

THE STRONG STATE AND PANCASILA: REFLECTING HUMAN RIGHTS IN THE INDONESIAN DEMOCRACY*

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Abstract

The rights of every Indonesian citizens are protected by the 1945 Constitution. Does the reality matches with the normative regulations? Does democratization improves the protection of human rights especially in term of the religious freedom? We find that there is a discrepancy between the ideal written constitution and the reality. In this following essay I argue that the failure of Indonesian democratic regimes to protect human rights is the result of the lack of “stateness”. The ideal of “stateness” is referring to Fukuyama idea that is “the ability of state to plan and execute policies and to enforce law”. I will present the argument that the weakness of the administration cause by an ambiguity in the interpretation of the Indonesia ideology, *Pancasila* (the Five-Principles). This paper will firstly discuss the idea of strong state and its relation to the protection of human rights. Alongside the theoretical examination of the concept, I will discuss the weakness of democratic regimes in Indonesia to protect human rights. This will be followed by an examination of the core argument of the paper, argue that the principle cause of the state weakness lies on the ambiguity of the administration to interpret *Pancasila*.

Keywords: *Pancasila*, Strong State, Human Rights, Democracy.

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I. INTRODUCTION

Indonesia has amended its Constitution (*Undang-Undang Dasar 1945*) which adopted Bill of Rights, as can be found in the article 28A-J of the Constitution.¹ The idea of incorporating bill of rights emerged for the first time when the constitution was prepared by the Investigatory Committee for the Effort for the Preparation of Indonesian Independence (BPUPKI, *Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia*) in June 1945. This historical evident is rarely mentioned by Indonesianist scholars. Bolan as long as my concern, is the one who describes in his book that Ulfa Santoso, a member of BPUPKI, proposed a draft of the constitution that included a section on human rights. But the idea was rejected and considered as an optional element by Supomo.² The adoption of the human rights sections in the constitution then happened 57 years later when it was amended in 2000.

The willingness of Indonesian governments to respect human rights came up concomitantly with the process of democratization. Ratification of covenants in relation to human rights protection took place in the Reformation era, except for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) which was ratified on 13 April 1984.³ During the Reformation era, the governments also enacted two laws related to human rights: the Human Rights Law (Law 39 of 1999) and the Human Rights Court Law (Law 26 of 2000).⁴ Thus, the rights of Indonesian citizens today are, normatively, protected by the 1945 Constitution.

Does the reality matches with the normative regulations? Hikmahanto Juwana argues that a positive development of the legislation was not followed by a real practice in the protection of human rights.⁵ The annual report of

¹ Tim Lindsey, 'Constitutional Reform in Indonesia: Muddling toward Democracy' in Tim Lindsey (ed), *Indonesia Law and Society* (2nd ed, 2008) 23, 28.

² B. J. Bolan, *The Struggle of Islam in Modern Indonesia* (1982) 30. Lindsey notes that Supomo, a supporter of the *integralistic staatside*, a kind of organic command-style of state, was the chief drafter of the Constitution.

³ The United Nations Human Rights Treaties, 'Indonesia, Ratification History' (2009) <http://www.bayefsky.com/pdf/indonesia_t1_ratifications.pdf> at 12 April 2009.

⁴ The act also became the legal basis for the establishment of the Indonesian National Human Rights Commission (KOMNAS-HAM). See, Hikmahanto Juwana, *Human Rights Practice in Post-Suharto Era: 1999-2006* in Naoyuki Sakumoto and Hikmahanto Juwana (eds), *Reforming Laws and Institution in Indonesia: An Assessment* (2007) 125.

⁵ *Ibid.*, p. 127.

Human Rights 2008 by The Wahid Institute and the Setara Institute confirmed the statement. The violations of human rights in 2008 escalated particularly in relation to the issues of the religious freedom. The Setara Institute,⁶ for example, recorded approximately 265 incidents of human rights in 2008. The apex of those incidents was the violations of some Muslim groups to the members of *Ahmadiyah*⁷ sect with 103 cases.⁸

Does democratization in Indonesia improves the protection of human rights especially in term of the religious freedom? Why we find a discrepancy between the ideal written constitution and the reality? In this following essay I will argue that the failure of Indonesian democratic regimes to protect human rights is the result of what Fukuyama called as the lack of 'stateness'. Using Weberian theory of state, Fukuyama argues that stateness is 'the ability of state to plan and execute policies and to enforce law'.⁹ Furthermore, I will argue that the weakness of Indonesian regimes is caused by an ambiguity of its very basic principle of the ideology, *Pancasila* (the Five-Principles).

Pancasila is a negotiated ideology that would become a sources of constant negotiation. *Pancasila* was created as the result of negotiation between the nationalist and the Islamist groups that yearn to apply the Jakarta Charter (*Piagam Jakarta*).¹⁰ It drives every regime to a dilemmatic position to stand in an outright principle of secular state respecting all religions and believes as stated clearly in the 1945 Constitution. Every administration, especially after the *Reformation* era, tends to lose to the pressures and demands of the Islamist groups. The Joint Letter of Decision (SKB, *Surat Keputusan Bersama*) on *Ahmadiyah* is one of the example which I wil elucidate it furthermore in the next chapter.¹¹

⁶ The Setara Institute is a non-government organization that focuses on the monitoring of human rights in Indonesia. The organization was founded by many prominent human rights activists as well as Indonesian religious and intellectual leader such as Abdurahman Wahid, Azyumardi Azra, Hendardi and Zumrotin. <<http://www.setara-institute.org/content/profil>> at 12 April 2009.

⁷ Ahmadiyah is a minority religious sect in Islam founded by Mirza Gulam Ahmad in India in 1889. Ahmadiyah came to Indonesia at about 1920, long before the independence. See Alfitri, 'Religious Liberty in Indonesia and the Rights of "Deviant" Sects' (2008) 3(1) *Asian Journal of Comparative Law* [18], The Berkeley Electronic Press <<http://www.bepress.com/asjcl/vol3/iss1/art3>>

⁸ The Setara Institute, *Berpihak dan Bertindak Toleran: Intoleransi Masyarakat dan Restriksi Negara dalam Kebebasan Beragama/Berkeyakinan di Indonesia. Laporan Kondisi Kebebasan Beragama/Berkeyakinan di Indonesia 2008*(2008) 20-24.

⁹ Francis Fukuyama, *State-building: Governance and World Order in 21st Century*, (2004) 6-7.

¹⁰ See below Part III (A).

¹¹ The SKB issued on 9 June 2008 under the pressure of the Islamists demonstrations. The SKB is an unclear decision because it does not clearly ban Ahmadiyah as favoured by the Islamists. However, the SKB order to the Ahmadiyah members to 'discontinue the promulgation of interpretations and activities that are *deviant from the principal teachings of Islam*, that is to say the promulgation of beliefs that recognize a prophet with all his teachings who comes after the Prophet Muhammad SAW'. The English version of the Decision accessed from (<http://www.thepersecution.org/world/indonesia/docs/skb.html>) at 13 April 2009.

This paper will firstly discuss the idea of strong state and its relation to the protection of human rights. Alongside the theoretical examination of the concept, I will discuss the weakness of democratic regimes in Indonesia to protect human rights. This will be followed by an examination of the core argument of the paper, argue that the principle cause of the state weakness lies on the ambiguity of the administration to interpret *Pancasila*.

II. STRONG STATE AND HUMAN RIGHTS

A. Defining “Strong State”

Do human rights need a strong state? Francis Fukuyama asked this question to discuss the human rights abuses in China. To answer that question, we will directly assume that the violations were the result of the ignorance of the strong central Communist government to protect human rights. That may be right, but for Fukuyama, the abuses happened mainly because the central Chinese government has failed to defend the rights of its people from the violations of the Chinese local governments. These local governments, especially under a particular body called township and village enterprises, had a powerful authority to do anything to establish and enhance business for the sake of economic development.¹² The body gained extraordinary achievement, but with the risk of the human rights abuses.

In response to this issue, the Chinese government may argue that the matter is merely the scale of priority. For Chinese people, economic rights are in the top agenda and need to be accomplished even with the risk of the limitations of political rights.¹³ This is a common phenomenon in undemocratic Asian developing countries like China, Malaysia, Singapore and Indonesia during the Suharto era. In fact, this issue has been debated since the prevailing of human rights paradigm in 1950s. Post-colonial states and the Communist bloc have resisted the idea of civil and political rights proposed by the Western countries as a normative standard of human rights in international community. Economic

¹² Francis Fukuyama, *Do Human Rights Require a Strong State* (2008), <http://www.digitalnpq.org/archive/2008_summer/13_fukuyama.html> at 1 April 2009.

¹³ Adamantia Pollis, 'Cultural Relativism Revisited: Through a State Prism' (1996) 18 (2) *Human Rights Quarterly* 316, 328.

and social rights are on the top priority of the Communist and post-colonial states.¹⁴ Although the Vienna Declaration stated clearly that “All human rights are universal, indivisible and interdependent and interrelated”,¹⁵ in reality, every state has its own independency, based on the principle of the sovereignty of state, to carry out one aspect as a priority above the other.

When we discuss authoritarian states such as Indonesia under the Suharto regime or Malaysia, China and Singapore, the image of a strong state always comes up to our mind. Suharto easily diminished and suppressed every criticism to his regime. The criticism should be oppressed because it would be an obstacle to achieve a stability and economic development. The kidnapping activists were the known phenomena during the New Order era.¹⁶ Every step of activists took would be under surveillance of the state apparatus. For the Suharto regime, development and human rights were seen as two conflicting concerns. Human rights, in this case, can temporarily be suspended.¹⁷

For this reason, demanding a strong state to protect human rights in contemporary Indonesian context seems to be an obscure idea. Bringing the idea of strong state back into the political life is like restoring the Suharto regime back to the nation. The obscurity to understand the concept of strong state, for Fukuyama, is “...because the word strength is often used indifferently to refer both to the scope as well as to the capacity”.¹⁸ Therefore we need to make a clear distinction between the scope and the strength of state. The scope of state relates to the role and function of state while the strength of state refer to the capability of state “to plan and execute policy and to enforce law clearly and transparently”.¹⁹

¹⁴ Henry J Steiner, Philip Alston, Ryan Goodman, *International Human Rights in Context* (3th ed, 2007) 263, 264.

¹⁵ *Vienna Declaration and Programme of Action: Report of the world Conference on Human Rights*, UN DOC A/CONF.157/23 (1993). Document accessed from: <[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)>.

¹⁶ This condition triggered the rise of resistance from human rights activist in the late Suharto Era, where a number of NGOs established KIP-HAM (The Independent Commission for the Monitoring of Human Rights Violations). This body later transformed into KontraS (The Commission for “the Disappeared” and Victims of Violence) <<http://www.kontras.org/jeng/index.php?hal=profile>> at 2 April 2009.

¹⁷ To discuss this issue, see, for example: Jack Donnelly, ‘Human Rights and Development: Complementary or competing Concerns’ (1984) 36(2) *World Politics*, p. 255.

¹⁸ Fukuyama, *Op.Cit.*, n. 9, 7.

¹⁹ Fukuyama notes that the other scholar called the strength of the state as the state capacity. *Ibid.*

The idea of strong state is not a new one.²⁰ In his work, *Political Order in Changing Society*, Samuel Huntington argues that for new post-colonial states, political order had to be their primary agenda. Political order could be achieved by making a balance improvement between rapid social changes and political institutionalization.²¹ The failure to create political institutions in response to a rapid social change were the cause of social conflicts, violence, revolutions and rebellions as can be seen in Asia, Africa and Latin America between 1945 to 1965.²² To maintain an order in a complex community like state, the strength of political institutions were needed. Furthermore, "...the strength of political institution depends on the scope of support and level of institutionalization".²³

Huntington's book was a respond to the failure of the modernization theory which believed that political order would rise as a consequence of economic development and social reform. While examining the handicap of the American foreign policy in 1950s which influenced by the modernization theory, Huntington said, "... in reality, economic development and political order were two independent elements and not necessarily connected one each other."²⁴ Furthermore, for the post-colonial states, stability was more important than liberty. The central question for a post-colonial state government was not whether the state could, for example, guarantee the political freedom and human rights, but how the government could govern. The government, first of all, must have legitimate authority to maintain public order before execute the other function.²⁵ Huntington argues, "...men may have order without liberty but they cannot have liberty without order".²⁶

When the book was republished in 2006, Fukuyama in the foreword of the book argues that the Huntington's approach has become a foundation for a 'development strategy' where an authoritarian regime in a new state is needed

²⁰ For comparison, see also Joel S. Migdal, *Strong Societies and Weak States* (1988). In his book he describes strong state as high capability to penetrate and regulate society as well as extract and use resource. In contrary, a weak state is the one that has low capability to do those things.

²¹ Huntington means this term as 'the process by which institution or organization obtain value and stability'. See, Samuel P. Huntington, *Political Order in Changing Societies* (1968), 12.

²² *Ibid.*, p. 4.

²³ *Ibid.*, p. 12.

²⁴ *Ibid.*, p. 6.

²⁵ *Ibid.*, p. 7.

²⁶ *Ibid.*, p. 8.

temporarily to establish political order and law enforcement for the sake of economic and social development. When these foundations are established, democracy and political freedom will rise concomitantly.²⁷ However, this mode of thinking is dangerously used as a foundation for authoritarian regimes to preserve their despotic governments. For this reason, Thomas Carothers, criticizes this view as the fallacy of 'sequencing' idea.²⁸

Like Huntington, the theory of strong state proposed by Fukuyama came up as a response to the decreasing role of state in a liberalizing world. No doubt that Fukuyama is a proponent of liberal policy. In *The End of History*, Fukuyama states that since the collapse of the Communist bloc, the only system that can survive and gives benefit for human being is liberalism. But, by cutting back the role of state, especially by privatization, the capability of state to regulate society and to enforce law unintentionally decreasing. Consequently, the liberalization does not bring a better condition. Otherwise, the decreasing scope of state generates a number of crisis ranging from diseases and poverty to human rights, especially in the third world countries.²⁹

For this reason, Fukuyama argues, "... the state-building agenda is as important as state reducing one". To begin this program, the distinction between the scope and the strength of state is needed. Furthermore, the distinction is useful to measure the degree of stateness. In this point, Fukuyama offered a new outlook to see and measure the degree of stateness of a particular country. In relation to the scope of state, Fukuyama uses three different categories adopted from the World Bank Development Report 1997 that differentiated the size of states into minimal, intermediate and activist. Liberal or neo liberal states stand in the minimalist position where its scope includes the very basic functions such as providing public goods, defense, enforcing law, provide order in society, protecting property rights and providing public health. In the opposite side are socialist or communist states where its scope includes not only the basic functions but

²⁷ Francis Fukuyama, *Foreword* in Samuel Huntington, *Ibid*, xiii. This type of thinking can be found in Huntington's disciple, Fareed Zakaria who warns the rising of dangerous illiberal democracy (democracy without rule of law). See Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (2003).

²⁸ Thomas Charoters, 'How Democracy Emerge the "Sequencing" Fallacy' (2007) 18 (1) *Journal of Democracy* 12-27.

²⁹ Francis Fukuyama, 'Imperative of State Building' (2004) 15 (2), *Journal of Democracy*, 17-31, p. 18.

also the redistribution of wealth. In the middle position are states with welfare state system.³⁰

How to measure the strength of state? The strength of state relate to, mainly, the capability of state to design and execute policy and to enforce law. In this case, aspect of effective bureaucracy, controlling corruption, maintaining transparency and accountability of government are included to measure the strength of state. To measure all these aspects, Fukuyama uses reports from several institutions such as Transparency International, Freedom House, and the World Bank as well as the Polity project. Using the data from those organizations, Fukuyama formulates a matrix with 'x' (the scope of state) and 'y' (the strength of state) axis. By this method he describes, for example, that the US is a state which has a moderate scope of state but has very good capacity to design and execute the policies, while Sierra Leone considered as a country which has not only a narrow scope of state but also weak capability to enforce law and to regulate its society.³¹ Fukuyama stated that even for orthodox economist such as Milton Friedman, the agenda to strengthen the capacity of state is more important than economic liberalization. Privatization is less important than the rule of law, especially for the third world where the state institutionalization is ongoing process for establishment.

B. The Weakness of State and Human Rights Abuse

What Fukuyama describes in his book mostly relate to the economic issues. However, Fukuyama's work implicitly suggests that the state-based analysis has become a central argument to examine politics, social, economic as well as human rights problems. This approach has been flourishing since 1980s, mainly after the printing of *'Bringing the State Back in'*. This book marked the prevailing of statist approach not only in political field but also in the others.³² The book gives attention to state as an autonomous actor and sees it not merely as 'the arena for which social conflict are waged' as can be seen in the Marxist theory.³³

³⁰ Fukuyama, *Op.Cit.*, n. 9, p. 8-11.

³¹ *Ibid.*, p. 14-15.

³² Karen Barkey and Sunita Parikh, 'Comparative Perspectives on the State'(1991) 17 *Annual Review of Sociology* 523-549, p. 524.

³³ *Ibid.*, see also Theda Skocpol, 'Bringing the State Back in: Retrospect and Prospect' (2008) 31 (2) *Scandinavian Political Studies* 109-124, p. 110.

Thus, using the statist approach in examining human rights issues will be beneficial due to the fact that the problems of human rights do not lie merely in, for example, the normative regulations of human rights or the adoption of a particular convention into national regulations, but in the disability of states to execute those regulations.

Indonesia has incorporated Bill of Rights in the amendment of its Constitution. It also has signed and ratified a number of the covenants of human rights. Furthermore, two human rights regulations have been enacted in the state. But, does Indonesia today have a better condition in terms of human rights record in comparison to the Suharto regime?

According to the Commission on Weak States and U.S. National Security, there are approximately 60 states in the world categorized as weak states.³⁴ The main problem of the weak states is the inability to control violence. The states also suffer from ineffective bureaucracy, mushrooming of corruption, lack of independent judiciary and disability to control its territories.³⁵ Put another way, the weak states are burdened by the low ability to “penetrate, regulate, extract and appropriate their resource”.³⁶ Moreover, sometimes the weak states have a high capability in some aspects such as in penetrating its apparatus into the society and extracting the resource while very low in the others: regulating and controlling their societies as well as using the resources in an uncorrupted way. All those states have problems with delivering “the fundamental political goods: physical security, legitimate political institutions, economic management as well as social welfare”.³⁷ In the realities, different states will have different cases. Therefore, we have to put the weak states in a gradation ranging from the failed and collapse states to the relatively better but still fragile one.³⁸

In addition, the problem of state weakness is not merely caused by the lack of state capacity, but also the result of deficiency of political will. Refer to Patrick, four different categories can be created to cluster weak states in relation to the

³⁴ Stewart Patrick, “Weak States and Global Threats: Facts or Fiction (2006) 29 (2) *The Washington Quarterly* 27-53, p. 29.

³⁵ Neil A. Englehart, “State Capacity, State Failure, and Human Rights (2009) 46 (2) *Journal of Peace Research* 163-180, p. 163.

³⁶ Migdal, *Op.Cit.*, n. 21, 5.

³⁷ *Ibid.*

³⁸ Patrick, *Op.Cit.*, n. 42, 30.

lack of both its capacities and will: “weak states with relatively high capacity and strong will, states that weak but have willing, state that have the means but not the will, and states that lack of both the capacity and the will”.³⁹

Furthermore, weak states also can be defined based on “three capability gaps: security gap, capacity gap and legitimacy gap”. By the security gap means that states cannot perform properly its basic function in controlling the use of forces within the territories. If states fail to control the violence, groups within the civil societies will have an ability to utilize violence and become a state competitor in this task. The second gap relates to the role of state in encountering basic goods for its society. Inability of states to meet this demand will create several crises such as poverty, pandemics of diseases and humanitarian. The last category has to do with legitimacy gap. In this case states have to develop and keep its legitimacy by enforcing law, protecting basic rights and freedom and giving opportunities to its citizen to participate in the political process.⁴⁰

We have to go further by asking a question: If state weakness is the source of multiple crises, including human rights, can the strength of state or state capacity be the guardian of human rights? Reasonably, it should be like this: the stronger the state the better protection of human rights will be. Look a glance to reality will confirm the statement: Sudan, Burundi, Afghanistan, and the Congo Republic are the states with very low capacity to govern and very bad record in protecting human rights.⁴¹

C. Reflecting on Indonesia: Democratic Transition and Human Rights Violations

The rise of the New Order era in the late 1960s was marked by a massacre of hundreds of thousands up to millions of Indonesian communists and people who were suspected as the members of the communists. A number of scholars estimated that the victims of the New Order anti-communist policy ranged from

³⁹ *Ibid*, See also The Commission on Weak States and U.S. National Security, 'On the Brink: Weak States and US National Security' (2004) p. 1.

⁴⁰ The Commission, *Ibid.*, p. 14-15.

⁴¹ Englehart, *Op.Cit.*, n. 43, 166.

78,000 up to 2,000,000 peoples.⁴² If we use a maximum estimation, the massacre would be one of the worst human rights disaster in the modern history.

Since that time, mainly during the Suharto regime, sporadic violence and human rights abuses have continuously occurred in Indonesia. Possibly due to this reason, Andrian Vicker, in his exaggerated phrase, called Indonesia as violent state.⁴³ He notes that what was called as 'order' during the New Order era was the order that based not on the law enforcement but on the state coercion. Correspondingly, Elizabeth Collinse in her article discusses a question: do Indonesian people culturally tolerate violent? She argues that the assumption saying that Indonesian people characteristically vicious was claimed usually by Indonesian elites in seeking their ground for a particular purpose such as to stop criticism using repression or to cover their weakness in regulating the society.⁴⁴ Furthermore, Collinse notes that the violence that continuously occurs is the result of four causes: the institutional failure, the defect of developmental policy, the paramilitary tradition and the use of paramilitary force by the elites to justify their interest.

If we look into violations of human rights during the Suharto regime, we can add one more cause: it was the result of an anxiety of the regime assuming that some people in the society wished for replacing *Pancasila* by other ideology.⁴⁵ The regime continuously suspected both the 'left extremist'; mostly refer to whom that suspected had any relation with the PKI and 'the right extremist' usually relate to the radical Islam, as the groups that endangered *Pancasila*.⁴⁶ The result of this anxiety was clear: massacre of thousands of the communist member. The communism was banned while socialism has become a distrustful ideology.

On the other hand, the repression to the Muslim groups was not as bad as what happened to the communist group. Among a number of human rights

⁴² Helen Fein, 'Revolutionary and Antirevolutionary Genocides: A Comparison of State Murders in Democratic Kampuchea, 1975 to 1979, and In Indonesia, 1965 to 1966' (1993) 35 (4) *Comparative Studies in Society and History* 796-823, p. 802.

⁴³ Andrian Vicker, 'Reopening Old Wounds: Bali and the Indonesian Killings-A Review Article'(1998) 57 (3) *The Journal of Asian Studies* 774-785, p. 774.

⁴⁴ Elizabeth Fuller Collins, 'Indonesia: A Violent Culture?'(2002) 42 (4) *Asian Survey* 582-604, p. 583.

⁴⁵ The analysis saying why a regime violates human rights can be found in Christian Davenport and David A. Armstrong, 'Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996'(2004) 48 (3) *American Journal of Political Science* 538-554, p. 539-540.

⁴⁶ Donald E. Weatherbee, "Indonesia in 1984: Pancasila, Politics, and Power" (1985) 25 (2) *Asian Survey* 187-197, p. 189.

abuses occurred during the Suharto regime to the Muslim groups, the *Tanjung Priok* incident on 12 September 1984 was the most outrageous one. The incident was triggered by the insolence act of the Military Sub-District Officers by entering a mosque without taking off their shoes and spraying dirty water on the mosque wall. The real number of the victims was never known. But it was estimated that 600 people were killed, several hundreds injured and 171 people were missing.⁴⁷ Subsequently after the incident, the authoritarian regime arbitrarily arrested a number of prominent Muslim leaders such as Abdul Qadir Djaelani, H. M. Sanusi, Usman Alhamidi and A.M. Fatwa⁴⁸.

The kidnapping of activists and the violent disturbances of amok people were the landmark of the ending of the Suharto regime. During this phase, Indonesian-Chinese people became the target of hostility of mass violent. A series of violence targeting Chinese community occurred in several cities in Java such as in Purwakarta, Pekalongan, Jakarta, Karawang, and Tasikmalaya within three months, from October to December in the late 1997. Hundreds of houses and public facilities were burned down. Tens of people died.⁴⁹ The brutality of the regime showed clearly at the *Trisakti* incident where the army shot student's demonstration and caused four students died and tens of them injured. In the last days of the regime, the brutality still hunted down the victims: the Indonesian Special Force (*Kopassus*), under the command of Prabowo, kidnapped tens of activists. Today about 14 people of the victims are still missing.

When Suharto fell in 1998, a chaotic situation later followed for several years. It was happened because the regimes that replaced Suharto, BJ Habibie, Abdurahman Wahid and Megawati, failed to regulate and penetrate into the society. In this case, those regimes were weaker than the previous one. Suharto was successful in penetrating his power into the society. At the same time, he also was capable of extracting resources for establishing his regime. But, Suharto failed both to regulate the society in establishing order based on the rule of law and to appropriate resources for the benefit of the people.

⁴⁷ Carmel Budiarto, 'Militarism and Repression in Indonesia'(1986) 8 (4) *Third World Quarterly* 1219-1238, p. 1233.

⁴⁸ Bahtiar Effendi, *'Islam and the State In Indonesia'*(2003) p. 52.

⁴⁹ Collinse *Op.Cit.*, n. 58, p. 592.

The weakness of the regimes after Suharto can be seen obviously when we look into several ethnic conflicts occurred from 1998 to 2003 in Maluku, Poso, and Kalimantan. During this disaster era, those provinces were like the land belongs to no one: no law no authority no security. Every group had ability to utilize violence using any kinds of weapon. The war in Maluku, for instance, was triggered by a small incident of fight between two young men. Within several days, the incident generated the riots that spread to the other regions. Within several months, the riot suddenly transformed to be an ethnic and religious war.⁵⁰ Consequently, thousands of people died. Mosques, churches, public facilities, houses and villages were destroyed and burned down. It wishes never happened if the governments at that time had an ability to enforce human rights regulations as stated in the Constitution and other regulations (including several ratified covenants). It would not take more than 4 year to solve, because it was too long and too expensive, if the governments at that time were strong enough to handle the crisis.

During the New Order period the actor of human rights abuses was the state, otherwise, at the transition time the violations usually carry out by the citizens as a consequence of the weakness of state. The powerful civil society has risen as the state competitor in monopolizing violence. Accordingly, the paramilitary groups such as *Laskar Jihad* (the Jihad Paramilitary Force), *Laskar Pembela Islam* (The Paramilitary Force of Defender of Islam) and *Laskar Mujahidin Indonesia* (the Indonesian Holy Warrior Paramilitary Force), as noted by Collinse, have privatized violence. These paramilitary groups act like military man. They wear a particular uniform and keep different kind of weapons. They also have a recruitment mechanism as well as military training. In several moment, these groups operates like policemen: sweeping discotheques, cafes and casino, stopping demonstration, closing down 'heretic' *Ahmadiyah* mosques, and, during the Maluku conflict, transforming to be armed militias.⁵¹

⁵⁰ Jacques Bertrand, 'Legacies of the Authoritarian Past: Religious Violence in Indonesia's Moluccan Islands' (2002) 75 (1) *Pacific Affairs* 57-85, p. 74-80.

⁵¹ Noorhaidi Hasan, 'Faith and Politics: The Rise of the Laskar Jihad in the Era of Transition in Indonesia' (2002) 73 *Indonesia* 145-169

The existences of these quasi-military groups are the major problem for Indonesia today. Collinse is quite true when she notes that one cause of the prevailing of violence in Indonesia is the presence of paramilitary tradition. In 2008, the Islamic Defender Front (FPI, *Front Pembela Islam*), a main body of the *Laskar Pembela Islam*, was the most frequent actor of human rights abuses. The Setara Institute recorded that FPI was responsible for 27 incidents of human rights abuses in 2008, while the report of the Wahid Institute notes 18 cases of violation initiated by the same actor.

With the coming of the *Reformasi*, Indonesia, in fact, has been moving from a bad autocracy to a weak democracy. No doubt that in the last 5 years the country achieved several progresses. The most obvious one is the progress in political field. Democracy has become a guarantee for everybody to express their opinions, ideas or critics without fear of being jailed or kidnapped. Freedom House scored Indonesia with 2 for the political rights and 3 for the civil liberty in 2008.⁵² Democracy also brings about some developments in the legal issue. Regulation on the eradication of corruption and the human rights protection were among dozens acts passed by Indonesian parliament. The establishing of the constitutional court in August 2003 was a landmark of this development. The court is the safeguard of constitutional rights of Indonesian citizen. Since that time every citizen has a constitutional right to ask the court to make a judicial review on a particular law if the law violated his or her constitutional rights.⁵³ Last but not least, the conflict resolution between the Free Aceh Movement (GAM, *Gerakan Aceh Merdeka*) and the Indonesian government in 15 of August 2005 was the most important achievement in Indonesian security. This peace agreement terminates the rebellious conflict that continued for decades and caused humanitarian crisis in Aceh.

However, democracy is not enough; normative regulations as well. Indonesia, in fact, is still regarded as the weak state. One indicator supporting the argument

⁵² See Freedom House, Country Report 2008 <<http://www.freedomhouse.org/template.cfm?page=22&year=2008&country=7412>> at 12 April 2009. The organization uses score from 1 to 7 where 1 describe a fully free democracy and 7 for the lowest freedom condition.

⁵³ The Constitutional Court of the Republic of Indonesia, 'The Constitutional Court Regulation No. 06/PMK/2005 On The Procedures of Judicial Review of Law' (2005) <http://www.mahkamahkonstitusi.go.id/eng/peraturan_mkri.php>.

is that Indonesian record on corruption is disgraceful. In the last 5 years, almost no progress in term of eradication of corruption in the country. According to the Corruption Perception Index published by the Transparency International, Indonesia was one of the world's most corrupt country with score 2 in 2004 and 2.6 in 2008.⁵⁴ No doubt that corruption is one factor that weakens the state. Furthermore, the Fund for Peace, an organization published the Failed State Index, in its annual report 2008 noted Indonesia as the weak state. Overall score for the state was 83 in 2008. This score slightly well than the same report in 2007 where the score was 84.4. However, those achievements were relatively good in compare to the score of the state in 2006 where the score was 89.2.⁵⁵ The Fund also asserted that there were four the state institutions with very weak condition and that have to be strengthened: military, police, judiciary and civil service⁵⁶. These institutions were troubled by the corruptions and the inefficiency to carry out their functions to enforce law and regulations.

Based on the reason above, we can understand why human rights record of the state achieved only a little progress in the last several years. Refer to the Political Terror Scale (PTS) report, the country ranking from 2003 to 2007 was 3.⁵⁷ It means that the country was still considered as having bad record on human rights due to the presence of political murders and brutality as well as other human rights incidents. The assassination of the human rights activist, Munir, on 6 September 2004 was a real evident of the political murders. The data from the Ciri Human Rights Index 2008 confirmed the PTS record. The Physical Integrity Rights Index, an index found in the Ciri Project that measure state record which uses four indicators: torture, extrajudicial killing, political imprisonment and disappearance, scored 3 to Indonesia in 2007. The Physical Index uses score ranged from 0 to 8 where 0 shows no government respect for those four rights and 8 for full government respect⁵⁸. In addition, the Ciri

⁵⁴ The Transparency uses ranking from 0 to 10 where 1 show shows highly corrupt and 10 for highly clean. See <http://www.transparency.org/policy_research/surveys_indices/cpi>.

⁵⁵ The Fund, *Op.Cit.*, n. 52.

⁵⁶ *Ibid.*

⁵⁷ See, <<http://www.politicalterroryscale.org/download.php>>.

⁵⁸ Ciri Human Rights Data Project, 'Short Variable Descriptions for Indicators in The Cingranelli-Richard Human Rights Dataset (2008)' <<http://ciri.binghamton.edu/documentation.asp>> at 4 May 2008.

also noted that torture, freedom of religion and worker's rights were the major problem faced by the country. These three areas have not improved, with a score that indicates a very bad record, since 2005. Thus, the Indonesian record is far from what could be expected in regard to all the regulations that have been enacted in relation to human rights.

III. THE AMBIGUITY OF INTERPRETING *PANCASILA* AND RELIGIOUS FREEDOM

A. Ambiguity on Interpreting *Pancasila*?

Among several human rights problems, religious freedom seems to be the most interesting one to be examined. The issue relates to the debate of compatibility between Islam and both democracy and human rights. The prevailing assumption sees Islam as an obstacle or, at least, as an unfriendly culture for both democracy and human rights.⁵⁹ Indonesia, in this context, is an interesting case since the world's largest Muslim country has adopted democracy following the collapse of the Suharto's New Order in 1998. Since that time, Indonesia has conducted three democratic, fair and peaceful elections.⁶⁰ It is too early to say that Indonesia is an exception for this general assumption. However, for Indonesian people, the recent situation can be a challenge to prove whether or not the country can be the exception. It also has a momentum to gain a better life in all aspects.

To be a good example of the compatibility between Islam and both democracy and human rights, Indonesia confronts a perpetual challenge: negotiating Islam and the state. This problem has arisen since the early days of the state when the founding fathers sought a foundation of ideology for the state in preparation for the independence in 1945. The negotiation seems to be an unfinished business because it remains a main problem of the days as can be seen in the demand of the implementation of Shari'a law that predominates in the *Reformasi*. It also can be the source of the state's weakness as well as the cause of the vulnerability of religious freedom in the future.

⁵⁹ See for example Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996).

⁶⁰ The first democratic election in the *Reformasi* era was in 1999. In 2004 for the first time the people voted for their president. Last month (April 2009), Indonesia conducted the third general election that will be followed by the presidential election in next September.

Pancasila is the state ideology that was an outcome of a contentious negotiation between *santri*, a devout Muslim group as opposed to an *abangan* who less devout,⁶¹ and *kebangsaan* (the nationalist) in the beginning of the republic. The ideology consists of five principles: belief in (1) One Supreme Being; (2) just and civilized humanity; (3) nationalism; (4) democracy; and (5) social justice. These principles are incorporated into the Preamble of the 1945 Indonesian Constitution.

Look into the history, in facing the independence, the founding fathers who were involved in BPUPKI, also known as *Dokuritsu Zyunbi Tyoosakai*, trapped in severe and long debate to find an ideology for the state. The debate was around the question whether the state should adopt Islam as its ideological foundation or not. The founding fathers in BPUPKI that the majority of them were Muslim split into two groups: the nationalists and the Islamists. The latter insisted that the country should be based on Shari'a law while the former saw that the country should be based on a secular-inclusive ideology.⁶²

Before the independence, social and political movements in the country were initiated by the Islamists groups. It was the Islamic Trading Association (SDI, *Sarekat Dagang Islam*), founded by H. Samanhudi in Solo in 1911, that initiated the first political movement. The SDI later transformed to be the Islamic Association (SI, *Syarekat Islam*) and became a more significant organization under the leadership of H.O.S. Tjokroaminoto and Agus Salim. George Mc.T. Kahin notes in his famous book, *Nationalism and Revolution in Indonesia*, that the organization was the first undertaker in fighting for the independence using a modern political program.⁶³ The organization attracted follower from various social class: trader, *ulama* (religious leader), worker, some *priyayi* (aristocrats) and also peasants.

Unfortunately, the organization could not maintain its viability since the organization was suffered by internal friction in 1920s. The friction began when

⁶¹ This is a distinction of social group in Indonesia proposed by a famous Indonesianist, Clifford Geertz, see Clifford Geertz, 'The Religion of Java' (1960) p. 6.

⁶² Effendy, *Op.Cit.*, n. 62, p. 13-14.

⁶³ George Mc.T. Kahin, 'Nationalism and Revolution in Indonesia' (1952) p. 65-66).

the organization was infiltrated by the Marxist-oriented members. The infiltrators mostly were the former member of a leftist organization called *Indische Social Democratische Vereeniging* (ISDV), founded by Hendrik Sneevlet, a former member of the Social Democratic Labor Party in Netherland, in 1914 but later collapsed because it failed to attract *pribumi* (indigenous Indonesia).⁶⁴ The friction was obvious when Darsono, Alimin and Semaun became a prominent figure of the organization. They were the main actors in articulating Marxist ideology among the members. The schism was more serious after the sixth congress of the SI that held in Surabaya in 1921. The congress, according to von der Mehden, “signaled the end of an era for Sarekat Islam and the demise of the organization as a mass movement”.⁶⁵

The diminishing role of SI and its internal friction made the organization failed to draw attention of many emerging Western-educated intellectuals like Sukarno, a disciple of Tjokroaminoto. He decided to form a new political organization in 1927 by establishing the Indonesian National Party (PNI, *Partai Nasional Indonesia*) which had different political view with his master’s party. The Sukarno’s party later would attract young intellectual leaders; among them were Muhammad Hatta and Sjahrir. These young people then became a prominent figure of the nationalist groups. This nationalist movement, in turn, took stage in confrontation with the Islamist activists, as noted by Bahtiar Effendi:

“...this nationalist movement, more than the earlier encounter with Marxism, set the stage for the ideological confrontation between the leader and activists of political Islam and their nationalist counterpart, especially with regard to the relationship between Islam and the state in an independent Indonesia.”⁶⁶

Since that time, the debate between these two groups had continued around the nature of nationalism. Both of these groups, in fact, had the same purpose: making Indonesia free and independence. The only different was whether they should adopt Islam for the basis of the state or not. The Islamist groups argued that the character of the nation should be based on Islamic values. Furthermore,

⁶⁴ Effendy, *Op.Cit.*, n. 62, p. 16-17.

⁶⁵ Fred R. von der Mehden, ‘Marxism and Early Indonesian Islamic Nationalism’ (1958) 73 (3) *Political Science Quarterly* 335-351, p. 348.

⁶⁶ Effendi, *Op.Cit.*, n. 62, p. 20.

for this group, the foundation of a nation should be understood as a medium to seek *ridha* Allah (transcendental consent of Allah), and implementing Shari'a law as a law of the nation would be the best way to achieve this purpose. On the other hand, Sukarno, the leading figure of the nationalist groups, argued that the idea of making Islam as a foundation would make a discrimination because not all people who live in the country were adherents of Islam. For this reason he proposed that there should be a clear separation between Islam and the state. He wrote:

“Thus reality shows us that the principle of the unity of state and religion for a country which its inhabitant is not 100% Muslim could not be in line with democracy. In such a country, there are only two alternative; there are only two choices: the unity of state-religion, but without democracy, or democracy, but the state is separated from religion.”⁶⁷

We can put the debate in the BPUPKI (later transformed became the Preparatory Committee for Indonesian Independence, PPKI) to determine the foundation of the state on this historical development. The Committee that established on 1 March 1945, with 62 members, was continuously devoted to work for the preparation of the independence until mid-August 1945. Despite examining the appropriate ideology for the state, the Committee also focused on several issues such as defence, economy, finance and educational systems of the new state.⁶⁸ Among those issues, the debate on finding basis of the state was the most confiscated one. Sukarno, Hatta, Supomo, Muhammad Yamin, A. A. Maramis were among others who stood for the secular principle in confrontation with Agus Salim, Kahar Muzakkar, Wahid Hasyim and many others who insisted on the demand of Islamic state. While the former agreed to accept Pancasila, a five principles that proposed by Muhammad Yamin and Sukarno, the latter insisted on their demand. The meeting was stuck and ended up with agreement to form a small committee, with 9 members from both factions, focusing on compromising these two views.⁶⁹

⁶⁷ Soekarno, *Dibawah Bendera Revolusi* (1964) p. 452. The English translation is quoted from Effendi, *Ibid.*, p. 23.

⁶⁸ Bolan, *Op.Cit.*, n. 2, p. 17.

⁶⁹ *Ibid.*, p. 23-25.

The small committee which held a meeting on 22 June 1945, with very hard endeavour, finally achieved a compromise. They created a draft of constitution which would be legalized in the subsequent full member meeting. Muhammad Yamin called this document of agreement as the Jakarta Charter. The Charter contained the introduction, the draft declaration of independence and revised five principles (Pancasila). The point that had revised was the first principle which initially sound “*the belief in God*” changed to be “*the belief in God with the obligation for adherent of Islam to carry out Islamic Shari’a*”

In the subsequent meeting, held on 10 to 16 July 1945, the agreement failed to be legalized. Two prominent figures represent the Christians community, A.A Maramis and Latuharhary, supported by two persons from the nationalist groups, Hosen Djajadiningrat and Wongsonegoro, objected to the additional sentence “*with the obligation...*” because it would be the source of discrimination. The Committee again involved in a severe debate. Instead, in response to the rejection of the committee, the Islamists demanded one more provision that should be included in the Constitution. The provision followed as “*the President of the Republic of Indonesia must be a born Indonesian who is a Muslim*”. The Islamists later insisted with these two demands. The meeting ended after Sukarno appealed personally to the nationalist and Christian members requesting sacrifice for the sake of the independence.⁷⁰ The meeting brought nothing about but a shaky agreement as can be seen in the objection of the Christians community who lived in the eastern region. They would abandon from the Republic if the provision and additional sentence in the five principles were not deleted.⁷¹ The Islamists were in turn to give their great sacrifice. Muhammad Hatta, a nationalist but had very close relation with the Islamists, appealed the Islamists to agree to make a particular modification of the Constitution, especially in relation to the provisions that became the objection. Finally, the Jakarta Charted was nullified, but the first principle then was transformed to be “*the Belief in the One and Only God*”.

⁷⁰ *Ibid.*, p. 33.

⁷¹ Deliar Noer, “*Partai Islam di Pentas Nasional 1945-1965*” (1987) p. 40.

Bahtiar Effendi describes the two reasons why the Islamist group easily accepted the nullification of the Jakarta Charter. Firstly, the phrase “*One and the Only God*” was “a symbolic gesture to denote the presence of Islamic monotheism element in the state ideology”. Secondly, the Islamists saw an opportunity to make an Islamic constitution for the nation through a general election that believed to be held in the near future after the independence.⁷² The 1945 Constitution, as stated several times by Sukarno, was only a temporary constitution. However, several leaders in this group such as Isa Anshary and Kasman Singodimedjo remained reluctant to accept the revision. Furthermore, they saw this moment as the first defeat of the Islamist groups in their effort to form an Islamic state in the republic.⁷³ Since that time, the Islamist groups has involved in a perpetual struggle to realize a dream that recognized as their rights: implementing Islamic law in the land.

The historical development of how *Pancasila* was formulated, indeed, have opened a wide interpretation in relation to the question whether Indonesia is a secular state that clearly separate state and religion or a semi-Islamic state as interpreted by the Islamist groups or neither both of them⁷⁴. *Pancasila*, until today, is ‘vague enough to be acceptable to all the disparate political and religious belief’⁷⁵. Moreover, this situation, to some extent, originates an unsteady foundation for every regime in the nation to formulate a fair policy in regard to the religious issues. This condition also weakens the state institutions in regulating society.

B. The Guardian and the Sympathizer

“... *No mountain is too high, no ravine too deep, no river too rapid, no forest too dense to form an obstacle for the soldiers of our army...defending the proclamation, the Revolution and the Pancasila...He who deviates will experience total destruction*”.⁷⁶

This exalted phrase was quoted by Bolan from Anne Marie Thé to describe the ending of a long rebellious movement of *Darul Islam* (DI, the Territory

⁷² Effendi, *Op.Cit.*, n. 62, p. 32-33.

⁷³ *Ibid.*

⁷⁴ Michael Morfit, ‘Pancasila: The Indonesian State Ideology According to the New Order Government’ (1981) 21 (8) *Asian Survey* 838-851, p. 840.

⁷⁵ Budiarjo, *Op.Cit.*, n. 61, p. 1224.

⁷⁶ Anne Marie Thé, ‘*Darah Tersimbah di Jawa Barat*’ (1968). Quoted from Bolan, above n. 2, p. 62.

of Islam) in West Java in 1962. Several months before, the Indonesian army arrested Sekarmadji Maridjan Kartosuwirjo, the one who in the mid 1920s spent his time in Surabaya in the same lodging with Sukarno and became the disciple of the SI leader Tjokroaminoto. While Sukarno later became a leader of the nationalist groups, Kartosuwirjo consistently followed the idea of his master in struggle to implement Islamic law in the country.⁷⁷ He was the one who stand in the extreme position of the Islamists line as can be seen when he declared the independence of the Islamic state (*Darul Islam*) on 14 August 1945 as the result of his disagreement with the nationalist leaders⁷⁸. However, it was not until 1948, however, that the declaration turned into an armed rebellion when Kartosuwirjo declared the independence of *Negara Islam Indonesia* (NII, the Indonesian Islamic State) in West Java. This rebellion was more serious problem for the republic when Kahar Muzakkar, a former member of BPUPKI, in 1952 declared that he and his follower in Sulawesi were became a part of *Darul Islam* under the leadership of Kartosuwirjo. The rebellion later continued for 11 years and ended when the Indonesian army captured Kartosuwirjo in June 1962. The rebellion caused approximately 25,000 people died and 120,000 houses were burned.⁷⁹ In my view, this event was the first human right tragedy in the country as the consequence of an unsteady foundation of the ideology.

The rebellion of DI had intensified an antagonistic relationship between Islam and the state. In spite of this revolutionary struggle, the Islamists continued their effort to implement Shari'a in the nation through a constitutional way. The first national election in 1955, 10 years after the declaration of independence, would be the best moment to realize the dream. They could organize a popular support, through a democratic mechanism, to pave the way for realizing the Islamic state. But, the hope might be difficult to be realized since the Islamists parties which consisted of Masyumi,⁸⁰ NU and PSII, controlled only 43.5 per cent of the seats. They failed to be a majority in the parliament.

⁷⁷ Liem Soei Liong, 'Indonesian Muslims and the State: Accommodation or Revolt?' (1988) 10 (2) *Third World Quarterly* 869-896, p. 874).

⁷⁸ Karl D Jackson, 'Traditional Authority, Islam and Rebellion: A Study of Indonesian Political Behavior (1980) p. 9-10, Effendi, *Op.Cit.*, n. 60, p. 35, Bolan, above n. 2, p. 57.

⁷⁹ Jackson, *Op.Cit.*, p. 15.

⁸⁰ The biggest Islamic party at the moment, formed in November 1945 as the sole party for the Islamists groups at the moment. See Bolan, *Op.Cit.*, n. 2, p. 10-12.

It is interesting to see the reason why the election was delayed for 10 years. Despite the revolutionary period from 1946 to 1950 where the nation faced re-occupation of the Dutch, there was another reason as noted by Herbert Feith: the fear of the nationalist groups to the great possibility of the Islamists group to win the election if it held too early.⁸¹ Due to this anxiety, the nationalists group did anything to postpone the election until the supporter of Pancasila was stronger.⁸² Thus, when the first election was held in 1955, the nationalists were confident that the Islamists, even though still significant, would not get a majority.

One of the main tasks of the new elected members of the parliament at that time (Constituent Assembly, *Dewan Konstituante*) was to design a permanent constitution to replace a temporary one.⁸³ The debate between the Islamists and the nationalists regarding whether the Jakarta Charter or Pancasila that should be adopted as ideological basis of the state resurfaced again during the meeting. Because the two-third majority decision failed to be achieved, the meeting which held periodically from 1956 to 1959 resolved nothing except a stuck and hateful moment. This situation was the main reason behind the Presidential Decree issued by Sukarno on 5 July 1959 that dissolved the Assembly and marked the beginning of what later called as the Guided Democracy and the end of constitutional democracy. The decree also arbitrarily stated that the ideology of the state was the Constitution of 1945 with Pancasila in its preamble. The Jakarta Charter, even though said as a document that inspired the constitution, was pushed aside and treated merely as no more than a historical document.⁸⁴ The decree led Sukarno to be the first despot of the country. He banned Masyumi on 17 August 1960, and in the following years he arrested a number of Masyumi leaders such as Muhammad Natsir, Sjafruddin Prawiranegara, Burhanuddin Harahap and many others.⁸⁵

Thus, by early 1960s, the Islamists struggle, both through a constitutional way or rebellion, to realize Islamic state could be repressed by the regime. But

⁸¹ Herberth Feith, *The Decline of Constitutional Democracy in Indonesia* (1962) p. 274-275.

⁸² *Ibid.*

⁸³ From 1945 to 1959 Indonesia had three different constitutional arrangements: the 1945 Constitution (1945-1949), the Federal Parliamentary Constitution of 1949 (1949-1950) and the 1950 Provisional Parliamentary Constitution (1950-1959), see Lindsey, *Op.Cit.*, n. 1, p. 43.

⁸⁴ Bolan, *Op.Cit.*, n. 2, p. 97-101.

⁸⁵ *Ibid.*, p. 104.

this was not the end of story, it was just a beginning. The DI rebellion and the constitutional struggle of the Islamic parties to implement the Jakarta Charter, along with the communist rebellion that took place in 1965, were the basis for the politics of guardianship. Both the regime of Sukarno and Suharto (officially became a president on 27 March 1968) claimed himself as the defender and guardian of Pancasila and the 1945 constitution. They “would take firm steps against anyone which will deviate from Pancasila and the 1945 Constitution...”⁸⁶ As the guardian, they also were responsible to prevent any possibility of deviation from Pancasila. Due to this reason, a right interpretation of Pancasila, which in fact meant as non Islamic or socialist interpretation, was needed. A massif workshop and upgrading courses called *Manipol-Usdek* during the Sukarno regime and *Penataran P4* (*Penataran Pedoman Penghayatan dan Pengamalan Pancasila, Upgrading Course on the Directives for the Realization and Implementation of Pancasila*) during the New Order time was organized to be an obligation for the entire citizen.⁸⁷ Ironically, *Pancasila* which initially perceived at least by the Islamist groups as the Islamic-tasted ideology, later turn into a means to repress the political Islam. The regime continuously suspected the Islamists groups as a dangerous threat for Pancasila.

This guardianship policy continued until the late 1980s and changed gradually when Suharto’s policy became more pleasant to these groups. The shifting policy of the regime at that time was the result of two things: the modification of the New Order’s political strategy⁸⁸ and the rising of a new genre of Islamist groups that promoted a substantive rather than a legal-formalistic Islam.⁸⁹ This shift, in my view, was a sign for the rising of the sympathetic policies for Muslim groups. During the late of the New Order regime, a numbers of policies were implemented to meet the aspiration of Muslim groups. Among those policies were the passing of the Religious Judiciary Act (1989), the Founding of ICMI (*Ikatan Cendekiawan Muslim Indonesia, Indonesian Muslim Intellectuals Association*) (1990), the Compilation of Islamic Law (1991) and the founding of Islamic Bank (1992).⁹⁰

⁸⁶ Allan A. Samson, ‘Islam in Indonesian Politics’ (1968) 8 (12) *Asian Survey* 1001-1017, p. 1005.

⁸⁷ Morfit, *Op.Cit.*, n. 88, p. 843-845.

⁸⁸ R. William Liddle, ‘The Islamic Turn in Indonesia: A Political Explanation, (1996) 55 (3) *The Journal of Asian Studies* 613-634, p. 625-631

⁸⁹ Effendi, *Op.Cit.*, n. 60, p. 195.

⁹⁰ Arskal Salim and Azyumardi Azra, ‘The State and Shari’a in the Perspective of Indonesian Legal Politics’ in Arskal Salim and

The desire for a formalistic Islam, mainly relate to the demand of the implementation of Sharia law, returns to the stage of political life as a consequence of the political liberalization and democracy in the *Reformasi* era. Arskal Salim and Azyumardi Azra notes four phenomena indicate the resurgence of political Islam. Firstly is the formation of several Islamic political parties that adopt Islam as their foundation. These parties, like Mayumi in 1955, fight for the implementation of Shari'a law through a constitutional way. The idea of implementation of the Jakarta Charter once again appeared in 2000 and 2001 when the United Development Party (*Partai Persatuan Pembangunan*, PPP) and the Crescent Star Party (*partai Bulan Bintang*, PBB) proposed it during the amendment session of MPR (People's Consultative Assembly) to replace Article 29 of the 1945 constitution. This event was impossible to be realized during the New Order era because the regime arbitrarily imposed a regulation to use *Pancasila* as a sole basis. Secondly, the *Reformasi* is marked by the rising demand from a number of regions in the country to implement Sharia bylaws. There are at least 37 local governments (districts or provinces) in the country that enact *Shari'a* bylaws⁹¹. Those *Shari'a* bylaws, no doubt, are discriminatory in its nature. Third is the rising of the Islamic paramilitary groups such as *Front Pembela Islam* (FPI) and Laskar Jihad. These groups do not hesitate to use violence in achieving their goals as noted by this essay above. Lastly, Azra and Arskal Salim notes the rising of some Islamic magazines such Sabili and Hidayatullah as a medium to promote the idea of Islamic state.⁹²

All those features show us how the regimes, mainly since the late 1990s of the Suharto's New Order to the present day, act as the sympathizer of political Islam. By doing this, the problems is not solved, rather it creates the new ones: discriminatory and unfair policy for minorities and the prevailing of violent culture in the name of religion. The issuance of the Joint Letter of Decision (*Surat Keputusan Bersama*, SKB) No. 3 Year 2008, No: KEP-033/A/JA/6/2008, No. 199 Year 2008 by the Attorney General, Ministry of Religion and Ministry of Interior Affairs on Ahmadiyah sects in 2008 was a clear example of a discriminatory

Azyumardi Azra (eds) *Shari'a and Politics in Modern Indonesia* (2003) p. 10.

⁹¹ Dawam Raharjo, Seputar Masalah Syariat, *Koran Tempo* (Jakarta) 8 December 2006.

⁹² Salim and Azra, *Op.Cit.*, n. 104, p. 1-3.

policy. This Decision was issued pursuant to the pressure of several Muslim organizations. The SKB did not stop the violence on Ahmadiyah sect; rather it was used by those organizations as a legitimate reason to continue the persecutions. According to the Setara Institute Annual Report 2008, about 145 of 193 human rights violations on Ahmadiyah occurred after the issuance of the SKB. This Decision clearly shows us how the state cannot stand in a steady foundation to act fairly pursuant to its constitution in guarantee the freedom of religion. Thus, either stands as the guardian of Pancasila or as the sympathizer of the political Islam will lead the state to a dilemmatic position causing discriminatory and human rights problems.

IV. CONCLUSION

This essay describes that the problems of human rights abuses in Indonesia, and possibly in other developing countries, is mainly because the state not strong enough to execute the regulations that have been enacted. In term of normative regulations, the state has guarantee fundamental rights of the citizen. The amended 1945 Constitution also states clearly the human rights section. But the weakness of the state seems to be the real obstacle to make the state stands in the place to be.

Indonesia is a new emerging democracy that stands in the late transition time. Despite a number of problems that weaken the state such us corruptions, ineffective bureaucracy, and paramilitary traditions as well as low ability to control its territory, Indonesia faces a fundamental problem: unfinished negotiation between Islam and the state. The negotiation has taken place since the early days of the nation and it seems to be a real treat for the future. Pancasila which initially supposed to be the best way to negotiate Islam and secular nationalism unintentionally becomes the source of human rights abuse. It because Pancasila, especially in the first principle, contain an ambiguity that can be interpreted differently depends on the desire of the regimes. Thus, this situation pushes every regime to a dilemmatic position to stand fairly in respecting the rights to life of every religion and believes in the country.

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