

Towards Post-Transitional Justice: The Failures of Transitional Justice and the Roles of Civil Society in Indonesia

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Abstract

When democratization took place in 1998 after three decades of authoritarianism in Indonesia, transitional justice became part of the nation's agenda. With the nature of compromised political transitions, transitional justice brought together the interest of those who wished to challenge the repressive regime and those who wished to distance themselves from the old regime in order to return to politics. As the result, transitional justice measures were successfully adopted in the beginning of the political transition but failed to achieve its goals of breaking with the old regime and bringing justice to victims. Today, twenty years after the reformasi, the elements of politics are consolidated, including those elements coming from the old regime. The author refers to this transitional justice period as "post-transitional justice," characterized by the extensive roles of civil society, in particular human rights groups, in setting the agenda since the beginning of the transition up until today when state-centered mechanisms are failing. These civil society groups shift strategies to work with communities and at local levels, which gives a strong character for post-transitional justice in Indonesia.

Keywords: Civil Society, Human Rights, Post-Transitional Justice, Transitional Justice

I. INTRODUCTION

"It's been twenty years now, how is it that we are still talking about transitional justice? What transition? What justice? Until when is the transition? Why hasn't anyone being punished for their crimes of past abuses until today?" (Sumarsih, mother of Wawan, personal communication, 2018)

Sumarsih, mother of Wawan, a student who was killed by the Indonesian military during a demonstration against Soeharto in 1998, posed these questions. No trial has ever been held on Wawan's case even though the Komnas HAM (Komisi Nasional Hak Asasi Manusia, National Commission on Human Rights) set up an investigative inquiry team which found that a violation of human rights was committed by the state apparatus. Sumarsih decided to take matters into her own hands and worked with other victims of human rights violations from various

other cases that mostly occurred during the Soeharto presidency (1966-1998). Since 18 January 2007, Sumarsih and those she worked with decided to pursue other methods, including peaceful demonstrations that take place in front of the Presidential Palace every Thursday (referred as *Kamisan*). Their only demand is for the President, as the chief representative of the State, to resolve past cases of human rights abuses and to end impunity.

It is difficult to argue with Sumarsih's insistence that Indonesia is in the right path for transitional justice. This is because transitional justice so far has failed in Indonesia. Immediately after democratization began in 1998, transitional justice became part of the agenda for the country. In Indonesia, the nature of compromised political transition resulted to compromised transitional justice where elements of the reformers and status quo met to pursue each other's interests. The status quo includes the military, who were mainly the perpetrator of past abuses under the repressive regime. Consequently, transitional justice measures were successfully adopted in the beginning of political transition, but these measures failed to achieve their goals to break with the old regime and bring justice to victims.

Until 2004, Indonesia had had most of the transitional justice mechanisms adopted: trials, security reforms, and a Law on Truth and Reconciliation Commission (TRC). However, out of 137 names accused of human rights abuses, none were punished. Moreover, the security sector reform failed to include accountability for past abuses, and the truth and reconciliation commission was formally annulled before its commencement. Transitional justice has been derailed since then.

After two decades, Indonesia's democracy has shown a solid consolidation between of all elements of the politics, including those coming from the old regime. Transitional justice is undergoing a new period the Author refers to as "post-transitional justice," where the attempt to address past human rights violation through state initiatives mechanisms becomes less meaningful especially to the state.

In the search of understanding a post transitional justice, civil society in Indonesia plays the most important role. Studies in transitional justice often look at the roles of civil society in supporting official transitional justice mechanisms. In Indonesia, however, civil society's role is far more beyond official mechanisms. Consisting of various societal elements, often led by human rights NGOs, civil society builds its creative power on justice and accountability, focusing on victims' experience at the local, national, and international level as well as building solidarity with the victims. With and without engaging the State, civil society seeks to present justice at any opportunity they encounter in areas of reconciliation, collective memories, and reparation for victims. Transitional justice, in this sense, shifted from state-centered mechanisms to dynamic forms of justice in transition, leading to the post transitional justice situation.

Civil society, in particular the human rights groups, were in the forefront of setting the agenda for transitional justice from 1998 until today when state-centered mechanisms have failed and led to post-transitional justice situation. However, their roles have been marginal in influencing political decisions. Rather than bringing desired outcomes from transitional justice agenda, their political lobbying and national advocacy resulted in the strengthening of impunity rather than human rights accountability. In a later period, civil society shifted its strategies by strengthening its works at the local level as well as international level. These strategies give strong character for post-transitional justice in Indonesia.

The first part of this paper discusses the conceptual frameworks and practices of transitional justice and the roles of civil society. Around the world, there have been shifts taking place from transitional justice to post-transitional justice in countries with a consolidated democracy. Such shifting requires an analysis of civil society's potential roles to bring justice in different approaches. The second part of this chapter looks at transitional justice in Indonesia, starting from the early adoption of measures to the State's failures and post-transitional justice. The Author argues for the conditions that contribute to the failures of transitional justice. The next part explores the roles of civil society in Indonesia, ranging from their encouragement of the State to adopt a transitional justice agenda to different strategies to achieve truth and justice as alternatives to state-sponsored transitional justice. The last part is the conclusion.

II. FROM TRANSITIONAL JUSTICE TO POST-TRANSITIONAL JUSTICE: REVISITING THE THEORIES AND RECONSIDERING ROLES OF CIVIL SOCIETY

In its simplest form, transitional justice, according to a 2004 report of the United Nation Secretary-General, is defined as “the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”¹ Attempts to settle cases of past injustices can take place through various measures and mechanisms. The mechanisms most referred to in the literature are those that involve prosecution, truth-seeking, reparations and institutional reform in the form of lustration or vetting, as well as reconciliation.

The field of transitional justice study has taken shape over the last twenty years. Scholars date the emergence of transitional justice differently. Arthur argues that for most activists and practitioners, the emergence of the transitional justice field was a consequence of the development of the broader human rights movement, especially within the context of democratisation in Latin America and

¹ United Nations, *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, Report of the Secretary General (New York: Commission on Human Rights, 2004).

Southern European countries in the 1970s and 1980s.² Democratic activists and their allies in government sought to find new and creative ways to address past injustices. They began to develop a nascent transitional justice framework to strengthen their new democracies and to comply with the moral and legal obligations that the human rights movement was articulating, both domestically and internationally.³ Some scholars who focus on transitional justice mechanisms argue that the origins of this approach date much earlier. Elster suggests that some mechanisms of transitional justice, such as purges and trials, were employed as long as 2,000 years ago during political upheavals in Athens.⁴ Meanwhile, Teitel states that the Nuremberg Tribunal in 1945 marked the initial ‘phase’ of transitional justice.⁵ In its simplest form, transitional justice, according to a 2004 report of the United Nations Secretary-General, is defined as “The full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”⁶

Attempts to settle cases of past injustices can take place through various measures and mechanisms. The mechanisms most referred to in the transitional justice literature are those that involve prosecution, truth-seeking, reparations and institutional reform in the form of lustration or vetting. Prosecution can occur on the domestic level, in hybrid-internationalised courts, or in international courts. The goals of prosecution are to redress the suffering of victims and to provide opportunities to establish or strengthen the judicial system and the rule of law in transitional countries. Such efforts also aim at reflecting a new set of social norms based on respect for human rights and can be a starting point for a process of reforming and building trust in government institutions.⁷

Truth mechanisms are efforts to establish the truth about past abuses. They include the creation of truth commissions – bodies that are tasked with uncovering what happened during human rights abuses – or other national and international

² Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice” (2009) 31 *Hum Rights Q* 321.

³ Louis Bickford, *Macmillan Encyclopedia of Genocide and Crimes against Humanity*, www.ictj.org

⁴ See Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, 2004). According to Elster, the meanings of these practices are understood by historical actors involved and got swept into a universal, homogeneous conception of transitional justice. Transitional justice, according to him, “is made up of the processes of trials, purges and reparations that take place after the transition from one political regime to another” (page 1). It is the aim of his book to present these practices in historical approach and build an analytical framework that can explain the variations among the cases. See also Arthur, *supra* note 2 at 328.

⁵ Ruti Teitel, “Transitional Justice Genealogy” (2003) 16 *Harv Hum Rights J* 69 at 69–70.

⁶ United Nations, *supra* note 1 at 3.

⁷ Paul Van Zyl, “Promoting Transitional Justice in Post-Conflict Society” in *Secur Gov Post-Conf Peace Build* (Geneva: Center for Democratic Control of Armed Forces, 2005) at 211.

efforts, such as major historical research or documentation of violence and victims of violence, and exhumations. State authorities often use truth-seeking in response to the limited effectiveness of international and domestic courts in dealing with past atrocities.⁸ In other words, when authorities lack the political will or ability to prosecute perpetrators—or believe it is too risky to do so—they often pursue truth-seeking as an alternative approach. In many contexts, truth comes together with reconciliation because most experts believe reconciliation can only be achieved if the past suffering of victims is acknowledged.

Reparations policies consider the physical requirements of, or moral obligations to, victims and survivors of abuse. Reparations can include economic compensation and non-material efforts including symbolic recognition such as state apologies to and memorialises victims. Unlike prosecutions, truth, and institutional reform, reparation mechanisms focus more on victims' experiences and needs.

Another mechanism reforms institutions that have histories of abusive behavior, including the security forces and related institutions. This measure is necessary in order to prevent recurrence of patterns of abuses and to establish a state-society relationship based on functioning and fair institutions. One concrete measure is to apply vetting as part of the security sector reform.⁹

Globally, an increasing number of countries have adopted and implemented transitional justice mechanisms. Sikkink and Payne created datasets on various mechanisms of transitional justice around the world.¹⁰ Their data shows a positive worldwide trend in state efforts to enforce accountability for human rights crimes. Prosecution and amnesties are the two mechanisms where use has increased most. Human rights trials have occurred at both domestic and international levels. Their dataset shows that domestic human rights prosecutions have been used widely in Latin America and Central and Eastern Europe.

The third largest numbers of prosecutions occurred in Asia, after Europe and the Americas. From 1970 to 2009, countries in Asia implemented 17 per cent of the total number of domestic human rights prosecutions. In terms of international

⁸ Priscilla Hayner, *Responding to a Painful Past: The Role of Civil Society and the International Community*, KOFF Series Working Paper Dealing with the Past: Critical Issues, Lessons Learned, and Challenges for Future Swiss Policy M^o Bleeker and Jonathan Sisson (eds) (Bern: Swiss Peace, 2005) at 27.

⁹ The term 'vetting' is often used interchangeably with other words such as 'lustration', 'screening', 'administrative justice, and 'purging'. One important distinction is that 'lustration' usually is the term used to refer to post-communist contexts, while purging is targeting people for their membership or affiliation with a group rather than their individual involvement in human rights violations. See Roger Duthie, "Introduction, in Alexander Mayer-Rieckh and Pablo de Grieff (eds), *Justice as Prevention, Vetting Public Employees in Transitional Societies*, (New York: Social Science Research Council), 2007, p. 17-18.

¹⁰ Leigh A Payne & Kathryn Sikkink, *Transitional Justice in the Asia-Pacific: Comparative and Theoretical Perspectives*, Renee Jeffery & Hun Joon Kim, eds. (Cambridge: Cambridge University Press, 2014) at 36–39.

tribunals, Asia, Africa, and Europe are the three regions that dominate; this is in contrast to domestic prosecutions where the Americas are more prominent. Countries in Asia implemented around 32 per cent of international prosecutions around the globe. These international prosecutions included the hybrid international-national tribunals in Cambodia and East Timor.¹¹ In the Asia Pacific, Jeffrey and Kim also show that increasing numbers of countries have adopted transitional justice mechanisms since 1980.¹² Olsen, Payne, and Reiter show that there is a growing trend for countries in the Asia-Pacific, including Indonesia, to institute more than one mechanism. Out of nineteen countries that adopted transitional justice by 2009, only six countries instituted just one mechanism. Others implemented two or more mechanisms either simultaneously or sequentially. The most commonly used mechanisms in these countries have been trials, truth commissions, and amnesties.

Although transitional justice has mushroomed globally, most scholarly works in the area focus on the mechanisms and their outcomes in emerging democracies. There have been very limited studies which look at post-transitional justice contexts. The term post-transitional justice only emerges in recent years, notably used by transitional justice scholars to explain the development of transitional justice in countries with consolidated political transitions and rule of law such as Latin American and South and Eastern European countries. Collins, for example, looks at post transitional justice in the context of judicial systems in Chile and El Salvador.¹³ Skaar similarly looks at the judicial and court systems in Southern Cone which are necessary to ensure the accountability of past human rights abuses.¹⁴ Hajji looks at the case of Spain where after forty years since the political transition started, the country is moving away from its responsibility to acknowledge its dark past.¹⁵ Almost similar to the Indonesian context, the main problem for Spain is how to redress the past abuses into today's politics and society. This is the starting point of this article in expanding the conceptual framework for post transitional justice which is not limited only to formal mechanisms of transitional justice as explained elsewhere.

Collins characterises post-transitional justice as being clearly distinguished from transitional justice.¹⁶ First of all, unlike transitional justice, post-transitional justice focuses on the subsequent questions of the quality, reach, and perfectibility of democracy. Secondly, it questions the comprehensiveness and sufficiency of

¹¹ *Ibid* at 40.

¹² Renée Jeffery & Hun Joon Kim, *Transitional justice in the Asia-Pacific* (2013) at 22–27.

¹³ Cath Collins, *Post-transitional Justice: Human Rights Trials in Chile and El Salvador* (Pennsylvania: Penn State University Press, 2010).

¹⁴ Elin Skaar, *Explaining Post-Transitional Justice: The Role of Independent Courts* (Place: CMI, 2009).

¹⁵ Nadia Hajji, *Post-Transitional Justice in Spain: Passing the Historical Memory Law* (Columbia: Columbia University Press, 2014).

¹⁶ Collins, *supra* note 13 at 23.

initial transitional justice compromises. Thirdly, initiatives in post-transitional justice are mostly non-state, driven by private actors operating both at the state and community levels. In that sense, fourthly, these initiatives are multi-sited, multi-actors, and multi-referential, depending on resources, expertise, and perception of success. Fifth, because of its multiplications of sites and actors, the initiatives may vary in aims and may well adopt different forms according to these aims. Lastly, post-transitional justice activities are likely to have an ‘internationalized’ character, encompassing norms and practices beyond domestic sphere.

Civil society plays major roles in both transitional and post-transitional justice. However, civil society’s roles are slightly different in the two contexts. In transitional justice, as some scholars emphasise their roles mainly in state-initiative mechanisms.¹⁷ Their roles are ranging from addressing human rights issues in transitional settings to transitional justice processes (Backer, 2003) or from public deliberation to technical roles such as victims’ assistance, investigation, mobilization, and so on.¹⁸ Experience from countries with successful transitional justice shows that civil society plays major roles by helping “to initiate, advocate for, and shape some of the strongest and most interesting transitional justice initiatives that have been implemented around the world.”¹⁹ Civil society groups include human rights organizations, humanitarian aid organizations, victim and survivor associations, development NGOs, lawyers, academic, mental health and medical associations, religious organizations, and conflict transformation and peacebuilding groups.²⁰

One of the main critics of transitional justice studies that heavily focuses on institutions, top-down state interventions and the law tends to consider civil society groups’ roles only to fill the gaps, or act as an “intermediary between institutional mechanisms and citizens.”²¹ Rather than looking at civil society as intermediary groups, Gready proposes to see civil society roles within a context of ‘justice in

¹⁷ Priscilla Hayner, *Responding to a Painful Past: The Role of Civil Society and the International Community* (Bern, 2005); Eric Brahm, “Uncovering the Truth: Examining Truth Commission Success and Impact” (2007) 8:1 *Int Stud Perspect* 16; David Backer, “Civil society and transitional justice: possibilities, patterns and prospects” (2003) 2:3 *J Hum Rights* 297; David Crocker, “Transitional Justice and International Civil Society: Toward a Normative Framework” (1998) 5:4 *Constellations* 492; Naomi Roht-Arriaza, “Civil Society in Processes of Accountability” in Ardsley M C Bassiouni, ed, *Post-Confll Justice* (New York: Transnational Publishers, 2002).

¹⁸ Roger Duthie, *Building Trust and Capacity: Civil Society and Transitional Justice from a Development Perspective (Full paper)* (New York: International Center for Transitional Justice, 2009).

¹⁹ Hayner, *supra* note 17 at 45.

²⁰ Duthie, *supra* note 16 at 12.

²¹ Paul Gready & Simon Robins, “Rethinking civil society and transitional justice: lessons from social movements and ‘new’ civil society” (2017) 21:7 *Int J Hum Rights* 956.

transition' where both justice and transition are dynamic, diverse and contextual.²² It is understood not exclusively as it relates to acts of violence that preceded transition, but also in terms of continuities of injustice. In such approach, civil society has different roles in its interaction with transitional justice, where they have more autonomy, independent action and the modelling of alternatives, often choosing not to see the state as a principal reference.

This framework allows us to examine the roles of civil society in modelling alternatives of justice in some countries. Recent studies of transitional justice, for example, acknowledge other ways of 'doing justice,' including bottom-up approaches which incorporate local practices and local initiatives by civil society groups or communities. Launched in 1995, REMHI (*Recuperación de la Memoria Histórica*, Historical Memory Project) is a well-known local bottom-up mechanism in Guatemala. It is a truth mechanism organised through a project led by the Catholic Church that aims to document the atrocities committed during Guatemala's 36-year civil war. Another example is a truth-telling initiative in Northern Ireland called the Ardoyne Commemoration Project (ACP). This initiative is described as grassroots 'single identity truth recovery' project set up in the Ardoyne area of North Belfast, an area that suffered one of the highest casualty rates during the conflict in Northern Ireland.²³

In post-transitional justice settings, these 'alternative' models of justice mechanisms are more likely to take place. Civil society, in this context, plays major roles in some of the characteristics of post-transitional justice mentioned earlier by Collins: civil society drives non-state initiatives operating both at state level and community level; the sites, forms, and actors involved mostly depend on the resources available in these groups; and they often internationalized the initiatives and encompassing local and domestic norms and practices.

In Indonesia, civil society has also been working on various initiatives to present justice both at the grassroots level²⁴ as well as the regional and national level.²⁵ Such initiatives emerged in part as a response to the failures of state-sponsored transitional justice measures. These initiatives have included documentation, exhumation, memorialisation, commemoration and reconciliation. NGOs and victims' groups have been actively involved in documenting

²² *Ibid.*

²³ Patricia Lundy & Mark McGovern, "Whose Justice? Rethinking Transitional Justice from the Bottom Up" (2008) 35:2 J Law Soc 265 at 284.

²⁴ Birgit Braeuchler, *Reconciling Indonesia: Grassroots agency for peace* (New York: Routledge, 2009).

²⁵ Sri Lestari Wahyuningroem, "Seducing for Truth and Justice: Civil Society Initiatives for the 1965 Mass Violence in Indonesia" (2014) 32:3 J Curr Southeast Asian Aff 115; Sri Lestari Wahyuningroem, *From State to Civil Society: Transitional Justice and Democratization in Indonesia* Australian National University, 2018) [unpublished].

testimonies of victims as well as historical archives.²⁶ Since 2008, these groups have also engaged in initiatives with regional governments.

III. THE FAILURE OF TRANSITIONAL JUSTICE IN INDONESIA

Indonesia's political transition started in 1998 with the fall, after 32 years, of the authoritarian regime, often called the New Order, led by General Soeharto. Following a massive economic crisis that hit the country, demonstrations took place in Jakarta and elsewhere in the same year.²⁷ This change marked the beginning of a transition from an authoritarian regime to democracy and made it possible for past human rights abuses committed during the authoritarian period to be acknowledged by the wider public.

After five successive presidents and four elections, there have been many attempts to bring about mechanisms for ensuring truth and justice with respect to past human rights abuses and with regard to more recent abuses during or after the reform process. Indonesia is one of the many countries that adopted more than one transitional justice mechanism. In the beginning of the transition, truth-seeking was pursued for multiple cases while legal reform also took place. Both processes later led to human rights trials. President Habibie (1998-1999) set up inquiry teams regarding the conflict in Aceh and on the rioting and violence that accompanied the regime change in Jakarta during May 1998. The National Commission on Human Rights (Komnas HAM), as an autonomous state body, also set up a number of fact-finding teams aimed at revealing the truth about human rights abuses, including those that had occurred in East Timor, the 1984 Tanjung Priok massacre, the 1989 Talangsari massacre, and some other cases of recent and past abuses. Trials began under Abdurrahman Wahid's (1999-2001) presidency, including trials on mass violence during East Timor's 1999 referendum for independence. In 2004, Indonesia finally passed a Law on Truth and Reconciliation. But a Truth and Reconciliation Commission (TRC) had not yet been established when the Constitutional Court annulled the Law in 2006. From that time, the central government took no more significant efforts to deal with or resolve cases of past abuses.

Law regulation that relates to the adoption of human rights norms into local policies were mostly chosen by the government during the early period of reform (1998-2004). Within this period, Komnas HAM had a significant role in promoting

²⁶ Hilmar Farid, Rikardo Simarmata & M Kelli Muddell, *The struggle for truth and justice: a survey of transitional justice initiatives throughout Indonesia*, Occasional paper series / International Center for Transitional Justice (New York, N.Y.: International Center for Transitional Justice, 2004).

²⁷ Richard Robison & Vedi R Hadiz, "Reorganising power in Indonesia: The politics of Oligarchy in an age of markets" (2005) 41:3 Bull Indones Econ Stud 395; Edward Aspinall, "The Surprising Democratic Behemoth: Indonesia in Comparative Asian Perspective" (2015) 74:4 J Asian Stud 889.

and maintaining the momentum for human rights accountability through inquiries (truth seeking initiatives) including for cases of past abuses under Soeharto's rule.²⁸ Other than Komnas HAM and its truth-seeking initiatives, state institutions also pursued other options related to transitional justice. The MPR (*Majelis Permusyawaratan Rakyat*, People's Consultative Assembly)– Indonesia's supreme law-making body - passed Resolution No. V in 2000 which later served as the foundation for other measures for transitional justice. The DPR (*Dewan Perwakilan Rakyat*, People's Representative Council)– Indonesia's parliament - also responded to demands for human rights accountability and transitional justice by passing various laws and taking political decisions on some cases of human rights violations. For example, it passed Law No. 39 of 1999 on Human Rights and Law No. 26 of 2000 on Human Rights Courts. The judiciary was also active. The Supreme Court accommodated some demands that it deal with past abuse cases, especially the 1965-66 violence - when hundreds of thousands of leftists were massacred by the army and its allies - by issuing a letter to the president and parliament recommending that they acknowledge and rehabilitate the rights of the victims in 2003.²⁹ Meanwhile, the security sector, including the military and the police, also took positive moves toward institutional reform and accountability.

Elsewhere, the state and political institutions chose to adopt transitional justice policies and mechanisms in an attempt to distance themselves from the Soeharto regime.³⁰ Learning from the “tactical concessions” adopted during Soeharto's time³¹, these leaders viewed transitional justice as a concession that could offer in order to gain political legitimacy in the new more democratic era, both from the international community and from the domestic public. Tactical concession here refers to Risse and Sikkink understanding of governments' rhetoric response to pressure groups demanding adherence to particular norms, by underestimating the impacts of the changes or concessions they made.³² Indonesia's transitional justice process was, from the start, politically superficial, as transitional justice was adopted only to respond to domestic and international pressures for accountability of the repressive regime.

²⁸ Ken Setiawan, *Promoting human rights: national human rights commissions in Indonesia and Malaysia* (Leiden University, 2013) [unpublished]. Cornelis Pratikno, *Komnas HAM 1993-1997: Pergulatan dalam Otoritarianisme* (Yogyakarta: FISIPOL UGM, 2002).

²⁹ Surat Ketua Mahkamah Agung (Letter of the Chair of Supreme Court), No KMA/403/VI/2003

³⁰ Sri Lestari Wahyuningroem, “Working from the Margins: Initiatives for Truth and Reconciliation for Victims of the 1965 Mass Violence in Solo and Palu” in *Indones Genocide 1965 Causes Dyn Legacies* (Cham: Palgrave Macmillan, 2018) 335.

³¹ Anja Jetschke, “Die Aktuellen Entwicklungen in Indonesien und Osttimor” (1999) 29:10 *Antimilitarismus Inf* 57.

³² Thomas Risse & Kathryn Sikkink, “The socialization of international human rights norms into domestic practices: introduction” in Thomas Risse, Stephen C Ropp & Kathryn Sikkink, eds, *Power Hum Rights* (Cambridge: Cambridge University Press, 1999) 1 at 66.

The nature of democratization itself contributed to the adoption and outcomes of transitional justice. Borrowing from Samuel Huntington's typology³³, Indonesia's political transition combined elements of both replacement and transplacement types of transition.³⁴ Replacement type regime change occurs when an authoritarian regime collapses or is overthrown and replaced by a democratic political order. In Indonesia's case, this element of regime change was obvious in the sudden collapse of the New Order's authority in the early months of 1998 and by the inability of the leading elements in the New Order government to overcome the multiple national crises Indonesia was experiencing and regain their former domestic political legitimacy. Their inability to maneuver politically in the face of this crisis left them with reduced power to resist calls for state accountability in various spheres, including human rights. The adoption of transitional justice measures to deal with the human rights legacy of the New Order was a result. Not only could former generals, Golkar's (New Order's political party) politicians, and other elements of the old regime try to regain public confidence by supporting the adoption of transitional justice measures, doing so helped them to distance themselves from Soeharto's regime. In other words, transitional justice was largely a tactical concession for many important political actors; it did not reflect deep normative transformation or the adoption of a new philosophical outlook on the part of many of the key actors authorising the new transitional justice framework. While this context helped facilitate the adoption of transitional justice measures, it also helped inject weaknesses into them.

If replacement regime changes are sudden, transplacements tend to take place more gradually and involve protracted bargaining between elements of the old regime and the rising elites of the new democratic order. Once Indonesia's new Reformasi (reform) began to settle into place, more or less coinciding with the election of a new parliament and the appointment of Abdurrahman Wahid as president in 1999, Indonesia's transition came more and more to resemble transplacement. A new pro-democracy political elite was gaining influence rapidly and demanding reforms in various sectors of politics and governance, but from the beginning, these reformers shaped the direction of the transition in cooperation with elements of the old regime. Negotiations between new and old elements of the political elite were constantly taking place on all aspects of decision-making, including in the design and implementation of transitional justice measures. The problems that arose in the implementation and outcomes of transitional justice were not merely about a lack of political will on the part of state leaders – an attitude which is common among human rights advocates in Indonesia – but are better viewed as being products of this constant negotiation of

³³ Samuel P Huntington, *The Third Wave: Democratization in the Late 20th Century* (University of Oklahoma Press, 2012).

³⁴ Wahyuningroem, *supra* note 30.

power at the elite level. Overall, justice objectives were compromised in the interests of achieving reconciliation among the political elite.

In general, the adoption of transitional justice measures and human rights policies was positive in terms of the promotion of state accountability and human rights protection. However, some assessments suggest that the implementation of these measures was deeply unsatisfactory. Juwana, in his assessment of human rights performance in Indonesia outlines significant improvement in the human rights legal framework and a myriad of new human rights institutions, but he also acknowledges that these contributed little to improving the protection and fulfilment of human rights, resulting in a ‘deficit in justice.’³⁵ Likewise, the Kontras (*Komisi Nasional untuk Orang Hilang dan Korban Kekerasan*, National Commission for Enforced Disappearance and Victims of Violence), an NGO based in Jakarta, and the International Center for Transitional Justice (ICTJ) conducted an assessment in 2011 in which they acknowledged that during the 13 years of political transition to that point, especially in the early years of democratisation, Indonesia had taken positive steps to bring about legal reforms and create institutions for state accountability for past human rights abuses. However, they noted that there was a period after the annulment of the Law on Truth and Reconciliation in 2006, when all these mechanisms stalled or stagnated.³⁶ Ehito Kimura relates the failure of transitional justice to the many ways by which the political elite contrived to obstruct efforts for justice by civil society groups.³⁷ He explains that transitional justice in Indonesia “illustrates some of the larger and continued problems of governance in post-Suharto Indonesia where the rules of the game have changed, but many of the players remain the same.”³⁸

Post the annulment of TRC Law, during the period of 2004 to 2009, the DPR passed some legislation and made recommendations that support transitional justice measures. These included Law No 11 of 2005 on Ratification of the International Covenant on Economic, Social, and Cultural Rights, Law No 12 of 2005 on Ratification of the International Covenant on Civil and Political Rights, Law No. 13 of 2006 on Victims and Witness Protection, and a Recommendation on the Enforced Disappearance of Activists in 1997-98. However, after 2009, transitional justice measures either failed to meet their objectives or were never implemented at all. Some trials took place under both military and civilian

³⁵ Hikmahanto Juwana, “Special Report: Assessing Indonesia’s Human Rights Practice in the Post-Soeharto Era: 1998-2003” (2003) 7 *Singap J Int Comp Law* 644.

³⁶ International Center for Transitional Justice & Komisi Untuk Orang Hilang dan Tindak Kekerasan (Indonesia), eds, *Indonesia derailed: transitional justice in Indonesia since the fall of Soeharto: a joint report* (Jakarta, Indonesia: International Center for Transitional Justice: Komisi untuk orang Hilang dan Korban Tindak Kekerasan, 2011).

³⁷ Ehito Kimura, “The Struggle for Justice and Reconciliation in Post-Suharto Indonesia” (2015) 4:1 *Southeast Asian Stud* 73.

³⁸ *Ibid* at 88.

jurisdiction, but all such trials punished only lower-level officers or offenders and failed to bring the masterminds or higher members of the chain of command to justice. All of these offenders were eventually found not guilty in their appeals. The Law on Truth and Reconciliation was also re-drafted by a team set up under the Ministry of Law and Human Rights and submitted to the parliament, but it has never been on the priority list of the parliament for the legislation agenda.

After Yudhoyono took over the presidency following his victory in the first ever direct presidential election in 2004—a position he regained for a second term in 2009, transitional justice stagnated. Yudhoyono has, as Mietzner argues, a “general disinclination to prosecute past abuses” or to settle cases of human rights abuses.³⁹ In the end, however, his promises of human rights accountability proved little more than empty rhetoric. Yudhoyono was under little pressure to deliver on human rights; he did not find it necessary to adopt a transitional justice agenda to prove his reformist credentials. His victory in the direct election provided him with strong legitimacy and he also gained success with the Aceh peace process in 2005.⁴⁰

Today, democracy is consolidated, and transitional justice is no longer within the political agenda. Indonesia has now had regular political succession through five democratic elections. The results gave strong legitimacy for political elites, despite the fact that many of the candidates came from the old regime. Human rights issues are used during campaign to delegitimize candidates who were named as perpetrators of past abuses. Eventually, once a candidate wins the election, they break the promises for human rights promotion and accountability. The current president Joko Widodo, for example, won twice against Prabowo Subiyanto, the former general accused of master minding activist kidnappings in 1997-1998 and violence in Mapenduma, Papua. Widodo made a priority of programs for his first leadership term called the *Nawa Cita*, that include settling cases of past human rights abuses including the 1965 mass violence. However, instead of settling the past abuses, Widodo stroked civil society’s initiatives for truth and justice in his attempts to counter the oppositions’ accusation of his affiliation to communism. Under his leadership, persecutions and repression against freedom of expression increased. Since January 2015 to July 2016, SafeNet (Southeast Asia Freedom of Expression Network) recorded 42 cases of repression of freedom of expression and association in Indonesia with an average of 4 to 5 incidents every month.⁴¹

The consolidation among the political elite also disregarded Komnas HAM’s investigation on seven cases of past human rights abuses. These cases are the 1965 mass violence, the 1997-1998 activist kidnappings, the 1989 Talangsari massacre,

³⁹ Marcus Mietzner, *Military Politics, Islam, and the State in Indonesia: From Turbulent Transition to Democratic Consolidation* (Institute of Southeast Asian Studies, 2009) at 316.

⁴⁰ Jiwon Suh, *The {Politics} of {Transitional} {Justice} in {Post}-{Suharto} {Indonesia}* (Ohio State University, 2012) [unpublished] at 245.

⁴¹ Sri Lestari Wahyuningroem, *Justice denied?* (2016).

the 1998 May riots, mass killings against thugs in the 1980's, the 1998 and 1999 Trisakti and Semanggi shootings, and the killings in Wamena and Wasior in Papua. The Attorney General's Office insisted that these investigations are lacking evidence and therefore cannot be preceded into *pro justitia* investigation. Using the criminal justice perspective, the office failed to acknowledge elements of human rights violation that involved the state and its apparatus.

Other than the Attorney General's office's official stance against any investigation for cases of past human rights abuses, the government, both the executive and legislatures, are also ignoring the recommendations of various transitional justice mechanisms that took place previously. In 2005, the Indonesian-Timor Leste's Commission of Truth and Friendship (CTF), a commission established on mutual agreement between the two countries to investigate acts of violence that occurred during the referendum in Timor Leste in 1999, released its findings and recommendations. The Ministry of Foreign Affairs is the leading institution for the Indonesian side, and there have been very small achievements in the implementation of recommendation, including the returning of thousands of Timorese children who were taken from their families and brought to Indonesia mostly by the military. Civil society groups, such as Asia Justice and Rights (AJAR), have been working to find and bring home these children, with small support from the Ministry.⁴² Other recommendations have been ignored by the government including the Supreme Court's recommendation for rehabilitation for victims of the 1965 mass violence in 2003 and the 2012 parliament's recommendation to establish ad hoc human rights court for enforced disappearance of activists in 1997-1998. In addition to the recommendations, some victims have won individual cases against various state departments under the civil law. However, there has not been any execution from these verdicts.

Out of this stagnation, a permanent TRC was established at provincial level in Aceh by local bylaws in 2013. Mandated in the peace agreement between the Indonesian government and the Aceh Freedom Movement (GAM) in 2005, the drafting of the TRC bylaw (Qanun KKR) was initiated by human rights groups in Aceh. Since the annulment of the national TRC Law by the Constitutional Court in 2006, the idea to have Aceh's TRC resulted in conflicting opinions from NGOs, local government and elite members of GAM, as well as the national government. These conflicting opinions were partly due to its mandate to investigate past conflicts that involve the signing parties of the peace agreement.⁴³ After several years of delays, the Aceh's legislative and executive government under Governor

⁴² Asia Justice and Rights (AJAR), *Bringing Them Home: Fifteen Stolen Children Reunited with their Families in Timor-Leste*, Press Release (2017).

⁴³ Edward Aspinall & Fajran Zain, "Transitional Justice Delayed in Aceh, Indonesia" in *Transitional Justice Asia-Pac* (Cambridge University Press, 2013).

Irwandy Yusuf, former GAM commander, passed the local bylaw (*Qanun*)⁴⁴ with insignificant resistance from the national government.

IV. THE ROLES OF CIVIL SOCIETY AND POST-TRANSITIONAL JUSTICE

Civil society groups played a significant role in Indonesia's democratisation. After Habibie opened up the political space and granted basic freedoms of expression and association in 1998, the civil society sector grew in size and scope of its work.⁴⁵ Civil society organisations included non-governmental organisations, religious organisations, mass-based membership organisations, unions, professional groups, and so on. The Indonesian Bureau of Statistics (BPS) noted a massive growth in the number of NGOs from 10,000 in 1996 to 70,000 in 2000.⁴⁶

This massive growth of NGOs, however, did not involve major changes in their structure. NGOs maintained their structural independence from the state during the authoritarian period and, because of that, when the old regime collapsed, NGOs were not implicated in its misdeeds. Unlike established political institutions and elites linked to Soeharto, who experienced a legitimacy crisis after the fall of their patron, NGOs expanded their activities and numbers, assisted by new funding from international and private donors. *Reformasi* gave them more space to articulate their criticisms of the old regime and provide inputs to the new regime without necessarily having to confront the state. Accordingly, the scholarly literature is generally positive on the roles played by NGOs during *Reformasi*. Antlöv et al., for example, mention that the transition to democracy would have taken longer and been more difficult had it not been for the voluntarism and commitment among the NGOs.⁴⁷ Not surprisingly, NGOs played an important role in negotiating and reformulating the balance of power between state and citizens.

Human rights groups set the democratic agenda by popularising the idea of transitional justice during the early years of political transition and keeping that agenda alive throughout that time. They tried to push for a reform of government practices so thorough that it would have amounted to regime replacement. They did this by advocating for the achievement of what the Soeharto regime had always managed to avoid by way of tactical concessions: human rights accountability. The politics of the human rights movement were effective in

⁴⁴ For more details about *qanun*, see also: Faradilla Fadlia & Ismar Ramadani, "The *Qanun* Jinayat Discriminates Against Women (Victims of Rape) in Aceh, Indonesia" (2018) 2:2 J Southeast Asian Hum Rights 448.

⁴⁵ Hans Antlöv, Rustam Ibrahim & Peter van Tuijl, "NGO governance and accountability in Indonesia: Challenges in a newly democratizing country" (2006) NGO Account Polit Princ Innov 147.

⁴⁶ Bonnie Setiawan, "LSM sebagai Kekuatan Sosial Baru", *Kompas* (17 April 2004).

⁴⁷ Antlöv, Ibrahim & Tuijl, *supra* note 45 at 4.

injecting into the transition an element of thorough reform bordering on replacement. Human rights groups believed one of the earliest agenda items for the new democracy was to ensure state responsibility for past human rights abuses by way of adoption and implementation of transitional justice. Transitional justice, for these groups, provided the platform for a clean break-up with the old regime and an agenda for thorough reform.

Jiwon Suh argues that human rights NGOs were the main factor that influenced the government to adopt human rights measures and policies, including the ratification of international laws and the drafting of domestic laws related to transitional justice mechanisms.⁴⁸ Despite the fact that Indonesia was a latecomer democracy able to benefit from practices of transitional justice pioneered elsewhere and had the support of international organisations and donors, she argues that human rights NGOs play important roles as norm entrepreneurs in driving these changes and in pushing the state to change its behaviour.⁴⁹

Achieving transitional justice seemed possible after Habibie, who replaced Soeharto as President, allowed a referendum in East Timor and established a joint inquiry team on the 1984 Tanjung Priok massacre. The investigation of the mass violence during and after the 1999 East Timor referendum instigated domestic demands for a similar investigation into the 1984 Tanjung Priok massacre. In contrast to the weak public and elite support for the East Timor process, there was wide support for investigations and trials for Tanjung Priok. This support was possible because of a contingent meeting of the interests of human rights groups and elements of the new elite. Even though these elite were fundamentally interested in short-term goals and gaining political legitimacy, their support became a push factor for the government to adopt some transitional justice measures. These included the establishment of the Law on Human Rights and the Law on Human Rights Court, with the latter needed to pave the way for trials in both of these cases and the Law on Truth and Reconciliation.

Human rights group worked independently and voluntarily in pushing for a reform agenda through a ‘dual track’ strategy—lobbying the upper political elite to influence them to adopt a reform agenda and working independently from any elite group to empower grassroot communities. On the one hand, NGOs actively engaged with the state and articulated their interests to the state openly rather than being estranged from formal political processes, especially at the national level. Aspinall highlights this approach as a main feature of civil society groups in the post-Soeharto period, most of which shared a consensus that the state and social order, after 1998, were fundamentally legitimate and that “the primary aims of

⁴⁸ Jiwon Suh, *The Politics of Transitional Justice in Post-Suharto Indonesia* (PhD Dissertation, Ohio State University, 2012) [unpublished].

⁴⁹ Jiwon Suh adopted the concept of normalisation and norm entrepreneurs from International Relation theory, especially by Finnemore and Sikkink (1998).

politics were conceived as pressuring, lobbying, or otherwise influencing the state to achieve desirable policy outcomes.⁵⁰ On the other hand, some of these organisations avoided working with government institutions and chose to be watchdog organisations as an expression of their distrust of the new regime. Instead, they preferred to build solidarity and mobilise with victims or the grassroots, ignoring representative political bodies including political parties.⁵¹

The ‘dual-track’ strategy characterises civil society’s, most specifically the human rights NGOs, approach during the early years of democratisation until 2006 when transitional justice was still on the political agenda. This is in response to both types of political transition, replacement and transplacement, explained earlier. Adopting this strategy, especially in collaboration with local governments, is also part of their aim to ‘seduce’ the state to adopt measures for truth and justice at the national level.⁵²

The majority of human rights groups pursued a strategy of working with government and the new political elite by lobbying for the formal adoption of human rights and transitional justice measures into law and to otherwise take action on past abuses. They actively lobbied both the executive and legislature to seriously deal with cases such as the East Timor abuses, the 1984 Tanjung Priok massacre, the 1998 kidnappings of activists, the 1998 and 1999 Trisakti and Semanggi shootings, and the conflicts in Aceh and Papua, the western most and eastern most provinces. NGOs also contributed directly to the drafting of human rights laws such as the Law on Human Rights and the TRC Law.

In some cases, such as the 1984 Tanjung Priok massacre, such strategy was successful. However, the success mostly depended on the other factor, which was based on political interests of the new political elite. KontraS had had coalition with organisations affiliated with new political elites at the time such as the Asosiasi Pembela Islam (Islamic Defenders Association, or API, led by Hamdan Zoelfa of Crescent Star Party or PBB, a member of parliament) and Aliansi Pengacara untuk Demokrasi Indonesia (Advocate Alliance for Indonesian Democracy or APRODI, an organisation consisting of figures affiliated with Islamic political parties). The coalition succeeded in raising the Tanjung Priok case to the national agenda and even got trials started. It was successful mostly because of the commitment and involvement of political elements of the Muslim groups, most notably the political parties, and involving prominent political figures, such as A.M. Fatwa, among the victims.

⁵⁰ Edward Aspinall, “Indonesia” in *Revolut Dissident Mov World* (Great Britain: John Harper Publishing, 2004) 183 at 75.

⁵¹ A E Priyono, Willy Purna Samadhi & Olle Törnquist, *Making Democracy Meaningful: Problems and Options in Indonesia* (Demos, 2007); Farid, Simarmata & Muddell, *supra* note 26.

⁵² Wahyuningroem, *supra* note 25.

Such success did not happen in other cases, for example the Trisakti, Semanggi I and Semanggi II (TSS) shootings.⁵³ Families of the victims demanded that the state should be held responsible for these deaths and injuries. In June 1998, the military prosecuted six officials from the Indonesian Police for the Trisakti shooting, and they were sentenced to six to ten months in prison a year later. The second prosecution started in June 2001 against eleven members of Brimob (police mobile brigade) for the Semanggi I case, and nine of them were sentenced to three to six years in prison in January 2002. In June 2003, the military court also prosecuted a military soldier of the Army Strategic Command (Kostrad), the Buhari Sastro Tua Putty, for the shooting of Yun Hap.⁵⁴ These military court cases did not satisfy the families of victims mainly because they only prosecuted low-ranking officers, without targeting the main perpetrators higher up the chain of command.⁵⁵ The families, TRK and KontraS paid visits and lobbied state institutions including Komnas HAM, the Jakarta Military Command, the Ministry of Defense, and Presidents Habibie and Wahid, seeking their support for proper justice processes on behalf of the victims. They also lobbied the DPR through some individual members, a strategy that was also adopted in the Tanjung Priok case.

After a mixed response from parliamentarians during the lobbying, in 2001 the parliament agreed to set up a Special Committee to investigate the three cases and gave a recommendation to the government on how to deal with them. The Special Committee, or Pansus (*panitia khusus*), was headed by Panda Nababan, a senior politician from the PDIP (the Indonesian Democratic Party of Struggle), the party which won the largest vote share in the 1999 election. After experiencing internal deadlock a few times, on 9 July 2001, when the prosecution against the six police officers in the military court was still on-going, the Committee presented its report and recommendations on the cases to a General Meeting of the DPR.

⁵³ The TSS affair included three different incidents that took place immediately before and after Soeharto resigned. The Trisakti shooting occurred on 12 May 1998 in front of Trisakti University where protesting students were calling for Soeharto's resignation. Troops shot dead four Trisakti students—Elang Mulia Lesmana, Heri Hertanto, Hafidin Royan, and Hendrawan Sie—and injured dozens of others. The Semanggi shootings were two separate incidents of student protest about Special Sessions of the Parliament, in November 1998 and September 1999. In the Semanggi I incident, which occurred from 11 to 13 November 1998, 17 people, mostly students were killed. In the Semanggi II incident, on 24 September 1999, one student and 11 others were killed, and more than 200 people were injured.

⁵⁴ From various sources, there are no information about the process and result of the trial, except in a book written by former Army Strategic Commander (Pangkostrad) Djadja Suparman, who was in charge when the Semanggi II incident took place. In his book, Suparman mentioned that the trial prosecuted an Army soldier, Buhari Sastro Tua Putty, for shooting Yun Hap (2013: 186). Even though it was proven in the Court that the bullet which killed Yun Hap was indeed coming from Putty's weapon, Suparman suggests in his book that the weapon might have been used by an unknown party.

⁵⁵ Sri Lestari Wahyuningroem, *From State to Civil Society: Transitional Justice and Democratization in Indonesia* Australian National University, 2018) [unpublished].

The party factions in the *pansus* were divided between factions that support an ad hoc human rights court, factions that recommended reconciliation as a form of non-judicial settlement, and those who concluded that gross human rights violations were not proven, and thus the shootings should be continued to be dealt with through the military courts.⁵⁶ During voting in the general session this final group won, and the cases were declared closed.

This outcome showed that the lobbying efforts had not been successful. There were two reasons for this result. The first and most obvious was that members of parliament lacked interest in these cases partly due to ignorance and the lack of a human rights perspective among most members of parliament. The second factor was indeed political. The *pansus* worked between January and July 2001, a period when Wahid's leadership as president was undergoing a crisis as he had lost support in the parliament and opposition to him was mounting. He had to deal with opposition not only in parliament, but also within his own ministries. He was impeached by the parliament, and Megawati of PDIP would replace Wahid as the fifth President of Indonesia.

The political landscape changed significantly after Megawati took over the presidency. Under her leadership, military elements consolidated with the conservative elements of the former semi-opposition. At the same time, Indonesia's new ruling elite, consisting of members of formerly semi-oppositional parties and organisations, were increasingly consolidating its position through the distribution of patronage and power-sharing arrangement in cabinet and elsewhere. Most of its members saw little value in a confrontation with the security forces over abuses that had occurred during the transition that had elevated them to power. Human rights groups failed to recognise or acknowledge this shift.

Unfortunately, there was not much agreement among human rights groups on which issues they should prioritise in their advocacy work. They did not establish a platform for working together to achieve their transitional justice goals, nor did they pause to analyse and evaluate the processes and outcomes of their activities. This is a feature identified by Mikaela Nyman, which reflects the fragmentation of Indonesian civil society.⁵⁷ The disunity of the elements within civil society made it difficult to cooperate on day-to-day issues on democratic reform, even though the call to remove Soeharto's regime united them as a movement. When it came to prioritising goals and activities, NGOs set up their expectations separately, and their goals and strategies sometimes clashed. The most notable example was the competing emphases on trials and prosecutions versus truth and reconciliation. On this critical strategic choice, the perspectives of two of Indonesia's most

⁵⁶ P Mutiara Andalas, *Kesucian politik: agama dan politik di tengah krisis kemanusiaan* (BPK Gunung Mulia, 2008).

⁵⁷ Mikaela Nyman, *Democratising Indonesia: The Challenges of Civil Society in the Era of Reformasi* (Copenhagen: NIAS Press, 2006).

important human rights NGOs diverged: the first approach was advocated by KontraS (Commission for the Disappeared and Victims of Violence) and the latter was articulated by ELSAM (Institute of Policy Research and Advocacy).⁵⁸

When transitional justice gained its momentum between 1998 to 2000, KontraS was the lead civil society organisation in articulating the position that prosecutions were the best way to settle past human rights abuses, despite their skepticism about the corrupt and inept legal system in Indonesia.⁵⁹ When political elite became concerned over the international attention on human rights accountability for the serious crimes that took place in East Timor, KontraS and particularly its chair, Munir, consistently supported the establishment of a human rights court that deals with various cases of past human rights abuses, especially for cases they advocated such as Tanjung Priok, Talangsari, East Timor, Aceh and the activists enforced disappearance case. Munir was also a member of the drafting of the Human Rights Court Bill established by the Minister of Law and Human Rights. For KontraS, a human rights court was not merely to deprive the military court of its authority in terms of human rights accountability, but to put into effect an international standard of criminal justice system that could increase possibilities of punishing high-ranking generals and decision makers by taking the command responsibility and crimes of omission into account.⁶⁰ KontraS strongly supported prosecution because there was an opportunity for human rights courts to be effective due to the weakening of the military and the strengthening of demands for human rights accountability.⁶¹

This stance was debated by other groups, most notably ELSAM (the Institute for Policy Research and Advocacy), which argued that truth-seeking was the first step toward justice, and thus a national truth and reconciliation commission was needed. In addition to its participation in the official drafting team, ELSAM prepared its own draft on TRC, involving international experts on transitional justice and a series of meetings with victims' rights groups.⁶² Its former director, Irdhal Kasim, admitted that the South African model inspired the initial conceptualisation of TRC. However, he added that the Indonesian TRC needed to be adjusted beyond the South African model by learning the best practices

⁵⁸ KontraS was established in 1998 as a transformation of KIP-HAM, the Independent Commission for the Monitoring of Human Rights Violations, a coalition of non-governmental organizations concerned on the increased violence by government during 1997 election where there had been cases of oppositions such as activists, students, and party members, were forcedly disappeared. See their profile at <http://www.KontraS.org/eng/index.php?hal=profile>. ELSAM was established earlier in 1993 by some prominent lawyers and human rights advocates, aimed at promoting and protecting civil and political rights of Indonesian citizens. See <http://www.elsam.or.id/>

⁵⁹ Farid, Simarmata & Muddell, *supra* note 26.

⁶⁰ Suh, *supra* note 48 at 134.

⁶¹ Wahyuningroem, *supra* note 55 at 134.

⁶² Suh, *supra* note 48 at 144–145.

from other TRCs.⁶³ Kasim draws the basic idea of TRC from Huntington, arguing for the adoption of amnesty as a necessary evil during the political transition.⁶⁴ He later suggested ‘the third way’ which refers to the complementarity of different transitional justice measures but acknowledged the strong political influences of the old regime such as Golkar and the military.⁶⁵

Jiwon Suh discusses the different approaches of these two NGOs as an example of how NGOs as norm entrepreneurs could pursue plural models of justice adopted from transitional justice practices in other transitioning countries such as Argentina and South Africa.⁶⁶ KontraS strongly believed that they needed to press ahead in order to assert basic principles of justice during the transition and to establish precedents that could be used to prevent future human rights abuses. ELSAM, by contrast, believed that it was essential to take into account the continuing strength of standpatter, conservative elements in the ruling elite, and move more slowly in promoting human rights protection.

Even though human rights groups failed to work out a consensus on their strategies and priorities, they did over time maximise their ‘dual-track’ approach by intensifying their ‘bottom up’ work, encouraging initiatives for transitional justice within communities at the local level⁶⁷, including strengthening collaboration with and involvement of communities of victims. Human rights groups were blocked from making significant progress at the national level but found they could move forward at the local level. Such opportunities were much greater in the context of the far-reaching decentralisation of political power brought about by Habibie’s reforms at the start of the *reformasi* period.

The ‘dual-track’ strategy of lobbying government officials and engaging the grassroots applied in almost all areas of work organised by human rights groups. An assessment by the International Center for Transitional Justice (ICTJ) in 2005 noted that at least 200 activities related to issues of past injustice in Indonesia were carried out by these groups between 1999 and 2002. Activities ranged from truth-seeking (documenting victim testimonies, exhumation of bodies, publications, and memorialisation) to filing cases for criminal justice to lobbying for reparations for victims and promoting reconciliation.⁶⁸

At the local level, civil society groups used more grassroots or community-based activities, mainly organising around documentation, exhumation, memorialisation, commemoration and reconciliation as well as organising public

⁶³ Wahyuningroem, *supra* note 55 at 65.

⁶⁴ Ihdhal Kasim, *Menghadapi Masa lalu: Mengapa Amnesti?*, Komisi Kebenaran dan Rekonsiliasi Briefing Paper (ELSAM, 2000).

⁶⁵ Ihdhal Kasim & Edie Riyadi Terre, *Kebenaran vs Keadilan: Pertanggungjawaban Pelanggaran HAM di Masa Lalu* (Jakarta: ELSAM, 2003).

⁶⁶ Suh, *supra* note 48.

⁶⁷ Patricia Lundy & Mark McGovern, “Whose {Justice}? {Rethinking} {Transitional} {Justice} from the {Bottom} {Up}” (2008) 35:2 J Law Soc 265.

⁶⁸ Farid, Simarmata & Muddell, *supra* note 26.

seminars. These local organisations worked with victims and grassroots communities. Syarikat in Central Java, for example, successfully organised what they called as “cultural reconciliation” between the 1965 victims and some perpetrators from their communities, including religious leaders from Nahdlatul Ulama (NU). Between 2001 and 2004, Syarikat held gatherings in 18 cities and districts around Central Java and Yogyakarta. Members of Syarikat were mostly *santri* (pupils) and young leaders of the NU. Their main reason for organising these events was the involvement of many NU members and leaders in the 1965 mass violence⁶⁹, as participants shared decades of trauma and potential tension within their communities.

Some NGOs also collaborated with the local governments. Palu City, in Central Sulawesi Province, has been documented nationally and internationally as a success story of local government’s sponsored transitional justice. Local NGO, SKP HAM Palu (Solidaritas Korban Pelanggaran Hak Asasi Manusia Palu or Solidarity for Victims of Human Rights Violation in Palu) worked with victims of the 1965 violence in documentation and approached local government for a reparation program. The Mayor, Rusdy Mastura, formally delivered an apology to the victims and their families, and launched of the program.⁷⁰ Other places are not successful like Palu, however. There are three factors that determined the outcomes of these local initiatives: the nature of violence, leadership of the local government, and the organizational capacity of the initiator NGOs.⁷¹

The other important element of civil society is the victim groups. NGOs involved victim groups in most of their initiatives. Since 2000, victims’ organisations have not only been involved in the human rights groups’ initiatives, they have also been very active in documenting their own stories and in organising or getting involved in various truth-seeking and reconciliation initiatives alongside NGOs. After the fall of Soeharto, the opening of political space allowed victims of past human rights abuses, including the 1965-66 mass violence that took place throughout the country in anti-communist purge, to form a variety of associations. Victims’ organisations such as Yayasan Penelitian Korban Pembunuhan YPKP 65 (Research Foundation for Victims of the 1965-1966 Killings), Pakorba (Association of Victims of the New Order), LPKP 65 (Research Institute for Victims of the 1965 Tragedy), LPK 65 (Institute for the Defenders of 1965 Victims), LPRKROB (Organization for Rehabilitation Struggle for New Order Victims), KKP HAM 65 (1965 Human Rights Victims Action Committee)⁷², IKOHI (Association of Families of the Enforced Disappeared) as

⁶⁹ Wahyuningroem, *supra* note 55 at 215.

⁷⁰ Wahyuningroem, *supra* note 25; Wahyuningroem, *supra* note 25.

⁷¹ Wahyuningroem, *supra* note 30.

⁷² Some of these organisations claim to have hundreds of members and branches throughout the country. Some draw exclusively on the former members of the PKI, but others include non-PKI affiliated figures and/or family members such as PAKORBA or IKOHI. See short profiles of some of these organisations in Farid and Simarmata, 2004: 36-38.

well as individual victims, took initiatives in conjunction with other civil society groups, including human rights activists, researchers, scholars, teachers, and community leaders.

These bottom-up initiatives by civil society groups resulted in positive, yet limited, outcomes. The positive outcomes have been on widening local acknowledgement on cases of past human rights abuses and acknowledgement of victims' experience of injustice. In some cases, the initiative shifted local understanding of how the event took place in their areas in the past. For example, the memorialisation of Rumoh Geudong (grand house) in Pidie, Aceh, in 2016 attracted wide attention from local people in the area as well as the Aceh province. There, attention was paid to the untold stories of torture and sexual violence against women in that house during the conflict in Aceh. The house was burnt down by an unknown party after the peace agreement, but the memory remains. The much greater outcomes of the local initiative of justice apply for the victims' agency and self-healing.

These initiatives from below and from the margin also have the potential to create a 'snowball effect' in other regions and might create pressure on the central government to adopt and implement national measures for truth and justice. However, a challenge arises from the framing of the violence by these NGOs in purely human rights language, which detaches the violence from national politics. In the long term, regional initiatives can localize the collective memory and sustain impunity nationally.⁷³

Other than working at the local level with victims, human rights groups also adopted a more comprehensive approach by combining both advocacy and campaigns at national and local levels. A coalition of NGOs called KKPK is an example. Initially the acronym KKPK stood for Working Group for Truth-seeking (Kelompok Kerja Pengungkapan Kebenaran) and was set up by activists and NGOs in 2008 to advocate for, and monitor, processes then taking place in the government in relation to the drafting of Law on Truth and Reconciliation Commission, several transitional justice mechanisms for Timor Leste (the ad hoc tribunal and the establishment of Commission for Truth and Friendship) and related justice policies. At first led by the former National Commission of Human Rights (KOMNAS HAM) member, the late Asmara Nababan, in 2010 the group was transformed into a new KKPK, an acronym for Koalisi Keadilan dan Pengungkapan Kebenaran (Coalition for Justice and Truth-seeking) led by Kamala Chandrakirana, former commissioner of National Commission on Anti-Violence Against Women (Komnas Perempuan). The new name means that the coalition is not limiting its mandate only to truth-seeking but also aimed at promoting various initiatives for justice, both retributive and restorative justice.⁷⁴ The coalition consists of more than thirty national and local organisations,

⁷³ Wahyuningroem, *supra* note 25.

⁷⁴ See <http://kkpk.org/tentang-kkpk/>, accessed on 5 July 2014.

including NGOs, victims' rights groups, as well as individuals concerned with human rights issues.

In 2012, the coalition launched a truth-seeking and reconciliation project called the Year of Truth. This initiative sought to document 100 cases of past human rights abuses in Indonesia, ranging from civil rights violations to economic and socio-cultural rights violations by the state. One of the activities held during this year was what they called *Dengar Kesaksian* (DK), or testimony hearings, which also intended to promote public education. These hearings were inspired by and modelled on the truth commission philosophy and involved hearings organised in open spaces so the public would have the chance to listen to the personal histories, or testimonies, of victims. They were widely covered by the national and local media.⁷⁵ Prominent public figures facilitate the process as 'commissioners' organised in what were called 'People's Council' or Dewan Warga.⁷⁶ These testimony hearings were organised in three locations: Palu, Solo, and Kupang. These events, notably victims' testimonies on the 1965 tragedy, gained much attention from local communities. However, as Annie Pohlman outlined, states around the world have been practicing the testimony-based media initiatives created and used by individuals and organizations for political goals attempts to "bring testifiers and witnesses together through an evergrowing range of audio-visual interfaces," refers as the "era of the witness."⁷⁷ Similar to the Year of Truth campaign, such practices are produced, disseminated, and circulated rapidly with little knowable or measurable effects.

Even though the effects of the event on the wider supports from the society and government cannot be seen, what has been obvious is that such initiative succeeded in widening its involvement to youth groups and local figures including religious leaders, academics, and even individual from military institution (Agus Widjojo, a retired Army general whose been active in promoting reconciliation among families of main elite involved in the 1965 political conflict, was among the members of the commissioners). Similarly, the regular weekly peaceful protest "*Kamisan*" (Thursday gathering) in front of the Presidential Palace by family of victims of various cases of past human rights abuses, inspired by the Argentinian *Las Madres* movement, has been successful to widen the movement to other places in Indonesia by involving many youth and student organizations.

Based on the initiatives, KKP launched an approach the called Satya Pilar (six principles) as a framework for settling cases of past human rights abuses; many were adopted from the transitional justice measures. These are rule of law, truth and acknowledgement for the cases and victims, reparation for victims,

⁷⁵ Some videos on this initiative are in YouTube and have been widely distributed worldwide. See their website <http://kkpk.org/>

⁷⁶ The council consists of both national and local figures ranging from religious leaders, academics and teachers, prominent activists, and local community leaders.

⁷⁷ Annie Pohlman & University of Queensland, "A Year of Truth and the Possibilities for Reconciliation in Indonesia" (2016) 10:1 *Genocide Stud Prev* 60 at 74.

public education and dialogue towards reconciliation, policy and institutional reform, and wide participation of victims.⁷⁸ Recently, the coalition also launched its initiative to develop a comprehensive measure to settle past injustice by taking into account the economic, social and cultural rights to complement civil society's advocacy on civil and political rights for victims. This new framework includes affirmative policies for victims and their families, advocacy for civil cases that involves individuals of victims, and the fulfilment of cultural rights through cultural expressions and memorialisation.

Meanwhile, another significant movement on settling the 1965 mass violence case took place on an even wider scale, reaching to international communities. Various elements of civil society in Indonesia and other countries organized a civil society human rights tribunal called the International People's Tribunal on Indonesia's 1965 Crimes against Humanity (IPT '65) in the Hague, 10-13 November 2015. The tribunal was set to probe mass violence that took place throughout Indonesia, following the previous investigation by Komnas HAM in 2012 on the issue. This tribunal aimed at encouraging the government to follow up on Komnas HAM's investigation, acknowledge the case, and provide reparation for victims. The tribunal also involved high profile judges from various backgrounds, including the United Nations and well-respected prosecutors. The verdicts from the judges were very political, that the Indonesian state is responsible for crimes against humanity and genocide that took place in Indonesia during the periods. The judge also found the involvement of other countries: the United States, the United Kingdom, and Australia, in facilitating the crimes.⁷⁹ Hundreds of researchers, activists, and students from at least seven countries involved voluntarily in the preparation and organization of the tribunal. The event was broadcasted live and was well accessed electronically in five continents. It was also widely covered by national and international media, and successfully got the attention of the political elite in Jakarta.

The IPT 65 was not the only civil society's human rights tribunals. Back in 2000, there was series of tribunals in Tokyo to probe sexual violence against women by the Japanese soldiers during World War II. Indonesia was also included since thousands of young Indonesian girls were victims. One of the prosecutors for the tribunal was Nursyahbani Katjasungkana, the leading figure that initiated the IPT 65. Other than the Tokyo Tribunals, there was also a citizens' tribunal for 1998 Biak Massacre in Sydney, Australia. The tribunal was organized by human rights groups and the Papuans who live in Australia to try the crimes against humanity that took place in Biak, Papua, the easternmost province in Indonesia, at the time when Jakarta was politically heated at the end

⁷⁸ Koalisi Keadilan dan Pengungkapan Kebenaran (KKPK), *Menemukan Kembali Indonesia* (Jakarta: KKPK, 2016).

⁷⁹ Saskia E Wieringa, "The International People's Tribunal on 1965 Crimes against Humanity in Indonesia: An Anthropological Perspective" in Andrew Byrnes & Gabrielle Simm, eds, *Peoples Trib Int Law*, 1st ed (Cambridge: Cambridge University Press, 2018) 107.

of the New Order regime in 1998. Unlike these two tribunals, the IPT65 had a larger impact, especially in Jakarta. The Indonesian government's responses to the event had a positive impact to the case itself.⁸⁰ The Coordinating Minister for Political, Law, and Security, former general Luhut Panjaitan, was concerned about the 'internationalisation' of the 1965 case. Together with his colleague, Agus Widjojo, a former general who is also director of the National Defence Institute, organized a public discussion in April 2016 on reconciliation for 1965 to compete the success of IPT 65 in getting public attention and at the same time to counter human rights discourse on the 1965 mass violence.⁸¹ However, instead of gaining the attention and sympathies of the public, the event was responded with fury from the extreme, nationalist Army elite who strongly rejected IPT 65 and any efforts to promote truth and justice for the case. Supported by right wing mass organizations, they also organized an event to negate both IPT65 and the event held by the government. Since then, persecutions and repressions against human rights groups and victims increased. The major incident took place in October 2017 when Muslim groups crushed a discussion organized by groups of human rights activists and victims organized in Indonesian Legal Aids' office in Jakarta. Before and during the 2019 election, human rights groups became more cautious of risks that can backlashed their movements, and especially can negatively impacted the victims.

V. CONCLUSION

This paper argues that transitional justice in Indonesia has stalled as democracy has been consolidated and the elite have gained political legitimacy through mechanisms of liberal democracy. In the early democratic transition, transitional justice was chosen as a reform agenda because it brought together the interest of the elements who wished to challenge the repressive regime and those who wished to distant themselves from the old regime in order to return to politics. Transitional justice measures were successfully adopted but failed to bring justice and accountability. After two decades, elements of the politics are consolidated, including those coming from the old regime, and transitional justice is undergoing a post-transitional justice period.

The post transitional justice period is marked by several characters. One that is most dominant is the role of civil society beyond state's accommodation to reckon with past abuses. The shift of strategy from state-centered mechanisms to local-level and international hearings and activities is partly a consequence of the failure to achieve meaningful results at the national level. The fact that the political

⁸⁰ Saskia E Wieringa, "The {International} {People}'s {Tribunal} on 1965 {Crimes} against {Humanity} in {Indonesia}: {An} {Anthropological} {Perspective}" in Andrew Byrnes & Gabrielle Simm, eds, *Peoples Trib Int Law*, 1st ed (Cambridge: Cambridge University Press, 2018) 107 at 131.

⁸¹ Wahyuningroem, *supra* note 41.

lobbying and national advocacy resulted in the strengthening of impunity rather than human rights accountability shows the powerlessness of the groups in pushing for the desired outcomes of transitional justice agenda. However, their persistence in working for truth and justice to settle cases of past human rights abuses dominates the characters of post-transitional justice in Indonesia.

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