Human Rights and Peace in Southeast Asia Series 4

CHALLENGING THE NORMS

Edited by

Azmi Sharom
Sriprapha Petcharamesree
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The Southeast Asian Human Rights Studies Network (SEAHRN) is an independent consortium of academic institutions and research centres which provide human rights and peace education through study programmes, research and outreach activities within the Southeast Asian region. The Network, which was established in 2009, currently has 20 members from seven countries: Cambodia, Indonesia, Lao PDR, Malaysia, The Philippines, Thailand and Vietnam.

SEAHRN was born out of a common dream to enhance and deepen the knowledge and understanding of emerging and seasoned scholars, educators, researchers and advocates as well as other in stakeholders from the Region about human rights and peace. The goal will be achieved by engaging in collaborative research, improving course curricula and study programmes, sharing of best practices and conducting capacity building training of educators, staff and students. Furthermore, it seeks to strengthen regional academic and civil society cooperation to sustain effective promotion and protection of human rights and peace in the Region. The Network desires to open its doors to interested institutions and individuals who share its vision for human rights and peace in Southeast Asia.

FOREWORD

This publication provides a delicate "hors d'oeuvre" of various tensions facing human rights, democracy, and governance in Southeast Asia and their interface with power relations in the political, social, economic and cultural fields. They range from misuse of laws by the State (alias the government of the day), attacking the enjoyment of human rights, to issues of justice/injustice, corruption, cultural relativism, intolerance and the financial seepage competitively polluting the exercise of rights and freedoms. The term "Southeast Asia" aptly invites critical analysis of its inherent heterogeneity, raising concerns for groups and individuals who are negatively affected by the homogenizing identity, policy and practice of the powers-that-be at both the national and local levels. Innately, there is a call for checks and balances against abuse of power, and the need to nurture human empathy through cross-cultural discourse and understanding.

In reality, they tempt us to invite even more analyses, for a fuller and more cathartic exposure in a continuum. A key role for analysts of and from the region (and beyond) who will never be redundant! The reader is challenged by the promise of an evolving, plural narrative – divergent, convergent, emergent.

Vitit Muntarbhorn
Professor Emeritus of Law,
Chulalongkorn University, Bangkok. 2015.

A NOTE OF GRATITUDE

The names of the editors on the cover of this book is misleading. That is not to say that the editors did not do their work; on the contrary the editorial team has strived hard to complete this latest edition to our series. It is misleading because it implies that they are the only ones involved in the process of producing this book. The fact is a large team of people are involved. This is especially true in the screening process where SEAHRN members collectively go through the many papers that we have and then select the ones we think are most suitable for publication here.

Therefore it is with gratitude and much appreciation that we acknowledge the following people:

- **Theresa Casal de Vela, Miriam College** (Philippines)
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Together we have once again demonstrated the team work that characterises SEAHRN and what can be achieved with it. Long may it continue!

Azmi Sharom
Chief Editor

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INTRODUCTION

At the Edge of Meaningful Change

In the inaugural paragraph of his paper on Human Rights and Asian Values, Amartya Sen, a Nobel laureate[1], quoted Thomas Paine who wrote in 1776 that "Asia had long expelled freedom". The full quotation said "Freedom hath been hunted round the globe. Asia and Africa have long expelled her. Europe regards her as a stranger and England hath given her warning to depart".[2] For Paine, as quoted by Sen, "political freedom and democracy were valuable everywhere, even though they were being violated everywhere too." [3] Sen commented that "the violation of freedom and democracy in different parts of the world continues today."[4] After over two centuries, this remains true in different corners of the world including Southeast Asia/ASEAN where deficit and regression of freedom and democracy has been more and more strongly felt throughout the region.

> *"We cannot limit our understanding of democracy solely by occurrence of elections. Elections are clearly a problematic process. We must grapple with the fact that there is often no access to a free media and that the judiciary is blatantly compromised", said, Anwar Ibrahim, former Deputy Prime Minister of Malaysia[5]. Another voice of Southeast Asia , Jose Luis Gasgon, currently Chair of the Philippines National Human Rights Commission, confirmed "having elections does not make a democracy. Ultimately, interventions must be done to strengthen civil society, to protect human rights, to ensure transparent political parties, to strengthen the judiciary to ensure its independence, to guarantee free and fair elections and to deal with major cases of extrajudicial killings".[6]*

Democracy, definitely, is based on the concept of freedom and participation. There is no valid reason to justify the hindering of groups of people to express only because they try to find space for public debates. Democracy, therefore, embraces notions of freedom of expression, free media, independence of judiciary, protection of human rights and transparency. Another characteristic which is no less important is dialogue and non violence in resolving a country's problem.

In Southeast Asia, people support democracy. In the 1980s-1990s, waves of democratization and people power swept through the region with a few exceptions in

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1   Amarya Sen received the Nobel Prize in Economics Science in 1998.
2   Amartya Sen, Human Rights and Asian values, 16th Morgenthau memorial lecture on Ethics&Foreign Policy, 1997. http://www.nyu.edu/classes/gmoran/SEN.pdf, accessed 20 November 2015.
3   Ibid.
4   Ibid.
5   John Feffer, Democracy Recession in South-east Asia, 13 June 2007, http://www.ipsnews.net/2007/06/politics-democracy-recession-in-south-east-asia/, accessed 20 November 2015.
6   Ibid.

the countries such as Laos and Myanmar.[7] In 2013, the Economist Magazine ranked Timor-Leste as the most democratic nation in the region followed by Indonesia, Thailand, Malaysia and the Philppines.[8] In 2014, Thailand came under what Thitinun, a political science Professor at Chulalongkorn University called 'thinly veiled dictatorship of Generals'. He even warned that we 'must wary of the potential leviathan the military government could become'. Whilst Thailand has been, since May 2014, experiencing military rule with absolute power, Myanmar, however, since 2011 has changed to move towards more democratic society with the latest elections early November 2015 (despite the fact that some groups were excluded from participating in the election process).

Michael Vatikiotis, a long time political observer in Southeast Asia wrote in 2014 "as if it wasn't bad enough that Indonesia's parliament just voted to curtail democracy at the grass root level, the Indonesian police have banned the democratic right to protest against the move at an international forum on democracy the government is hosting in Bali, Indonesia. That's almost as absurd as the military's insistence in Thailand that it intervened to save democracy".[9] Under the new military regime, academic freedom, in its real sense, in Thailand has been under threat and many times attacked. Order for interrogations (as part of "attitude adjustment"), detention of those who criticize the government has become regular practice in the country previously praised for the respect of academic freedom. Thailand, unfortunately, is not the only country where rights and freedoms are under threat and democracy is "being expelled", other countries, such as Malaysia, are more or less in the same condition. Michael Vatikiotis continued by adding that "In Southeast Asia the word 'transition' imparts more ambiguity. Power changes hands more easily, but remains concentrated in the hands of the few. No attempt to eradicate corruption goes beyond scratching the surface and punishing the minnows. Impunity prevails, as victims of political repression are asked to bury the past to avoid opening up old wounds".[10] Moreover, repressive laws ranging from Lese Majeste provision, Defamation law to Sedition Act have been used to suppress democratic voices in different countries around the region.

Although many countries in Southeast Asia have come a long way on economic front, its democratic institutions still have a long way to consolidate. In most if not all of the countries, political institutions have been dominated by patronage politics and remained concentrated in the hands of a few.[11] The major challenges have been faced by Southeast Asian countries include poverty and inequality, lack of accountability, executive abuses

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7   Ibid.

8   Democratic deficit, http://asiapacific.anu.edu.au/news-events/all-stories/democratic-deficit, and Political Party Forum Southeast Asia, http://partyforumseasia.org/2013/05/16/timor-leste-the-most-democratic-country-in-southeast-asia/, 16 May 2013, accessed 22 November 2015.

9   Michael Vatikiotis, Murky democratic dawn in Southeast Asia, New Mandala, 10 October 2014, http://asiapacific.anu.edu.au/newmandala/2014/10/10/murky-democratic-dawn-in-southeast-asia/, accessed 22 November 2015.

10   Ibid.

11   Ibid.

and weak institutions.[12] At the regional level --ASEAN-- the same challenges are also felt as undemocratic and unconstitutional change of the government in ASEAN Member State has not been even questioned let alone sanctioned by ASEAN and other AMS despite the commitment made by ASEAN to promote democracy, human rights and fundamental freedoms.

After almost five decades of its existence, ASEAN Member States still adhere to a specific version of politics which is not liberal but open to capitals and investments in order to forge economic development. Most of countries in SEA/ASEAN see the development gap as the greatest challenges that they have been trying to address. Democratic deficit in any members of the association has not been seen as "problem" in ASEAN. With this perception, any restrictions of political freedoms and non democratic regime are accepted without any questions. That's the reason why in many countries activists and academics have been charged, imprisoned, tortured, forced to disappear or killed for their belief in freedom and for the fight for their rights. Journalists are subjected to prosecution and/or persecution where security law, in one form or another, remains in force. Perpetrators have not been held accountable and impunity continues to prevail in most if not all countries in the region. Many of aspects as described and analysed are further discussed in different papers in this Series.

In his keynote speech, Malik Imtiaz Sarwar spoke about the increase in the use of laws suppressing the freedom of expression in Malaysia since the general elections of 2013. Although he mentioned the Malaysian Communications and Multimedia Commissions Act 1998 and the Penal Code (Revised 1997) his focus was on the Sedition Act 1948, a remnant of British colonialism which the Prime Minister of Malaysia had promised to repeal in 2012. However instead of its repeal the law has been used extensively in particular in the last three years.

Imtiaz contends that the broad definition of sedition in the Act meant that it could be used to protect the "dignity" of the monarchs, the religion of Islam and the favoured status of the Malays which goes beyond the normal meaning of the word which is to create unrest and rebellion. This broadness of interpretation ultimately serves the interest of the government. For example a verbal attack of the ruling party can be interpreted as being an attack on Malays.

Further proof of how the use of the law appears to be self-serving can be found in the selective manner that the law is used with organisations and individuals who are seen to be in favour of the government escaping legal action even though they have said things which objectively (based on the existing law) could be constituted as seditious whereas those who are deemed as being anti-government are charged for seemingly innocuous statements.

However, it is not just the law which is the problem. Ultimately, Imtiaz laments the

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12   Ibid.

failure of state institutions to protect the citizens of the country. Agencies that should be independent of government instead behave in a manner which appears to be serving governmental interest. Imtiaz argues that these are the very institutions that should be upholding the Constitution and the protection that it provides the citizenry and they are failing. Thus we have judges meting out custodial sentences for incongruous "offences" and the Attorney General's Chambers prosecuting seemingly harmless statements with vigour.

Institutional failure is a great cause of concern because although the political situation is fluid, institutional protection should be a constant as they are often the last line of defence when it comes to the protection of freedoms. Systemic failures too can have a negative impact on human rights as pointed out by Herlambang P. Wiratraman and Aloysia Herawati in their respective chapters.

Both papers address certain shortcomings of the legal system in Indonesia. Herlambang writes about the increasing use of the judicial process to intimidate journalists. He states that repression need not come from the state per se, for as can be seen in Indonesia since the Reformasi (reformation) movement of the late 1990s there have been much improvements in the laws including those which specifically protect press freedom, yet this does not mean there are no threats against the press.

Instead he traces the worrying growth of what is described as unjustifiable law suits against press freedom (ULAP). There are five elements to determine if a law suit falls under this category.

- It has to be directed against professional journalists
- The lawsuit is intended to damage a media organisation or to jail journalists
- The law suit is used as a threat
- The lawsuit is accompanied by other threatening behaviours such as physical attacks either on individuals or media premises
- There is a political or economic interest behind the law suit

Cases such as Tomy Winata v. Tempo Inti Media Inc (2003) is an example of ULAP where the publication Tempo was sued for such a large amount of money that if they were to lose they would be bankrupt. In this particular case Tempo won but Herlambang worries about the frequency of such actions. He expresses special concern for ULAP cases which happen in the provinces. In Jakarta there is a strong network of journalists and civil society thus support systems are in place and are robust. However away from the capital journalists and media organisations may be more isolated and therefore more vulnerable.

Herlambang also details actual physical attacks on journalists which has even led to deaths. Normally journalists working on issues such as corruption, the unlawful exploitation of natural resources and other issues that involve either politics or large amounts of money are at risk. The combination of physical attacks and legal action which can be extremely

burdensome, has meant that there have been situations where media owners have instructed their reporters from working on certain stories. There even exist agreements between the media and their attackers where in return for not reporting; violence will cease.

Violence is also a theme found in Aloysia's chapter. In 2012 approximately 1500 Sunni Muslims attacked a group of followers of the Shia branch of Islam. In the attack one Shia person died, numerous people were injured and there was extensive damage done to property with scores of Shia houses, mosques and stables burnt.

One man who was suspected as being behind the attacks was Rois Al Hukama who had been vociferously attacking the Shia' faith and their followers. He was charged with actually committing the acts of violence or of instructing others to do so. None of these charges were proven. Aloysia does not dispute the court process itself. Instead she regrets that the prosecutors did not choose to charge Rois for hate speech for which provisions exist in Indonesia.

She lists down the various speeches made by Rois which demonises Shi'ism using language which was highly incendiary. All these were done prior to the 2012 attacks. Admittedly a causal connection between the two may be difficult to prove, which is why Aloysia questions the wisdom of not using Indonesia's law against hate speech to charge Rois. The poor choices made with the law has led to an injustice and the right of people not to be discriminated against; and the author asserts that hate speech is against human rights for it promotes discrimination; was not given due protection.

The issue of how factors other than the State can influence rights can be found in the chapter on academic freedom in Malaysia by Chang Yi Chang and Choo Chean Hau. When discussing academic freedom in Malaysia, two laws usually form the foundation of the discussion: The Statutory Bodies (Discipline and Surcharge) Act 2000 and the University and University Colleges Act 1971. The former is relevant to academic staff where according to this law it is an offence to criticise government policies by staff of statutory bodies. Seeing as how public universities are statutory bodies, this will apply to lecturers as well. The law goes into the realm of the ridiculous when it states that to praise government policy requires ministerial permission. Although this ludicrous Act has yet to be used against academics, its existence is a constant threat, especially for those in the social sciences and arts. The University and University Colleges Act is more relevant to students restricting as it does their freedom of association and speech.

What Chang and Choo does is to explore growing academic capitalism in Malaysia which they claim also has a negative effect on academic freedom. They state that academic capitalism is when universities engage in economic activities to generate funds. Malaysian public universities for example are encouraged to commercialize their research and to work closely with industry. In private universities, the trend is seen in the types of courses being offered which are aimed at providing a workforce and is very market driven.

The writers argue such an emphasis on the market and industry narrows the breadth of what a university should be and academic freedom, in particular in research, will be affected by the availability of funds which in turn will be driven by market forces as opposed to academic ideals of knowledge seeking and pure research. This concern of the writers appear to be further justified by recent events in Malaysia where the government has cut funding to public universities, in some cases by as much as 27 per cent, and insisting that universities be more self-reliant.

Bui Hai Thiem's chapter discusses the anti-corruption measures being taken in Vietnam. In Vietnam, anti-corruption activities are largely government driven. Or to be more accurate, they are driven by the Communist Party of Vietnam (CPV) as anti-corruption efforts are placed directly under the purview of the Politburo.

But such efforts have been aimed mainly at high profile cases involving high ranking officials, while "smaller" incidences in areas such as land administration, environmental governance, healthcare, education the police and the judiciary are still, according to the writer, rampant but draw less attention.

It is this gap which is being filled partly by the efforts of the media and civil society. The media plays a large role by impacting public perception on the issue of corruption. By highlighting these cases, the public are made aware of the harm that corruption creates as well as the extent of it. Even though the media are handicapped to a certain extent by short comings in the law, like a lack of freedom of information, the writer claims they are still an important player. And seeing as how the CPV is publicly taking corruption seriously, the media has more space in being critical even towards the government when discussing such issues.

Civil society is active too. Either in the form of Non-Governmental Organisations like the Transparency International affiliated Towards Transparency or grassroots movements which are loose coalitions of NGO and individuals who have taken an aggressive and voluble stance against corrupt practices using social media and protests to get their message across which is fundamentally about how fed up they are with corruption. It would appear therefore that an interesting side effect of these anti-corruption measures is a growing vitality in civil society and the (slight) expansion of democratic spaces

Democracy is the theme Vidhyandika Djati Perkasa's chapter. The writer explores democratic practices in Papua New Guinea where conventional local elections suffer from corruption and a disconnect with the citizenry. This has led to an ineffectiveness of the local governments as well as a high level of distrust against them. What Vidhyandika asks is whether a solution can be found in indigenous electoral systems.

The system discussed here is the "noken" system which is basically a mechanism where registered Papua voters select a head to vote on their behalf. The advantage of this system is the increased engagement between the electorate and their chosen proxy, leading to a greater level of involvement and investment in the election process. On the other side of

the argument Vidhyandika's study exposes some deep problems such as the imbalance of power between leaders and the community with the leader's influence being far too great. In the end, incorporating indigenous methods may appear pluralistic, inclusive and imaginative, but it does not actually address deeper issues such as poverty and poor education which has a more profound effect on the democratic process.

Tim Rackett provides an interesting perspective on the troubles in southern Thailand. He examines the situation via the lens of exploring Buddhist religious identity and its relationship with nationalism, racism and violence. Through his analysis of extensive literature on the issue, he asserts that it is not accurate to marginalise the role of religion in the conflict in south Thailand. This is not limited to Muslim identity and fundamentalism but also encompasses Buddhism as well. One example he makes is how monks have been part of Thai political machinations, having been identified over the years with Thai nationalism and a loyalty to "Thai-ness", taking the most obvious form in loyalty to the King. Thus they become entwined in the conflict by virtue of association with the State.

Furthermore a distinct push for a Thai homogeneity, i.e. to make "Thai" those deemed as the "other" exacerbates the problems by creating a sense of alienation and marginalisation. He concludes by asserting that it would therefore be unwise to ignore the role of religion, both Muslim and Buddhist, and sticking to the misconception that the problems in the south are purely or primarily socio/economic in nature. There has to be a dismantling of ethno-religious identity politics and an embracing of pluralism and diversity in order to defuse the volatility that such divisive politics created. In fact, there can be no democracy without pluralism.

A democracy is a system that allows citizens to change their government via some process in which the people freely participate in choosing the persons who govern. Free speech and other human rights are yet to be ensured. In the region, democracy becomes just a ritual that only results in recycling of elites, therefore, can never contribute to improve the conditions of the poor. For too long, powers in Southeast Asian countries have been unaccountable for their acts. The distribution of power in the region remains unbalanced. After so many years, democracy still does not find a fertile ground to firmly set foot but always at risk of being expelled from the region.

FUNDAMENTAL LIBERTIES AND THE ROLE OF AGENCIES OF THE STATE

Malik Imtiaz Sarwar

* Keynote Speech at the Third International Conference on Human Rights and Peace & Conflict in Southeast Asia (October 2014, Kuala Lumpur, Malaysia)

Sedition is very much in the mind of the average Malaysian these days. Since the General Election of 2013, more than twenty persons have been charged and a further 14 or so investigated for this very vague and anachronistic offence which allows for prosecution for the uttering of statements which have a seditious tendency as defined under the legislation. This somewhat mind boggling offence is made that much more so for the fact that the legislation declares the intention of the accused as being irrelevant to the charge. The manner in which the courts, the Public Prosecutor and the Police have approached the offence further suggests that truth is not a relevant consideration.

The situation has outraged civil society. The Federal Government had, through the Prime Minister, promised its repeal in 2012. Some believe that the legislation is being used to stifle legitimate criticism and is therefore being applied selectively. They argue that the justification advanced by the authorities for the use of the law – the protection of the dignity of the Monarchs, the religion of Islam and the status of the Malays – is self-serving as these critical features of the Malaysian constitutional arrangement are not, and cannot be, under attack. They point to the fact that those persons who have been charged or investigated for sedition since 2013 cannot be said to have been in any way threatening of the status quo in any wrongful manner. In one instance, a member of the legislative state assembly of Penang was charged for having used a Malay word that loosely translates into "damn, you" against the political party that leads the coalition of parties that forms the Federal Government and several state governments. In Penang, that coalition forms the opposition.

The situation has been seen to be dire enough for the Malaysian Bar, recognised for its commitment to the Rule of Law and human rights, to have held an urgent Extraordinary General Meeting of its members in September this year at which, by an overwhelming majority, members condemned the use and continued use of the Sedition Act to stifle free speech. They also condemned the selectiveness with which it has been applied. The resolution of the Bar lists more than a few instances in respect of which no action has been taken despite complaints having been lodged. In one instance, the founder of a Malay rights NGO, Perkasa, was said to have called for the burning of bibles, a statement which objectively would fall within the ambit of the offence as it has been interpreted by

the courts and applied by the Public Prosecutor and the Police. The Public Prosecutor has declined to prosecute on the ground that this statement was made in defence of Islam.

The Sedition blitz has, to an extent, had a polarizing effect. As can be expected, politicians with, or aligned with, the ruling coalition have defended the use of the legislation, and the manner in which it has been applied. Those on the other side of the divide condemn it. Civil society is also divided, with Malay or Islamic NGOs championing its use for the protection of Islam and the Malays. To say the situation is fraught would be an understatement.

It is regrettable that the situation we find ourselves in the product of the kind of divisive racial and religious politics that has been allowed to perpetuate, as well as what might reasonably be described as a laissez faire attitude towards the separating of politics from government. It is no surprise that that line has become so blurred that many now find it difficult, if not impossible, to recognise, let alone appreciate, the need for participative democracy, and the Rule of Law. In this context government, and the coercive powers it wields, has become nothing more than means to achieving a political objective, in both the narrow and wider sense.

This is a worrying state of affairs; not least for the fact that it has led to a wholesale undermining of the freedoms that distinguish us a society, and which inform our way of life. I do not think that we have as yet seen such an assault on the freedom of expression as have in these last two years. In addition to the Sedition Act, we have seen investigations under the Communications and Multimedia Commissions Act, just recently a Malaysian was sentenced to the maximum jail term of 12 months for a first offence under that Act; his crime was having posted material on facebook that was offensive. We have also recently seen someone charged with provocation under the Penal Code for having likened our Inspector General of Police to Himmler. I understand from media reports that someone who had the temerity to strike an image of the Prime Minister with his slipper is currently under investigation, of what crime I am not certain.

We have been shown, more and more, that the exercise of our minds is not something to be undertaken lightly, and those of us who dare speak out loud what it is we are thinking must tread fearfully. More so when this involves criticism of the Government, and the institutions and agencies of the State. All this puts into question what it means when it is said our freedom of expression, and other freedoms, are guaranteed.

In 1957 we were blessed with a cutting edge written constitution. In what some might describe as a not so amusing irony, the eminent persons who were charged with the task of formulating a draft observed that respect for the basic freedoms was so entrenched in the then colonial Malaya that there was, in their view, no need for a guarantees of liberties to be written in. That an entire part, Part II, was written into the constitution was an effort undertaken in excess of caution.

These freedoms were an indication of the possible lives Malayans, and later Malaysians, could lead. They provide a framework of what could be. Recent events had led many to wonder how effective Part II is, and how we could have ever taken those freedoms that it enumerates for granted.

More and more we are being told that what could be is what should be in the minds of those in authority. Leaving aside it being a society without much of a sense of humour, judging by the reaction of the Public Prosecutor to the Himmler tweet, that society the authorities envision seems to be society that tolerates little or no criticism of anything that can be perceived as being related to or connected with the political status quo of the nation.

We are told by those authorities that we have to live our lives in fear of reactions that may undermine the stability of this nation. What those reactions are remains in the realm of imagination. As those more learned and wise than me have noted, Islam is not under siege, nor are the Malays, in as much as some of the national broadsheets may suggest otherwise. From my perspective, there doesn't seem to be anything to suggest some grand conspiracy aimed at destroying the constitutional position of the monarchs, Islam or the Malays, or any other body established under the constitution. If anything, it is the lack of imagination that repressive enforcement of laws aimed at curbing or containing those freedoms so essential for the functioning of a fully participative democracy engenders that is slowly and strangling this country.

This then raises the question of what it is that the agencies of the state are meant to do. As a student of constitutional law, I have always thought that the primary duty of the agencies of the state was to protect the way of life guaranteed by the Constitution. It is no coincidence that that oaths of office of high officials require them to swear to protect and defend the Constitution. It is of critical importance that protecting and defending the Constitution includes protecting and defending the fundamental liberties that the Constitution guarantees. It is a matter of settled constitutional principle that those freedoms are to be understood in the widest and most dynamic sense. Just as it is that any restriction on those freedoms, be they by the Executive or its agencies or the Legislature is only countenanced to the extent that only such restriction as is absolutely necessary to address the kind of mischief that the founders of the constitution envisaged is permitted.

Seen in this light, it is not easy to understand the thinking underlying the recent onslaught on free expression. One is compelled to wonder how it is that the agencies involved in the suppression reconcile their actions with their duties under the Constitution. Prosecutions have been commenced and where convictions have been secured, custodial sentences have been pursued, even where the offences committed was the first criminal offence committed by the accused person. First instance judges in the subordinate courts have seen it fit to uphold these demands for custodial sentences, notwithstanding such sentences being incongruous. As I mentioned, the person charged under the Communications and Multimedia Commissions Act was sentenced to 12 months in prison. In stark contrast

to that, a person who in a fit of road rage attacked a car with a steering lock was fined RM5,000 and 240 hours community service.

When pressed for explanations, the authorities have have resorted to the traditional mantra of state authorities all over the world: they acted in the interest of national security. The lack of a coherent explanation has led to a belief that there has been selective use of these laws to stifle dissent.

Governments come and go. Institutions however remain. The Rules of law requires that those who serve the nation in these institutions recognise that their role requires them to stay above the inevitable political conflicts that are a necessary evil of the democratic process. They must also be allowed to operate in a context that gives them the peace of mind their demanding roles require. It is for this reason, for example, that Judges and the Auditor General in this country, are given security of tenure. Perhaps it is for this reason that the Auditor General has consistently delivered hard-hitting reports on public spending. The Attorney General, who is also the Public Prosecutor, does not have security of tenure. He is further in no way accountable to Parliament. Despite the obvious importance of his role, he does not enjoy security of tenure and for all purposes and intents hold office at the pleasure of the Government. I understand he is appointed by contract with the Government, as is the Inspector General of Police (although I stand to be corrected on that). This state of affair is unsatisfactory, in part for it potentially allowing for an impression that those who hold these offices serve the Governments that appoint them.

Much has been said about the appointments process of judges in this country. The ultimate choice of who is appointed as a judge devolves to the Prime Minister, whose constitutional function it is to advise the Yang di Pertuan Agong on judicial appointments, His Highness being obliged by the Constitution to act in accordance with the advice of the Prime Minister. The Malaysian Bar and civil society have championed the need for an independent judicial appointments commission. Though a commission was set up in 2009, its composition and role leaves much to be desired. Unlike its equivalent in the UK, which is independent of both the government and the judiciary, its members are mainly senior members of the Judiciary. Furthermore, the function of the commission is merely to recommend appointments to the Prime Minister who is not bound by law to accept the same. The commission is further not obliged to account to Parliament for its choices. This situation leaves much to be desired.

It is vital that discussions on the promotion and protection of human rights take into account these practical dimensions of the human rights framework in any particular countries. This is more so in countries in this part of the world who are not subjected to a regional mechanism.

NO ROOM FOR JUSTICE?
WHEN THE COURT IS USED TO ATTACK JOURNALISM IN DECENTRALISED INDONESIA

R. Herlambang P. Wiratraman

Freer situation in post Soeharto'sdecentralised Indonesia does not automatically affect local journalists and press who have been facing brutal attacks or violence. The court for justice is still far away from reaching and protecting journalists. Yet, the internal pressure from media owners or editors to withdraw the case leaves frustrated journalists alone to get more legal protection.

Injustices situation are caused by two major problems, which are the weak judicial protection system and the pressure from political-economy power alliances who secure their vested interest by deploying hired gangsters in attacking the press.

Therefore, avoiding the court is a serious matter for journalists to consider whether or not they bring justice before the judicial system. This is not always related to distrust over the judicial system, but it is more a 'forced situation'(situasi keterpaksaan), and it might lead to the systematic of impunity governance. The paper dissects to what extent avoiding the court could be fairly considered as possible justice for journalist in the context of decentralised Indonesia.

No Room for Justice?
When the Court is Used to Attack Journalism
in Decentralised Indonesia

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1. Introduction: Decentralisation as Context

Journalists in Indonesia often opt to avoid the court while seeking justice as a form of limitation on their freedom of press. This is happening despite all the talksabout increasing press freedom since the end of the Suharto regime in 1998. While journalists should indeed enjoy greater press freedom, they increasingly face substantial risks when reporting critically about the possible monkey business by business people and politicians. In the regions where decentralisation and limited democratic monitoring are supposedly providing greater margins for corruption, journalists often face threats of violence and brutal attacks. On top of that, pressure from media owners and the editors to withdraw cases due to fear leads to a very frustrated working position or journalists and limits their attempt to obtain legal protection. While Indonesia's legal reform is widely acclaimed both nationally and internationally, the fact that justice is still a long shot for many journalists is worrying as it affects the way they work and eventually shapes the content of news reports about developments in the regions.

As a result of the factors above journalists working in the region cannot believe such statements by President Susilo Bambang Yudhoyono that the media is enjoying excessive freedom (perskebablasan). On 3 June 2010, during the 4th celebration of Jurnal Nasional newspapers, the President stated that "before reformasi, press freedom has been fettered or deficit. But now after reformasi, press freedom is working well, and even enjoys a surplus". At the same time, a communication professor, Tjipta Lesmana, spoke in the major Indonesia daily Kompas of an 'overdose' of press freedom. According to Tjipta Lesmana this "'overdose' of press freedom is inseparable from the problem with its underpinning law that was drafted during legislation-making when Indonesia, after President Suharto, was intoxicated by freedom" (Kompas, 9 December 2010).

In stark contrast with such statements by state officials, journalists see that press freedom is in fact scarce, that it is only offered at a minimum level, and that it is still in many ways perilous. As a result, in the daily practice of their work they often face injustice. This injustice has so much to do with two key problems. The first is the weak judicial protection system and the second is the pressure from political and economic power alliances that are keen to secure their vested interests by deploying privatised gangsters to attack the press. In this situation, instead of seeking justice through the legal system, avoiding courts has become a strategy for journalists to steer free from intimidation and violence.

In this article, I will show that the contemporary limits of press freedom in Indonesia cannot be separated from the politics of decentralisation in Indonesia's during the post-Soeharto era. Due to the devolution of previously centralised state power, political configurations in the regions shifts not only from centralised to decentralised system but also through involvement of powerful coalitions of interests at national and sub-national levels of governance. Hadiz (2007) appropriately labels these coalitions as 'predatory elites'. In practice it means that certain powerful elites engage with 'privatised gangsters'who help

to safeguard a set of local predatory systems of business and political power relations (Hadiz 2010). Wilson (2006) points out that the related proliferation of paramilitary and vigilante group post-1998 is a manifestation of the decentralisation of violence as a political, social, and economic strategy which seriously limits the sovereignty of the state. In relation to the media, Romano (2003) suggests that to understand the Indonesian press, it must be situated in relation to the evolving political culture, which is, as we have seen, heavily influencing press freedom. So while the role of the government in legislating and effecting press freedom has been still intense and strong, the power of predatory elites at local level has been significantly affecting the situation.

In the evolving situation, it is hard for the media to gain access to justice. Instead of accessing justice through the judiciary, journalists tend to avoid the court because journalists distrust the judicial mechanisms and they are aware of the lack of protection system to them provided by the state. However, this paper will argue that avoiding the judiciary does not always relate to distrust over the judicial system, but instead more to what journalists themselves call a 'forced situation'(situasi keterpaksaan). Below I will show that this forced situation leads to systematic impunity and this begs the question to what extent journalists consider avoiding the court as a possible avenue to achieve justice.

2. Courts as a Means of Intimidation

Post-Suharto Indonesia is experiencing gradual political democratisation, especially with respect to electoral processes. This democratisation has led to the progressive adoption of numerous international human rights instruments in newly legislated national laws. The court system has also been subjected to reformasi and as a result many judicial reform programs were focused on the Supreme Court. The judiciary's power structure and its position in society has been changed from being a key instrument in support of the New Order regime to a more balanced executive and legislative power relation to civil society. Yet there are still several problematic issues such as access to court decision and judicial corruption (Pompe 2005a; 2005b). The extent to which these problems affect justice seekers can only be assessed by looking at some concrete cases. In this section I will explore the limits of the provision of justice experienced by journalists to illustrate the effects of a still poorly functioning judiciary in particular the significant margins available to politicians and corporate individuals to affect judiciary processes.

Nearly all journalists in Indonesia would agree that lawsuits against journalists or media firms are a means of intimidation rather than reflection of a fair process of judiciary mechanism. This has been quite often stated by many journalists, reporters, or even media owners in Indonesia.[1] They all share this opinion in response to the lawsuits.

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1   Abdul Latief, a Mataram journalist, interviewed on 1 September 2009; Rika Yoez, a Medan journalist, interviewed on 28 June 2010; Tjunding Levy, a Papua journalist, interviewed on 29 April 2010.

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There is overwhelming evidence that journalists have been often seriously threatened with this kind of lawfare. As written by Luwarso (2005), Press Council observed that the use of court, although it is allowed by the law, is one of threats against press freedom. Journalists call it 'gugatan yang tak masuk akaldansekadarditujukanuntukmelawanpersbebas'or ULAP ('unjustifiable lawsuit against press freedom') (Wiratraman, 2014).

The concept of ULAP is inspired on Reporters Without Borders news (2008) on 'Unjustified lawsuits by church against press condemned' on 21 February 2008. That news item reported that followers of the evangelical Universal Church of God (Igreja Universal do Reino de Deus) had filed dozens of lawsuits against the media.

Actually none of Indonesia's journalist mentions about such particular concept; however, they really felt the abuse of lawfare in attacking press. Therefore, this writing introduces ULAP as a concept in defining such situation.

Much earlier, the idea of unjustified lawsuits was coined by Canan and Pring (1988: 507, 515) as SLAPP or Strategic Lawsuits against Public Participation. Canan and Pring(1988) used SLAPP to refer to instances of the court being used as a 'political retaliation' instrument or as a weapon in social conflict. Law as a social conflict was originally also written by Turk (1976). Thus, a 'ripple effect' from the folklore surrounding SLAPPs may discourage political participation by other citizens and groups (Canan and Pring, 1988: 515). Hence, in the context of press or journalism works, lawsuits against press have a significant influence to restrict and limit its freedoms.

ULAP in the case of Indonesia is clearly an 'intimidation strategy' used to silence the press and force the media companies to run its journalism in such a way that it does not disturb the interests of key stakeholders in the region. The ULAP concept is necessary for defining the concept of 'unjustifiable' lawsuit, which may help journalist to consider any legal actions, and it looks like not only against the media but also freedom of the press in the country. During the fieldwork that underpins this article, I have identified five elements of ULAP in relation to the way it affects the way journalists conduct their work. The first is that ULAP is directed against professional journalism. Second, lawsuits against journalists are intended to collapse news media or even jailing all press workers. Third, the lawsuit is by and large a threat that has retaliatory motive and is not based on ethical evaluation and lacks a strong moral foundation. Fourth, the lawsuit is accompanied by others acts of intimidation like destroying press offices and/or beating journalist or editor. Finally, the lawsuit mostly originates from the corner of a certain political-economy interest (Wiratraman 2012; 2014).

The court cases of Tomy Winata v. Tempo Inti Media Inc. (2003) and Raymond Teddy v. seven medias(2010) illustrate ULAP in practice. Tomy Winata is a tycoon and (in)famous businessman in Indonesia. Winata owns a number of banks and hotels and he is also the Vice President Commissioner of Artha Graha Bank. One of his many support groups was

mobilised to physically attack Bambang Harymurti, a journalist working for Tempo in a Police Office, on 17 May 2004.[2] Following that incident Winata filed two lawsuits against Tempo Inti Media Inc (magazine and newspapers). Specifically, Winata sued Tempo in relation to the article entitled "Is there Tomy in Tenabang?"that was published on edition 3-9 March 2003, page 30-31. The article detailed the role of Tomy in burning Tanah Abang market. Winata argued that this is slander, in particular where the allegation is made that Winata was involved in submitting a proposal for the renovation prior to the fire. Winata's lawyer presented the case on 5 June 2003 and demanded compensation for material losses amounting to IDR100 billion (around AUD9.3 million) and compensation for immaterial losses amounting IDR100 billion (around AUD9.3 million). Undoubtedly, such huge amount could make Tempo collapsed, if the court decision is in favor to Winata's lawsuit. Therefore, the use of lawfare in this case is part of the way to silence press freedom.

In a slightly different way the case of Raymond Teddy v. seven medias also illustrates the dynamics of ULAP. The seven media's brought to court here include seven medias included: SuaraPembaruan, Republika, Detik.com, Harian Sindo, Kompas, Warta Kota, and RCTI. Raymond, a businessman, was allegedly 'injured' by the media news about him gambling in a star hotel in Jakarta in October 2008. At the time, Raymond was on 'suspected status' in a pre-trial process and facing criminal indictment because of involvement in gambling businesses in Jakarta. Raymond fervently disputed the news that he had been arrested by the police and stressed that he was not guilty while the press informed him like he was found guilty. Raymond then filed the rather insulting cases against seven medias into four split lawsuits in four District Courts. He asked the court for compensation from those medias. The amount of compensation varied from one to other medias but was excessive. Suara Pembaruan, for instance, was sued in the East Jakarta District Court and requested to pay USD 3 million for damages. In the South Jakarta District Court, Republika newspapers and Detik.com were sued up for USD3.5 million in damages. Harian Sindo (Seputar Indonesia) was to pay USD2.5 million and was sued in the Central Jakarta District Court. In the West Jakarta District Court, Kompas, Warta Kota and RCTI were sued for USD16 million in damage. At the end of these cases, all lawsuits were refused by the court; and this meant that press was protected by judiciary decision.

As we have seen, the two ULAP cases above were dismissed at all levels in the judiciary. Although the media and thus the journalists won the cases, these lawsuits sent clear message to the media that it was possible to attack professional journalism instead of supporting press freedom in democratising Indonesia. In this respect it is important to note that both cases happened in Jakarta and that in the political environment of the capital the legal position of journalists received strong support from their editor, the director of the media company and from a professional lawyer. At the same time, massive support came from solidarity groups including other journalists, their organisations, and also civil society groups that are keen to support press freedom. This may all sound good, but the

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2   "Penyerangan Kantor MBM Tempo", Tempo Interaktif, 17 May 2004, http://tempo.co.id/hg/time-line/2004/05/17/tml,20040517-02,id.html (accessed on 11 October 2013).

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mere fact that so many law suits were brought against journalist and media companies by powerful business leaders is indicative of a change in politics and the use of the legal system therein. While the success rate of ULAP to silence critical media may be limited in Jakarta because of the presence of critical, well-organised and powerful civil society, the growing frequency of related law suits is sending clear signals to the media that they have to reckon with business people and politicians who align with them.

In contrast, in the regions outside of the nation's capital we hardly hear of such success stories. There we see a different dynamics of ULPA evolve, especially where elite power alliances strongly shape the political economy. Such power alliances have seen massive growth over the last decade with the growing freedom of investment and politics at the regional level due to reformasi's devolution of central state power. In contrast to the situation during President Suharto's authoritarian regime, Indonesia is commonly, in particular among foreign Indonesia watchers, believed to move towards democratisation, yet on the ground many see that this promise is far from being fulfilled. As seen above, severe attacks by means of court cases and threats with violence against the media are common nowadays. We may conclude that press freedom is in a perilous state. Heryanto and Hadiz support this when they write "freedom of the press continues to be challenged not by an authoritarian state but by a variety of vested business interests or by the exercise of societal political violence"(2005: 261).

In many of the regions where resources heavily affect the political economy ruling elites have become predatory and appear keen to undermine the rule of law and often do not hesitate to deploy gangsters to secure their vested interests (Klinken and Barker, 2009). With respect to what this means for press freedom and the position of journalists is hardly highlighted and appears to be a rather complicated matter. The key elements involved are quite simple: predatory elites use the law and courts as weapons to attack journalists and press. How the picture is more complicated will be discussed in the following section.

3. The Attacks and Impunity

In the regions, the situation of press freedom is really bad. In 2006, the first journalist was killed. Herlyanto, a journalist of Delta Pos daily in Probolingo, was found dead with stabbing wounds all over his body on 29 April 2006. The motive behind the murder was Herlyanto's report in Delta Pos on corruption by local bureaucrats.[3] In September 2006, the murderer was arrested and he turned out to be hired by the head of a project who had marked up government budget for its projects. The next incident is the murder of Radar Bali's journalist Anak Agung Narendra Gede Prabangsa. The case is widely known as the Prabangsa case. Prabangsa was killed because of his news report on corruption issues in Bangli District Government, especially at Education District Office. From the start the

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3   Alliance of Independent Journalist (AJI) investigation concluded that the killing was related to news which has involved numerous village authorities ("AJI Malang Yakin HerlyantoTewasAkibatPemberitaan", Gatra, 8 October 2006).

case was really complex and it appeared hard to be pushed into legal responsibility. A major factor here was that the actor behind the killing was a member of parliament who is also the brother of Bangli's District Mayor, I Nyoman Susrama. Due to solidarity and support from various levels, not just from journalist associations but also numerous non-governmental organisations, political parties, and media itself supported the unraveling of the Prabangsa case, the police continued its investigation. This eventually led to the sentencing of Susrama while another five other killers were sentenced to imprisonment.[4] So while the perpetrators in the Herlyanto case still enjoy impunity, the killers of Prabangsa have faced justice.

The case of Prabangsa is clearly an exception to an ever-growing list of acts of violence towards journalists including outright murder. In 2010, the torturing of Harian Aceh's journalist Ahmadi in Simelue (18 May 2010)[5], the intimidation of Ardiansyah Matrais in Merauke, Papua on 30 July 2010,[6] and the killing of Ridwan Salamun in Tual, Maluku (21 August 2010)[7] are among the most prominent recent stories that evidence suppression of press freedom in Indonesia. Harian Aceh journalist Ahmadi could only bluntly conclude that "journalists in Indonesia live in an inhumane jungle!".[8] Earlier, Ahmadi was brutally beaten up by military officers in Simeulue Island, Aceh, after reporting on illegal logging business by the military.

These cases raise a number of important points. First of all, besides the issue of corruption, it is necessary to be noted that the issue of natural resources exploitation at local level has become a hazardous subject for journalist to report about. The cases of Ahmadi in Aceh and Ardiansyah Matrais in Papua illustrate this painfully. From this we can conclude that journalists working region rich in natural resources must consider local elite connections between government officials and business actors and the potential risk those alliances may bring to the media. Second, the actors committing violence are 'non-state' actors; the

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4   In September 2010, the Supreme Court decision strengthened the decisions by the District Court and High Court. Nyoman Susrama was sentenced for life imprisonment; I Nyoman Wiradnyana while I Komang Gede, and I Komang Gede Wardana were imprisoned for 20 years; and I Dewa Gede Mulya Antara and I Wayan Suecita were punished for 8 years in jail. The Supreme Court judges were chaired by Artidjo Alkostar, with panel members Imam Harjadi and Zaharuddin Utama.

5   Ahmadi has reported illegal logging in Simeulue which involved military personnel, Faizal Amin. He was convicted guilty of grievous assault against Ahmadi. The Iskandar Muda Military Court in Banda Aceh has sentenced a former military intelligence officer to 10 months in jail for such attack.

6   Matrais is a reporter for the local Merauke TV and in his reports he has covered the controversial plans for a large agribusiness development in Merauke. In the week before his death, Matrais received threats in text messages similar to those sent to at least three other local journalists: "To cowardly journalists, never play with fire if you don't want to be burned. If you still want to make a living on this land, don't do weird things. We have data on all of you and be prepared for death" ("ArdiansyahMatrais, Merauke TV", CPJ, 2010, http://www.cpj.org/killed/2010/ardiansyah-matrais.php, accessed on 21 March 2011).

7   Ridwan Salamun, 28, a correspondent for Sun TV, was filming violent clashes between local villagers in the southeastern Tual region of Maluku when he was stabbed repeatedly.

8   Ahmadi, journalist for the Harian Aceh newspapers, interview, 5 July 2010.

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acts of violence are never done directly by members of the elites themselves. In short, the violence against journalists in the regions is significantly related to contestations in the political economy, rather than that it has to do with politics in the centre or policies developed at the national level.

While political and economic stakeholders are the main force behind limiting press freedom in present-day Indonesia, the judicial process that ought to be applied to alleged violations of information by journalists is not applied by the press itself. The press in this regard are the media owners, the editors, and the journalists association. In other to explain this reluctance I will discuss three examples: the 2007 case of Pertamina, the state's oil company in Mataram, the case of the Adam Malik Hospital, Medan in 2010, and the case of Kemenag in Pamekasan in 2012.

The first case tells the story of a Pertamina officer who is not happy with the writing of a journalist in Mataram. Sadikun Syahroni, the Head of Pertamina intimidated four local journalists from the Lombok Post, Suara NTB, NTB Post and Radio Global who attended a Pertamina press conference about fuel scarcity in West Nusa Tenggara. Syahroni pointed a gun at them and threatened the journalists with a sickle during the press conference. This misbehaviour was reported to the police, but that this was not producing any prosecution against Syahroni. The journalists said that the role of Indonesian Journalist Association (PWI) is lobbying this case in order to drop or to discontinue judicial process.[9]

The second case is similar to the first in that it also concerns intimidation not followed by legal action. The case is about a doctor working in Adam Malik Hospital, Medan who intimidated five TV reporters, such as from TPI, TVOne, and Trans 7 on 7 February 2010. The doctor, who has a military background, was assisted by a paramedical and hospital security guard. The doctor allegedly locked the door of his office when the journalists were trying interview him on alleged malpractice. While not being able to get out of the office, the security guards and the paramedical intimidated the journalists to prevent them from reporting on the malpractice. Those journalists and several journalist associations reported the incident to the police, but this eventually resulted in an agreement between journalists and their media and doctor and hospital manager to discontinue the judicial process. It was unclear how they could settle the case and discontinue judicial process, since the process was not transparent. A number of other journalists and their media associations argued that the fact that the media was pressured into a so-called 'win-win solution' is shocking because the attack against journalist was too serious to culminate in a compromise. They argued that this undermines the law and degrades press freedom.[10]

The third case is about the Head of Pamekasan's District Office of Religious Affairs, Mr. Normaluddin, who threatened to kill journalist Sukma Firdaus after he reported about a

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9   Personal communication with two journalists (anonymous), and interview with them in Mataram, 24 June 2010.
10 Personal communication with a journalist (anonym), in Medan, 29 June 2010.

corruption scandal in Normaluddin's office on 15 December 2012.[11] Soon after the threat a lot of protest by journalist associations in Surabaya and other regions in East Java against Normaluddin took place. Journalists asked the police to conduct an investigation and to be brought before the court. Nevertheless, in the process of preparing the court case, the Press Council and involved parties organised a meeting in Surabaya on 11 March 2013 during which it was decided to settle an agreement and discontinue the court procedure. The meeting resulted in a three-point agreement. One of the points was that "Kedua belah pihak sepakat menyelesaikan kasus ini dengan saling memaafkan dan kasus hukum di anggap selesai" ("both parties agree to solve the case by apologising to each other and that legal action will not be pursued"). Firdaus found this agreement unacceptable as he saw it as unjust.

In my heart, I would like such a case to be brought before the court. Agreement might be necessary considered if the court decision has been taken first. Since I am working at a press company, I of course have to obey the company's policy otherwise it would ruin my career as a journalist. Hence, I do not have any choice. To me, discontinuation of legal process is a form of injustice to journalists. I hope that this case teaches the violator and is good that he had admitted his failure and that he promised to never pressure journalists again.[12]

This shows that avoiding the court is in principal not an option for journalist, but that it is a situation that journalist are forced to accept. It is an injustice they have to live with. Accepting such injustices is a common element in Indonesia's freedom of press. It leads to complicated dealings between journalists and political and economic stakeholders and does not allow journalist to report to the public what is really happening in their country. At the same time, journalist work for low salaries and hardly enjoy protection while their companies are poorly managed and tend to avoid court process because there are expensive, time-consuming, and unlikely to acquire decisions that favour them.

Impunity for the perpetrators is this not only caused by factors outside of the media; they also result from the attitude in the media. It is now common that the media owner and even the journalist associations interrupt press legal cases and pressure the journalists to discontinue the case and request a settlement of the case before it reaches the court. This puts the journalists in a predicament: he either discontinues the case (gives in to pressure from the boss) or loses his job. We may conclude that their struggle for justice through the state legal system is hopeless.

As I found at the regional level nearly all journalists say that if they make an investigative report on corruption or illegal business they not only to be ready to compromise their professionalism as outlined in the Press Code of Ethics (Kode Etik Jurnalistik) but also

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11   "Diancam Dibunuh, Wartawan Madura Unjuk Rasa", Tempo, 20 December 2012, http://www.tempo.co/read/news/2012/12/20/058449447/Diancam-Dibunuh-Wartawan-Madura-Unjuk-Rasa (accessed on 14 March 2013).
12   Sukma Firdaus, interview, 2 April 2013.

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to be ready to face the media company. The promise and likelihood of protection from editors and media owners become important factors to ponder before journalists write about corruption and dodgy business deals.[13] If their assessment of risk is not done properly and someone is annoyed by the report, journalists and their media companies may face violent attacks.

4. Room for Justice?

As indicated above, journalists in Indonesia feel that since reformasi they should be enjoying more press freedom yet because of growing list of violence against the media to curtail its criticism of politics and business, they have to live with fear. Because bringing those who limit the freedom of the media to court only increases the chance of getting shut down, suffering from violence or even getting killed–which is how far those with vested interested are willing to go–most now consider the court as incapable of providing justice. In light of the legislation on press freedom, the kind of justice sought can be delivered, but the pressure from vested interested prevents it from being dispersed. Justice in this context is both about freedom to work as a journalist according to media ethics as well as the protection of those doing journalistic investigation and reporting to the public.

The case of Adam Malik Hospital in Medan and the case of threatening journalist by showing a gun in Pertamina office in Mataram are instances for avoiding criminal procedure mechanism. It is quite strikingly that journalists or editors as victims hesitantly desire [formal] 'justice' in solving press legal cases. Their beliefs actually reflect how they see ineffective legal system that cannot protect them.

My findings overwhelmingly indicate that neither journalist nor editor or the media venture brings the violation of press freedom before the court, because they believe that it would only further deteriorate their freedom. There are two possible ways to explain this. First, journalists believe that the violators are not well educated and thus poorly understand the legal rulings for solving the matter. On the one hand, sentencing them to imprisonment will then only lead to increasingly severe acts of retaliation. On the other hand, it is argued that if they face justice they might learn about the rule of law and come to understand the importance of the press for a democracy that is coming of age. In the practice that is currently evolving we see that the journalists are forced to accept what is often called a 'peace agreement' (kesepakatan damai), as if there is a war between two belligerent parties. The agreement is on paper and the journalist is forced to sign it to avoid any violence against him. While effectively curtailing the journalist from reporting any further on the case, an act of violence against them by the other party would mean a breach of the agreement which can be brought before the court.

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13   Interview with a journalist in Mataram, 24 June 2010 and interview with Damyanus Ola, editor of Pos Kupang, 22 July 2010.

However, and this is the second point, the 'peace agreement' is not between the journalist as an individual and the person who threatens him but between journalists and professional entities, groups, firms, government departments, and communities. If an individual journalist sets an agreement in such situation, it has been always found that the media owners were involved in forcing the journalists. For example, in the case of the Adam Malik Hospital recounted above, the agreement that was forced upon the journalist included two key parties: the media company and the hospital. Another example is the case between a taxi driver association and the Independent Journalist Association (AJI Bali) in Denpasar. In that case a number of journalists were beaten up and their cameras were destroyed by taxi drivers. AJI Bali opted for 'peace agreement' with the Taxi Driver's Association since the majority of people in the association feared thought that the agreement would establish friendship with …and that new relationship would improve press freedom.[14] From these cases we can conclude that in the attempt to preserve press freedom at the regional level in Indonesia, non-legal reasoning is applied to seek some level of justice.

This, however, does not mean that all journalists and all media companies agree with this strategy. Many see it as a compromise and they are in fact aware of and highlight the ineffectiveness of the judicial system and they distrust this system as well. The other factor they discern is or even distrust of judicial mechanism and lack of protection are the most serious problems for journalist or editor to deal with the court or other judicial processes. Avoiding the court proceedings, from this point of view, is deemed as unjust and in fact paving the road to structural impunity for those who do not like their dealings to get exposed by the media. Indeed, if a journalist is being examined as a witness for a judicial proceeding that would take up so much of his time and become very intrusive to his work. Regardless of the issue of a fair or unfair judicial system, engaging in the judicial system particularly when it comes to criminal proceedings is a serious burden for a journalist. Criminalisation of journalist in this context would be a more serious problem for journalists, and that would be detrimental situation for press freedom.

Another interesting aspect of avoiding the court relates to lawsuit mechanisms. Rather different to criminalisation, civil lawsuits are more acceptable to journalists to solve press legal cases, especially after the 'right to reply' (the person or persons to give response or rebuttal to the preaching of the fact that adverse name good) or the 'right to correction' (a necessity to make corrections or errata to any information, data, facts, opinions, or images that are not true that reported by the press in question) mechanism is applied. Although it is not stipulated explicitly in the Press Law No. 40 of 1999 (Press Law), the civil court mechanism is only the last resort when its mechanism and the mediation process through the Press Council have failed or are unsatisfactory. Hence, the role of the civil court in examining a press legal case is important and necessary. However, at this point the use of private law should reflect its goals and should not just be based on the goals of private law but also on a consideration of the extent to which such goals are important

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14   Bambang Wiyono (Nusa Bali daily), interview, Denpasar, 27 July 2010; Rofiqi (Chairperson of AJI Bali), interview, Denpasar 28 July 2010.

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in protecting private rights and securing press freedom in its function of control. In this regard, the public dimensions of private law must be considered when anti-press legal cases are examined. If not, the civil court mechanism would allow for a repressive mechanism instead of a protective one.

During the fieldwork that underpins this article, I found several reasons why they journalist felt attacked by the lawsuit.[15] The most serious problem that is also commonly faced by journalist is that the lawsuit is accompanied by a request for a significant amount of compensation money. As most journalists receive low salaries and have limited contractual security, this is stressful. Even for the media companies paying a lot of money for compensation may lead to their bankruptcy.[16] Another reason is that the lawsuit could trap a journalist in a situation of structural threat. According to the Press Law, a journalist is not directly and personally liable, but it would be getting worse situation if editors also divert the burden of responsibility to the journalists. Another reason is that the judicial process mostly takes very long, often become complicated and thus even more time-consuming and costly.

In this respect it is interesting to recount a case of five journalists[17] who were sued by Agus Budiarto, the Head of the Institute for Airport Affairs and Stewardess Education and Training (LPPKP), in Mataram, West Nusa Tenggara, in 2011. The journalists reported that the certificate of the school is not recognized by the Department of Education. Therefore, LPPKP alumni questioned whether they could be recruited by the new International Airport in Mataram.[18] Budiarto alleged that the journalist degraded his reputation and defamed him and reported the matter to the police on 5 July 2011.[19] Besides criminalising the journalists, Budiarto, also a law school lecturer, filed the lawsuit to District Court in Mataram.[20] Budiarto demanded that the five journalists pay IDR1 billion (AUD93,000) each. Beside asking for such high monetary compensation, Budiarto required the court to demand the press to apologise in their forums for a period of three months.

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15 The lawsuit is considered as an attack since it has many consequences for journalists who do journalism works. Journalist must be dealt with court process which takes time and energy, and of course it would bother their daily works. The situation becomes worse if the media management or editor does not protect them from such lawsuits. Moreover, those journalists who does not have 'permanent status'or 'permanent employer/staff', such as contributor, correspondent, and stringer, they are not fully protected by editor or management (media owner)(interview with group of journalist at AJI Mataram office, Mataram, 25 June 2010. This fact was also mentioned by many journalists when they told their story during "Press Legal Training for Journalist" in Surabaya, 4-5 August 2012 and in Kediri, 11-12 August 2012 (LBH Pers and AJI Surabaya/Kediri).

16 However, learning from these cases above, their asking compensation through civil court mechanism has been likely to be unsuccessful in the end.

17 Febrian Putra (Lombok Post), Aris (Suara NTB), Helmi (TVRI), Ahmad Yani (RRI) and Sudirman (Lombok Post).

18 Puluhan Alumni LPPKP Pertanyakan Kejelasan Nasib", Lombok Post, 10 May 2011. "Lulusan LPPKP Mengaku Tertipu", Suara NTB, 10 May 2011.

19 This was registered in Mataram District Police No. 576/ SPK. Mtr/2011/Res, 5 July 2011.

20 This was registered in Mataram District Court No. 76/PGT.G/2011/PN MTR, 23 June 2011.

Because it soon became apparent that there was not protection for the journalists, this lawsuit led to a shockwave through the world of journalists in Indonesia. One of the affected media companies said that the court process would be too lengthy and too costly, and that it could disturb and create more problems for them. When they were asked whether in principle they agree to solve the case without bringing to the court process, the journalists answered that they did not fully accept the idea of discontinuing such legal case. However, for continuing the private law case they would need to hire a lawyer, make available time, and spend considerable energy on the fight in court.

Eventually the Budiarto's case was discontinued through a 'peace agreement' that was made among parties. Although the lawsuit against journalists was withdrawn, this case indicates that avoiding the court is not a matter of distrust in the judicial processes but about weak protection of journalists, especially in using court as a 'justice room'. This situation is likely similar to the one in India where the main challenge to press freedom seems to be the self-interests of press owners and the lack of financial independence of the press (Yin 2011: 32). In conclusion, press freedom in the period following the end of authoritarian regime of President Suharto is rather vulnerable. Discontinuation of the judicial processes in the context of decentralised Indonesia occurred when the growing numbers of local media have been massively established without increasing its capacity to professional journalism. It may be important as well to see that such illustrated cases were revealing the capital and political configuration rather than the issue of effectiveness of law. Hence, the phenomenon of avoiding the court clearly led to increasing impunity in decentralised Indonesia.

5. Further culture of impunity: Some concluding remarks

Decentralisation in the context of post Soeharto has new implications, which are related to journalism and press freedom in general. Albeit journalists and the media companies have benefited greatly from the 1999 Press Law and the political context of post authoritarian regime where they supposedly enjoy significantly more freedom, journalists, especially those who work at local level, still suffer from injustice.

First, decentralisation makes more possible violence and various attacks against journalist and editors, including the increasing number of lawsuits which are filed to intimidate and even to collapse journalism.

Second, there has been a new phenomenon that journalists prefer to drop cases or avoid courts in order to survive in its journalism works. Actually, avoiding the court is not always acceptable for journalists, since it would do more harm in terms of judicial uncertainty and the possibility of structural impunity. However, bringing justice to the court would also mean more intimidation for them, either pressures from external, especially 'predatory elites', 'privatised gangsters', or internal media, from editors or media owners. The majority of press companies in Indonesia even do not have lawyers on board who could secure

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the position of their journalists. Hence, it is not just about distrust of the court process, a factor that is often mentioned in relation to Indonesia's notoriously complicated routes to justice. Avoiding the court is also a consideration because of the fear of tycoons, bureaucrats, and the vigilantes who they can mobilise.

Third, it is rather a fear situation for journalist to bring justice to the court. Because of the lack of protection journalists have to continuously ponder the risks of their work and consider applying self-censorship. It is fair to state that press freedom is deemed by journalist at local level as 'freedom on paper' only (kebebasan cuma di atas kertas).

Fourth, while having such legal-political context, several legal cases have been settled by using compromises outside the court or judicial mechanisms. Unfortunately, such settlement allows situation which evolves and continues the extent of alliances between politics and business.

Learning from press legal cases, injustice in decentralised Indonesia has significantly amplified restriction of press freedom in the new pattern, especially with a creation of further culture of impunity.

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HATE SPEECH IN THE COURT OF LAW: THE CASE OF ROIS AL HUKAMA V. TAJUL MULUK, MADURA, INDONESIA

Aloysia Vira Herawati

The attack against Syi'ah community in the subvillage of Nangkernang in Sampang, Madura has brought Sunni's leader, Rois Al Hukama, to the court of law. However, it was perceived that there was a lack of evidence provided by the prosecutor to convict Rois. Therefore, the panel of judges decided to free Rois from all the charges. The trial process has fulfilled Rois's rights to fair trial and equal treatment before the law. Nevertheless, it had not fulfilled the principle of justice for the victims. The court's decision has left unresolved the main perpetrator or 'mastermind' of the attack against the Syi'ah. One of the reasons is because the prosecutor did not focus the conviction on hate speeches committed by Rois towards the Syi'ah, and that the hate speeches lead to the attack. Rois should have been charged with article 156 Penal Code and Law Number 12/2005 on the Ratification of the International Covenant on Civil and Political Rights. These laws show that hate speech and hate crime are related, and show Rois's role as the perpetrator in the attack against the Syi'ah.

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1. The Birth of Syi'ah in Sampang, Madura

Syi'ah community in Sampang had just started in the early eighties, when a Kyai (Moslem priest) named Makmun was inspired by the teachings of Ayatollah Ali Khomeini, the Syi'ah leader from the Islam revolution occurred in Iran at that time. He decided to learn the teachings of Syi'ah and teach them to his fellow villagers in Nangkernang, Karang Gayam, Sampang. The majority of people in Nangkernang were fervent Sunni followers, therefore teaching Syiah to the villagers transparently would be considered an insult. Kyai Makmun decided to conduct subtle and indirect method of teaching, to anticipate any possible conflicts between him and his villagers. In order to preserve his teachings, in 1983 Kyai Makmun sent his children to a pesantren (Islamic school). For about eight years, Iklil al Milal, Tajul Muluk, Rois Al Hukama, and Ummi Hani studied Islam at Pesantren Yayasan Pesantren Islam in Pasuruan, East Java. In 1991, they came home to Sampang. Only Tajul Muluk continued studying at another pesantren in Saudi Arabia in 1993. He did not finish his study, due to lack of financial security, and came home to Indonesia in 1999.

Tajul Muluk started teaching Syi'ah with his father, Kyai Makmun to their villagers. In early 2004, together with their students, they built a pesantren on the family's land. Tajul Muluk applied a different method of teaching from his father. He taught Syi'ah teachings transparently and openly. Surprisingly, this teaching method did not immediately result in open conflict. On the contrary, sympathy and interest to Tajul Muluk and his teachings grew, and the number of students had become hundreds within three years. This impact did not occur without reason. Villagers were not interested merely in Tajul Muluk's teachings, but mostly on his personalities as well as his religious conduct. Tajul Muluk was popular as a egalitarian, friendly, helpful, and thoughtful person in providing assistance to the needy. He was also social, and never demanded payment for any preachings he conducted. These had not only made him a famous young Moslem priest in the entire Karang Gayam, but also made him accepted as Syi'ah priest among Sunni followers.

However, the condition had also brought problems. It did not take long before Tajul Muluk received discouragement from other Muslim leaders in the area. Ali Karrar Shinhaji, a family relative of Kyai Makmun, was the leader of another pesantren in Pamekasan, Madura. He paid Tajul Muluk and his siblings a visit. In this meeting, Karrar explicitly objected to Tajul Muluk's Syi'ah teachings. He further expressed his disagreement towards the teachings, stating that Syi'ah teaching was false and actually a blasphemy to Islam. This refusal came also from other Kyais in the district, although it was only in words. The Kyais were not bold enough to conduct any actions to stop Tajul Muluk's activities, because they still had fear towards Kyai Makmun. The disagreement finally became an open refusal, when Kyai Makmun passed away in June 2004 (Kontras Surabaya, 2012).

2. The Conflict of Syi'ah and Sunni

The conflict between Tajul Muluk and other Kyais started as early as mid 2005, when Karrar held an open meeting in Karang Gayam and invited thousand of people including all Kyais in the district of Omben. The meeting was designed to be a mass praying meeting, however also intended to declare refusal towards Tajul Muluk's Syi'ah teachings. This meeting had marked the moment of Tajul Muluk's being given status as a blaspheme. Starting in 2006, efforts of hate speech, condemnation, and victimisation had been continuously occurred. Several meetings had been held by Sunni Kyais in Madura with a single agenda, which was to clarify their claim on blasphemy toward Tajul Muluk's teachings. The meetings were initiated by different actors, which actually showed the escalation of urgency on the claim for the Sunni Kyais. The different actors include Karrar himself; other Kyais in district, city, and regent levels in Madura; Islam organisations such as Majelis Ulama Indonesia/ MUI (council of ulamas) and Nahdhatul Ulama in Sampang; government entities such as Department of Religion in Sampang; and police entities on district of Omben and city of Sampang. The intimidations towards the Syi'ah followers in Nangkernang were also initiated, usually occurred at different places during the meetings. These intimidations never resulted in physical attack, however developed atmosphere of terror and fear towards the Syi'ah followers. Tajul Muluk never accepted the Kyais' demand for him to admit that Syi'ah was a blasphemy to Islam. He insisted that Syi'ah was a recoqnised and admitted idealism in Islam, and therefore refused to resign himself from Syi'ah. However, his resistence was broken down in 2009 when he was invited in another meeting and forced to answer a number of questions concerning Syi'ah teachings. Tajul Muluk was cornered and eventually was forced to sign a letter stating that he stopped any activities related to Syi'ah teachings in Sampang. The letter, from then onward, was used by the anti-Syi'ah communities to attack Tajul Muluk's community during their activities and rituals, and to promote hate speech in mosque's preachings toward Tajul Muluk's community. This condition had divided the villagers into two sides. They had become enemies, engaged in cold war, and waited for the moment to burn a fight.

The peak of this conflict was ironically inflicted by internal conflict between Tajul Muluk and his brother, Rois Al Hukama. Rois Al Hukama protested Tajul Muluk's initiative to marry one of Rois's female students to their neighbour. While it was Rois's argument that he deserved more than Tajul Muluk to marry the student, it was actually his affection towards her that encouraged his protest against Tajul Muluk's decision. Their disagreement over this matter resulted in deep hatred from Rois toward Tajul Muluk. Rois announced his resignation from Tajul Muluk's pesantren as well as Syi'ah. He also campaigned hate speech against Tajul Muluk and the family, and campaigned to expel Tajul Muluk and the entire pesantren out of Karang Gayam. Rois Al Hukama's campaign was the most violent action compared to the other actions, and was the only reason to the escalation of conflict and the occurrence of a number of physical attacks towards the Syi'ah community in the village (Kontras Surabaya, 2012).

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3. The Attack and Killing of Syi'ah Members

On 26 August 2012, a group of children and several parents from Tajul Muluk's pesantren are traveling to a Syi'ah pesantren in Pasuruan, East Java, when they were stopped by a mass of Sunni followers. The Sunni followers forced the children and parents to cancel their journey and to go back to their homes in Nangkernang. The mass forbid more people to becoming members of the wrongful belief. At the same time, a mass of Sunni followers also surrounded the compound of Syi'ah families. The families were already waiting to confront the Sunni mass. The travelling group had arrived and joined their fellow Syi'ah members. This was the moment when both groups engaged in quarrels and later in hostility actions. Some of them threw stones at each other, while others began attacking each other with tools they used as weapons. Approximately 1,500 followers of Sunni had outnumbered the Syi'ah members, and they got more violent. They started burning the houses of the Syi'ah members, and destroyed the properties. The attack ended in the loss of one person's life, a number of people wounded, and numerous properties destroyed. There were 48 houses, 33 mosques, 43 kitchens, and 28 stables burned down. According to witnesses' testimonies, during the start of the besiege, two of the Syi'ah seniors had contacted both the local police in Omben and Sampang. However, only two officials arrived and powerlessly intervene the conflict (Yayasan LBH Universalia, 2012).

4. The Trial Process of Rois Al Hukama

The dispute between the Sunni and the Syi'ah members on 26 August 2012, which ended in the attack of the Sunni against the Syi'ah, has been brought to the court of law. The prosecutors have appointed Rois Al Hukama as the main suspect in this case, while positioning Tajul Muluk as the victim of the attack. To Rois Al Hukama, the prosecutors have established three accusations. First, he has either individually or collectively committed, instructed to commit, or took part in committing deliberate actions to take other people's lives. He was convicted with Article 338 juncto Article 55 of Penal Code. Second, he has either individually or collectively committed, instructed to commit, or took part in committing deliberate actions to cause other people's serious injuries. He was convicted with Article 354 juncto Article 55 of Penal Code. Third, he has individually or collectively committed, instructed to commit, or took part in committing outward and massive violent attack against both people and properties that caused other people's deaths. He was convicted with Article 170 juncto Article 2 of Penal Code.

Looking at the fulfillment of rights of Rois Al Hukama as the accused in this case, all relevant parties, i.e. police, prosecutor, and judges have fulfilled Rois's rights to fair trial and equal treatment before the law. This can be concluded from the case verdict of Hukama v. Muluk (2013), where panel of judges has taken into account all three charges toward Rois based on witnesses' testimonies as well as the provided physical evidences. During the process of trial, both eye witnesses and a decharge witnesses have been provided, as also have all possible and related physical evidences before the judges.

The considerations from the panel of judges cover several aspects. The first aspect is related with the Article 170 paragraph 2 point 3 of Penal Code, which are the element of perpetrator and the element of "collectively and publicly commit violence against people or properties, if the violence leads to the death of other people". In the earlier element, panel of judges consider that this element has been proven because the prosecutor has presented a person as the defendant, who becomes the subject to be held responsible for his or her deeds. In this case, this person is Rois Al Hukama, and he confirms the identity. In the latter, panel of judges considers that this element is not proven because based on witnesses' information and the existing physical evidence, the defendant was not present at the moment and place of the event of 26 August 2012. A number of witnesses states that the defendant stayed at his own house during the period of conflict, while the event took place at approximately 300 – 500 metres from the defendant's house.

The second aspect is related with the Article 338 juncto Article 55 paragraph 1 point 1 of Penal Code, which are the element of perpetrator and the element of "person who deliberately commits, instructs to commit and takes part in committing actions leading to the loss of other people's lives" and of participation, that is "person who commits, instructs to commit, or takes part in the action". In the earlier element, the panel of judges has proven it by consideration. In the latter, panel of judges considers that this element is not proven. Based on the witnesses' information, the defendant has never conducted any abuses, stone-throwing, destruction, burning, and killing at the moment of the event. The defendant has not either committed or instructed to commit as well as took part in committing such actions as abuses, stone-throwing, killing, and burning at the moment of the event. The witnesses state that the defendant was not present amongst the Sunni mass during the period of conflict at Kampong Nyaloap in the village of Nangkernang. A number of witnesses also states that they did not hear the defendant announcing the provocation to the Sunni mass to bring tools as weapons and taking part in the stone-throwing, abuses, killings, destruction, and burning down of the Syi'ah community's houses. The third aspect is related with the Article 354 point 2 juncto Article 55 paragraph 1 point 1 of Penal Code, which are the element of perpetrator and the element of "person who deliberately causes serious wounds to other people, commits, instructs to commit, and takes part in committing the actions, if they lead to the death of other people". In the earlier element, the panel of judges has proven it by consideration. In the latter, the consideration from the panel of judges relates to Article 55 paragraph 1 point 1 of the Penal Code, which states "person who instructs to commit or takes part in committing the action". The understanding of the phrase "takes part in committing" is the person who commits and the other person who also commits. The understanding of the phrase "instructs to commit" is the existence of at least two persons committing the action; meaning that there is a person instructing another person to commit the harmful actions to others. According to the panel of judges, these elements are not proven because none of the witnesses heard of the defendant instructing to stone-throwing, abuses, killing, destruction, and burning houses down. Furthermore, during the period of conflict the defendant was not present amongst the Sunni members. Based on these explanations, the

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panel of judges considers that the defendant did not commit, instruct to commit, or take part in committing the harmful actions towards others.

Based on the existing considerations being built during the trial, it was perceived that the prosecutors could not provide sufficient proofs for the allegations. There was a lack of evidence being provided by the prosecutors to convict Rois. Therefore, the panel of judges decides to acquit Rois Al Hukama. The judges' decision is already appropriate and correct. This is the decision they should take, when they could not see allegations being sufficiently proven. Looking from the perspective of fair trial and equality before the law, the judges' decision has met Rois's civil and political rights. Rois Al Hukama has his rights recognized and fulfilled, and he has his trial court being held appropriately and in accord to the existing legal procedures.

5. The Correlation between Hate Crime and Hate Speech: The Forgotten Element

Although there are a number of people being held responsible in this case, the process of trial has not fully met the sense of fairness for the victims. This case leaves a number of problems, and these problems have not been satisfyingly resolved. First, the mastermind or the real perpetrator of the attack against the Syi'ah community has not been held responsible and punished. Second, instead of earning justice, Tajul Muluk has been held as the convicted on the case of defamation of religion. Third, members and families of the Syi'ah community are being unprotected from further attacks and discriminations by other groups of people.

Observing further, the dislike or hatred towards the Syi'ah community in Sampang has been started since 2005, or even further longer. This issue can be proven from statements of a number of witnesses during the process of trial on Rois Al Hukama. On a number of occasions, Rois Al Hukama delivers statements that strongly imply his hatred towards the Syi'ah. Those verbal statements include:

The content of tausiah (communal praying) from Rois Al Hukama as a preacher during a prayer ceremony in 2011, as quoted "The Qur'an of Syi'ah is different in principle and foundation from that of the Qur'an itself, but they pretend it to be the real Qur'an".

A preaching by Rois Al Hukama during a prayer ceremony in 2010, was quoted that "The Syi'ah are blasphemes, the Syi'ah are like paddy snake. Do not accept their offerings, better to bury them. Wash first before using chairs that being sat down by the Syi'ah because they are impure."

A preaching by Rois Al Hukama in an istighosah prayer ceremony in 2010, as quoted "The Syi'ah are blasphemes, infidels, impure. It is impure to eat food given by the Syi'ah. It is also forbidden for the Syi'ah to be in company with the Sunni."

A preaching by Rois Al Hukama in a prayer ceremony in 2010 was quoted "If there is any Syi'ah members in Blu'uran (village), they shall be expelled, because Syi'ah people are blasphemes and infidels."

Statements from Rois Al Hukama that imply his dislikeness were heard by a number of people because it was stated during his preaching. These statements can be categorised as hate speech because Rois Al Hukama delivers statements of hatred and hostility towards the Syi'ah community. Based on this reasoning, Rois should have been accused by Article 156 of Penal Code as well as Law Number 12/2005 on the Ratification of the International Covenant on Civil and Political Rights. Article 156 of Penal Code regulates punishment for those who "publicly gives expression to feelings of hostility, hatred or contempt against one or more groups of the population of Indonesia". By utilising these two documents, the line can be drawn to clearly comprehend the corelation between hate speech and hate crime and to rightfully bring indictment on Rois Al Hukama as the perpetrator or mastermind by whom the attack against the Syi'ah is instructed.

The corelation between hate speech and hate crime is actually very obvious. In numerous occasions, hate speech functions as the root event resulted in social conflicts, and later leading to more complicated and gruesome violence and abuses (Pultoni, Aminah, and Sihombing, 2012). The corelation between the hate speeches stated by Rois Al Hukama as the local religious leader, and the violence and attack against the Syi'ah community in Sampang is strongly existed, as suggested from a number of information related to this case from various sources, i.e. interviews, media news and online searches (Sihombing, 2013). The result from the data compilation concludes that there is a strong corelation between the hate speeches and the event of violence and attack against the Syi'ah community in the village of Karang Gayam, Sampang, Madura on 26 August 2012. The explanation is that the mass is being mobilised using the hate speeches to arise hatred and hostility, and at the same time build a biased and discriminated opinion and attach stigma towards the Syi'ah community in East Java.

In addition to the strong corelation between the hate speeches and the attack, there has also been a condoning statement delivered by the Head of Regent in Sampang. This is revealed from a testimony by one of the witnesses. During Mauludan ceremony in 2012, the head of regent gave speech, and in his speech he stated that "if there is any members of the Syi'ah community who refuses to return to the Sunni belief, they will surely be expelled out of Sampang". As a public officer, the head of regent should have not delivered such statement. As a person with a sense of authority, his statements are powerful to build and direct opinions of his people towards others. Instead of exclusively supporting a certain group in the society, as a high-rank public officer, the head of regent should have utilised his authority to protect his people, regardless of any physical, social, and political differences, including the difference in religion and belief (Sihombing, Pultoni, Aminah, and Roziqin, 2012).

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6. Hate Speech and Hate Crime: A Violation of Human Rights

The right to freedom of religion and belief is a human right that applies universally and is codified within the international human rights instruments. Since the beginning of human rights era, this right is perceived as a fundamental right equally important as the right to freedom of thought and conscience. Therefore, this right is categorized as a non-derogable right, meaning that the existence of human being cannot be separated from the recognition of this right. Alternatively, this right lives inherently and completes the existence of human being.

Statements emphasizing the recognition of right to religion and belief are found in several of international human rights instruments. Article 18 of the Universal Declaration of Human Rights (UDHR) and Article 18 of the International Covenant of Civil and Political Rights (ICCPR) are instruments that clearly state the recognition of this right in their documents. Some other instruments state the importance of recognition of this right in the implementation of the respected right in their documents. Those instruments include the International Covenant of Economic, Social, and Cultural Rights (ICESCR); the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the International Convention on the Right of the Child (CRC); and the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Indonesia, as the diligent country responding to many international human rights instruments has ratified all of the above covenants and conventions in its domestic legislation system (Fealy, 2008). The Indonesian Constitution adopted the articles of UDHR into its own. Other national ratifications are Law Number 11/2005 on the Ratification of the ICESCR; Law Number 12/2005 on the Ratification of the ICCPR; Law Number 29/1999 on the Ratification of the CERD; Law Number 7/1984 on the Ratification of CEDAW; Law Number 5/1998 on the Ratification of the CAT; and Presidential Decree Number 36/1990 on the Ratification of the CRC. Indonesia has its own national law on human rights, namely Law Number 39/1999 on Human Rights. Indonesia's role in adopting these international instruments into domestic laws has implicated the country's obligation to not only recognize, but also to promote and fulfill all related rights in those instruments.

The issue of hatred incitement or hate speech has long been fought for having positioned as a criminal action. International community's struggle for the world to believe that hate speech should be regarded as crime has started as early as the World War II. The struggle reached its peak when the United Nations adopted Article 20 point 2 of the International Covenant of Civil and Political Rights (ICCPR). It accommodates the prohibition of war propaganda or advocacy on hatred incitement toward religion/race/nation, which result in discrimination, violence, and hostility against religious/ethnic groups or members of those groups.

Point 7 of the General Comment on Article 18 ICCPR confirmed the prohibition of religion's or belief's manifestations amounting to war propaganda or advocacy on hatred incitement toward religion/race/nation, which result in discrimination, violence and hostility. This hatred advocacy or war propaganda against religions is no longer tolerable action. According to Article 20 point 2 as well as its general comment, it is the State obligation to make a legislation that punishes such an action (The Indonesian Legal Resource Centre, 2012).

Several other international human rights instruments have also stated their disagreement and prohibition towards religious hatred. Those instruments include ICESCR, ICAT, ICERD, ICRC, and ICEDAW. In particular, ICERD has explicitly stated that state parties of the Convention are obliged to implement immediate measures to eliminate all forms of incitement and discrimination based on nation, race, and religion. The Convention emphasizes that state parties should strongly regard any forms of hatred propaganda against different races, religions, and ethnics as criminal action and as eligible to be legally prosecuted. Article 4 of the Convention emphasizes further that state parties should "declare illegal and prohibit organizations which promote and incite racial discrimination as an offence punishable by law".

7. The Implication of Absence of Hate Speech in Court

The verdict of the State Court of Surabaya Number 3320/Pid.B/2012/Pn Sby has become one of the most important legal products, particularly in the action of hate speech. The verdict consists of the statements of the panel of judges, which involves Rois Al Hukama as the accused to violate the criminal law as regulated in the Penal Code and structured in the indictment by the prosecutors.

The verdict has recorded thoroughly and systematically the whole process of trial on the accused, Rois Al Hukama. This can be seen from the stages of the trial process, which are recorded accordingly and smoothly from one stage to another. It results in the clearness of the document itself. As being regulated in the Law Number 8/1981 on the criminal procedures, the process of trial is an inseparable element from the formal criminal law. Therefore, its implementation should absolutely recognize and uphold the principle of legal certainty. Each stage in the trial process should be founded over the legal principles as regulated in the Law Number 8/1981, in order to anticipate any efforts to limit or take away the fundamental rights inherent to every human being alleged of committing crimes.

The process of trial has systematically implemented all stages as regulated in Law Number 8/1981, namely the allegations, the verification, and the verdict stages. However, the equally important aspect in the process of trial is the guarantee to the protection of the rights of the defendant before the law. Providing assistance for the defendant from a legal counselor is a manifestation of fulfilling the defendant's right. The stage of allegation has also been implemented by putting forward a number of legal provisions towards the

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defendant. It becomes the foundation of the case, for the judges to proceed with the trial. Clear description on these legal provisions is a very important responsibility of the public prosecutor, because it becomes the manifestation of legal certainty for the defendant. Public prosecutor takes full responsibility on his proposed allegations; therefore he should be able to prove these allegations during the trial process. Moreover, a clear and precise legal provisions being proposed by the public prosecutor will anticipate the defendant from being double accused on the same case. This will also enhance the guarantee of legal certainty for the defendant. The defendant is being accused of violating three alternated legal provisions, namely Article 338 juncto Article 55 paragraph 1 point 1, Article 354 juncto Article 55, and Article 170 paragraph 2 point 3 of the Penal Code. These three allegations are treated as subsidiaries; meaning that the defendant is accused of committing murder as person instructing the crime or as person committing the crime leading to a mass destruction. The public prosecutor has the responsibility to prove these accusations based on the three legal provisions.

A more interesting aspect of this process of trial is that the panel of judges held a quite long verification stage by bringing upfront a number of witnesses. The witnesses' ratio is very balanced; representing equally both the public prosecutor and the counselor. Again, this is in accordance to the regulation in Law Number 8/1981. Taking into account the verification process as the most decisive stage, presenting balanced and equal number and side of the witnesses will help in increasing the objectivity level of the process. A substantial note drawn from the testimonies of all the witnesses is that the witnesses' information has absolutely no correlation with the allegations from the public prosecutor. The witnesses did not succeed in supporting the public prosecutor, i.e. by providing proofs for the verification of the allegations. On the contrary, the witnesses' testimonies show that the defendant is not guilty of violating the legal provisions.

The action that the defendant has done is inciting people's hatred towards others due to difference in religious beliefs. The public prosecutor has misjudged to relate the defendant's actions with the death of others and the loss of homes being burned. This is considered unfortunate, considering that the defendant's action has actually showed the intention to spread the hatred directly and publicly. In observing the verification of the legal provisions as charged by the prosecutor, the judges concluded that the accusations could not be proven. In the first accusation, based on Article 338 juncto Article 55 paragraph 1 point 1 of Penal Code, the defendant's action does not slightly show his intention to instruct to commit a murder, but rather to build hatred towards a group of people. In the second accusation, based on Article 170 paragraph 2 point 3 of Penal Code, the defendant's action does not show his intention to instruct to commit destruction, but rather to infiltrate hatred due to difference in religious teachings.

Taking into account the above explanation, it is evident that the protection of fundamental human rights in the verdict from the perspective of the defendant has been fulfilled. Each stage of the trial process proves the protection and guarantee of legal certainty, so that

the defendant is free from efforts of arbitrary limitation of his fundamental rights. The process of the criminal procedure has been well implemented, apart from the fact that the defendant cannot be held responsible for the crime. It is the misperception of the prosecutor, who proposes the legal provisions on attack, killing, and destruction, whereas spreading hatred is the actual crime being commited. The defendant should have been charged with article 156 of Penal Code, for committing or spreading hatred towards a certain group of people with different religious understanding from him.

8. Conclusion

On the perspective of the defendant, the case verdict has fully fulfilled his fundamental rights because the trial process has fulfilled the procedure of investigation, prosecution, and trial in accordance to the existing legislations. On the perspective of the victims, it was a contrasting result. The case verdict has not fulfilled the principle of justice of the victims. First, the mastermind or the main perpetrator of the attack has not yet been identified and held responsible. Second, the victim is positioned as the accused on the allegation of defamation of religion. The public prosecutor did not use the appropriate articles of Penal Code, which can be related to the element of hate speech. The prosecutor has not yet included other legal provisions, i.e. Article 156 of Penal Code, or higher legal provisions or the Law Number 39/1999 on Human Rights, to build his allegations.

A principle in Penal Code is that it is not allowed to accuse the same person twice on the same case, although with a different foundation of allegations. Taking this into account, it should be noted that it would be difficult to bring Rois Al Hukama to the court on the case of hate speech.

Acknowledgements

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THE RISE OF ACADEMIC CAPITALISM IN LOCAL HIGHER LEARNING INSTITUTIONS IN MALAYSIA: A PRELIMINARY ON ITS IMPACTS TO ACADEMIC FREEDOM AND INTELLECTUALISM

Chang Yi Chang and Choo Chean Hau

In the quest of intellectualism, academia struggles for academic freedom to ward off any interference on their works. The assumption that university autonomy will benefit such struggle is premature as it overlooks the fact that the Malaysian higher education institutions are increasingly engaged in academic capitalism. The rise of academic capitalism in Malaysia is twofold. First, in public higher education institutions (PbHEI), academia has been motivated to actively seek collaborations with business sectors in the pursuit of diversifying sources of funding through the commercialization of R&D. This trend exposes public academia to market force and adversely affects academic behaviors. Second, in private higher education institutions (PvHEI), academia has been reduced to mere instructors to serve ever greater number of students. In sum, the trajectory of higher education development in Malaysia proves the rise of academic capitalism to be disadvantageous to the academic freedom and intellectualism in PbHEI and PvHEI.

1. Academic Freedom and Academic Capitalism: A Critical Discourse

1.1 The Importance of Academic Freedom and University Autonomy in the Quest of Intellectualism

A central totem of the academy is academic freedom. This concept pertains to the right of faculty to enjoy considerable autonomy in their research and teaching. The assumption that drives academic freedom among the academia is that the citizenry benefits when university faculties are able to search for truth without hindrance, and they are able to report their findings without fear or favor. Faculties are evaluated by their peers based on the quality of their ideas rather than by administrators for instrumental reasons (Tierney 2004, p. 250). Academic freedom is imperative in the quest of intellectualism. Academia as the pursuer of intellectualism is supposed to be entrusted with the responsibility in seeking for logical arguments and generating more questions in improving and increasing knowledge to a civilization. However, academic intellectuals within the academia are most often, in contemporary society, to be employed in higher education institutions especially universities and therefore likely to be subjected to vocational duties and obligations that restrict their ability to pursue academic intellectualism. Thus, any discourse pertaining to academic intellectualism must duly study on the academic freedom and university autonomy.

First of all, let us scrutinize the essence of academic freedom. According to Sheila Slaughter (1988, p.241), academic freedom is provisionally defined as the circumscribed but significant professional autonomy professors exercise with regard to curricula, research agendas, and the deployment of expertise in the wider society. Here, the essence of academic freedom rests on two pillars: the freedom of research and content preparation and the freedom to teach and learn. As the institutional setting for most academic intellectuals is university, university autonomy is actually inseparably tied with academic freedom. In terms of academic freedom and the quest for intellectual excellence, the freedom of inquiry might not be intervened by power, or at least in its own university autonomy towards academic pursuits (Tierney & Lechuga 2010, p.120). Academic freedom is primarily defined within the context of a professor's right to free inquiry without external hindrances - a social contract between society and the professorate in which the public agrees that the pursuit of truth without interference from political and economic interests or other individuals in the best interest of society. With this environment in place, professors' autonomy in deciding how best to pursue truth is thus guaranteed. In much the same way as lawyers and doctors are allowed to self-regulate their profession, higher education is provided with considerable autonomy.

University autonomy is quintessential in the quest of knowledge; even during the medieval period, the academia within the university received certain autonomy from the church (Tan 2010). This autonomy, to some extent, allows the struggle of intellectuals for rational arguments and skepticism in medieval Europe. Meanwhile, for Zhang Ai-fang (2006), autonomy and the university are closely entwined. Without exception, academic freedom

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is the ultimate goal of universities. In medieval Europe, the power struggle between the religious institutions and the feudal power allowed autonomy to be given to university in areas such as the exemption from taxation and conscription, and the formulation of university rules and curriculum. However, scholars did not have the freedom in conducting research until the 19th century with the establishment of Berlin University. Traditionally, academic freedom has a very clear framework: academia may not be interfered by religious institutions, governmental power and other organizations. Yet, today's academia faces a daunting challenge in the struggle of academic freedom and university autonomy. In a more micro level, with reference to Wang Jian-hua (2008), although individuals in the academia might receive power from the capitalistic structure of economy, the idea of academia serving political or economic power is the biggest threat to academic freedom. Science (or knowledge) should be developed without the interference of the authority, and not the other way around, in which the authority develops science (or knowledge).

1.2 Towards Academic Capitalism and its Context

To understand academic capitalism and the erosions of academic freedom, the context of academic capitalism must be discussed: how academic capitalism changes the concept of intellectualism to make it much more market oriented and subsequently becoming a marketable instrument.

Since 1970s, the call for high technology in US has taken centre stage, and the differences between basic and applied research are collapsing. The business, governmental and military leaders come together to collaborate in natural scientific researches through university-industry partnership. With their rising economic influences, business leaders call for the allocation of resources in higher education to be redirected to programs that produce worker better to serve private sector and redirecting state resources to costly high technology field (Slaughter 1988). Obviously, the cold war atmosphere attracted institutional power to see universities as an instrument to win back power both at the state level and the international level. Advanced capitalist states such as US are using their higher education sectors in becoming states with sophisticated and highly advanced technology.

The reality is that academia in the medieval Europe engaged in a constant struggle to fight off religious interferences while academia in today's globalized and liberalized world would have to engage in a constant struggle to fight off not just political-legal interferences, but also interferences from the capitalist market and economy. The interferences from the capitalist market and economy threaten objectivity and autonomy as key aspects that define the academic freedom in teaching and research. Xu Si-xiong and Wu Ye-lin (2011) stated that academic capitalism are weakening the education of humanities and pure research in three aspects: first, an orientation for the academic capitalists to be imbued with the interests of the capitalist market; Second, the neglect of pure research which generates the inquiries of knowledge; and the last one, the marginalization of humanity courses which are seen to be far away from the so-called capitalist market values.

On the other hand, Toby Park (2012, p. 88) argued that colleges and universities have globalized in the sense of offering extensive study abroad programs and, in some instances, opening complete campuses in different countries. A final artifact reflecting the globalization of higher education is that of an increased focus on distance and online education, allowing students from across the globe to access university resources and instruction. The political shift towards the free market and neo-liberalism has created opportunities for universities to engage in entrepreneurial activity through institutions characterized by public-private interactions that blur boundaries between public, non-profit, and for-profit activity. University and faculty entrepreneurism presents challenges to professorial norms and values when it puts profit before discovery, chooses secrecy with regard to intellectual property over openness, and makes decisions without consulting with faculty via governance mechanisms (Slaughter 2011, p. 242).

 "Academic Capitalism" is an umbrella term for capturing the wide array of market and market-like activities universities engage in to generate external revenues from education, research, and service. First introduced into the scholarly lexicon in the mid-1990s by researchers Sheila Slaughter, Larry Leslie and Gary Rhoades, the term poses an oxymoron, violating the common conception that academic should be motivated by the pursuit of new knowledge and the elevation of learning over profit (Hoffman 2012, p. 12). Sheila Slaughter and Larry Leslie (1997) pointed out the term academic capitalism in their research on several public universities in the advanced capitalist states. They observed that the universities and the corporate world become closer after the public institutions reduce their budget allocation to the higher education. As a result, strong tie and attachments to the corporate sector and the so-called marketable values have an adverse affect on the pursuit of intellectualism among the academia.

The market force does change the values and beliefs in universities. The terms like copyrights, patents and market consultation have all come into the picture. The commercialization of copyrightable educational materials has involved a rewriting of marketplace "rules" to facilitate the entry of academic institutions into the private-sector marketplace. Traditionally, it has been typical for individual academics to control the commercial use of their copyrightable education products, such as books and articles. Under an academic capitalism regime, institutional policies are created to give colleges and universities, rather than individual academics, ownership and royalty claims relative to the intellectual products of faculty and employees (Rhoades & Slaughter 2004, p. 45). The trends discussed above show that the rise of academic capitalism in universities is initiated top-down as universities aspire to entwine themselves with the capitalist market.

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2. Public and Private Higher Education in Malaysia: The Rise of Academic Capitalism and its Impacts on Academic Freedom and Intellectualism

2.1 The Rise of Academic Capitalism in Malaysian Public Higher Education

The decline of government funds for public higher education institutions (PbHEI) in western industrialized countries, such as US and UK, has been said to be a key factor that leads to the rise of academic capitalism (Slaughter & Leslie 1997). However, governments in most developing countries, including Malaysia, still provide large funding to its PbHEI. The public expenditure on higher education as a percentage of total public education expenditure in Malaysia from 2000 to 2010 actually increased from 32.06% to 34.45% (UIS 2014, p. 21), not to mention the amount of funding and research grants for PbHEI was continuously on the rise due to bigger budgetary allocation for the educational sector by Malaysian Federal Government. For instance, RM54.6 billion or 21% of the total budgetary allocation has been set aside in 2014 for the educational sector compared to just 16% in 2012 (Malaysia 2013; 2012, p. 4). Yet, this does not mean that PbHEI are free from academic capitalism. The rise of academic capitalism in Malaysia is not entirely due to the government's plan to reduce public funding for the higher education per se. Therefore, to portray a more accurate picture of the rise of academic capitalism in Malaysia requires more vigilant studies on the intertwining historical, political, and socioeconomic factors that shape the development of Malaysian higher education sector.

Historically, the establishment of higher education in Malaysia began with the foundation of University of Malaya in 1961, University of Science Malaysia in 1969 and Tunku Abdul Rahman College in 1969 (Department of Higher Education 2011a). Over a half century later, the number of public universities in Malaysia has grown exponentially to 20 universities by 2014. According to Ministry of Education Malaysia (2012a), these universities are categorized into three groups: 5 research universities, 4 comprehensive universities, and 11 focused universities. Of these, research universities and focused universities are geared towards research and development (R&D) in tandem with the reduction of the number of undergraduates and the enrolment of more postgraduates. On the other hand, comprehensive universities have a higher proportion of undergraduates. According to Abd Rahman Ahmad, Alan Farley, and Ng Kim-Soon (2013, P. 556-557), the growth in the number of public universities affects the funding allocation to be received by each individual university, particularly since a number of these public universities have been established only recently and thereby require additional funding to cover for start-up operation and development compared to the established universities like University of Malaya (UM). The growth in the number of public universities is necessary for two major reasons, firstly to cater for more social demands of public higher education, and secondly, to develop skilled and knowledgeable human capital for the socioeconomic development of Malaysia in the highly competitive and globalized world.

Firstly, the greater social demands of public higher education is triggered by the increasing cost of studying higher education abroad since 1980s particularly in UK and Australia which burden the students, parents, and the government (Thangavelu 2008, p. 272; Lee 2014, p. 4), the universalization of upper secondary education since 1991 (Thangavelu 2008, p. 272), the massification of higher education (Lee 2014, p. 3), the state-driven democratization of higher education (Wan Abdul Manan 2008, p. 2; Asharaf & Mustafa Omar 2013, p. 11), the perceived value of having higher education qualification, ethnic inequity in accessibility to public higher education due to the mandated ethnic quota admission policy (Lee 2014, p. 3-4), and lastly regional inequity in accessibility to public higher education which pressures Malaysian Federal Government to have at least one public university in each state of Malaysia. The greater social demands of public higher education since the 1980s lead to the spike of enrolment in PbHEI and exert pressures on the government to accommodate the increase student intake through the expansion of capacity in the existing public universities, the upgrade of existing public colleges or public university colleges to public universities (e.g. University of Malaysia, Terengganu or UMT), and the construction of new public universities (e.g. University of Malaysia, Kelantan or UMK).

Secondly, the development of human capital has always been the priority of Malaysian Federal Government. For instance, in line with the second thrust of the National Mission, the National Higher Education Strategic Plan (NHESP) outlines the need for Malaysia to produce human capital with a first class mindset in order to face developmental challenges in knowledge-and-innovation-based economy, and that the desired human capital should be knowledgeable, skilful and possess a superior personality (Ministry of Education Malaysia 2012b). To this end, the growth in the number of public universities to accommodate greater number of enrolment is imperative as upper secondary education is no longer the minimum entry requirement for many occupations in an economy that gears towards the production, dissemination, and commercialization of knowledge.

Nevertheless, to view the provision of public higher education solely from its perceived political and economic benefits risks the erosion of its fundamental role in the promotion of intellectualism. University is not only an agent of social engineering, an ideological state apparatus, or a massive training facility for the labor force, as has been observed by Lewis A. Coser (1970, p. a280) it is also the most favorable institutional setting for intellectuals to enjoy academic freedom. He further elaborated that the issue of academic freedom is only debatable as intellectuals claim the right and freedom to disagree with the fund providers that pay the intellectuals' salaries. The fund providers, such as the government and capitalists or even the higher-ranked bureaucrats within the universities, disagree with such claim and continuously undermining intellectual activities. The rise of academic capitalism exposes public researchers to more market pressures and thus further restricting their academic freedom and subsequently hampers intellectualism.

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To accommodate the expansion of enrolment, UNESCO Institute for Statistics (UIS 2014, p. 15) observed that higher education in Asia including Malaysia has resorted to 'expand out' through the construction of new universities, the hiring of new faculty members, and the diversification of delivery mechanisms. However, these measures do not augur well with the Malaysian Federal Government's intention to ensure the sustainability of public funding for higher education in light of the increasing cost of higher education provision. As pointed out by Asharaf Mohd Ramli and Mustafa Omar Mohamad (2013, p. 5), the fiscal sustainability of public higher education sector has become a contentious issue. As a matter of fact, the rise of academic capitalism in the public higher education sector is not due to an imminent threat of significant reduction of financial support from the Federal Government; rather it can be attributable to the pragmatic reaction of the Federal Government to various fiscal and socioeconomic challenges in the future, especially since education in general and higher education in particular are indispensable towards the achievements of national visions and aspirations. Concerning the fiscal sustainability of public higher education sector, Asharaf Mohd Ramli & Mustafa Omar Mohamad (2013, p. 5) again made the following comments:

… The method of totally dependent upon financial support from the government or public fund deem not feasible in the light of the global phenomenon of an increase cost of higher-education provision, and the diminution of expenditure allocated to the sector. Under the innovative concepts of cost-sharing, the students and parents are required to share tertiary education expenditure through the imposition of certain fees for admission into public higher learning institutions, which was previously free. In the meantime, student loan scheme and financial assistance from government agencies and charitable organization are offered to ease the financial burden towards the students. However, public higher education in a few countries, including Malaysia has been facing sustainability issue of funding an increased cost of student-loan arrangement and to cover operational expenditure of public universities. These two challenges have been accentuated with the high rate of defaulters of student loan and the demanding task of fulfilling the financial need of twenty public universities for teaching and learning as well as purchasing research facilities and equipment …

Lee Hock Guan (2014, p. 4-9) also shares a similar view as above. They concur that the student loan scheme and financial assistance from government agencies such as the National Higher Education Fund (PTPTN) and Public Service Department of Malaysia (JPA) are simply unsustainable and complicate the fiscal management of public higher education provision. This is in addition to the rising cost of public higher education provision due to the rising operational expenditure of public universities, which are caused by the hiring of more administrative staff to serve more students, the improvement of library capacity, resources, and services, the expansion of campuses encompassing the constructions of more teaching and learning facilities and the student hostels, the expansion of research facilities and equipments, and last but not least the over-bureaucratization of public universities.

However, they failed to see that the rising operational expenditure of public universities is also caused by the expansion of postgraduate education provision. In the quest to become the leading research and educational hub, research universities have fixed the ratio between undergraduates and postgraduates at 1:1 (Department of Higher Education 2011b).

According to UIS (2014, p. 15), higher education system has to 'expand up' through the expansion of postgraduate education provision in order to ensure that there are sufficient instructional staffs to serve not just the escalating number of postgraduate students in public universities, but also to serve in the rapidly expanding private higher education system. This is in line with second thrust in the National Higher Education Strategic Plan (NHESP) (Ministry of Education Malaysia 2012b). To this end, Federal Government of Malaysia (2013) finances tuition fees at postgraduate level, especially for executives in the private sector, through the MyBrain15 programme, and a sum of RM110 million is allocated for this purpose in 2014. Besides, more civil servants including teachers have also opted to pursue postgraduate studies in the quest to fulfill job requirements, to be eligible for the increment of remuneration according to Malaysian Remuneration System (SSM) or for the promotion purpose. Here, the escalation of postgraduate education provision is largely motivated by political-economic factors. Hence, whether this is beneficial for the development of intellectualism and the pursuit of academic freedom remain to be seen, particularly since many of these postgraduate students are not going to serve in educational sector and as such, may be apathetical concerning both issues.

Apart from the growth in the number of public higher education institutions and the rising cost to sustain them, another key issue to be studied concerning the rise of academic capitalism in Malaysian public higher education system is regarding the investments into the improvement of public universities' research capacity and capability. To this end, Malaysian Federal Government has allocated more research grants to the public higher education institutions. In 2014 alone, research grants worth RM600 million were provided to public higher education institutions in the quest to improve the status of research universities by encouraging more researches to be carried out and having more numbers of articles for publication in international journals (Malaysia 2013). This is not surprising since Malaysia had spent 1.07% of GDP in research and development (R&D) in 2011 (UIS 2014, p. 159). In Malaysia, universities performed 29% of total R&D expenditure nationwide, which makes academia the second-largest performer of Malaysia's R&D (UIS 2014, p. 34).

Rapid commercialization of R&D will spur the rise of academic capitalism in public higher education institutions. Malaysian Federal Government encourages public universities, particularly research universities, to collaborate with corporate entities in commercializing universities R&D (Abd Rahman, Farley & Ng 2013, p. 558). To this end, a number of funds have been provided which include the Commercialization of Research & Development Fund (CRDF) managed by Malaysian Technology Development Corporation or MTDC. CRDF is expected to enable full commercialization of home-grown R&D, developed by local universities/research institutions or the private sector, either through a spin-off

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company, a start-up company, or other forms of undertakings (MTDC 2012). However, the promotion of commercialization of R&D in public universities may have adverse effects on the intellectual behaviors, such as producing entrepreneurial researchers who focus on targeted, commercial, applied and strategic researches, rather than intellectual researchers who mostly devote to basic, explorative, curiosity-driven researches.

The rise of academic capitalism in public higher education institutions is caused by the global economic and fiscal instability that threatens the economic prosperity of Malaysia. Malaysian Federal Government responds to this threat through the introduction and implementation of various strategic plans, or new policies, in addition to the emphasis on fiscal management in all governmental agencies including public higher education institutions. According to the World Bank East Asia and Pacific Regional Report (2012, p. 118) on higher education, Malaysia along with China and Thailand have moved from historically negotiated budget to formula funding in allocating funding for higher education institutions. This can be seen in the National Higher Education Strategic Plan beyond 2020 and National Higher Education Action Plan 2007-2010 which propose funding reform that are applicable to all Malaysian public higher education institutions (Abd Rahman & Farley 2013, p. 283). The public funding is divided into two components: the fixed component (e.g. salary and cost of utilities) and the variable component (e.g. R&D and student co-curricular activities) (Abd Rahman & Farley 2013, p. 284). The latter is based on the Rating System for Malaysian Higher Education Institutions or SETARA (Abd Rahman & Farley 2013, p. 284; Asharaf & Mustafa Omar 2013, p. 7-8).

2.2 The Rise of Academic Capitalism in Malaysian Private Higher Education

As has mentioned previously, the enrolment increase spurs the growth of the number of public universities and other forms of public higher education institutions. Nevertheless, the gap between greater demands of higher education institutions and greater numbers of public universities continue to widen from the 1980s to the 1990s (Thangavelu 2008, p. 272). Under tremendous market pressure, Malaysian Federal Government 'expands out' by allowing or encouraging the entry and greater role of private higher education providers (UIS 2014, p. 15; Lee 2014, p. 4). This helps to ensure the democratization of the private higher education sector. The need for this democratization hinges on, in the words of Thangavelu Marimuthu (2008, p. 272), the paradigm shift in the economic structure of the country, the external pressure brought by globalization and the technological revolution, the democratization of secondary education, the decrease of student numbers in overseas higher educational institutions, the increasing local demand for higher education, and the demand for a highly skilled workforce for the knowledge economy.

As of 17th September 2014, a vibrant and crowded private higher education sector has a shocking amount of institutions, encompassing 36 private universities, 30 private university colleges, 7 branch campuses of foreign universities, and 420 colleges (Department of Higher Education 2014). PvHEI seem to play a complementary role in providing an

alternative route in higher education, especially in this era of universalization of education along with the limitations of public institutions to cater to the increasing demand of tertiary education (Wan 2007, p. 7). The key role of private higher education institutions (PvHEI) in Malaysia is in meeting the escalating social demands of higher education and subsequently reducing the fiscal and socio-political pressures on the government and PbHEI.

Over the past two decades, a number of private colleges have been upgraded to become private university colleges while some private university colleges have been elevated to become private universities. Subsequently, more PvHEI are able to contribute to the expansion of postgraduate studies by offering programmes in master degree and even doctoral degree. As a result, there will also be an increasing demand for faculty with higher qualifications to cater to the growing need of private institutions in offering higher level programs, in accordance with the minimum quality compliance (Wan 2007, p. 9). However, the increase in private academia should not be seen as a contributing factor in the pursuit of academic freedom or the development of intellectualism. Although many of these PvHEI impose stricter requirements for the private academia to be involved in R&D as part of their continuous assessment practice on staffs, the private academia are usually burned-out with higher corporate demands in teaching workloads and administrative work that hamper their efforts in committing to creative, original, and inspiring researches. They are not only constrained by role strains or limited financial support towards their R&D, the corporate culture of many PvHEI also turns academia into capitalist intellectuals who seek to maximize their prestige and income by focusing on R&D with high commercial values only.

A large number of the engineering programmes offered by PvHEI are electrical, electronic, telecommunications, information systems, along with a handful in civil, mechanical, mechatronics and environment. In contrast, engineering programmes in public universities generally encompass all aspects of engineering including highly specialised areas such as oil and gas, chemistry, marine, manufacturing, aeronautical and biotechnology (Wan 2007, p. 11). The comparison of courses from the listing of both public and private institutions clearly indicates the contrasting trends between the higher education providers in Malaysia.

According to Wan Chang Da (2007), public universities provide a comprehensive approach to university education whereas private universities and colleges are predominantly market-driven in the choice of courses being offered (p. 12). As such, the programmes to be offered in the PvHEI is carefully chosen and targeted, in line with the labor market demands. This trend is worrying as it marginalizes many programmes which are deemed as commercially unprofitable for the PvHEI. Therefore, the development of intellectualism which demands academia and educational institutions to pursue any knowledge for the sake of knowledge is clearly at stake in PvHEI. The corporate culture and market orientation of PvHEI restrict and discourage academic freedom as the decisions in teaching and research are strongly influenced by expectations from its organizational structures and business owners/managements.

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Worse, in recent years, concerns over the quality of private higher education provisions spur government's decision to rein in on poor private higher education providers through two approaches. Firstly, an active and vigilant monitoring on all PvHEI is carried out by various governmental agencies, such as Department of Higher Education and Malaysian Qualifications Agency (MQA). Secondly, a more stringent approach in approving the establishment and operation of new PvHEI, with the exception of foreign university branch campuses which continue to rise in number. The aforementioned concerns should be of no surprise as most PvHEI are run as business corporations which shape its business managerial natures in promoting cost-efficiency, profit maximization, market orientation, and outcome-based performances. Such natures obviously compromise the role of private academia by reducing them to be mere instructors and employees. Although there are some variations in the state of PvHEI, in general, the freedom of speech, opinion and publication of private academia is as restricted as, if not more than, public academia.

3. Conclusion

Intellectualism as the core and distinctive feature of academia has to be sustained and promoted through academic freedom which allows academia to actively engage in the production and dissemination of knowledge; two tasks to be carried out through research and teaching respectively without the adverse political-legal, commercial, economic and religious interferences. Academia is intellectuals who count on institutions to provide employment and remuneration, and also to provide a favorable institutional setting and sufficient resources for them to pursue academic freedom in the development of intellectualism. As such, their academic freedom is thought to be relying on university autonomy. Nevertheless, the university autonomy may not safeguard academic freedom and intellectualism as the universities in Malaysia are now actively encouraged to engage in academic capitalism.

The rise of academic capitalism in PbHEI is observed when they now relentlessly seek collaborations with business sectors in the pursuit of diversifying sources of funding through the commercialization of R&D. This trend exposes public academia to market force and adversely affecting academic behaviors especially in regard to decisions in R&D. On the other hand, the rise of academic capitalism in PvHEI is observed when private academia has been reduced to mere instructors to serve the ever greater number of students. Most of them lack sufficient resources and conducive setting in the pursuit of academic freedom and the development of intellectualism. Therefore, in conclusion, it is imperative to review the rise of academic capitalism and its adverse effects on the academic freedom and intellectualism in Malaysia as the value of academia and educational institutions should not be seen purely from the commercial or economic perspective; they should also be seen by taking into account their invaluable contributions in pursuing knowledge and truth freely and intellectually as a service to, and in the interest of, the wider society.

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THE POLITICS OF ANTI-CORRUPTION AND INTEGRITY SYSTEM REFORM IN VIETNAM

Bui Hai Thiem

Anti-corruption is a critical area of governance across Southeast Asia but it still lacks sufficient attention at ASEAN's political agenda. In Vietnam, corruption has long been considered as a serious threat to both the national development, the very survival of the regime and a cause of violations of human rights. Various corrupt practices have been identified and tackled by party-state agencies through reforms, notably legal and judiciary reforms in parallel with efforts to protect and promote human rights. Various efforts by the party-state to efforts to build and strengthen the national integrity system have been put in place and broad engagement and cooperation with the international community through anti-corruption dialogues have been underway. However, corruption is still rampant. In that context, civil society has emerged as a key pillar in the integrity system despite the continuing anathema by the party-state over the development of civil society. The paper critically examines the integrity system reform and civil society processes and actions in influencing anti-corruption politics. The analysis of a high-profile case in Vietnam will shed clearer light onto the contestations in civil society over the anti-corruption politics and practice. Civil society has become a substantial force to establish a moral high ground in anti-corruption governance.

1. Introduction

In the political discourse of the Communist Party of Vietnam (CPV) leadership, corruption has been described as major threat to the survival of the regime and Vietnam's national development. This was publicly recognized at the mid-term CPV Congress in January 1994. Formal commitments to fight corruption have been reiterated in various CPV's resolutions, state laws and political leaders' discourses.[i] Beginning as party affair, anti-corruption has become a critical area of governance for the party-state. Various efforts by the party-state to build and strengthen the national integrity system have been put in place and broad engagement and cooperation with the international community through anti-corruption dialogues have been underway. However, corruption is still rampant and the post-Doi Moi period is accompanied with increased corruption (Gainsborough 2010: 50). In that context, civil society has emerged as a key pillar in the integrity system despite the continuing anathema by the party-state over the development of civil society. As a high level of corruption is an indicator of severe legitimacy problems for the regime (Holmes 2007: 17), the party-state has been considering and implementing integrity-based reforms to tackle this issue. These reforms have opened up political space for civil society actors to influence the construction of new norms and practices in anti-corruption governance. Furthermore, corruption has been identified as the cause of various violations of human rights (International Council on Human Rights Policy 2009). Thus, to honour its commitment to the protection and promotion of human rights, the party-state has to place anti-corruption high on its political agenda. The interaction between anti-corruption and protection and promotion of human rights has generated profound dynamics for the more meaningful participation from different social actors in this area of governance.

In the absence of Non-Governmental Organizations (NGOs) as an independent force that can mount outright challenges to corrupt practices by powerful party-state institutions and officials, non-state actors are increasingly circumvent and transcending the party-state as agents of integrity-based reforms. Civil society processes and actions have sought to establish a moral high ground in anti-corruption governance. Despite inherent tension and contestation in these processes, the party-state can no longer exclude or discount the role of civil society in this critical area of governance.

This paper will first outline the context of anti-corruption politics. It is followed by a discussion of integrity-based reforms that have been under way. The roles and participation of civil society actors will subsequently be critically examined. The paper will critically examine the integrity system and civil society processes and actions in influencing anti-corruption politics. The analysis of some recent high-profile cases in Vietnam will shed clearer light onto the contestations in civil society over the anti-corruption politics and practice. This paper draws from a wide range of sources including interviews, government documents, statistics, and media analysis.

2. Background to Anti- Corruption Politics in Vietnam

The CPV has made formal commitments to fight corruption and showcased various efforts to build and strengthen the national integrity system since Doi Moi. The commitment has become an underpinning pillar for the anti-corruption strategy in the state apparatus in the years to follow. The political discourse of the threat posed by corruption has been transformed into legal rules and norms in combating corruption. Significant changes in the legal framework included more severe punishments for acts of corruption. It specifies the range of actions considered illegitimate and unlawful in relation to corruption. The amendments to the Criminal Code in 1992 introduced death penalty for some acts of corruption (Amendment to Article 225 on receiving bribes). One of the first high profile anti-corruption trials took place in January 1997 and Pham Huy Phuoc, Director of Tamexco, a state-owned company, was found guilty of embezzling about US$30 million and sentenced to death. The year 1997 was marked with the massive protests by peasants in Thai Binh province in which widespread corruption among local officials was a major cause (Tuong Lai 1997; Kerkvliet 2003: 47-49). Facing with the increasingly serious situation of corruption, Vietnam's first anti-corruption legislation known as the 1998 Anti-Corruption Ordinance was adopted by the Standing Committee of the National Assembly to strengthen regulative rules against corruption. The 1999 Criminal Code had a separate chapter (Chapter XXI, Part A) on corruption crimes and maintained the death penalty. With a legal framework on addressing corruption in place, the party-state started to increasingly use the court to address corrupt practices of officials and party members. As argued by Gainsborough (2003: 69) this practice was new in the 1990s as the party traditionally used designated party institution (the Control Committee) to discipline wrong-doing party members.

Along with legislative measures on anti-corruption, the party has intensified efforts to build the integrity system and the norms which set standards and/or expectations that govern and control the behaviour of party members and public officials. A major milestone for these efforts was the second Resolution of the sixth plenum of the 8th Tenure Central Committee[ii] in 1999 on 'some fundamental and urgent issues of party-building' and the launch of an anti-corruption campaign based on the traditional socialist tenet of criticism and self-criticism. Accordingly, a steering committee was established by the CPV Central Committee to fight corruption in party cells and members.[iii] Following this commitment, a number of high-ranking officials involving corruption had been disciplined. Ngo Xuan Loc, Deputy Prime Minister and a member of the CPV Central Committee was dismissed from office in December 1999. Two members of the CPV Central Committee holding senior positions in the state agencies were sacked in July 2002 and later imprisoned due to their involvement in a large-scale corruption case with a mafia boss Nam Cam.[iv] This steering committee played a critical role in addressing a number of high-profile cases between 1999 and 2006 such as Nam Cam, PMU18, the trading of garment and textile export quotas at the Ministry of Trade, and the land grab case in Do Son (Hai Phong city). While the widely publicized anti-corruption trials demonstrate the commitment by the party-state,

they are 'equally an indicator of the pervasiveness of the problem' (Dosch 2009: 379). The heavy media coverage of corruption also helps shaped the public perception of corruption in the country. The media plays a key role in the frontline of anti-corruption campaigns.

In order to strengthen the integrity system across the state institutions, the 2005 Anti-Corruption Law replacing the 1998 Ordinance formalized the establishment of a central anti-corruption steering committee headed by the Prime Minister to coordinate national efforts. The implementation of this law should be seen in light of anti-corruption governance after the CPV National Congress in 2006. Prime Minister Nguyen Tan Dung took office in June 2006 with a strong commitment to combat corruption. The 2005 anti-corruption law was amended in 2007, paving the way for consolidating the centralized authority of the Prime Minister in overseeing anti-corruption governance (Article 73). In fact, while there were more centralized measures taken to tackle corruption, more tightening control had been applied to the press in reporting corruption. And despite a strong political commitment and centralized measures, the period following the 2006 Party Congress is notably marked with an increase in the scope for rent-seeking and political infighting between powerful interest groups (Vuving 2013). The worsening economic situation of Vietnam and his administration's economic mismanagement since the Global Financial Crisis in 2008 has cost the Prime Minister and his client-patron network certain political capital. Two large-scale corruption scandals were exposed at the two major state-owned conglomerates, i.e. Vinashin (Vietnam Shipbuilding Industry Group) and Vinalines (Vietnam National Shipping Lines). Both were nearly bankrupt. Vinashin's debt in 2010 totalled US$4 billion and Vinalines' debts amounted to US$3 billion in 2012 due to embezzlement and mismanagement by the directors and chairmen who were appointed directly by the Prime Minister. In separate trials, Pham Thanh Binh, Chairman of Vinashin was sentenced to 20 years in prison and Duong Chi Dung, Chairman of Vinalines was sentenced to death.

In face with widespread frustration about economic mismanagement and rampant corruption, the party-state decided to curtail the executive power from anti-corruption purview. The Resolution of the 4th Plenum of the CPV Central Committee Plenum in January 2012 set in motion another complex swerve for Vietnam's anti-corruption politics. It reinstated the long-standing anti-corruption measure of criticism and self-criticism as a means of political maneuvering. Subsequently, the 5th Plenum of the CPV Central Committee in May 2012 decided to establish the Central Anti-Corruption Steering Committee under the purview of the Politburo and the CPV General Secretary to be its head. It also decided to re-establish the Commission for Internal Affairs (Ban Noi chinh trung uong) as the permanent party institution designated for assisting the Central Anti-Corruption Steering Committee. The compliant National Assembly promptly adopted another amendment to the 2005 anti-corruption law in November 2012, abolishing the Prime Minister's chairmanship over the central anti-corruption steering committee. As a result, anti-corruption governance has effectively been placed under the centralized power of the CPV Politburo. These moves imply a re-emphasis on anti-corruption governance

as fundamentally party affair. Setting up party institutions tasked with anti-corruption responsibilities and the appointment of Nguyen Ba Thanh, party secretary of Da Nang city, as the head of the Commission for Internal Affairs in December 2012 fueled speculation about internal completion inside the party and an countervailing force against Prime Minister Nguyen Tan Dung's patron-client networks (Malesky 2014: 35). This also suggests that utilizing law to combat corruption was viewed by the party to have been inadequate.

The constant changes in the key institution tasked with anti-corruption responsibilities and party-state leaders' public acknowledgement of the unceasingly pervasive corruption send a message that the measures have not worked well so far. A major reason is that the rules and norms have failed to specify and maintain 'strict boundaries between what belong to or should be protected by the state for the public good and what people in society, as individuals and groups, can use as their own' (Kerkvliet 2003: 45). Furthermore, sanctions and punishment against violations of anti-corruption rules and norms have not been well monitored and enforced. In the absence of the rule of law,[v] enforcement of anti-corruption sanctions is politically motivated. For example, when questioned in a televised session of the National Assembly in 2014 about the measures taken against the former Government Inspector General whose corrupt practices had been exposed by the media, the incumbent Government Inspector General replied that he did not have any answer because the person in question was under the purview of the Party Secretariat and investigation into this case by the Party Central Inspection Committee (Uy ban Kiem tra Trung uong) was still ongoing. The CPV General Secretary Nguyen Phu Trong, Chairman of the Central Anti-Corruption Steering Committee emphasized that combating corruption should give priority to maintenance of stability and unity in the party.

It is noteworthy that anti-corruption politics in Vietnam tend to focus on big corruption cases involving high-ranking officials while corruption is rampant across all sectors like land administration, environmental governance, healthcare, education, policing, judiciary and entrenched in the system at all levels. Explaining the phenomenon of big corruption cases, Gainsborough (2003: 70) argues that they represent 'an attempt by the political centre to discipline the lower levels of the party-state in a climate of increased decentralization.' This argument seems to echo the point made by Vu Quang Viet (2006) about the decline in power by the political centre (the CPV Politburo) and the rise in local power due to decentralization since Doi Moi. While this might be true for some particularly anti-graft cases at the lower level of the party-state, it cannot account for many other cases with alleged connections to the top leadership. Vuving (2013) offers a different account of big corruption cases exposed, describing them as a consequence of political infighting between major factions in the rent-seeking party-state. This argument can find support from McKinley (2009)'s study which suggests a clear correlation between state-owned media coverage of corruption cases and politically important events.[vi] This account of anti-corruption politics echoes Khan (1998)'s thesis of patron-client networks built on incumbent elites' political compromises in exchange for clients' loyalty. According to this thesis, in combating corruption, it is highly likely that political masters are held hostage by

their clients in the network. Nevertheless, in any account of the anti-corruption politics, significant changes in the way the party-state responded to corruption have emerged.

The recent prominence of anti-corruption politics in Vietnam has generated more political space for reforms and participation from social actors. The linking of corruption to violations of human rights 'creates new possibilities for action' (International Council on Human Rights Policy 2009: 5). In this sense, the social media has been playing an increasingly important role. In their study of budget transparency and politics of accountability in Vietnam, Warren and Nguyen (2013) note a broadening and diversification of institutions under the parameter of the one-party state. This broadening of political space for anti-corruption governance has been made possible via integrity reforms and civil society processes in which the role of state institutions has dissipated and civil society action is on the rise. Before discussing the broadening of institutions and their changing roles, including civil society, it is necessary to turn to a discussion on the understanding of corruption in Vietnam. In the next section, I discuss the public perception of corruption through the TI survey and media analysis. I then examine integrity-based reforms to combat corruption. I use a section for discussing the role of civil society actors and their participation in this area of governance, focusing on the media, NGOs, CBOs and other non-state actors, and the social media. The case study of Do Son land grab illuminates the key point about the dynamic character and contestatory nature of civil society processes in anti-corruption governance.

3. Perception of Corruption in Vietnam

While corruption can have many forms and expressions, it has a clear connection to the misuse of authority or power. According Kerkvliet (2003: 45), corruption is 'appropriating for the benefit of oneself or others in society that which is supposed to remain in the public domain or be used by state agencies in order to govern.' For Transparency International (TI), corruption is 'the abuse of entrusted power for private gain' (CPI 2011). Gillespie (2001: 4-5) points out that legal norms in Vietnam formulate corruption as wrongdoing in the misuse of official power (predatory corruption) and public opinion tends to tolerate some official misbehaviours in receiving small bribes (petty/white corruption). Paradoxically, while corruption is a threat to the political regime's legitimacy, it is 'unavoidable part of maintaining political control' (Khan 1998: 111).

As it is highly difficult to measure the level of corruption, perception matters a great deal. There have been two main ways to capture the perception of corruption in Vietnam. The first measure is based on quantitative research to develop indices and the second is based on the analysis of the media, both mainstream and social media, which traces the frequency and dominance of corruption-related topics. TI has pioneered with the Corruption Perception Index (CPI) which measures the perceived levels of public sector corruption in a given country. According to TI's CPI, Vietnam's score has been consistently poor and has not been improved markedly over the years (Figure 6.1). Thus, Vietnam

has never received a pass mark on the CPI. It demonstrates an increasingly widespread frustration from the public with corruption.
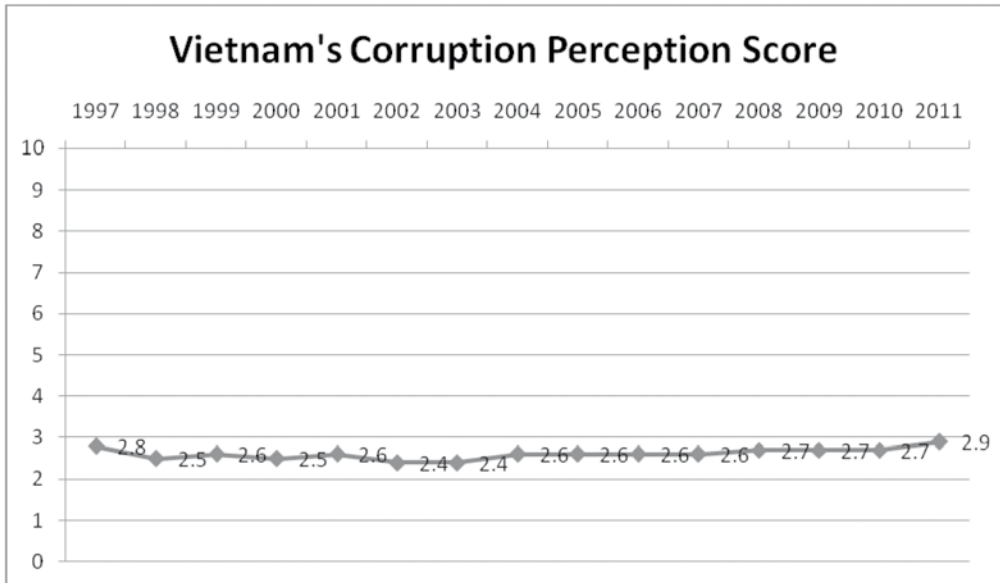

Figure 6.1. Vietnam's corruption perception score in the Transparency International's CPI over the period of 15 years (1997-2011). Scale: 0= highly corrupt; 10=extremely clean.

Most surveys indicate that party-state anti-corruption efforts have been perceived as ineffective. For example, in a survey titled "Global Corruption Barometer 2010" commissioned by TI in Vietnam, 62% of the respondents said corruption had increased over the past three years. This raised an interesting puzzle about why the population's confidence in corruption efforts has decreased over the years. This is very important because it will have direct implications for the perceived legitimacy of the CPV's rule. While there is an argument that the Vietnamese media becomes more assertive in the fight against corruption (McKinley 2008), the mixed signals from the party-state over corruption reporting has complicated the role of media in this aspect. On the one hand, the CPV National Congress in 2006 urged the media to become more active in uncovering graft and the CPV Politburo called on the press to step up its anti-corruption reporting, increased censorship and discipline over corruption reporting occurred. In 2008, journalists who reported the PMU 18 corruption scandal[vii] suffered a serious blow. Two reporters were arrested and brought to court for charges of "intentional disclosure of state secrets" and seven others were heavily disciplined.[viii] The chief editors of Thanh Nien and Tuoi Tre, the two most influential newspapers in anti-corruption coverage, were dismissed from their positions in the same year. In 2010, the Editor-in-Chief of Vietnamnet and two other journalists were disciplined after a report on Vietnamnet ran the headline that 'Police ranks

first in corruption', carrying the results of a survey conducted by a consultancy company for TI.[ix] These are a few examples, among various cases, that suggest a limit on the capability of the media to report on corruption. Since the PMU 18 corruption scandals, the media seems to have uncovered less cases of corruption amid the rising prominence of a rent-seeking party-state. While the media has been prominent in anti-corruption campaigns, it is far from fulfilling public expectations in their roles of exposing corruption and offering forum for debates on fighting corruption.

4. Integrity-based Reforms to Combat Corruption

Integrity-based reforms have been cautiously considered and implemented by the party-state in anti-corruption governance. Before discussing the reforms, it is important to understand the meanings of integrity. It is a concept that is as difficult to measure as corruption and the best possible way so far is to monitor perception. There have been various efforts to monitor perception of integrity, for example the Integrity Perception Index developed by the Korean Independent Commission Against Corruption (KICAC) or the National Integrity System (NIS) developed by Transparency International (TI). According to TI, integrity is 'the use of public power for officially endorsed and publicly justified purposes.' In a democratic regime, the elected government and legislature set the officially endorsed uses of public power (Sampford, 2005). However, in an authoritarian system, the use of public power is not always clearly set and it depends on substantive values. TI takes into account the substantive values in its definition of Integrity Systems. Accordingly, the Integrity Systems are 'the institutions, laws, procedures, practices and attitudes that encourage and support integrity in the exercise of power in any given society' and they functions to 'ensure that power is exercised in a manner that is true to the values, purposes and duties for which that power is entrusted to, or held by, institutions and individual office-holders' (TI 2005). This concept was used in the country study report on Vietnam's National Integrity System commissioned by TI in 2006 to assess Vietnam's holistic approach to combat corruption. The report provided a very broad picture of Vietnam's NIS which covers a wide range of institutions from the Communist Party to civil society, private sector and the media. While this report can be a good entry point to understand the integrity system in Vietnam, it only provides a rough checklist of institutions with general description of their mandate and performance.

While Doi Moi is usually referred to as market-based reforms in the economic sphere, integrity-based reforms have taken place across administrative, judicial, and legal spheres. These reforms are framed as "three-pronged attack" (Sampford et al. 2007: 1) on poor legislation, bad judicial practices, and complex administrative practices, or to put in another word, they aim at improving the public integrity. In this aspect, building the national integrity system has become a significant task for Vietnam's party-state to bring about better governance in every aspect of society.

The public administrative reform (PAR) is designed to tackle some of the root causes of corruption embedded in the size of bureaucracy, bureaucratic culture, complex and burdensome administrative procedures. It has been implemented on a gradualist basis since 1990s with a Public Administration Reform Master Plan promulgated every ten year since 2001. According to some neo-institutionalist theorists (Evans 1989), there is a high correlation between the level of official corruption and the size of bureaucracy in a country (with an exception of Sweden). The party-state has recognized that the administrative field is a fertile ground for corruption and has tried to reduce cumbersome and complex administrative practices that are conducive to corruption. The goal of the reform is to attain a 'democratic, clean, strong, professional, modern and effective administration.'[x] It targets four key areas, i.e., institutional reform, administrative apparatus reform, public service and public servants reform, public finance reform. These reforms are to improve the integrity in the bureaucracy and its service. Particularly a measure to fight corruption by making public servants to declare their assets and income was adopted in the 1998 Anti-Corruption Ordinance and subsequent government decrees in 1998, 2002, 2007, 2011 and 2013. Accordingly, all state employees are required to declare assets worth more than VND50 million (around US$3300). The 2005 Anti-Corruption Law also requires all state employees and their family members to declare their assets annually with a view to increase the transparency in government. However, until 2011, the declarations of assets and income by public officials were not made publicly available. As from 2011, the declarations of assets and income can be made public but only at the office where the respective public officials work. However, the competent authorities can decide whether to make public declarations of assets and income at a closed meeting or to post them on a notice board at the office.

While there were high expectations on the measure of assets and income declaration to fight bureaucratic corruption, the results turn out to be disappointing. In a Government report presented by the Inspector General to the National Assembly, it was acknowledged that this measure has not been effective. Only one single case out of nearly a million asset declarations in 2013 was found inaccurate and the related official was disciplined.[xi] Indeed this sheer fact is indicative of serious problems in implementing and policing the government decree on assets declaration. It has been almost impossible for the inspection apparatus at all levels to detect the irregularities and inaccuracies in the asset declaration by public officials. Obviously a genuine political will is wanting in tackling this problem.

Another significant aspect of administrative reform is the strong emphasis of 'grassroots democracy' in the aftermath of Thai Binh uprising in 1997. The Government promulgated a decree on grassroots democracy in 1998 and an additional one in 2003 and the Standing Committee of the National Assembly adopted the Ordinance on Grassroots Democracy in 2007 to address the deficiencies in the 2003 Decree. Interestingly, the rhetoric employed by the party-state in the emphasis of grassroots democracy is 'uncannily similar to the prescriptive analyses of "good governance" issued by the World Bank' (London 2009: 391). It is hardly a coincidence that Vietnam's economic performance had been promoted by the

World Bank as a success story among developing countries before the 2008 global financial crisis. However, the transparency and accountability mechanisms for decision-making announced in the grassroots democracy law are 'rarely exercised' (London 2009: 391).

The judiciary and court-related institutions in Vietnam have been tasked with most important roles in conducting anti-corruption preventive and investigative activities. As commented by Sampford et al. 2007: 88), they are the provider of three types of public goods that are significant to anti-corruption governance: justice through protection of constitutional norms and monitoring of the law (litigation and investigation), effective frameworks for law protection through the improvement of judicial institutional capacity (facilitating reforms) and legal assistance to the ongoing general reform of state institutions (via expert advice and recommendations). Thus, reform in this section has been considered crucial. The legal and judicial reforms are broadly outlined in Resolution No.48-NQ/TW on Legal System Development Strategy (LSDS) and Resolution No.49-NQ/TW on Judicial Reform Strategy issued by the CPV Politburo in 2005. The core of these reforms aims at addressing the problems of poor legislation and bad judiciary practices which are related to the integrity of the legal and judiciary institutions. The LSDS focuses on the improvements in the quality of laws and the availability of laws in the critical areas of governance as well as the capacity of legal institutions. Reforms in these fields have been implemented with a view to make the legal and judiciary institutions more responsive to the logic of transparency and accountability. A major step in this line was the legal norm set in the 2008 Law on Promulgation of Legal Normative Documents (the law on law-making) that requires any law drafting committee to seek comments and feedback from the people affected by the respective law. The incremental legal reform has been implemented in parallel with the judicial reform which focuses on the courts, the procuracy and the police.[xii] Part of the legal and judiciary reform aims at addressing the problems with integrity of the institutions and personnel in this sector where corrupt practices are common.

The integrity-based reforms across the administrative, legal and judiciary spheres have significant meanings for anti-corruption governance. The party-state has allowed the opening of channels of communication with international donors via annual anti-corruption dialogues to discuss these issues. On the one hand, the outcomes of these reforms remain uncertain and ambiguous despite the heightened efforts and support from international donors. The continued poor score of Vietnam on international indices and independent reports has pointed to little impact of these reforms. On the other hand, the reforms have paved the way for a broadening of political space, both invited and newly created, for social actors to participate. Thus, the anti-corruption governance has become more dynamic and open to change.

5.   Civil Society and Anti-Corruption Politics

Civil society plays a critically important role in the integrity system to tackle corruption. This role is widely recognized by the international community and promoted by international donors in Vietnam such as the World Bank, DFID, SIDA, and USAID although it is still circumvented in the official anti-corruption discourse. It is in civil society that a wide range of processes from consensual to conflictual approaches can be adopted to deal with corruption. In an opaque environment of the rent-seeking party-state in collusion with predatory business interest, civil society embraces a promise of being potentially a countervailing force against the corrupt power. This point is resonated with Khan (1998)'s argument:

If the pervasiveness of corruption is related to the types of contestation facing states, between and among capitalists and incumbent political elites, we need to examine the role of particular groups within civil society who generate this contestation in the first place and the possible effects of further attempts at strengthening 'civil society.'

Civil society processes against corruption usually involve the activities to provide assistance for the development of accountability and transparency mechanisms, oversight public institutions, for the reform of state administrative institutions and the reform of social welfare systems, and for the making of public policy against corruption via the use of intellectual resources and critical knowledge. The main actors in these processes are the media, NGOs, informal groups, bloggers, the business sector and street protests. Given the context of Vietnam where the business sector is fraught with elitism and interest group manipulation (Gillespie 2008) and street protests are strictly banned, this paper focus on the media, NGOs, and bloggers.

5.1. The Media in Anti-Corruption Efforts

Despite various constraints on the freedom of press and the control from the party-state via the censorship system, media reporting on corruption has played a number of roles. As the press in Vietnam is partially or wholly owned by the party-state institutions, they serve a political mission which includes uncovering corruption. The 1989 Press Law stipulates the role of the press in Vietnam as 'the mouthpiece of party organizations, state bodies, and social organizations, and a forum for the people' (Article 1). Thus, the press has been active in exposing corruption cases, monitoring and publicizing party-state's anti-corruption efforts, and offering the public a forum for debate through which opinions can be shared and provided to relevant party-state institutions (McKinley 2009: 6-7). According to Transparency International and the Global Corruption Barometer (2010), the press in Vietnam is perceived as the second most trusted institution in the fight against corruption. The press has been able to make use of the invited and claimed space, albeit limited, to contribute to the dynamics of anti-corruption governance.

The substantial and wide-ranging media coverage of corruption in Vietnam has generated social impact by influencing public opinion on the situation of corruption and generating increased pressures on the party-state for improved results in anti-corruption governance. One of the dilemmas that the press faces is that it has to tread a careful line between reporting on corruption, and damaging the prestige of the party-state institutions and officials. Particularly coverage of high-level corruption is more likely to receive greater censure and/or reprisal. In practice, the press is not always compliant with the party-state instructions. At times, it crosses the line and shapes the civil society action against particular cases of corruption beyond the party-state control. And when a particular media outlet/newspaper does take risk, it often has political patronage (McKinley 2008).

A major difficulty that the press faces when reporting on corruption is the lack of access to information. The law on access to information has been overdue for too long although many drafts have been prepared and deliberated at the government meetings and National Assembly sessions. The vague regulatory framework on what kind of information the press can get and report creates a lot or risks for corruption reporting. Thus, the press has been 'pushing the boundaries on what is acceptable in taking on their state-sanctioned anti-corruption role' (Cain 2013: 18). The boundaries have become more blurred in the context of opaque environment of rent-seeking and political-business interest collusion.

The findings from McKinley's (2009: 3) study on elements of state control constrain or abet the Vietnamese press' ability to expose corruption suggests that:

The problems associated with information access make it easy for political and business interests to manipulate the media, as the release of information by them may be linked to the settling of scores about which journalists are unaware. By publishing the information, reporters become unwitting 'hit men,' or pawns in a fight for power, and their coverage becomes necessarily biased. While clearly dangerous, this manipulation of the media by those in authority will, at the very least, ensure that someone is always willing to support the media's work by providing information about corruption.

Despite all problems it faces, the Vietnamese media remains at the forefront of the anti-corruption governance. The desire by the party-state to enlist and direct the role of the media in the ani-corruption governance at times conflict with client-patron relationships and transgressed other more important party power relations and hierarchies.

5.2. Non-State Actors in Anti-Corruption Efforts

The NGOs are increasingly, albeit slowly, making their presence felt in anti-corruption governance. While the NGOs are often portrayed as typical representative of civil society organizations, it is important to note that they are 'by and large led by and ultimately serve the interests of the ubiquitous middle classes' (Khan 1998: 10). The best known anti-corruption NGO in Vietnam is Towards Transparency, TT's national contact. Besides,

there are various NGOs working indirectly on anti-corruption via many issues related to transparency, accountability, and integrity. Although the trust in NGOs for anti-corruption remains low according to the Global Corruption Barometer 2010, their continued efforts in the related fields have been important for educating the public and influencing policy and practices in anti-corruption governance. They often work closely with the media and mass organizations to make their contribution to reduce corrupt practices. In the absence of opposition politics, the mass organizations represented by the Vietnam Fatherland Front (VFF) are assigned the tasks of being at the people's forefront of anti-corruption battle. Most legal documents on anti-corruption and grassroots democracy highlight this role of the VFF and are silent on the role of NGOs. Thus, the NGOs have been seeking partnership and cooperation with the mass organizations in improving aspects of the integrity system. They carefully choose the issues and themes to work on and deploy strategies to influence the discourse and policy-making process accordingly by engaging with key stakeholders in each campaign and forming strategic alliance along the issues/ themes they want to influence changes. Examples of these active NGOs are Live and Learn Centre and the Institute for Study of Economy and Environment (iSEE) with the campaign 'Toi tu te' [I do the decent things] which aims to generate change in corrupt practices throughout the society. The NGOs also use official channels or the invited space to promote integrity against corruption. A notable example is the Vietnam Anti-Corruption Initiative (VACI) program organized by the World Bank in coordination with the Government Inspectorate between 2011 and 2014 with a view to awarding small grants for projects that help to reduce the prevalence of corruption at any level. Many NGOs and informal groups have received VACI grants for their projects to strengthen public integrity and transparency. One of the VACI awarded projects was the website toidihoilo.com [I paid a bribe] initiated by a group of innovative citizens to encourage people to disclose information about bribes and corrupt practices that they have encountered.

A new phenomenon in anti-corruption governance is the recent emergence of various loosely organized non-state actors. These are informal groups or networks of people who have become so frustrated with the rampant corruption that they want to act collectively in response to either a particular case or the general problem of corruption. These actors adopt more confrontational approach and their processes of claiming the political space have generated contestations and challenges to the party-state at both local and national levels in addressing the corrupt practices of the latter's agencies and cadres. The sign of banners and slogan shouting at demonstrations against land grab corruption cases have recently become more common throughout the country. They are forming the kind of protest politics which is unprecedented in Vietnam. While in most cases these groups of people are marginalized and repressed, the processes can finally reach successful outcomes in some particular cases. The success of the informal groups of petitioners in Do Son land grab corruption case (2004-2007) in Hai Phong city was attributable to their high level of organization, influential alliance-building and and sustained pressures on the government bodies to bring the case to light. A group led by Le Hien Duc, the 2007 TI Integrity Award winning citizen, has been active in serving as a connecting point for

corruption denunciations and coordinating efforts to help the victims of corrupt officials [Hiep hoi Dan oan Viet Nam].

Bloggers and social media are the newest social force that is critically pushing the limits of anti-corruption governance in Vietnam. The scope of agency exercised by this social force has been enlarged in most part due to its independence from the party-state control. The blogosphere has increasingly established itself as the most sought source for different perspectives and in-depth analysis of corruption cases and anti-corruption politics in Vietnam. Its more informed analysis has increased the influence on public opinion and pressure on the party-state. A number of critical political blogs have been identified as threats to the party-state such as Quan lam bao, Dan lam bao, and Basam. Several bloggers like Truong Duy Nhat and Pham Viet Dao were arrested and jailed for crossing the line in amplifying public frustration about official corruption.

These types of civil society actors mentioned above usually operate separately in anti-corruption governance as they have different ranges of distance and relations from the party-state. On some particular cases of corruption where they share the sphere of influence and echo each other in protecting the victims and denouncing the corrupt officials, the power of the civil society actions is multiplied to an extent that the party-state cannot discount. As the party-state has so far failed to provide an effective response with strategic and integrative approaches to corruption, contestatory claims and processes in civil society have been on the rise recently. The case in point is an illegal land eviction that ended in violence in Tien Lang district of Hai Phong province in January 2012 which 'released a torrent of popular grievances over corruption in local police departments' (Cain 2013: 2). The Prime Minister Nguyen Tan Dung was reported to appreciate the role of the press in exposing the wrongdoings and corrupt practices of local authorities in the high-profile land eviction in Tien Lang. The joined voice by various quarters of the media, both traditional and social media that sided with the farmers who fell victims to the wrongdoings of local officials had riveted the whole country. The case exposes both latitude and depth of many problems with the administration, legal and judiciary system in the country. Civil society action against corrupt officials and in support of the victims who even had committed violent resistance had generated phenomenal pressure on the party-state beyond the case in point. The Do Son land grab corruption case in 2000s is also pertinent to this discussion as it suggests how civil society processes were playing out in the ant-corruption governance. In this case, informal and unorganized networks of activism had emerged and were operating outside of the party-state. They engaged in contestations and challenges against the corrupt norms and practices in the opaque dealings among local officials. At first, they suffered serious persecution and clampdowns from some corrupt elements of the party-state at local levels. Later, they had been gradually been tolerated and endorsed by the party-state to fill in the gap in anti-corruption governance. The party-state had tried to appease the popular discontent by punishing errant officials and maintain its control of the higher ground in the governance area critical to its political legitimacy. The

battle of values and norms throughout civil society processes has contributed to shaping and reshaping power relations in this case.

6. Conclusion

In this paper I have looked at the perception of corruption and some of key integrity-based reforms to combat corruption in Vietnam. I then examine the interaction between civil society and the party-state in this area of governance. The case study of Do Son land grab is illuminative of the counter-hegemonic formulations in civil society amid the eroding confidence by the public in the party-state's capacity to rectify itself in order to fight corruption.

This paper contends that anti-corruption governance becomes a critical site of contestations and challenge and civil society has an important role to play. It suggests that civil society processes have a power of transformative potential to influence changes in anti-corruption governance. In Vietnam, corruption has long been considered as a serious threat to both the national development and the very survival of the regime. Various corrupt practices have been identified and tackled by party-state agencies through reforms, notably legal and judiciary reforms. Various efforts by the party-state to efforts to build and strengthen the national integrity system have been put in place and broad engagement and cooperation with the international community through anti-corruption dialogues have been underway.

However, corruption is still rampant. In that context, civil society has emerged as a key pillar in the integrity system despite the continuing anathema by the party-state over the development of civil society. In the absence of non-governmental organizations that can mount outright challenges to corrupt practices by powerful party-state institutions and officials, civil society processes generated by citizen's activism, NGOs, the media and the blogosphere have become significant in broadening the political space in anti-corruption governance. Civil society has become a substantial force to establish a moral high ground in anti-corruption governance.

Acknowledgement

Endnotes

i   See Resolution of the 4th Plenum of the 11th Tenure CPV Central Committee issued in 2012 and speeches by succeeding CPV General Secretary Le Kha Phieu, Nong Duc Manh, and Nguyen Phu Trong on fighting corruption.

ii See the text of the Resolution available at http://www.cpv.org.vn/cpv/Modules/ News/NewsDetail.aspx?co_id=30678&cn_id=124005 (accessed on 31/8/2011)

iii Ban Chi dao Trung uong VI (2) [The Central Steering Committee VI (2)] was established by the second Resolution of the sixth Plenum of the CPV Central Committee in February 1999 to deal with corruption among party members. It was dissolved in September 2006.

iv The two members of the CPV Central Committee were Bui Quoc Huy, Lieutenant General, Deputy Minister of Public Security and Tran Mai Hanh, General Director of the Voice of Vietnam Radio.

v   The term "rule of law" is used here in two senses as suggested by Dicey (1959): (1) the idea of lawful constraint of authority; and (2) the idea of the right to equal individual subjection to the law.

vi Politically significant events in Vietnam include the CPV National Congress, CPV Central Committee Plenum, National Assembly elections and meeting sessions.

vii PMU 18 Scandal is named after a Project Management Unit No.18 at the Ministry of Transport which was charged with embezzlement of millions of dollars of public funds. This case is compared to the mother of all corruption scandals ever exposed before the CPV Congress in 2006 (Gainsborough 2007).

viii http://tuoitre.vn/Chinh-tri-Xa-hoi/257288/Hai-nha-bao-chuyen-viet-dau-tranh-chong-tham-nhung-bi-bat.html: accessed 31/8/2011.

ix Vietnamnet reported a figure from the survey that a record high number (82%) of respondents said police is the most corrupt sector in Viet Nam. (http://www.bbc. co.uk/vietnamese/vietnam/2010/12/101217_vietnamnet_discipline.shtml: accessed: 31/8/2011).

x   See Resolution No. 30c/NQ-CP dated 8/11/2011 promulgating the Master Plan on Administrative Reform between 2011-2020.

xi See http://vnexpress.net/tin-tuc/thoi-su/gan-mot-trieu-nguoi-ke-khai-tai-san-mot-nguoi-bi-ky-luat-3080427.html (accessed 20 September 2014).

xii   For a more detailed analysis of the legal and judiciary reform in Vietnam, see Nicholson & Pitt (2012).

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DEMOCRACY AND LEGITIMACY 'FROM BELOW': CONTEXTUALIZING PAPUA'S[1] GOVERNANCE AND TRADITIONAL ELECTORAL SYSTEM

Vidhyandika Djati Perkasa

Abstract

Indonesia emerged as a model of democracy in Southeast Asia after the success to conduct competitive direct elections that theoretically would produce legitimate governments. However, the issue of democracy and legitimacy gets more complicated when it is associated with the province of Papua with its problems of human rights violation, disrespect for the human dignity, marginalization, and poverty that all led to the fertile separatisms movement which opt for independence. Fearing lost identity and extinction, the indigenous groups try to preserving their traditional values such as the local election system. The Central Government has applied measure to preserve a locally-known culture and tradition known as 'the Noken' system within the general election system. The essence of the Noken System is that voters do not exercise their right to vote under the one-man one vote principle but to allow tribal chiefs to determine for whom the tribal groups or clans vote.

Regardless of its deep-rooted cultural values, this system is questioned by this paper as to whether it promotes or contradicts the values of democracy. This paper also analyzes both the values and challenges of the Noken System in electing legitimate leaders.

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1   The island of Papua, standing on the easternmost part of Indonesia, is divided into two provinces: West Papua and Papua. This paper will focus only on the province of Papua.

1. Background

The International New York Times dated 5 September 2014 describes Indonesia's most competitive Legislative and Presidential elections that were held from April to July 2014 that resulted in a dramatic yet peaceful end.[2] Despite such achievement, there is no assurance of a causal relationship between a democratic election and a legitimate government. In this case, the whole idea of legitimacy can be assessed 'beyond' formal and legal election processes. It could be related to the performance of local governments or even to the rendering of support from the people in government's daily governmental tasks.

Although "legitimate" elected leaders are supposedly the products of a 'democratic election', they are in fact 'illegitimate' in the eyes of the people if they fail to perform and fulfill their mandate as leaders (i.e., they fail to promote human security, commit corruption, etc). The legitimacy of Indonesia's elected leaders is still questionable despite well-managed elections in the democratic era. The country is marred by ample chronic issues such as endemic corruption, religious intolerance, poverty, ethno-religious conflict, marginalization, discrimination against indigenous peoples, and human rights abuses.

The issue of democracy and legitimacy becomes more complicated when it is associated with decentralization or regional autonomy. Decentralization gives more power and authority to the provincial and district leaders. Hence, 'local election' becomes a set of strategic tools which originally operates to elect local leaders but actually increases potential local tension and conflicts.

For example, in Papua's democracy, legitimacy and local election are subject to question. This troubled province has become the spotlight of domestic and international affairs for decades. The 'mishandling' of Papua for years has caused misery to citizens, especially the indigenous peoples.

There are problems of human rights violation, disrespect for the human dignity of the Papuans and uncontrolled migration which have caused disparities between the migrants and indigenous people, exploitation of natural resources, rampant corruption, weak law enforcement, marginalization of indigenous Papuans, rapid spread of HIV/AIDS, vertical and horizontal conflicts, and the neglect of basic social services. It is ironic that even though the island is rich in natural resources but the region is one of the poorest in Indonesia.

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2   Indonesia has experienced a set-back in democracy when the National Parliament voted for indirect election (voting through the legislative) to choose local leaders both at the Provincial and District levels. This move contradicted the spirit of democracy which stresses on "one man one vote principle." The reason for such change was basically pointed to the heavy financial costs to hold direct election. To save his face and maintain his legacy as the proponent of democracy, former President Susilo Bambang Yudhoyono had issued a Government Regulation (Perppu) No. 1/2014 which 'annulled' the Law No. 22/2014 on Local Government Election (Indirect Election). This regulation was finally approved by the Parliament. Indonesia's democracy was finally saved from a catastrophic event.

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Out of such condition, Papua is fertile to separatist movements led by the Papuan Independent Movement (OPM). There are demands made by these separatist movements mainly opting for referendum or independence. Realizing the threat of these separatist movements, the Central Government has implemented various measures to curb and weaken such movements and address grievances of the Papuans by sending more troops into the province and, more importantly, implementing the Special Autonomy Law in 2001.

The Law is currently under-revision and to be named Special Autonomy Plus or Otsus Plus. The Law focused on giving greater political and economic power to the Papuans. The Law recognizes that "the administration and development of the Papua Province has yet to fulfill the feeling of justice, has yet to achieve prosperity for all people, has yet to uphold the rule of law and has yet to respect human rights in the Papua Province, in particular the Papua community" (Preamble, Section F, Law No. 21 on Special Autonomy for the Province of Papua, cited in ICTJ, 2012).The Law also acknowledges the importance of enhancing human dignity and preserving local culture and traditions.

In addition to its complexity and the impact of globalization and modernization, Papua is experiencing societal transformation from a 'closed and isolated' society to a more open one. This transformation, however, runs parallel with significant cultural shocks and perceived threats to the diminishing local values and wisdom due to the impact of modernization. Fearing lost identity and cultural extinction as perceived by local Papuans through 'culture genocide' by 'external forces' via the military or by a 'designed policy', most Papuans have taken such negative thoughts and thus become 'radical' in preserving their traditional values. Preserving cultural values has been used as 'ammunition' by indigenous Papuan to justify their [non-] 'integration' with Indonesia as a nation state. Furthermore, threats to local values can spark resentment and demands for independence.

The Central Government is aware of the rapid development in Papua. The Special Autonomy has not yet succeeded to bring progress and positive changes despite the pouring of trillions' of Indonesian Rupiah (IDR) into the province. Ironically, the trillions of Rupiah have contributed to more widespread and massive corruption. Conflict and violence have also escalated, and thus Papua remains one of the poorest provinces in Indonesia. The 'failure' of Special Autonomy again has sparked resentment and provoked instability in the Province.

In attempt to prevent further societal disturbances along the attempts at preserving cultural traditions, the Constitutional Court have legalized the traditional communal election system, more commonly known as "the Noken System" (after a traditional Papuan bag). The key of the Noken System lies on the fact that the voters do not exercise their right to vote under the principle of 'one-man one vote' but to allow tribal chiefs to determine for whom the clans vote. The Noken System has been applied both at the legislative and

presidential elections, mainly in the highlands areas, despite the controversies that the System has brought.[3]

Regardless of their deep rooted cultural values, the Noken System's values in promoting or contradicting democracy are questionable. What 'strength' and/or 'challenge' does the Noken System have or to face to elect legitimate leaders through proper and fair elections? This paper will start the discussion by contextualizing local state legitimacy and government performance in Papua. It will then be followed by the discussion on the Noken System as part of local election through its positive aspects and controversies.

2. Contextualizing Local State Legitimacy and Government Performance in Papua

Local state legitimacy is the product of local election. Indonesia has progress to apply the direct election since 2004 for electing President and Vice President, Provincial Governor and Deputy Governor, head of a district (Bupati), members of the Parliament at the national level (DPR), Provincial Parliament (DPRD I) and District/Municipal Parliament (DPRD II).

Local election is, in principle, a natural selection mechanism to elect qualified leaders. In addition to that, election is not only about choosing qualified leaders but also about electing leaders who maintain their relationships with their constituents and the public at large. There is popular belief that leaders cannot maintain their authority unless they are legitimate (Rahmani, 2010), and the leaders are perceived as legitimate based on citizens' evaluations of the institutions of the state and their perceptions of these institutions' right to rule (Carter, 2011). In its simplest term, legitimacy is about people's support to the regime. This popular belief is, however, may not be relevant in the context of Papua.

One of the major problems in Papua is how the leaders maintain authority closely related to ideas of promoting good governance, which is a difficult task to be materialized in the Papuan context because of the poor quality of elected persons as well as the way they were elected. As argued by King (2006), 'governance in almost all levels in Papua is generally quite poor in quality and downright awful.' This is due to various factors.

First, the political elites and bureaucracy committed massive corruption and frauds. The Finance Investigating Board (Badan Pemeriksa Keuangan) announced its Second Semester Report in 2011 that ranked Papua at fourth and West Papua at sixth from 33 other provinces in term of the highest corruption rate[4]. An alarming report from the Finance Investigating Board revealed the size of corrupted figures based from its audit

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3   In the Presidential election in July 2014, the Noken System was applied in 16 districts in Pegunungan Tengah Districts.

4   http://postingbebo.blogspot.com/2012/09/15-provinsi-dengan-tingkat-korupsi.html.

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on the Special Autonomy Funds. From IDR 28.8 trillion of the funds that was disbursed from 2002 to 2010, Finance Investigating Board found some of the funds were not properly allocated.[5]

National and local newspapers reported more high rank officials were implicated in corruption and graft scandals. In 2012 there were 14 cases of corruption, and in 2013 the cases increased to 60 cases. Eighty percent of those cases were committed by government officials within the bureaucracy.[6] In West Papua, 44 members of the local Parliaments were implicated in corruption scandals.[7]

Second, the lack of authority of the local government also manifests in failures to eradicate poverty and increase the welfare in Papua. In September 2014, the poverty rate in Papua stood at 27.80 percent or roughly 864,000 people still lived in poverty.[8] Even though Special Autonomy funds amounting to the disbursement of IDR 38 trillion have positively contributed to increase the welfare of the Papuan, financial and economic security is still an alarming problem in Papua.[9]

With regards to the overall health condition in Papua, it has the highest rate of maternal and infant mortality rates compared to other provinces in Indonesia. The maternal mortality rate in Papua in 2010 is 573 per 100,000 births, as compared with national figure of 228 per 100,000 births. Meanwhile, the infant mortality rate for Papua in 2012 is 54 per 100,000 births, as compared to the national figure of 34 deaths per 100,000 births (Rerey, 2014).[10] The spread of HIV/AIDS is also alarming with 336 cases in 2015[11].

Third, the lack of authority is directly correlated to the incapability of local government with the assistance of security apparatus to maintain stability and security. Both vertical and horizontal conflicts are escalating. In the highlands of Puncak Jaya, the security apparatus is struggling to curb the separatist movements. Both civilians and security officers have become the victims.

The performance of local government in the promotion of good governance has always been quite poor. Kemitraan Partnership has conducted the assessment of governance performance through Indonesia Governance Index 2012 (Kemitraan, 2013). Table 1 below shows the scoring for each dimension.

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5   Tinjauan Hukum atas Pengelolaan Dana Otonomi Khsusus bagi Provinsi Papua (jayapura.bpk.go.id)
6   See Korupsi di Papua naik Drastis, Kompas, 14 February 2014.
7   Ibid.
8   Indikator Penting Provinsi Papua, April 2015, http://papua.bps.go.id.
9   Otonomi Khusus Papua: Dikucuri Dana Rp. 38 Triliun, Rakyat Masih Menderita (kabar24.bisnis.com)
10   See also http://health.liputan6.com/read/558806/masih-tertinggi-di-indonesia-kematian-ibu-dan-balita-di-papua.
11   www.komdat.kemkes.go.id.

ARENA	Index per Arena	Participation	Fairness	Accountability	Transparency	Efficiency	Effectiveness
Government	4.35	5.35	2.93	3.43	3.74	8.49	4.52
Bureaucracy	4.25	2.87	2.26	3.27	6.36	6.50	3.15

Table 1: Governance Index in Papua

Source: Kemitraan 2013.

The Indonesia Governance Index (IGI) ranges from the scale of 1 (very poor) to 10 (very good). The IGI could be interpreted by looking at the position within the scale of 1-10 using mid value of 5.50. A score of 5.50 (between the range of 4.86-6.14) is categorized as fair score; score of above 3.57 to 4.86 as fairly poor; and above 6.14 to 7.43 as fairly good (Kemitraan, 2013, p. 56). In the participation and transparency dimensions which involve local government, the bureaucracy, and locals Parliaments, it was identified that the public was not involved in the process of planning, budgeting, and implementing and evaluating stages. Finally, the Ministry of Home Affairs has conducted an evaluation for local government performances in 33 provinces in 2011 and found that Papua ranked the 31st from 33 provinces.[12]

From the above description, local governments which are extremely poor in performance have produced societal distrust towards the local government units. This may contribute to the increasing interaction gap between local government and the society leading to protest, anarchic demonstration, and social and political instability. Conflicts, both vertical and horizontal, tend to be a daily practice in Papua without local state capability to overcome such conflicts.

With such conditions, local state legitimacy is also in question. Conceptually, the central importance of legitimacy is the belief that rules and regulations are entitled to be obeyed by virtue of who made the decision or how it was made (Tyler, cited in Levi, Sacks and Tyler, 2009). A major effect of legitimacy is an increased likelihood of compliance with government rules and regulations. Without legitimacy, people may be less likely to support government programs that redistribute economic resources (Hethertington cited in Levi, Sacks, and Tyler 2009).

Such compliance to obey to rules and regulations is absent in the Papuan context where 'society disobedient' emerged. People perceive local government units as illegitimate because they have 'malfunctioned'. In this case, stability and legitimacy tend to be maintained through (security) force.

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12   Kinerja Kabupaten di Indonesia Timur Jeblok (http://m.jpnn.com/read/2011/04/25/90357/Kinerja-Kabupaten-di-Indonesia-Timur-Jeblok).

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3. Local Election and the Noken System in Papua

As explained above, the election does not directly contribute to the legitimacy of government by choosing capable leaders. In the Papuan context, direct local election did not improve the quality of democracy and increased welfare but in fact resulted in reverse effects in the form of conflicts and anarchic protests. Most local elections in Papua resulted in dispute and violence brought to the Constitutional Court (Mahkamah Konstitusi).

The 'type' of disputed election in Papua is believed to be the result of the Noken System which was legalized by the Constitutional Court. The Constitutional Court made a breakthrough when it acknowledged the 'Noken System' as a legal mechanism of election to be implemented in Papua.[13] According to the Constitutional Court, the Noken System is in line with the basic principle of 1945 Constitution (UUD 1945) which acknowledges and respects traditional society, culture, values, local wisdom, laws, and practices. The Constitutional Courts also stressed no contradistinction between the traditional election mechanism and the official election mechanism.[14]

Another reason to implement the Noken System was related to geographical difficulties in Papua that impeded people to come to the ballot stations. In addition, the majority of the Papuans in the highlands are illiterate. Others express reasoning that if the Noken System was disrupted, conflicts would occur. In other words, 'open system of competitive electoral system was alien to the highland cultures and thus posing great risk of sparking violence that it trumped the individual's rights to a secret ballot' (Nolan, Jones, and Solahudin, 2014).

However, as mentioned earlier in this article, presumably that there was more 'political' reasons to legalize the Noken System due to interlinking issues of separatism, referendum, independence, cultural revivalism, genocide, prolonged injustice, discrimination, and human rights abuses.

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13   This Noken System is normally practiced in the isolated mountainous and highland areas in Papua. According to the Central Statistics Agency (BPS) Census in 2010, 1.6 million of the province's all 2.8 million live in the mountainous area (the Jakarta Post, 29 January 2013).

14   The legalization of the use of the Noken System stems from a local election dispute in the regency of Yahukimo that was brought to the Constitutional Court. With Constitutional Court Regulation Number 47-81/PHPU.A-VII/2009 dated 9 June 2009, the Court considered that the acclamation system within the 'Noken' was legitimate according to local wisdom and also useful to avoid societal conflicts. In 2009, the judges wrote in a case in Yahukimo district that 'if I have to force election using the national laws in effect, there is concern that conflicts would arise among community groups. The Court is of the opinion that it is preferably for the communities not to be involved in (or) moved towards a system of competition (or) splits within and between groups that could disturb the harmony that they could have otherwise preserved' (cited in Nolan, 2012).

4.   The Noken System

A noken is a net-like traditional woven bag using orchid fiber, spun yarns, and barks. Noken could be used for various purposes such as to carry agriculture products, as a baby swing or baby carrier, to store important documents, as students' bags, and as a souvenir (ANFREL, 2013).

After the Constitutional Court legalized the Noken System, the National Election Commission (KPU) established the basic procedure to implement the Noken System (KPU, 2013). The noken must be hung up in a piece of wood and planted in the ground within the boundary of the polling areas (TPS). Normally a noken is carried on the neck or head. In this election mechanism, noken is 'replacing' the use of conventional ballot boxes as a tool to store votes.

The number of noken will be adjusted or equaled to the numbers of candidates. For example, if there are 10 candidates, there will be 10 nokens. Each noken will represent a particular candidate. For example, noken A stands for Candidate A. Each noken will normally have the name and picture of the candidates.

There are variations in how the Noken System is practiced.

a.   The registered voters line up in front of the noken of the candidate of their choice. The polling officers (KPPS) will then head-count the votes.

b.   The voters place the un-punched ballot cards into the noken bags of their choice. The KPPS will then punch the ballot cards later for the voters.

c.   The head of the tribal group will take all the ballot cards of 'his people' that have been registered, punch the cards, and gave the cards to the KPPS. This third type of mechanism is a type of representation based on acclamation. In other words, the voters just gathered at the polling ground and witness their tribal leader proxy for their vote on their behalf. It is the tribal leader that will punch the ballot cards and put them inside the noken or give it to the KPPS.

d.   There is also the case that tribal leaders would only inform the Local Election Committee verbally that certain numbers of votes appear as the result of acclamation that will be given to particular candidates.

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e.   Controversially, some votes were sent through text messages with reason that it was too far for voters to reach the ballot stations due to geographical isolation.[15]

The positive benefits of the Noken System are twofold: the Noken System prevents conflict and deliberation produces the votes. As the paper will discuss in the following Section of this paper, tribal leaders, or also conceptualized as the Big Man, play an important role in the Noken System.

Prior to Election Days, tribal leaders would gather their people and discuss among themselves to which candidates they would vote. They would talk about the background of the candidates, their jobs, and how they have contributed towards the development of their villages. In some case they would call the candidates to have discussion with them as part of a 'feasibility test'. Afterwards, tribal leaders with their people will decide whether the votes will be given to a particular candidate or divided with other candidates (Tebay, 2014).

For example, if there were two Candidates (A and B), the votes could be given solely to A or divide equally between A and B. If they were more candidates, the same rule applies: votes were given absolutely to a particular candidate or divide equally with other candidates. This attempt was seen to avoid conflict, especially if the Candidates originated from their village or near-by villages. Therefore, there was indeed a 'primordial' consideration in distributing or allocating the votes.

In some cases, the candidates were just 'unknown' to the clan members. Therefore, the members would trust the Big Man to give their votes on their behalf. The people believe that their leaders will not abandon them in suffering. Whatever the Big Man chooses, the people believe it is also best for them (Panggabean, 2014). Another indicator to avoid conflict is a proposal that voting must be conducted with openness and transparency. This openness avoids suspicion among the people and between the Big Man and his people. The Noken System is also seen as a mechanism to show loyalty between tribal leaders and their people.

The proponent of the Noken System would argue that this system is 'legal' in the sense that it is conducted directly, in participatory manner, and of free-will and deliberation, as well as a transparent and honest process. However, the opponent of the Noken System would disagree. They would argue mainly whether the process has been conducted fairly and based on free-will of each individual. The Noken System was seen as a 'manipulative system' prone to fraud.

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15   In the Presidential election held on July 2014, the disputes emerged because the witness of the losing candidates did not see any election processes in some areas. The dispute makes sense because not only the votes were given verbally but also some were sent through by text messages (SMS) which the clans claimed as a result of acclamation.

5. The Controversies with the Noken System: Entangled by Traditionalism?[16]

Despite the 'positive' side of the Noken System, this paper assesses whether the Noken System contradicts or supports the values of democratic election system. In Indonesia, the election mechanism adopted the principle of LUBER JURDIL (Langsung, Umum, Bebas dan Rahasia or 'Direct, Public, Free, and Confidential, Honest and Fair). The 'Direct' means that all voters must give their votes directly without being represented by other people; the 'Public' principle means that participation to elections is open to society members with the rights to vote. 'Free' means that voters give their votes without pressure from anyone; 'Confidential' means that the votes given by the voters are only known by the voters themselves. 'Honest' means that election must be conducted according to the rules to ensure that voters have the rights to vote according to their free choice, and each vote has the same value so as to determine the leaders who will be elected. The 'Fair' principle means that there is fair treatment to all voters and their participation in election. The honest and fair principle applies to election participants and Election Committees.[17]

The Noken System provides shortcuts to the 'Direct' principle since voters could be represented or could allow a proxy voter to the tribal leaders as part of an acclamation. Tribal leaders justify this by saying that it prevents suspicion and conflicts within the society. Therefore, all votes must be discussed first among clan members of the society openly.

In the Noken System, the 'Public Principle' represents the most violated principle of the election process. For example, voters receive no invitation to poll stations, suffer from fraudulent voter listing, and see no final voter list. There was also fraud in 'creating' eligible voter lists. Prior to the legislative and presidential election, there were mysterious 'additional' voters amounting to 1 million voters indicating inflated voters lists, frauds, and manipulation.[18]

The 'Free principle' should question whether or not the voters were absent or their votes were taken forcibly for the existence of the uncontrolled authoritarian role of tribal leaders and impact of money politics. In the Noken System, the 'Confidential Principle' does not apply either since voters 'visibly' line up in front of the noken that represents a particular candidate. The Noken System was instead associated with the LUBET Principle with the 'T' standing for 'terbuka' or open.

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16   From this section to the end see Vidhyandika D Perkasa and Devi Darmawan, 'Observing Local State Legitimacy, Electoral System and Human Security in Papua: Tangled by Shackle of Traditionalism', Paper presented at the Third International Conference on International Relations, Human Rights and Development (ICIRD), 'Beyond Borders: Building a Regional Commons in Southeast Asia', Chulalongkorn University, Bangkok, 22-23 August 2013 Thailand.

17   See also http://id.wikipedia.org/wiki/Pemilihan_umum_di_Indonesia.

18   See also Carving Up Papua: More Districts, More Trouble, IPAC Report No 3, 9 October 2013.

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According to the 'deliberative' argument that openness could avoid conflict, the voting process should be conducted openly. Nevertheless, violence still occur as public can easily identify who votes for whom within such an open system. In this fraudulent election system, each or all candidates would distribute money or goods prior to the election to win the hearts of potential voters. As such, candidates would easily notice when the paid voters fail to vote for them despite their taking the 'bribes'. This was an obvious source of conflict. Aside from the above controversies of the Noken System which violated the known liberal democratic principles, other controversies appear around the issues of voting behavior and the role of the Big Man.

5.1. Voting Behavior and Transformation of Values

Voters' behavior is unique in Papua. Even though the culture and tradition elements are strong in Papua, in some cases members of clans do not necessarily follow their ethnic or tribal groups' choices (see also Mitezner.) Empirically, people could simply vote for a candidate who has given them large sums of money or a candidate that could fulfill their needs in instance.

Some intensive research in Papua found reports about respondents who said that Papuan people normally "cannot plan the future and only think on daily basis". They would directly consume money and goods without having thought to save what they earn.[19] Therefore, money politics in Papuan election is fertile and as seen as an effective tool to win votes. Another character of the Papuan, according to one informant, is on the collaboration aspect. There is the tendency for the Papuans to easily collaborate and support someone that will 'benefit' them—if not then they would easily become hostile.[20]

From the description above there is a notion that Papuans' voting behavior is closely related with transformation of values that tend to be distorted. Small cases from Papuan elections showed how people could murder their relatives just because they had chosen another candidate. Not to mention cases of betrayal and disloyalty, in other minor cases the aspect of kinship, harmony, and primordialism as the rationale to vote can now be questioned. Apparently, people's typical orientation now, in casting votes or in anything else, is based on money. In other words, the loyalties of the Papuan are shifting, and money tends to matter the most (see also Kanaparo, 2010).

Society transformation is connected to the process of monetization which can be extremely 'shocking' to the previous life-style of the Papuan. For decades, Papuans have lived in isolation, backwardness, and prolonged poverty. They have been living in a subsistence society. With the 'exposure' to 'outside' influence (e.g., hedonistic life-style) brought by the migrants coming with foreign and national companies, their lives have

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19   Interview with NA 12 September 2012, one local state official in Jayapura.
20   Interview with NL, an activist in Wamena, Papua.

been 'transformed' ironically in a negative sense; no longer they live in a subsistence society but neither a modern society as they remain dominantly a traditional society.

External influences that prevail in Papua are essentially 'money, status, and power' (ANFREL, 2013). They naturally could enhance the locals' dignity through money, status and power. Indigenous Papuans, especially with the low levels of educational background are possibly not ready to experience such shocking transformation. The Special Autonomy tends to cause 'negative' spillover in this transformation as well. The Special Autonomy Funds tends to be benefited by political elites and its cronies solely. More luxurious cars owned by elites; and more frequent visits by government officials without 'clear' agenda to the island of Java. Corruption, nepotism and collusion is one big enemy of Special Autonomy (Sumule, 2003). Agus Alua,[21] the former chairperson of the Papuan People Assembly (MRP), also commented that, "No one is really committed to implement Special Autonomy. When one official speaks of Special Autonomy, one actually only thinks of money, not policy."

Therefore, this monetization has caused local 'good' values (e.g., togetherness) to be distorted or even 'contaminated'. Economic and material values tend to be highly praised and desired among the Papuans. There is the notion that all other values will be sacrificed for the sake of achieving these economic values. The Noken System with this 'open' voting mechanism where money, status, and power matter the most would only exacerbate conflicts.

5.2. Acclamation, Deliberation and Representation: the Role of Big Man[22]

In the highlands, tribal leadership is closely related to the big-man system. As explained earlier, the tribal leader plays a crucial role directing the votes in the Noken System in the name of acclamation, consensus, deliberation, representation and to avoid conflict. The question "Is it really based on acclamation and free will from the people?"

In the Big Man system, a leader plays an important function. A candidate in the election could also be part of this big-man system. A leader is a chief of a tribe who protects his people or tribe. A leader is someone who leads a war and who fulfills the needs of his people. Financially success is taken as an absolute requirement of one who is called a leader. A leader should be generous (awut hano), friendly (owas liok sek), convincing (owake hano); good speaker (ane hano), courageous (ayuk lek), clever and sensitive (Ngadimin, 1994).

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21 Cited in Conflict Management in Indonesia: An Analysis of the Conflict in Maluku, Papua and Poso. The Indonesian Institute of Sciences, Current Asia and the Centre for Humanitarian Dialogue. 2011, p. 38.

22 See also Vidhyandika D. Perkasa, 'The Society Under Siege: Observing Human Insecurity and Root Causes of Weak Governance in Papua', Paper presented at the First International Conference on International Relations, Human Rights and Development, 19-20 May 2011, Thammasat University Bangkok, Thailand.

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More specifically, the ideal characteristics of a Big Man are as what follows (Mansoben, 1995).

- The status of a leader is earned from achievements and is not just inherited.
- The source of power lies on the individual's skill in allocating and distributing assets (material), diplomatic ability, public speaking, courage to lead in battles, and a huge body compared to those of his people while possessing a generous character.
- The authority given solely to one man, i.e., the leader himself. Thus, it is a one man power by nature or so-called autonomous.
- Bureaucracy principle does not grow in the Big Man system.
- A reciprocal, asymmetric, patron-client relation is formed between the leader and his adherents.
- A Big Man should show his quality and skill in order to maintain the loyalty of his followers.
- A Big Man is also known as a businessman due to his aptitude in accumulating particular sources and manipulating people to accomplish his objectives (wealth, power, and prestige).

In the above description, a strong point of this leadership style is in its 'authoritarian' style and an execution of power of one and only man or so called autonomous. From an extreme perspective, the upshot of tribe chief management is that such leader does not listen to any inputs from his people. His leadership is extremely top-down and non-participative. Another important point of this Big Man system is the importance of 'wealth' in sustaining his leadership. He is also manipulative accomplishing his objectives to gain wealth, power, and prestige (Hayward, 1980; Baker, 1983; Mansoben, 1995).

Under the Noken System, the leader will build relations with the candidates and their own people. The candidates are people with sources of wealth, which the tribal leaders need in order to sustain his power. One of the characteristics of a Big Man is generosity to his people. He will need money and other resources to maintain his leadership.

The relationship between candidates and tribal leaders is also about position and status. The successful candidate's promises of giving particular position for the tribal leaders within the bureaucracy are common. This could transform the tribal leaders from a traditional into a modern bureaucracy or governance system. In other words, the successful candidates promise the tribal leaders a position in the bureaucracy once elected. The bureaucracy is the 'field of wealth and fortune', especially within the Special Autonomy that attracts many people because of its abundant funds.

In the name of 'deliberation', these leaders will talk to their clan members manipulatively in order to persuade the latter to choose a particular candidate. These tribal leaders will also promise (e.g., better living condition, secured jobs) to their people once this candidate is elected. Exacerbated by the atmosphere of 'culture distortion' due to monetization

mentioned above, values of a leader that stress on togetherness, solidarity, reciprocity, and participation have been eroded by personal self-interests of these leaders and their cronies.[23] Because of his manipulative character and authoritative position, it is also seen 'natural' for a leader to intimidate or force his people to choose a particular leader without resistance as the people would not dare to rebel against decisions made by the Big Man for fear of their well-being.

Such leadership characteristic is closely related to the social and cultural structure of Papua, which is patrimonial in its nature. The non-egalitarian structure gives tribal leaders an important position to 'represent' the 'voice' of the people. Human relation is vertical with strong patron-client relationship (Lefaan, 2012). The people are seemingly subservient and obedient to the leaders.

In this case, there is a notion that Papua lacks 'critical mass' that has the capacity to 'escape' from oppressive situations enforced by their leaders and the candidates. This was mainly due to the low educational status and lack of a strong economic basis for the people, especially in the isolated highland areas in Papua.

From the above conditions of this Noken System, it is unlikely that the acclamation of votes is 'purely' the result of a deliberately free will-based process. It is normally based on the interests of the tribal leaders. Tribal leaders also stress the importance of loyalty of their people. Therefore, polling must be made 'open' so leaders could judge whether or not their people are loyal to the leaders' decision.

Even though there is a close relationship between the tribal leaders and their people, the political representation that exists in this Noken System is, along Spivak's argument (1988), a part of the 'speak for' process or 'standing for' (Pitkin, 1972) in which the tribal leader used his people to gain power in collaboration with the election candidates.

Thus in this Noken System, conflicts due to the open system occur when voters have received materials or goods from a particular or other candidates without ultimately voting for them. In this open system, 'deviation or navigation' of the voters are easily spotted or identified.

5.3. Leadership Legitimation and Ethnocentrism

Tribal leaders maintain legitimation even though he is 'manipulative' to his own people by using the Noken System as a means to gain power. There are probably some basic requirements (closely related to material benefit) that this leader must fulfill to maintain trust from his people. The element of primordialism or prioritizing ethnical background, also called ethnocentrism, would still dominate his manipulative behavior.

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23 See also a discussion by Kurer (2006) on clientelism and politics in Papua New Guinea.

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This is visible when this leader acquired his position in the modern bureaucracy. He would choose his staff in the bureaucracy from similar ethnic lines. He does not take education background, capacity, career hierarchy, and qualification as primary requirements to employ someone in the bureaucracy. Values of togetherness, participation, solidarity, community self-help, reciprocity, human relation, attentiveness, and service value are characteristically exclusive. The leaders only implemented these 'decent' values limited to their communities (tribes) based on primordial attribute.

The people from other tribes have been politically marginalized, and this practice has been perpetuated through the ongoing grudges, revenges, and 'tribal wars' within the modern government structure. With the 'open' system of Big Man, there will always be grudges from the other tribes to depose the incumbents (from another tribe) and this may initiate instability within the government system.

At this point, even though a leader is in fact legitimate among his own people based on ethnic lines, his leadership will be dominated by self-interest, primordialism, ethnocentrism, low capacity bureaucracy, and 'unstable' governance due to continuing 'tribal war' that is brought into the modern government system as mentioned above.

In the broader context, the Noken System contributes to aggravating ethnic-based tensions and conflicts through various manipulation, fraud and political intrigue through the configuration of ethno-politics, which is prone to money politics (see ANFREL Report 2013) The Noken System does not support the election of qualified and legitimate leaders.

6. Concluding Notes

Although the Noken System has been legalized in Papua based on the spirit of local wisdom and harmony, in practice the 'risk' of such implementation is too great. The Noken System has sacrificed the 'rights' of individuals to give their free-will vote for the sake of acclamation, consensus, and deliberation. The majority of voting clan members tends to be the victims of intimidation.

In addition, faced by complications within the Papuan society, mostly in the process of transformation around poverty, illiteracy, backwardness, and isolation, the Noken System further supports 'suppression' of local tribal leaders against their own people. The Noken System does not give positive political education to indigenous Papuans. There was no strong proof as well that the Noken System prevented conflicts and maintained harmony.

The Noken System is seemingly an inappropriate means to elect legitimate leaders in the Papuan context. There are too many "elected" leaders implicated in corruption cases.

With such practices of the Noken System, local governmental units' legitimacy in Papua will be continuously in jeopardy.[24]

The Noken System is also a fertile ground to practices of corruption and money politics—two elements that could potentially 'de-legitimize' local governmental system. At the end, elected leaders are also implicated with scandals of corruption. The 'malfunctioning' of the Noken System is primarily attributed to the 'unprofessionalism' of the Local Election Committee in general to conduct such events. It also points to inconsistent applications of electoral regulation. There are also elements of traditionalism that have 'destructed' the implementation of the Noken System.

Despite such limitations of the Noken System, there are also the positive aspects of the system in the sense that it has shown familiarity and intimacy between a leader and its people through intensive dialogue. From that point the leaders have obligation to protect its people at all cost. With the Noken System, there is also a sense of openness between the leader and their people since the votes are given publicly. There is also an open space to build trust between the leaders and the people under the Noken System.

With both the positive and negative aspects of the Noken System, there is always still room for improvements. At the national level and for policy makers, there needs to be more effort and sensitivity to understand the local Papuan culture in more detail and to find solutions to overcome spillovers of cultural and traditional 'impacts' (e.g., the Big Man System, 'the culture of war'). This applies as well to the judges at the Constitutional Court, who need to bring an end to romanticizing village life and to act more 'professionally' in passing verdicts not merely in the name of 'tradition and harmony'. A systematic public education on election and political education to the society will also be essential. Lastly, more studies need to be conducted to observe the Noken System. These studies will be useful as inputs as whether the Noken System should be maintained with necessary improvements or completely abolished.

Acknowledgment

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24   Cases of corruption in Papua are documented in http://infokorupsi.com/.

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WHO DO THEY THINK YOU ARE? IMAGINED ETHNIC AND RELIGIOUS IDENTITIES, THAI RACISM AND VIOLENCE IN SOUTHERN THAILAND

Tim Rackett

This paper begins to explore the role of imagined and constructed formations of identity and difference, sameness and otherness, ethnicity and religion and the role they play in generating political violence in southern Thailand. It is argued that attachment to exclusive and particularistic identities, incited by militant Buddhist and Muslim nationalist politics, causes division and conflict. Formations of Thainess and Malayness and ways of being Buddhist and Muslim need to be understood as being as used, lived and performed in a particular time and place: a conflict situation in the instance of southern Thailand. After briefly glossing and evaluating some influential accounts of the role of ethnicity and religion in explaining the southern conflict, I focus on the situational performance of Thai Buddhism and its implication in racism against Malay Muslims. At stake is a human right to dissent or exit from a particular version or tradition of religious and cultural practice if it has oppressive and violent consequences. It is power-knowedge relations and socio-political forces that fix forms and experiences of Thainess as Buddhist and Malayness as Muslim. Lastly, I suggest in order to secure a durable peace we need to disable ethno-religious identity politics by a practice of tolerance through being indifferent to differences, constructed otherness and recognizing the deep south as a zone of hybridity, wherein people share in common multiple and mixed identities, cultural and religious practices.

How are we to make sense of the complex causes and dynamics of the continuing violence in Thailand's deep Southern states of Pattani, Yala and Narathiwat? Violence took victims, claimed to be over 6,097 deaths in the period January 2004-April 2014 (Deep South Watch), who are Malay Muslims and Thai Buddhists. This paper addresses that portion and aspect of political violence which is related to insurgency and security issues- not crime, lawlessness, local politics (Askew, 2010:121-3). Violence was generated by mobilizing individuals and populations through imagined ethnic and religious differences as belonging to exclusive ethno-religious communities in a zone 'Patani' marked by multiple and mixed hybrid performances of culture, religion and identity. I argue it is constructed differences and otherness that function to set people apart and against each other in an identity politics. Individuals ethnic, cultural and religious identifications, displays of loyalty and affiliation are read as a national security issue and threat by the Thai State and the stakes of a righteous insurrection by Muslim militants. My assumption in this paper is that it is the enforcement of particularistic identities and interests drives xenophobia and racism. Islam and Buddhism can be peaceful and tolerant of difference but also can support and generate violence. We must understand how are they performed in a specific situation, particular time and place; how they are lived and used by actors: How are people Buddhist and Muslim in the south of Thailand? My focus shall be on the performance of Buddhism and its implication in racism against Malay Muslims.

At stake is how both state and non-state actors engage in a identity politics of religion and ethnicity prescribing what individuals 'true authentic identities' and 'real interests' are. This struggle over identities posits and presupposes primordial experiences of religious, cultural and national identity and belonging: Thainess and Malayness, and ways of being Muslim and being Buddhist. That is, divisions, identities and differences as pre-given causes, rather than constructed effects of power-knowledge relations. In the south people are interpolated by the Thai state, monks, Buddhist militia, Muslim Malay insurgents, imam, to identify with a 'side', a 'cause', and 'join us or disappear'. The actions and incitation of Buddhist security forces, peacekeepers and separatist Muslim rebels divide Southern populations into two hostile 'camps' of polarized racialised and religious identities: dark Muslim un-Thai strangers- 'Khaek' and Siamese occupiers, non-believers- 'Kafir'. Ethnic and religious differences become absolute and fixed together, so that to be a 'true Thai' you must be Buddhist, and to be a 'real Malay' you must be Muslim; this self-other relationship not only denies any sameness, but makes each other into an Other, the enemy within, enemy-others. Buddhist and Muslim friends and neighbours living in peaceful co-existence become transformed into feared and hated others: one of 'Them', not one of 'Us', the enemy (Jerryson, 2011:79).

A critical question is whose and which normative version of Islam and Buddhism, Thainess and Malayness is being imposed in Southern Thailand and with what socio-political consequences? A majority or minority version? An 'elite' Thai or Malay, or, militant group's version of culture, religion and tradition? What do ordinary individuals

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and communities of the deep South think? What are their versions and lived experiences of religiosity and ethnic identification? What controls ways of interpreting, living and enacting Buddhist and Muslim traditions, customs, beliefs and spiritual practices? Do individuals have freedom of choice of following another version of their religion, different from their grandparents and what is taught inside, and outside, schools? A right to dissent from and exit a particular Buddhist or Muslim practice and truth which justifies violence, whether it be offensive or defensive? In the areas of conflict how do people identify themselves, aside from the identities pinned on them by the Thai state and Muslim insurgents? Are religious and ethnic differences and identities the most important for people, rather than gender, political, and local differences?

Let us orientate ourselves by briefly examining three key interpretations of the southern Thailand conflict and the role played by ethnic and religious differences in them.

Duncan McCargo understands the conflict's cause not to lie in religion or ethnicity but rather a legitimation crisis (2009:180) of the Thai state and control by the Thai king's sacred rule. McCargo sees separatist violence in the region as contained and prevented by the 'virtuous rule and security' of network-monarchy, with the Thai king as a major political actor, which unravelled when Thaksin changed local security and administrative agencies (McCargo, 2009:7-9). The Thai state lost its moral authority and legitimacy in the South. Hence the cause of conflict is political 'a call for autonomy, representation and participation' by Southern Muslims (McCargo, 2009:18). It is not an ethnic conflict in McCargo's analysis. The Thai state enrolled and co-opted Muslim elites as its agents to govern but in the process Thai-ified them and thus local Southern leaders lost their moral and spiritual authority; this exacerbated violence and the separatist cause as local Malay Muslim populations were excluded from participating in governing, having neither been consulted nor given their active consent (McCargo, 2009:20,54,59). Conflict is part of a nationalist struggle between Patani and Bangkok rather than centered in Islam (McCargo, 2009:187,188). McCargo argues that whilst insurgents use Islamic language and customs, Southern violence is not a religious conflict about Islam but rather 'historical-political grievances' (McCargo, 2009:188).

Islam is not the cause of violence but an 'ideological frame, a legitimating resource' (McCargo, 2009:12,180) used by militants in the context of a lack of Malay Muslim political representation and participation in governance. Thus, Islam is an idiom and means to contest and combat the Thai state and Bangkok rule. But nevertheless, I would argue, that Islam is used by radicals as though they wish to 'divide and rule' Malay Muslims, to judge and impose identities as good or bad, loyal or traitors to Islam and to demonize Thai state officials, security forces, inciting animosity. So, whilst there is not a Southern Thailand 'jihad' (Askew, 2010:125) or any direct orders for 'juwae' fighters to kill, it is difficult to agree with McCargo (2009: 48,9) that religion-including Buddhism as we shall see shortly-only plays a minor role in inciting and supporting killing. In an arena of conflict religions are used to legitimate and justify killing humans as others: 'unholy'

and impure enemies. For both Buddhists and Muslims it can be a sacred duty to use defensive violence and kill to preserve: their 'territory'-drive out colonizing 'invaders' and 'occupiers'- identity and religion.

McCargo's (2009) analysis of the Southern conflict is problematic in several ways, namely, it tends to:

1) underestimate how religion and ethnicity are performed situationally and used to cause violence and enact oppositional identities.

2) ignore Thai racism and processes of racialization, especially religion as a marker of ethnicity and membership of an imagined race which results in the ethno-religious exclusion of Malays and Muslims from Thainess;

3) play down the ethno-religious aspect of the Southern conflict as resistance against the Thai state as a Buddhist racist state;

4) have a Thai state-centric point of view centred on a sovereign myth of legitimacy of the virtuous rule of the monarch. Alternately, adopting a Schmittian perspective, 'sovereignty' and rule can be understood as it actually operates in Thailand, especially in the restive south, through extra-legal military powers of suspending and annulling the constitution and rule of law to create states of exception and emergency (Schmitt, 1996; Agamben,1998; Rackett, 2014 a,b.) which does not turn on individuals as giving their active consent as 'citizens' and rational actors but rather as subjects.

5) focus on and privileges the role of Malay Muslim elites, individual personalities, taking for granted their interests and identities, to the exclusion of the diverse and multiple identities of ordinary Malay Muslims (cf. below; and Askew, 2010:147-8).

Askew's research and interviews with insurgents 'emphasize religious motivation as a principal impulse and mechanism of commitment for many recruits. Insurgent leaflets have commonly demonized the Thai state and Buddhists as kafir (unbelievers), claiming that Muslims are under attack and that Thai troops have been sent south to kill Muslims' (Askew, 2010:126). Askew argues for the importance of ethnicity and that the meaning and solutions to the southern unrest converge on the key question of Malay Muslims of the borderland: how do they view the current violence, and just how do they position themselves on a range of matters extending from ethno-religious identification, relations with and experiences of the Thai state, and attitudes towards separatist-inspired insurgency and their views on violence and ... identifications (Askew, 2010:143-4).

Jerryson's bold hypothesis is that the primary cause of violent conflict in the south is racial inequality (Jerryson, 2011:144,166). Thai state led exclusionary policies together

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with impoverished social conditions gives rise to separatist strife. Malay Muslims are 'displaced from the normative identity twice-fold…neither ethnically Tai, nor religiously Buddhist' (Jerryson, 2011:144). Any solution to the conflict, argues Jerryson, requires 'reworking of Thailand's concept of racial formations' which act to 'displace minority identities by measuring their ethnic and religious identities against the norm of Thai Buddhism' (Jerryson, 2011:183).

I think Jerryson's interpretation is correct. Pace McCargo's analyses conducted in terms of the legitimacy crisis of 'network monarchy' and the inviolability of the king's sacred 'body politic', these are not the primary issue in the southern conflict. I would question if Thai Bangkok rule has ever been legitimate? And not just in the deep South. Historically there were rebellions and resistance against Bangkok ruled in the North and Northeast Thailand (Winichaikul,1994). I would argue governmental rule in Thailand is exercised through a normative Thai Buddhist identity and imaginary race (Rackett, 2014a). Thus a case could be made, pace McCargo, that the conflict, Malay Muslim insurgent separatists are not attacking the monarchy, its putative legitimacy but rather the racist and religious form of Bangkok 'internal colonial' racist rule.

Arguably, all the diversity of 'ethnic' populations in Siam: Lanna, Mon, Chinese, Khmer, Lao, have been subjected to Bangkok 'internal colonization': "Thai-ified' and 'Buddhaized' to varying degrees (Winichaikul, 1994; Streckfuss, 1993; Streckfuss, 2011). The deep south displays the effects of this process of colonization and has been restive to rule by and through Thainess. But given the regional Muslim majority and Buddhist minority mixed dynamic of the South either exclusive Buddhist or Muslim rule will alienate and marginalize individuals and communities in this hybrid zone.

Racism is ignored by McCargo's analysis along with religion's role in justifying and generating violence. Thainess as a dominant form of (Buddhist) rule through the imposition of a racialized identity fuelling racism against the: Malay in the South, Khmer and Lao in the Northeast, 'Hill Tribe' indigenous minorities in the North and refugees from Burma.

I think to understand the Southern conflict we need to not just to pose the question of regional autonomy, but to what extent will the Thai state, its form of rule, allow minority populations, not just the Malay Muslims, dissent and autonomy from an imposed exclusive formation of Thainess? People are gauged as civilized and judged worthy for inclusion within the boundaries of Thainess, historically, according to the degree which they embrace Buddhism, qua civility, and display signs and sentiments of unconditional love of nation and king (Streckfuss, 2011). Do Thai citizens exist or are there only Thai subjects? Are 'ethnic' Malay Muslims free to be Thai and Muslim, Thai Muslims? Malay Buddhists? Or just Thai?

I shall now have a dialogue with and examine Jerrysons work 'Buddhist Fury' (Jerryson, 2011) to underscore the force of racial, ethnic and religious discourses which fix situational identities and differences. In other words, how ethnicity and religion are made to figure in fuelling antagonism and violence. The work of Juergenmeyer (2001), Zizek (2003) Juergenmeyer and Jerryson (2010), Faure (2010) Tambiah (1976,1996), Victoria (1998), Jerryson (2011) (Streckfuss, 2011) and Rackett (2014,a,b) de-bunks the myth of Buddhism as a moderate moral spiritual force 'above' the political and outside the state. Whilst Buddhism is not violent in-and-of-itself, as a lived tradition it can lend itself to dark and deadly uses. Thus, there are Buddhist dimensions to the violent Thai state power struggle to control the South.

In Thailand to be Thai is to be Buddhist. But, equally in the South, and Malaysia, to be Malay is to be Muslim. Ethnicity and religious affiliation are welded together in an imagined community of faith and destiny. For Jerryson, the political stake in the South of Thailand is Malay Muslims desire 'for autonomy based on ethno-religious identification' (Jerryson, 2011:8). Jerryson's comparative and historical narrative helps render the religious violence in southern Thailand intelligible as a norm and not an enigmatic exception. Buddhism, in the thrall of Thai state nationalism, functions as a fundamental marker of ethnicity and imagined 'race'. Jerryson shows how being Thai and Thainess are state produced racialized identities, which haves their source in Siam's response to Western colonization and Buddhist and Hindu religious traditions. Thai identity politics doubly excludes Malay Muslims from Thainess: by their other religion and racialization as 'khaek' dark strangers.

Buddhism has never existed outside the State (Jerryson, 2011:58,9; Tambiah, 1976). Buddhism historically has served forms of governance as a source, and means, of legitimating sovereignty, providing spiritual and moral guidelines for kings' righteous pure rule, which do not exclude violence and war. Monks as spiritual exemplars are attributed with the power to purify and order hearts and minds and social relations (Gray, 1986). This sacred role is not discrete from politics and power. Under Thai State nationalist purview, Thai monks have had a political role as emissaries: agents for building new national identity and unity. Monks enrolled in governmental programmes embodied the law and authority of the state not just the dhamma(Jerryson, 2011,61-8,106-7). As state agents they promoted socio-political objectives to re-integrate ethnic populations and create moral communities of national belonging identity and solidarity. Thus their political duty politicized their representations(Jerryson, 2011:85). The advent of 'the political monk', was set out first by the work of Tambiah (1976) and Somboon (1993):- 'pra thammathut' missionary role for monks in rural North and Northeast to unify and detach restive locals from regional affiliations and identifications, radical politics, to re-attach them to nation, king and religion; 'pra thammacarik' monks 'civilizing mission' focused on 'hill tribes' Karen, Hmong, Shan, to convert them to Buddhism, reduce drug trafficking, as loyal subjects (Jerryson, 2011:165; Tambiah, 1976; Somboon, 1993). Buddhism was used as an anti-communist ideology from the 1950's to late 1970's to neutralize rebels in the South

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and Northeast. The Thai state is sacralized as an imaginary repository of pure dhamma practice, which monks politically defend in the frontline. Anyone who wishes to change is the socio-political order, create division and disharmony becomes an enemy of the state demanding political action. As Jerryson underscores political monks are a phenomenon of violent times.

The present southern conflict marks the re-emergence of a nationalist and political use of monks, supported by Queen Sirikit, to uphold the faith: 'pra asamak' role is to support the laity, increase the number of southern monks and protect the integrity of Buddhism in Yala, Pattani and Naratiwat 'danger' zones (Jerryson, 2011:66).

Enrolling monks in governmental programmes transforms them into symbols of Thai nationalism and Thai Buddhism. Monks have become military targets in conflict, provoking violent reactions and increasing religious tensions, through the particular way they perform Buddhism in the South by asserting their political role and call for a strong form of Buddhist nationalism. Some southern monks address the 'Malay Muslim problem' in a way reminiscent of monk Kittivuddho's (1976) right wing Buddhist nationalist 1970's call to defend the faith against communism and to justify killing impure enemy others in a time of emergency. Buddhist religion is used by/serves the state, and non-state actors both to justify and legitimate violence. Security forces, police, soldiers, militia, villagers are guided by Buddhist principles. However, their role in the violence is played down by the Thai public image of Buddhism as non-violent and the troubles in the South as an Islamic conflict caused by Malay Muslims.

Jerryson explores the question of how Buddhist monks become to be 'walking embodiments of Thai nationalism'? (Jerryson, 2011:50). Thai monks roles mean that they are double agents of the State and Sangha, representing the sacred and the profane, as living symbols of the Dhamma and representatives of Thainess, the Thai polity. It is monks' political agency that explains their targeting by insurgents. As representatives of the Thai State, monks, unintentionally, are a catalyst escalating religious violence and identity politics. Jerryson argues the conditions for evoking Buddhist violence are: a space of conflict; politicized Buddhist images, roles and representations and any defacing assault upon their sacred status and incarnation (Jerryson, 2011:50).

How to be a Thai Buddhist is learnt and performed in a specific way in the southern Thai conflict zone. The role of being a Buddhist monk has been politicized as a response to violence and, furthermore, incites religious Thai nationalism. Monks incarnate and signify the legitimacy of the Thai state in a 'convergence of Thai sacrality and governance' (Jerryson, 2011:81). The consequences of Buddhist soldiers and police defending monks and local communities against insurgent Muslim attacks, is the militarization of Buddhist identities and spaces: temples become fortresses and military camps and have led to the advent of a seemingly enigmatic figure the military monk 'tahan pra' (Jerryson, 2011:114-142).

A rise in insurgency since 2004, the year of the Tak Bai and Kru Ze massacres of Malay Muslims in the south by Thai security forces (McCargo, 2009:28-49), makes religious practice a national security problem of identification of who and what you are, either: friendly and safe, on our 'side', or a dangerous threat, on the other 'side'. This political drama is staged by nationalist ideology as an anti-Thai clash threatening to destroy Thai Civilization and unleash anarchy. Buddhism is used to manage the 'state of emergency' in the South. But according to Jerryson, Buddhists are attacked, not primarily as Buddhists, but rather, as symbols and representatives of the Thai State and Bangkok rule; this helps explain why Buddhist monks are targeted by insurgents and the theatrical performance of extreme violence against them: beheadings, high rates of injury and death.

Monks signify the sacred and profane: political and religious power together with purity as 'walking embodiments of Thai nationalism'. When monks are attacked by militants, with their heavy load of 'symbolic capital' this is experienced as an attack on the 'body-politic' as well as the Buddhist Sangha; the result being local and national fury (Jerryson, 2011:50). Monks are drawn into violence and politics through their 'religio-political identities'. The closer they are to conflict the more religion becomes relevant to the violence. It is not their intention to be catalysts for Buddhist violence, but despite their equanimity, their actions and meanings exceeds religious authority, representing the sacred nation, national religion. The body of a monk is a sacred vessel of the dhamma, sacrosanct, making murder a defilement inciting moral outrage. As ethical 'body-examples' of spiritual purity, wisdom, the charismatic embodiment of dhammic truth, when they are attacked this is experienced as an attack on a sacred incarnation and pathway to enlightenment-much as defiling the Koran or the Prophet (Jerryson, 2011: 59).

The Thai State is normatively Buddhist and political monks amplify this leading to embattled nature of Buddhist spaces and ways of life in the South. Monks are seen as the enemy even though they have no enmity towards Muslims. Ironically, monks cannot detach their political identity, role and ethno-nationalist significations. They are perceived as agents of the state. The problem is they are not seen as an individual Buddhist monk, having a local identity, but as just another representative of a Buddhist Thai State. Monks are identified as a religious and national symbol not humans. When monks, temples and statues are attacked this simultaneously defaces a sacred political and religious symbol (Jerryson, 2011: 70).

A byproduct of religious violence is a dualistic mentality, eliminating complexity and ambiguity, robbing people of plural identities, ethnicities, either one of 'us' Thai Buddhist friend or, one of 'them' Malay Muslim enemy. In this absolutist morality people and events are either good or evil. Conflict thus loses any local meanings and motives and is read, for instance, as Malay Muslim separatist irrational violence (Jerryson, 2011:73).

Attacking a national symbol discloses, unleashes and reinforces its full power and status propelling a conflict onto a cosmic stage (Jerryson, 2011:74) Juergensmeyer). Violence

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transforms a temple into a national cause resulting in the militarization of temples and Buddhist actors became political entities and targets. A supernatural cosmic drama of trans-individual actors and supra-human forces performing Buddhism at risk and in moral peril, not a mundane story of power politics, separatist forces against the nation-state. Defacing temples and monks was seized upon as a cause to promote a militant Buddhist nationalism. The image of beheaded monks is used to incite hatred, to justify and drive a fantasy fear of insurgents performing a Muslim 'ethnic cleansing' of Buddhists. Muslims are demonized into evil others inflaming aggression into an orgy of destructive violence. Mobilizing religion transforms security forces into 'moral guardians, sacred avengers of the nation, not mere State servants, whose sacred duty is to uphold and protect the integrity of Thai Buddhism' (Jerryson, 2011:75,76).

National rage and Buddhist fury are products of monks' political role in a conflict zone unleashing the latent power of their sacred representations: a 'religionization of politics' is manifest in the management of conflict southern Thailand by politicizing Buddhism. Monks enact being a dhammic vessel, blessing people and amulets, purifying, offering merit making on alms rounds, performing ceremonies and rituals, living an ascetic lifestyle. But all these roles and forms of agency are interrupted and changed by violence. Performing Buddhism, being a Buddhist, has become militarized: police and military make merit by giving monks saffron bullet-proof vests! Monks see having guns as a minor misdemeanor, necessary to fulfilling their duty in violent circumstances (Jerryson, 2011:84,85,114-142).

How to be a monk is prescribed by socio-political parameters and fantasy. Religion is de facto normatively Buddhist in Thai society. The Thai King is an upholder and righteous protector of all faiths but must be Buddhist to have pure 'blood' and 'barami' to perform this sacred duty (Tambiah, 1976; Gray, 1986). Buddhist monks have demonstrated to assert that Buddhism is the national religion of Thailand. Rama VI argued that Buddhist war is justifiable if defensive and killing is done for a higher cause from good intentions not hatred and intolerance. The spectre of Kittivuddho haunts the South urging that it is only a minor sin to kill non-human enemies of religion, nation and monarchy as a revered sacred duty (Kittivuddho, 1976). Buddhist nationalism displaces other social and moral problems so that southern Malay Muslims, like communists in the 1970s, become public enemy of Thainess 'No 1' for Buddhist laity and monks who have to defend and preserve Buddhism by any means necessary. In southern Thailand violence is exacerbated by monks performances leading to militarization making them Other and their otherness a cause of violence. This is exemplified by the question of whether a person can be a monk and a soldier: the advent of the 'military monk' soldiers ordaining to fulfill their sacred duty Jerryson, 2011: 122)

The 'tahan pra' 'soldier monk' exists in the South, despite official denials 'monks cannot fight and have weapons' (Jerryson, 2011:114-21) and Western fantasies ignorant of the Asian tradition of Buddhist warrior monks (Jerryson and Juergensmeyer, 2010; Victoria,

1998). They signify the collapse between the sacred and profane authorities of Thai Buddhism-Church and the State. Soldiers can become monks, but not vice versa. Military monks transgress a sacred image of peaceful non-violent meditating monks, their secret existence exposes the foundational myth that Buddhism and violence are mutually exclusive. Monks carry weapons in their shoulder bags for protection, but the issue, argues Jerryson, goes deeper showing the presence of military monks and the State at the heart of southern temples (Jerryson, 2011:120). A soldier monk who shoots to kill, to defend other monks and the dhamma, can justify this as a minor sin, lesser evil, to protect Thai Buddhists against 'Mara': Malay Muslims constructed as enemy-others incarnating a negative, violent, 'evil' opposite of 'Thai goodness' (Jerryson, 2011:120; Keyes, 2010).

Thai racialized identity

Thai racism identifies Malay Muslims as 'khaek' not by using a Western biological notion of race, but rather one based on skin colour, a sign of spiritual purity and means of identification for inclusion or exclusion within the fold of Thainess. Khaek as a category subsumes multiple ethnicities, South Asians, Malays, Arabs, aggregated together by the shared attribute of having a dark skin, which is can be read by Buddhists as a sign of impurity and inner badness (Jerryson, 2011:151,2; Keyes, 2010). It is not ethnicity that causes racism, exclusion and inequality in Thai society but, rather, how race and religion are combined in identity formation.

Religion, argues Jerryson, (2011) is most important for Malay Muslim identity but it excludes them from Thainess. Malay ethnic identity has become fused with Islam. But it has not always been so. Historically, in the 17 Century until 1900 there were Malay Buddhists and the state of Patani was considered by Malays as neither Buddhist, nor, Muslim; this shows that although Malay is an indeterminate and ambiguous identity, identification as Malay Muslim fixes as set apart from dominant Thai society (Jerryson, 2011:152). Was this a product of Siamese colonization? Jerryson sees it as associated with Malay Muslims racial categorization making them ethnically and religiously Other.

Chinese are included in Thainess on the grounds of being Buddhists, their shared customs and beliefs, socio-economic role and status (Jerryson, 2011:145). Thai Buddhism is the normative measure of identity and civility, which others lack, and becomes a racial identity. Khaek is a racialized identity including a religious marker, a negative classifier 'people of another religion' (Jerryson, 2011:152-3). Keyes (2010) argues that 'khaek' is associated with the 'Buddhist evil' figure of Mara, demons and their human followers, imagined as dark bearded figures-(unintentionally) representing historical Malays and South Asians. Thus, I argue that Thai social order embodies racialized distinctions and statuses and to this degree it has traces of the Hindu caste system re-worked by Thai Buddhism and politics.

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Having a dark or light skin is not just a sign of a poor socio-economic occupation, or aesthetic issue of beauty, but is an indigenous Buddhist classifier of moral and spiritual purity-as shown by Christine Gray (1986). Buddhism is not an exception to religious traditions assigning people to superior and inferior racial groups. Indeed, the formation of Thai national identity, as a response to European colonization, excluded Malay Muslims resulting in today's southern conflict. Racial forms of otherness and colonial difference were borrowed and deployed by Siam.

The Siamese forged a notion combining nation+race+citizenship :'chaat' as a new form of national identity (Streckfuss, 1993) and racialized religious identification. The Brahmin and Buddhist origins of 'chaat' in Sanskrit 'jati', signify birth, rank, caste, family, race and lineage; membership of a 'divine race' to become, or to be born Buddhist (Jerryson, 2011:157,158). Caste, purity and pollution, the sacred and mundane are all entailed in 'jati's meanings of spiritual and socio-economic status, racial formation of superior pure and impure inferior castes- one sign of membership being possession of a light skin colour. Jati was taken up by 19th Century nationalist ideology by Rama VI making Buddhism into a signifier of being civilized, a superior race, not savage jungle others within Siam, on the international imperial stage (Jerryson, 2011:158). As Scott puts it: 'barbarians are a state effect, only existing from the point of view of the state' (Scott, 2009:123). Siam needed savages and inferior beings for its appearance of being civilized: ethnic and religious minorities took on this role. Buddhism was crafted and re-presented as rational, philosophical and logical not based on blind faith. Siamese Buddhism became part and parcel of Siamese racial identity by excluding Malay Muslims as 'foreign and semi-barbarians' as Chao Phraya Yomarat expressed it (Jerryson, 2011:161), but including ethnic Lao, Khmer, Vietnamese and Chinese as they were closer, as Buddhists, to the Siamese race. Malays could not change their religion and become Thai. Ethnic Vietnamese, Khmer and Lao could be included in Thai nationality 'as if of the same blood' but not Malays as Muslim khaek (Jerryson, 2011:164).

Violence stems from racial inequalities decided upon religious and ethnic identifications. Skin colour, not speaking Thai and being Buddhist become pathologized as if one can read off religious identity from a persons appearance: to see one is to know one, a dark skinned potential terrorist. In a zone of conflict identities become racialized into incarnations of goodness and badness as effects of the trauma of violence (Jerryson, 2011;79,169). Faith becomes fate when identification is fixed to an essential culture, selfhood and primordial religiosity. Buddhism is used to construct otherness of those who question and oppose Thainess. Religious and racial truth regimes identify who and what people are: pure or unclean, inferior, or superior, worthy of living or dying.

Same or Other? Who do the ethnic Malay Muslims think they are?

Let us examine a pathbreaking analysis of southern 'turbulence' by Askew (2010). He unreifies the Malay in Malay Muslim by challenging much received wisdom about conflict

on the grounds that it takes for granted as pregiven the unity, identity, politics and interests of Malay Muslims. Many claim to speak for represent the "Malay Muslim" but in a reductionist manner which refies them in fixed a primordialist "culture and way of life" (Askew, 2010:144). Drawing upon ethnographic research, Askew argues that actually there are many ways of being an ordinary non-elite Malay Muslim (Askew, 2010:146). Whilst some Malay Muslims may express resentment of the Thai state and the past conquering of the Patani sultanate by Siam (Askew, 2010:144), others resent insurgent groups and identify with Thailand, have no interest in the past, seeing themselves as being Thai and at the same time using local Malay language.

Askew argues that an elite vs peasant, authentic vs collaborator, traitor interpretative polarity ignores how rural Malay attitudes fit neither separatist nor loyalist models. The trouble with elite views, whatever they may claim, is that they are not representative the majority (Askew, 2010: 147). There exists an over politicitised view of what Malay views and identifications ought to be. For instance, dividing the population into minority Buddhist and Muslim majority communities which obfuscates existing neighbor relations and perceptions of 'a more collective locality-based identity that transcends singular ethnic identification' (Askew,2010:146). As I showed, following Jerryson, polarisation is a an effect not a cause of conflict: a product of religious and ethnic nationalism which creates dualism of absolute differences. Askew is correct to state that 'exclusive "Malay" identification is situational and relational' (2010:146). What exists in reality are multiple and hybrid identifications which confound normative ideological and political presuppositions. For example, 'An inclusive locality-orientated form of identification crossing ethno-religious boundaries can be seen operating in some mixed neighborhoods' (Askew, 2010:146-7). Malay Muslim loyalty, as determined by neighborhood in some Muslim areas, expresses strong opposition to insurgents, as voiced by villagers, village heads and sub-district chiefs, and also has led to the formation of anti–insurgent hit squads.

The point is that any unified category of "Patani Malay identity" is seriously brought into question, along with essentialist notions of "Malayness" and any 'irreducible and primordial ethnic consciousness as a basis of common interest and grievance' (Askew, 2010:147). The latter are constructs of analysts and their moral and political romantic presuppositions. Ordinary Muslims, unlike Muslim elites and academics, may vary well be quite indifferent to, the politics of, Malay Muslim identity (Askew, 2010: 148). In the light of the diversity of experiences of being Malay, views and identifications, the question which needs to be asked of both elites and separatists is who do they speak for? Thus, local elites compete with one another using questions of religion and identity as 'a ground for political capital' (Askew, 2010:148). Developing Askew's logic, the question can be raised of the insurgents: who do they think they are? A vanguard? In other words, an elite, imposing on others a view of themselves as incarnating the truth of historical oppression and who represent the majority of the Malay Muslim people, their real and/ or best interests? But, as Askew, astutely asks: 'just what does this mean for ordinary Muslims still remains obscure and under-examined' (2010:148).

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Neither Buddhist nor Muslim Patani? Figures of Hybridity

The possibility of cultural and religious hybridity (McCargo, 2009:25; Jerryson, 2011:47; as conceptualized by Jan Nederveen Pieterse) undermines reification of the Muslim in 'southern Malay Muslims' and raises the question of how far have communities been united and unified by a shared single Muslim tradition and customs? 'Patani' as a region is marked by complex patterns of hybrid beliefs and practices: Hindu, Buddhist and Islamic local spirits and magic, spells and offerings.

In the Thai nationalist 'master narrative' the deep south represents the loss of territory by the Siamese state and the a sacred site and source for Buddhism the kingdom of Langkasuka (Jerryson, 2011:35,6; Jory, 2013: xx1v). Whilst, Muslim militants draw upon a counter-master narrative of the past in which the Patani sultanate was an Islamic state. However, as McCargo points out, Patani was ruled by a Queen for a while and there is 'no evidence it was ever governed by a council of ulama or that the Koran was used as the basic law' (McCargo, 2009:178). Indeed, Anthony Reid demonstrates that pre-Isamic Patani from the 15th to 17th Centuries was a paradigm of pluralism. A cosmopolis of hybrid features seen in its traders and inhabitants: Chinese, Portuguese, Javanese, Sumatran, Malay, Cham and Japanese (Reid in Jory, 2013:3-21). Elements of this 'neither Buddhist nor Muslim but melange of bits and pieces of both' hybridity live on today to problematicize ethnic and religious binaries.

Den Tohmeena, the son of the famous Islamic teacher and martyr Haji Sulong-'disappeared' by the Thai state August 13 1954- could be seen as an incarnation of hybridity. He had a secular education, spoke perfect Thai, wore Western dress and was married to a Buddhist, and, at the same time, was a powerful Malay Muslim advocate against Thai state violence and played a role as mediator for ordinary people (McCargo, 2009:63).

At Wat Srisudachan Pattani, medications, blessings, powerful amulets, and removal of curses are performed for Muslims using Buddhist spells to remove Muslim hexes. Chickens are offered to graves by Muslims and Saiburi fishermen pray to the sea goddess (McCargo, 2009: 20,1). One tradition associated with the south is a Malay form of Islam 'overlaid with magical and syncretic practices' (McCargo, 2009: 180). For example, insurgents make oaths on the Koran, eat paper with Arabic vows washed down with holy water and are blessed by a village immam (McCargo 2009: 151).

Muslim militants may use Malay magic and protective spells (McCargo 2009: 138-90) and join in with Buddhist rituals and practice magic, in spite of any influence of Arabic fundamentalist Islam which does not accept this.

Malay Buddhists?

Muslims used to come to cultural festivities in Buddhist temples, Thai New Year, the kings birthday. Buddhist temples were communal resources centres for Buddhists and Malay Muslims to work and socialise (Jerryson 2011:129). The reporter Muhamad Ayub Pathan has described cross-cultural hybrid practices in the south such as 'Thai Buddhists teaching in Isamic boarding schools, mali flowers grown by Muslims for the Thai market, and local Chinese traders who speak fluent Malay' (McCargo, 2012:103). Inter-faith marriages do occur, including, less frequently, conversion from Islam to Buddhism (Jerryson, 2011:162,163). Malays used to convert to Buddhism (Jerryson 2011:44) and ordain as monks historically in Narathiwat and were venerated for their spiritual achievements (Irving Johnson cited in Jerryson, 2011:219). In Satun there is evidence of family ties to Buddhism. Malay Muslims ordained to make merit when their children fell ill and recovered. Muslim parents prayed to Buddhist ancestors to cure their child and promised that their child would become a nun or monk (Nishii, 1999;2015). These instances show the mixing of Thai Buddhism and Malayness and how they could be unified (Jerryson, 2011:129).

Putting Out the Fire?

In this final section of this paper I want to make some suggestions about conflict resolution by a strategy of toleration and detaching from forms of attachment to identity and truth-telling that impede truce-making and peacemaking .

There is a need to abandon absolute notions of who is good and evil, right and wrong, as fixating on past injustices assigns blame and resentment and will not promote a truce and peacemaking. Thai State racist forms of rule and Muslim rebellion remain within a problematic of alternate conflicting authorities of truth and sovereignty.

The challenge of coexistence is how well can people tolerate others differences in ways of life and belief/non-belief other than their own? Can they live with others' otherness without trying to convert or integrate them into their sameness? In situations of fighting oppression there exists a tendency to say 'we will emancipate you if only you follow us' and become the Same as us (Thompson, 2005: 88). Following Thompson's arguments religious fundamentalism, Buddhist and Muslim nationalisms, involve arrangements of sameness rather than otherness (Thompson, 2006). A quest for identity. Fundamentalism entails the fantasy that certitude is possible about the world in which some believers possess the truth and who narcissistically elevate minor differences into absolute ones. This is done in such a way as if identity can exist without difference. In other words, a desire to make everyone identical. In the Southern conflict people and communities become marked by otherness and positioned as evil enemy-others from within moral, religious and ethnic formations of sameness : 'We-Thai Buddhists /We-Malay Muslims are 'good' because the other is 'bad', the cause of 'evil', disorder and violence'. Is there

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another way of thinking outside negative, absolute notions of sameness and otherness, identity and difference? People become locked in Manichean dualities of fixed absolute differences when their spiritual practices and beliefs are performed as forms of religious nationalism imposed by others: 'You can only be a Buddhist or Muslim in this way, the true authentic way'. Can anything be learnt from the West and its traditions about coping with diversity and difference to bring about a durable peace?

As Thompson argues (2005) in the Western tradition after the Treaty of Westphalia (1648) secured peace from war, religion became a matter of private conscience not a state concern; this led to tolerance of different faiths, histories, cultures and identities. Tolerance is defined by Henry Kamen (1967) as the 'concession of liberty to those who dissent in religion'. Toleration is both a mode of regulation and way of life.

How then to get combatants to tolerate one another? Thompson audaciously suggests that truce seeking is more important than truth seeking in the pursuit of peace (Thompson, 2005:101). Fixation on justice will lead to an attitude of 'I am right and you are wrong' and attributing blame. Whereas, a truce situation moderates two parties where there is no winner or loser (Thompson, 2005:102). Thus, political conflict and antagonisms can be moderated by cultivating a style of conduct 'that embodies a studied indifference towards difference' (Thompson, 2005:102). Such a practice of toleration makes what others have elevated into absolute and cosmic differences insignificant; this has the effect of deescalating violent conflict and depolarizing ethno-religious identities amongst social combatants to try and secure social peace (Thompson, 2005:84,85).

The important conclusions for peace making are that constructed religious and ethnic differences do not have to trump other differences, and, furthermore, they are not necessarily the most important aspect of being human and living together. People are more the same than other. Religions are implicated in driving racism. In the 'Deep South' of Thailand how much of an in-between Thai and Malay and neither nor Muslim and Buddhism culture exists? It is nationalist attachment to politicized religious and ethnic identities that fuels violence and excludes the possibility of multiple hybrid identities: diverse ways of being Thai and Malay in a local web of embedded populist identifications, in village neighborhoods or regional zones.

Note

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ABOUT SEAHRN

The Southeast Asian Human Rights Studies Network (SEAHRN) was born out of a common dream, among its 14 founding members, to enhance and deepen the knowledge and understanding of students and educators as well as other individuals and institutions from Southeast Asia in human rights. This goal will be achieved by engaging in collaborative research, improving course curricula and training programmes, sharing of best practices and conducting capacity building training of educators, staff and students and other interested individuals and institutions. Furthermore, it seeks necessary regional academic and civil society cooperation to sustain the effective promotion and protection of human rights in the Region. The Network desires to open its doors to interested institutions and individuals who share its vision for human rights and peace in Southeast Asia.

Member institutions and individuals of SEAHRN are aiming to achieve the following core objectives:

- To strengthen higher education devoted to the study of human rights in Southeast Asia through faculty and course development;
- To develop deeper understanding and enhancement of human rights knowledge through collaborative research;
- To achieve excellent regional academic and civil society cooperation in realizing human rights in Southeast Asia; and
- To conduct public advocacy through critical engagement with civil society actors, including inter-governmental bodies, in Southeast Asia

In pursuit of these objectives, SEAHRN has expanded its membership to 22 academic institutions. Moreover, it has successfully organized three international conferences on Human Rights and Peace & Conflict in Southeast Asia (Bangkok, 2010; Jakarta, 2012; Kuala Lumpur, 2014). It has also done training both seasoned and emerging scholars in human rights based research and instruction. It has also published an academic series containing relevant researches on some human rights and peace issues in the Region. It is currently developing a human rights and peace textbook which features various themes written for and by Southeast Asian academics and scholars.

In terms of resource material development, SEAHRN has already published Human Rights in Southeast Asia Series 1: Breaking the Silence (October 2011) Human Rights and Peace in Southeast Asia Series 2: Defying the Impasse (September 2013) and Human Rights and Peace in Southeast Asia Series 3: Amplifying the Voices (September 2013). Its Members were involved in producing the first ever university-level textbook on human rights and peace and conflict in Southeast Asia.

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At this juncture of imbalances in terms of democratisation and socio-economic development, it is imperative that we remain vigilant in inquiring and assessing structures, cultures and actors who have the power to impact millions of lives in this Region. "Challenging the Norms" is an homage to critical engagements and discourses initiated by those who believe in a more rights and peace-embracing Southeast Asian community.

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