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Authoritarianism and Constitutional Politics in Post-Authoritarian Indonesian Society: Reemergence or Legacy

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Abstract: *This paper discusses how the legacy of authoritarianism in Indonesia has influenced the country's post-authoritarian constitutional politics. Because of some degree of ideological continuity from the authoritarian period, post-authoritarian Indonesia shows a unique situation of constitutional politics. Specifically, the positioning of Pancasila as an incontestable state ideology exposes the freedom of expression and association to severe risks, even in post-authoritarian Indonesia. In the discussion of post-authoritarian Indonesian society and constitutional politics, I review how the violation of Pancasila has been defined in Indonesia both during and after the authoritarian period. To explore this issue, I examine the court judgments concerning the anti-subversion law in which anti-Pancasila activities were defined to restrict opinions. I then review the social organization law amended in 2017 to argue how the law links Pancasila with the discourse of Asian values. In conclusion, this paper argues that both during and after the authoritarian period, the interpretation of Pancasila was restricted, thus subjecting Indonesia's political freedom to risk.*

Keywords: *anti-subversion law, constitutionalism in Indonesia, Pancasila, post-authoritarianism, social organization law.*

I. Introduction

One of my lasting impressions of Indonesia after May 1998 was the "red" zone in bookstores. The anti-communist Soeharto regime had strictly prohibited the publication of books on the Indonesian Communist Party (*Partai Komunis Indonesia*, or PKI) and its leading figures, as well as translations of books on socialism and communism.[1] After the end of the Soeharto regime, these topics became so popular that the display area in bookstores appeared red from a distance because of the symbolic book covers. Moreover, there were active critical

[1] Among all, article 2 of the resolution of tentative MPR (MPRS) no. XXV in 1966 prohibits any activities, including publication, to propagate Marx-Leninism and communism. The basic press law (The law no. 1966/11) prohibited press publications based on Communism and Marx-Leninism (art. 11) while the law provided that no ban is imposed on national press and national press does not need a publication permit. Furthermore, the circulation letter of the director-general of press and graphic of the Ministry of Information No. 1988/01 (no. 01/SE/Ditjen-PPG/K/1988) prohibited printing publications that contain Communism and Marx-Leninism teachings.

arguments against Pancasila, [2] the state ideology, in mass media and in political and academic arenas. This fact represents how issues of state ideology, once monopolized by the authoritarian regime, could now be openly discussed.

However, by 2010, more than ten years since the beginning of the reformation, the situation had changed completely. Pancasila was once again enshrined as a sacred, inviolable state ideology, and the mood of open discussion on the meaning and status of Pancasila had diminished. I attended various academic conferences where I read academic papers published in Indonesia that used Pancasila as part of their titles, and the assumption was always that the inviolable state ideology should not be taken seriously or treated critically.

Nevertheless, a stark difference exists between the indoctrination of Pancasila in the Soeharto regime and the current manifestation of Pancasila as a state ideology. The Soeharto regime's definition of Pancasila supported the authoritarian regime, as is evident in the *Orientation of Realization and Implementation of Pancasila* (*Pedoman Penghayatan dan Pengamalan Pancasila*, P4), which differentiates Indonesian democracy from liberal democracy.[3] Then, this government-sanctioned interpretation of Pancasila restricted political and social activities using various guidelines or regulations. Regarding press freedom, for instance, the press council (*Dewan Pers*) formulated the guideline for developing an ideal press that obligated press media to be "free but responsible" and not to make negative criticism.[4] As for labor issues, the minister of labor issued the ministerial decision on the guideline for implementing Pancasila in industrial relations in 1985.[5] This guideline also emphasized the labor-employer relationship based on the principles of family and mutual assistance, thus restricting a confrontational labor union. Furthermore, as discussed in the following sections, courts criminalized opinions and activities critical of the government as anti-Pancasila in many political cases. In other words, Soeharto's government monopolized the authority to interpret Pancasila.

By contrast, since the reformation began, at least for now, no entity has enjoyed such a monopolistic power to define the contents of Pancasila, while Pancasila itself is considered an inviolable state ideology. As a result, the lack of a superior interpreter of

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[2] Pancasila means 'five principles' in Sanskrit. In Indonesia, it refers to the five principles stated in the last paragraph of the preamble of the Constitution, which is considered to be the state ideology. The five principles in the preamble of the Constitution are as follows: (1) belief in the one almighty God, (2) a just and civilized humanity, (3) the unity of Indonesia, (4) democracy guided by wisdom through consultation and representation, and (5) social justice for all Indonesian people.

[3] Regarding democracy, the fourth principle of Pancasila, P4 stipulates that a person should give priority to the interests of the state and society, without forcing its will on other people, and prioritize consultation and discussion (*musyawarah*) for taking decisions in the common interest. Robert Cribb, "The Incredible Shrinking Pancasila: Nationalist Propaganda and the Missing Ideological Legacy of Suharto," in *The Return to Constitutional Democracy in Indonesia*, ed. Thomas Reuter (Melbourne: Monash Asia Institute, 2010), 68; Wakhidun Abdurrahman, Adi Sulistiyono, and Abdul Manan, "The Concept of The State Law of Pancasila," *Souuth East Asia Journal of Contemporary Bussiness, Economics and Law* 17, no. 5 (2018): 71–72.

[4] Press council decision (*keputusan dewan pers*) No.79/XIV/ 1974.
The guideline was issued in 1974 after the large-scale media banning caused by Malari affairs in order to delimitate media freedom in Indonesia. Although the press council is supposed to be advisory body of press companies and journalists to assist the government, it was chaired by the information minister and was not independent of the government.

[5] The decision of the minister of labor (*keputusan menteri tenaga kerja*) No. KEP-645/MEN/1985.

Pancasila forms a unique condition of post-authoritarian Indonesian constitutional politics, where plurality in politics, active parliamentarianism, the separation of powers, a long list of human rights in the Constitution and the severe restriction on freedom of expression exist simultaneously under a vague but uncontestable ideology.

To examine post-authoritarian Indonesian society and constitutional politics, I will review how the violation of Pancasila has been defined in Indonesia, both during and after the authoritarian period. First, I review the judgments on cases of offense against the anti-subversion law during the Soeharto regime. Second, I discuss the amended law on social organization in 2017 (hereinafter referred to as the social organization law of 2017), which was first enacted as a presidential regulation in lieu of the law, and then adopted by the parliament (*Dewan Perwakilan Rakyat*, DPR) as a law (Law No. 16/2017). The social organization law of 2017 provides the Minister of Internal Affairs with the administrative discretion to disband any social organization considered hostile to the state's Pancasila ideology.[6] The article argues that, as an absolute state ideology, the vaguely conceptualized Pancasila has a chilling effect on the freedom of thought and expression as well as on democracy in Indonesian society.

Important research on authoritarian tendencies was done from the political perspective in Indonesia after the reformation. Hadiz argues that local elites whose predatory power is rooted in Soeharto's regime formed localized oligarchic alliances.[7] Heryanto and Hadiz attribute an insufficient pro-democracy civil society based movement after the reformation to the legacy of the 1965 anti-communist massacres and argue that the post-authoritarian environment remains the "arena of old elites and their protégés" despite the existence of free elections and a multi-party system.[8] Those works of political science correctly point out that the cause of the current authoritarian turn in Indonesian politics is a remnant of the Soeharto regime.

This article examines the remnant of authoritarianism in the context of law and constitutionalism to offer a new perspective on Indonesia's constitutional politics. For that purpose, this article investigates the court judgments and legal statutes that are not addressed by previous research.

II. Legal Materials and Methods

The research in this article applies a socio-legal approach, which analyzes the law in the context of society to recognize their mutually constitutive relationship.[9] Specifically, it

[6] The Social Organization Law of 2017 provides for the competence of the Interior Minister as follows:
Article 59 (4) c '[Social organization is prohibited] to adhere to, develop, and spread teachings or understandings that are contrary to Pancasila',
Article 60 (2) 'Social organization that violate provisions in article 52 and article 59 section (3) and (4) shall be subject to administrative or criminal sanctions', and
Article 61 (3) 'The administrative sanctions as referred to in Article 60 (2) are:
a. Revocation of registered certificate by the [Interior] Minister.'

[7] Vedi R. Hadiz, *Localising Power in Post-Authoritarian Indonesia: A Southeast Asia Perspective* (Redwood: Stanford University Press, 2010).

[8] Ariel Heryanto and Vedi R. Hadiz, "Post-Authoritarian Indonesia: A Comparative Southeast Asian Perspective," *Critical Asian Studies* 37, no. 2 (2005): 251.

[9] Naomi Creutzledt, Marc Mason, and Kristen MacConnachie, eds., *Routledge Handbook of Socio-Legal Theory and Method* (New York: Routledge, 2020), 4.

examines how a political ideology has been defined through positive laws in Indonesia and developed through interaction within Indonesian social and political contexts. For that purpose, this article reviews court decisions and statutory regulations, paying special attention to their backgrounds and consequences in Indonesian constitutional politics. The author corrects court decisions cited in this article from case books compiled by the Indonesian supreme court, NGO offices that are involved in political cases, various law journals, and, as secondary sources, from mass media and NGO reports.

III. Result and Discussion

What Constitutes "Anti-Pancasila"? The Case Of the Anti-Subversion Law

a. Multiple interpretations of Pancasila

Initially, Pancasila was intended to be a flexible, pluralistic state philosophy that accommodated diverse social philosophies in Indonesian society. Pancasila was proposed in 1945 at the meeting of the Indonesia Independence Preparation Investigation Committee (*Badan Penyilidik Usaha Persiapan Kemerdekaan Indonesia*, or BPUPKI) to discuss diverse ideas on the formation of the future independent state.[10] There was a stark division between the group that claimed an independent state based on secular nationalism and the group that desired Islam as the state ideology. To reach a compromise, the then committee chair Soekarno proposed the idea that one of the principles included in Pancasila should be a state based on belief in one almighty God.

Another interpretation of Pancasila is communitarianism. Soekarno insisted that Pancasila contained principles that reflect the communitarian values inherently respected by Indonesian society. Soekarno explained that the principles contained in Pancasila could be summarized as mutual support within society (in Javanese, *gotong-royong*). In the same meeting, a leading legal scholar of that time and the *de facto* composer of the constitution, Soepomo explained that the future state constitution should not be a liberal one, but one that reflected the communitarian values of traditional Indonesian society. According to Soepomo, a Pancasila-based constitution would not contain any mechanism that supposed a contradiction between the ruler and the ruled, such as the limitation of state power or the protection of human rights against an arbitrary government.

The first interpretation of Pancasila as a state concept compromising secular nationalism and Islam created a complex implication about religious issues both for Islamism and the freedom of religion in Indonesia. The second interpretation of Pancasila, which reflected the communitarian social structure, implied the weak protection of individual freedom and democratic government.

Indonesia achieved independence in 1945. After the war of independence and a brief period of unstable parliamentary democracy, Indonesia became an authoritarian regime. [11]

[10] Wendra Yulardi, "The Dynamic Interpretation of Pancasila in Indonesia State Administration History : Finding Its Authentic Interpretation," *Novelty* 11, no. 1 (2020): 42–47.

[11] In this article, I assume a relatively narrow meaning of an authoritarian regime—a regime in which political participation is strictly restricted and governmental power is concentrated in a relatively small group under the strong executive branch of the government. It follows that the legislative and judicial branches are subject to the control of the executive branch. Periodic elections are held under the authoritarian regime but only nominally. Based on this definition, both the Soekarno regime after 1955 and the Soeharto regime are authoritarian regimes.

During the political transition, the government used Pancasila to legitimize the authoritarian regime. Various security regulations referred to Pancasila as a reason for criminalization if any activities were seen as violating it. The anti-subversion law[12] was one of these security regulations and was the most powerful legal tool for suppressing anti-government activities. The next section reviews how an activity that violates Pancasila is defined under the anti-subversion law.

b. Anti-subversion Law

The anti-subversion law was enacted in October 1963, during a relatively stable period for Soekarno's government. [13] Although Soekarno lifted martial law in May 1963, Soekarno needed a legal tool to sustain his power, which was built on a fragile balance between the military and the PKI. Thus, Soekarno enacted the anti-subversion law to suppress any activity threatening his regime.

However, by the September 30 incident in 1965, Soekarno had lost political power and Soeharto was able to drive Soekarno away from the presidency. Despite Soeharto's claim that he would recover constitutional order, the new parliament decided to maintain the anti-subversion law and authorized it as a parliamentary law (Law No.13/1963). [14] As a result, the Soeharto regime also utilized the anti-subversion law as means to suppress first the PKI, and then other political dissenters such as radical Islamic groups and democratization movements.

Article 1 of the anti-subversion law states that any person shall be punished if:

the person conducts such acts, intentionally, or with obviously assumed intention, or with knowledge of the result or obviously assumed knowledge of the result:

> *1. To destroy, damage, or deviate from the Pancasila state ideology or the Broad Guidelines of State Policy (GBHN)…*

The anti-subversion law was a useful legal tool used by past authoritarian regimes in Indonesia to suppress political dissent. In particular, because of its vague definition, activity against Pancasila state ideology in article 1(1) was the most frequently used reason for criminalizing political dissent. Even though the Soekarno government enacted the anti-subversion law, the Soeharto government, which took over Soekarno's power and criticized the deviation of constitutionalism in the Soekarno government, was the regime that more frequently used the anti-subversion law. This chapter identifies what was considered

[12] The official title of the anti-subversion law is Law no. 11/PNPS/1963 on eradicating subversive activities (*Undang-undang tentang pemberantasan kegiatan subversi*). PNPS stands for the *Penetapan Presiden* (i.e., Presidential Decision) issued by the President in lieu of law under the emergent situation. After the transition of presidential power to Soeharto 1965, the Parliament authorized this presidential decision as a law.

[13] Until the early 1960s, Soekarno's government was plagued by regional uprisings. Rebellions in Sumatra and Sulawesi that were directly caused by martial law occurred in 1957 and were suppressed by 1961. The rebellion by the Darul Islam group in West Java was also suppressed in 1962. The 'Republic of South Maluku' was crushed in 1963. Finally, in 1963, Indonesia agreed to cease the armed conflict with the Netherlands regarding the status of West Papua (Irian Jaya).

[14] In the special session convened after the 30 September incident, MPRS adopted resolution no.19/1966 that ordered the parliament to review presidential decisions and presidential regulations issued by Soekarno since 1959. Based on this MPRS resolution, after two years of work for review, the parliament enacted Law no. 5/1969 which declared several presidential decisions and regulations as parliamentary laws, including the anti-subversion law.

Pancasila during the Soeharto regime by examining how the crime of "anti-Pancasila" activity of the anti-subversion law was judged in different political criminal cases.

c. Cases of the Indonesian Communist Party (PKI)

After the September 30 incident, the Indonesian Communist Party (PKI) and its affiliated organizations were outlawed,[15] and former PKI members who had engaged in armed resistance in several regions were tried for violating the anti-subversion law.

In PKI-related cases, the courts reasoned that the ideology of the Communist Party pursued the destruction or replacement of Pancasila as a sole state ideology. Furthermore, in a series of trials, the courts decided that the mere participation of the Communist Party[16] or non-violent propaganda activity for the Communist Party[17] constituted a subversive crime because the PKI's object was to overturn Pancasila by establishing a communist regime.

d. Cases of Islamic radicals

Radical Islamic groups also proved a serious political risk for authoritarian regimes. Although Soekarno's government suppressed the regional insurgencies of *Darul Islam* in the early 1960s, radical Islamic groups continued to exist. In the 1970s, the government suppressed the political movement of Islamic groups called *Komando Jihad*. Many *Komando Jihad* members were accused of anti-Pancasila activities under the anti-subversion law.

The Bojonegoro District Court passed a judgment on 11 November 1981 that actual conduct violating Pancasila was not necessary to constitute an anti-subversion crime; it was sufficient for a person to simply recognize the possibility of damaging Pancasila.[18] Furthermore, the judge maintained that the accused should recognize no legitimate state ideology other than Pancasila. Therefore, the judgment that membership in an organization aiming to establish an Islamic state constituted an act of destroying Pancasila was upheld. The judgment by the Kotabumi District Court on 9 February 1982 reasoned that establishing such an organization was a subversive act, arguing that committing a robbery was not the main reason for conviction.[19] Another judgment by the Bojonegoro District Court on 31 March 1983 found a defendant who had failed to even recruit new members guilty of a subversive crime.[20]

These judgments demonstrate the view that there was an uncompromized contradiction between Pancasila and the Islamic State, and that any political activities that intended to replace Pancasila ideology with Islamic state ideology were an incorrect interpretation of Islam, which constituted a subversive act.

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15 Article 1 of MPRS resolution No.25 of 1966.

16 Madiun district court decision on 31 December 1977 (No. 431/ 1977) and Buntok district court decision on 14 April 1979 (No. 1/1978/PID/TML/PN.BTK.(SUBV)).

17 Wonogiri district court decision on 20 May 1978 (No.38/Kts/1978 WNG). According to the indictment, the accused, a member of the PKI, committed the crime for disseminating communism in the district command of the military, in collaboration with the commander since 1958. Furthermore, after the September 30 incident occurred, the accused tried to conduct military training for party members and mobilize soldiers in the regional military command. However, the accused did not conduct violent activities. The court judged that the accused committed the crime of violating Pancasila morality and required a heavier penalty so that the conduct would not be repeated.

18 No.9/PTS.PID.SUBV/1981/ PN.Bojonegoro

19 No.01/PID.SUBV./1981/PN.KTB

20 No.2/ III/ 1983/ PIDANA BIASA SUBVERSI/ PN.BJN

e. Cases of Separatist groups

The judgment of the Lhokseumawe district court on 14 February 1983 convicted a sympathizer, who was not even an armed combatant, of the Free Aceh Movement (*Gerakan Aceh Merdeka*, GAM) because GAM's political purpose was to destroy Pancasila by establishing an authority other than that of the legitimate government.[21]

On 15 December 1984, the Serui District Court found a student member of the Free Papua Organization, who did not even engage in armed activities, guilty of a subversive crime. [22] According to the judgment, while the accused understood Pancasila, and especially the principle of unity of the state, the student participated in a subversive activity by distributing the organization's anthem and tentative constitution with the intention to deny Pancasila as a sole state ideology.

The Penal Code of Indonesia also has treason clauses (Book 1, Chapter I: Crime against the State Security). However, the crime of subversion is significantly different from treason in terms of requirements. As understood from the cases above, even if no engagement in militant activities was proven, the courts passed judgment that involvement in separatist activities was a crime of subversion because it created a severe division in society and loss of trust in the legitimate government.

f. Cases of the Democratization movement

The cases mentioned above confirm that under the anti-subversion law, the use of violence was not a requirement for an activity to be judged anti-Pancasila. Thus, even non-armed activities were deemed anti-Pancasila and penalized for subversion. Soeharto's government effectively utilized this interpretation of the "anti-Pancasila" activity to suppress political dissents that demanded a democratic government. This section reviews three cases in which the government applied the crime of subversion to the mere expression of opinion or peaceful activities by labeling them as anti-Pancasila.

In the cases discussed previously, while the accused persons did not directly commit violent activities, they were affiliated with organizations who had armed operations. [23] However, Soeharto's government also applied the anti-subversion law to purely unarmed activities. The following alleged subversion cases reviewed here involved no violent activities whatsoever.

The first case is the arrest of retired Army General Dharsono, who was accused of subversion for publishing an unofficial report of the Tanjung Priok incident titled "White Paper on Tanjung Priok".[24] Dharsono was arrested in November 1984 for involvement in a terrorist explosion conspiracy that

[21] No.7/ PTS.PID.B.SUBV/1983/ PN-LSM and No.06/ PTS.PID.B.SUBV/ 1983/ PN.LSM. In both cases, the accused persons only offered meals and meeting places for the GAM members but were not involved in armed operations.

[22] No.3/ PID.B/ 1984/ PNS

[23] The PKI also intended to organize the people's army (*Tentara Rakyat*) and prepared armed insurgency against the government by organizing PKI cells within the national armed forces.

[24] The Tanjung Priok incident occurred on 12 September 1984. Tanjung Priok is in the northern part of Jakarta near the Tanjung Priok port, one of the largest industrial ports in Indonesia. The military troops shot demonstrators that protested the military's behaviour alleged to be disrespectful to Islam in this area, causing many casualties. This incident was followed by a terrorist explosion on 4 October against Bank Central Asia, a Chinese-owned bank in Jakarta.
For details on Dharsono's case regarding the Tanjung Priok incident, see: Peter Burns, "The

occurred after the Tanjung Priok incident. However, during the court process, the prosecutor's indictment referred mainly to the contents of the "White Paper" that, according to the prosecutor, contained damaging statements about the government's authority. Regardless, the prosecutor stated that Dharsono's influence on the riot in Tanjung Priok was indirect.[25]

Despite the fact that Dharsono's indictment did not mention any organized armed activities, the Central Jakarta District Court still found Dharsono guilty of subversive activities and sentenced him to imprisonment for ten years. The court judgment stated that the criticism against the government made through the "White Paper" did not adhere to the constitution, which was based on Pancasila democracy. In other words, because the accused did not trust the parliamentary bodies (MPR and DPR) to debate the political issue in accordance with "the family principle" but chose instead to criticize the government by presenting the "White Paper," his behavior was perceived to be based on liberalist culture.[26]

The second case is a series of the government's actions to suppress student pro-democracy activities. In the late 1980s, the negative aspects of the Soeharto government's development policy, including economic disparity, corruption, and autocracy, became increasingly visible. Despite these social problems, student political activities had been strictly controlled for the so-called "normalization of campus life" since 1978. Consequently, instead of large-scale rallies in public spaces, students organized small study groups outside of campuses[27] and sought solidarity with laborers and farmers, including establishing various NGO activities.[28]

The government suppressed even these small-scale pro-democracy student activities. On 26 February 1990,[28] the Supreme Court convicted the accused for criticizing the economic policy and undemocratic nature of Soeharto's government in a small study group. The court deemed it a subversive act, reasoning that even though societal criticism of the government was necessary, the objection must be made in a manner that would not contradict Pancasila and the Constitution. Furthermore, according to the decision, the opinion of the accused was influenced by Marxism and Leninism gained from the novels of Pramoedya Ananta Toer.

In this case, the court condemned the style in which critical activity against the government was delivered and decided that it constituted a subversive act. According to the court's judgment, the defendant made their statement at the study group in a manner that constituted subversive activity. The defendant's statements were deemed so hardliner and radical as to cause hostility, division, and confusion among the people disturbing national security. The judgment maintained that although social criticism was necessary and acceptable in Indonesia, such criticisms must be moderate, non-confrontational, not contrary to the interests

Post Priok Trials: Religious Principles and Legal Issues," *Indonesia* 47 (1989): 61–88, https://hdl.handle.net/1813/53910.

25 *Tempo*, 24 February 1985.

26 "Indonesia: The Anti-Subversion Law: A Briefing," Amnesty International, 1997, https://www.amnesty.org/en/documents/asa21/003/1997/en/.

27 Edward Aspinall, "Student Dissent in Indonesia in the 1980s" (Centre of Southeast Asian Studies, Monash University, 1993), 14.

28 Anders Uhlin, *Indonesia and the 'Third Wave of Democratization': The Indonesian Pro-Democracy Movement in a Changing World* (Routledge, 1997), 86–87, 105–10.

of the people, not destructive of unity, and not contrary to Pancasila and the Constitution. In addition, the judge decided that the defendant's statement indicated an intention to expel Pancasila ideology. Because the communism from Pramoedya's novels was found to have influenced the defendant, their statement purported to replace Pancasila ideology with other ideologies, thereby causing hostility among the social classes.

The third case concerns the People's Democratic Party (PRD). The government claimed that the PRD masterminded a riot that occurred after the condemnation of the occupation of the Indonesian Democratic Party Headquarters by supporters of Megawati Soekarnoputri on 27th July 1996. The chairperson of the PRD and leaders of the sub-organizations were arrested for a subversive act. The Central Jakarta District Court decided that the mobilization of laborers and students for the demonstration organized by the party could destroy Pancasila and the Broad Policy Guidelines (*Garis-garis Besar Haluan Negara*, GBHN).[29]

The PRD's party platform, action plan, and manifesto objected to the fundamental systems of Soeharto's authoritarian regime. The PRD's platform outlined the principle of the "People's Social Democracy," which aimed to create a democratic multi-party system. In their action plan, the PRD further proposed the abolishment of the five laws enacted in 1985 relating to political systems that legally supported Soeharto's authoritarian regime [30] and the military's political function (*dwi-fungsi ABRI*): controlling inflation; increasing the minimum wage; allowing a presidency other than Soeharto's; monitoring general elections; operating a referendum in East Timor; supporting Megawati Soekarnoputri; and rejecting Pancasila as the sole state principle. The "Manifesto of PRD" also declared that there was no democracy in Indonesia; that the 30-year-long Soeharto regime had oppressed the political rights of people, and that the parliament had been maliciously structured to maintain the regime. The PRD also collaborated with labor and student groups to stage various protests.

The Central Jakarta District Court decided that the PRD's activities constituted anti-Pancasila subversive acts. According to the court's decision, the PRD rejected Pancasila as the sole principle and demanded that the five political laws enacted in 1985 (that parliament had duly enacted by the parliament following the MPR decision in 1983) be revoked. Furthermore, the judge indicated that the PRD had incited students and workers who did not understand the PRD's political demands to achieve its political interests. Therefore, according to the court's judgment, these activities were potential destroyers of Pancasila and the GBHN. Meanwhile, regarding the violent July 27 incidents in which the PRD was allegedly involved, the decision only briefly mentioned that the PRD participated.

These three cases indicate how broad the notion of "anti-Pancasila" was under Soeharto's authoritarian regime. At first, the "security" to be protected by the anti-subversion law was the closed profit-sharing system in an authoritarian Soeharto regime that advocated develop mentalism. In this system, broad political participation by ordinary citizens was not permitted, and any

[29] No.225/ Pid.B/ 1996/ PN.Jkt.Pst.

[30] These political laws refer to the laws on the general election, parliament bodies, political parties, and Golkar, and the law on referendums enacted in 1985.

open criticism against the negative aspects of the development policy, such as nepotism, wealth concentration, or the widening income gap, were deemed anti-Pancasila subversive activities that could pose a risk to security. Furthermore, even if the defendants' violent acts were not sufficiently proven during the court process, the law on anti-Pancasila subversive acts could still be applied based on the defendants' previous speeches or opinions.

Another important point is that the Indonesian authoritarian government allowed the expression of critical opinions of the government only through extremely limited channels. In this context, the Pancasila way of criticism was understood to be a non-confrontational expression of criticism. Thus, as in prior court judgments, opinions should only be delivered through "deliberations in DPR/MPR to conduct consultation based on the family principle," or in a "moderate, not confrontational, not contradicting people's interest and not violating Pancasila and the Constitution" manner. In fact, the President controlled the parliament through strict regulations on the parties' activities and nominated seats appropriated for military officials, and the meaning of a manner "not violating Pancasila and the Constitution" was so opaque that any political activities faced the risk of arbitrary criminal punishment by the government.

By monopolizing the interpretation of Pancasila, the authoritarian government under Soeharto could penalize any expression that did not serve the regime's interests. Using oppressive measures backed by the strong presidential powers afforded by the 1945 Constitution, Soeharto's regime strictly limited free argument about Pancasila and monopolized the interpretation of the Pancasila ideology. Pancasila was positioned as a supra-individual absolute truth transcending the Constitution, [31] and constitutionalism in Indonesia became merely semantic, failing to restrain the President's arbitrary exercise of political power.

After more than 30 years as president, Soeharto's resignation in 1998, combined with the amendment to overhaul the Constitution, which supported the legitimacy of authoritarianism, meant that the situation should have changed completely. However, reality seems to reflect the opposite. Therefore, the gap between normative democratic constitutionalism under the amended Constitution and the restrictions on political freedom should be examined. The next chapter discusses how the legacy of Soeharto's regime regarding "anti-Pancasila" activities is still entrenched in current Indonesian constitutional politics.

[31] According to Grimm, in discussing the constitutional typology of Loewenstein, 'The decisive line runs between systems based on a supra-individual absolute truth, on the one hand, and systems that give primacy to individual autonomy on the other hand'. While this absolute truth can be either religious truth or secular truth, a vision of the perfect society—the final goal of all historical development—'always entails subordination of the constitution to the truth'. See: Dieter Grimm, "Types of Constitutions," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 114; For the comparison of the constitutional typologies of Loewenstein, Grimm and Sartori, see: Albert HY Chen, "The Achievement of Constitutionalism in Asia: Moving Beyond "Constitutions without Constitutionalism," in *Constitutionalism in Asia in the Early Twenty-First Century*, ed. Albert H.Y. Chen (Cambridge University Press, 2014), 9–12.

Post-Authoritarian Constitutionalism and Social Organization Law

a. Legal situation during the post-authoritarian period

Among various legal products of Soeharto's regime, the "five political laws" enacted in 1985 were the most powerful legal tools for sustaining an authoritarian regime. These five political laws and their functions are as follows:

- The General Election Law (*UU Pemilu*, Law No. 1/1985) – restricted political parties' activities in a general election
- The Parliaments Law (*UU MPR, DPR dan DPRD*, Law No. 2/1985) – provided non-elected seats for the military in parliament bodies at both national and local levels
- The Political Party Law (*UU Partai Politik dan Golkar*, Law No. 3/1985) – restricted the freedom of political parties[32]
- The Referendum Law (*UU Referendum*, Law No. 5/1985) – protected the 1945 Constitution as a tool of the authoritarian regime
- The Social Organization Law (*UU Organisasi Kemasyarakatan*, Law No. 8/1985) – restricted freedom of association

The first four laws were abolished or amended soon after the end of Soeharto's regime. Only the Social Organization Law remained untouched until its amendment by Law No. 17/2013 in 2013. While the most severe threat to the freedom of association during Soeharto's regime, the single umbrella organization rule[33] was not applied as strictly as in the previous regime, the prohibition of anti-Pancasila organizations remained unchanged.

The laws in 2013 and 2017 (Law No. 16/2017 that recognized the government regulation in lieu of Law No. 2/2017 as a parliamentary law) amending the Social Organization Law formally abolished the single umbrella organization rule, but interestingly seemed to tighten restrictions on organizations assumed to be anti-Pancasila. The amendment of the social organization law in 2017 was initially enacted as a government regulation in lieu of law, and the parliament authorized this presidential regulation as a law pursuant to Article 22 of the Constitution.[34]

In its preamble, social organizations were obliged to defend Pancasila as follows:

a. The state has an obligation to defend the sovereignty of the Republic of Indonesia as a unitary state based on Pancasila and the 1945 Constitution.
b. The violation of the principle and purpose of social organization based on Pancasila and the 1945 Constitution is reprehensible in view of the morality of the Indonesian nation regardless of the ethnic, religious, or national background

[32] Since the beginning of Soekarno's authoritarian regime, the Indonesian government has insisted that Golkar (a functional group) is different from political parties. However, in practice, Golkar has played the role of a powerful political organization. To avoid complexity, 'Law no. 3/1985' in this article is referred to as the political party law.

[33] Article 8, Law no. 8/1985 provides that 'to play a greater role in carrying out its functions, social organizations gather in a guiding and development platform of the same category'. Thus, a social organization is obliged to be a subordinate part of the upper national umbrella organization that the government authorizes.

[34] Article 22 of the Constitution states that:
(1) Should exigencies compel, the President shall have the right to enact government regulations in lieu of laws.
(2) Such government regulations must obtain the approval of the DPR in its next session.

of the perpetrator.

To achieve this purpose, the preamble further explains why the Interior Minister, not the judiciary, had the legal authority to disband alleged anti-Pancasila organizations:

a. Because Law No. 17/2013 on social organizations has not adhered to the principle of *contrarius actus,*[35] it is not effective to impose sanctions on social organizations that adhere to, develop, and spread teachings or ideas that are contrary to Pancasila and the 1945 Constitution.

Even though civil freedoms had expanded significantly since the end of the Soeharto authoritarian regime, as the law's preamble declares, the government considered Pancasila an inviolable state ideology and any organization that denied or rejected Pancasila was not permitted to exist in Indonesia. Furthermore, based on the principle of *contrarius actus*, because of the Interior Minister's wide discretion, this law represented a severe restriction on the freedom of association guaranteed by the Constitution (Articles 28 and article 28E).

As discussed in the previous chapter, Soeharto's authoritarian government suppressed political dissent through a monopolized interpretation of Pancasila. In the next section, this article considers the implications of the previous regime's legacy that are reflected in the amended social organization law that prohibits and even disbands organizations deemed "anti-Pancasila." For this purpose, I refer to the notion of "Indonesian values" or "Indonesianess" and the concept of illiberal constitutionalism.

b. Indonesian values

The references to "Asian values" that emerged in popular human rights discourses in the 1990s indicates the most significant characteristic of the amended social organization law of 2017. Interestingly, in the elucidation section, the amended social organization Law of 2017 refers to the Bangkok Declaration on Human Rights in 1993. The Bangkok Declaration of 1993 was adopted in the Asia-Pacific regional preparatory meeting for the Vienna International Human Rights Conference in 1993.[36] Around the time of that conference, there was heated controversy over the concept of human rights between Western developed countries and non-European (mainly East and Southeast Asian) countries.

The Bangkok Declaration of Human Rights was the first direct collective refutation by Asian authoritarian countries of the accusations of poor human rights records in that region. The declaration stated that because each state had its own socio-cultural values and human rights based on their unique culture and society. Therefore, Western countries should not force non-Western countries to accept their values, including those concerning human rights. This argument is often referred to as the "Asian value discourse" or "Asian Human Rights" discourse. Despite the bold claim of the Asian value discourse in the 1990s, this argument did not have an adequate

[35] This Latin term means that if a state authority has specific competence, that competence includes the competence to reverse the previous decision.

[36] Strangely, the reference to the declaration in the elucidation part of the amended social organization law is written in English and the quotation from the original text of the declaration is not complete. the author has not yet found a reason for this part of the law being written in English. Furthermore, the English part seems to be a quotation from other documents; however, there is no reference to the source.

theoretical foundation, and it was ultimately no more than a self-legitimation of domestic human rights restrictions by authoritarian Asian regimes.

The amended social organization law reiterated the Bangkok Declaration in 1993 to support the legitimacy of the restrictions on the freedom of association in the name of Pancasila. The elucidation of the law refers to the Bangkok Declaration on two points: the matter of the fair application of human rights, and Indonesia's unique social values.

Regarding the matter of the application of human rights, the elucidation of the law refers to paragraph 10 of the Bangkok declaration, which states:

> "*10. Reaffirm the interdependence and indivisibility of economic, social, cultural, civil, and political rights, and the need to give equal emphasis to all categories of human rights."*

The law interprets this sentence as a rejection of the unconditional recognition of civil and political rights by insisting that:

> "*The barely disguised subtext here is that civil and political rights (with their assertions of democratic and protest rights) have been wrongly prioritized by the supporters of human rights in the Global North with the result that the subject of human rights often appears exhausted once the issue of democratic freedom has been fully ventilated (penjelasan umum the 4th paragraph)."*

This argument reminds us of the authoritarian develop mentalism that characterized Suharto's regime, which suppressed labor unions, farmers' organizations, and groups of urban poor who complained that they suffered from the consequences of allowed mega-development projects.

As for the emphasis on Indonesia's unique social values, the law quotes the eighth paragraph of the Bangkok Declaration, which states:

> *"8. Recognizing that while human rights are universal, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural, and religious backgrounds."*

This elucidation insists that the interpretation of the Universal Declaration of Human Rights should not be made or applied as contradicting historical, cultural, or religious backgrounds. At this point, Pancasila was referenced as defining Indonesia's historical, cultural, and religious backgrounds.

During Soeharto's regime, the discourse on cultural values played a significant role in restricting alleged "anti-Pancasila" activities based on the anti-subversion law. Subversion was not a crime of violence, but a crime against the values of Indonesian society as contained in Pancasila. Therefore, as indicated during the trials of General Dharsono, student activities, and PRD, a subversive activity meant an act against any mode of behavior and thought consistent with Pancasila values. Furthermore, Soeharto's government monopolized the authority to determine what Pancasila meant and what activities were deemed inconsistent with the Pancasila values. To justify Pancasila values, the Soeharto regime referred to the story of a "good traditional Indonesian society." For instance, in this context, the family principle, mutual support, and an integrated state[37] was presented as the reality embodying the "Indonesian values" or

[37] For more details on the 'integralistic state' discourse in the Soeharto regime, see: Marsillam Simanjuntak, *Pandangan Negara Integralistik* (Jakarta: Grafiti, 1994).

"Indonesianess" [38] that distinguishes Indonesian society from Western liberal society. Therefore, arguing the meaning of these values was disallowed by the broader public, and any opinion that raised doubt about the government's interpretation of Pancasila was restricted and even criminalized.

The articles in the amended social organization law that prohibit anti-Pancasila activities indicate that post-authoritarian Indonesia shares this social value discourse and thus maintains the legacy of the authoritarian regime.

c. Illiberal constitutionalism

What effect does the emphasis on Indonesian social values have on post-authoritarian constitutionalism in Indonesia? The concept of illiberal constitutionalism offers rich implications for this discussion. While the liberal polity recognizes individual autonomy and state neutrality as its two main pillars, the illiberal polity prioritizes community interests and actively promotes a particular vision of communal life.[39] Thus, unlike a liberal polity, an illiberal state is "expressly non-neutral, privileging a substantive vision of the good, informed by ethnicity, religion, or communal morality".[40] From this viewpoint, the 1945 Constitution, which deems Pancasila as the state ideology, has characteristics of illiberal constitutionalism.

While illiberal constitutionalism does not necessarily result in an undemocratic regime, "communitarian and theocratic constitutional orders, in their search for identity and authority, may not sufficiently restrain the abuse of public power or articulate a substantive articulation of the good and common life which is satisfactorily inclusive". [41] Therefore, even though the amended Constitution of Indonesia provides for the protection of human rights and the restriction of executive power that is far stronger than it was before, this Constitution is still vulnerable to authoritarianism. It is especially dangerous if there is no opportunity to debate the meaning of ideology and the common good.

A tendency to exclude opinions not favored by society's majority is also evident in other laws. Among all, the frequent application of defamation charges under the Electronic Information and Transaction Law (Law No. 11/2008) restricts free expression of opinions unfavored by the political and social *status quo*.

The blasphemy law (Government regulation in lieu of Law No. 1/1965) is yet another case that limits free space for the argument on "Indonesianess." In the judicial review decision in 2009 on the Blasphemy Law,[42] the Constitutional Court used the concept of "Indonesianess" (*keindonesiaan*) as the main basis for its judgment confirming the constitutionality of the Blasphemy Law. The

[38] Although these values were referred to as being inherent in traditional Indonesian culture, the fundamental concepts were imported from European political and legal ideas, such as the historical legal school or organic state concept during the pro-independence nationalism period. As for the foreign roots of the traditional value discourse in Indonesia, see: Peter Burns, *The Leiden Legacy: Concepts of Law in Indonesia* (Netherlands: Brill, 2002); David Bourchier, *Illiberal Democracy in Indonesia: The Ideology of the Family State* (New York: Routledge Politics in Asia Series, 2014).

[39] Li-Ann Thio, "Constitutionalism in Illiberal Polities," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 134.

[40] Thio, 136.

[41] Thio, 149.

[42] The constitutional court decision No. 140/PUU-VII/2009

court reasoned that any religious propaganda contradicting Pancasila, which provides the principle of "the State based on one almighty God," shall not be accepted by good Indonesian citizens. Furthermore, the judgment defined blasphemy as an interpretation of religious teachings which are assumed to be deviations from the authoritative Indonesian *Ulamas* (Islamic law scholars) or clerics. In other words, this court decision referred to the opinions of conservative religious organizations in Indonesia as congruent with "good Indonesian values." Furthermore, these conservative religious organizations have a strong influence on the government. Among all, the blasphemy charge in 2017 against Basuki Tjahaja Purnama *alias* Ahok, the former Jakarta Governor, proved the risk of a monopolized interpretation of ideology. Despite the very weak grounds of the charge, the court found Basuki guilty of blasphemy because of his election campaign speech of the previous year.

IV. Conclusion

All three Indonesian Constitutions have positioned Pancasila in their preambles that declare fundamental constitutional principles. In fact, the interpretation of Pancasila has varied throughout Indonesia's history of constitutional politics. However, the two authoritarian regimes of Soekarno and Soeharto successfully monopolized authority over Pancasila and suppressed political dissents.

The Anti-Subversion Law enacted in 1963 was one of the most effective legal tools for an authoritarian government that utilized the Pancasila ideology for its political interests. As seen in the series of court judgments regarding the crime of subversive activities, anti-Pancasila activities have been widely defined, ranging from armed organization against the government to unfavorable opinions of the government. Furthermore, Soeharto's government attached a cultural meaning to Pancasila, combining it with the idealized traditional culture of Indonesian society in which community members live peacefully for the communal good without conflict among members or between the ruler and the ruled. As a consequence of labeling Pancasila as cultural, even moderate opinions could be labeled as anti-Pancasila if the mode of expression was deemed subversive.

While the current Constitution provides for the protection of the freedom of opinion, and most security regulations restricting political dissents have been abolished or revised so that the law protects political and civil liberties, the ambiguous meaning of Pancasila values and the lack of freedom to discuss state ideology still has a chilling effect on the freedoms of expression and association in Indonesia. As seen in the amendment of the social organization law, the potential risk of arbitrary use of the "anti-Pancasila" argument remains high. Therefore, the current emerging risk of authoritarianism in post-authoritarian Indonesian society is partially the result of the legacy of the authoritarian regime that made Pancasila an unquestionable absolute value in Indonesia.

At present, the targets of the amended social organization law are confined to extreme Islamist groups. However, as in Suharto's regime, the text of the law itself broadly and vaguely covers social organizations whose platform "denies or replaces Pancasila," including communism and Marxism–Leninism. The Soeharto regime often labeled groups or persons who demanded accountability from the government as "communists" and excluded human rights

protections from political forums. Therefore, the amended social organization law remains a serious risk of authoritarianism in Indonesia.

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