Legal Pluralism in Indonesia: Anachronism or An Idea whose Time Has Come?

I. Introduction: Two views of Legal Pluralism

The phrase "legal pluralism" refers to the recognition by the nation-state of the existence of multiple sources of law within its own jurisdiction. In addition to official legislation, secondary sources exist and are accepted as valid. These sources can be, *inter alias*, religious law, customary law, or international treaties. The notion of legal pluralism assumes a more or less ideological dimension, by which the government authority seeks to accentuate its pluralistic orientation, yet does not call into question its own monopoly to administer the laws.

In addition to the foregoing legalistic definition, there is a socio-legal view of legal pluralism which argues that legislation has not and cannot have the authority that the government presumes it to have. Instead, pre-existing or longtime social institutions possess their own normative and regulatory spheres of influence and are capable of enforcing their will on their members separately from the government authority. Pluralism results from the parallel existence of a variety of social norms that are produced by different and autonomous sources of authority within the boundaries of the nation-state.

I. The Sources of Pluralism in Indonesia

Which of the above paradigms hold true for contemporary Indonesia? The answer is that while both have validity, the socio-legal state of affairs overshadows the ideological-legal one. Indonesia's legal pluralism is driven by autonomous vehicles which travel parallel or even divergent roads. Indonesia, with five big islands and about 30 smaller island groups is the largest archipelago in the world.[1] As a result of this geographic dispersion, Indonesia has about 500 tribes and with a corresponding 500 dialects.[2] As a result of her

[1] It with the total number of islands reported at 17,508. This data is reported Indonesian Naval Hydro-Oceanographic Office and published at http://www.aseansec.org/member_countries.html

[2] In addition to Bahasa Indonesia which is based on Malay, some of the other distinctly different local languages of Indonesia are: Acehnese, Batak, Sundanese, Javanese, Sasak, Dayak, Minahasa, Toraja, Buginese, Halmahera, Ambonese, Ceramese, and several Irianese languages. These languages are also spoken in different dialects.

geographic location at the crossroads of travel and commerce between the Indian and Pacific Oceans, East and West, the archipelago has imbibed from all of the major cultures and religions of the world.

In a nutshell, the sources of legal pluralism in Indonesia are

- The historical accretion of different religions in the archipelago. In chronological order, these are animism since prehistoric times, Hinduism-Buddhism before the 14th century, Islam afterwards, and Christianity as the latest arrival.
- The deep-rooted existence of indigenous jurisprudence, *adat*, especially in the rural areas (*desa/kampung*). *Adat* is mostly in the unwritten tradition and varies from locality and locality and from island to island.
- The overlay of the *Syariah*, the theocratic Islamic law code and *hadith*, the Islamic legal traditions.
- The imposition of Dutch legislation and colonial apartheid legal practices that are based on race and national origin. During the last one hundred years of Dutch rule, some effort at legal reform based on the "debt of honor" approach was attempted. One result was the enlargement of diversity between the cities, the coastal communities, and the insular countryside.
- A short period of colonial legal reform by the British (1811-1816) during the Napoleonic wars (1795-1816).
- A short period of reform by the Japanese who occupied Indonesia (1941-1945) during World War II.
- Independence of Indonesia from Dutch rule.

Three distinct ideological periods after independence can be identified: (1) the period of parliamentary democracy (1950-1959), (2) the Guided Democracy of President Sukarno (1959-1965 - reversion to the 1945 "revolutionary" Constitution), (3) the New Order of Presidents Suharto and Bacharrudin Jusuf Habibie (1965-2000). The current presidency of President Megawati Sukarnoputri (and the short caretaker period of President Abdurrahman Wahid) is so short that it is still unclear which direction policies are heading.

The existence of the peculiarly Indonesian style of legal pluralism has and continues to contribute to the dissipation of national cohesiveness, promote inefficient governance, and deepen the chronic economic stagnation, or even worse. The matter is of such urgency that President Megawati Sukarnoputri issued this dire warning:

> If religious and communal conflict does not stop and violence continues, we will split into lots of small races, into lots of small countries all of which will be weak in the face of outside forces … We will become the Balkans of the East.[3]

[3] Remarks at an October 29, 2001 ceremony commemorating the birth of Indonesia's nationalist youth (*permuda*) movement in 1928. This also coincides with the 100 days of the Megawati administration. See, http://dailynews.yahoo.com/h/ap/20011029/wl/indonesia_100_days_2.html and http://sg.news.yahoo.com/reuters/asia-68756.html.

These revealing remarks support the view that the situation is the result of divergent forces imposed from the bottom up and is not pluralism by national design from the top down.

II. *Pancasila*: The Indonesian Attempt Towards National Identity

The one question that challenges practical Indonesian politicians and legal commentators (both Indonesian or others) is: "What is the Indonesian national identity?"

The succinct and most enduring answer is *Pancasila,* a doctrine laid down by President Sukarno in a speech on June 1,1945. *Pancasila* contains five principles[4], specifically:

- *Kebangsaan* (nationalism)
- *Kemanusiaan* (international humanism)
- *Kerakyatan* (representative government or democracy)
- *Keadilan Sosial* (social justice), and
- *Ketuhanan* (belief in one God).

Beyond the mere definition of *Pancasila,* there looms the more critical question of how *Pancasila* is to be made real in Indonesia. As matter stands now, the answer is that *Pancasila* is to be implemented by the president[5] and the president's delegates, with the strong backing of the *Angkatan Bersenjata Republik Indonesia* (ABRI)[6] and the *pro forma* blessing of the *Majelis Permusyaratan Rakyat* (MPR)[7]. By Law No. 8 of 1985 on Social Organizations, *Pancasila* must be adopted by all organizations as their *azas tunggal,* or sole foundation; by this statute, all other competing concepts were elbowed out of organized life in Indonesia.

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[4] These five principles are incorporated into the Opening to the 1945 Constitution and the Preamble to the (Provisional) Constitution of 1950.

[5] Chapter III Article 4 (1) of the 1945 Constitution provides: The President of the Republic of Indonesia shall hold the power of government in accordance with the Constitution.

[6] Now known as Tentara Nasional Indonesia, (TNI) the former ABRI, the Armed Forces of the Republic of Indonesia has settled comfortably into *dwi fungsi,* that is "dual function" the doctrine that the armed forces serve dual roles – a socio-political role in addition to a military role. Because of *dwi fungsi,* it is routine to rotate senior military officers into senior government functions through an Indonesian revolving door. In fact, it almost seems that successful military service is a *sine quo non* to high political office in keeping with the revolutionary culture through the end of the New Order. See, Peter Holland, Regional Government and Central Authority, in Indonesia: Law and Society, (T. Lindsey, Ed.) The Federation Press, 1999, pp212-213. The need for *tertib dan damai* and *stabilisi* have bolstered TNI/ABRI's standing among Indonesians. In July 1999, President Wahid signed a decree removing the national police force of 175,000 members from the armed forces and from the supervision of the Minister of Defense and providing for civilian oversight.

[7] Chapter III Article 3 shall determine the Constitution and the guidelines of the policy of the State.

With respect to legislation, the Constitution calls for a joint effort between the President and the *Dewan Perwakilan Rakyat* (DPR)[8], but in actual practice, legislative power also has been tilted towards the executive.[9] Further, the President holds the sole power to promulgate government regulations to implement statutes.

In constitutional concept and in actual practice, the power to govern is concentrated in the person of the executive, especially as was the case of first two presidents. Indonesia, despite its ancient deep-rooted legal pluralism was to, nilly-willy become an integrated modern state.[10] This was the obvious political answer to the malaise flowing from colonial practices and millennia of religious syncretism. Hence, the national motto of the United State was "*Bhinneka Tunggal Ika*."[11] Such was the original vision of President Sukarno for an Indonesian integralist national identity, a vision continued by Suharto, and one that Megawati has little flexibility or apparent inclination to change.

III. The Pitfalls of Power Concentrated.

Contemporary Indonesia, like many states that has power concentrated in one branch of government, suffers from a number of drawbacks such as:

- A top heavy executive government and bloated bureaucracy.
- An underdeveloped private sector.
- Endemic entrenchment of nepotism during the last thirty years.
- Uneven distribution of wealth in the population.
- Dysfunctional reliance on personal relationships and personalities for conducting business.
- A government that lacks transparency in all its branches.
- Economic inefficiency, by-passing of market competition, and poor use of capital as a result of corruption in government.
- Over dependence on the military for political stability and suppression of dissent
- Acquiescence to the military as power broker of last resort.
- Political centralization in Java and domination of the Javanese cultural tradition .

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[8] Chapter III Article 5 (1) provides that "[t]the President shall hold the power to make statutes in agreement with the *Dewan Perwakilan Rakyat.*" Chapter VII Article 20 (1) provides that "[e]very statute shall require the agreement of the *Dewan Perwakilan Rakyat,*" but Article 21 (2) also provides that [s]hould those drafts, although agreeed to by the *Dewan Perwakilan Rakyat,* not be ratified by the President, those drafts may not be submitted again during the same session of the *Dewan Perwakilan Rakyat.*

[9] Control of the DPR by the President is achieved by packing the DPR with members of the *Golongan Karya* (GOLKAR – the party comprised of government bureaucrats and officials) and ABRI.

[10] For a discussion of the role of *Pancasila* in the integrated state, see, Siafriddin Prawiranegara, <u>*Pancasila* as the Sole Foundation,</u> *Indonesia* 38 (October 1984) pp 74-83.

[11] Literally this translate to "Many remains One" or "Unity From Diversity." This curiously resembles the "*E Pluribus Umum*" of the United States of America. Here is where the similarities end – the Indonesian Constitution vests almost plenary powers in the Executive, the President.

- Resort to violence from those who disagree with government policies, including sectarian violence.
- Abuse of human and civil rights.
- Excessive reliance on a strong charismatic leader, a paternalistic figure suitable for the *kekeluargaan* or the family like nature of the Indonesian nation-state..
- A subservient legislature that rubber stamps the law-making proposals of the president.
- A labyrinthine but dysfunctional judiciary including the *Mahkamah Agung* that is not independent of the executive.
- Neglect in the development of procedural and substantive law, including commercial law and contracts.
- The substitution of culture, especially political culture and revolutionary culture[12] for the rule of law.
- Loss of international confidence and international investment.

Many observers have remarked that in Indonesia, "politics is everything," and business is transacted according to which politician one knows. Perhaps this derives from the Indo-Javanese aristocratic tradition that emphasizes well cast roles such as the *priyayi*[13] and *pamong praja*[14]. Power stratification is also the result of the easy inheritance of Dutch colonial methods of government. The absence of a meaningful legislature and effective judiciary simply reinforces this cultural caste tendency.

However, Indonesia is also a land of paradox – alongside the strenuous effort to create an integralist state is found the dragging inertia of time honored diversity and separatism. Like the ancient Tao saying, the more one pushes, just as hard is the natural push in opposition. The thirty-two year rule by President Suharto has brought much economic progress, especially to the big cities and the island of Java, but all the progress came to a shattering halt in 1998. That year Indonesia endured a 7% negative growth, interest rates climbed to 75% and the rupiah suffered a threefold loss in exchange value with the U. S dollar.[15] Jakarta and other cities across the archipelago were engulfed in looting, racial violence,[16] and sectarian disturbance. The violent upheavals coupled with the lingering Asian economic crisis of 1997, and international rebuke over East Timor brought about the downfall of Suharto. The situation remains precarious and uncertain as Indonesia saw the rapid succession of three presidents in as many years.

President Megawati, having come to power in the last three months along with her party the Indonesia Democratic Party of Struggle (IDPS), has reiterated a grim and gloomy warning in her state-of-the-nation speech to the MPR. She informed the country's highest

[12] *Hukum revolusi.* A famous quote of President Sukarno is "You cannot make a revolution with lawyers." Attributed to Sukarno from a speech at a national conference of Indonesian lawyers in 1961 and published in "*Hukum & Masjarakat*," Jakarta, Djambatan, 1962.
[13] Members of the Javanese upper class who trace their roots to the ancient aristocracy.
[14] Javanese courtiers who now strive to hold on to their bureaucratic positions in modern Indonesia.
[15] The exchange rate went from 6000 rupiahs to the dollar to 18,000. See, Timothy Lindsey, An Overview of Indonesian Law, in Indonesia: Law and Society, (T. Lindsey, Ed.) The Federation Press, 1999, p9.
[16] In conformance to Indonesian tradition in times of instability and loss of civil restraint, the Chinese communities were singled out and victimized by the mob running *amok*.

legislative body that there was no good news to report, with debt-servicing repayments approaching dangerous levels, unemployment rising, investment dropping off, individual incomes low and Indonesia perceived as high-risk all-round.[17] Separatist unease continues in Aceh and the outer eastern islands, in particular Irian Jaya. Renewed violence can erupt at any moment and the leadership seems to be bracing for the next storm.

IV. Pluralism v. Integralism - Is Indonesia Out of Options Or is there Another Opportunity for a *Negara Hukum*?

None of the time honored methods including late efforts at *keterbukaan*[18] seem to be working well for Indonesia presently. New remedies are being tried, the most novel of which is the Law No. 22 on Regional Autonomy and Law No. 25 on Fiscal Equalization Between Center and Regions[19], both promulgated in 1999 during the Habibie Administration. The implementing regulations seeks to devolve power and revenues to the thirty provinces and the 365 *kebupaten* (regencies). Law No. 22 reverses the 1979 decision to streamline village government to that of the model of central Java and gives each province the autonomy to develop its own model of village government that may eb based on old village institutions and leadership and these villages may resolve local issues in accordance with local custom. The law also gives Aceh and Irian Jaya Special Autonomous Region status and for Aceh, the application of *syariah* to the Muslim inhabitants. The centralization scheme went into efffect on January 1, 2001 but is expected to proceed at a slow, deliberate pace until 2007 at which time the decentralization is expected to be complete. However, the government appeared now to have second thoughts and in the second half of 2001 measures were taken to arrest the momentum of decentralization.

As evidenced by Law No. 22 and No, 25, pluralism remains part of the Indonesian political tradition, Integralism has not been able to overcome the ills that have been building up over the New Order decades and finally breaking out as an epidemic in the last three years. But will decentralization bootstrap Indonesia out its troubles? The focus on so-called "KKN"[20] (corruption, collusion, and nepotism) that has been the source of much public anger and mass *reformasi* demonstrations has neither lifted Indonesia out of its present slump nor brought the country closer to a *negara hukum*. Has Indonesia run out of options?

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[17] See, http://sg.news.yahoo.com/011102/1/1nedz.html. The members of the legislature appeared to appreciate her candor, accepted Megawati's bad news and acknowledged that economic difficulties inherited by Megawati and the global downturn were making her job more difficult.
[18] Demand by reformers for openness or transparency in government.
[19] See, http://www.rand.org/publications/MR/MR1344/MR1344.ch5.pdf .
[20] *Korupsi, kolusi, nepotisme.*

The concept of a *negara hukum*, that is a "nation of law," is as indigenous to Indonesia just as is *Pancasila*. *Negara hukum* was recognized in the Elucidation of the Constitution of 1945, specifically at Article VI.6.I. where it was explicitly stated that

> **Indonesia is a State based on Law ("*Rechtstaat*").** 1. The State of Indonesia is based upon law (*Rechstaat*), it is not based upon more power ("*Machtstaat*").

An opportunity for the realization of *negara hukum* lies in strengthening the separation of powers of government in Indonesia and recourse to tried and true approaches towards a federal system of government.

IV(a) Strengthening the Separation of Powers

The 1945 Constitution recognized three parts to the government: the executive, legislative, and judicial. The realpolitik of *eksekusi* [21] overshadows the other two branches. Chief Justice Sarwata had said that: "Indonesia does not hold to a pure separation of powers, the *Trias Politika*, but to a distribution of powers." Having identified the challenge, the approach of reform then should be a concerted effort to devolve power from the executive to strengthen the other two parts of government.

On this subject that great oracle, Baron de Montequieu (1689-1755) can provide valuable insight and guidance. Montesquieu saw the need for and recommended the separation of the one into three. He warned all who would listen that when the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.

John Locke (1632-1704), who preceded Montequieu, also searched for a state of more balanced government. In his effort to prevent the tyranny of absolute power, and because human frailty is such that it will succumb to the temptation by a strong personality to grasp for unrestrained power, Locke advocated the limitation of the power of government by placing several parts of it into different hands. Locke rejected the divine right of kings.

The view of Locke and Montesquieu can be contrasted against that of Thomas Hobbes (1588-1679). Hobbes advocated the rule of a king because he felt a country needed an authority figure to provide clear direction and firm leadership. Because the people were only interested in promoting their own self-interests, Hobbes argued that democracy which gave the power citizens to choose their government leaders would end in failure. To Hobbes, the best government was an all powerful creature comparable to the Biblical sea monster, the Leviathan.[22] Hobbes stood for unitarian government .

[21] Execution of law etc.

[22] Nothwithstanding his distrust of democracy, Hobbes believed that a diverse group of representatives presenting the problems of the common person would, hopefully, prevent a king from being cruel and

The historical background for the thinking of Locke, Montesquieu, and Hobbes was the conflict between the absolute monarch and the emerging parliamentary assemblies of Europe. The American colonies broke with the monarchic tradition by first revolting against Britain and then implementing Montesquieu. The Constitution of the United States upon which the new nation was founded specifically required three separate branches of government.[23] Each branch, being endowed with substantive power, was expected to substantially check and balance the powers of the other two. Of the three branches of government under the American constitutional scheme, the judicial was manifestly the weakest; this condition was only to be remedied by the wisdom and daring of Chief Justice John Marshall.

Based on the unfolding of events in Indonesia and current conditions, an opportunity exists for the judiciary to seize the moment and bootstrap itself into a position of influence within the Indonesian system of government. Indonesia is at the cross-roads of political change – the New Order, that brainchild of Suharto has been finally discredited and Megawati Sukarnoputri[24] now stands at the helm after the rapid departure of two other short term "caretaker" presidents. She took power on a bold campaign platform of progressive reform different from the policies of Suharto. International and domestic observers have noted the adroitness demonstrated by Megawati's skilful shuffling of the various interests clamoring for representation in her Cabinet.[25] There is presently in progress a changing of the guard. Ministers are being shuffled, old office-holders are leaving, and new ones are moving in. GOLKAR, now out of power, is jockeying for influence with IDPS, the party of Megawati. Political uncertainty and unease prevail as the mettle of the new woman of is yet to be tested in the fires of Indonesian politics. Disagreement and conflicts are bound to arise in this unprecedented period of change.

IV(b) An Opportunity for the Judiciary to Seize the Moment

With the end of the eighteenth century, the United States of America was engaged in a great experiment of nation building. After having won the Revolutionary War by 1783, the young country was still in a politically vulnerable if not economically precarious position[26] when compared with the powerful nation-states of Europe.[27] American party

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unfair. Rather surprisingly, Hobbes came up with the concept of "voice of the people," which meant that one person could be chosen to represent a group with similar views. However, this "voice" was merely solicited and not necessarily listened to - the last say lay with the king.

[23] The three branches being the Executive (Article I), the Legislative (Article II) and the Judiciary (Article III).

[24] Megawati is the daughter of Sukarn and there will always linger a question of whether she will revert to her father's policies.

[25] See, Dr Stephen Sherlock, Current Issues Brief 4 2001-02 Indonesia's New Government: Stability at Last? Foreign Affairs, Defence and Trade Group, Parliament of Australia, Parliamentary Library, 30 August 2001 at http://www.aph.gov.au/library/pubs/cib/2001-02/02cib04.htm.

[26] The American Revolution ended in 1783, but the young republic it created faced a difficult time. A severe economic depression forced people unable to pay their debts first into court, then into jail. For example, these troubles were viewed as arising from the mercantile elite of Eastern Massachusetts, especially Boston, who demanded hard currency to pay foreign creditors. The farmers of Western

politics was still evolving and many politicians were distracted or even beseiged with the uncertainty of the moment.

Such was the tumultuous environment of John Marshall, the third Chief Justice of the United States Supreme Court (1801-1835).[28] At this time, the Court, while having a constitutional existence, was considered the least prestigious and least desirable branch of the federal government insofar as public service is concerned. Indeed, with the war over, the entire federal government suffered from neglect as many of the leading citizens at that time believed in the primacy of state rights. Most were busy in their own cities and absorbed in the politics of their home states. In short, even with the Declaration of Independence and the Constitution in place, in reality, America still lacked a national identity, a condition noted by George Washington on may occasions.

John Marshall recognized both the feebleness of the Court and of the federal government itself and in his own lawyer-like way, resolved to do something about both. True to the challenge, he had to achieve his goals in two steps. First, he had to elevate the Court to a equal status, if not even superior position vis-à-vis the other two branches of government. Only then could he as Chief Justice help develop America's national identity. Justice Marshall succeeded brilliantly in both, bequeathing a living constitutional legacy, a blueprint for establishing the American rule of law for all to see and emulate.

The opportunity for the great opening moves of the Court came in the form a dispute between the incoming Republican (President Thomas Jefferson) and the outgoing Federalist (President John Adams) Parties. Jefferson had just upset the *political status quo* by beating the Federalists to the White House, an unprecedented feat because since George Washington, only Federalists have occupied that residence. During the last days of the Adams Administration, the Federalist Congress had passed the Judiciary Act of 1801.[29] This Act reorganized the federal judiciary by creating a number of lower federal courts. With the passage of the Act, came a large number of new circuit judgeships which President Adams rushed to fill. A second Act created the courts for the District of Columbia and Adams also made appointments for these lower judicial positions. The

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Massachusetts, after years of frustration, reacted with an armed uprising that lasted for six months at the end of 1786 and start of 1787. George Washington in a letter to James Madison dated November 5, 1786 wrtoe: "Let us look to our National character, and to things beyond the present period. No Morn ever dawned more favourable than ours did-and no day was ever more clouded than the present! Wisdom, & good examples are necessary at this time to rescue the political machine from the impending storm." Thomas Jefferson, in his letter to James Madison, from Paris, dated January 30, 1787 remarked: "I hold it that a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical. Unsuccessful rebellions, indeed, generally establish the encroachments on the rights of the people which have produced them. An observation of this truth should render honest republican governors so mild in their punishment of rebellions as not to discourage them too much. It is a medicine necessary for the sound health of the government."

[27] America had to fight Britain yet again in the War of 1812.

[28] Chief Justice Marshall served from 1801-1835 after two relatively unknowns, Oliver Ellsworth (1796-1800), and John Jay (1789-1995). John Rutledge was a recess appointment in 1795 by President Washington and was never confirmed by the Senate. Marshall was appointed by President John Adams.

[29] Also known as the Circuit Court Act.

midnight hour effort to create lower courts and to pack them with Federalist appointees[30] greatly angered the Jeffersonian Republicans. William Marbury was one of the men appointed by Adams to be a justice of the peace for D.C. The Senate had confirmed the appointments and Adams signed the commissions of office. Now it fell upon the Secretary of State to affix the Great Seal of the United States on the commissions and to deliver them to the appointees. In the turmoil of transition, the final ministerial step of delivery was overlooked and William Marbury never received his commission. When President Jefferson entered the White House, he ordered his Secretary of State, James Madison, not to deliver the commissions issued by Adams.

What did Marbury do? He sued in the United States Supreme Court on an action for mandamus against Madison. To establish jurisdiction, Marbury invoked Section 13 of the Judiciary Act of 1789,[31] and sought a writ ordering delivery of his commission. John Marshall himself was a last minute appointee of Adams to be Chief Justice of the Supreme Court, having previously served in the White House as his Secretary of State. Indeed, it was Marshall himself who had affixed the Great Seal on the commission but who had failed to deliver the commission to Marbury - now he was asked to adjudicate his own oversight!

In those early days of the Republic, no one seemed to have challenged the appropriateness for Marshall to hear the case. Hear the case Marshall did but how was the Court[32] to decide?

The realpolitik facing the Marshall Court was that the Court depended on the Executive to enforce its decision. The reality was that President Jefferson was apt to simply ignore the mandate of the Court and the impotence of the Court would be made apparent to all. A more timid or less enterprising man would have disavowed any authority over the Executive and dismissed the case,[33] but only a fool would have ordered President Jefferson to deliver the commission. Since Justice Marshall was neither, he framed the issue before the Court to be the constitutionality of Section 13 of the Judiciary Act of 1789. Marshall held this Act to be unconstitutional by reason that as the original jurisdiction conferred on the Court by Article III of the Constitution was exclusive, it could not be enlarged by Congress. In *dicta*, Marshall suggested that Marbury was certainly entitled to his commission and that the Executive was not above the law, but the Supreme Court was not the tribunal to seek relief. This avoided a direct confrontation with Jefferson and in return the President left the Marshall Court alone.[34]

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[30] It was reported that President Adams appointed over fifty judges – all right-thinking Federalists. See, Bernard Schwartz, History of the Supreme Court, Oxford University Press, 1993, p40.

[31] This Congressional Act purported to give the Supreme Court original jurisdiction in mandamus cases against federal officials. Article III of the Constitution did not give the Court such jurisdiction.

[32] The other Federalist justices were: Alfred Moore and Bushrod Washington, both appointed by Adams, and the remainder were Washington appointees, viz. William Cushing, William Paterson, and Samuel Chase. As it was the dawn of the Jefferson presidency, he was yet to make any appoints to the Court

[33] Political questions could be declined as non-justiciable, but this doctrine was developed much later in the second half of the twentieth century.

[34] President Jefferson did appoint three Justices, they being William Johnstone (1804), Brockholst Livingston (1806) and Thomas Todd (1807). Justice Marshall outlived the Jefferson Administration by a good many years.

The case of Marbury v. Madison,[35] established the power of the judiciary to review the constitutionality of statutes and as a general proposition, is remembered as the first step towards the supremacy of judicial review over the other two branches of American government. Having laid the cornerstone, Marshall continued to build the temple of justice. He did so not through raw political muscle, but through subtle and patient exertion of judicial wisdom whenever an opportunity presented itself in the form of a case or controversy that came up before the Court. By filling a niche and laying a stone there, a majestic creation came into being. In 1810, in Fletcher v. Peck,[36] the Court exercised its power to invalidate a state law as unconstitutional and ruled that a Georgia statute violated the Contract Clause of the Constitution. In 1816, in Martin v. Hunter's Lessee,[37] and again in 1821 in Cohens v. Virginia,[38] the Court established its power to review and overrule the decisions of state courts for consistency with the federal treaties and statutes respectively. In McCulloch v. Maryland,[39] in a direct confrontation with the Jeffersonian philosophy of state primacy, the Court upheld the power of Congress to create the Bank of the United States as advocated by Alexander Hamilton through a broad interpretation of the Necessary and Proper Clause.[40] The nation was rapidly moving into a coherent national entity with a solid legal infrastructure for expansion of commerce and economic growth.

IV(c) Commerce As Judicial Route to National Rule of Law and the Role of Federalism

In the above four cases, the Court can be viewed as assisting the national government in laying down a uniform national rule of law. From the national identity perspective, the contribution of the federal judiciary is to help resolve issues of federalism as actual disputes arise and usually in favor of federal, that is national power.

The other great contribution of the Marshall Court towards federal supremacy, and therefore a national rule of law[41] is the Commerce Clause cases. In Gibbons v. Ogden,[42] Brown v. Maryland,[43] and Willson v. Black Bird Creek Marsh Co.,[44] the Marshall Court laid the foundations of federalism in commerce. The Court helped establish the supremacy of the national government in matters of interstate commerce while also setting forth the limits of national government, as it must be balanced with the powers of the state, a jurisprudence that help establish the system of federalism that exists today.

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[35] 1 Cranch 137, @ L.Ed. 60 (1803).
[36] 10 U.S. (6 Cranch) 87 (1810).
[37] 14 U.S. (1 Wheat) 304 (1816).
[38] 19 U.S. (6 Wheat) 264 (1821).
[39] 17 U.S. (4 Wheat) 316 (1819).
[40] This is also known as the doctrine of implied powers.
[41] Cf. *Hukum negara.*
[42] 22 U.S. (9 Wheat) 1 (1824).
[43] 25 U.S. (12 Wheat) 419 (1827).
[44] 27 U.S. (2 Pet.) 245 (1829).

After Marshall, the Court continued its role as the final arbiter of federalism as the Court will do today.

Federalism is a system of government where power is shared between one national government and many sub-national governmental entities. Under federalism, there is a well established understanding between the division of powers between the federal and the states and local government. Any misunderstanding that may still persist can be confidently taken to court by the litigants with the expectation that the controversy will be competently and fairly resolved by the judges. In modern America, a taut but well-balanced and functional equilibrium exists between the unitary national power and the pluralistic power of the smaller units of government. Should any part of the system malfunction, the judiciary retains the power to restore the balance. The salient result in the United States was the reduction of barriers against trade between the states and localities, removal of inefficiencies as a result of localized political action, and the enhancing of the functioning of the mechanisms of market competition.

V. Conclusion

A great wit once wrote: "Some are born great, some achieve greatness, and some have greatness thrust upon them." This paper suggests that judicial greatness must be achieved by seizing the moment as the opportunity thrusts itself. The Marshall court seized upon the political quarrel between the Federalist and Republican parties and made itself supreme insofar as the constitutional adjudication of cases and controversies is concerned. It then helped the young, uncertain country gain a strong national yet federal identity, laying down the solid legal foundation for commercial growth as a cohesive nation.

A similar type of opportunity may well exist now and certainly will present itself in the future for the Indonesian judiciary. The fall of Abdurrahman Wahid was precipitated by a constitutional crisis in which the power of the executive was at an impasse with the power of the legislature – the government practically ceased to function. Fortunately, Indonesia emerged from the crisis with only minor turmoil but the situation could easily have deteriorated into general violence. The primary price was the general paralysis of government at a time when urgent decision making was necessary in face of the economic meltdown. Over a year was squandered while the economy got no better, political reform came to a halt, and popular disillusionment with face-off between the executive and legislature increased. TNI once again began to selectively flex its muscle in its effort to broker power and consolidate its own influence.[45]

In the beginning of 2001, the regional autonomy law began to be implemented. Now President Megawati has begun expressing bewilderment at the enormity of the problem and to date she has not initiated significant changes. Instead there are indications that the

[45] Although TNI/ABRI did essentially nothing when the Dayaks in Kalimantan was terrorizing the Madurese migrants.

movement towards decentralization is being braked. Will national paralysis set in? Indonesia can scarcely afford any more inaction but there exists a vacuum of credible authority. She is in need of assistance from every quarter of government.

A high court of vision, enterprise and daring can seize this opportunity and pour the foundations of an enduring *negara hukum*, even as the Indonesian government grapples with the despair of loss of confidence in the government, the divisive forces of pluralism, and the threat of violent political fragmentation. A judiciary that empowers itself[46] into independence[47] and that actively participates in creating the longed for *negara hukum.* The judiciary can help create a balanced federal system that incorporates a centralized national government alongside functional regional and local governments. The judiciary can do this not by sheer political muscle but by patient, persistent judicious wisdom. This may be a new approach that will achieve long term success in building a nation.[48]

Charleston C. K. Wang
November 16, 2001
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[46] It must ensure that members of Executive including TNI see the wisdom of its decisions and give it the necessary support.
[47] The judiciary must declare independence from the Ministry of Justice which oversees the courts and which is a part of the executive.
[48] See, e.g. Satya Arinanto, The Need of a Constitutional Court in Indonesia, paper presented at Asian Law Centre Conference on Indonesian Law: The First Fifty Years, University of Melbourne, 28 September 1996, pp 2 – 10.