as peripheral and sometimes forgot altogether.

Judges responded quickly to the political and ideological changes that followed the unsuccessful coup of October, 1965, and its aftermath of human destruction. Having been swept aside by Sukarno as irrelevant to the revolution, they took revenge on Guided Democracy by fervently supporting the New Order and condemning the old. Judges flung off the khaki uniforms they had been forced to adopt under Guided Democracy and again donned solemn black robes. Almost at once, national and local leaders of the Judges Association (IKAHI,

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Sumanang, 1967; Damian, 1968; Sario, n.d.; Kowani [Congress of Indonesian Women], 1967; Prawiranegara, 1967).

[8] In civil law systems, the various legal professions are not well integrated, as career patterns diverge almost from the time of graduation from law school (Merryman, 1969: 109-119). The potential disadvantage to private lawyers, advocates, is compounded in Indonesia by the sharp differentiation between public and private vocation, high status being associated with bureaucratic office, particularly in the old patrimonial-bureaucratic culture of Java.

Ikatan Hakim Indonesia) set about formulating principles of the New Order *negara hukum*, with heavy emphases on the judicial function, procedural justice, and legality. During 1966 and 1967 the political atmosphere seemed favorable to them, partly because the reaction against Guided Democracy's abuses was frequently expressed in legal terms. There was much talk of restoring the *trias politica*, judicial guarantees of human rights, and judicial control of executive action—all of it inspired by what had happened under Guided Democracy but bearing unavoidable implications for the New Order government.[9] The courts themselves, subjugated by Sukarno and corrupted nearly as much as the rest of the bureaucracy, represented both the evils of the old order and, for some, the hopes of the new.

Early in 1966 the Provisional People's Consultative Assembly (MPR), the highest constitutional body, directed the Government and Parliament to review the legislation of Guided Democracy in order to bring it into line with the 1945 Constitution. Law 19/1964 was high on the list to be reconsidered. Not until 1969 did Parliament actually rescind it, contingent upon promulgation of a new law, but the delay was due only partly to the priority given other political issues. The problems thrown up by a review of Law 19/1964 proved to be very delicate. At the end of November, 1966, a conference of first-instance and appellate court chairmen, led by the judges of the Supreme Court (*Mahkamah Agung*), took the initiative in stipulating the provisions they wanted to see in a new statute on judicial organization. These included a judiciary fully organized under the Mahkamah Agung and thus separated from the Ministry of Justice, as well as powers of judicial review over legislation. In

[9] It is not clear what effect the massacres of late 1965, following the coup, had on legal ideology in Indonesia. One might speculate that in some way the terrifying bloodshed, in which possibly hundreds of thousands—Communists and others—lost their lives, produced a sense of social guilt and a wish for procedural correctness, but there is no substantial evidence for it. The fact is that for many who are quite committed otherwise to concepts of legality, the Communists, revolutionary threat that they were, stood outside the circle of acceptability; here political norms applied, as in fundamental zero-sum conflicts anywhere, and the contradiction between the demands of legal justice and political justice were barely evident for those involved, or at least most of the victors. The subject has never appeared prominently in public discussions. By 1967-68, however, a few intellectuals, journalists, and human rights activists began to react strongly against new waves of arrests, detentions, and suppression of local political suspects. At about the same time, the issue of political detainees—as many as a hundred thousand, many of them still now in camps—began to attract more attention, though with limited effect on government policy. The massacres and mass detentions, along with continuing abuses of criminal process after the *coup*, may well have had some primary influence on thinking about human rights (Amnesty International, 1977; van der Kroef, 1976-77; Yap, 1971).

early 1967 the Cabinet established a state committee, with members from the Mahkamah Agung and the Ministry of Justice, to draft new statutes on judicial organization. It was immediately beset by conflict over a first draft conceived by judges and rejected by Ministry of Justice officials. By late 1968 Minister of Justice Umar Seno-Adji submitted to Parliament the Ministry's own draft, along with two other bills (on the Mahkamah Agung and lower civil courts) which were never taken up. All attention focused on the law on judicial organization, which was to contain the general principles of judicial function and procedure. Parliamentary commission "B" held hearings with IKAHI, the Mahkamah Agung, and the Indonesian Advocates Association (PERADIN, *Persatuan Advokat Indonesia*), as well as the Ministry of Justice. Two years later, following extensive negotiation, Law 14/1970 was finally promulgated.

There is no point to a close textual analysis of this statute; its critical meanings are broadly political. Two major institutional issues that it raised, judicial independence and judicial review, will concern us here. They are closely related in the effort by judges, advocates, and their supporters to force a departure of principle from the body of legal doctrine and tradition deposited by the Dutch in Indonesia. But this change also implied a transformation of the structure of political authority, which its promoters did not have enough power to achieve.

Judicial independence was a tense issue for two reasons. First, Law 19/1964 framed it with symbolic significance as an attack on the patrimonial assumptions of Guided Democracy, which tacitly carried over into the New Order. Second, it turned into a bitter intra-bureaucratic fight between IKAHI and the Ministry of Justice, which was related to but independent of the constitutional question.

No one denied publicly that the judiciary should be independent, but the conditions of independence were differently interpreted. In a national address on August 16, 1968, President Suharto, dealing with his Government's efforts to strengthen law and establish a constitutional order, insisted that as the executive was no longer interfering in the work of the courts, judicial independence was no longer really a problem. But it was. No one who wanted stronger courts could be satisfied with a promise that was not backed up by concrete institutional change. The critical change that judges and advocates sought, along with rescission of the offensive article 19 of Law 19/1964, was the separation of first-instance (*pengadilan negeri*) and

appellate (*pengadilan tinggi*) courts from the Ministry of Justice and their reorganization under the Mahkamah Agung, which alone in the judiciary was administratively independent. Those who prescribed this surgical transplant, however, sought to cure different ills. Groups outside the government who favored institutional autonomy for the judiciary understood it to be an essential step towards making it possible for the courts to exercise even minimal control over the rest of the government. But for most judges, separation from the Ministry had quite as much to do with enhancing the status of the judiciary within the government, whether or not institutional control was at issue. The Ministry of Justice's perspective was different: if judges withdrew, as prosecutors had in 1960, the Ministry would be reduced to a minor collection of routine functions.

IKAHI and the Ministry fought bitterly over the issue of separation. IKAHI leaders stood staunchly by the *trias politica*, which was, they insisted, in constant danger of violation. They argued that dividing control over lower civil courts between the Mahkamah Agung (substantive jurisdiction) and the Ministry of Justice (administrative-financial supervision) created unnecessary tension and gave the executive branch an irresistible lever over judges (Kusumaatmadja, 1968). Minister Seno-Adji replied that his Ministry was not actually using such a lever, that the judiciary was no less in need of control than the executive, and that a rigid concept of separation of powers was less productive than one of institutional cooperation (Seno-Adji, 1968, 1967).

IKAHI's support, while considerable, was almost entirely outside the bureaucracy and politically inadequate to bring about such a reform. Within the legal system, judges apart, private lawyers were the most committed and vocal proponents of judicial autonomy (Tasrif, 1971). They numbered then only about 350 to 400 nationwide, with half the total in Jakarta, but the professional advocacy was growing rapidly with foreign investment and commerce, and they were more active, professionally and politically, than at any time since independence in 1950. Generally liberal and deeply skeptical, through experience, of government authority, advocates were more dedicated ideologically to principles of legality and the *negara hukum* than any other single group. None had more to gain professionally from these principles, without which, as under Guided Democracy, private lawyers were institutional pariahs, utterly at the mercy of the official side of the legal system (Singo Mangkuto, 1973; Lev, 1976). Judicial independence held out the

hope of enhancing the prestige and efficacy of their own institutional forum, and even of making judges more responsive to the professional interests of advocates. Moreover, their clients, and private interests generally, stood to gain from a reduction of administrative power in favor of judicial authority, if it could be made to work according to public and formal rules—if, in other words, the judiciary could be distinguished quite clearly from the administrative bureaucracy. It was not that anyone expected a great deal from the courts, and the judges' position won more sympathy than the judges themselves, but the judiciary was the least unfavorable institution with which private persons had to contend.

Inside the government IKAHI stood alone. Other administrative departments, always on guard against fission, tended to sympathize with the Ministry of Justice. So, within the legal system, did prosecutors and police, partly out of shared bureaucratic ethos, but also because a more autonomous judiciary might limit their own discretion. Finally, among political leaders, including President Suharto, judges had no support at all. Whose immediate interests, after all, would actually be served by greater judicial autonomy? Individual judges could at times be useful, but the courts, unlike the prosecution, had nothing of such obvious political value to offer to the regime that an institutional reward was in order. On the contrary, the judges' demand for complete autonomy, like their demand for judicial review, was irritatingly divisive and implied a criticism from within the government that seemed wrongheaded, distasteful, and even a little traitorous.

In the end the judges and their supporters lost. Law 14/1970 merely eliminated the despised article 19 of Law 19/1964 and reconfirmed (in article 4, para. 3) the constitutional provision of an independent judiciary. IKAHI and PERADIN have since kept the issue alive, but as yet without a glimmer of success (PERADIN, 1978: 99).

Does it really make a difference that the Ministry of Justice retains administrative responsibility for the lower courts? Ministry officials deny any influence over the judicial function itself, while those committed to separation claim that judges—employed, paid, and promoted (on the advice of the Mahkamah Agung) by the Ministry—cannot help but feel divided in their loyalties and probably will not bite the hand that feeds them. But the problem is really more subtle than this. Indonesian judges, with few exceptions, tend not to have a strong sense of functional independence to begin with. They

conceive themselves as *pegawai negeri*, officials, and as such, members of a bureaucratic class to which high status has always attached.[10] One implication of the role of *pegawai negeri* is that it is patrimonially associated with political leadership, to whose will it must always be responsive. It is this as much as anything else that underlies the issue of judicial independence. Whatever the daily effects of the Ministry's responsibility, it is symbolically important as a reminder of the judiciary's conceptually limited autonomy and the direction of its loyalties. In this context, one can see the implications of the judicial independence issue for evolving concepts of the *negara hukum*, liberal versions of which require a sphere of "autonomous" law to which the courts' own autonomy can be pegged. Forestalling this notion is the still much stronger conception of the fundamental unity of political power and the primacy of the interests of political leadership in the Indonesian state (Anderson, 1972).

The same light illuminates the judicial review issue, in which there was even less hope for pro-judiciary forces than that of judicial independence. Not the wish for review powers alone, but the implicit assumption that review would somehow create its own political foundations, was highly unrealistic. Yet, this was the most fundamental question in the new law, and the one that most bluntly represented the basic conflicts involved. The proposal was to give the Mahkamah Agung authority to test not only the formal validity of legislation—powers implicitly recognized but never used to ascertain whether an act had been properly passed—but also the substantive constitutionality (*hak menguji materieel*, *materiele toetsingsrecht*) of every legislative act and executive decision brought before it in litigation. It was supported by exactly the same groups that favored judicial autonomy.

Judicial review was not really a new idea. From time to time since the beginning of the revolution it had appeared, though not until the late 1960's with any great sense of public purpose or widespread support. In the colony, following Dutch (and generally European) constitutional theory, courts were expressly forbidden to interfere with or interpret legislative will, though there were colonial precedents for quashing

[10] It may be worth arguing, against the analysis in the text and in footnote 8, that Indonesian judges do not actually differ much from judges in other civil law systems (Merryman, 1969: 109-119). If so, the Indonesian cultural variable is less significant than that of political-bureaucratic structure generally and *its* cultural implications. What would then be important in distinguishing one civil law country from another in these respects is the relative strength and status of private interests; as these are weak in Indonesia, though the condition may be changing, they have little balancing power against officialdom.

decisions of the Governor-General that contradicted legislative acts. The 1945 Constitution, restored in July, 1959, made no mention of review, as those opposed to review frequently pointed out. But unlike the colonial *Algemene Bepalingen van Wetgeving* (General Principles of Legislation, art. 20), neither did it expressly forbid review, a point made much of by those who favored it.[11] In the constitutional deliberations of 1945, the nationalist historian and lawyer Mohammad Yamin proposed review powers for the Mahkamah Agung, on the United States pattern; but Prof. Supomo, then Indonesia's most influential legal scholar, was strongly opposed, and Yamin dropped the issue (Yamin, 1959: 336, 339-344).[12] Thereafter judges themselves were the most enthusiastic proponents of review, but for much the same reason that they were attracted to judicial independence. With the American constitutional model in mind, they had long dreamed of review powers as the ultimate mark of judicial significance, the sense of which had begun to elude them soon after independence (Lev, 1965). By the time of the New Order, however, review had begun to pick up substantial support in other quarters. For pro-judiciary groups outside the government, judicial review unequivocally meant institutional control, which with Guided Democracy in the background and army power up front, had become a key concept in liberal *negara hukum* thinking. It was quite clear, in the New Order as under Guided Democracy, that private groups, including

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[11] The 1945 Constitution is exceedingly brief with respect to judicial authority, as well as most other matters. Section IX, art. 24, provides that the judiciary consists of a Supreme Court and other judicial bodies established by statute, and that the organization and authority of judicial institutions will be determined by statute. The short-lived federal constitution of 1949 did provide the Supreme Court with review powers, which helped to keep the idea alive, perhaps, but also connected it with the unpopular notion of federalism. The provision was dropped from the unitary constitution of 1950.

[12] The essentials of Yamin's idea lasted, showing up in the IKAHI proposals of the late 1960's. He put much emphasis on the role of the Mahkamah Agung, which he conceived as a unifying institution, incorporating chambers not only for civil and criminal law but also *adat* (customary) law and Islamic law, with powers to review legislation for possible conflicts with the constitution, Islamic law, and *adat* law. Yamin, of Minangkabau (West Sumatran) origin, though at home in Java, and Supomo may have represented something of the difference between outer Indonesian and Javanese political perspectives. Supomo, later (like Yamin) a Minister of Justice, was quite conservative socially and politically. He anticipated later arguments against review by rejecting the notion that the Mahkamah Agung should have any control at all over the legislative power and argued, moreover (as did Sukarno later), that Indonesian constitutional views did not distinguish rigidly in principle between the powers of government. Furthermore, he insisted that whether a law is in conflict with the constitution should generally be construed not as a legal but as a political problem, an analysis that Seno-Adji implicitly followed in his debate with IKAHI. Supomo argued, in effect, for the exclusive legitimacy of political and bureaucratic power, which was characteristic of Javanese *and* colonial Dutch constitutions, while Yamin proposed a significant departure from those traditions in favor of greater dispersal of governing authority.

political parties, would not dominate Parliament or the People's Consultative Assembly. The judiciary *faute de mieux* became a last (albeit shallow) ditch possibility for erecting institutional controls in the state.[13]

In 1966-67 legal scholars, judges, private lawyers, and intellectuals had already begun to suggest such institutional reforms as the creation of a constitutional court, or administrative courts, and judicial review as means of restricting the exercise of government authority (*Simposium*, 1966). At the time, briefly, liberal ideas enjoyed some momentum. Guided Democracy was under attack, and the original New Order alliance of army, students, and intellectuals had not yet disintegrated. The anti-liberal themes of Guided Democracy, soon to reappear as strong as ever, were still submerged by anti-Communist and anti-Sukarnoist slogans and by the rhetoric of constitutionalism, the new *negara hukum*, rights, and political change. In this atmosphere, politically tense but open, liberal ideas had their day in two committees of the People's Consultative Assembly. Ad Hoc Committee II, responsible for considering the reorganization of the government, drafted a report that favored dispersal of political power, more political participation, and institutional controls over political authority. It assumed, for example, executive accountability to Parliament and recommended greatly strengthened courts, giving the Mahkamah Agung constitutional review powers and command

[13] Under both Guided Democracy and the New Order, there were attempts to press the courts into service against executive policy, but judges would have none of it. In the early 1960s a suit was brought against Sukarno for violating the constitution, but the first-instance court of Jakarta refused to hear it. Again, after Law 14/1970 was passed, private lawyers and others tried publicly to convince the Mahkamah Agung simply to assert a right of review over legislation and executive action, on the model of *Marbury* vs. *Madison*. In mid-1971 two labor organizations asked the Mahkamah Agung for relief, under article 28 (freedom of association and expression) of the constitution and an ILO convention of 1949, ratified by Indonesia in 1956, against pressures brought to bear on them by local officials to disband and join government sponsored organizations. Mahkamah Agung chairman Subekti refused, arguing that the Court was in no legal position to do anything at all (*Tempo*, May 22, 1971: 13). The weekly *Tempo* (Time), recently established by young intellectuals and much concerned from the start with *negara hukum* issues, insinuated that it wasn't the green banyan tree, the symbol of legal justice, that was dominant, but the black banyan tree, the symbol of the army-backed Golkar organization. Also in 1971, in the *Nusantara* case, a prosecution of the editor of this daily under the infamous *haatzaai* (spreading hate) provisions of the criminal code, the first-instance court of Jakarta was urged to ignore these articles, which the colonial government had used against Indonesian nationalists. Asikin Kusumaatmadja was the one high judge who spoke out in the same vein, arguing that judges must assert themselves over the written law. The first-instance court of Jakarta stuck to the code, however—largely, many believed, because the Government was obviously behind the prosecution—and sentenced the editor. The Mahkamah Agung never decided the case in appeal, evidently setting it aside, which left the editor free but did not establish the principle of judicial interference sought by supporters of review.

over a system of administrative courts. At the same time, and in the same ideological temper, Ad Hoc Committee IV was developing a draft bill of human rights (Yudana and Sumanang, 1967). Together the reports of these two committees represent the summit of liberal influence in the early New Order. Nothing came of either one. The human rights draft, caught up in Islamic objections, never came to a vote. Ad Hoc Committee II's proposal, however, compelled the Government to react, altogether negatively, in order to put a stop to this political drift.[14] Minister of Justice Seno-Adji, in a report to the Cabinet in mid-1967, challenged nearly every premise and conclusion of the report (Seno-Adji, 1967).

Seno-Adji's initial argument against review was that only the MPR, as the highest constitutional instrument, could serve as guardian of the constitution. Indeed, he insisted, the MPR had already demonstrated the appropriate review process by ordering the President and Parliament to rescind objectionable legislation from the Guided Democracy period (Seno Adji, 1968: 71). Judges and advocates, among others, replied that the MPR itself, Parliament, and the President had all in the past proved perfectly capable of violating the letter and spirit of the constitution; review authority should therefore be vested in an institution less likely to do so. There were other proposals—a constitutional court, for example—but the principle was the same, and the Mahkamah Agung had the nearly unanimous and unremitting support of judges and advocates. Among proponents of review, particularly in the civilian political parties, there was no lack of skepticism about it, originating partly in doubts about the competence and courage of the Mahkamah Agung judges and partly in sound suspicions that army leaders would not accept such an imposition anyway. But in the search for instruments of control there were no obvious alternatives.

The debate over judicial review lasted until Law 14/1970 was finally promulgated, though among judges and advocates it remains an issue today (PERADIN, 1978). The political positions in the conflict were quite clear: the Government wanted maximum freedom of movement unencumbered by institutional (or other) restraints, while groups outside the Government sought to impose limits on it. Two lawyers—the outspoken advocate Sumarno P. Wirjanto from Sala in Central Java, and the legal scholar Sunarjati Hartono of Pajajaran

[14] My understanding of the Ad Hoc Committee II proposal, a copy of which I do not have, comes from Seno-Adji's argument with it in his own 1967 report.

University in Bandung—specifically formulated the distinction as one between the rule of discretion (*kebijaksanaan*) and the rule of law (*Kompas*, Jakarta daily, March 3-4, 1969; Hartono, 1968: 105; also Yap, 1973).

For analytical purposes it is useful to distinguish the doctrinal from the political dimensions of this conflict, as the doctrinal issues illuminated evolving lines of political-legal ideology that will undoubtedly emerge again and again. It is particularly interesting that the Government rested its case on traditional *rechtsstaat* doctrine, inherited from the Netherlands via the colony, while many who supported review tended increasingly towards liberal perspectives that approximated, and often drew upon, English and especially American rule of law concepts. It is no mere coincidence, or the result of foreign language oneupmanship, that the very term "rule of law" became common among private lawyers, judges, intellectuals, and others, almost to the exclusion of *negara hukum*.

The main theoretical objection to review was that it would raise the Mahkamah Agung above Parliament and the MPR, which putatively represented the democratic will of the people. Against arguments from common law models, Minister Seno-Adji, representing the Government's case, was able to draw on the experience of a much larger universe of civil law states. From a civil law perspective, the Mahkamah Agung had quite enough to do directing the lower courts, whose work was badly in need of improvement. With respect to the often-mentioned American example, the Minister avoided the essential issue of judicial control over political authority by focusing on the federal responsibilities of the American Supreme Court, which were irrelevant in the unitary state of Indonesia.[15]

The combination of political fantasy and doctrinal integrity in these arguments made them difficult to deal with. One of the more striking consequences of the controversy over review and related issues was the extent to which it compelled those who favored institutional change to break more or less radically with doctrinal tradition. The heritage of colonial legal theory—as well as an older heritage of political culture—went against them. The bent of civil law doctrine toward legislative supremacy and administrative prerogative provided the

[15] Seno-Adji also denied the Mahkamah Agung any authority over administrative courts, in which liberals saw another means of recourse for private citizens against the actions of executive authority (Seno-Adji, 1967, appendix III: 16; 1968: *passim*). But in any event, the New Order Government, like that of previous regimes, had no interest in establishing courts whose major purpose would be to hear suits against the government.

Government with a ready-made defense of the political status quo, and allowed very little leeway for anyone else to justify a displacement of institutional authority to the courts. Yet the substantive legal advantages, guarantees, and protection of private interests contained in the Dutch codes and principles inherited from the colony were no longer practically valid in the independent state, because the power of private interests was inadequate to maintain them. What remained of the private economy after the nationalizations of 1958, and what grew rapidly again in the New Order, depended much less on regular legal process than on negotiation with political and bureaucratic elites. Noncommercial interests were more salient politically than commercial ones, but even less capable of contending advantageously with the government. It was not that the old codes offered no means for containing political and bureaucratic authority. The legal means existed amply: for example, the concepts of *abus de pouvoir* and *detournement de pouvoir* are available still in the Dutch form of *onrechtmatige overheidsdaad* (Yap, 1973, Hartono, 1968: 52). But the fact that such instruments existed in theory, while having atrophied in practice, made it possible to argue against any innovation that held out hope of greater efficacy.

Advocates of change were therefore driven increasingly to reject the principal tenets of civil law doctrine itself, which had become the Government's preserve. The point should not be exaggerated, because whole bodies of legal doctrine are not transformed so easily or consistently. But judicial review, as one outstanding claim to innovation of principle, was accompanied by other conceptually related ideas: accusatorial trial procedure, which was particularly attractive to professional advocates, who believed that it would give them balancing power against prosecutors and judges and offer better protection to criminal defendants than the inquisitorial procedure of civil law practice; the concept of contempt of court, which would give judges more procedural muscle; and a firm principle of damages against wrongful government action (Razak, 1970; Tasrif, 1971: 26-29, 130; Wirjanto, 1971; Sujardjono, 1971; Primawati, 1971). In their emphasis on limiting the exercise of government power, all these ideas, but particularly review, constituted a conception of political power and its conduct quite different from the one that had always governed Indonesia.

Here was the essential reason why judicial review was doomed to failure. In fact, it probably would not have made

much difference. The posture of most judges vis-a-vis political authority had always been basically timid and acquiescent. Most judges, however, were unknown quantities to army leaders, who tended, when not ignoring them, to identify judges, advocates, and related intellectuals as grumblers against the army's involvement in politics. More important, the ideology of political power did not make a dispersal of formal authority seem sensible, as the actual distribution of political power did not make it necessary. At stake was the patrimonial assumption, no less compelling for President Suharto and his staff than for Sukarno and his, that state leadership has a natural claim to a monopoly of power, itself indivisible, along with its responsibilities and prerogatives. It was precisely this assumption that liberal lawyers, students, intellectuals, and many others were challenging. But there was no question of permitting independent centers of institutional power to develop. From the point of view of the army, which had more power at its disposal than any other political elite independent Indonesia had known, the liberal ideology of separation of powers grated against the New Order's emphasis on unity, leadership, and speedy development; and it smacked of civilian efforts to undercut the army's political legitimacy (Amin, 1970).[16] Similarly, the demand for judicial review reflected disparagingly on the trustworthiness of political authority, now held securely by the army, and represented a potential obstacle that the Government saw no need at all to encourage.

Consequently, Law 14, while granting the judiciary a symbolic taste of review in article 26, rendered it meaningless. The Mahkamah Agung was denied the role of constitutional guardian. Its powers of review did not extend to enacted statutes (*undang-undang*) or their implementing regulations, but were limited by article 26 (1) to determining whether administrative regulations (*peraturan*) and decisions (*keputusan*) conflicted with higher legislation. Even here the Mahkamah Agung's authority was watered down to exceedingly humble proportions.

[16] To some extent, it was such an attack. In his lengthy polemic with the army-backed daily *Berita Yudha*, S. M. Amin, a lawyer, argued that separation of executive, legislative, and judicial authority was an absolute condition of the *negara hukum*, but that military infiltration of all state institutions had rendered any such separation meaningless (Amin, 1970: 25 and *passim*). Minister Seno-Adji, in his 1967 report, devoted much attention to countering Ad Hoc Committee II's proposals with respect to the judiciary, but in the same vein he also developed a strong argument against presidential responsibility to Parliament. The two issues were related in the understanding by army leaders, as President Suharto and others occasionally made quite clear, that the constitutional character of the New Order was basically like that of Guided Democracy, which the army had helped to create. What needed changing, in their view, was not the structure of state but state policies.

In the parliamentary committee responsible for the final draft of Law 14, a question arose over whether the authority actually to quash a regulation vested in the Mahkamah Agung or in the administrative office that had produced it. It was the last disagreement between pro-judiciary and pro-administration forces. The formula that was finally worked out gave the administrative office itself sole authority to rescind a regulation declared by the Mahkamah Agung to be in conflict with a higher act (*Undang-undang*, 1971: 48-49). The meaning was unmistakable: ultimate authority over the law rested not with the courts, but with the bureaucracy.

On the basic institutional issues of Law 14/1970, then, liberal perspectives lost out decisively. Elsewhere in the statute, particularly with respect to criminal rights, they seemed to have won recognition. But it was hollow.

Criminal rights were a critical focus of liberal concern because procedural abuses in political and conventional criminal cases had become common under Guided Democracy and did not abate in the New Order (Amin, 1970: 9-16). In addition, the overwhelming power of public bureaucracy over the lives of private citizens was most unambiguously evident in criminal process. Growing ideological differences about the proper role of government were therefore likely to emerge here in a grinding tension between those views which assumed the patrimonial primacy of bureaucratic prerogative and those which were beginning to emphasize the legitimacy of private rights. The new rights literature of the late 1960s and 1970s demonstrated equally well both the evolving consciousness among some groups of being "private" and their consequent wish for protection against public power (See Damian, 1968).

Those who favored stronger courts also generally favored fuller protection for criminal defendants, but the most outspoken lobby on criminal rights consisted of private lawyers. For advocates, the weakness of their own professional role within the judicial system was closely related to the poverty of private rights; both were a function of the unbalanced centrality and privilege of the official side of the legal system. Advocates had long complained that even the limited guarantees provided by the colonial penal and procedural codes were ignored by the police, prosecutors, and first-instance judges. Among public officials, judges were the most sympathetic to efforts to improve criminal procedure, but inconsistently, while prosecutors and police were reserved or recalcitrant. From an official point of view, the need for individual rights reflected suspiciously on

the quality of official responsibility and rubbed against the grain of state ideological emphases on the transcendent interests of "society."[17]

Yet, despite the power disposed against criminal rights, Law 14/1970 appears to provide unqualified guarantees. Article 7 forbids all arrests, detentions, searches, and seizures without written authorization or in violation of prescribed procedures. Article 9 establishes government liability for false arrest and criminal penalties for official *abus de pouvoir* in criminal process. The right to legal counsel, in which professional advocates were deeply interested, is established by article 35; article 36 provides that accused persons may request legal assistance from the time of arrest or detention.

These guarantees are a mirage, however, even statutorily. Actually the language of Law 14 follows that of Law 19/1964 with respect to criminal rights. The Ministry of Justice had already agreed then, under Minister Astrawinata, that such principles were desirable. Practice was another matter, in 1970 as in 1964. In both statutes the basic procedural rights depend upon ancillary legislation, none of which has been forthcoming. This peculiarity of Law 14 was much criticized by lawyers, but it cannot be dismissed as merely sloppy legislative drafting. The unimplemented concession is a bizarre variation on a common bureaucratic tactic, but is built into the legislation itself. Without clearly locating responsibility for the problem, it naturally favors the status quo, as those who oppose change may argue that the new rules are not yet operative. This has

[17] A standard position on criminal rights among prosecutors and police, as well as any other government officials, states that the balance between the rights of individuals and the rights of society must favor the latter (Nasution, 1972: 101-102). The "rights of society" are never clearly defined, however, leaving the distinct impression that they are really in part a symbol for prerogatives of authority. During the period under discussion, one individual stood out as an exception among police and prosecuting officials on the issue of criminal rights: Hugeng Imam Santoso, head of the national police from 1968 through 1971, strongly favored fuller procedural protection of accused persons.

Political leaders paid little attention to the criminal rights issue, in part because it became problematic for them only in matters of political crime. Here the military security apparatus was usually engaged anyway, setting aside the conventional criminal and procedural codes. Far-reaching legal authority to deal with political crime, defined very loosely, was provided by Presidential Decree 11/1963 (LN 101, TLN 2595, 1963) on the eradication of subversion, which was validated by Parliament and re-promulgated as a law (LN 36, TLN 2900) in July, 1969. Military security, when it acts, does rather much as it thinks necessary; and one result is long detentions without trial. The civilian legal apparatus is responsive, politically but also legally under the subversion law, to the security apparatus. Nevertheless, the civilian courts offer a forum of defense for those accused of political crimes, and often will go as lightly in sentences as judges dare, depending, of course, on the judge and the political circumstances. Between the civilian courts and military security there is considerable tension, but it is felt more by civilian than by military officials.

happened consistently to article 36 on legal counsel, for example. Neither the police nor, especially, prosecutors have been willing to allow accused persons to meet advocates before preliminary investigation is well underway or finished. It is sometimes permitted, but always at official pleasure; the "right" does not exist. Similarly the other procedural rights laid down in Law 14 are empty of practical meaning. What is left to them is the promise, which professional advocates particularly have tried to use as a lever to compel the Government to fulfill the law (PERADIN, 1978: 100, Resolution II).

The last issue of Law 14 we will deal with here concerns advocates themselves, the most consistent spokesmen for a liberal version of the *negara hukum*. Institutionally, in critical ways, the professional advocacy is to the formal legal system what middle-class power is to the political system. Earlier it was mentioned that the alliance of judges and advocates in favor of judicial independence and review was uneasy, as it was not founded on shared values and common systemic commitments. Judges above all are officials, part of the national bureaucracy from which they draw social status as well as inadequate salaries. Private lawyers are excluded from the tacit fellowship of judical officials, who tend to view them as illegitimate intruders rather than contributing members of the judicial system. Advocates and their clients both suffer for it.

Fervent supporters of a more powerful judiciary, advocates have also been the chief critics of the courts. In 1964 Minister of Justice Astrawinata, who was sensitive to this problem, proposed the creation of a special committee, including professional advocates, to evaluate judicial recruits and review the work of first-instance judges. IKAHI, acting as a bureaucratic union, rejected the innovation. The idea remained alive in the Ministry, however; and the first draft of Law 14 sent to Parliament devoted one section (VII, arts. 32-34) to a Council for the Examination and Evaluation of Judges (*Majelis Pertimbangan Penelitian Hakim*, MPPH). Made up of members from the Mahkamah Agung, the Ministry, IKAHI, and PERADIN, the MPPH was conceived as a "nongovernmental special council" organized under the Mahkamah Agung and was to make all final decisions on the appointment, promotion, transfer, dismissal, and administrative punishment of judges initiated either by the Mahkamah Agung or the Ministry of Justice. Judges were too sensitive to the decline in status they had suffered since independence to see the proposal as anything less than a further slight and a threat to the security of the career judicial corps.

As a result of IKAHI's objections, the MPPH was dropped from the final draft of Law 14, denying professional advocates—and by extension the public—any role in the internal administration of the judiciary (*Undang-undang*, 1971: 38, 93). Here too assumptions of patrimonial-bureaucratic prerogative won out easily over liberal challenges.

IV. CLASS CONFLICT AND THE NEGARA HUKUM

Throughout this discussion the issues of an Indonesian *negara hukum* have been understood to involve a struggle between political authority on the one hand and a growing but still inchoate middle class on the other. It has not been much of a contest, as the continuum of forces engaged overwhelmingly favors the side in control of the state. After two years of conflict and negotiation, nearly all that Law 14 accomplished was to excise the explicit presidential prerogative of interference in judicial process. For the rest, it confirmed the fortress-like centrality of political leadership and its bureaucracy that Guided Democracy had rescued from the challenge of the parliamentary system. In the years since, as before, the essential modes of economic and political intercourse have rested on a premise of elite power and discretion, taking the forms *inter alia* of inconsistent regulation, pervasive corruption, and frequent recourse to coercion. This does not mean that there are no limits. They are imposed at least minimally by the Government's own worries about popular legitimacy, by inter-elite conflict, and also by international pressures of various sorts. But within the government apparatus itself, bureaucratic (including legal) sub-systems have relatively little political autonomy and are therefore ineffective as means of internal control.

Here the middle-groups do not have much influence. So they bargain, profitably to those in power and sometimes to themselves, but without any guarantee of their continued bargaining power. What they seek is essentially an institutionalized route of access to and influence in the state. As yet, and perhaps for long into the future, they do not have enough organized power to force through anything like this objective. Government control of a mixed economy, in which a kind of state capitalism is a dominant feature and the private economy is dependent upon the bureaucracy and political leadership for commercial advantage, assures this condition, as does the consequent weakness of political parties and private associations other than GOLKAR, the present regime organization.

Moreover, existing patterns of class relationship do not favor any rapid accumulation of power by emergent middle-class groups, even if they should be able to coalesce over the lines of religious and ethnic cleavage that divide them. The basic problem here, lying almost mute behind a screen of urban economic and political activity, is that of the peasantry, who have remained virtually unrepresented since the destruction of the Communist Party in 1965. One can argue that only on the basis of some kind of alliance between urban middle classes and the peasantry can fundamental political and economic change eventually be forced through, but it is hard to conceive how such an alliance might soon be fashioned.[18] Apart from their lack of autonomous economic power and influential political organization, the middle-groups are, at best, ambivalent about the implications of peasant interests and, at worst, greatly fearful about the possibilities of peasant revolution.[19] After more than a decade of army rule, a few have come around to thinking that a peasant revolution might be a good thing, but most, whatever other objections they have to the army, do not think the price paid for annihilating the Communist threat has been too great. Part of this price is their own limited political influence and the uncertainty of discretionary rule. To some the *negara hukum* promises a lower price, more influence and less uncertainty, in an implicit settlement between the middle-groups and whoever happens to be in power. To others, among them professional advocates, intellectuals, and others committed to further-reaching reform, the *negara hukum* means a more pervasive reordering of the Indonesian polity to extend the advantages of certainty, regularity, protection of personal rights, and procedural equity beyond the urban well-off to the urban and rural poor. Out of this liberal, but in context moderately radical, perspective have come new programs of legal aid, pressures on traditional legal doctrine, and the sorts of reform demands that lost out in Law 14/1970. To the left of this position are those who argue that a liberal version of the *negara hukum*, while better than nothing, is no longer enough

[18] The term "alliance" is used loosely, because the peasantry is not likely to gain much from it. Barrington Moore, Jr. (1966) has dealt with the significance of whatever relationships do develop between urban leadership and peasant classes.

[19] During the early 1970s the Government forbade any political party activity below the district level, except at election times. The peasantry is to be considered a "floating mass," insulated from the divisive influences of party conflict. From another point of view, as many critics of the policy have contended, it is essentially an effort to demobilize the peasantry politically (Liddle, 1973).

in the face of the social, political, and particularly economic disabilities of the peasant majority, whose only hope lies in an even more fundamental revolution.

It is hard to ignore similarities between Indonesia and other countries where the pressures of social and political change have focused, if only briefly, on legal systems. The analogy between Indonesian demands for judicial independence and review and German demands for judicial review and "free law" under the Weimar Republic is striking and should not be set aside merely because there seems to be little else to compare between the two countries (Unger, 1976: 188-192; Neumann, 1957: 52-56). In the German case these demands had conservative intentions, because the class behind them was strong; and they were successful, because the state then was weak. In the Indonesian case the reverse is true on both counts. Yet in both countries, at times when constitutional boundaries seemed open to redefinition, middle-class groups sought to change the uneven balance of power between private interests and public authority by reordering the relationships among government institutions themselves.[20] Although not always well articulated, one essential point of the struggle for an Indonesian *negara hukum* has been to create within the government an institutional network to which private interests might have unimpeded access and in which their social, economic, and political concerns would have advantageous influence. Failing usable representative institutions, the judiciary alone can serve this purpose, though seldom very well, because judges seem to be functionally differentiable from the general bureaucracy and work under cover of a transcendent myth—law—whose content is relatively manipulable.

To repeat an earlier argument, there is no reason why the law-state must emerge dominant anywhere. The role that law, as institution and as political myth, may play depends in large part on the results of political conflict. In Indonesia law appears to various groups as a way out of political and economic disadvantage or as a means of reconstituting the relationship between state and society on new moral grounds (Mahasin, 1978). If the forces behind an Indonesian *negara hukum* lost out in the battle of Law 14, their struggle inevitably goes on in many more or less significant confrontations with the Government, in courts and other public forums, over issues of human rights, the behavior of public officials, procedural guarantees,

[20] Arnold Paul (1969) has attributed the remarkable influence of the American judiciary in part to this kind of successful quest by corporate interests for a favorable and amenable institution during the late 19th century.

and the limits of political authority and official prerogative (PERADIN, 1978). Through such conflict the thematic dimensions of the *negara hukum*, the concept of an Indonesian law-state, are evolving. The *negara hukum* has become a standard issue of political conflict and ideological discourse. Because it does have substantial support, it is likely to bear some influence in the evolution of Indonesian politics.

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