

## *Ethnic Chinese in Indonesia: Would it be better?*<sup>1</sup>

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### **Introduction**

The New Order regime under Soeharto, after the abortive communist coup on 30 September 1965, promoted anti-Chinese politics in which minority ethnic Chinese were not given opportunities for political-expression. They were only allowed to be active in the business sector, so they became an exclusive group segregated from indigenous Indonesians. They were coerced into a situation similar to what they experienced in the Dutch Colonial era. The New Order implemented a policy akin to that in the Dutch Colonial era, which policy divided all persons living in Indonesia into one of the three groups, namely (i) Europeans; (ii) the Foreign Orientals, particularly, the ethnic Chinese; and (iii) Indigenous Indonesians.

The laws and regulations introduced by the New Order curtailing the civil and political rights of the ethnic Chinese were not only in the form of presidential instructions but also circulated in letters from the Cabinet and ministerial decrees.<sup>3</sup> For more than three decades, the New Order created antagonism and conflict between indigenous (*pribumi*) and non-indigenous people (*non-pribumi*). The ethnic Chinese connection with the power elite even made it worse, and caused anger among indigenous businessman who did not enjoy those benefits.<sup>4</sup>

Finally, linked to the economic downturn resulting from the 1997 currency crisis, the conflict culminated and burst into the holocaust of the May 1998 riots,<sup>5</sup> in which more than 1,200 people were reported killed and more than 160 women were gang-raped. Regardless of their mistakes, if any, in dominating the economy—the conglomerates created extremely high social envy among indigenous Indonesians—the minority ethnic Chinese did not deserve to be slaughtered and gang-raped. Furthermore, the violation of the right to life, right to property and right to liberty is a serious violation of very basic human rights. The May 1998 riots were inhuman and

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<sup>1</sup> This paper is prepared for the International Symposium: '**Constitutions and Human Rights in a Global Age: an Asian Pacific Perspective**' on 1-3 December 2001, organized by the Australian National University, Canberra, Australia.

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<sup>3</sup> For example, the Presidential Decree No. 240 year 1967 which strongly requests the ethnic Chinese to forego their Chinese names and adopt the Indonesian name, and even more strictly, the Presidential Instruction No.14 year 1967 which basically bans the use of Chinese symbols and many other Chinese cultural traditions were restricted.

<sup>4</sup> While only 3.5 percent of the Indonesian population is Chinese, they hold 80 percent of the country's privately owned assets, in Chin Ling Ho, 'The Chinese of South-East Asia', London, MRG, 2000 as quoted by Mieke Kooistra, 'Indonesia: Regional Conflicts and State Terror', London, Minority Rights Group International (MRG), 2001.

<sup>5</sup> See the Final Report of *Tim Gabungan Pencari Fakta* (Coordinated Team for Finding Facts or 'TGPF') for further details on the May 1998 riots. This Coordinated Team reported that approximately 1,217 people were dead and 91 people were injured during May 1998 riots. The Coordinated Team further reported that most of the victims of the gang rapes were from the ethnic Chinese.

disrespectful of the human rights of those ethnic Chinese.

The protection of a citizen's life is basically the responsibility of the state, and a right guaranteed in the Indonesian 1945 Constitution. According to the preamble of the 1945 Constitution, the state is obliged to protect every citizen, regardless of his ethnicity, socio-economic strata, religious back-ground and political stance. However, as frequently debated, the 1945 Constitution is not sufficient to protect and uphold human rights, particularly, those of the minority ethnic Chinese. Not to mention that the 1945 Constitution itself stipulates that the president of the Republic of Indonesia must be an indigenous Indonesian.<sup>6</sup>

In this paper I will try to discuss how the Indonesian 1945 Constitution promotes and encourages respect for human rights vis-a-vis constitutional rights and fundamental freedoms of the Indonesian ethnic minority, particularly ethnic Chinese. Is the recent Second Amendment to the 1945 Constitution, which adds new Chapter XA on Human Rights, sufficient to cover those human rights protection and fundamental freedoms? Do the discriminative laws and regulations still exist in the amended 1945 Constitution?

### **Human Rights as the Constitutional Rights of Ethnic Chinese**

Discussing human rights, one should first refer to the state based on law, (*rechtsstaat*) as the state based on law is an ideal home for human rights. In the state based on law the human rights guarantees, namely the independence of the judiciary, due process of law and judicial review, shall prevail.<sup>7</sup>

Unfortunately, the Indonesian 1945 Constitution does not provide any specific article with regard to the state based on law, except for a statement in its Elucidation, '*Indonesia is a state based on law (rechtsstaat) not merely based on power (machtstaat)*'. No further explanation of this statement is available in the 1945 Constitution, however we could refer to the three main characteristics of a state based on law to comply with:

1. The acknowledgment and protection of human rights which guarantees the equality in the areas of politics, law, socio-economy, culture and education;
2. The legality principle in all kinds of law;
3. An independent, impartial judiciary, free from interference from any branch of power.

Oemar Seno Adji once stated that the state based on law (*rechtsstaat*) of the Republic of Indonesia is based on a national philosophy, *Pancasila*.<sup>8</sup> The characteristics of *Pancasila* are almost the same with the principles applied in 'Rule

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<sup>6</sup> This is due to the fact that one of the Vice Chairmen of the *Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan/BPUPK* (Committee for the Examination of Efforts for the Preparation of Independence or '*Dokuritsu Zyunbi Choosakai*'), which was formed to draft the 1945 Constitution, was a Japanese. Thus, the wording of 'the President is an indigenous Indonesian' was deliberately incorporated into as to prevent a Japanese to be an Indonesian president.

<sup>7</sup> Todung Mulya Lubis, *The Rechtsstaat and Human Rights, in Indonesia Law and Society*, Timothy Lindsey (ed.), (Sidney: the Federation Press, 1999), pp.171-172.

<sup>8</sup> Pancasila which means 'five pillars' are (1) belief in one god; (2) justice and civility among peoples; (3) the unity of Indonesia; (4) democracy through deliberation and consensus among representatives; and (5) social justice for all.

of Law' countries, particularly defined by the International Commission of Jurists, which pinpoint the importance of respect for human rights. Those characteristics are also in line with the separation of powers. The state's power should be allocated to distinct legislative, executive institutions and judiciary, yet the 1945 Constitution does not completely separate those institutions. In fact, an independent and impartial judiciary is *a conditio sine qua non* to the principle of a state based on law (*rechtsstaat*). However, in this paper I will not further elaborate the separation of powers and put a special emphasis on the upholding of human rights as the constitutional rights in the state based on law Indonesia.

### **Human Rights in the 1945 Constitution**

The 1945 Constitution was drafted by *Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan* (Committee for the Examination of Efforts for the Preparation of Independence or 'BPUPK')<sup>9</sup> and was eventually adopted as the Constitution for the newly independent state of the Republic of Indonesia on 18 August 1945 by *Panitia Persiapan Kemerdekaan Indonesia* (Committee for the Preparation of Indonesia's Independence or 'PPKI').

It is interesting to note that even though the 1945 Constitution was drafted well before the adoption and proclamation of the Universal Declaration of Human Rights (10 December 1948), the 1945 Constitution does contain a number of provisions promoting and ensuring respect for some basic human rights and fundamental freedoms, including:

1. Article 27 paragraph (1) envisions that 'All citizens are equal before the law and in the government and obliged to respect the law and government without exception';
2. Article 27 paragraph (2) declares that 'Every citizen is entitled to work and a reasonable standard of living';
3. Article 28 provisions that 'The freedom of association and assembly, to express opinion orally, in writing or otherwise stipulated by law';
4. Article 29 paragraph (2) reiterates that 'The state guarantees the freedom of every residents to profess and practice their own religion and belief';
5. Article 30 paragraph (1) provides that 'Every citizen has the right and is obliged to take part in the national security and defense';
6. Article 31 paragraph (1) guarantees that 'Every citizen has the right to education'.

In view of the circumstances and period in which the 1945 Constitution was drafted, the very brief provisions on human rights in the 1945 Constitution are reasonable. It was drafted in a very short time when Indonesia was still under the

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<sup>9</sup> The draft of 1945 Constitution was completed on 16 July 1945 by BPUPK. BPUPK was established on 1 March 1945 under the leadership of Mr. Radjiman Wedioningrat as the Chairman and one Japanese Mr. Ichibangase Yoshio together with Mr. Suroso as the Vice Chairmen. On 7 August 1945, the Japanese allowed the establishment of *Panitia Persiapan Kemerdekaan Indonesia/PPKI* (Committee for the Preparation of Indonesia's Independence or '*Dokuritsu Zyunbi Inkai*') whose entire members were Indonesians under the leadership of Soekarno (Chairman) and Mohammad Hatta (Vice Chairman). On 18 August, PPKI Congress officially promulgated the 1945 Constitution. See Adnan Buyung Nasution, *Aspirasi Pemerintahan Konstitusional di Indonesia: Studi Sosio-Legal atas Konstituante 1956-1959 (The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956-1959)*, (Jakarta: PT. Intermedia, 1995), pp.10-15.

Japanese occupation and struggling for independence. The Indonesian founding fathers promised to draft a new constitution for the independent Republic of Indonesia after a certain degree of stability has been achieved. Thus, it only contains the most basic provisions whilst other implementing rules will be stipulated in lower laws and regulations.<sup>10</sup>

Perhaps it is also important to briefly discuss, in comparison, the human rights provisions in two other constitutions which were promulgated during the period of 1949 -1959 prior to the reinstatement of the 1945 Constitution.

### **The Constitution of the Federal Republic of Indonesia 1949<sup>11</sup>**

Following the transfer of sovereignty from the Netherlands to the newly formed *Republik Indonesia Serikat* (Federal Republic of Indonesia or ‘RIS’), an appropriate constitution was drawn up and promulgated.

In contrast to the 1945 Constitution, the Constitution of the Federal Republic of Indonesia 1949 (‘RIS Constitution’) was a long document and its provisions were drafted in detail. Of the total 197 articles, 35 articles were devoted to human rights and fundamental freedoms including duties and responsibilities of the national authorities to promote and protect the welfare of the people. It could be concluded that the RIS Constitution was intended to incorporate human rights and fundamental freedoms originated from the Universal Declaration of Human Rights 1948 and ensure that those rights and freedoms were constitutionally-based.

### **The Interim Constitution of the Republic of Indonesia 1950<sup>12</sup>**

The RIS Constitution ceased with the enactment of *Undang-undang Dasar Sementara Republik Indonesia* (Interim Constitution of the Republic of Indonesia) on 15 August 1950 (‘Interim Constitution’). Similar to the RIS Constitution, in the Interim Constitution out of 146 articles, 37 articles were devoted to address human rights and fundamental freedoms. The Interim Constitution took over all provisions on human rights stipulated in the RIS Constitution, and even added one provision regarding the right to demonstrate and strike in Article 21, which were not granted in the RIS Constitution or in the Universal Declaration on Human Rights.

The Interim Constitution ceased to apply on 5 July 1959 with the reinstatement of the 1945 Constitution as of this date.<sup>13</sup>

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<sup>10</sup> Soekarno was the one who reiterated that the 1945 Constitution constituted an interim constitution. He emphasized that the constitution currently drafted by BPUPK was a temporary constitution. Later on when the country reached a more stable situation, a more complete and perfect constitution would be drafted through *Majelis Perwakilan Rakyat* (People’s Representatives Assembly). Adnan Buyung Nasution, *Op. Cit.*, pp. 28-29.

<sup>11</sup> Enny Soeprapto, ‘Various Possible Ways to Address Human Rights and Fundamental Freedoms in the Constitution’, paper presented at the Legal Reform Program (LRP) Launch, Jakarta, November 2001.

<sup>12</sup> Ibid and See Adnan Buyung Nasution, *Op. Cit.*, p. 28.

<sup>13</sup> On 22 April 1959, Soekarno on behalf of the government made a speech before the Konstituante. In his speech he proposed to reinstate the 1945 Constitution. He also provided four basic reasons to support his proposal, namely (i) the 1945 Constitution was the ultimate solution for such critical situation at that time; (ii) the 1945 Constitution was rooted from the Indonesian culture and ideology so that it would be able to unify the country; (iii) the structure of state organs provided in the 1945 Constitution would greatly enhance an effective government; (iv) the implementation of the 1945 Constitution would be justified according to

## Second Amendment to the 1945 Constitution

In the Annual Session of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or 'MPR') 7-18 August 2000 with the agenda Amendment to the 1945 Constitution, the 'Second Amendment to the 1945 Constitution' has been promulgated, which added a substantial new Chapter XA comprising Articles 28 A through 28 J on Human Rights including:

The right to life (Article 28 A);

The right to recognition, security, protection of law and equality before the law (Article 28 D paragraph 1);

The right to work and remuneration (Article 28 D paragraph 2);

The right to equal opportunity to take part in the government (Article 28 D paragraph 3);

The right to a nationality (Article 28 D paragraph 4);

Freedom of religion, speech, education, employment, citizenship, place of residence, association and expression (Article 28 E);

The right to be free from torture and freedom from slavery (Article 28 I paragraph 1);

The right to be recognized as a person before the law and freedom from prosecution under retrospective legislation (Article 28 I paragraph 1);

Protection of traditional cultural identities and non-discrimination, including freedom of conscience (Article 28 I paragraph 3)

Specifically, one provision upon which we could rely in the context of non-discrimination, namely Article 28 I paragraph 2 which states:

Everyone has the right to be free from any discriminative action on whatever basis and is entitled to a protection from such discriminative action.

*However, as frequently debated, such a new chapter has no significant contribution to the future upholding of human rights due to the fact that those new articles in Chapter XA of the 1945 Constitution are similar to the provisions of Law No. 39 Year 1999 regarding Human Rights, a lower regulation than the 1945 Constitution.<sup>14</sup> The 1945 Constitution is supposed to provide more basic principles of human rights and fundamental freedoms than its lower implementing regulation.*

In fact, despite the new articles on human rights and fundamental freedoms as explained above, the discriminative provisions do still exist in the 1945 Constitution. The Second Amendment only amended and made changes to Chapter X on Citizens and Residents paragraphs 2 and 3:

2. Residents are Indonesian citizens and foreigners residing in Indonesia.

3. Any other matters with respect to the citizens and residents will be further stipulated by law.'

Yet no change was made to paragraph 1 of Article 26 of the original 1945 Constitution:

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the law. Adnan Buyung Nasution, *Op. Cit.*, pp. 319-324.

<sup>14</sup> Satya Arinanto, 'Pengaturan Hak Asasi Manusia dalam Rangka Perubahan UUD 1945' (Regulation on Human Rights within the Framework of the Amendment to 1945 Constitution), paper presented at Seminar on the Amendment to the 1945 Constitution held by *Badan Pembinaan Hukum Nasional* (National Board of Legal Development), Jakarta, October 2001.

A citizen is **the indigenous Indonesian peoples** and those people of other races who are confirmed as ‘citizens by law.

Thus, to ethnic Chinese disappointment, the very basic article on Citizens and Residents in the 1945 Constitution still retains the term ‘Indonesian indigenous people’ which is seen by the Chinese community as a way to provide justification for discrimination. Even during the heated debate on this Chapter in Commission A of the Annual Session in August 2000, one member asked rhetorically ‘Who are truly indigenous Indonesians?’<sup>15</sup>

## Conclusion

As a state which does not have great experience in legal reform, it is not an easy task for Indonesia with its pluralistic society to amend the constitution, particularly amendment to the constitution in respect of human rights and fundamental freedoms. Every legal problem and policy should be handled and analyzed carefully on a case to case basis.

The members of the People’s Consultative Assembly probably should take more time in amending the constitution. Perhaps they need to review the provisions on human rights stipulated in the previous RIS and Interim Constitutions as a comparison, and further, international treaties, among others, (i) Universal Declaration of Human Rights 1948; (ii) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities 1992; (iii) International Covenant on Civil and Political Rights 16 December 1966; (iv) International Covenant on Economic, Social and Cultural Rights 1966; (v) International Labour Organisation No. 169 Indigenous and Tribal Peoples Convention 1989.<sup>16</sup>

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<sup>15</sup> Mieke Kooistra, *Op. Cit.*, pp. 7-8.

<sup>16</sup> **Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities:**

Article 1 (1) *States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity;*

(2) *States shall adopt appropriate legislative and other measures to achieve those ends;*

Article 2 (1) *Persons belonging to national or ethnic, religious and linguistic minorities... have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.*

(2) *Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life...*

**International Covenant on Civil and Political Rights:**

Article 1 (1) *All peoples have the right of self –determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

Article 20 (2) *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

**International Covenant on Economic, Social and Cultural Rights:**

Article 13 (1) *The States Parties ... agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups,...*

The members of the People's Consultative Assembly must also bear in mind that as a member of the United Nations and adoptee of the Charter of the United Nations, Indonesia has reaffirmed its faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. Those should take first place in the Indonesian Constitution.

The above is to ensure that the Indonesian Constitution definitely upholds human rights and fundamental freedoms of all Indonesian people, particularly the ethnic Chinese, and there will be no more discriminative provisions in the constitution. I believe that any attempt to repeal the discriminative laws and regulations should begin from the constitution itself as the supreme law of the country, and therefore, any laws and legislation repugnant to it will be considered void.

Thus, it is a high time for the newly established government under the leadership of President Megawati to seriously consider implementing legal reform—not only put priority in the economic and political reform—to repeal the discriminative laws and regulations, and eventually come in line with the spirit of the founding fathers namely the state based on law (*rechtstaat*) and not based on power (*machtstaat*). Last but not least, we must have a serious, clear and conducive agenda on how the integration of the ethnic Chinese into society must be developed if Indonesia wants to be considered as a modern and civilized state.

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