

## INDONESIA'S PRESIDENTIALISM: MODERATING STRONG PRESIDENTS, ENHANCING REPRESENTATION

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SUMMARY: I. *Executive Dominant System: Need it result in a divisive presidency?* II. *Power-sharing arrangements: the Indonesian Experience.* III. *Ruling by Decrees: Dangerous impediment of Executive-dominant presidential system.* IV. *Electoral system design: building the infrastructure of legitimate presidency.* V. *Nation-wide direct popular elections: people's voice, people's choice.* VI. *Bottom-up approach in party nomination in presidential election.* VII. *The crux of equality principle in electoral representation.* VIII. *Establishing a Judiciary for Solving Political Questions: the role of the Constitutional Court.* IX. *The Demise of once All-Powerfull People's Consultative Assembly.*

Presidential systems where governing authority is vested under the leadership of a single chief executive, runs the risk of the “winner takes all” tendency which if left unchecked, is highly likely to encourage autocracy. Strong and stable political party system and effective oversight of the parliament, both crucial pillars of representative democracy, would be essential in establishing the mechanism of checks and balances to prevent presidential system to rule with dominance and there are options available to enhance the working of a conventional presidential system with constitutional checks and balances. Such as the experience of Indonesia, which had been undertaking one of the largest transitions in history since a massive unrest led to the resignation of former President Soeharto, whom had seize control over the country for nearly 33 years, in 1998. Indonesia has since undertaking massive reforms and becoming one of the most successful

presidential democracies in the world. One lesson that perhaps be of use, in particular for other democracies in the global South, is that Indonesia's experience perhaps suggests that more options are available for relatively young democracy due to likelihood of massive changes might be more readily accepted compared with such changes in more established democracies. Indonesia is a unitary state by design of the initial framers of the constitutions, however as some of these reforms will be discussed further in this paper some of these reforms might also work equally successful in federal and mixed presidential system settings.

Prominent relationship that comes into play in a presidential democracy is the relationship between presidential institutions and political parties in the parliament, both are linked by the same constituents. They have a fair chance to become critical of one another and yet the possibility of cooperation between them would be just as likely: it is in their self interest to be able to influence one another in a representative democracy. The question in this regard would be which one of these would be able to instil effective checks and balances mechanism to prevent the "winner takes all" nature of presidential institutions in policy making? If this tendency can be minimized, to who's benefit, parties or the constituents? Furthermore, if implementation of presidential system in a democracy is faced with major weakness or failure, would the shift to parliamentary system would be the only viable alternative?

Presidential system can be encouraged to provide policies aimed at broad constituencies if constitutional and system design were set in a way that incorporates both incentives and inherent pressures to the effect that government's survivability will depend on the success of its response to constituent's demands. This set of incentives and pressures might be built into the system in a range of perspectives and approaches. This paper attempts to discuss some aspects and dynamics of presidential government system as it evolves in Indonesia, challenges it faced in establishing safeguards to avoid the "winner takes all" inclination within presidential institutions, and attempts to solve those challenges in Indonesia's representative democracy. This paper is not intended to be comprehensive; discussion is limited to only some of the major reforms that took place and contributing significantly to the development of Indonesia's presidential system post-1998. Nevertheless, I am hopeful that this paper might be of interest to encourage further understanding of the diverse aspects of Indonesia's experience and transformations in its presidential system

and would be able contribute to the discourse of advancing presidential democracy.

### I. EXECUTIVE DOMINANT SYSTEM: NEED IT RESULT IN A DIVISIVE PRESIDENCY?

Strong president in a presidential system of government is the centre of concerns over the likelihood of encouraging autocracy. Weak president are less of a concern as provided this can be balanced by a strong administration. There is concern over this argument, however, of whether a strong president would be a liability rather than considered as desirable in *all* circumstances. The need of strong leadership of the chief executive is perhaps one of the more desirable trait and relevant even crucial in time of crises; a properly attributed president might make a difference to avoid a divisive presidency. The fear of strong president and the apparent need to limit its powers, one might argue in similar light that a poorly attributed, insecure president may affect to weaken rather than strengthen a presidential system.

Divisive presidency perhaps is more likely to happen in the case of these circumstances:

1. Questions over the legitimacy of the president.
2. Challenges over the inclusiveness of the ruling government.
3. Divisive attitude is being encouraged by the government.

Various academic exercises by research institutions and practitioners alike has been devoted to find ways and options to overcome these challenges, and some analyst suggests that the design of constitutional provisions and electoral system can work to the effect of lessening or increasing the likelihood of a divisive presidency in a presidential system, depending on the options chosen. It is important to stress that with regards of the meritorious achievement these studies deserved, there are limitations of how much impact would a particular system design can bring positive changes, without the presence of other equally important elements whom have the capacity in effecting changes into practice. It is, in a major way, the delivery that matters and the people who can drive a change where a system cannot.

Questions over the legitimacy of the president and the government can likely be reduced by reforms in electoral system of president. Direct election of the president would be more likely to create an equal base of legitimacy of the president over the popularly elected members of the parliament. An equal base of legitimacy between the president and parliament need not to result in zero sum game in a presidential system: strong presidency does not necessarily means a weak parliament, but a weak base of legitimacy of the president will always create a weak presidency resulting in ineffective government.

Indirect elections, however, is not without merit of its own. Under the appropriate settings indirect elections can promote clear lines of accountability, cooperation between executive and legislative branches, and encourages the creation of simple majority-minority and effective opposition in the government. It does however highly likely to suppress pluralism with regards to the inclusiveness of parties in government, can encourage severe polarisation and divisiveness not only within the parliament but among the electorates as well. The absence of terms of office limit also runs the risk to be less likely to encourage change.

## II. POWER-SHARING ARRANGEMENTS: THE INDONESIAN EXPERIENCE

In government system choice, sometimes power-sharing arrangement rather than division of powers can be considered as an alternative in accommodating diversity of socio-political forces (ethnic groups, social groups, ideology etc) to enhance inclusiveness in representation. This particular power-sharing arrangement appears to be more dominant in countries which either facing challenges of intense fragmentation or massive threat of a divided society in the transitions to democracy. Some examples of power-sharing arrangement are applied in transitional post apartheid South Africa, the most complicated collective rotating presidency of Bosnia-Herzegovina, Nigeria, or the ethnic groups' representation in Micronesia.

In a slightly different dynamics yet a power-sharing arrangement nevertheless, Indonesia's experience devolved from an executive heavy presidentialism under a supreme People's Consultative Assembly or MPR system towards a more conventional presidential system with constitutional checks and balances.

During first President Soekarno's years since independence in 1945, the power sharing between the President and the cabinet were of the nature perhaps of mutual disinterest rather than a collective working government: the cabinet is representing party membership in the parliament, but the authority of selecting the *formateur* or person in charge for selecting members of the cabinet, is the prerogative of the President. Since the *formateur* will later become prime minister, this means that the configuration of coalitions in the government and policies, is beyond the hands of the parties themselves in the parliament. The cabinet can exclude any party from membership of the cabinet, regardless of their electoral performance in parliamentary elections, and parties do not have any authority to object of their own members in the cabinet. This in the end contributed to frictions between the President, the Prime Minister, the cabinet and parliament -to the point that both the cabinet and parliament are so divisive that prevent any government policy to be able to be implemented successfully.

The divisiveness was so severe so that the President and political parties were polarizing against each other, frictions and loyal opposition between parties prevented the parliament to function, and this opposition in the end was practically isolated themselves from policy making process. The instability and inertia in the national government in this period makes the system that was intended to protect diversity of social, ethnic, religious group and to maintain regional interests in a unitary state met a failure. In the outbreak of local tensions which derived from underlying dissatisfaction with Jakarta's policy, cabinet fell one after another and local struggle groups were suppressed as insurgents until the abandonment of the president-cabinet ministers system through the re-enactment of the 1945 Constitution in 1959 by a presidential decree. The establishment of a State of War and Siege military administration in 1957 which preceded the decree had paved the way for an executive heavy autocracy known as the Guided Democracy.

The inability of political parties to make working alliances with each other, even at the time that their existence is threatened, further indicates weakness within the party system. However, the dissolution of two political parties opposing the government Masjumi and PSI in 1960, was a sign of an authoritarian regime eliminating its political rival. Contributing factor to this tendency was that important decisions and policy in Guided Democracy was the outcome of negotiations between President

and Army Leadership, whose political ambitions are unclear and virtually the only permanent force of the country. This makes the armed forces if allowed to become a political force would have ultimate advantage compared with any other political groups or leadership: free from having to justify its existence and often, are in the position to be powerful enough to exhort concessions in many forms from the civilian leadership. The military's role in politics to a large extent was due to their role in suppressing regional uprising, especially leading to the State of War and Siege in 1957 and as history attested, remains a dominant power in Indonesia's politics until the reform movement gaining its momentum after a mass riot in 1998.

### III. RULING BY DECREES: DANGEROUS IMPEDIMENT OF EXECUTIVE-DOMINANT PRESIDENTIAL SYSTEM

The ability to make decision unilaterally without a chance for other branch to intervene would pose serious threat to representative democracy everywhere, and it appears to be more prevalent in an executive-heavy presidential system where division of powers between the executive and legislative branch of government are severely distinct. Other democracies safeguards against this by implementing veto rights, whereby an executive decision can be overridden by a threshold of votes in the parliament. In this regard, some implemented equal veto rights between branches where the chief executive can stop legislation passed by the parliament from being into effect. An example of a system with an executive veto rights is the United States' presidential system, where all legislation before it can be passed by both houses of the parliament must be presented to the President for approval, whom should provide a response within 10 days before it shall become laws if the President failed to respond with an objection or amendment. This veto right of the President can be overridden by a 2/3 vote in both houses of the Congress. The US system implicitly enables veto right to the legislative branch up until 1986 when the US Supreme Court declared legislative veto unconstitutional. The question in this matter then, is of whether veto rights would be the only options of preventing ruling by decrees? What if equal veto rights have become void, such as demonstrated in the United States political process, aren't there any other viable options that may be considered?

In post-Soeharto Indonesia's experience at least, there is another option. Policy making processes in Indonesia's constitutional setting was designed in a way that powers to legislate is vested in the parliament, with no rights reserved for the President to veto laws passed by the parliament. However, no bills shall be passed by the House without a joint deliberation and mutual agreement with the executive. Only then, legislation can be passed by the parliament and sent to the President for signature, which within 30 days, it will become laws irrespective of whether the President had signed the jointly approved bill or not. Subsequently, the President must secure approval of the parliament for each state budget proposal, without which, the budget for previous financial year will apply. The President must also seek approval from the parliament on a number of key decisions and policies, such as decision to enter into agreement and treaties with other countries, in particular those of the nature which will have an effect on the state's financial burden and those which requires amendments or enactment of new laws. Appointment of some key positions within state bodies must also secure endorsement from the parliament.

Another crucial important measure against ruling by decrees relates to presidential powers in time of an emergency and the power of the President to dissolve the parliament, which opens the possibility of unilateral decision making and concentration of powers in the executive's hand. As part of major reforms in post-Soeharto Indonesia, further measures was being put in constitutional provisions to safeguard powers not to be concentrated in the president including in the event of state of emergency. In the event of a state of emergency the grounds of declaration of the state of emergency and governing authorities during this period are specified in legislations. A constitutional provision is added to the effect that even in a state of emergency, the President may not froze or dissolve the parliament and any government regulations in lieu of laws issued by the President at anytime must be approved by the House of the Representatives in their immediate sessions and if failed to secure approval such regulations must be revoked and declared no longer in effect.

Indonesia's transitions following an abrupt shift of powers from the first president Soekarno to its predecessor Soeharto would perhaps be a relevant example for how a state of emergency can be exploited in a way that ends up with succession outside constitutional boundaries. That the president was the casualty of the transitions was highly unusual, but the circumstances of how it happened perhaps were not. A lot of mystery surrounding

this particular transitions in Indonesia's political history even now, as the military regime put a comprehensive tight lid over information coming in and out during the alleged coup by the Indonesian Communist Party in October 1965 when 6 of the Army's high ranking senior generals and one lieutenant, the aide of one senior general whom were managed to escape, was murdered. Many important documents of this period are missing and history writing was monopolized by the army from then on and for the remaining 32 years general Soeharto was in power. President Soekarno was held responsible for the failed coup and was put under a house arrest until the military regime in power can determine his innocence. Soekarno held the position that he was led to believe that his life was in danger in the coup and that the broad power mandate that he gave to Soeharto was temporary and had been withdrawn when he assumed leadership of the army and appointed new caretaker for the armed forces daily organization after the imminent danger was under control. During the next 2 years after the attempted coup happened the worst manhunt in history, where military-sponsored civil militias hunts down and claimed lives of communist party members and people alleged to be sympathetic towards them. The death toll was disastrous with estimates ranging from the lowest 50,000 (army police initial assessment) to the highest 1,000,000 lives met their tragic fate during that dark history of Indonesia, hundreds of thousands of others such as Pramoedya Ananta Toer had to survive detention without trial, among threats of starvation, torture and diseases in the detention camps, many survived to the fact that the army had their properties and valuable confiscated.

It was under the broad mandate of March 11 1966 executive order Soeharto held control over the country under army leadership, temporarily dissolved the parliament and arrested or prosecute many of its members whom were affiliated with the Indonesian Communist Party (PKI) or allegedly involved in the failed coup and called in a provisional People's Consultative Assembly (*Majelis Permusyawaratan Rakyat/MPR*) to be convened to establish laws under the state of emergency. The only senior Army highest rank officer surviving the murder, General Nasution whose daughter Ade was killed during the attempt on his life during the incident, chaired this provisional assembly together with other army leadership. It was under this assembly that President Soekarno was removed from office in 1967, based on the assembly's rejection of his accountability report over the coup, as summoned by this supreme body of people's sovereign-

nty under the 1945 Constitution. The ground for removal from office was that the Assembly was dissatisfied with the President's response to held the PKI—the fourth largest party as the result of 1955 General Elections—, responsible for the coup and punishing its members for it. After removing Soekarno from office this assembly then appoints Soeharto to continue exercising executive powers until a new MPR established after the general elections which was originally scheduled for July 1968. New election laws had been passed under army leadership in 1969, but it was not until 1971 the first new order general elections was being held, the reason for this was that Soeharto would not risk holding an election for as long as Soekarno was still alive: Soekarno passed away broken down and severely ill in June 1970.

Indonesia during Soeharto's 32 years leadership was run under meticulously arranged censorship to eliminate political opposition. Although under the 1945 Constitution as it originally enacted the powers to legislate was exercised by the executive in agreement of the legislature, however the legislative machinery was significantly weakened through a forced fusion of political parties into 2 groups: Islamic leaning parties, nationalist and a government and civil service political grouping known as *Golongan Karya or Golkar*, which Soeharto initiated and soon after become the incontestable party with more than 70% majority in all general elections after '71 elections. Criticism for the government was severely restrained and this in combination with poorly attributed legislative powers led to inactive, rubber stamping legislatures. Soeharto also 'fortified' the supreme body of people's sovereignty, the MPR, with appointed members of numerous elements as large as twice the size of the House of Representatives (*Dewan Perwakilan Rakyat/DPR*) in addition to 100 military and non-military appointed members of the 460 members House. The membership of MPR increased to 1,000 with at least 60% of the members was political appointees since 1987; only in 1999 MPR these numbers was reduced to 700 retaining only 238 appointed members and vacate the remaining 300 seats. In 2004 membership of the MPR, no longer a supreme body it once was under the Constitution as it originally enacted consist fully of elected members of the House of Representatives and the new second regional chamber the Council of Regional Representatives (DPD) of 550 and 128 respectively. This, in combination with heavy recalling and broad measures for censures led to a halt of political activism in legislatures that paved the way for policies running predomi-

nantly by executive orders and regulations, virtually without checks, to the point where legislatures passed laws identical to the president's directives and implementing regulations were overwhelmingly carried the status of executive orders and government regulations.

After president Soeharto's forced resignation from office following a mass riot in 1998, the Vice President Habibie replaced him on a transitional basis until new general elections in 1999 produced new government. During this transitions period some early reforms had begun to take place, but it was not until the new members of the MPR elected through that first democratic elections after 1955 were critical constitutional reforms began to take place in 1999. The first amendment to the constitution redirect legislative powers back to the House of Representatives with joint deliberation and mutual approval with the President, restore the rights for the legislatures to initiate bills with the requirement of president's approval removed and to restrict government regulations only as specified to implement laws. Further measures to safeguards against ruling by decrees were installed through the enactment of second amendments the year after, that when exigencies compels the President may establish government regulations in lieu of laws but such regulations must obtain the approval of the parliament during the next session which if not approved by the legislatures then that government regulation must be revoked. Procedures for establishing laws also are regulated by law, in which executive orders abolished and replaced with presidential regulation which further stipulated to be restrictively administrative in nature and no longer policy instrument as it was under the old system. Another measure against ruling by decrees is the addition of constitutional provision explicitly prohibits the President from freezing or dissolving the parliament.

#### IV. ELECTORAL SYSTEM DESIGN: BUILDING THE INFRASTRUCTURE OF LEGITIMATE PRESIDENCY

Electoral system in presidential election have close relation not only with what are desirable base of the president's claim to power and legitimacy, but also how this could encourage a wider base of constituent as well how it could appeal to the electorate and their expectations in accountability of presidential institutions. How an electoral system is designed to encourage and promote and how this will work in practice,

however is not without its limitations. One example is the limit of how electoral system design can assist in creating a linkage between the elected representative and the electors they represent. Another is the limit of how electoral system can protect elected president from questions of legitimacy, even how electoral system can protect election result from the same question over its legitimacy. Other limitation relates to the nature that electoral systems are decided through a political negotiation, and politicians involved in this process in effect can limit the options available for the system.

System alternatives for electing the chief executive falls into two broad categories: direct popular elections and indirect election through representative body of the electorate. Direct popular elections are often believed to be more likely to encourage candidates to appeal support from a wider range of constituencies and promoting constituent's involvement with public accountability of their elected leaders. Indirect elections include for example election of president by a representative assembly, designated electoral assembly or other institutions whose membership may be elected or appointed. Examples of this system are those implemented in Greece, Botswana, Guyana, Suriname, Micronesia, Kiribati, China, Vietnam, and prior to 2004 in Indonesia. Having significantly narrower size of electoral bloc, criticism of indirect election system focused on concerns over transparency of the process, how fairly represented are the constituents in this electing body and questions over legitimacy of the result. Due to smaller size of the electoral body, concerns over the risk of irregularities and political cow trading are higher in indirect elections. Supporters of both options have valid points and arguments, and despite criticism of each of these two election options, both are facing similar risk, and none is fully secured from risk of system of a down ever happening. The resulting government cannot claim—at least not without challenge—that one is more legitimate than another based on different electoral systems under which they were elected to office.

#### V. NATION-WIDE DIRECT POPULAR ELECTIONS: PEOPLE'S VOICE, PEOPLE'S CHOICE

This is not to suggest that indirect elections or mixed system is of a lesser legitimate system, it is one of the options of ensuring fair represen-

tation of wide range of constituencies with diverse and overlapping aspirations. From the representation point of view, direct vote is more likely to give the electorate free and fair chance of choice: which candidates they see as most suitable to represent and to channel their aspirations into government, which offers a different choice than the political parties they choose for the parliamentary elections. Whether it will be aspirations relating to pluralism and diversity, ethnics political and social development, regional agenda, gender equality, minority group's rights and representation etc, each elector will be able to decide their choice of government leaders based on their own preference and priorities of issues.

From the candidate's point of view, in comparison with election by the parliament direct election will give a strong incentive not to rely too much on the support of their traditional base of supporters: party leadership who is able to negotiate the outcome of the election process in the parliament. This sort of complacency, if left unchecked, could lead to politically stagnant representation: since it will be very likely that the election of the President will be a mirror of party competition in legislative elections.

In Indonesia a striking example of this is the longevity of presidential term of former president Suharto. The People's Consultative Assembly (MPR) whose membership was overwhelmingly dominated by Golkar—a party whom Suharto was its patron—in addition to growing number of appointed functional group and regional representation, re-elected him for consecutive terms following each of six general elections since 1971. There was no room for other candidate to compete in this indirect election: political practices was so tightly controlled each five years election time the winner had been known so as to make nomination process appears unnecessary. When the MPR again anonymously supporting Suharto's presidency following the 1997 General Elections, public opposition and dissatisfaction was quickly turn into mass protest and riot in 1998, which led to his disgraceful resignation shortly after that. This experience motivated a rapid reform since that period, including an overhaul change of electoral system, a limitation of terms in office of five years and may be re-elected for one further term only, through constitutional amendments that was finalised in 2002, new legal framework concluded in 2003, and the first direct election of president was held in 2004.

Under the new system Indonesia's president and vice president are chosen directly by the constituents as a single ticket nominated by par-

ties, to win the election the candidate must poll more than 50% of the total number of votes in addition to at least 20% votes in more than half the number of provinces. In the event that no ticket meets this votes and distribution requirements, the people will choose between top two tickets in a second round run-off election, where the ticket with the highest number of votes will be elected as new president and vice president. In ensuring a President elect to be produced, the distribution requirements has been deliberately removed from the second round run-off election.

In relation to electing the president there are some school of thoughts suggest that presidents elected to office whom have come from parties holding a majority in the parliament to be more favourable in terms of effective government. This issue has been one of the crucial issues considered throughout the debates in the parliament at the time of drafting new implementing legislation to establish direct presidential elections in Indonesia. Different views were put across and arguments thoroughly debated until a reasonably common ground emanates from the negotiation table: a threshold for nominating tickets for presidential election are desirable, yet it should not be prohibitively high in that it will restrict nomination only to a couple of largest parties.

The qualifying threshold for nominating a presidential ticket that was agreed was either 15% of the House of Representatives (DPR) seats or 20% of votes in the most recent DPR election. Even if the votes were evenly distributed between parties, this will limit the number of candidates in the presidential election to 5 or 6 tickets, while without a very few largest parties whom can attain a majority in the parliament, none since 1999 democratic elections—in 1999 and 2004 the single largest party in each elections PDIP and Golkar only polled 33.74% and 21.58% (33.12% and 23.09% of DPR seats) respectively—, it is very unlikely that there will be fewer than 2 tickets running for president. Result of 2004 DPR election produced only 2 parties Golkar and PDIP which qualify to nominate without a coalition under this threshold, and only Golkar qualifies for both criteria, despite of 66.2% of entire electorate had distribute their votes among the top 5 parties in 2004 (80% among the top 7). If results from 1999 elections is simulated under this threshold it would have qualify only the top two automatically, regardless the fact that much higher percentage 86.6% of total votes were distributed among the top five.

This relatively low threshold is deemed suitable for Indonesia in current time, after more than three decades party politics have been manipu-

lated in such a way it produced mounting dissatisfaction and frustration with the exclusive representativeness in politics, despite the overwhelming majority of one party. It seems refreshing to have the freedom and real choice for a change.

And a change indeed, Indonesia's first directly elected president, Susilo Bambang Yudhoyono had won the second round run-off election over the incumbent Megawati Soekarnoputri, was nominated by an entirely new, smaller party in the parliament. His running mate Vice President Jusuf Kalla has since won leadership of the Golkar party, however, he was not running the Golkar ticket in the last election. President Yudhoyono policies the last four years has been reasonably supported by the parliament with few exceptions, such as the ever unpopular policy relating to reduced government subsidies on fuel. It's highly likely that President Yudhoyono will seek re-election next year, it will be interesting to observe further of how important party strength in parliament would affect presidential election's outcome and the resulting government effectiveness, and if it is desirable should the restriction be left to legislations or the "market", the electorate to decide?

Still in relation with the change in presidential election system from MPR-elected to direct popular election, the removal from office procedure of the president and vice president also was reviewed to commensurate with the shift in powers attributes resulting from direct election. To protect the directly elected president from being removed from office unilaterally by the parliament on policy ground, the Constitution was amended to include the provision that a President and Vice President may not be removed from office unless proven to have breach the law through either treason, bribery, corruption, other grave criminal offence or moral turpitude, or has ceased to meet the qualification to serve as President. The procedure for removal from office involves the Constitutional Court to investigate, conduct trial and make a decision that the grounds upon which the House of Representative's motion to impeach to be legally well-founded. Only if the Constitutional Court decides that the President is proven to have breach the impeachable charges under the constitution, then the House of Representative may proceed to submit the motion to impeach to the MPR for decision. Decision of the MPR to remove the President from office requires the approval of two third (2/3) of at least three quarter (3/4) total membership of the MPR present. Decision to remove the President from office can only be taken after the President has

been given the opportunity to provide explanation to the plenary session of the MPR.

## VI. BOTTOM-UP APPROACH IN PARTY NOMINATION IN PRESIDENTIAL ELECTION

Considering the important role of nomination in electoral representation, perhaps it's worth a closer look, particularly the internal process of choosing final candidates of the party. To encourage wide range of constituents support for the candidacy, the role and involvement of party members in the region would be crucial in making the decision of which candidate are most legitimate to run in the presidential elections for the party. This aspect of presidential election implementing legislation can be optimized to encourage wider support from party members in the regions which also represent diverse ethnic background and constituencies.

The current provision of party nomination of candidates in Indonesian direct presidential election law is non-descriptive, except that it is advisable that the internal selection process would be conducted democratically. In 2004 elections each party were having different approach, Golkar for example was experimenting with decision making procedure for the final ticket in the presidential election through internal party convention in Jakarta. Others such as PDIP was making this decision through their internal procedure, most parties had made this selection process strictly internal and without much information of the process were being made available for the public. Comments that the internal process of selection of final ticket was ignoring regional input to the process, lack of transparency and not sufficiently democratic appeared in some media at the time.

One option is through establishing an unambiguous procedure based on the current principle of a democratic internal party procedure in selecting a ticket for the presidential election. To be politically meaningful, the provision of this matter should encourage parties to empower party members in the region to be involved in the selection process and that a candidate for this internal selection is possible to be proposed by the regions. To prevent this process to become a mere formalities, parties should also be encouraged to ensure the credibility of the internal process by a commitment that regional input and aspirations will effectively be reflected in the final ticket that will be running in the direct presidential

election. A democratic, transparent, equal opportunity in nomination of candidate selection would be essential also to enable independent candidates to be nominated in the election through political parties. This and the incentive with regards to regional interest and aspirations to effecting outcome of this internal selection process perhaps can be considered as an option to encourage a more democratic culture in the party system. An approach that perhaps worthy of a further discussion as an alternative for democratization of party nominating procedure, is an option to apply an internal primary election to choose the party's ticket in the direct presidential elections. Ideally, all party members would be entitled of a vote in the primary, and preferably with the same value of that of party leadership. If the integrity of the process can be justified, for example that promising politician's chance to win party's support for candidacy would be just as good as party leaders nominated in the same selection process, this option might enhance the legitimacy of the party's candidate in the elections as well as contributing to the long term goal of strengthening the party's cohesiveness.

#### VII. THE CRUX OF EQUALITY PRINCIPLE IN ELECTORAL REPRESENTATION

To provide ways to promote 'freedom' and 'fairness' in presidential elections system perhaps considered not a simple task to address in the electoral system design. Nevertheless, to ensure 'equality' in electoral system, at least in Indonesian context, is proven to be even more problematic. Reason for this is perhaps because of the rapid development of direct election over the last few decades have provide reasonably sufficient scholarly options and references for establishing standards for democratic, free and fair elections. Equality, is arguably a less clearly defined concept and strategies for it requires careful examination of local context and challenges compared with the more or less universal concept of freedom and fairness in elections.

In Indonesian electoral representation context, to exercise the value of equality in electoral representation would require answers to a convoluted challenge: the Java – outside Java representation. With more than 60% of Indonesia's population are in Java (6 provinces), and less than 40% in the rest of the archipelago (27 provinces), the disparity is so big to the

effect that any conventional proportional representation system would be arguably disproportional. One vote one person is not necessarily one value within Indonesian context: magnitude of 50% +1 simple majority or even absolute majority rule would have a mere 5% margin over the whole Java vote. This limits severely the options that can be taken to correct this disparity to incorporate equality of representation in presidential elections. To create new value to offset this disparity, although hypothetically possible (i.e. weighing of votes with different quantum towards proportionality), run the risk of pre-empting animosity of the legitimacy of the formula used.

Compromise approach to compensate this disparity in Indonesia's current general elections law is by incorporating a distribution requirement 20% votes in more than half the number of provinces in addition of polling more than 50% of the votes in the presidential elections and by using two different electoral representation system for two chambers of the national legislatures: proportional multi member district for 550 membership of the House of Representative (DPR), and a fixed 4 seats for each province regardless of size for the new Regional Representation Council (DPD) elected using single non transferable votes in each province. In this compensation scheme, 60:40 ratio are the Java-outside Java balance in the DPR and approximately 20:80 ratio in the DPD, which if simulated with seat acquired comparison this would compensate up to 7.5% more for outside Java regions for balance of up to 52.5: 47.5 which still have advantage to Java under simple majority system of decision making process. Challenges toward this compromise approach, is further exacerbated by the condition that this compensation scheme would only have significant value for the outside Java regions in affecting policy making if both chambers have equal powers, which in this case in Indonesia it is not, the DPR is the sole legislative power while the DPD's powers are very limited to advisory role. A more satisfactorily answer to solve this challenge in equality in electoral representation, apparently would continue to have to be explored, whilst an approach to institute this equality principle in presidential election seems a further long way to solution.

Perhaps it is worthwhile to emphasize limitation of what electoral design can contribute to electoral politics, and to democracy itself. Although electoral system design could have affect the probability of certain changes that will affect electoral politics, however in practice it cannot or to

the best have limited ability in effecting such change: as what is pertinent in the success of electoral system is what the outcome means for the constituent themselves and how it affects them. Electoral system as its own is an administrative process of political recruitment; therefore it cannot be expected to bring about the desired changes expected from the leadership: it is the leaders and the constituent who are able in effecting such changes. Electoral system is a part of key implements of representative democracy, however like in a process of any system, it cannot and should not be regarded as representation itself, for an electoral system cannot substitute either representation (democracy) or the 'demos' itself.

#### VIII. ESTABLISHING A JUDICIARY FOR SOLVING POLITICAL QUESTIONS: THE ROLE OF THE CONSTITUTIONAL COURT

In democracies around the world, disputes and questions often arises between parties, government as well as citizens over various issues of political nature that inevitably emerge as the interactions between them become more complex and interests in conflict with another. Dispute over elections result in the United States in 2000 presidential elections for example, or the similar dispute over the result of the recent election in Mexico. Other examples includes cases where a group of citizens put forward a request to dissolve a political party which they deemed to have to promote unacceptable values or messages that threatened democratic principles, or in the event of conflicting authorities between government bodies or cases where citizens seeking justice over their constitutional rights that have been violated or denied of exercising them. Would the Supreme Court, administrative court be the appropriate judiciary to turn to in these cases? Would the answer to these questions or the solution for the dispute are questions of legal issues or political in nature?

In the experience of Indonesia, and to an extent in the United States as well, the judiciary with the highest jurisdiction—the Supreme Court appear to be reluctant to make decision on cases of a political nature, where the problem in question is not to solve legal dispute but was more of seeking legitimacy over a political disagreement. The nature of some cases involved violation of laws or offences whose litigation are perhaps rather straightforward; others requires interpretation of what actually certain provisions in the constitution or particular legislations means

politically, what does it binds or where exceptions beyond what can be read between the lines of those provisions. These questions of a political implication perhaps outside the boundaries of law enforcement justices would comfortably offer, other than his or her subjective opinion about the matter in question.

As a part of fundamental constitutional changes in reforming its system of government, Indonesia decided to establish a new Constitutional Court as separate from the Supreme Court, each with its own jurisdiction that are distinct to each other's. The Constitutional Court has powers of judicial review on constitutionality of laws, resolving disputes relating to constitutional powers of state institutions, to make decision for the dissolution of political parties, deciding to resolve dispute over election results, plus the duty to rule on motions to impeach the President and/or the Vice President upon the request of the House of Representatives. Recognising its distinctive nature of duty and jurisdiction, the amended constitution further set down recruitment criteria of the nine Constitutional Court justices: three justices shall be nominated each by the Supreme Court, the House of Representatives and the President; all justices nominated should have legal education background and has work experiences in legal related fields for more than 10 years, have excellent command of constitutions and constitutional laws, should be of impeccable integrity and personality and never been convicted for any offences which carries the maximum penalty of 5 years or more.

A court of this specialist jurisdiction such as the Constitutional Court is not entirely without caveat however, it remains a possibility that the court decision will be affected by subjective opinion of the justices at that particular time. Especially with regards to interpretation over what particular provision in the constitution or laws means or had intended to bring into effect. It is not only important to have the mechanism to adjudicate if disputes of this political nature ever arisen, yet perhaps more important is that this interpretation of the constitution or laws provisions must be satisfactorily accepted as legitimate, not only by branches of government but also accepted by the nation as a whole, by the constituencies. This legitimacy likely to be acquired by the court in the earnest, but this credibility is perhaps something that is not automatically possessed by a court. The question worth considering in this regard perhaps is it of a nature that will be important enough and affect the public significantly? Would it be beyond the boundaries of a court to make decision over such matter? If

the question is of a certain nature that might justify drafting a new law or amending the constitution, perhaps it will be better if these questions be left to the people, or lawmakers and not a court, to decide?

#### IX. THE DEMISE OF ONCE ALL-POWERFUL PEOPLE'S CONSULTATIVE ASSEMBLY

Another power sharing arrangement in Indonesia's system of government is the People's Consultative Assembly (MPR) system, the personification of people's sovereignty under the 1945 Constitution as it originally enacted, which due to the absolute mandate it holds, have unlimited power. This supreme body is not the head the state and cannot govern by itself; therefore it was vested with the authority to select and remove the President and determine the general direction of the state. Under the 1945 Constitution the MPR is sharing its power with the President, with a broad provision that those powers can be taken back by the MPR if it wishes to do so. Three presidents in Indonesia had been removed from office by the MPR: Soekarno, ironically was removed from office by the supreme body whose conception and return was of his own decision, and two post-Suharto contemporaries: Vice President B J Habibie replacing Suharto's position after his resignation in 1998 and the influential NU leader President Abdurrahman Wahid.

The MPR-President power sharing scheme has weaknesses that it was easily distorted by the president, parties, or the MPR itself. One possibility of exploit is that since membership of MPR consist of members of the parliament (DPR) and representation of functional, religious and minority groups, the institutional capacity of the MPR can be weakened through weakening the DPR and distorting the recruitment process of functional groups. During Suharto presidency, the government was systematically limiting the numbers of political party into a three party system which soon was able to be dominated by government party Golkar. Functional group representation in the MPR was selected by local council, which both the number of representatives for each group and members appointed for the MPR was under the government control. This led to an inertia MPR and rubber stamping parliament which in effect, means unchallenged government control over policy and to a great extent security of the President's position, where every five years

between 1967 and 1997 the MPR re-elect Suharto as President by anonymous consensus for six consecutive terms. The MPR's broad power to remove president from office might also be used by parties within the MPR to the other extreme: to remove of a president they don't like. Such is the case with transitional president Habibie in 1999 and Abdurrahman Wahid from office in 2001, where Megawati Sukarnoputri then assumed the position of President.

This MPR system was gradually being reduced by its own commitments to relinquish the absolute power of the MPR and to shift Indonesia towards a more conventional presidential system through constitutional reform following the 1999 General Elections. The goal of this transition was achieved in the 2001 amendment of the 1945 Constitution on the powers of the MPR which in effect relinquish MPR broad power and restricted only to powers relating to constitutional amendments, inaugurate Presidents elected through direct popular election, and to decide on impeachment motion that is submitted by the parliament and which grounds for this motion has been investigated to be well-grounded by the Constitutional Court. Through this amendment the MPR also, in effect, relinquish its own status as the epitome of people's sovereignty and therefore restoring constitutional democracy as sole means of implementation of sovereignty. This change marked one of a very rare, if any, experience in the world where a supreme assembly with absolute power has agreed to relinquish its own powers constitutionally and peacefully, in one of world's largest transitions to democracy.