

**REFLECTIONS ON OLIGARCHY, DEMOCRACY,
AND THE RULE OF LAW IN INDONESIA**

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by

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Struggles throughout history show us that there is a powerful and persistent human desire for freedom, justice, and equality. But history also reveals that human societies remain gripped by profound and durable inequalities, patterns of exclusion, and especially a capacity of small groups (oligarchs and elites) to benefit themselves as they dominate everyone else. There have been important victories, and no one can deny that there has been progress in addressing inequalities. But if we are honest, we must admit that the achievements have been slow and partial. And in some cases, inequality has actually increased even though we live in an era that is more vocal about fairness and rights than any that came before us. Dr. Martin Luther King declared in a famous 1968 oration that “the arc of the moral universe is long but it bends toward justice.”¹ Although his message was intended to be uplifting, it is disturbing that progress toward justice is so gradual that it must be measured on a galactic scale.

The main message of my lecture on this important occasion is that whatever our achievements may be in the realm of justice, fairness, and human dignity, we are far too comfortable with extreme inequalities. Levels of inequality and unequal power that are too high to be labelled “civilized” have become normal. It does not take much effort to see that our democracies are dominated by the few rather than the many; that our economies produce wealth inequalities both within and between nations on a scale never seen before in human history; and our legal systems bend to the powerful rather than the powerful bending to the law (as the weak must do). I mention these failures not to be pessimistic or depressing, but rather to remind us that the pursuit of meaningful change starts with an honest assessment of where we are. What I offer today is in the spirit of continuing the important struggles of those who have come before us – not only because it is the only responsible thing to do, but also because it would be a tragedy to allow their efforts and sacrifices to be in vain.

This lecture begins with an analysis of the problem of inequality and democracy. The emphasis is on societal inequalities that democracy is supposed to remedy, but which instead end up undermining democracy itself. This is followed by a closer look at our most durable societal inequalities, with an emphasis on a special set of actors known as oligarchs as the most extreme

¹ Dr. Martin Luther King Jr., “Remaining Awake through a Great Revolution.” Speech given at the National Cathedral, Washington, D.C., March 31, 1968.

example. More than any other group, oligarchs undermine the achievement of representative democracy in our countries. In the last part of the lecture, the discussion turns to unequal power and the rule of law. The argument is that when we say “the rule of law and not of men,” the important locus of struggle is not at the mass level of ordinary citizens, but rather among oligarchs and elites, the most powerful actors in the system. Taming them and having them submit to laws and legal institutions is the most challenging power contest any nation faces. Thus, later in this lecture I will propose a redefinition of the rule of law that will help guide and focus future struggles to achieve this important goal.

I will argue that achieving the rule of law is far more difficult than a simple transition to democracy. This is because oligarchs and elites can easily adapt to, capture, and dominate democracy. This is not possible with the rule of law because rules and punishments applied equally to the weak and the strong directly threaten the power of those at the top. From the perspective of oligarchs and elites, democracy is the use of power in a different way, whereas the rule of law is an absolute loss of power. At the surface level, Indonesia’s experience with the Corruption Eradication Commission is just about corruption. But at a deeper level, it is a battle to tame the country’s oligarchs and elites – a power contest with important consequences for the rule of law in Indonesia, and a fight that the most powerful actors are currently winning.

Before turning to the legal dimension, it is important to understand the unequal distribution of power in societies and the implications this has for democracy and the rule of law.

Modern Democracy as the Pursuit of Equality within Inequality

“Man was born free, and everywhere he is in chains.”

Rousseau, *The Social Contract*, 1762

In Rousseau’s time, there was no meaningful democracy. Oppressive monarchies and other authoritarian regimes dominated the landscape. His solution to achieve human freedom and legitimate government was to shift sovereignty to the people. But if we fast-forward to the 21st century, it is evident that simply establishing democracy and freedom are not enough. There is a different set of chains that imprison us. In focusing too narrowly on government alone, Rousseau’s analysis and remedy overlooks and underestimates the lasting impact of social

stratification and hierarchy outside of the government structure on political equality. An updated version of this opening line of *The Social Contract* might be: “Man is born the same, and everywhere he is unequal.” Democracy and freedom are important gains, but neither is enough to achieve equality because they fail to address the most important and durable forms of extreme inequality in society.

All modern democratic societies contain a fundamental contradiction. We cherish equality as one of our highest principles, and yet we tolerate and even embrace structures and institutions that generate huge power inequalities that make democracy unrepresentative. Inequalities of power subvert all formal (institutionalized) efforts or designs to achieve principled equality. Unequal power means unequal society, no matter what constitutions we write or principles we proclaim.

This contradiction exists because for hundreds of years, modern societies have pursued two tracks that cannot be reconciled. One is the formal political and legal track that declares equal participation and equal rights for all. Democracy has wide legitimacy because it is based on the principle that the power and voice of every citizen should be equal. It is so compelling that people are willing to risk suffering and death to achieve it. The equality principle of democracy is enshrined formally, but also narrowly, in the practice of one person, one vote on election day. In the legal realm, it is enshrined in the principle of equality before the law. No matter what their position or status, persons bend to the law, never the law bends to persons.

The other track is the economic sphere based on private property and markets. This is a realm that also draws its legitimacy from fundamental principles of equality such as fair competition and open access. And yet, in practice markets consistently produce massive inequalities. Everyone is supposed to be equally free to compete in the market, and, in its ideal form, markets should be a level playing field that does not favor particular persons. The only advantage one is legitimately permitted to bring to the market is a *competitive* advantage, rooted exclusively in the desirability of the product or service one offers. You win in the market because consumers choose you over others. And they choose you because of your efforts and innovations. That is the ideal version of markets, not the reality.

After several centuries of experience, it is undeniable that market capitalism does two things very well: it raises overall living standards and it produces extreme inequalities of wealth. Although the creation of great fortunes alongside masses of people with barely enough to live is

disturbing, on its own it is something that could potentially be corrected or adjusted through government policies that re-balance wealth. But this does not happen because extreme wealth inequalities do not just make certain people super-rich, they also make them super-powerful in society. Our economic system inevitably produces oligarchs who can easily convert wealth power into political power, and who have a strong incentive to do so precisely to defend their wealth.

Markets do an excellent job of concentrating wealth, while politics (especially democratic politics) threatens to spread it again. The challenge for the rich and powerful few is to dominate politics to reduce the risks of redistribution. In democracies, the power of oligarchs distorts the political system and undermines – and in some cases even cancels – democratic equality based on voting. What I am saying is that our struggles to achieve equality (through democracy) are contained within even larger and far stronger struggles to produce inequality (market capitalism). The result is political equality that is stunted by almost unlimited material inequality.

Democracy has been critiqued from many angles. Debates have produced two broad ways of thinking about democracy. One emphasizes the substance or the content of democratic self-government. We measure or assess democratic government by its democratic outcomes.² The fundamental principle is that the “will of the people” should be actually visible in the policies, actions, and priorities of government. But critics asked a fair question: What is the “will of the people”? Joseph Schumpeter in his critique of this classical view of democracy argued that the idea of the “will of the people” is an impossible myth. It does not exist in reality. People have many wills on many issues. Sometimes the people know what they want. Many times they do not. Sometimes they want what influential elites tell them they should want, and this could change if other elites, who are more persuasive and charismatic, shift the debate in different directions.

² Martin Gilens and Benjamin Page (2014) analyzed the power of average citizens compared to that of oligarchs and elites. A quantitative study of thousands of decisions in the U.S. Congress showed that, “Not only do ordinary citizens not have *uniquely* substantial power over policy decisions; they have little or no independent influence on policy at all. By contrast, economic elites are estimated to have a quite substantial, highly significant, independent impact on policy.” When it comes to influence on representatives in Congress, “it makes very little difference what the general public thinks” (p. 572).

This does not mean that ordinary people are ignorant sheep. What it does mean is that people are themselves complex, that they have many views on many topics that are also complex, and that most societies do a very poor job of educating and informing their citizens. And except in very small communities where everyone participates directly in self-government (which is exhausting, by the way), if there is such a thing as the will of the people, it will be realized through representatives.

This modern reality prompted Schumpeter to shift our fundamental idea of democracy away from the substance and content of government toward *procedures*. He redefined democracy as a procedure for choosing representatives in government.³ From this perspective, a government is democratic if it is the result of “free competition for a free vote.” Democracy is not government of, by, and for the people. That’s another myth. It is the selection of government leaders through elections that are genuinely free, fair, and competitive. The role of the people is not to govern themselves, but rather to select those who will govern them. No more and no less.

Note that this specific way of choosing representatives may or may not result in government policies and actions that satisfy the needs and desires of the people. According to Schumpeter’s redefinition (which is the dominant one globally), we can *hope* or *assume* that the democratic procedure of choosing representatives will indeed result in some sort of “will of the people” being realized. But the important point is that it does not have to in order to be democratic. The entire legitimacy of democracy is based on *how* representatives are chosen, not any connection between the policies they produce and majority interests.

What is remarkable is that despite Schumpeter’s more simple and minimalist definition, and despite the irrelevance of actual outcomes or needing to reflect the interests of the majority, Schumpeter’s redefined democracy still fails on its own terms because gross inequalities of

³ Saffon and Urbinati (2013), in their spirited defense of procedural democracy, write: “The proceduralist vision insists that equal political liberty is the most important good for which democracy should strive.” They continue, “Equal liberty implies not only the right to participate in politics via voting and freely expressing one’s mind but doing so under equal conditions of opportunity, which entails protecting civil, political, and basic social rights with the aim of ensuring a meaningful equal participation.” This naïve formulation ignores the effects of extreme power inequalities on democracies. As John McCormick (2011) makes clear in *Machiavellian Democracy*, which Saffon and Urbinati do not engage, democracy even at its best amounts to “elective oligarchy” in all societies with enormous wealth inequalities.

power across all societies make the free competition for a free vote virtually impossible. Even Schumpeter's stripped down interpretation of democratic government still rests on the bedrock foundation of *equal voice and equal power for all citizens*.

Free competition for a free vote is meaningless if a few thousand oligarchs and elites have the power to direct, constrain, block, or overwhelm the democratic method at every stage. A useful image might be a stadium full of people all speaking and yelling at once as they try to be heard, while a much smaller and more coordinated group of oligarchs and elites blast their voices and messages through towering speakers. Only in those rare moments when the crowd chants the same message in unison can they overwhelm the amplified voices.⁴

It is not a great stretch to apply this image to free and fair elections – and what determines which voices or ideas get circulated, which ones get amplified, which ones end up shaping the issues that are on the agenda during campaigns, and who gets selected to represent the people. Moreover, this does not even begin to address the ongoing power and influence oligarchs exert during the years *between* elections when most of the citizens filling the imaginary stadium go back to their families, work, and lives in general. Oligarchs and elites have the opportunities and resources to remain engaged and apply pressure long after the election results are announced. Even by Schumpeter's reduced definition of democracy, at best the people get elections skewed by oligarchs and elites, followed by a government even more skewed by them.

What is evident from this discussion is that even retreating to a minimalist procedural definition cannot rescue democracy if power is so unequally distributed in society that the institution of “one person, one vote” is overwhelmed by some people having the equivalent of millions of votes. To understand how this happens, we must explore the many forms of

⁴ The widespread use of public opinion polls early in an election cycle provide ordinary citizens with some influence before election day. Firms providing this service to politicians mushroomed in Indonesia after 1998. Networks of elites and political parties may have their preferred candidates for office. But persistently dismal polling numbers make it hard to attract large donations from oligarchs to fund increasingly expensive campaigns. To overcome this obstacle, candidates try to pay pollsters to produce impressive numbers. Some large Indonesian oligarchs have responded to this by setting up their own internal polling teams to ensure they have accurate numbers before giving money to cash-hungry candidates. Recent research by Dirk Tomsa (2020, p. 1) challenges this mass-empowering view of polls, finding that “democratic responsiveness seems to have declined rather than improved despite an ever-growing number of public opinion surveys.”

empowerment that are not derived from formal rights of equal participation and voting. This is the realm of stratification, oligarchs, and elites.

Simple Inequality, Extreme Inequality, and the Power of Oligarchs

The core problem of our democracies has nothing to do with how democracy is defined. It does not matter whether we emphasize outcomes or procedures. It is also irrelevant whether a single will of the people exists, or whether we have direct democracy versus elected representatives. In stratified societies, which are the only kind that exist, these issues are a distraction. The important point is that democratic government *of any kind* is impossible when citizens have extreme inequalities of power. Even if there were genuinely competitive elections, universal suffrage, and full freedoms of assembly, participation, and access to information, a system would still be disqualified as undemocratic if it gave nearly everyone one vote, but gave a small number of citizens a million votes each. This is because granting a single vote to each person expresses democracy's core requirement that power be shared equally among all citizens.

But for this core principle to be meaningful, the assumption is that an equal vote gives everyone an equal voice. That is, equal political power is democracy's qualifying element. It follows, then, that granting a single vote to everyone is sufficient for democracy *only if* citizens also have relatively equal power endowments in all other relevant categories. If they do not, and if inequalities of power are extreme, it is the same as giving one vote to the majority and a million votes to a few.

The study of inequality has a long and contentious lineage. In a pioneering article that launched a sharp debate in the pages of the *American Sociological Review*, Kingsley Davis and Wilbert Moore (1945, p. 242) argued that there is a "functional necessity of stratification." They pointed out that in complex societies people have different roles, and there are important reasons why different rewards are associated with each role.⁵ They concluded that inequality is universal because it is necessary and beneficial. In response, Melvin Tumin (1953, p. 387) granted the

⁵ According to Davis and Moore (1945, p. 243): "If the duties associated with the various positions were all equally pleasant to the human organism, all equally important to societal survival, and all equally in need of the same ability or talent, it would make no difference who got into which positions, and the problem of social placement would be greatly reduced." Social inequality is, therefore, "an unconsciously evolved device by which societies insure that the most important positions are conscientiously filled by the most qualified persons."

“ubiquity and antiquity” of inequality, but countered that the real issue was how power and property were distributed. Walter Buckley (1958) pointed out that Davis and Moore confused *social differentiation* with *social stratification*. It is not controversial that large and complex societies must have complex divisions of labor. It is also not problematic that different roles will have different rewards. What is neither necessary nor inevitable is *extreme* differences in those rewards. The problem of inequality is not its existence, but rather its scale, which Davis and Moore did not address and could not explain.⁶ Functional theories of social differentiation (the claim that complex societies need inequality to function) fail to account for the shocking magnitude of social stratification evident from the earliest civilizations to the present.⁷

The missing element in such theories is the role that power plays in the capture of unequal rewards, which not only produce no apparent social benefits, but actively cause harm to the community. The antidote to extreme inequality is not absolute equality, a goal conservatives raise to dismiss and derail agendas for meaningful change. Striving for radical equality has proven dangerously utopian, and we are so far from this ideal that it does not merit serious consideration. The real terrain of contestation and of analysis concerns the *degree* of inequality, and how it can be reduced to non-pathological levels. If inequality is inevitable and even useful, extreme inequality is neither. The realistic opposite of extreme inequality is what might be called *simple inequality*. The distinction between simple and extreme inequality is rooted in their relationship to social, economic, and political power. Simple inequalities are relatively benign because they are too small to create distorting power imbalances in society. Simple inequalities do not alter life chances or allow individuals or small groups to dominate large communities.

⁶ Emphasizing “qualifications” as the basis for who fills different roles in society, Davis and Moore argued that people gain access based on innate talents or training. They acknowledged that innate capacities could not explain most social inequalities because “talent is fairly abundant in the population.” Instead, they pointed to the training process, which is “so long, costly, and elaborate that relatively few can qualify.” (Davis and Moore 1945, p. 244). The obvious problem with this analysis is that it is circular since access to “training” is itself conditioned by prior social inequalities.

⁷ Wrong (1959, p. 775) notes that Davis and Moore never demonstrate that “a more equal distribution of rewards is in principle incompatible with the maintenance of a complex division of labor.” For a more recent critical engagement with the Davis-Moore thesis, see Panayotakis (2014).

Extreme inequalities confer enormous power and do not arise naturally or randomly. They are fought for aggressively and defended consciously.⁸ And because of the role of institutions, inequalities that generate massive rewards and power have important self-sustaining characteristics.⁹ Institutions are the rules, norms, and procedures that reflect the winners of past social battles and struggles. They are the artifacts that remain when the dust of social conflict has settled. It is useful to think of institutions as resilient structural thickenings in the interstices of social relations that support existing power relations against challenges. Institutions are important in giving power and domination their stability and continuity. For instance, the institution of property rights, backed up by state coercion, is vital in the smooth transfer of wealth and power across generations. Slavery renders people themselves as property. The initial capture of people makes them slaves; the institutionalization of slavery ensures their status is continued for generations.

This sustaining role of institutions explains why ruptures or “critical junctures” are so important for understanding change throughout history. Major crises can crack and break institutional structures that are otherwise durable largely because they are under constant development and repair. Although the weak sometimes win the battles that produce institutions, nearly all important social structures and institutions have deep safeguards built into them that reflect and maintain *unequal* distributions of power and rewards. When pushing back against the strong and privileged, victories are rarely a clean sweep.¹⁰ Nowhere is this more evident than in the institutions and politics of democracy.

Of all the inequalities that exist in society, none is more extreme and important than wealth inequality for the distortions it creates in democracies and in the rule of law. It is also noteworthy that while inequalities of power exist across race and gender, it is clear that at least some progress has been made on these fronts in most countries. Only in wealth inequality has

⁸ On the origins and development of extreme inequalities from pre-history to the present, see Winters (2017). For further important sources on inequality, see Voss (2010), Dow and Reed (2013), Therborn and Aboim (2014), Lamont and Pierson (2019), and Ridgeway (2019).

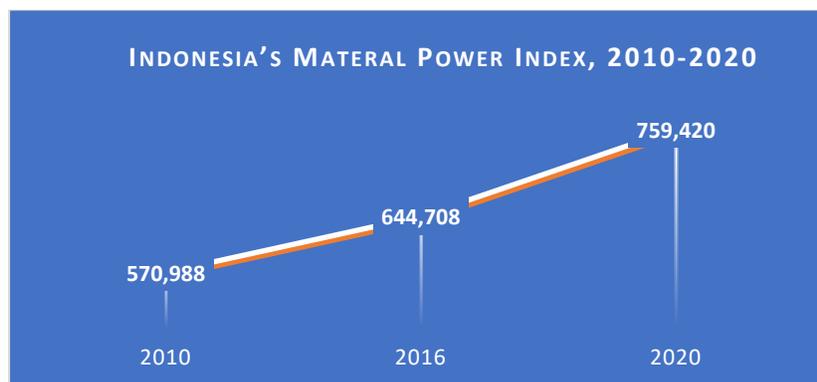
⁹ It is much easier to gain and hold power when one already has a significant head start. This is why rags-to-riches stories impress us so much more than wealth and power passed on through families and networks. Albeit with different motives, the weak and the strong alike celebrate the ones who slip through the gaps in the system or scale the high barriers to social mobility.

¹⁰ On this point, Dennis Wrong (1959, p. 775) laments “the eternal difficulties faced by reformers and Utopians in ‘making the leap from history into freedom.’”

the situation become not only worse during the past fifty years, but dramatically worse compared to 500 or 1,000 years ago.

Consider data on Indonesia for two indicators of wealth-power concentration. The first is the Material Power Index (MPI). This measures how much material power oligarchs at the top have compared to an average person (see Figure 1).

Figure 1. Change in the Material Power Index in Indonesia, 2010-2020.



It is calculated by dividing the average wealth of the 40 richest Indonesians (available annually from *Forbes*) by the wealth position of the average citizen (using GDP per capita as a proxy). The results show that an already large wealth-power gap in Indonesia in 2010 has grown rapidly during the past decade. The average top oligarch in Indonesia had about 570,988 times the wealth power of an average citizen in 2010. This rose to 759,420 times by 2020, a 33% increase. This means that wealth concentration among oligarchs is rising much faster than overall growth in the economy.

Another indicator, the Wealth Concentration Ratio, provides a snapshot of which countries have extreme wealth concentration at the top. This is calculated by comparing a country's median and average wealth from data collected by Credit Suisse. The median wealth in society is the middle point in the population. Half the adults are richer and half are poorer. The average wealth is the total wealth in the country divided by the number of adults. For all 171 countries in the Credit Suisse dataset, the average is higher than the median. This is because wealth concentration near the top in every country skews the average higher. The question is how much higher. This is what the Wealth Concentration Ratio tells us. It is derived by dividing a country's average wealth by its median wealth. Table 1 presents a comparison of the 10

countries with the highest Wealth Concentration Ratios in 2019. Indonesia is ranked 8th in the world with a ratio of 5.3 compared to a world average of 3.0.

Table 1. Ten Highest Wealth Concentration Ratios, 2019

Rank	Country	Median Wealth (US\$)	Average Wealth (US\$)	Wealth Concentration Ratio
1	Netherlands	31,057	279,077	9.0
2	Russia	3,683	27,381	7.4
3	Ukraine	1,223	8,792	7.2
4	United States	65,904	432,365	6.6
5	Sweden	41,582	265,260	6.4
6	Thailand	3,526	21,853	6.2
7	Germany	35,313	216,654	6.1
8	Indonesia	1,977	10,545	5.3
9	Denmark	58,784	284,022	4.8
10	India	3,042	14,569	4.8
**	Average			3.0

Source: Credit Suisse Global Wealth Databook, 2019.

This brief detour into the topic of concentrated wealth and the power it confers to the rich is the basis of oligarchic theory.

Oligarchs are actors who are empowered politically and socially by wealth (Winters 2011, 2014). Concentrated wealth always attracts threats for those who possess great fortunes. Those threats can be vertical or horizontal. The non-rich from below can try to take the wealth from those at the top. From above, the state can take wealth in the form of high taxes and redistribute it to others in society. In the case of monarchs and dictators, sometimes that redistribution is to themselves personally. Horizontally, oligarchs pose threats to each other. One quick way an oligarch can become much richer is to take the fortune of another oligarch.

Throughout history, these threats from all directions have been an existential fact for oligarchs, and they have no choice but to engage in wealth defense or perish. I define oligarchy not as a form of government, but as the politics of defending wealth. Oligarchy describes the particular ways that the power and interests of the rich few are expressed. And what is

significant about oligarchs embedded in any political system, from authoritarian to democratic, is that wealth itself is their specific instrument of power. There are two key factors that determine the political power of oligarchs. The first is the *form* of their wealth. I might be rich because I own 10 million heads of cattle. But cattle are difficult to use for political leverage. Financial assets are the most versatile and potent form of wealth power. Money can be used for a vast range of political objectives.

The second factor is *how easily* wealth power can be deployed in a given political system. I might have a mountain of cash, but campaign finance laws that are strict and aggressively enforced might prevent me from spending it on candidates or parties. This does not mean that oligarchs' money is useless during elections, but it does mean that they must be much more careful about how they spend it to ensure their candidates and policies win. As we know from the Indonesian case, sometimes oligarchs skip the step of backing parties or candidates and just create their own parties and campaign for themselves. This has been happening in Indonesia at both the national and regional levels, and it is a pattern that has grown during the last decade in other democracies around the world.

The use of wealth power is not limited to campaigns and elections. Oligarchs can deliver funds to legislators and politicians to get favorable decisions on laws and policies such as taxes, labor, investment regulations, or to win huge government contracts. They can hire thugs to intimidate people or institutions, or rent crowds to simulate popular protest. To avoid legal consequences, they can bribe police, prosecutors, and judges. All of these expressions of power are quite visible and well known, and also quite unavailable to ordinary citizens.

Much less visible, but no less important, is what I call the Wealth Defense Industry. This is a multi-national and multi-billion dollar industry whose only purpose is to hide and protect the wealth of the ultra-rich, especially from government taxation and redistribution, but also to launder and relocate stolen funds. This industry is full of talented and highly paid professionals including lawyers, accountants, lobbyists, and wealth management specialists. All major law firms around the world have a wealth management division, and some companies do nothing except help oligarchs protect their fortunes.

I have written extensively about how oligarchs operate within Indonesia's democracy. The key points I would emphasize here are that while all adult Indonesians have a single and equal vote in Indonesia's elections from 1999 forward, oligarchs exert tremendous power that

goes far beyond simple voting to shape the range of political issues in play, which parties and candidates can go forward, and who has a significant chance of winning. The system is also highly dynamic in that government is a key target of oligarchs for influence and control, but government office is also a potential pathway to becoming an oligarch. Government office is a potential source of affluence in many countries. But because of the central role of extractive industries like oil, gas, mining, coal, and timber, opportunities arise in Indonesia to skim resources large enough to produce fortunes on an oligarchic scale. In the U.S., for instance, politicians can hope for tens or hundreds of thousands of dollars through corruption. If they are really lucky, they can break into the millions. But in Indonesia it is possible to reach the hundreds of millions or even billions of dollars.

Although Indonesia's scores and rankings for democracy and freedom have declined in recent years, the country has performed well as a minimalist procedural democracy. Elections have occurred on time, there are multiple candidates and parties who compete openly and with a minimum of violence, and voting fraud is minimal. The free press and rights of speech and assembly have mostly been preserved (again, with recent declines being the exception), and candidates who lose elections step down from their seats or step aside for the winner.

Democracy is the only system of government in which powerful leaders surrender their positions willingly and often. SBY's single greatest contribution to Indonesian democracy was to peacefully step down when he faced his two-term limit. All of these things are important. But they do nothing to limit or neutralize the massive wealth power and influence of Indonesia's oligarchs and elites. As elsewhere around the world, Indonesia is a blend of democracy and oligarchy. A system of equal power based on equal votes is surrounded and dominated by the unequal power of oligarchs and elites.

In the last part of this lecture, I would like to look more closely at this question of concentrated wealth and power in Indonesia. Through a case study of the rule of law, I intend to show how the KPK represents an effort to tame the power of Indonesia's oligarchs and elites, including an assessment of why that effort is important and yet failing.

Power and the Rule of Law

Extreme power concentrated into a few hands subverts the rule of law in the same way that it distorts democracy. We have seen that democratic elections are "free and fair" in the

narrow competitive sense, but utterly unfair with regard to equal voice and influence among all citizens. This is what McCormick meant by democracy as “elective oligarchy.” We conduct elections, but within a broader social and political structure dominated by extreme power of oligarchs and elites.

Oligarchs and elites block the establishment of the rule of law when their personal power is sufficient to bend and influence the legal system in their favor. My proposition to you today is that the very definition of the rule of law only makes sense if it is focused on the success or failure of taming a country’s oligarchs and elites.¹¹ Because this has not yet happened in Indonesia, we must conclude that the rule of law does not yet exist. The good news is that during the past two decades, the country made a major effort to force its oligarchs and elites to submit to the rule of law. The bad news is that after a very strong start, the battle between law and Indonesia’s most powerful actors has turned decisively in the favor of the powerful. I am referring, of course, to the inspiring and yet tragic saga of the KPK.

Before focusing on the KPK, let us first examine the fundamental relationship between the rule of law and the power of persons. There are two important elements in the analysis. The first and easiest part is to define clearly *what* the rule of law is. This definition allows us to say whether the rule of law exists and identify what key obstacles stand in the way. The second element is to understand *how* the rule of law gets established, which is a very different matter. Both of these dimensions require an emphasis on power that is far more common in political science than in the field of law, particularly in places where it is taught quite normatively.

How should we define the rule of law? It is important to focus on what the rule of law *is* rather than what goals it is ideally supposed to achieve, such as liberty, freedom, or justice. Paul Gowder mentions three basic components. The first is *regularity*, which means that officials are reliably constrained by laws and rules in the use of the state’s coercive capacities. The second is *publicity*, which means the people are informed of the rules and can challenge their application in individual cases. And the third is *generality*, which means that the state does not make “irrelevant distinctions” between persons when enforcing the rules. (Gowder 2013, p. 566).

While Gowder’s elements hint at the central role of power in the rule of law, we must be more explicit. I want to start a process of redefinition. I begin by offering what I will call

¹¹ On defining the rule of law, see Oakeshott 1983, Belton 2005, Carlin 2012, and Gowder 2013.

Reformulation 1: ***The rule of law exists when the laws and legal institutions are reliably more powerful than all persons who govern or are governed.*** What is important about this redefinition is its focus on institutions, persons, and power. The essence of the rule of law is that people bend to the law, never the law bending to persons. The rule of law requires a strict and complete *depersonalization* of the rules and their enforcement, which is the meaning of *non sub homine, sed sub lege* (not under man, but under laws).

The first dimension of depersonalization is with reference to officials within the state. The people in government above us – whether they hate us or like us, whether they are from our tribe or party, whether it is in their personal or political interest to support or undermine us, or whether they are just having a good or bad day – must be irrelevant. The second aspect of depersonalization is that our own individual characteristics do not matter for the administration of the law. Neither our identity, our position, our status, nor our power position is relevant. The law applies equally to all – hence the blindfold covering the eyes of Lady Justice (a symbol with a scale and sword going back at least to Roman times, although her blindfold was not added to statues and images until the 16th century).

But why is she wearing a blindfold? The answer is that if Lady Justice could see us, there is a risk that the prejudices (the word literally means “pre-judgements”) of those in power would change how we are treated by the legal system. Her blindfold is for *our* protection. But there is another more subtle message in the blindfold. Lady Justice must also be shielded from knowing the potentially intimidating power of the person who stands before her. If she knows, if she feels their power, and if their power is greater than hers, her enforcement of the law will be distorted.

This power aspect of the rule of law starts to move us from *what* the rule of law is to *how* the rule of law is achieved (as well as when and why it fails). This brings me to Reformulation 2, my final definition: ***The rule of law exists when the laws and legal institutions are reliably more powerful than the most powerful actors in society.*** Notice how this definition changes what we focus on. We no longer treat all citizens as a single undifferentiated mass. Just as we saw in the discussion of democracy, most people have an average endowment of power or voice. For each of them as individuals, their one vote is all they have to influence politics. But oligarchs and elites have power on a scale that is gigantic.

This redefinition of the rule of law draws our attention to the fact that the power of ordinary persons is usually too insignificant to matter, but also that the power of certain people is potentially overwhelming. With regard to oligarchs and elites, the symbolism of the blindfold is not that Lady Justice does not know who comes before her, but that she is so powerful and confident that she *does not care*. For Lady Justice, the power of oligarchs and elites is invisible, as if it is not there. She is unafraid. Thus by taking the power position of different actors across society into account, we reach a very different, and, I would argue, deeper understanding of equality before the law. It means that the legal system will not discriminate against the weak and punish them unfairly, and it will not be intimidated by the strong and let them go free despite their guilt.

In most societies, the weak bend to the laws because they are overpowered, while the laws bend to the strong because the legal system is overpowered.¹² The terms we use actually reflect this elite-mass distinction. The “mundane” rule of law exists when people at a mass level follow the law and legal institutions are reasonably successful in detecting, adjudicating, and punishing violations. Interestingly, the most common term used when this breaks down at a mass level is a “failed state,” which is a condition of rampant lawlessness where power and enforcement devolve to multiple non-state actors who enforce various rules in a patchwork manner across different segments of society.

When we say a country has a “rule of law” problem, we are not referring to lawlessness on a mass level. Rather, it refers to states where the legal system is bent or distorted by the powerful because they have the capacities, resources, or connections to influence or intimidate the legal apparatus, from police and investigators up to prosecutors and judges. This distinction is readily apparent in Indonesia – a society where most people follow the basic rules, the mundane wheels of justice turn, and hundreds of thousands of people end up in jail for their various crimes.¹³ Everyone agrees that there is a rule of law problem in Indonesia, but no one describes the country as lawless or a failed state. Rather, the rule of law is weak because it does not reliably force the most powerful to bend to the rules.

¹² For instance, in the case of China: “If a case arises between two normal people, then the law is somewhat powerful. But if one person is a company official or from the government, then there is no power in the law” (Gorni 2003).

¹³ On the routine operation of Indonesia’s legal system at the mundane level, see Hurst 2018.

This reorientation of our understanding of the rule of law, and why it fails, redirects our attention to power struggles at the very top of the system as the locus of the rule of law problem. The rule of law exists when powerful officials in the government are constrained to follow the law, and when powerful actors in society get arrested, tried, convicted, and punished in a manner that is routine, ordinary, and undistorted by their individual power resources.¹⁴ Rachel Belton (2005, p. 9) emphasizes the centrality of power conflicts in the rule of law when she observed that “real powers are being taken away from powerful individuals when judiciaries are strengthened and procedural laws that bind the executive are passed.” She continues that “reformers would be naïve not to expect recalcitrance and evasion of reforms meant to achieve this end from those who stand to lose power.” She explains why:

As with reining in the government, creating equality before the law changes the balance of power in a society, giving far more power to ordinary people at the expense of the rich and powerful. It is therefore likely to meet with political resistance when it becomes successful enough to really threaten power holders. (Belton 2005, p. 10).

This last observation about threats to powerholders and political resistance is particularly relevant to the struggle over the rule of law at the top in Indonesia.

KPK and the Rule of Law

The KPK was created to focus on corruption by officials, which is only a fragment of all power abuses at the top involving wealth. But the story of the KPK is of far greater significance than simply preventing the theft of state funds or reducing state losses. The creation of the KPK represents the single most important attempt in Indonesian history to establish the rule of law – redefined just now as legal institutions that are reliably more powerful than the country’s most powerful actors.

¹⁴ Note that this focus on power is very different from issues like judicial independence, the training of judges, and other areas of legal reforms. Such investments are good for general legal quality and strength, but do not confront the specific power challenges of taming oligarchs and elites. The case of the Magna Carta shows clearly that “politics and power matter a great deal in establishing the rule of law. Michael Oakeshott [1983] correctly noted that the rule of law cannot protect itself against external assault. It must have powerful defenders or interests who gain from supporting it. Reform programs that focus on providing computers to improve court efficiency in the midst of a political autocracy, for example, seem rather like treating heartburn in a patient suffering from cancer.” (Belton 2005, p. 19).

Indonesia under Suharto was not a lawless state, but there was no rule of law. The array of oligarchs and elites around Suharto, both civilian and military, were far stronger than the country's legal apparatus. Laws and the machinery to enforce them mattered only for the non-powerful. This changed in 1998 when a deep crisis created an opening for major reforms in Indonesia's legal system. The economic crisis, financial ruin, and a series of mass mobilizations in the streets left Indonesia's oligarchs and elites off balance, groggy, and disunited. It is important to understand this moment not just as a collapse of Suharto's power position, but as a collapse with ripple effects across the power structure at the top. It is significant that Indonesia's security apparatus, which worked hand-in-glove with Suharto, was also damaged and weakened in this period.

The unified demand of the demonstrators was an end to collusion, corruption, and nepotism. Some activists explicitly stated what the essence of this demand really was – an attempt to force powerful persons to bend to the rule of law just as the powerless routinely did.¹⁵ All rhetoric aside, from a power perspective, the creation of the KPK must be understood as a direct threat to abuses of power at the top of Indonesian society. The only way to do this was to form an institution or body that was somehow more powerful than they were. From the beginning, imposing legal constraints on Indonesia's oligarchs and elites was an uphill battle. And the design, scope, and the unfolding struggles the KPK has faced reflect the titanic power confrontations that were involved.

A first point we must recognize is that the break in the status quo power structure that appeared in 1998 was limited in scale and duration. Let us recall that it is very rare for a fallen dictator to step down and then just quietly go home and spend his remaining year watching TV and enjoying being a grandfather. Batista in Cuba, the Shah in Iran, Somoza in Nicaragua, Marcos in the Philippines, Mubarak in Egypt, Gaddafi in Libya, and Ceaușescu in Romania all

¹⁵ See Elizabeth Kramer (2019) for an excellent overview of the NGOs and other elements in civil society that fought hard to create the KPK. She makes special mention of Masyarakat Transparansi Indonesia (MTI), the Indonesia Procurement Watch (IPW), the Indonesian Corruption Watch (ICW), the Indonesian Legal Aid Foundation (Yayasan Lembaga Bantuan Hukum Indonesia, YLBHI), Transparency International Indonesia (TII), the Movement against Corruption (Gerakan Anti-Korupsi, GeRAK), Advocacy for a Corruption Eradication Commission (Advokasi untuk Komisi Anti-Korupsi, AKAK), and the Movement against Rotten Politicians (Gerakan Anti Politisi Busuk, GAPB).

were overthrown in the wake of mass uprisings and they either fled into exile, were jailed, or were killed. Suharto is the exception. I think we all would agree that Indonesians are very nice people in general. But this does not explain why Suharto was treated so gently. I would argue that it is because he and the status quo powers were overwhelmed in 1998 and 1999, but not by very much and not for very long

The support among oligarchs and elites for stronger laws and institutions that would make corruption a high-risk game was not universal. It is true that by the early 1990s, oligarchs were finding it more difficult to defend their fortunes against predatory actions by members of the first family. By the late 1990s, their concerns became alarm and panic. It was not corrupt practices that upset them. Most of them became fabulously rich precisely through pay-offs of one kind or another. It was a new *unpredictability* within corruption that was so disturbing. During the early decades of the Suharto regime, money flowed among the powerful in an orderly manner where payments were not ruinous and, as in strong mafia operations, a deal was a deal. If problems arose, Suharto as mafia Don would sort it out and restore peace and order. This important function is what broke down as the New Order matured. What oligarchs longed for was the old predictability, which made some of them entertain seriously the possibility of supporting a stronger legal system.

But this was not the dominant view. The nation's political-economy had for decades been built upon resource extraction rather than production and manufacturing. The dominant logic of competition in extraction economies and politics is "getting a piece of the action," which is a classic insider-outsider contest. The pathway to enrichment is to get inside and connected to wealth flows, and then stay connected as long as possible.

All of these variables and motivations strongly favor corruption – and not just corruption, but an entire *bagi-bagi* culture and cartel politics to go with it (Slater 2011; Winters 2011; Dick and Mulholland 2016). In the legal system, it starts with ordinary traffic police officers standing all day in the hot sun breathing poisonous exhaust fumes. They collect "irregular fees" from the passing cars. Why do they do this? It is easy to prove that it is not for their own greedy enrichment. Just follow a dozen policemen home and see how they live. They are the lowest rung on a long ladder of extractions and transfers upwards. This example is not to single out and criticize the police. Even when part of the extraction is carried out by the lowest levels, the overall design of the system is to ensure enrichment at the top. These practices are rampant in all

sectors of a political economy where extraction is dominant and getting a piece of the action is paramount.¹⁶

It is noteworthy that there was a new breed of politician that was elected in 1999 who drew their strength and popularity from the anti-corruption movement. They joined forces with NGOs, some reformist oligarchs, and others inside the government to create the KPK. In terms of power, this coalition was influential not only because of their own power resources, but also in relative terms: their opponents in the system were still regrouping from Suharto's fall. Regaining balance and confidence takes time. This meant that for the KPK, the clock was ticking and the reformers had to act fast before the window of opportunity closed.

It is obvious that the need for legal reform after 1998 was systemic, but that the response was necessarily segmental. This is not because the reformers lacked vision or understanding. It was a reflection of the limited power position from which the rule of law initiative was launched. The reformers lacked the power and backing to attempt a deep and wide reform of the police, prosecutors, and judges across the entire country. Nothing short of a social revolution would make that even remotely possible. Establishing the KPK was a toe in the door and the most that could be realistically expected under the circumstances. Think of the KPK as a focused and powerful laser beam rather than a broad and weak flood light. Segmental rather than systemic reforms mean the adoption of an enclave approach.

To fight at the very highest level of power in the country, the strategy was to pass special laws, implant the KPK in a narrow legal space, erect high walls around that space, fill the institution with carefully selected personnel, give those people extraordinary powers of investigation, focus on a very limited form of power abuse (state losses), and bring defendants to judgement in special courts (another enclave) devoted only to corruption cases. The hope was that this enclave approach might, through its popularity and legitimacy, jump-start a process of incremental change in the broader legal system. But instead of transforming the system, the KPK ended up being a parallel system.

¹⁶ See Kenny and Warburton (2021) on paying bribes in Indonesia. Note that sequencing is important. Indonesia's extraction economy arose before the rule of law was established and strong. Norway is an example of a country that had established reasonably strong institutions of law before the rise and dominance of the extractive oil and gas industry that made elevated the country from European poverty to wealth. Of course, it is difficult but not impossible to undermine legal institutions that are strong and long-established.

We could say that the initial strength of the KPK was based on its segregation from the rest of the system. It was cleaner, more reliable, and also quite successful in the prosecutions it pursued. But over time, this separation became KPK's weakness. Unless the KPK was able to do more than just catch big fish and achieve high conviction rates, it was doomed. If the KPK could not become an instrument of broader transformation in the legal system (which is a power game, not a technical project), or if other power centers in the system did not push for change in other areas of the legal apparatus, then the KPK's isolation would become a formula for failure. In fact, it is worse than that. The more effective the KPK was while trapped within its narrow space, the more it accelerated the forces and processes of backlash against it. In the eyes of Indonesia's oligarchs and elites, the KPK is bad because it is good.

My own assessment is that the limitations of the KPK should not be blamed on planning and execution errors by the reformers who established the Commission and ran it for over fifteen years. The fate of the KPK, especially its isolation and its vulnerability, reflects the best that could be done given the limited power and support the reformers had.

It is under these conditions that we see repeated efforts to strip the KPK of its powers, with the most recent and most devastating blows coming at the end of 2019.¹⁷ Notice that if the KPK was a body that caught and prosecuted illegal fishing boats in Indonesian waters (owned by foreigners), or if the KPK was very good at tracking down murderers and rapists (crimes of ordinary people), Indonesia's oligarchs and elites would sponsor the celebration of KPK's leaders and shower them with achievement awards. But the KPK does not pursue such easy targets. It goes after the most dangerous targets of all: locals who are powerful. This may make friends among ordinary Indonesians, it makes enemies at the top, where most of the power rests. The people have a lot of latent power, but it matters only when they are activated and mobilized.

It was during this limited power opening after 1998 that Indonesia's most important attempt to tame the powerful and establish the rule of law over them occurred. And those limitations explain a lot about how the KPK saga has unfolded, and why this most popular and legitimate body is now being gradually neutralized. The simple answer is that as the power of

¹⁷ A great deal has been written on the determined effort over the past decade to neutralize the KPK. For a good overview see, "Intimidating the KPK," *Tempo*, 15 August 2012; "DPR Set to Revise KPK Law," *Tempo*, 9 October 2015; Mulholland 2016; Atmasasmita 2019; Adhiyuda 2019; Buehler 2019; Aji 2019; Ihsanuddin 2019; Mulholland and Sanit 2020; and Adjie 2020.

Indonesia's oligarchs and elites became stabilized and recharged, and as many of the divisions that erupted in 1998 at the top were mended, the balance of power that briefly favored the KPK turned quickly against it. The powerful began to close ranks. The result is not just that the KPK's fate was threatened, but much more importantly, Indonesia's progress toward the rule of law was halted as oligarchs and elites reasserted their power. Instead of creating systemic ripple effects that reformed the rest of the legal apparatus, the KPK remained a beach-head that has been forced to fight a defensive rather than offensive battle almost from the beginning.

That does not mean the KPK effort has been a complete failure.¹⁸ It depends on how people read what happened and what lessons they draw. One is that most normative approaches are ineffective. It is nice to have principles on your side. But the most effective instrument against great power is greater power. That is the condition under which KPK was born in the first place. And its fate can be tracked by the changing power constellation in the years after 2004. This story underscores the centrality of power to the establishment of the rule of law.

As we review the events of the last 15 years surrounding the KPK, there has been a tendency to personalize the power struggles, which makes them appear petty rather than system-threatening. Because so much is at stake, taming oligarchs and elites is never pretty. It is an understatement to say that their capacities to fight back are significant. And the history of the KPK proves that being on the front lines of the rule of law battle is extremely risky. High profile KPK figures have been jailed for murder, disfigured and blinded by acid thrown in their face, and falsely accused of corruption. The press has sensationalized these conflicts in mostly personal terms. If not placed in proper context, the public can easily get the impression that these are just personal conflicts as ambitious players jockey for top positions, or jealous and petty turf battles between institutions like the police versus KPK (a crocodile versus a gecko).

But this is a serious misinterpretation of the battle that is actually occurring. It is important to appreciate that the backlash against a body like the KPK, as it tries to impose the rule of law on the most powerful, will always be played out case by case, drama by drama. But this does not reduce the importance of what is at stake in the bigger picture. At the end of the day, the important result will be that the powerful will bend to the law, or the law will bend to

¹⁸ For assessments from KPK officials on the Commission's achievements and challenges, see Jasin 2011, Nainggolan 2014, and Putrie 2016.

the powerful. All drama and tragedy aside, this is the only thing that matters for the future of the country.

From this story we see that the power struggle at the heart of the rule of law starts with important breaks or openings in the constellation of status quo power. These crises can produce a power configuration that produces major reforms, new laws, new institutions, new behaviors, and new expectations among the people and sometimes among the powerful themselves. It matters whether oligarchs and elites believe these changes are permanent and they must adjust to the new realities, or they are temporary and can be reversed. Once legal reforms are in place, it is the repeated and consistent acting out of investigations, prosecutions, and punishments without fear or intimidation that makes the rule of law ordinary and expected, and ultimately institutionalized and empowered.

Does this require a certain amount of individual courage among those carrying out these procedures? Yes, of course. But wearing the blindfold of Lady Justice, and treating the dangers of the powerful as if they are not there, should never rely solely on the courage of individuals because most of us are not heroes (which explains why every language has a special word for those who are). The personal and professional commitments of actors in the legal system are not enough in the absence of other forms of power to confront the powerful.¹⁹

In a normative sense, the rule of law is an idea and a principle around which there is very little controversy. It is hard to find anyone willing to go on the record against the supremacy of law in principle. But the rule of law in practice is a matter almost purely of power. And it is incumbent upon legal educators and legal professionals (lecturers, professors, lawyers, prosecutors, and judges at all levels) to recognize that unless the role of unequal power in the hands of individuals and groups is understood and challenged, achieving the rule of law will remain elusive. This means that the study and implementation of law must integrate a knowledge of history (when and where has the implantation of law succeeded and failed), of political science (what role do things like power, movements, and political crises play in when the rule of law advances or retreats), and economics (because no greater distortion or inequality

¹⁹ The same is true on the other side of the coin. It is naïve to rely on individual morality to slow down, much less end, rampant corruption and similar abuses. Personal convictions and principles matter, but they are ineffective when individuals are surrounded by power relations and other forces that favor corruption and can actually make a firm unwillingness to participate risky in one's position or career.

of power exists than in the distribution of material power resources – wealth and money). We must pull apart our notions of democracy, law, and economy so that we can disentangle the relationships and understand the assumptions we make. And then, having understood the different elements of the whole, reassemble it conceptually with greater understanding and mastery.

To bring the conversation back to this important celebration today, I would like to pose a simple question: What would a course in Law School look like that analyzed the fundamental relationship between extreme inequalities of power and the successful establishment of the rule of law? I leave the answer to this question to my esteemed colleagues in the FH UGM as they chart their path forward to the next 75 years as an important leader in law and society in Indonesia.

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