

DEMOCRACY AND CONSTITUTIONALISM IN ASIA:
THE CASE IN INDONESIA TODAY¹

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INTRODUCTION

Ladies and gentlemen, and distinguished guests. Thank you for the opportunity to address the conference today. Thank you to the organizers -- the University of Pennsylvania Institute for Advanced Study of India in New Delhi, in collaboration with the Center for Advanced Study of India, University of Pennsylvania, O.P. Jindal Global University, and the Ford Foundation – for your invitation to speak at this Colombo Conference on Comparative Constitutionalism in South Asia.

I am very excited to join this conference. The honor of delivering the keynote address resonates deep within me as I meet so many knowledgeable and informed experts who have focused – as have I – on understanding the interplay of democracy and constitutionalism in Asia. I look forward to sharing with you my views on the situation in Indonesia as the country adjusts to competing visions of what constitutes a constitutional democracy. I will also look at recent political developments in Indonesia, where we have just conducted local elections across the country at the end of June, 2018.

Ladies and gentlemen, we in Asia live in the most diverse, most populated societies on the planet. Common sense, logic, political theory, and just plain-old intuition all suggest that the institution of democracy is the best system of government to build general prosperity and social justice for all, while guarding the liberties of every individual citizen. When we look across the region, we see an interesting collection of countries demonstrating various degrees of democratic development and institutionalization, particularly in South and Southeast Asia. Despite quite varied forms and levels of institutionalization we also hear consistent expressions of commitment towards the goal of achieving democratic societies.

THE DYNAMIC AGENDA OF DEMOCRACY

There are an estimated 4.4 billion people or approximately 59.63% of the world's population living in the 48 countries of Asia³. Two of them, India and Indonesia, represent the

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³ According to the US Census Bureau, world population estimate in 2016, per 23rd of August, is approximately 7,346,235,000.

largest and the third largest democratic countries in the world⁴. All religions of the world grew up in Asia. Judaism, Christianity and Islam grew from West Asia. Buddhism and Hinduism grew from South-Asia, while Taoism, Confucianism and Shintoism grew from East Asia. Notably, almost all the great religions, can be found in Indonesia, and each have influenced very strongly the cultures of Indonesian societies throughout the history. Until now the majority of its population embrace Islam, and at this point in history, Indonesia is the country with the largest Muslim population in the world. (Muslims represent 87% of Indonesia's current population in 2018 of 266,927,712 persons)⁵.

In 2016, the Economist Intelligence Unit (EIU) produced a Democracy Index that measured the level of democracy on a ten-point scale from 0 (authoritarian) to 10 (full democracy).⁶ The average democracy score for Asia was 5.05 in 2006, and by 2016 this had increased to 5.41, while the global average for both years stood at 5.52. Thus, while the world score stayed stagnant, Asia's score indicated forward movement. Net democratic progress surpassed all other regions of the globe. Solid gains in scores were recorded in South Asia (up 0.62 points) and Southeast Asia (up 0.50 points), while East Asia experienced a stagnation (up 0.02 points). Indonesia, the largest democracy in Southeast Asia, has recorded significant achievement and enjoys the results of its reform era in the last two decades. In 2016, Indonesia was ranked 48th in the world, while India was ranked 32nd.

However, in the 2017 Democracy Index, the EIU reported that the Asia's two largest emerging democracies suffered significant declines in their scores. Citing a rise in "conservative religious ideologies" the EIU dropped India to 42nd from the 32nd, and placed Indonesia at 68th from 48th. Throughout 2017, India experienced a series of mob attacks on marginalized groups. According to the EIU, the strengthening of right-wing Hindu groups led to a rise in vigilantism and violence against minority communities as well as other dissenting voices⁷.

In the case of Indonesia, the EIU's judgement was based on last year's gubernatorial campaign in Jakarta, the country's capital and most important city, which was marred by the arrest of the non-Muslim incumbent governor Basuki Tjahaja Purnama. The blunt talking reformist governor, known as "Ahok" was charged and found guilty under Indonesia's stringent blasphemy law, which has often been used to limit freedom of expression. There was a significant regress of the scores in 2017, just because of Jakarta governor election in Indonesia and vigilante cases in India.

However, the decline in scores reflects the conventional approach or methodology used to measure levels of democracy. That approach relies too much on output-oriented judgements to measure democratization when we ought to look at the process of democratization within the socio-cultural context of the respective societies. If we do that, I believe that we then see a clearer

⁴ The second largest democracy in term of its population is the United States of America, approximately 327 million people according to usapopulation2018.com.

⁵ Republic of Indonesia, National Board of Statistics, 2017.

⁶ Democracy Index 2016, <https://www.eiu.com>.

⁷ Democracy Index 2017, <https://www.eiu.com>.

and more encouraging path to democratic transformation than the relatively minor swings in annual scores.

In the case of Indonesia, the 1945 Constitution, first applied from 18 August 1945 to December 1949 and then re-applied since July 1959 and with its first amendment in 1999, the idea of democracy or popular sovereignty which was followed did not yet guarantee protection for human rights. Since the Second Amendment in 2000, all international human rights instruments have been adopted materially in Article 28A to 28J of the 1945 Constitution. Furthermore, the substance of the Third and Fourth Amendments in 2001 and 2002 respectively cover fundamental changes that enabled the founding of the system of modern Indonesian constitutional democracy. The problem now is a matter of implementation which contains within it various socio-economic and socio-cultural aspects that live on in society. Because of that, the process of transformation towards democracy Indonesia requires quite a lengthy and sequenced period of time until all the constitutional values and norms upon which there is agreement can truly be reflected in the practices of a constitutional culture that lives to the core of society. At the same time too, the transplanting of constitutional principles or “cultural borrowing” of the values of constitutional democracy from outside the experiential realities of a society requires a process of cultural transformation that is certain to be dynamic along the path to creating a genuine democratic constitutional culture⁸. Therefore, today, democratic civilization cannot only be seen as a final score without considering that it is a process of civilizational transformation. Indonesia and India are the largest and also most pluralistic countries in South Asia and Southeast Asia and almost in every aspect of social and public life. These two countries like other countries where we are coming from share similar experiences in the practices of democracy and constitutionalism, moving from being western colonized societies to future independent constitutional democratic countries, while promoting each’s own respective political cultural traditions from past history. To achieve this the transformation to become a democracy must be seen as a complex process, especially in this era with so many changes thus bringing about a need to re-evaluate all old theories and metrics, because not all of them can be applied in evaluating the processes of change in the civilization of democracy in this age and for the future.

DEMOCRATIC CONSTITUTIONALISM IN INDONESIA

Since its independence in 1945, Indonesia has adopted the idea of democracy and constitutionalism. The ideas have been explicitly formulated in 5 constitutions applied since the independence, i.e. (i) the 1945 Constitution, (ii) the Constitution of Federal Republic of Indonesia of 1949, (iii) the Provisional Constitution of 1950, (iv) the 1945 Constitution with its Explanation enacted in 1959. This final Constitution has been improved through four rounds of amendments in 1999, 2000, 2001 and 2002 and the adoption of some 174 new provision while retaining 25 of the

⁸ Jimly Asshiddiqie, *The Constitution of Cultures and Constitutional Cultures*, Malang: Intrans, 2017.

original provisions of the 1945 Constitution (300% new), and by continuing to use the name of the 1945 Constitution, now known as the Constitution State of the Republic of Indonesia of Year 1945. I refer to these changes as an incremental big-bang changes that affirm the principle of continuity and change. Almost all the new ideas transplanted from outside and which have now reached the stage of implementation cannot but be expected to face constitutional cultural obstacles in being applied in practice.

The quality of Indonesian democracy in its full sense has just been adopted following the first four amendments in 1999, 2000, 2001, and 2002. The new constitutional rules comprise almost everything needed by Indonesia to be a modern constitutional democratic country, such as the promotion and protection of human rights, applying the principles of checks and balances in power relations between and among state organs or functions, upholding the principles of an independence of judiciary, etc. The principle of checks and balances have been affirmed by transforming the old quasi-presidential system into a pure presidential system and leaving behind the system in which there was a supreme state institution to become one where that is complemented with a constitutional court as the senior most and final interpreter of the Constitution within a constitutional democracy. In short, the 1945 Constitution has been transformed significantly even though this process unfolded over a four years period. This was an example of incremental change that was fundamental in scale or an incremental big bang of constitutional change that ensured balances were retained amid a process of substantial change within a relatively tight time frame – continuity and big bang change.

But, still, the transformation process in the post-reform era, in the last 20 years since 2002, requires further consolidation, more improvement, and further institutionalization. Implementing the 1945 Constitution that has 300% changed provisions requires time too because these changes have not been accompanied fully by a culture of democracy in moving forward with the world of normative ideas that have been incorporated into the written constitution. The process of institutionalizing democracy calls for further development in terms of effectiveness and also in terms of developing contemporary leadership role models in the arts of exercising state power on a day to day basis. This requires transformational leadership that is effective and active in being role models in this era of great upheaval and change, a none too easy task to achieve, considering the needs to respond practically and even pragmatically to short term matters of urgency in an era of transition and consolidation over these past 20 years.

In this process of transformation, the 1945 Constitution has also introduced a system of “rule of ethics” in addition to the “rule of law”. The transformation should be guided by the rules of the Constitution, the fair enforcement of the law and the Constitution by an independent judiciary (which itself needs to reform to be more respected and respectable) consisting of the Supreme Court and Constitutional Court; and at the same time, the role of public ethics infrastructure and the rule of ethics in supporting the rule of law are also introduced in the new amendments. Therefore, the Constitution can be treated as the supreme source of law

(constitutional law) as well as the supreme source of ethics (constitutional ethics) supporting, guiding, and guarding the constitutional democracy of Indonesia.

The constitutional reform agenda (from 1999-2002) following the fall, after 32 years, of the New Order era under General Suharto's presidency in 1998, has changed Indonesia very fundamentally, transforming it from an authoritarian regime to a modern constitutional democracy. The first direct election of the President and Vice President was conducted successfully in 2004, while the fourth direct presidential elections will be conducted next year in 2019 in a simultaneous scheduled election with national and local parliamentary elections. In the long run, the current multi-party system will transform and consolidate the grouping of political parties into between two and four coalitions that will make the Indonesian political system more stable and sustainable into the future. Under the leadership of the three presidents, i.e. B.J. Habibie, Abdurrahman Wahid, and Megawati Soekarnoputri, during the transitional period (1998-2004), Indonesia was successful in ending its long authoritarian systems and moving toward democracy in a genuine sense. The management of reform started from the first day that President B.J. Habibie took over the presidency from President Soeharto. Since then, there have been so many changes enacted, among others:

1. Political relaxation:⁹

- 1.1. Lifting the laws restricting freedom of expression, upholding freedom of the press, and freedom of peaceful association.
- 1.2. Releasing and freeing about 150 political prisoners, including all incarcerated communists.

2. Political Parties and Elections:

- 2.1. Transforming GOLKAR, the quasi political party created and used by Soeharto's New Order regime for power consolidation, into a normal political party by delinking it from the bureaucracy and the military and police; and providing for an open and fair multi-party system in the Constitution.
- 2.2. Accelerating the next scheduled parliamentary elections from 2002 to 1999 with the appointment by the Peoples' Assembly (MPR) of the new president brought forward from 2003 to 1999 as well. The adoption of a direct presidential election system in the Constitution through the third and the fourth Constitutional Amendments and then conducting the first direct presidential elections in 2004.
- 2.3. Establishment of an independent General Elections Commission, Electoral Supervisory Board, and the Honorary Council of Election Officials, plus the Constitutional Court as four integrated but independent administrative and institutional systems to guarantee electoral democracy.

⁹ Sergio Bitar and Abraham F. Lowenthal, *Putting Principles into Practice: Democratic Transitions (Conversation with World Leaders)*, Johns Hopkins University Press, Baltimore, 2015.

3. Restructuring constitutional state organs:
 - 3.1. Creating a three-chamber-legislative system: the House of Representatives (DPR), the Council of Regional Representatives (DPD), and the People's Assembly (MPR).
 - 3.2. Establishment of a Constitutional Court.
 - 3.3. Strengthening the independence of the Supreme Court by integrating full administration of justice under the authority of the Supreme Court.
 - 3.4. Establishment of a Judicial Commission.
 - 3.5. Strengthening the powers of the National Audit Body (BPK).
 - 3.6. Separation of the police from the military as two independent constitutional agencies.
 - 3.7. Empowerment of the independent Central Bank and the establishment of the Financial Services Authority (OJK).

4. Distribution of power to various independent agencies and Civil Services Reform:
 - 4.1. Ensuring the bureaucracy is independent and secured from political interference.
 - 4.2. Establishment of an Ombudsman;
 - 4.3. Establishment of an Anti-Corruption Commission (KPK).
 - 4.4. Empowering the National Commission of Human Rights.
 - 4.5. Establishment of an independent National Commission of Antitrust and Anti Monopoly (KPPU), and other independent agencies, such as National Commission of Public Information (KIP), National Commission of Broadcasting (KPI), etc. authorized independently with mixed functions as administrator, regulator, and adjudicator for cases of violations of the respective laws related to the protection of fair operation of and competition of markets within the commercial sector, the protection of freedom of public information, the watchdog for the neutrality of electronic media, and so forth.

5. Decentralization and local autonomy
 - 5.1. Enacting laws to affirm wide ranging autonomy and decentralization in the provinces, cities and counties all over Indonesia.
 - 5.2. Enshrining the constitutional status of special autonomous regions currently covering four provinces (and later expanded to become five provinces, i.e.: Aceh, Jakarta, Yogyakarta, Papua, and West Papua).
 - 5.3. Application of direct election for governors of provinces, chiefs of counties, and mayors of cities by voters all over Indonesia.
 - 5.4. Application of the direct election of heads of villages all over Indonesia, ensuring that sovereign authority rests with voters in the cities as well as in the villages. Every five years, each and every eligible voter living in the towns and cities have their votes for the elections of president, governor, and city major; whereas those who are living in the villages, have their votes for the elections of president, governor, county chief and the head of their village.

FUTURE THREATS AND CHALLENGES

Despite all these stories of progress of which we are grateful, we must also note several challenges and even new threats to the principles of democracy, both in its practice as well as in its theory. In this era of disruption, we cannot rely merely on fixed theories inherited from earlier era that are not necessarily relevant in addressing the problems of humanity in this age and into the future. Among others there are six issues that deserve serious attention, namely; (i) the emergence of a disbelief in democracy guaranteeing the welfare of the people; (ii) the development of radical religious interpretations that are anti-democratic in nature; (iii) the diminution of the quality of democracy in various countries like the USA and Russia; (iv) the emergence of the need to prevent conflicts of interest between sources of new power, that is the state, civil society, the market and the media; (v) the emergence of a new phenomenon that I term the “deinstitutionalization of politics” and the postmodern individualization of politics; and (vi) the development of a symptom of universalization of constitutional values in the midst of the realities of constitutional culture in every individual country.

3.1. The economic success of China without democracy

The first problem that has given rise to a disbelief in democracy relates to the increase in the standards of welfare of a community that is not always in parallel with applying a system of democracy. The Peoples’ Republic of China is a country that still applies a belief in communism but whose economic development has been very successful even though it is without democracy. Moreover, the PRC has recently amended its Constitution to permit a Chinese President to serve for life. As such the state administration of the PRC could well continue to develop to become a nation that is ever stronger and stable, or at least tranquil, into the long term.

The emergence of China, which while still applying communism, but which has been successful in developing its economy, gives rise to a wide-ranging conclusion that economic welfare can be achieved without democracy. Because of that, many people are convinced that the welfare of the people should be prioritized at the expense of a free democracy. The most moderate among these people hold to the view that the conditions to develop a democracy is met when the level of welfare or per capita incomes of the people has already reached a certain level as a basis and social model for the development of a quality democracy. With these developments, promoting the idea and principles of democracy confronts real obstacles in facing the realities of communities that place a higher priority on their daily needs and welfare.

This matter also holds relevance in Indonesia, in Malaysia and in many other countries. The economic influence of China with its expansive networks through its Chinese diapora throughout Asia is very strong, including in Indonesia. Some who used to be involved in communism but in general now are active in business and constitute most of the major business

people in Indonesia. Even though they only represent 5% of the Indonesian population they command 95% of the Indonesian economy. In addition to that Chinese offshore investment practices are accompanied by the mobilization of Chinese labor to follow investment activities to various nations including to Malaysia and Indonesia. These issues create larger problems in the process of building social integration, and the institutionalization of inclusive politics in practicing constitutional democracy in Indonesia.

3.2. Emergence of Radicalism, Ideology of a Caliphate, and the Relationship between State and Religion

The second problem is that the seemingly endless colonialization of the people of Palestine and assorted conflicts in the Middle East is disseminating an ideology of hatred, enmity and an ideology of war from the Middle East to all Muslim majority nations by giving birth to assorted radical anti-democratic movements with democracy being perceived as somehow “Western” and giving succour to an ideology promoting an Islamic Caliphate and other radical interpretations. In addition to that much of the agenda of democratization in the Middle East which was seen initially and enthusiastically as the “Arab Spring” has not been very successful, especially as seen in Egypt and elsewhere. Tunisia remains the brightest beacon to arise from the Arab Spring.

These issues also resonate in dealing with the very plural political cultures of Indonesia, in which politics are not yet institutionalized on a rational basis so that differences of primordial sentiment (ethnicity, race, religion and social class) are very open to be exploited for political gain for short term electoral benefits. This is a matter that is of great concern to people in terms of stoking inter-ethnic conflict or even inter-religious conflict as well as the problem of the relationship between religion and the state.

On the political “culture” of playing with primordial sentiments and negative campaigning for elections, these are not of course specific to Indonesia. Such things often still occur even in the USA: when Obama first sought election to the presidency, his opponents disseminated photos of him dressed in a Yasir Arafat styled kaftan from Palestine. This photo of Obama was of course intended to associate Obama with Muslims, with Palestine and even to terrorists. Even though this negative campaign did not succeed in thwarting Obama’s election, but it nonetheless demonstrated that such things could still occur in American presidential elections in the 21st Century. As a result, should such campaigns be deployed in Indonesia or India we should see them with some sense of proportionality as part of the process of transforming towards a more mature form of democracy in each nation that each have their own specific problems.

Regarding the relationship between religion and the state, it should be noted that Indonesia follows five philosophical principles called *Pancasila*, which places Belief in One Supreme God as its first principle. Furthermore Article 29 of the Indonesian constitution, states that the state is based on the belief in One Supreme God. But the notion of the One Supreme God is universal, that is God of and for all people who believe in the Almighty according to his/her own respective

beliefs or religions. No one may or can compel or force any one to follow any religion in which he/she does not believe. The government may not interfere with freedom of belief and religion. But the Indonesian government may work in fraternal cooperative relationships with any religious organization for the purpose of promoting the quality of attitudes and behaviors of all citizens in accordance with the Constitution and the state's law. Indeed, the government is considered to have its own duty to assist and help anyone to believe in his/her God or his/her respective religion. The government has also the obligation to empower any religions and treat all religious organizations as its partners in developing the human quality of the whole people, especially with regards to the ethical aspects of public life or the spiritual and moral values shared in social life.

This fraternal relationship practiced in Indonesia is of course very different from what is applied in Europe and the United States of America. Under communist regimes, especially in Eastern Europe in the past time, the relationship between state and religion was very negative. Under these communist regimes, God and religion were considered detrimental, even subversive. Meanwhile most Western European countries had experienced a very long history of hostile relations between the state and religion. A new and different development has been seen in the United States of America since the 19th century, namely that the relationship between the two is friendlier than that which unfolded in Europe. From Europe to America, the relationship between the state and religion moved progressively from a hostile relationship to a friendly one. In Indonesia, the relation is not only friendly but also fraternal. The Indonesian government works in close cooperation with any religious organization for the purpose of promoting the quality of attitudes and behaviors of all citizens in accordance with the Constitution and the state's law.

Is there any possibility to adopt religious law to become the state's law through legislation? Why not? All religions may be treated as rich sources of virtues and noble values to be adopted to become the contents of any needed law and regulation to uphold and advance justice and the good life. In this regard it is like any universal values from International Instruments of Human Rights or best practices of constitutional values from any other countries in the world that can be adopted or transplanted into the constitutional rules in our respective countries. So far as it is not contrary to the highest agreement or highest national consensus written in the constitution, the Islamic syari'ah law derived from the teachings of any fiqh (the science of Islamic law) schools of thought may be treated scientifically as legal and legitimate scientific sources of law in Indonesia. The same treatment is also applied to the holy books of other religions, such as the Bible, Veda, etc. Even in the faculty of law, the students are accustomed with so many good words which are popular among Christian churches, or other religions, such as Hinduism, Buddhism, and Confucianism.

3.3. The Election of a Racial and Religious Hater as President and the Practice of Democracy without Changing of Leadership

Since the dawn of the 21st century there has been a re-emergence of hatred based on ethnic, racial and religious differences in the politics of Western nations. Even so certainly in Western

Europe to date no elections have been won by the haters and their political parties. The election of Donald Trump as President of the USA is a new phenomenon. His antipathy towards Islam and Muslims and non-White immigrants has been shown bluntly by him on numerous occasions. According to an EIU report, the USA scored of 7.98 out of a maximum of 10 in 2016 and was always considered as a full democracy. This figure dropped in 2017 into the status of a flawed democracy for the first time in the history of this data series. The change reflected a sharp fall in popular confidence in the functioning of public institutions, predated and aided by the election of Donald Trump as President. Starting from the year 2017, USA is now among other flawed democracies, placing it behind 19 full democracies, such as Norway, Ireland, the UK, Spain, etc. Now, the USA is ranked 21st among other flawed democracies, such as South Korea, India, and Indonesia, Chile, Botswana, and Mexico.

There are two important things that the world learned from the example of the USA. First, this is the first time that a big and influential businessman has been elected President of the USA and certainly the first time that anyone has been elected President in 2016 who has never served the nation in any way shape or form, for example from the bureaucracy, the military, the judiciary, the legislature or any other elected office. Second, President Donald Trump is considered by historian to be the most racist leader since Woodrow Wilson (1913-1921). This is also the first time in the 21st century, 153 years after the abolition of slavery (1863) and 52 years after the passage of the Civil Rights Act (1964), a racial, ethnic, and religious hater has won major support from the American people to be the President of the most influential country in the world. When these developments are combined with the regressing phenomena of democracy in the world, the position of those who do not believe in democratic system of government become emboldened. This can also be seen in Indonesia today. They use this democratic regression and the bad examples in contemporary American democracy as a rationale for rejecting any idea of democracy.

On the other hand, there is a new trend in Russia and China to strengthen leadership by removing limits for terms in office. President Vladimir Putin has been re-elected for his fourth term, making him the longest term ruler of Russia since Stalin led the old USSR. President Xi Jinping has succeeded in entrenching his position by a constitutional amendment that makes him eligible to be a president for life. These are all the new signs that in a long run, Russia and China will be more stable and even stronger under a strong and effective leadership, (or at least for as long as the health of these paramount leaders remain). These countries will create more confidence for those rejecting democracy to grow in many parts of the world.

3.4.The Emergence of the New Quadru-Politica

Another serious challenge that Indonesia must confront in this age is the management of democratic activities that are becoming ever more expensive and requiring larger costs. Many political positions must be filled through general elections to the House of Regional Representatives (DPD) as well as the House of Peoples' Representatives (DPR). Representatives throughout Indonesia filling these two national chambers will also be elected at the same time as

those being elected to provincial, city and county level councils. Finally, the President will also be elected on this same day. All up some 17,478 people will be elected. In addition, some 548 local government leaders including 34 governors, 416 county chiefs and 98 mayors are also elected directly. All of these require considerable expense so that candidates and their party backers are forced to seek as much financial support as possible to win elections.

The need for these huge funds has encouraged unhealthy practices of collaboration among parties and corporations that constitute indirect and even direct conflicts of interest between one and the other. This has contributed to so many corrupt practices taking place across the nation. This is reflected in the fact that between 2004 and 2017 some 313 local government leaders were jailed due to their involvement in corruption. Among central figures in a political party, that is its general chair, some four have been jailed for corruption. Two of these had been leaders of religious based parties while the remaining two had led nationalist parties. Each of the 10 parties currently sitting in Parliament contain some cadre who have been convicted of corruption. This is because the need to raise money, both by each candidate as well as by their party, can be said to be very substantial. As a result, the role of corporations in politics also calls for specific handling in the future so that there does not emerge conflicts of interest between political positions and corporate business interests.

At this point of time in Indonesia regulations that prohibit these kinds of conflicts of interest do not exist. Even in the USA despite the fact that there exists the law on government ethics¹⁰ which provides for Blind-Trust Management to manage the equity assets of political officials so as not to give rise to conflicts of interest between the public offices being occupied with the equity holder, there continues to exist no regulation regarding businesses owned by a President. Now after the election of businessman Donald Trump to the presidency of the United States everyone is now aware of the importance of differentiating and indeed separating the political office from the business world so as to not give rise to conflicts of interest. Furthermore in Indonesia in this age there is also a growing trend of corporate conglomerate owners who control a group of large businesses to also control networks across the electronic communications media sector in the form of television, radio and online media, and then to become the core leader of some community organisation that has extensive networks in “civil society”, and then to establish their own political party, or to buy an existing political party or to become the general chair or core position holder in the political party. These days, several political parties are led directly by the head of a conglomerate who commands the television media industry that then advertises himself and his party every day.

If at some day in the future a conglomerate holder who controls the media industry, and a community organization and is also the head of a political party succeeds in being elected President

¹⁰ US Federal Ethics in Government Act of 1978 requires all government officials to disclose their financial holdings unless they are placed in a qualified blind trust. Many of them sell off their assets or transfer them to a blind trust in order to avoid scrutiny or the appearance of conflict of interest.

of Indonesia they would in fact be in command of the four important forces in the society, that is state administration, civil society, the market and the media – all of which would be in the hands of one autocrat. If that were the case, the future of democracy would face a collapse. This is what Sheldon Wolin referred to as inverted totalitarianism in an incorporated managed democracy¹¹. Because of this, there emerges a need in our time to give serious attention to the new phenomenon of power relations that emerge between four domains of power in a new *quadru-politica* that is the emergent threat of new totalitarianism through the possibility of (a) the joining of (i) the state, (ii) the market, (iii) civil society, and (iv) the media (especially the electronic media, the internet and social media) in one hand as a form of 21st century totalitarianism; and (b) the need for a new understanding of the “separation of powers” and the prohibition of conflicts of interests between the four pillars of power (the new *quadru-politica*) as a new characteristic of quality democracy and integrity in this millennial age¹². These issues, in my view, require far more urgent attention by experts than making issue with the blasphemy case against the non-Muslim former Governor of Jakarta or cases of negative campaigning through mobilising primordial sentiments that are more related to a level of democratic civilization that is immature due to various cultural constraints that are temporary in nature.

3.5. Universalization of constitutional values and the problem of constitutional cultures

The fifth issue that I believe to be very important in this era is the beginning of the emergence of an awareness of the problem of local political culture versus the institutionalization of new values brought about by the transplanting of constitutional systems from the wider world that often inhibits the process of institutionalizing the politics of constitutional democracy in practice. The problem of the universalization of constitutional values is a reality experienced in almost all nations, including in Indonesia. Almost the majority of the substances contained and set forth in the text of the Constitution comes from foreign ideas and experiences. Then the problem is in the implementation of the constitutional rules and the institutionalization of power structure and functions of the state that were formed in practice in many ways not in conformity with the realities of the political culture and the constitutional culture that lives at the heart of society and in the practices of the conduct of state power.

If the ideas of the constitutional norms being institutionalized in practice come from the wider world while the cultural traditions coming from the ancestors from time immemorial are not compatible with each other then there will surely emerge a discrepancy between modern institutions that have been built upon the cultural traditions that live on within society. This reality will in turn complicate or inhibit the emergence of these constitutional values in their practical application. For this the study of *constitutional cultures* is very important in closing the intellectual gap between the political and cultural traditions, which have been handed down from the history

¹¹ Sheldon S. Wolin, *Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism*, Princeton University Press, Princeton, 2008.

¹² Jimly Asshiddiqie, *The Idea of Social Constitution: Institutionalization and Constitutionalization of Civil Society's Social Life*, Jakarta: LP3ES, 2014.

of every community, and modern constitutional ideas and principles that have been adopted from the wider world and institutionalized in the practice of constitutional democracy in each nation. In essence there is a need to prevent there being a widening discrepancy between political institutions and traditional cultures that can cause modern ideas of constitutional democracy and democratic rule of law (*demokratische rechtsstaat*) to be merely systems on paper.

Because of that, the values adopted from outside and the values developed from one's own culture must find points of meeting that are universal. These universal values we can find from our own traditions as well as from outside, so that the adoption of a constitutional provision from outside is no longer seen as something foreign because within it are also to be found one's own cultural traditions. In doing so our mixing with values that originate from outside do not have to be based upon pragmatic attitudes, to merely photocopy or be in some form of uncritical constitutional transplantation, except for some inferiority complex to oppose anything that is foreign and comes from another country. Every country must have its own *constitutional identity* as a constitutional state.

3.6. Deinstitutionalization of Politics: Postmodern Individualization of Politics

In addition, in this all-disruptive age of social media there is a new tendency that impedes the institutionalization of politics, namely the tendency towards an individualization of politics that is causing a deinstitutionalization of politics. There are three phenomena emerging in Indonesia recently, i.e. (i) the phenomenon of *crowd politics* that ought to evolve to become organized politics; (ii) there is also an emerging habit of political office holders to communicate personally and directly on social media and in doing so bypassing respective institutional agencies, and (iii) the phenomenon of exploiting law enforcement by police as a pressure and support tool for the expression of hatred among citizens or groups to denigrate each other. The consequence of this is that the process of public communication is filled with an atmosphere of hatred and enmity that tends to be directed personally, and for law enforcement authorities to be used as a tool among groups and communities, that are not in line with the interests of society and the nation. Oppositionist groups tend to give vent to their views that are opposed to the government harshly and crudely through social media using blunt sentences and, by using identities that are anonymous enables everyone to act in crude ways. Supporters of the government are no less harsh and crude in their communications through social media. Beyond that those who cannot contain their verbal communications to social media vent their anger through "demonstrations" in open spaces creating a new habit of "crowd politics" that began with mobilising to bring about the downfall of the non-Muslim Governor of Jakarta who was jailed successfully, and which was evaluated to be connected to pressure from mass demonstrations.

In public communications between officials there also emerges communication that is private in nature through social media. The consequence is that criticism launched by an opposition figure against the government in parliament can be transformed into person to person criticism

through mass public media or social media, so that politics develops to become the politics of the individual public official with no institutional consequences for the relationship between the government and parliament. I refer to this phenomenon as the *deinstitutionalization of politics* that is very unproductive in terms of striving to advance the practical application of the principles of constitutional democracy. Under whatever the circumstances, politics must be institutionalized, not the other way around.

In Indonesian experiences, there are varied experiences, for example the problem that befell the Constitutional Court, in 2015 in which the third Chair of Constitutional Court was caught red handed receiving bribes and corruption. Whosoever conducts a crime, including someone occupying the position of Chair of the Constitutional Court, must be prosecuted firmly as an individual. At the same time, the institution of the Constitutional Court must remain standing resolutely because it has institutionalized well in terms of its position and function within the post-Reform constitutional structures of Indonesia. Based on the 1945 Constitution, the Constitutional Court has five authorities that are crucial in the system of Indonesia's constitutional democracy, namely: (i) to examine the constitutionality of laws (legislation) that is final and binding; (ii) to make rulings on electoral disputes, (iii) to make rulings on disputes between institutions of the state; (iv) to make rulings on the dissolution of political parties; and (v) to make rulings on opinions from the DPR that the President/Vice-president has/have committed such a violation as to meet the constitutional provisions for the DPR to recommend their dismissal to the Peoples' Assembly (MPR).

OTHER SPECIFIC QUESTIONS ON INDONESIA

As the questions raised in the Terms of Reference of the Conference, there are multiple legal/constitutional provisions in Indonesia on the relationship between the state and religion. The first principle of Pancasila is the Belief in One God; Art. 29 of the Indonesian constitution states that the state is based on the belief in one supreme God. But questions may be raised whenever cases emerge with regards to the implementation of these constitutional rules in practice. Firstly, for example, in January 2006, the Ministry of Religious Affairs accorded official status to six religions and the government formed the Indonesia Ulama Council (MUI) in 1975 and considers their fatwas in making decisions and drafting legislation. What is the status of the six religions accorded by the government? The so-called accordance or agreement by the government is actually only an administrative registration in nature. The official registration has many things to do with the tasks of the government to facilitate and empower the institutions or organizations of every religious group in the country, without neglecting the recognition of the constitutional status of the actual existences of other belief or religions.

Secondly, many observers consider that the Indonesian Constitutional Court's decisions such as on the "Blasphemy Law" case in 2010¹³, criminalized religious differences and allowed the government to retain its authority to ban groups it considers "deviant;" and to distinguish between religions and mystical beliefs? The Court has not articulated any clear principles to determine when action by the state to limit a person's freedom of religion would or would not be permissible. For me, it was just a misperception on the court ruling by many lawyers and scholars. Actually, what was approved in the ruling of the Court on the constitutionality of the blasphemy law should be understood as an encouragement to reform the law through legislation. The ruling should be understood that the law is only constitutional as long as it is not used by the government to retain its authority to ban groups it considers "deviant;" and to distinguish between religions and mystical beliefs. Besides, the substance of constitutional advice in the ruling was also clear that the law must be revised through legislation to avoid violation of freedom of beliefs guaranteed in the Constitution.

However, by the above ruling, the law is now still valid and can be misunderstood easily in the actual practice that the court lets the government retain its authority as it has been suspected. Therefore, for me, to avoid the misunderstanding, the court should have better accepted the request by the applicants and declared the law is conditionally unconstitutional rather than declared it to be conditionally constitutional, and since then the law would have been invalid until the legislators adopt a new revised law. This type of ruling order would have been more appropriate, more effective in forcing the legislators to prepare a new bill and would not create any misunderstanding. Unfortunately, during the case, I had finished my term and retired from the Constitutional Court, and the ruling of the Court had rejected the request of the applicant and declared the law to be conditionally constitutional. This means that the law was still to be accepted by the courts on conditions that in the implementation, the law would not be understood as banning so-called "deviant groups".

I thank you heartily for your interest and attention. I hope that our ongoing exchanges of views and experiences on the issue of constitutionalism in Asia will enrich all participants from all countries with new information useful for the development of political and legal science in general, and useful examples for the development of constitutional democratic practices in our respective countries.

¹³ The Constitutional Court of the Republic of Indonesia, Ruling no. 140/PUU-VII/2009.