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**Cause lawyering in a fragile democracy:
the Indonesian Foundation of Legal Aid Institutes (YLBHI)**

Timothy Sinclair Mann

Submitted in total fulfillment of the requirements for the degree of
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Abstract

This study explores how democratic change affects lawyers and the strategies they use to promote social change, through a case study of Indonesia and the Indonesian Foundation of Legal Aid Institutes (Yayasan Lembaga Bantuan Hukum Indonesia, YLBHI) and its regional offices, known as LBH. I examine YLBHI-LBH by drawing on literature on cause lawyering and legal mobilisation. Under the authoritarian New Order, YLBHI was Indonesia's most prominent cause lawyering organisation and an influential hub of resistance to the Soeharto regime. The far-reaching democratisation process that began after Soeharto fell in 1998 established many conditions supportive of cause lawyering. Yet the impact of democratic transition on the practice of cause lawyering in Indonesia is yet to be examined in the literature. This project seeks to address this gap, and, as its title suggests, it also addresses the democratic regression that has become a feature of Indonesia over the past decade.

This thesis argues that there is a clear relationship between the quality of democracy and the form of cause lawyering practiced. In contrast to expectations, YLBHI-LBH did not thrive after democratic transition. It has returned to prominence as Indonesian democracy has begun to unravel. Democratic regression has led to a deep scepticism among YLBHI-LBH staff about the ability of legal reforms to lead to social change. This has prompted YLBHI-LBH to again prioritise the more confrontational style of cause lawyering it developed under Soeharto, in which it maintains a distance from the state and collaborates with grassroots social movements. The thesis provides new insights into how Indonesian cause lawyers respond to democratic change, how they view their roles as lawyers, and the strategies they use to promote social reforms. It shows how YLBHI-LBH is performing a vital role defending Indonesia's democratic gains at a time when Indonesia's democracy is increasingly fragile.

Declaration

I hereby declare that this thesis comprises only my own original work towards the degree of Doctor of Philosophy and contains no material that has been accepted for accepted for the award of any other degree or diploma at the University of Melbourne or any other educational institution.

To the best of my knowledge, it contains no materials previously published or written by another person, except where due acknowledgement is made in the thesis.

The thesis is under 100,000 words in length, excluding figures, tables, and bibliography.

Timothy Mann

9 February 2022

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Glossary

AJI	Aliansi Jurnalis Independen, Alliance of Independent Journalists
Aliansi Nasional Reformasi KUHP	National Alliance for Reform of the Criminal Code (KUHP)
aliran kepercayaan or aliran kebatinan	traditional belief
amdal	analisis mengenai dampak lingkungan or analisis dampak lingkungan, environmental impact assessment
anggaran dasar	articles of association or organisational constitution
anggaran rumah tangga	organisational bylaws
Ashura	A holy day observed by Shi'a Muslims
asisten pengabdian bantuan hukum	assistant legal aid lawyer
babi buta melawan	to blindly oppose
Bakin	Badan Koordinasi Intelijen Negara, State Intelligence Coordination Agency
bantuan hukum	legal aid
Bappenas or Kementerian PPN	Badan Perencanaan Pembangunan Nasional, National Development Planning Agency, (officially Kementerian Perencanaan Pembangunan Nasional Republik Indonesia/Badan Perencanaan Pembangunan Nasional, the Ministry of National Development Planning/National Development Planning Agency)
beres	settled, sorted out, in order
BIN	Badan Intelijen Negara, State Intelligence Agency
BNN	Badan Narkotika Nasional, National Narcotics Agency
BPHN	Badan Pembinaan Hukum Nasional, National Law Development Agency
buta hukum	ignorant of the law
cacat formil	procedurally flawed
CLS	Critical Legal Studies
CSO	civil society organisation
Densus 88	Detasemen Khusus 88, Special Detachment 88, the Indonesian National Police's counter-terrorism unit
Dewan Kehormatan	Ethics Board
Dewan Pembina	Advisory Board
Dewan Pengawas	Supervisory Board
Dewan Pengurus	Board of Directors
DPD	Dewan Perwakilan Daerah, Regional Representative Council

DPR	Dewan Perwakilan Rakyat, People's Representative Council, the national legislature
DPRD	Dewan Perwakilan Rakyat Daerah, Regional People's Representative Council
dwifungsi	dual function (of the military), the political and social role of the military
Elsam	Lembaga Studi dan Advokasi Masyarakat, Institute for Policy Research and Advocacy
Fitra	Forum Indonesia Untuk Transparansi Anggaran, Indonesian Forum for Budget Transparency
FPI	Front Pembela Islam, Islamic Defenders Front
FPKR	Forum Pemurnian Kedaulatan Rakyat, People's Sovereignty Purification Forum
Gafatar	Gerakan Fajar Nusantara, Archipelagic Dawn Movement
Golkar	Golongan Karya, Functional Groups, the political party of former President Soeharto
golput	golongan putih, literally 'white group', a term used to describe abstention from voting, but also blank voting, intentionally spoiling the ballot, even disenfranchisement
hak angket	the right of the DPR to summon and question
halal	permitted under Islam
HAM	hak asasi manusia, human rights
ICEL	Indonesian Centre for Environmental Law
IDLO	International Development Law Organisation
ICJR	Institute for Criminal Justice Reform
ICW	Indonesia Corruption Watch
Ikadin	Ikatan Advokat Indonesia, Indonesian Advocates League
Indonesia Vrij	Indonesia Free
Indonesia Menggugat	Indonesia Accuses
Insiden Monas, Tragedi Monas	Monas Incident or Monas Tragedy, an attack on supporters of religious freedom by members of the Islamic Defenders Front (FPI)
ISSI	Institut Sejarah Sosial Indonesia, Indonesian Institute of Social History
ITB	Institut Teknologi Bandung, Bandung Institute of Technology
IUP	Izin Usaha Penambangan, Mining Business Licence. May be specified further, for example, IUP Eksplorasi (Mining Business Exploration Licence), or IUP Operasi Produksi (Mining Business Production Licence)
JM-PPK	Jaringan Masyarakat Peduli Pegunungan Kendeng, Community Network for the Kendeng Mountains

Kajian Lingkungan Hidup Strategis	Strategic Environmental Study
Kalabahu	Karya Latihan Bantuan Hukum, Legal Aid Training
keberpihakan	literally partisanship, alternatively ‘concern for...’
KIPP	Komisi Independen Pemantau Pemilu, Independent Election Monitoring Committee
Koalisi Ornop untuk Konstitusi Baru	Civil Society Coalition for a New Constitution
Komar	Komunitas Milah Abaraham, Abrahamic Religion Community
KontraS	Komisi untuk Orang Hilang dan Korban Tindak Kekerasan, The Commission for Disappeared and Victims of Violence
Komite Pembelaan Rakyat	People’s Defence Committee
Komjak	Komisi Kejaksaan, Prosecutors Commission
Komnas HAM	Komisi Nasional Hak Asasi Manusia, National Commission on Human Rights
Komnas Perempuan	Komisi Nasional Anti Kekerasan Terhadap Perempuan, National Commission on Violence Against Women
Kompolnas	Komisi Kepolisian Nasional, National Police Commission
Kopkamtib	Komando Pemulihan Keamanan dan Ketertiban, Command for the Restoration of Security and Order
Kostrad	Komando Strategis Angkatan Darat, Army Strategic Reserve Command
KPA	Konsorsium Pembaruan Agraria, Consortium for Agrarian Reform
KPK	Komisi Pemberantasan Korupsi, Corruption Eradication Commission
KRHN	Konsorsium Reformasi Hukum Nasional, National Consortium for Law Reform
KSUM	Komite Solidaritas Untuk Marsinah, Solidarity Committee for Marsinah
KUHP	Kitab Undang-Undang Hukum Pidana, Criminal Code
KUHAP	Kitab Undang-Undang Hukum Acara Pidana, Code of Criminal Procedure
KY	Komisi Yudisial, Judicial Commission
LBH	Lembaga Bantuan Hukum, Legal Aid Institute
LBH Apik	Lembaga Bantuan Hukum Asosiasi Perempuan Indonesia untuk Keadilan, Legal Aid Institute of the Indonesian Women’s Association for Justice
LBH Masyarakat (often styled as LBHM)	Lembaga Bantuan Hukum Masyarakat, Community Legal Aid Institute (not related to the YLBHI network)

LBH Pers	Lembaga Bantuan Hukum Pers, Legal Aid Institute for the Press (not related to the YLBHI network)
LPH YAPHI	Lembaga Pengabdian Hukum Yekti Angudi Piadeging Hukum Indonesia, YAPHI Legal Services Agency
LeIP	Lembaga Kajian dan Advokasi untuk Independensi Peradilan, Indonesian Institute for an Independent Judiciary
lembaran putih	white paper
LPSK	Lembaga Perlindungan Saksi dan Korban, Witness and Victim Protection Agency
mafia hukum or mafia peradilan	judicial mafia
Malari	Malapetaka Lima Belas Januari, The Fifteenth of January Disaster
MaPPI (sometimes styled as MaPPI FHUI)	Indonesian Court Monitoring Society (of the Faculty of Law, University of Indonesia)
Maulid Nabi	The commemoration of the birthday of the Islamic prophet Muhammad
Milah Abraham	‘Religion of Abraham’, a new religious movement connected to Gafatar
modernisasi hukum	legal modernisation
Monas	Monumen Nasional, National Monument
Mosi Tidak Percaya	Motion of No Confidence
MPR	Majelis Permusyawaratan Rakyat, People’s Consultative Assembly
MUI	Majelis Ulama Indonesia, Indonesian Council of Ulama
Nasdem	National Democrat Party
negara hukum	Rule of law. Literally, ‘law state’
NKK	Normalisasi Kehidupan Kampus, ‘Normalisation’ of Campus Life
NKTSAN	Negeri Karunia Tuan Semesta Alam Nusantara, Archipelagic Nation of the Grace of the Lord of the Universe
Ombudsman Republik Indonesia	Indonesian Ombudsman
Opsus	Operasi Khusus, Special Operations
Pancasila	The Five Principles, Indonesia’s state ideology
PBHI	Perhimpunan Bantuan Hukum Indonesia, Indonesian Legal Aid Association
PDI	Partai Demokrasi Indonesia, Indonesian Democratic Party
pedagang kaki lima	informal street traders
Pedoman Pokok Nilai-Nilai Perjuangan YLBHI dan Kode Etik Pengabdi Bantuan Hukum	Guide to YLBHI Struggle Values and Code of Ethics
pembangunan hukum	legal development

pendidikan hukum kritis	critical legal education
pengabdian bantuan hukum	LBH legal aid lawyer, literally 'legal aid servant'
pengacara	lawyer
penyadaran	consciousness raising
Peradi	Perhimpunan Advokat Indonesia, Indonesian Advocates Association
Peradin	Persatuan Advokat Indonesia, Indonesian Advocates Union
peraturan	regulation
perbuatan melawan hukum	unlawful act
Peringatan	Warning
Peristiwa 27 Juli	27 July 1996 Incident
perjuangan Order Baru	The New Order struggle
Perkap	Peraturan Kepala Kepolisian Republik Indonesia, Police Chief Regulation
Perkasi	Persatuan Warga Kassi-Kassi, Kassi-Kassi Residents Alliance
Perludem	Perkumpulan Untuk Pemilu dan Demokrasi, the Association for Elections and Democracy
Perppu or Perpu	Peraturan Pengganti Undang-Undang, Regulation in Lieu of Law, or interim emergency law
Petrus	Penembakan Misterius, Mysterious Shootings
PI	Perhimpunan Indonesia, Indonesia Association
PK	peninjauan kembali, reconsideration, or reopening of a case by the Supreme Court
PKI	Partai Komunis Indonesia, Indonesian Communist Party
PKS	Partai Keadilan Sejahtera, Prosperous Justice Party
Polri	Kepolisian Nasional Republik Indonesia, Indonesian National Police
PPP	Partai Persatuan Pembangunan, United Development Party
PRD	Partai Rakyat Demokratik, Democratic People's Party
PSHK	Pusat Studi Hukum dan Kebijakan, Indonesian Centre for Law and Policy Studies
PTUN	Pengadilan Tata Usaha Negara, State Administrative Court
PUDI	Partai Uni Demokrasi Indonesia, Indonesian United Democracy Party
Rancangan Undang-Undang	bill
Rechtsstaat	state based on law, rule of law

reformasi	Reform, the reform era following the fall of Soeharto
Reformasi Dikorupsi	Reform Corrupted
Risalah Sidang	Summary of Court Proceedings
RKUHP/RUU KUHP	Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana, Draft revised Criminal Code, or Criminal Code bill
rumah demokrasi	home of democracy
RUU Pertanahan	Rancangan Undang-Undang Pertanahan, bill on land (tenure)
RUU Minerba	Rancangan Undang-Undang Pertambangan Mineral dan Batu Bara, bill on mining of minerals and coal
RUU PKS	Rancangan Undang-Undang Tentang Penghapusan Kekerasan Seksual, bill on the eradication of sexual violence
SBSI	Serikat Buruh Sejahtera Indonesia, Indonesian Workers Welfare Union
SDP	Sistem Database Pemasyarakatan, Corrections Database System
SIUPP	Surat Izin Usaha Penerbitan Pers, Press Publication Business Licence
somasi	summons
Supersemar	Surat Perintah Sebelas Maret, 11 March Instruction
surat edaran	circular
surat keputusan	decision, sometimes translated as decree
TMII	Taman Mini Indonesia Indah, Beautiful Indonesia in Miniature Park
TNI	Tentara Nasional Indonesia, Indonesian military
TPHKI	Tim Pembela Hukum dan Keadilan Indonesia, Team of Defenders of Law and Justice in Indonesia
ulama	Islamic scholar
undang-undang	statutes
wadah tunggal	single receptacle
Walhi	Wahana Lingkungan Hidup Indonesia, Indonesian Forum for the Environment
Wantimpres	Dewan Pertimbangan Presiden, Presidential Advisory Council
WIUP	Wilayah Izin Usaha Pertambangan, Mining Business Licence Area
yayasan	foundation
YLBHI	Yayasan Lembaga Bantuan Hukum Indonesia, commonly translated as Indonesian Legal Aid Foundation, a direct translation is Indonesian Foundation of Legal Aid Institutes

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PART ONE: THEORETICAL FRAMEWORK & HISTORY

Chapter 1: Introduction

1.1 Reformasi Dikorupsi¹

In September 2019, Indonesia witnessed the largest student and civil society protests in the country since the fall of Soeharto's authoritarian New Order regime two decades earlier. The protests were sparked by the national legislature (*Dewan Perwakilan Rakyat*, DPR) rushing through reforms to the 2002 Law on the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*, KPK) that were "disastrous for the KPK and Indonesia's anti-corruption drive" (Butt 2019). Political elites had long sought to weaken the KPK (Mietzner 2021b, 162). This time, they finally got what they wanted.

Seemingly buoyed by their efforts to destroy the KPK, legislators insisted they would pass a revised Criminal Code (*Kitab Undang-Undang Hukum Pidana*, KUHP) by the end of the month, a job that lawmakers have grappled with for decades (T. Maharani 2019; Butt and Lindsey 2018, 200). The draft revised criminal code, known as the RKUHP or RUU KUHP,² would have dismantled several key democratic reforms and was roundly criticised for introducing new and expanded criminal offences (Akbari 2019). Among its most controversial provisions, the draft code criminalised co-habitation of unmarried couples and all consensual sex outside marriage, and reintroduced offences for insulting the president and the government that had previously been struck down by the Constitutional Court (Ristianto 2019; Butt and Lindsey 2018, 203). In addition to the RKUHP, lawmakers also said that, before their terms expired on 30 September, they planned to pass a new land law and revisions to laws on mining, corrections and labour that were criticised for diluting environmental protections, threatening citizen rights and further weakening anti-corruption efforts (Putsanra 2019). At the same time, legislators infuriated gender activists by showing none of the same urgency for passing a long discussed bill on the eradication of sexual violence (*Rancangan Undang-Undang Tentang Penghapusan Kekerasan Seksual*, RUU PKS) (Cahya 2019).

The constellation of these multiple threats culminated in these landmark protests, which were dubbed *#ReformasiDikorupsi* (*#ReformCorrupted*) to capture the anger over the weakening of the KPK, and the sense that the achievements of the reform era (known as *reformasi*, and considered to have begun in 1998 when Soeharto fell) were slipping away.³ Student protests began outside the national legislative complex in Jakarta on 19 September, after the passage of the revised KPK Law. They continued over several days in multiple cities across Indonesia, with the largest protests on 24 September. Thousands of students in Jakarta blocked one of the city's main roads, displaying creative, and often humorous, banners that were shared widely across social media. According to *Tempo*

¹ Reform Corrupted.

² *Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana*.

³ The term *reformasi* can be used to refer to both the movement that had a role in Soeharto's downfall and the period of democratic reform that followed.

magazine, about 50,000 demonstrators protested across the country on 24 September (Dongoran 2019).

The police response to the protests was excessive and brutal. In Jakarta at the time, the city seemed on a knife edge. I spoke to activist and journalist friends who spent hours hiding in a university building after being pursued by police. One night of the protests, the street I lived on was closed by police, as they fired tear gas at retreating students. By the time the demonstrations abated, at least five students had died, hundreds were injured, and more than 1,300 protesters were arrested, with at least 380 named suspects by police (CNN Indonesia 2019d). Many were detained without access to legal counsel or their families.

Speaking to crowds outside the national legislative complex on 24 September was legal aid lawyer Asfinawati (Asfin),⁴ the director of the Indonesian Foundation of Legal Aid Institutes (*Yayasan Lembaga Bantuan Hukum Indonesia*, YLBHI). In a searing speech to students from the back of a truck, Asfin said:

“They refuse to pass laws that are needed by the people. They refuse to pass the bill on the eradication of sexual violence. They refuse to pass the bill on indigenous peoples. But in a short time, they will pass laws that benefit them, that benefit their cronies, that benefit the oligarchs. Are we going to stay silent, or are we going to fight, my friends? Fight!” (Trismana 2021).

Figure 1.1: YLBHI director Asfinawati speaking to demonstrating students at the #ReformasiDikorupsi protests in September 2019 (Screenshot from Trismana 2021).



⁴ Like many Indonesians, Asfinawati uses only one name.

It might seem unusual for legal aid lawyers to be engaging in acts of open political dissent or aligning themselves with popular protests like this. But YLBHI and its affiliated regional Legal Aid Institutes (*Lembaga Bantuan Hukum*, LBH)⁵ have long had a deeply political understanding of their role. LBH pioneered legal aid and legal activism in Indonesia under Soeharto's brutal New Order (1966-1998),⁶ defending political detainees, bravely speaking out against abuses of state power, and advocating for democracy, human rights, and the rule of law in profoundly challenging circumstances. Yet its more overtly political activities do not mean LBH lawyers eschew legal action. When students were arrested, there was never any question about which organisation would be there to defend them. Throughout its history, LBH has worked tirelessly within Indonesia's dysfunctional legal system to try to secure better outcomes for Indonesia's poor and marginalised. It performs a vital and desperately needed service in an environment where the poor really "only have access to the legal system as criminals" (Meili 1998, 496)⁷ – a sentiment so widely shared that it is common for Indonesians to say the law is like a knife, 'blunt upwards and sharp downwards' (*tumpul ke atas, tajam ke bawah*).

1.2 Introduction to LBH and cause lawyering

This thesis uses a case study of Indonesia, and LBH specifically, to explore how democratic change affects lawyers and the strategies they use to promote social change. It is also an institutional history of LBH since 1998. By tracing the trajectory of LBH over time, I show there is a clear relationship between the quality of democracy and the form of cause lawyering practiced. Contrary to expectations, LBH struggled somewhat following the democratic transition that began in 1998, but it is thriving again now democracy is under attack.

The early years of LBH have been documented by scholars including Edward Aspinall (2005), Takeshi Kohno (2010), Daniel Lev (1987; 1996; 1998; 2000), Todung Mulya Lubis (1985b; 1985a), and Adnan Buyung Nasution (1985). More recently, Tim Lindsey and Melissa Crouch (2013) published a paper on cause lawyering in Indonesia. But there have been few other detailed works published in English on the Indonesian experience of cause lawyering. For such an influential organisation, the limited academic attention given to LBH in the post-authoritarian era is a significant oversight.

⁵ There are important differences between YLBHI and LBH, explained further below. Throughout this thesis I use the term LBH to refer to the organisation in general terms, although also specify YLBHI or individual regional LBH offices, such as LBH Surabaya, when necessary.

⁶ Although Soeharto was officially installed as president in 1968, the New Order is conventionally considered to have begun on 11 March 1966, when Indonesia's first president, Soekarno, was forced into signing the *Supersemar* (*Surat Perintah Sebelas Maret*, 11 March Instruction), which effectively transferred presidential authority to Soeharto (Lindsey and Santosa 2008, 3).

⁷ I am borrowing an observation made about Brazil, but one that could be equally applied to Indonesia.

I examine LBH by drawing on literature on cause lawyering and legal mobilisation.⁸ The concept of cause lawyering as a focus of scholarship and a distinct category within the legal profession was introduced by Austin Sarat and Stuart Scheingold in 1998 and explored further through a book and series of edited volumes (Sarat and Scheingold 1998b; 2001a; 2005b; 2006a; 2008; Scheingold and Sarat 2004). Although there is no universally accepted definition of cause lawyering, in general terms it refers to “the set of social, professional, political and cultural practices engaged in by lawyers and other social actors to mobilise the law to promote or resist social change” (Marshall and Hale 2014, 303). Cause lawyers can therefore be distinguished from conventional lawyers in that they see their role as extending beyond client service to the service of a cause. For cause lawyers, their work is a profoundly moral and political activity (Scheingold and Sarat 2004, 2–3).

Much cause lawyering scholarship focuses on the experiences of cause lawyers in liberal democracies, in particular, the United States. Yet cause lawyering also exists in transitional and emerging democracies and even under authoritarian regimes, as indicated, for example, by the growing academic attention paid to politically motivated lawyers in China (Fu and Cullen 2008; Fu 2011; Liu and Halliday 2011; Givens 2013; Pils 2014). Even so, cause lawyering literature generally presents democratic regimes as offering more opportunities for mobilising the law to promote reform (Cummings and Trubek 2008, 33; Sarat and Scheingold 1998a, 5; Scheingold and Sarat 2004, 131; Yap and Lau 2010, 2; Chen and Cummings 2013, 455). Some of the bolder claims about the association between cause lawyering and democracy have been made by Scheingold and Sarat, who state that there is “no doubt” cause lawyering is “more likely to flourish in liberal democratic settings” (Scheingold and Sarat 2004, 131). While they certainly recognise the vital role of cause lawyering outside liberal democratic contexts, they also comment that there is a “natural affinity between cause lawyering and democratisation” (Sarat and Scheingold 2001b, 14).

Indeed, empirical accounts from countries including Brazil, South Africa, South Korea, and Taiwan describe changes associated with democratic transition as supporting the development of cause lawyering (Chang 2010; Baik 2010; Goedde 2009; Vieira 2008; Klug 2001; Meili 2009). Scholars point to a range of developments associated with democratisation as providing opportunities for cause lawyering, including the introduction of constitutional and other legal guarantees of rights, the presence of constitutional courts, judicial independence, political openness, providing new avenues for policy advocacy, a strong civil society sector and free media, and adequate funding support, among other political and institutional factors (see, for example, Cummings and Trubek 2008, 33–41; Baik 2010, 116; Munger, Cummings, and Trubek 2013; Chang 2010; Goedde 2009; Ginsburg 2007; Meili 1998; 2009; Vieira 2008; Rekosh 2008).

These factors are important in the context of the institutional history of LBH because many of the democratic reforms implemented in Indonesia after 1998 established such conditions, or aspired to do so. As Part Two of this thesis explains, the constitution was amended to guarantee an extensive array

⁸ I prefer the term ‘cause lawyering’ over other similar terms that are often used interchangeably, such as ‘public interest lawyering’ or ‘social justice lawyering’, because of its inclusive nature. I discuss issues of terminology in Chapter 2.

of rights, a constitutional court with powers of judicial review was established, judicial independence was improved, and restrictions on civil society and the press were lifted. The government was more open to civil society, and there were opportunities for lawyers to collaborate with, and even enter, the state. It is therefore worth interrogating whether assumptions about democratic reforms fostering an environment in which cause lawyering can flourish have been borne out in the Indonesian case.

This thesis also draws on Hilbink's three typologies of cause lawyering to analyse the experience of LBH since 1998 (Hilbink 2004). Hilbink designates cause lawyers as proceduralist, elite/vanguard and grassroots, depending on their visions of the system in which they operate, their causes and their roles. Briefly, 'proceduralist' cause lawyers view the legal system as "essentially fair and just" – they believe if the system functions as it should then justice will be delivered (Hilbink 2004, 665). They are largely concerned with procedural justice – as such, this form of cause lawyering is closest to conventional legal aid. 'Elite/vanguard' cause lawyers, meanwhile, are focused on social change but believe law (rather than politics) is the most appropriate method to bring about change. They therefore focus on strategies like strategic litigation and law reform to bring about change (Hilbink 2004, 673). 'Grassroots' lawyers, on the other hand, have a deep scepticism about the capacity of litigation as being able to deliver social change. While they still engage in legal action, they collaborate closely with social movements and often use nonlitigation strategies like community organising, public education and demonstrations to further their causes (Hilbink 2004, 681, 686). These categories are particularly helpful when reflecting on how democratic change affects cause lawyers and their strategies of work.

There is no more appropriate organisation for the study of cause lawyering in Indonesia than LBH, one of the oldest and most prominent legal and human rights organisations in the country. LBH was established by Adnan Buyung Nasution in 1970 to provide legal aid to poor and marginalised Indonesians. LBH was also motivated by a struggle to limit state power through a largely lawyerly concern for instatement (or reinstatement) of the rule of law, known in Indonesia as *negara hukum*, or by the German term *Rechtsstaat* (Aspinall 2005, 100). But LBH quickly developed a distinctly political vision of its role. It realised that simply providing pro bono legal assistance under the authoritarian system of the New Order was "hopelessly beside the point" (Lev 1987, 20). LBH devised its own ideology of legal aid and activism, which it termed 'structural legal aid' (Nasution 1985). This concept essentially held that legal aid should be directed at addressing the structural causes of inequality that resulted in the legal problems of the poor. In practical terms, litigation was combined with a variety of nonlitigation activities, including community legal education, community organising, research, and media campaigns (Nasution 1985, 37).

LBH was involved in many of the monumental, path-breaking cases of the New Order period. In fact, it became "the defence instance of choice" (Lev 1987, 18) for the most controversial political cases. To name just a handful, it defended families evicted for the creation of *Taman Mini Indonesia Indah* (Beautiful Indonesia in Miniature Park), a pet project of the wife of President Soeharto, Siti Hartinah;⁹

⁹ See Chapter 3.

in 1973, it supported transgender woman Vivian Rubiyanti to change her gender on official documents following sex reassignment surgery;¹⁰ it defended student council administrators in the wake of the Bandung Institute of Technology (*Institut Teknologi Bandung*, ITB) 1978 ‘White Book’ controversy (Nasution 2011, 10);¹¹ it advocated for female students’ right to wear headscarfs at school, at a time when the New Order regime sought to suppress public expressions of Islam (LBH Jakarta 2015, 27); it played a key role in advocacy following the death of labour activist Marsinah;¹² it represented communities evicted for the Kedung Ombo reservoir; and defended activists charged with subversion after they established the leftist Democratic People’s Party (*Partai Rakyat Demokratik*, PRD).¹³ In the most sensitive cases, hopes of victory in the courtroom were virtually nil. Yet these highly contentious cases often functioned as a form of “political theatre” (Lindsey and Crouch 2013, 624). They exposed abuses of power to broader public scrutiny and embarrassed the government on the domestic and international stages.

In the late New Order years, as calls for *reformasi* grew louder, LBH became even more political in its outlook. It developed into a key centre of civil society opposition to the Soeharto regime, and a meeting point for activists, students and other pro-democracy actors (Aspinall 2005, 108). It even labelled itself a ‘locomotive of democracy’ (Nasution 2011, 12). While it would be overstating LBH’s influence to suggest civil society was responsible for the fall of Soeharto, a crucial contribution of civil society – and LBH as one of its leading actors – was that it “eroded the ideological foundations of authoritarian rule” (Aspinall 2004, 82).

In the several years following Soeharto’s fall, Indonesia transformed itself from an authoritarian regime to a lively constitutional democracy, and arguably the freest country in Southeast Asia (Aspinall 2015). Reviewing existing literature on cause lawyering, one might assume that the demise of the New Order would provide the conditions for cause lawyering to flourish. To an extent, such assumptions are correct. There were indeed more opportunities for cause lawyering after Soeharto left office. But the experience of LBH tells a more complicated – and more interesting – story.

As an institution, LBH did not thrive following democratic transition, even if it played a role in that transition taking place. Following the democratic transition, LBH faced an identity crisis. Its organisational identity was so tied up in efforts to dismantle Soeharto’s authoritarian regime that it had to reassess its reason for being. Much of this reflection concerned how to use the law and for what

¹⁰ For this support of Vivian, LBH faced harsh criticism from conservative Islamic groups. In 1973, the court ruled in favour of Vivian – the first time an Indonesian court allowed a change of gender to occur on official documents (LBH Jakarta 2015, 23–24).

¹¹ The ‘White Book of the Students’ Struggle 1978’ (*Buku Putih Perjuangan Mahasiswa 1978*) was issued by ITB students, and involved a searing critique of New Order rule. The book was quickly banned and prompted a clampdown on student political activity (Bourchier and Hadiz 2013, 119–26).

¹² Marsinah was a worker and labour organiser at a watch factory in East Java who was found murdered days after leading a demonstration over her employer’s failure to provide workers with the minimum wage. LBH was one of the most prominent voices in the Solidarity Committee for Marsinah (*Komite Solidaritas Untuk Marsinah*, KSUM), a civil society coalition that formed to demand investigation of her death, (Avonius 2008, 104–7).

¹³ Both the Kedung Ombo and PRD cases are discussed in Chapter 3.

cause. If the state was no longer authoritarian, was it to be opposed, partnered with, or both, or neither? On top of having to confront these kinds of existential questions, YLBHI ran into funding problems. Its previously reliable foreign donors shifted focus and prioritised governance programming over the oppositional, pro-democracy activism of LBH (Aspinall 2010, 6; Munarman et al. 2004, 56). Partly sparked by these challenges, YLBHI also experienced several debilitating crises surrounding leadership changes, which weakened the organisation and further discouraged its donors (Mann 2020).

Despite the significant challenges brought about by democratic transition, as mentioned, the fall of the authoritarian New Order did provide new opportunities for different forms of cause lawyering, and LBH was willing to take them up – to an extent. There were new opportunities for strategic impact litigation, that is, litigation aimed at changing law or policy to bring about broader social change. These strategies would have been almost certain to fail under the New Order. LBH was also presented with new avenues for public policy advocacy, and opportunities for working directly with state institutions to strengthen their internal procedures. Cause lawyers at LBH have toyed with these elite-focused strategies, and they have had some success in securing progressive reforms. But these strategies never really took root. LBH cause lawyers have often been somewhat uneasy about collaborating with the Indonesian state on reform, and the capacity of legal reforms to lead to real change in society. This hesitancy has only grown in recent years, and for good reason.

There is now a broad academic consensus that a serious decline in Indonesia's democratic quality has occurred under current President Joko 'Jokowi' Widodo, who came to power in 2014 (Power 2018; Aspinall et al. 2020; Aspinall and Mietzner 2019; Diprose, McRae, and Hadiz 2019; Schäfer 2019; Warburton and Aspinall 2019; Power and Warburton 2020; Mietzner 2021b; Mujani and Liddle 2021). Scholars point to a range of factors as contributing to Indonesia's democratic malaise, such as growing populism, the connected issues of increasing religious conservatism and societal polarisation along Islamist and pluralist lines, intolerance and poor protection of minority rights, major declines in freedom of expression and association, and the active efforts of political elites to dismantle critical democratic reforms implemented after the fall of Soeharto (Mietzner 2020b; Power and Warburton 2020; K. Setiawan 2020; Warburton and Aspinall 2019; Aspinall and Mietzner 2019; Marta, Agustino, and Wicaksono 2019; Power 2018). The 2019 *Reformasi Dikorupsi* protests discussed above were a clear manifestation of student and civil society anger over this democratic backsliding.

This thesis is essentially a story about LBH finding its feet again. I argue the trajectory of YLBHI and its regional LBH branches from the authoritarian period through to the current day demonstrates there is a strong association between the quality of democracy and the form of cause lawyering practiced. It will show that as Indonesia's democracy has come under pressure, LBH has rediscovered its *raison d'être*. When the state was more open, LBH made some forays into elite-focused forms of cause lawyering. But democratic regression has led to a hardening of the oppositional identity LBH forged under the New Order. It stands firmly on the side of victims, prioritising a confrontational form of cause lawyering involving a close collaboration with grassroots social movements. Surprisingly, it has

started to again play a convening, coalition-building role among pro-democratic groups in civil society, similar to the role it played under the New Order, even if it no longer has the same extent of influence over civil society. Rather than simply demonstrating the challenges of cause lawyering in states where liberal democracy is on unsteady ground, this thesis shows how vital it is.

1.3 Key research questions

The overall research question driving this study is: how has democratic change affected LBH as a cause lawyering organisation in Indonesia? In exploring this overarching question, the project responds to several pressing questions about cause lawyers in post-authoritarian Indonesia: how have cause lawyers adapted to new legal opportunities and the more open political structure available since the fall of the New Order in 1998? How have they adjusted their views about the state, the legal system, their causes and their roles as lawyers with democratic transition, and more recently, with democratic regression? Has LBH been more or less effective in its efforts to advance social justice reforms since 1998? What do LBH lawyers see as the most appropriate cause lawyering strategies for the current political and institutional context?

1.4 Significance and motivations

This thesis provides a specific contribution to the literature on cause lawyering. As stated, it is the first detailed study of LBH since the New Order years. LBH might have labelled itself a ‘locomotive of democracy’ under Soeharto but there have been few academic examinations of how the organisation has conducted its cause lawyering practice since the transition to democracy occurred.

The emphasis on democratic change is crucial. As noted, cause lawyering and legal mobilisation literature suggest democratic transition should provide the conditions for cause lawyering to thrive. Democratic transition provided stronger rights protections, judicial independence, new legal forums for cause lawyers as well as a more open political environment, factors that should support legal mobilisation. This study provides an opportunity to examine how adaptable Indonesian cause lawyers are to these shifts in contextual dynamics, and how their views of the legal and political system changed. It explores how their visions of the legal and political system affect the strategies and practices they adopt. Significantly, I argue that simple assumptions about democratic transition providing more opportunities for cause lawyering do not hold in the case of LBH.

Ultimately, this study is not concerned with establishing a causal relationship between cause lawyering and democratisation, that is, determining whether cause lawyering is a catalyst or an outcome of democratisation, or both. Rather, the primary focus of this study is to examine how Indonesian cause lawyers and their strategies of work have been affected by democratic change. The Indonesian example is particularly interesting because it involves both a dramatic shift to democracy and then a gradual slide toward democratic regression over the past decade. The study therefore contributes to broader understandings about the role of cause lawyers in defending liberal democratic gains in an increasingly illiberal democracy, where the rule of law has never been entrenched. As

mentioned, the thesis will show that LBH's approach to cause lawyering is closely associated with changes in the quality of democracy.

This study was partly motivated by my previous experiences with YLBHI and LBH, when I worked with the Jakarta office of international nongovernmental organisation The Asia Foundation, from 2011 to early 2015. During this period, I managed grants to YLBHI and LBH regional offices, and came to know many current and former staff. As discussed later, I occasionally heard disparaging comments from donor organisation staff, and other members of Indonesian civil society, suggesting LBH had failed to live up to the promise it demonstrated during the Soeharto years. The basic essence of this criticism was as follows: YLBHI continued to view the state as the enemy, when there were in fact many opportunities to collaborate with the state on reform. I recall critics commonly said it was too comfortable with its old methods of working, calling out government hypocrisy in the courtroom, and conducting noisy demonstrations on the street. Donors occasionally complained LBH failed to adapt to the times, and continued to favour these kinds of blunt direct action approaches rather than undertaking "nuanced political and stakeholder analysis" that would allow for the development of "sophisticated and tailored" approaches to reform (Antlöv, Brinkerhoff, and Rapp 2010, 428).

This was a view to which I was sympathetic, to a degree at least. As will be discussed in Chapter 4, it is significant that most people expressing this viewpoint were, like me, based in international donor organisations, which tend to have a preference for governance programming, and are oriented toward working with the state to achieve formal policy change. I have no doubt my own views were also coloured by my experiences working for a donor organisation with a strong governance focus. I was initially interested in exploring if – and why – LBH had failed to adapt to the democratic transition. As this thesis will make clear, however, my views have since evolved.

1.5 Key definitions and terminology

1.5.1 Liberal democracy and democratic decline

When Sarat and Scheingold refer to liberal democracy, they state that it entails "representative government, the rule of law, individual rights (including private property), and an autonomous, open and pluralistic civil society" (Scheingold and Sarat 2004, 102). This thesis follows similarly conventional understandings of liberal democracy as involving free and fair elections, the rule of law and guarantees of civil and political rights, including for minorities (Scheingold and Sarat 2004, 102; Warburton and Aspinall 2019, 263; Huq and Ginsburg 2018, 87; Peerenboom 2004, 4).

Clearly Indonesia does not meet these conditions. Scholars tend to describe Indonesia as a 'procedural democracy', an 'electoral democracy', an 'illiberal democracy', or use a range of other qualifiers to denote its defects (Warburton and Aspinall 2019; Aspinall and Mietzner 2019; Diprose, McRae, and Hadiz 2019; J. S. Davidson 2018, 4). I agree with Warburton and Aspinall's description of contemporary Indonesia as an illiberal democracy: "a system in which the population can effectively choose their own leaders but in which there are serious constraints on civil liberties and the rule of

law” (Warburton and Aspinall 2019, 263). I could have used Larry Diamond’s term “at-risk democracy” (Diamond 2008). In the end, however, I have chosen to use the term ‘fragile democracy’ in the title of this thesis because I believe it succinctly captures the democratic regression (and risk of further decline) that is a feature of Indonesia today.

When discussing Indonesia’s democratic decline, it is important to note the country is hardly unique in this regard. Democratic regression in Indonesia is consistent with a trend toward democratic backsliding that has been observed around the world (Haggard and Kaufman 2021; Repucci 2020). Some authors note that from a comparative standpoint, Indonesia’s democracy looks quite healthy. Indeed, Indonesia can still make a claim to being the most democratic country in Southeast Asia (Hicken 2020, 28). But these comparisons are cold comfort for the LBH cause lawyers who confront the realities of democratic decline daily and see themselves as a bastion of defence against further backsliding. For LBH cause lawyers, democratic regression is an urgent problem that occupies much of their thoughts, as this thesis will show.

1.5.2 Rule of law

Recognising that the rule of law is a highly contested concept, this thesis uses a simple definition of the rule of law as “meaningful restraints on the state and individual members of the ruling elite” – involving “a government of laws, the supremacy of law and equality of all before the law” (Peerenboom 2004, 2). Definitions of the rule of law often make the distinction between ‘thin’ and ‘thick’ versions of the concept. Briefly, a thin understanding of the rule of law has a formal focus. Law should be made by entities authorised to make law, and should be made in accordance with agreed rules (Peerenboom 2004, 2). Law should be public, clear, consistent, stable, prospective (rather than retroactive), and generally applicable – it should be applied equally to all people (Tamanaha 2009, 3–4; Peerenboom 2004, 2). Notably, a ‘thin’ rule of law can be implemented under any regime, democratic or undemocratic, and can therefore include immoral laws (Tamanaha 2009, 13). A ‘thicker’ conception of the rule of law, meanwhile, is more concerned with substantive issues and incorporates understandings of political morality, justice and rights (Tamanaha 2009, 4; Peerenboom 2004, 3–4). A liberal democratic rule of law involving representative democracy and respect for civil and political rights is one such thicker understanding (Peerenboom 2004, 4). Regardless of these differences, as the Introduction to Part Two and other elements of this thesis will show, Indonesia still struggles to meet even a more minimalist ‘thin’ conception of the rule of law (Peerenboom 2004, 25).

1.5.3 Civil society

This thesis also refers frequently to civil society. In simple terms, civil society organisations (CSOs) can be considered as associations independent of the state and the private sphere. I follow the commonly used definition offered by Larry Diamond, who describes civil society as: “the realm of organised social life that is open, voluntary, self-generating, at least partially self-supporting, autonomous from the state and bound by a legal order or set of shared rules” (Diamond 1999, 221). It is important to recognise that a vibrant civil society does not necessarily promote democratisation

(Hefner 2000, 35; Beittinger-Lee 2013, 2). This thesis is mainly concerned with pro-democratic civil society actors, but I acknowledge there are many actors and organisations in Indonesian civil society that are ‘uncivil’ or do not necessarily promote democratic values and ideals (Hefner 2000, 35–36; Beittinger-Lee 2013). While I am wary of equating civil society with pro-democratic groups, this thesis occasionally refers to civil society in broad terms. Nevertheless, I am careful to specify anti-democratic or intolerant civil society actors when necessary.

1.5.4 LBH and legal aid organisations in Indonesia

Another important note on terminology relates to the differences between YLBHI and LBH. YLBHI, as stated, is the Indonesian Foundation of Legal Aid Institutes. It is the Jakarta-based umbrella body for the network of 17 LBH offices based in the capital cities of many Indonesian provinces. LBH offices are run independently, but they are guided by the YLBHI organisational by-laws and code of conduct, and share a common ideology or approach to legal aid. Given these similarities, most academic discussions of YLBHI/LBH blur the lines between these organisations. I am also guilty of this to a degree. During fieldwork, I spent most of my time with the leadership team of YLBHI, who do have responsibility for defining broader organisational priorities, even if they do not have direct control over the regional LBH offices. I use the generic term LBH to refer to the entire YLBHI-LBH network, simply to avoid using the clumsy longer acronym. If I refer to YLBHI or name a specific LBH office, such as LBH Bandung, or LBH Surabaya, I am referring to that organisation specifically.

Another point worth clarifying is that LBH has been so influential as the pioneer of legal aid in Indonesia that ‘LBH’ is now used as a common term for a legal aid organisation. There are many other Indonesian legal aid providers that use the term LBH in their organisational names but are not part of the YLBHI network. Prominent examples include LBH Apik (Legal Aid Institute of the Indonesian Women’s Association for Justice, or *Lembaga Bantuan Hukum Asosiasi Perempuan Indonesia untuk Keadilan*), LBH Masyarakat (Community Legal Aid Institute, or *Lembaga Bantuan Hukum Masyarakat*, often styled as LBHM), and LBH Pers (Legal Aid Institute for the Press, or *Lembaga Bantuan Hukum Pers*). It is also important to recognise that some of the organisations that use the LBH term are progressive cause lawyering organisations in the same mould as YLBHI-LBH, while others may simply offer conventional legal aid services.

1.6 Methodology, focus and limitations

This empirical study adopts a qualitative approach to the examination of how Indonesian cause lawyers have been affected by democratic transition. The focus of the project is a case study of LBH. Case studies are particularly helpful for exploring ‘how’ or ‘why’ questions about current events that the researcher is unable to control (Yin 2009, 9). There are, of course, many other cause lawyering organisations in Indonesia other than those in the LBH network. For example, 524 legal aid providers from civil society are officially registered with the Ministry of Law and Human Rights.¹⁴ There are

¹⁴ Law and Human Rights Ministerial Decision No. M.HH-01.HH.07.02 of 2018.

also numerous legal reform-focused organisations that do not engage in direct service provision. I focus solely on LBH because of its history, influence, and size. LBH is the most prominent cause lawyering organisation in Indonesia and the only one with a long history of operation under both the authoritarian New Order as well as in democratic Indonesia. Any examination of cause lawyering in Indonesia would be incomplete if it did not examine LBH. Nevertheless, it is important to recognise that the conclusions drawn through this study apply to LBH, and cannot necessarily be applied to Indonesian cause lawyering in general.

In many ways this study serves to document the modern history of LBH after the fall of the New Order, but I make no claims to providing an exhaustive account of LBH's activities and strategies after 1998. Although I interviewed several former LBH staff, I focus particularly on the experience of LBH cause lawyers in the contemporary era, especially during the period of fieldwork. An extended period of fieldwork was conducted from 6 June 2019 to 24 December 2019. The timing of this fieldwork is significant. Fieldwork was conducted during a time of great uncertainty about Indonesia's democratic future. The *Reformasi Dikorupsi* protests occurred in late September and early October of 2019. These protests, and the repressive police response to them, affected the responses of participants in this project.

The study collected qualitative data through a combination of semi-structured interviews, participant observation, and review and analysis of documents, three of the most common methods used in qualitative research (Patton 2002, 4–5). The flexible and open-ended nature of qualitative inquiry allowed for adjustment of the approach in response to emerging dynamics during fieldwork (Webley 2010, 932). For example, interview questions were revised slightly to capture respondents' views on the *#ReformasiDikorupsi* protests.

The majority of data was collected through in-depth, semi-structured individual interviews, a common method used by qualitative researchers to examine perceptions of the law and legal profession (Webley 2010, 936). Interviews are central to qualitative empirical studies like this one because they can provide detailed, nuanced responses that would be difficult to obtain through other methods like surveys or questionnaires (Etienne 2005, 1207). Almost all interviews were conducted during the fieldwork period in 2019, although some additional and follow-up interviews were completed over voice and video call in 2020 and 2021.

Interview participants were selected through a mixture of purposive and snowball sampling. Purposive sampling involves the deliberate selection of key participants who are likely to provide rich data that would be difficult to obtain elsewhere, and can offer opportunities for in-depth understandings and insights (Liamputtong 2013, 14). Snowball sampling, meanwhile, involves asking participants to provide details of other potential interview subjects relevant to the project (Liamputtong 2013, 17). Several current and former YLBHI and LBH staff were already well known to me, which greatly assisted in this process. For example, I had previously worked with YLBHI director Asfin. She was supportive of the project and was able to act as a “gatekeeper” to provide further access to members of the LBH network (Doherty 2016, 138). Her trust and endorsement

assisted in expanding access to other LBH staff. Several other interview subjects assisted by providing contact details or introductions to other participants. YLBHI's annual national work meeting in Jakarta in late 2019 also provided an opportunity to meet with directors of all the regional LBH offices, including from areas difficult, if not impossible, to travel to, like Papua.

I conducted more than 60 interviews with 56 current and former staff at LBH, participants from international nongovernmental organisations (NGOs) and private development contractors that fund LBH's work. This number of interviews was sufficient to reach saturation, that is, the point at which no new themes emerged from the data collected (Given 2016, 135). Interviews generally lasted between 60-90 minutes, and explored cause lawyers' views about the state, the legal system, their priorities, their perception of their roles, and their motivations for doing the work they do. I also asked cause lawyers about their strategies and approaches, encompassing issues such as case selection and management, as well as advocacy tactics and views on nonlitigation activities. A breakdown of participants is as follows:

- 31 current LBH staff, including directors, division heads and junior staff;
- 18 former LBH staff, who now hold positions in academia, private firms, government bodies, and donor organisations; and
- 7 members of donor organisations, including international NGOs and private development contractors.

Several senior YLBHI and LBH staff were interviewed more than once. Aside from the handful of non-Indonesian respondents, all interviews were conducted in Indonesian. All interviews were recorded, transcribed in English from the original Indonesian, then coded based on the main themes identified.

Another important research strategy was participant observation. In addition to in-depth interviews, I attended LBH press conferences, public seminars, paralegal trainings, and community legal education activities. Press conferences, public discussions and seminars were held almost every week at the YLBHI/LBH Jakarta office. These events were often quite revealing in terms of how cause lawyers at LBH viewed the state and conceptualised their role, and their personal and institutional values. Researchers have noted that public statements by legal associations can reveal their ideological positions or how they wish to be publicly perceived (M. Lee 2017, 2), and I also found this to be true of LBH. I also engaged in more general observation of the daily work of cause lawyers at LBH, in recognition of the fact that informal, naturally occurring conversations can also be an important means of gathering information (Patton 2002, 27).

In addition to interviews and observation, I also examined written documents, reports, and research products – other avenues through which LBH perceives its contribution to democratisation, human rights and the rule of law. Organisational bylaws and internal organisational policies, public annual reports (extending back to the early 2000s), policy and research papers, conference proceedings and other secondary literature were examined as channels through which the organisation shapes its approach to cause lawyering.

A potential limitation of this study is that it relies on the subjective accounts of lawyers – I did not seek to interview policymakers (aside from a couple of former LBH staff who have taken on roles within state structures) or clients. It therefore offers an incomplete account of lawyers' work, particularly if the focus is on assessing 'effectiveness' (a negotiable concept in itself). Nevertheless, the emphasis on interviews with LBH cause lawyers as the main method of data collection was still appropriate, as the main goal of the project was to explore why cause lawyers selected particular strategies of work and how they viewed their practice, rather than make an assessment of their effectiveness. As this study relies heavily on interviews with current and former lawyers, there is the possibility cause lawyers may have recalled events incorrectly, over-emphasised the role of LBH in their descriptions of advocacy activities or public campaigns, or provided information they thought might please me as the interviewer (Leeuw and Schmeets 2016, 140–41). For example, when discussing motivations and their visions of their role, there is the small but unlikely possibility cause lawyers may have altered their responses so that they were consistent with LBH's organisational values and codes of conduct, rather than reflecting their true beliefs. The sample size of lawyers interviewed helps to reduce the chances of cause lawyers offering responses more in line with what they think they should say than what they actually believe.¹⁵

1.6.1 The impact of Covid-19

This project was completed in the shadow of the Covid-19 pandemic. As noted, I planned to obtain most of the data for this project through in-depth, face-to-face interviews. Fortunately, I completed my initial period of fieldwork before social distancing and travel restrictions were imposed and international travel became impossible, meaning most of my interviews were able to proceed as planned. But the pandemic still caused significant disruptions to my project. I had originally planned to spend three additional months in Jakarta in early to mid-2020, to conduct follow-up interviews with YLBHI and LBH staff, and to spend a more extended period with staff in the LBH Jakarta office. The Covid-19 pandemic made these plans impossible.

This affected my project in several ways. LBH Jakarta is the most prominent of the regional LBH offices, but because of a lack of ability to travel in 2020 and 2021, I was not able to spend much time in the office, or in casual discussions with lawyers from LBH Jakarta. During fieldwork in 2019, I found that informal conversations, during lunch and cigarette breaks, were often important moments to obtain insight, or were useful for directing future interviews. Of course, even if I were able to travel to Indonesia in 2020, these kinds of informal conversations would not have been possible, as most LBH staff would have been working from home. The impact of pandemic-related disruptions was fortunately mitigated by the fact that I conducted interviews with several current and former LBH Jakarta staff during 2019, including the current director and three past directors. Ultimately, I spent less time with LBH Jakarta staff than I would have preferred, but not so little that I was not able to gain an accurate picture of the organisation's work.

¹⁵ See the discussion of similar limitations in Southworth (1999, 475–77).

During 2020 and 2021 I conducted several additional, follow-up interviews over phone or video call with respondents already interviewed during 2019. Given these respondents were already known to me, I do not believe the sometimes-stilted nature of phone or video calls affected responses. It should be acknowledged that were it not for travel restrictions associated with Covid-19, I may have recruited new participants, but I am confident the broad sample of lawyers already interviewed provides a sufficiently accurate picture of LBH cause lawyers' views.

1.7 Overview of the thesis

This thesis is divided into two parts. Part One consists of three chapters, including this introductory chapter, and aims to introduce the concept of cause lawyering and LBH as an archetypal cause lawyering organisation. Following this chapter, Chapter 2 reviews the cause lawyering literature. It defines cause lawyering, examines the political and institutional factors that influence cause lawyering, and introduces a typology for categorising cause lawyers. This provides a theoretical framework for analysing the Indonesian practice of cause lawyering and examining how it has been affected by democratic change.

Chapter 3 builds on Chapter 2 by examining the rich Indonesian tradition of cause lawyering practiced by LBH, focusing on Soeharto's New Order period. This chapter establishes how cause lawyering was practiced by LBH under an authoritarian regime, examines LBH's 'structural legal aid' approach, and places it in the context of the cause lawyering theory discussed in Chapter 2. This history of LBH under the New Order is important to provide a basis for examination of how cause lawyers' practices and views about the state changed with democratic transition, and, more recently, regression.

Part Two of the thesis focuses primarily on how LBH is practicing cause lawyering in the current era, in a period of democratic decline. It consists of five main chapters and begins with a brief introductory section. The Introduction to Part Two describes the democratic transition and key political and institutional changes that occurred when Soeharto fell in 1998, as well as the threats to democracy that have emerged over the past decade. The major democratic changes outlined in this introductory section had significant implications for LBH and the form of cause lawyering practiced, as the chapters that form Part Two demonstrate.

Chapter 4 focuses on organisational issues that have affected the shape of LBH cause lawyering in the post-Soeharto years. The transition to democracy precipitated several major organisational challenges, relating to organisational identity, funding, leadership and staffing. As stated, this thesis serves to document the modern history of LBH. These challenges are an integral aspect of this history, and they had a significant impact on the form of cause lawyering practiced. Aside from funding, these organisational issues are rarely examined in scholarly accounts of cause lawyering. This chapter examines these organisational factors – plus some organisational factors not directly related to democratic transition – to help explain why LBH did not immediately thrive following the democratic transition.

Chapter 5 goes on to examine the litigation strategies deployed by LBH in the post-authoritarian era. The political and institutional changes described in the Introduction to Part Two delivered new opportunities for cause lawyers to mobilise the law in an effort to bring about broader social change. Chapter 5 focuses on some of these new elite-focused strategies – specifically constitutional litigation, litigation in the administrative courts and citizen lawsuits. While LBH has had some success with these strategies, it is largely sceptical about the ability of legal decisions to deliver social change, as this chapter will show. The chapter also looks at case defence – a form of cause lawyering that has changed little since the authoritarian era.

Chapter 6 builds on Chapter 5 to examine LBH's approach to working with social movements. Throughout its history, LBH has combined litigation with community organising and community legal empowerment work. Following the democratic transition, these activities were implemented inconsistently. This chapter will describe how LBH has placed greater emphasis on these grassroots-focused strategies over recent years, as it has begun to lose faith in the ability of legal reforms to lead to change in the lives of its clients.

Chapter 7 continues from Chapter 6 to look at a different kind of nonlitigation strategy – direct engagement with the state. The democratic transition offered new opportunities for cause lawyers to engage with state structures, through policy advocacy and legislative lobbying, as well as efforts to strengthen the capacity of state institutions. Chapter 7 examines some of LBH's attempts to experiment with these accommodative, elite-focused forms of cause lawyering in the post-Soeharto period. The chapter describes how disappointment with these efforts and broader disenchantment with the state and its attitude to reform over recent years has led to LBH prioritising a confrontational approach that keeps the state at arm's length.

The final content chapter, Chapter 8, synthesises discussions in Chapters 5, 6 and 7, by revisiting the concept of structural legal aid and looking at how it has been applied in the post-Soeharto period. The chapter also looks at a strategy connected to structural legal aid – convening and coalition building. This was an important role played by LBH in the late New Order period, and it is becoming important again now, as Indonesian democracy is unravelling. By examining LBH cause lawyers' reflections on the state and the role of structural legal aid over time, the chapter illustrates the core argument of this thesis, showing there is a strong association between the health of democracy and the style of cause lawyering practiced.

Chapter 9 concludes by summarising the main findings of the study and explaining the implications of the Indonesian experience of cause lawyering practiced by LBH for broader understanding of cause lawyering and democratic change.

Chapter 2: Cause lawyering

2.1 Introduction

This chapter reviews the literature on cause lawyering and legal mobilisation to provide a theoretical framework for discussion of cause lawyering in Indonesia, and cause lawyers at LBH, the most prominent and influential cause lawyering organisation in Indonesia. While this chapter will touch on the Indonesian experience of cause lawyering, the focus is on sketching out the boundaries of the definition as understood in scholarly literature and exploring the conditions said to provide opportunities for cause lawyering globally. This will provide a basis for exploration in subsequent chapters of how democratic change affects Indonesian lawyers and the strategies they use.

The chapter begins by looking at definitional issues. Definitions of cause lawyering and cause lawyers are somewhat fluid and may differ according to location and regime type. In clarifying what is meant by the term, I briefly look at the history of public interest law, as cause lawyering is often also called (Scheingold and Sarat 2004, 5), and touch on some of the theoretical debates that have occurred. In doing so, I recognise that understandings of cause lawyering and public interest law are influenced by the US experience, as I explain below. This chapter will argue, however, that despite its genesis in the US, cause lawyering remains a useful concept for thinking about and analysing the work of activist lawyers in Indonesia. In fact, this thesis will add to the US literature, demonstrating Indonesian cause lawyering developed at the same time as, and largely independent of, developments in the US.

Having elaborated the key elements of the definition, I move on to the central focus of this chapter – an examination of the political and institutional structures said to influence and provide opportunities for cause lawyering. These include regime type, judicial independence, constitutional and other legal protections of rights, a strong civil society sector, adequate funding, the legal profession, and legal education, among others. Democratic transition in Indonesia involved major changes to the political and institutional environment, with the introduction of many of these critical supportive factors.

The chapter then continues to explore the main strategies of cause lawyering, which include not just litigation, but extend to legislative lobbying and policy advocacy, community organising, community legal education, public media campaigns, and more. The tactics cause lawyers use to pursue social change are highly dependent on the political and institutional factors mentioned above. They also vary according to cause lawyers' perceptions of the quality of democracy, as this thesis will show. The final section of this chapter adds to this discussion and introduces a typology for categorising cause lawyers and their perceptions of the system, the cause they are pursuing, and their role as lawyers.

Through exploration of these aspects of cause lawyering literature, this chapter develops a framework for analysing the Indonesian practice of cause lawyering and examining how it has been affected by democratic transition. This framework will support the central argument of this thesis that there is a clear relationship between the form of cause lawyering practiced in Indonesia and democratic quality.

2.2 What is cause lawyering?

Despite more than two decades of scholarship, there is no universally accepted definition of cause lawyering or cause lawyers. As mentioned, the concept was first described by Austin Sarat and Stuart Scheingold in 1998. It has been developed and explored by them in a book and a series of edited volumes they produced that dominate the literature on cause lawyering (Sarat and Scheingold 1998b; 2001a; 2005b; 2006a; 2008; Scheingold and Sarat 2004). Through the compilation of a broad range of empirical case studies of cause lawyering, Sarat and Scheingold have sought to identify common themes and advance general principles about the work cause lawyers do, and their relationship to the organised legal profession, the state and regime type.

From the outset, however, Sarat and Scheingold acknowledge that “providing a single, cross-culturally valid definition of the concept is impossible” (Sarat and Scheingold 1998a, 5). The concept continues to evolve and how it is understood and the practices it involves are highly dependent on configurations of state and society and the development of the legal profession in the places where it occurs (Scheingold and Sarat 2004, 3). Nevertheless, Sarat and Scheingold describe cause lawyers as lawyers who “commit themselves and their legal skills to furthering a vision of the good society” (Sarat and Scheingold 1998a, 3). Most definitions of cause lawyering seek to capture the activist nature of the concept. Cause lawyers are said to differ from “conventional lawyers” in that they consciously use their legal skills in pursuit of moral or political causes in which they believe (Hajjar 2001, 68). In fact, Scheingold and Sarat describe moral or political commitment as “an essential and distinguishing feature of cause lawyering” (Scheingold and Sarat 2004, 4).

Cause lawyering is often directed toward the politically and socially marginalised (Munger, Cummings, and Trubek 2013, 365), and this is especially the case in Indonesia. But it entails more than the simple provision of legal assistance to underrepresented individuals, such as with pro bono activities or conventional legal aid. Cause lawyers see their role as extending beyond client service to the service of a cause (Scheingold and Sarat 2004, 3). This does not mean cause lawyers do not take their duty toward clients seriously, but they do see client service “as a means to their moral and political ends” (Scheingold and Sarat 2004, 7). The clients of cause lawyers are diverse, and may include poor and marginalised individuals facing direct legal threats, politically disempowered communities that have yet to develop a shared awareness about their rights, and even large, well organised social movement groups (Marshall and Hale 2014, 306–7). Sometimes, the cause being defended or advanced may be broad, and affect many groups in society, such as cause lawyering to defend the right to freedom of expression. Cause lawyering does not preclude the representation of individual clients, but in taking on these cases, cause lawyers tend not to see their clients as atomised individuals. When legal efforts are directed toward correcting underrepresentation of individuals, such cases are viewed as having deeper political significance beyond the individual case (Chen and Cummings 2013, 22). This also means that, inevitably, tensions occasionally arise when cause lawyers prioritise the affirmation of certain legal or political principles over their clients’ immediate, sometimes more pragmatic, concerns (Marshall and Hale 2014, 311; Scheingold and Sarat 2004, 17; Luban 1988, 319).

In addition to the essential element of moral or political commitment, cause lawyering is further contrasted against conventional legal practice in that it is “frequently directed at altering some aspect of the social, economic, and political status quo” (Sarat and Scheingold 1998a, 4). Or, to use Boukalas’s pithy description, cause lawyers are “essentially political actors – albeit ones whose work involves doing law” (Boukalas 2013, 396). I favour the definition used by Marshall and Hale. In their review of cause lawyering literature, they describe the concept as “the set of social, professional, political and cultural practices engaged in by lawyers and other social actors to mobilise the law to promote or resist social change” (Marshall and Hale 2014, 303). This broader definition recognises there are activities conducted by non-lawyers (such as paralegals or researchers) that also fall under the rubric of cause lawyering. Litigation is just one of many strategies associated with law that may be deployed in service of the cause.

The various aspects of cause lawyering are summarised well by Jigmiddash and Rasmussen in their discussion of cause lawyers in Mongolia:

“Rejecting the role of law as the protector of the status quo, these lawyers embrace the law as a way of achieving social justice. Using their legal expertise and skills, they work both within the legal system and beyond the courts in the communities that they serve to challenge injustice and hold governments and other powerful interests accountable. By engaging in a larger political struggle and elevating the lawyer’s role beyond individual representation, these lawyers challenge the traditional concept of lawyers as actors within a system, and instead frame lawyers as architects of society at large” (Jigmiddash and Rasmussen 2013, 567).

As the next chapter shows, from its establishment in the 1970s, LBH saw itself in these terms, as part of a movement for social and political change, committed to transforming structures that oppressed poor and marginalised people.

Non-profit organisations have historically been the main site for cause lawyering on behalf of poor and marginalised groups (Weisbrod, Handler, and Komesar 1978; Nielsen and Albiston 2006, 1596), and they are the dominant site for cause lawyering across Asia (Yap and Lau 2010, 6). However, cause lawyering can be conducted from a variety of practice sites, including pro bono work in private firms, and even within government structures (Chen and Cummings 2013, 125–200; Klug 2001; NeJaime 2012). Private firms are oriented toward profit, and cause lawyers working in these organisations may have only limited opportunities to conduct pro bono activities in support of a cause (Scheingold and Sarat 2004, 129). Some cause lawyers therefore question whether lawyers in for-profit firms can truly be committed to social change (Chen and Cummings 2013, 30). But excluding private lawyers from the definition of cause lawyering is too restrictive – many lawyers based in large corporate firms work pro bono on major issues like capital punishment, the rights of indigenous peoples, and labour law, among others, and are clearly motivated by commitment to a cause. Further, non-profit organisations are not immune from considerations of funding. Even if they do not seek

profit, non-profit organisations are still dependent on grants or donations, from government, private foundations, philanthropists or members of the public (Chen and Cummings 2013, 128). This may lead to cause lawyers prioritising causes that reflect the priorities of their financial donors (Chen and Cummings 2013, 31), as will be discussed further in this and subsequent chapters. Acknowledging that, ultimately, practice site has little bearing on what should be considered cause lawyering, this thesis focuses on cause lawyering conducted from legal aid organisations in civil society – LBH in particular – simply because CSOs are the primary venue for cause lawyering in Indonesia.

If one of the defining characteristics of cause lawyering is a desire to work towards “a vision of the good society” (Sarat and Scheingold 1998a, 3), motivation can also help to clarify what separates cause lawyering from conventional or ‘professional’ lawyering. However, attempting to pin down motives for human behaviour is a fraught process. Motivations can change over time and most people would admit to possessing mixed or overlapping motives, and this is true, too, of cause lawyering (Menkel-Meadow 1998, 38). Scholars that have looked at motivations for cause lawyering have found that it is often motivated by a interacting mixture of altruism (including altruism driven by personal religious values), political ideology, and personal or professional self-interest (Menkel-Meadow 1998; Etienne 2005, 1216–17; Chen and Cummings 2013, 22–28; Tam 2010, 670; Meili 1998, 494). Consider, for example, how a political commitment to strengthening the rule of law may be motivated at least in part by professional self-interest. As Lev puts it, strong autonomous courts, binding procedural codes, the rule of law and the values that surround it are “a lawyer’s paradise” (Lev 1998, 447). Likewise, cause lawyers involved in high profile cases may be able leverage their visibility into prestigious positions in academia or government (Chen and Cummings 2013, 24). This is all to say that cause lawyers rarely act based on a single motivational factor, and acting with an element of self-interest does not necessarily mean that lawyers are not engaging in cause lawyering. Even if there are other interests hiding behind cause lawyers’ superficially altruistic behaviour, this does not mean that these lawyers are cynical about their practice or even conscious of their personal motivations (Willemez 2005, 65).

2.3 The birth of public interest law

Cause lawyering emerged as a distinct category within the legal profession in the United States in the 1960s and 1970s. ‘Public interest law’, as it was then called, was directed primarily at serving the interests of underrepresented groups, such as racial and ethnic minorities, women, the poor, children and the elderly (L. Trubek 2011, 418). Public interest law drew on a tradition of poverty and civil rights legal advocacy practiced by groups such as the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Coloured People Legal Defence and Education Fund (NAACP LDF), which were both established in the early twentieth century (L. Trubek 2011, 418). The precursors to public interest law can be found much earlier, for example, in the abolitionist movement, or even in the activities of certain lawyers during the American Revolutionary period (Chen and Cummings 2013, 41–62). But it was not until the 1960s and 1970s that public interest law

was really recognised as a unique form of practice within the profession (Scheingold and Sarat 2004, 40).¹⁶

The Ford Foundation was particularly influential during the 1970s as a result of its establishment of seven nonprofit “public interest law” firms focused on the civil rights of marginalised communities in the United States (McClymont and Golub 2000, 92; L. Trubek 2011, 418). A major Ford Foundation-funded research project reached a general definition of public interest law, finding it:

- 1) “is an activity undertaken by an organisation in the voluntary sector;
- 2) provides fuller representation of underrepresented interests (would produce external benefits if successful);
- 3) involves the use of law instruments, primarily litigation.” (Weisbrod 1978, 22)

This understanding of public interest law went beyond similar earlier concepts of legal aid to include provision of legal services to groups of people who were poorly organised or otherwise might not have been able to afford litigation individually, such as in consumer rights and environmental protection cases (L. Trubek 2011, 418). The Ford Foundation-funded research stated that most public interest law activities could be grouped under the following categories: “civil liberties, environmental protection, consumer protection, employment, education, media reform, healthcare, welfare benefits, housing, voting, and occupational health and safety” (Southworth 2013, 497). By the mid-1970s, about 100 public interest law groups had been established in the United States (Cummings 2011a, 7). In the early years, especially, most of these organisations were focused on using test-case or impact litigation, that is litigation designed to change the law or bring about progressive reforms, usually on behalf of vulnerable social groups (Cummings 2008, 900).

Public interest law was therefore initially associated with legal liberalism: belief in the idea that activist lawyers could use strategic impact litigation to assert rights and change society (Cummings 2020, 93; Kalman 1996, 2). It had a strong focus on limiting state repression and upholding first-generation rights, with an emphasis on promoting social equality and the rights of marginalised groups (Scheingold and Sarat 2004, 107; Cummings and Trubek 2008, 8–9). Over the following decades, scholars and practitioners began to challenge the dominant theory of public interest law, and its association with test-case litigation, with nongovernmental organisations as the primary vehicle for its delivery (Cummings 2012, 509–10). There was also a strong counterreaction to the largely liberal goals of early public interest lawyers (Cummings 2011b, 362). Conservative groups were soon founded to champion right-wing causes, advocating against abortion, affirmative action, gun control and unions, among other issues, while also claiming to be serving the interests of underrepresented groups (Southworth 2013, 498). Both progressive and conservative groups were able to adopt the concept and claim to be acting in the public interest.

¹⁶ Weisbrod, Handler and Komesar published an early influential text that sought to take stock of and analyse the emergent public interest law industry, *Public Interest Law* (Weisbrod, Handler, and Komesar 1978).

Dissatisfaction with the ambiguity inherent in the term ‘public interest law’ led scholars to propose alternative concepts (Cummings 2012, 519–20). Scheingold and Sarat justified their preference for the term ‘cause lawyering’ by stating that the term ‘public interest lawyering’ inevitably prompts questions “about what is, or is not, in the public interest” (Scheingold and Sarat 2004, 5). They prefer cause lawyering because it “conveys a determination to take sides in political and moral struggles without making distinctions between worthy and unworthy causes” (Scheingold and Sarat 2004, 5). But scholars have also questioned whether the term ‘cause lawyering’ is too broad or contains some of the same moral assumptions as ‘public interest law’. These terminology considerations are explored further below.

2.4 Law and Society studies and its offshoots

The rise of new organisations specifically designated ‘public interest law’ firms coincided with the development of law and society studies in the late 1950s and early 1960s (Garth and Sterling 1998). Now a large interdisciplinary field, law and society studies intended to dismantle the assumption that law was autonomous, rational and impartial and show that it was shaped by, and had a part in shaping, society. It sought “to show that law is not, and cannot be, separated from society, that law inevitably reflects particular interests, that the behaviour of law, as revealed in legislation, administration of judicial decisions, is always explicable in terms of the standard sociological categories of class, status and interest” (Sarat 1985, 28). Among its many areas of inquiry, law and society studies aimed to explore the reasons why the law was experienced differently by people of different class or social status.

An important theoretical precursor to law and society studies was ‘legal realism’, and Roscoe Pound’s idea that “law on the books” could be distinguished from “law in action” (Pound 1910). Emerging at the same time as, and connected to, law and society studies was “gap studies”, which attempted to identify, and propose remedies for reducing, the “gap” between law on the books and law in action (Feeley 1976). The central premise of gap studies was that by identifying deficits between law in the books and law in action, law in the books could be reformed and therefore be implemented more effectively (Davies 2017, 427). Early gap studies scholars were particularly interested in exploring the implementation or impact of US Supreme Court decisions. Significantly, gap studies arose in the civil rights era, when scholars were optimistic about the potential of law to address social injustice, and had a strong public policy orientation (Gould and Barclay 2012, 325–26). From the beginning, however, gap studies was criticised, particularly for overly simplistic assumptions about the capacity of law to lead to changes in behaviour and failure to pay sufficient attention to how law can reproduce inequality (Gould and Barclay 2012, 328–29).

Although gap studies has now largely been abandoned, it did lead to a stronger focus on the study of law as part of social life, and the emergence of legal mobilisation as a dominant strand of law and society scholarship. One of the most widely cited definitions of legal mobilisation is that “the law is... mobilised when a desire or want is translated into a demand as an assertion of one’s rights” (Zemans 1983, 700). Legal mobilisation may take the form of impact litigation designed to achieve social

change or it may simply involve a broad appeal to the law or legal norms in an effort to influence policy or behaviour (Vanhala and Kinghan 2018, 5; Zemans 1983, 700–701). Cause lawyering – through its exploration of the role of lawyers in influencing policy and advancing social change – is an important part of this broader legal mobilisation scholarship.

An important critique of public interest law and an early contribution to the legal mobilisation field was Scheingold’s influential 1974 work *The Politics of Rights*. Scheingold argued lawyers were too often captured by “the myth of rights”, that is, the view that securing legal rights in the courts could lead to social change (Scheingold 2004, 5). Focusing on litigation, Scheingold argued, diverted energy and resources from other political action strategies (Cummings 2008, 1015). Despite his pessimism about the value of litigation to lead to meaningful change on the ground, Scheingold argued that the myth of rights should be considered a “resource” (Scheingold 2004, xix). He stated it was possible “to capitalise on the perceptions of entitlement associated with rights to initiate and to nurture political mobilisation – a dual process of activating a quiescent citizenry and organising groups into effective political units” (Scheingold 2004, 131). This book also focused on cause lawyers (whom Scheingold referred to as activist lawyers in the original 1974 publication), and their potential to use rights in a “politically savvy fashion” to generate social change (Scheingold 2004, xvii). Recognising a preference for litigation among many US public interest law organisations, he commented that “cause lawyers were more likely to be captives of the myth of rights than its opportunistic, strategically motivated political maximisers” (Scheingold 2004, xix).

Another influential early work was by Galanter, who showed that law was in fact often a tool of the “haves” and that legal institutions often reinforced inequality (Galanter 1974). Galanter examined the use of the courts by “repeat players” and “one-shotters”, finding that the better resourced and more experienced repeat players were more likely to come out ahead in litigation efforts. Public interest law, Galanter believed, had the potential to strengthen the capacity of the “have-nots” to participate more equally in the legal process (Galanter 1974, 143).

A related element of law and society studies relevant to this project is the critical legal studies (CLS) movement, which emerged in the late 1970s. CLS scholarship incorporated a diverse range of theoretical perspectives – it is often said that there was never a single CLS theory (Davies 2017, 194). Broadly, however, CLS scholars criticised legal liberalism, arguing individual rights strategies discouraged collective action by encouraging the false belief that judicial decisions could lead to social reform. Ultimately, this only served to perpetuate the inequality inherent in the status quo (Cummings 2020, 95; 2017, 1596). An important aspect of CLS was a belief that legal institutions and legal processes are political (Davies 2017, 195), or as Hutchinson and Monahan stated succinctly, “law is simply politics dressed in different garb” (Hutchinson and Monahan 1984, 206).

Finally, while not a major consideration of this thesis, it is also important to recognise some additional theoretical context relevant to the Indonesian case. As a country of the Global South that declared independence from the Netherlands in 1945, Indonesia was also influenced by theories of political and economic development in favour at the time. The ‘modernisation theory’ of development, prominent

from the post-World War II period through to the 1970s, assumed all countries would follow a linear pattern of development from “traditional (economically backward) to [the] modern (economically advanced)” (Bernstein 1971, 144), essentially replicating the path of countries of the Global North. The now defunct ‘law and development’ model (discussed below and in Chapter 3), had its roots in modernisation theories of development (Tamanaha 1995; Snyder 1980), and aimed to export western legal institutions and legal culture, believing it could lead to economic development (Lindsey 2004b, 16). Modernisation theories of development quickly came under attack, in particular, from Marxist-inspired ‘dependency theory’ scholars. Dependency theory, popularised by Andre Gunder Frank, Raúl Prebisch and others, broadly argued that “core” industrialised countries were able to experience growth and economic development by exploiting the non-industrialised, raw-material producing, “peripheral” countries through unfair trade, keeping them in a position of underdevelopment (Herath 2008, 821). While dependency theory scholars were not particularly focused on law (Tamanaha 1995, 479), the theory did prove influential for some Indonesian cause lawyers from LBH.

As Chapter 3 will demonstrate, LBH’s approach to legal aid and political action resonated with many of the above theoretical discussions, even if the organisation did not regularly articulate its work in reference to theory.

2.5 Cause lawyering or public interest law?

The terms ‘cause lawyering’ and ‘public interest law’ are often used interchangeably with no attempt to make a distinction between the two or explain why one term is favoured over another (L. Trubek 2011, 420). Many scholars now simply treat the wide variety of similar concepts as synonyms: social justice lawyering, “rebellious lawyering, activist lawyering, progressive lawyering, transformative lawyering, equal justice lawyering, radical lawyering, lawyering for social change, critical lawyering, socially conscious lawyering, lawyering for the underrepresented, lawyering for the subordinated, alternative lawyering, political lawyering, visionary lawyering” (Menkel-Meadow 1998, 33) and so on. It is illustrative that a 2013 *Wisconsin International Law Journal* special issue on “lawyers for social justice” included articles not only on social justice lawyering but also “cause lawyering”, “public interest lawyering”, “public interest litigation”, and “cause advocacy” (University of Wisconsin-Madison 2013).

Sarat and Scheingold define cause lawyers as lawyers who use their professional skills “in a partisan pursuit of the good” (Sarat and Scheingold 2005a, 1). But this runs into the same problems of moral judgement as “public interest lawyering”. Whose version of “the good” falls within the scope of cause lawyering? Can legal activists like Indonesia’s Family Love Alliance (AILA), who have sought reform of the Criminal Code to prohibit all extramarital sex (Batu and Sapiie 2017), be considered cause lawyers? They would argue they are working for their vision of the good society. Scholars have criticised the reluctance of cause lawyering scholars to distinguish between “worthy and unworthy causes” (Scheingold and Sarat 2004, 5), for promoting moral equivalency between legal advocacy groups with vastly different, even opposite, goals (Cummings 2011b, 370).

Given the broad variety of terms and concepts with broadly similar meanings, does it ultimately matter which is used? One purpose of this brief review of the history of public interest law in the US is to demonstrate how this legacy continues to shape contemporary understandings of public interest lawyering. Although public interest law is now understood to encompass a wide array of practices, such as legislative lobbying, social movement organising, community legal empowerment and public information campaigns, the history of public interest law in the US as being focused on rectifying underrepresentation and emphasising strategic impact litigation continues to be influential.

The model of public interest lawyering that developed in the US was highly contingent on constitutional guarantees of rights, the existence of powerful independent courts and an organised and autonomous legal profession (Munger, Cummings, and Trubek 2013, 365; Epp 1998, 2–3). These supportive elements are not always present in other countries, and certainly not in Indonesia. Despite this, all over the world, lawyers seek to mobilise the law to promote social justice – including in countries with vastly different political and institutional histories to the US. In Indonesia, for example, postcolonial debates also influenced LBH’s approach to legal aid, as the next chapter will show.

What term is appropriate to describe the types of activities and practices conducted by Indonesians who use their legal skills to advocate for social and political change? In Indonesia, a variety of terms are used. LBH commonly refers to its legal aid lawyers as *pengabdian bantuan hukum*. The English translation is a little awkward but the word *pengabdian* emphasises service or devotion to a cause, while *bantuan hukum* means legal aid. A direct translation is ‘legal aid servant’. Historically, some LBH offices have also used the term *pengacara publik*, or ‘lawyer of the public’, a term that suggests a reference to the public interest. However, there is no one term used consistently across Indonesia to describe people who deploy law to promote social reform and address underserved legal needs. Other commonly used terms include *aktivis hukum* (legal activist), *pengacara hak asasi manusia (HAM)* (human rights lawyer), *aktivis hukum dan HAM* (legal and human rights activist) or sometimes simply *pengacara dan aktivis HAM* (lawyer and human rights activist) or *advokat dan aktivis HAM* (advocate and human rights activist).

‘Public interest law’ and ‘cause lawyering’ are both imprecise terms and both come with their own baggage. I find ‘public interest law’ to be too restrictive for the Indonesian case, because of its association with the US experience and the historical emphasis on top-down impact litigation. I agree with Munger, Cummings and Trubek that one of the advantages of cause lawyering is that it encourages a focus on cause lawyers and consideration of how they mobilise the law to advance social change (Munger, Cummings, and Trubek 2013, 365). Ultimately, however, I am less concerned with pinning down the most accurate label to represent the Indonesian experience than I am with describing and exploring the practices that constitute it. Acknowledging there are valid criticisms associated with the term ‘cause lawyering’, I find it sufficiently broad and inclusive to accommodate the practices engaged in by LBH lawyers, and, as such, this is the term I have adopted for this project.

2.6 Political and institutional factors affecting the development of cause lawyering

Opportunities for cause lawyering and the shape that it takes in different countries and contexts is highly dependent on the structure of the political and legal institutions in place. This thesis argues there is a clear relationship between the form of cause lawyering practiced in Indonesia and democratic quality. Consideration of political and institutional factors that provide opportunities for cause lawyering, and their relationship to democratic change, is therefore vitally important.

As discussed, the early US model of cause lawyering was associated with legal liberalism and relied on the courts being an appropriate venue to promote social change (Marshall and Hale 2014, 305). In a seminal work, Charles Epp argued constitutional guarantees of rights, leadership from reform minded judges and public rights consciousness were important for legal mobilisation in the United States. But also essential was what he termed a “support structure” for legal mobilisation of rights-advocacy organisations and lawyers, and sources of financing (Epp 1998, 2–3).

What factors have been important for the development of cause lawyering in other areas of the world? In a comparative review of legal mobilisation for justice in Asia, Munger, Cummings and Trubek identify autonomy of law and political openness as the two most important factors influencing opportunities for and forms of legal mobilisation (Munger, Cummings, and Trubek 2013, 376–80). They elaborate these broad factors further, citing judicial independence, the presence of a vibrant professional community, a range of available practice sites, particularly CSOs, the ability to freely communicate with the public, and opportunities to mobilise politically as highly influential in the mobilisation of law for social justice (Munger, Cummings, and Trubek 2013, 398–401). Another comparative study asserts the growth of cause lawyering in Asia can be attributed to: “democratisation..., transnational migration of norms and ideals, and judicial recognition of courts’ institutional role in shaping public law discourse” (Yap and Lau 2010, 2).

Indonesia is particularly relevant for the study of cause lawyering and legal mobilisation because it has undergone such fundamental change in its institutional and political environment over the past two decades, involving many of the factors mentioned above. Before reflecting on how these changes affected the shape of cause lawyering in Indonesia in Chapters 4–8, however, it is important to examine more deeply the kinds of structural factors considered to affect cause lawyering. The following section reviews theoretical literature and empirical case studies to identify the important political and institutional factors that influence the ability of lawyers to mobilise the law to promote social change. These include, but are not limited to, the government system or regime type, the independence of the judiciary, formal legal protection of rights and accessible forums in which to claim these rights, the development of civil society, funding, the profession, and legal education. These factors are worth considerable reflection because as this thesis will show, they influence the form cause lawyering takes.

2.6.1 *Regime type*

The openness of a country's political system clearly has a major impact on the opportunities available for cause lawyering. Democratic settings are generally considered to provide a more favourable environment for efforts to mobilise the law for social change (Cummings and Trubek 2008, 33; Sarat and Scheingold 1998a, 5; Scheingold and Sarat 2004, 131; Yap and Lau 2010, 2; Chen and Cummings 2013, 455). Sarat and Scheingold, in particular, make the link between cause lawyering and democratisation quite explicit, even if they do recognise the important role of cause lawyering in authoritarian settings. For example, they describe a "natural affinity between cause lawyering and democratisation" (Sarat and Scheingold 2001b, 14), and state there is "no doubt" cause lawyering is "more likely to flourish in liberal democratic settings" (Scheingold and Sarat 2004, 131). They further state that: "liberal regimes with well entrenched rule-of-law systems can be expected to provide more and different opportunities for cause lawyering than authoritarian regimes that do not afford their citizens even the most minimal of human rights" (Sarat and Scheingold 1998a, 5).

Indeed, democratic transition has been identified as crucial to the development of cause lawyering in countries including Brazil, South Africa, South Korea, and Taiwan (Chang 2010; Baik 2010; Goedde 2009; Vieira 2008; Klug 2001). Scholars point to a range of developments associated with democratisation as being supportive of cause lawyering, such as constitutional and legal guarantees of rights and the development of judicial independence, issues discussed in detail below (Cummings and Trubek 2008, 33–34; Baik 2010, 116).

In a broader sense, however, "political openness" has a major impact on the opportunities available for cause lawyering. As Munger, Cummings and Trubek note, "the power of organisations, movements, and individuals to oppose the government through politics has a direct relationship to their capacity to mobilise law for social change" (Munger, Cummings, and Trubek 2013, 378). When a government is tolerant of political dissent, where there is greater political space for the discussion of social issues, cause lawyering becomes a more viable prospect (Cummings and Trubek 2008, 34). More open political systems provide stronger guarantees of freedom of expression and association, supporting the development of a strong civil society sector and a free media, factors also considered supportive of legal mobilisation (Munger, Cummings, and Trubek 2013, 379, 399–400; Rekosh 2008, 62). Yet although a more open political environment can provide more space for legal mobilisation, it may also mean cause lawyers find using the courts is less necessary (Munger, Cummings, and Trubek 2013, 378). In politically open regimes, activists and social movements may have greater freedom to engage in political advocacy or direct lobbying of the legislature, so they may find they need to use litigation less frequently, or supplement it with other strategies (Goedde 2009, 86; Chang 2010, 140; Klug 2001).

While open regimes tend to provide more opportunities for cause lawyering, cause lawyering exists, and may even thrive, in more restricted political environments. Indeed, LBH proved as much under the New Order. One of the defining features of authoritarian regimes is that they "do not offer their citizens an expansive collection of rights designed to protect the individual from excesses of state power, nor are there legal traditions supporting the rule of law over the exercise of political power"

(Marshall and Hale 2014, 315). In oppressive environments where opportunities for political participation are limited, civil society is weak and the media tightly controlled, channelling grievances through the courts may be one of the safest options available for those seeking social or political change. And despite their sometimes-sweeping statements about the compatibility between cause lawyering and democratisation, Scheingold and Sarat also acknowledge liberal democracy is by no means a prerequisite for cause lawyering. “Despite its affinities with liberal democracy,” they state, “the fewer the democratic alternatives, the more vital cause lawyering becomes” (Scheingold and Sarat 2004, 133). They also note cause lawyering has shown itself to be “surprisingly adaptable to ostensibly hostile settings” (Scheingold and Sarat 2004, 133). This is a key point. Cause lawyering might be more commonly associated with liberal democratic contexts, but it is present in all types of regimes, “even in the most authoritarian states” (Munger, Cummings, and Trubek 2013, 372), and in these circumstances can be a crucial means of holding the state to account.

There are many examples of the “judicialisation of politics” in authoritarian settings (Fu 2011, 353; Moustafa 2007, 201). Under authoritarian regimes, courts can provide a forum for free speech, a space for activists to bring contentious or potentially politically sensitive issues to public attention. As Hershkoff argues, “the very act of litigation affords a juridical space in which those who lack formal access to power become visible and find expression” (Hershkoff 2002, 9). This was also the case in Indonesia under Soeharto’s New Order, where cause lawyers defended those accused of subversion and took on other politically sensitive cases, as Chapter 3 will discuss. With virtually no hope of success, these trials functioned as “political theatre”, drawing significant public attention and helping to promote democratic values and aspirations for the rule of law in a highly repressive environment (Lindsey and Crouch 2013, 624).

2.6.2 Legal system

Scholars have argued that the legal system of a country (that is, common law or civil law) can influence the possibilities available for cause lawyering (Chen and Cummings 2013, 455). As noted, in its early years, cause lawyering was commonly associated with “sweeping test cases” in the US federal courts (Ellmann 1998, 359), where federal court victory could establish precedent with implications for underrepresented communities. By contrast, the main sources of law in civil law countries are codified statutes – for example, criminal, civil, or commercial – that are designed to be comprehensive and “take into account all social interactions and potential conflicts” (Meili 1998, 497). In civil law systems, where formal systems of judicial precedent are usually absent, the courts have less room for flexible or innovative interpretations that deviate significantly from the rules and procedures outlined in the codes (Jigmiddash and Rasmussen 2013, 581). But this does not mean cause lawyering is absent from these contexts. In fact, cause lawyering literature describes traditions and analogues of cause lawyering in many civil law countries, including Argentina, Brazil, France, Mongolia, South Korea, Taiwan, Thailand and Indonesia, to name just a few (Meili 1998; Vieira 2008; Willemez 2005; Jigmiddash and Rasmussen 2013; Baik 2010; Goedde 2009; Munger 2015; Lev 1998). Constitutional Courts, present in most civil law countries, provide an avenue for strategic or impact litigation similar to the form practiced in the United States. Further, the limitations of the civil

law system may, in fact, encourage cause lawyers in these countries to engage in practices commonly associated with political activism. As Sarat and Scheingold note, “the timidity of the courts in civil law systems and the frustration of cause lawyers with litigation can lead them to adopt more overtly political strategies” (Sarat and Scheingold 1998a, 6). As this study will later show, this has been an important factor motivating cause lawyers at LBH to pursue more political strategies.

2.6.3 Judicial independence

Closely related to political openness is the independence of the judiciary. In states with an established rule of law, courts are generally expected to be impartial and free from government intervention, allowing them to protect or extend rights to individuals (Halliday 1999, 1047). A strong and autonomous judiciary provides a means to mobilise the law to challenge political power and promote social justice (Munger, Cummings, and Trubek 2013, 378). Judicial independence is commonly described as a critical factor in the development of cause lawyering (Munger, Cummings, and Trubek 2013, 376–77, 398; Cummings and Trubek 2008, 33; Baik 2010, 119; Chang 2010, 137). This seems relatively self-evident. If cause lawyering is to be successful, the courts must be free of executive intervention and willing to rule against the interests of the state to protect or extend rights.

In many countries around the world, however, legal systems function to serve the needs of the ruling powers (Ellmann 1998, 363). This is true in many of the postcolonial countries of Asia where judicial systems may be highly vulnerable to intervention from the executive branch of government. In many Asian states, the judiciary ends up acting more to protect the interests of the government rather than as an independent check on state power (Munger 2015, 304). This tendency is often characterised as rule by law rather than rule of law (Carothers 1998, 97). Indeed, Indonesian legal activists from LBH often invoke the phrase ‘rule by law’ when criticising state overreach (“Indonesia Lawyers Club” 2020).

Authoritarian governments may exert pressure over the courts through a variety of means, such as control of bureaucratic appointments and opportunities for advancement, constitutional amendment or even direct political pressure (Munger, Cummings, and Trubek 2013, 377). In environments where the rule of law is poorly developed, constitutions and statutes may be viewed as little more than paper documents, subject to change or difficult to enforce (Abel 2011, 314). Judges may be “subservient, ideologically hostile, or simply corrupt” (Ellmann 1998, 363). Courts may refuse to take jurisdiction over sensitive or public interest cases, reject cases for technical reasons, or, in the worst cases, retaliate against the lawyer or client, as discussed below (Munger, Cummings, and Trubek 2013, 398). Even the rare independent-minded judges under authoritarian regimes may be hamstrung by oppressive legal codes or statutes they are required to enforce (Ellmann 1998, 363). These pathologies were all present in Indonesia under Soeharto.

Despite the formidable challenges associated with cause lawyering under authoritarianism, cause lawyering persists in these environments. Indeed, as stated above, “nowhere is cause lawyering more important than in regimes where even a rudimentary commitment to the rule of law is lacking” (Scheingold and Sarat 2004, 132). When there is only limited judicial independence, legal strategies

may still be useful as a means for shining a spotlight on rights abuses by the state, or gaining greater support for a cause (Munger, Cummings, and Trubek 2013, 399; Meili 1998, 492). Ellmann offers a helpful summary of the attraction of cause lawyering under authoritarian regimes with limited judicial autonomy:

“[E]ven if court victories will be rare, court action may be useful... There may well be symbolic, and important, victories to be won through court proceedings that end in legal defeat; bringing justice to public attention is, in and of itself, a significant human rights strategy... Individual victories can be won, even when sweeping impact litigation cannot prevail, and these individual victories... may be important to the viability of political struggles” (Ellmann 1998, 366).

As mentioned, LBH made savvy use of the courts under the authoritarian New Order, publicising rights abuses and holding the state to account. As I will demonstrate, this style of cause lawyering is growing in prominence again, as the state is becoming increasingly closed to more accommodative versions of cause lawyering.

It is important to note that although courts can provide a forum for airing grievances in a constrained political environment, pursuing controversial causes through the courts can entail significant risk. Cause lawyers operating under authoritarian regimes may be subject to significant state repression (Munger, Cummings, and Trubek 2013, 379; Baik 2010, 117). In 1986, for example, LBH founder Adnan Buyung Nasution had his registration revoked by Minister of Judicial Affairs Ismail Saleh after an outburst in his defence of a prominent government critic (Lev 1998, 440) (see Chapter 3). Even if cause lawyers do not face threats to their personal security or safety, engaging in politically sensitive cause lawyering can risk backlash from a hostile state, and potentially lead to further restrictions on judicial independence (Scheingold and Sarat 2004, 132). Just as this was true of Indonesia under authoritarianism, it is now re-emerging as a problem in democratic Indonesia, as this study will show.

2.6.4 Legal rights and forums in which to claim these rights

In addition to judicial independence, the presence of constitutional and legal rights frameworks are recognised as key factors in the development of cause lawyering, and, like judicial independence, have been highlighted in a broad range of contexts, including in Argentina, South Korea, Taiwan, and Hong Kong (Tam 2010; Cummings and Trubek 2008, 34; Baik 2010; Chang 2010; Goedde 2009; Ginsburg 2007; Meili 2009). The third wave of democratisation occurred during a time of rising international human rights activism and awareness, and resulted in a new set of democratic constitutions containing strong provisions on civil and political rights (Vieira 2008, 232; Meili 2009, 53–54). In Indonesia, too, one of the landmark reforms of the post-Soeharto era was the insertion of extensive human rights protections into the amended constitution (Lindsey 2008, 29). That the constitutional guarantee of rights provides the basis for individuals to claim or defend their rights is readily apparent. Rights contain notions of entitlement or expectation and, as such, help to frame how

people think about perceived injustices (Scheingold 2004, 131). Inconsistencies between written legal rights and state actions that encroach on these rights creates openings for cause lawyering to develop (Fu and Cullen 2008, 123). In countries where rights are formally recognised, cause lawyering can provide a means to “mobilise the newly minted rights regime” (Cummings and Trubek 2008, 34).

Beyond the constitutional acknowledgement of rights, however, the presence of a court with powers of constitutional review is a vital institutional channel for individuals to assert these rights (Baik 2010, 121). Independent constitutional courts have been described as important enabling factors supporting the rise of public interest litigation in countries including Indonesia, Mongolia, South Korea, and Taiwan (Jigmiddash and Rasmussen 2013, 582; Chen and Cummings 2013, 456; Ginsburg 2007, 51; Chang 2010). Scheingold and Sarat describe constitutional litigation as “the bedrock of cause lawyering”, noting it can offer “institutional access, legitimacy and bargaining leverage” (Scheingold and Sarat 2004, 130). In some countries, the establishment of administrative courts have also been important for creating new forums for citizens to challenge government actions (Chang 2010; Baik 2010, 116).

It is important to recognise, however, that an increase in formal legal rights or the establishment of new institutional structures like constitutional courts or administrative courts are no guarantee cause lawyering will thrive. They are important foundations, but judges “must be receptive to human rights arguments and actively use the new legal tools... in response to cases brought by cause lawyers” (Tam 2010, 679). Many transitional or newly democratic regimes have passed progressive new statutes and established new democratic institutions that can hear rights claims. However, if the judiciary or related new institutions are inhabited by remnants of the old regime, if they are unwilling to grant standing to civil society organisations or individual citizens, or if they remain resistant to rights claims, cause lawyering may face significant challenges (Meili 2009). This has also been a challenge in Indonesia, where courts have shown an inconsistent response to rights claims, despite the extensive protections offered by the amended constitution (see Chapter 5). While constitutional litigation may not always be successful, it can be used strategically to raise awareness among the public, stimulate debate, or encourage the legislature to engage in reform (Chang 2010, 136; Scheingold 2004, 131). These considerations are a key element of discussions in Chapters 5-8.

2.6.5 Civil society

A country’s civil society sector, and the freedom with which CSOs are permitted to operate by the ruling regime, can play a significant role in providing opportunities and resources for cause lawyering, as well as shaping cause lawyering practices and approaches (Munger, Cummings, and Trubek 2013, 400). CSOs have historically been the main practice site for cause lawyering in the United States and they are also the primary vehicle for cause lawyering in many countries of the Global South, where other opportunities for social justice lawyering may be limited (Munger, Cummings, and Trubek 2013, 400; Ellmann 1998). More open regimes tend to place fewer restrictions on civil society, and allow it to develop more freely, offering expanded practice sites for cause lawyering (Munger, Cummings, and Trubek 2013, 400–401). Democratisation, and the

increased opportunities to mobilise law that often accompany it, may also lead to CSOs (including those not outwardly focused on law reform) adopting legal strategies as a means to better serve their beneficiaries (Cummings and Trubek 2008, 36; Farid 2013, 425; Meili 2009, 46; Rekosh 2008).

Beyond the role of CSOs as important practice sites for cause lawyering, broader civil society can fulfil important supportive functions. An active and free civil society sector allows the formation of more productive alliances that can strengthen the impact of legal mobilisation when the courts are weak (Munger, Cummings, and Trubek 2013, 400). Civil society organisations can, and often do, make human rights claims on the state, collaborating with cause lawyers in activities to supplement and sustain the momentum of legal advocacy, such as advocating for legislative reform, conducting public media campaigns and demonstrations, and engaging in other policy advocacy activities (Goedde 2009, 78–79; Meili 1998; 2009; Jigmiddash and Rasmussen 2013; Chang 2010, 137; Ginsburg 2007; Baik 2010, 130; Hsu 2019). When marginalised groups have greater freedom to organise and pursue their interests, cause lawyers can partner with them to increase pressure on the state and hold it to account (Fu and Cullen 2008, 122). Meili, for example, found cause lawyering was more successful where local grassroots social movements were established, organised and unified (Meili 1998, 511). By the same token, cause lawyers can provide legal representation to and support civil society actors when they face legal threats, for example, from participating in direct action activities that provoke the ire of authorities (Sarat and Scheingold 2006b, 9).

These are all critical considerations in the examination of LBH, the most prominent site for cause lawyering in Indonesia, and one of the most prominent CSOs in the country. At times, LBH has acted more like a typical campaigning human rights organisation than a cause lawyering organisation (Aspinall 2005, 103). During the late New Order period it performed an important convening role in civil society, and it has begun to take up this mantle again over recent years (see Chapter 8).

2.6.6 Funding

Availability of sufficient financial resources is critical in providing opportunities for cause lawyering, which, as stated, is typically not oriented toward profit. In many countries of the Global South, there is no established tradition of pro bono work among private legal firms (Abel 2011, 314; Yap and Lau 2010, 7). Consequently, cause lawyers most commonly work from CSOs with access to sustainable sources of donor funding (Chen and Cummings 2013, 464; Munger, Cummings, and Trubek 2013, 400). This funding rarely comes from government sources. When governments do provide funding, it is often for less politically sensitive activities, such as traditional legal aid (Ellmann 1998, 353). This was the case with LBH, which was funded by the Jakarta government for some years, although only for case-based work. In most cases – and especially in cases where cause lawyers seek to challenge powerful domestic interests – donor funding is likely to be drawn from foreign sources (Ellmann 1998, 354).

Scholars have argued the proliferation of cause lawyering across the globe is connected to trends in the international development sector (Chen and Cummings 2013, 467; Cummings and Trubek 2008,

18; Ellmann 1998). As far back as the 1960s, the US promoted legal reform abroad to encourage economic development, as part of the ‘law and development’ movement (D. Trubek and Galanter 1974; Cummings 2008, 960; Lindsey 2004b, 16). This modernisation project quickly came under criticism for being “ethnocentric and naïve” (D. Trubek and Galanter 1974, 1081).¹⁷ From the early 1990s, donors changed orientation to promoting ‘the rule of law’. Organisations like the Ford Foundation and the Open Society Institute, as well as multilateral and bilateral donors like the United Nations and the US Agency for International Development (USAID), funded cause lawyering initiatives in countries of the Global South as a way of promoting resistance to authoritarian power and expanding access to justice (Cummings and Trubek 2008, 18; Cummings 2008, 963–64). The support was largely directed at supporting activities such as strategic “impact litigation, legal aid, pro bono and clinical legal education” (Cummings and Trubek 2008, 29). LBH received significant flows of foreign funding throughout the 1990s, as Chapter 3 discusses.

Consideration of funding is important, as it may influence not just opportunities for cause lawyering, but also the activities undertaken, and causes pursued, by cause lawyers (see Chapter 4). Reliance on the sometimes-fickle support of foreign donors can restrict CSOs (Abel 2011, 314). For example, scholars have noted that foreign donors are much more likely to lend support to initiatives to strengthen civil and political rights while giving less prominence to economic and social rights (Halliday 1999, 1048). Another consequence of dependence on external funding is that cause lawyers may find grants are only provided for activities in line with neoliberal values (Scheingold 2001, 396–98). Indeed, foreign funders’ rule of law orientation has sometimes raised concerns about western legal imperialism (Cummings 2008, 964), much as did the law and development movement (Lindsey 2004b, 16). White notes women’s rights activists in Ghana were encouraged to focus on the proceduralist goal of providing “access to legal services” rather than addressing substantive concerns facing local women, partly because such concerns were not a priority for their global funders (White 2001, 62). Further, a dependence on foreign money can compromise CSOs’ domestic standing, particularly among government figures suspicious of foreign influence (Abel 2011, 314). This has often been the case for LBH, which regularly faces questions about the sources of its funding when it raises sensitive issues (CNN Indonesia 2019b).

2.6.7 The legal profession

Cause lawyering is, of course, also dependent on the lawyers themselves. The strength and independence of the professional community, as well as the willingness of lawyers to transgress conventional understandings of professionalism and align themselves with a cause, can have a major impact on the practice of cause lawyering (Chen and Cummings 2013, 464; Chang 2010; Baik 2010). As Munger, Cummings and Trubek note, if cause lawyers are to challenge government policies, or bring rights violations to public attention without fearing for their safety or security, the profession must be able to operate with a degree of independence, and as such, this factor is closely related to the openness of the state (Munger, Cummings, and Trubek 2013, 399).

¹⁷ See discussion in Chapter 3.

While lawyers are a critical part of cause lawyering efforts, the relationship between the formal profession and cause lawyering is often ambivalent. Support from the profession for cause lawyering efforts is by no means assured. By identifying with the goals of their clients, or choosing to accept cases based on the causes they believe in (Scheingold and Sarat 2004, 9), cause lawyers may violate key features of traditional understandings of legal professional ethics across a range of jurisdictions.

The standard (US) conception of the lawyer's professional role, for example, is underpinned by two principles: partisanship and neutrality (Postema 1980, 73). Under this standard conception, lawyers are expected to provide morally detached representation, and should therefore resist involvement in the client's cause (Boon 2014, 24). Cause lawyers transgress these conventional understandings of professional lawyering as being characterised by "moral neutrality and technical competence" (Sarat and Scheingold 1998a, 3) and directly bring their own morals and beliefs to bear on their work (Scheingold and Sarat 2004, 2).

Scholars have suggested the inquisitorial system in civil law countries (which includes Indonesia) provides more room for "moral activism" by lawyers (Nagorcka, Stanton, and Wilson 2005, 452).¹⁸ Indeed, the Indonesian Advocates Code of Ethics appears to allow for less detached legal conduct in the lawyer-client relationship. According to Article 3(a) of the Code, advocates can refuse to provide counsel or legal aid if a case is not within their area of expertise "and is contrary to their [personal] conscience".¹⁹ At the same time, however, advocates must be free and independent, should not be influenced by anyone, and are "obliged to struggle to uphold human rights in the Indonesian rule of law state" (Article 3(c)). This is consistent with the findings of my research. LBH lawyers believe they must not be emotionally invested in their cases, but would typically refuse to represent military figures over ethical concerns.

Even if professional standards in Indonesia provide greater room for personal morality, other factors are less supportive. In many countries around the world, professional associations may not encourage cause lawyering, or even pro bono activities or work for "needy" clients (Abel 1998, 97; Vieira 2008, 257; Cummings and Trubek 2008, 40–41). This is particularly the case in countries where the bar is weak or poorly organised (Cummings and Trubek 2008, 40–41). Indeed, in Indonesia, the weak and disunited legal profession has provided little leadership or even coordinated support to reform efforts in the post-Soeharto period (Lev 2007, 410). Individual firms have, however, occasionally been supportive of legal aid organisations. By the same token, in some countries, the organised bar has resisted the development of pro bono cause lawyering, fearing it would encroach on their revenue (Cummings and Trubek 2008, 41).

¹⁸ Although beyond the scope of this discussion, I recognise that there are different understandings of legal ethics in the adversarial systems in common law jurisdictions like the US, England or Australia, and the inquisitorial systems used in civil law countries (Nagorcka, Stanton, and Wilson 2005; Leubsdorf 2001, 15; Smith 2006, 501).

¹⁹ Notably, however, the same article notes that they cannot refuse cases over "differences of religion, belief, ethnicity, ancestry, gender, political beliefs or social standing".

Internal factors within the profession can also affect cause lawyering. The demographic representativeness of the profession can affect its accessibility (especially to poor or marginalised clients) and lawyers' commitment to cause lawyering practice (Abel 1998, 95). Scholars have also noted an economically privileged, homogenous profession may be less likely to take on controversial or unpopular cases or causes (Abel 1998, 96; Baik 2010, 121). In Indonesia, the legal profession has historically been very small for the size of the population (Lev 2007, 395), although it is very far from homogenous. Accurate data is hard to come by but according to data from the Indonesian Advocates Association (Peradi), in 2011 there were only about 20,000 registered lawyers – a tiny figure for Indonesia's population of about 250 million (Lawyers for Lawyers n.d.).

2.6.8 Legal education

Legal education has been of only limited importance in the development of forms of cause lawyering in Indonesia, but it is worth mentioning briefly because of both international and local factors influencing cause lawyering. The training of foreign lawyers in US (and other Global North) law schools has been described as a critical factor in the spread of cause lawyering in countries of the Global South (Cummings and Trubek 2008, 37–39; Meili 2009, 47). Legal education was a significant aspect of the now widely discredited 'law and development' movement (D. Trubek 2016, 305). I do not want to overstate the influence of foreign legal education in the development of cause lawyering in Indonesia or suggest it has been a "transplant" from abroad, but it is important to acknowledge that LBH was founded by Adnan Buyung Nasution after he returned to Indonesia from studies in Australia. Buyung was reportedly inspired by his direct exposure to the provision of legal aid there, and returned to Indonesia determined to set up a free legal aid service, as Chapter 3 will discuss.

In many countries (including Indonesia) university legal education may be "largely irrelevant to practice or hostile to social change" (Abel 2011, 314). Meili, for example, has commented that legal education in Latin America is doctrinaire and emphasises memorisation of the legal codes over legal theory, interrogation of the function of law in society or clinical legal education (Meili 1998, 498–99; 2009, 46). This is also true of Indonesia, where law schools prioritise formal legal education and place little emphasis on critical thinking skills, socio-legal studies, human rights, or anti-corruption (Kelly and Susanti 2014, 39). In some countries, foreign donor support for clinical legal education programs at local law schools has also been influential, although the form clinical legal education has taken has not always followed US patterns (Rekosh 2008, 83–92). In Indonesia, too, there is a growing clinical legal education movement, developed with support of USAID, but only in a fraction of Indonesia's 300-plus law schools (Kelly and Susanti 2014, 39). While law schools have only had a limited impact on the development of cause lawyering in Indonesia, LBH has developed its own intensive training program to encourage cause lawyering practice, which it calls *Kalabahu* (*Karya Latihan Bantuan Hukum*, or Legal Aid Training), discussed in Chapter 4. This has arguably been of greater influence in encouraging the development of a certain style of cause lawyering than the nascent clinical legal education program.

2.7 Strategies of cause lawyering

Understanding the different strategies cause lawyers have at their disposal is critical in the examination of how Indonesian cause lawyers and cause lawyering has been affected by democratic change. The strategies pursued by cause lawyers are highly dependent on the political and institutional factors mentioned above, as well as cause lawyers' views on the state, the legal system and their roles as lawyers. Which strategies or tactics cause lawyers view as most viable for achieving social change can change according to the quality of democracy, as this thesis will show. Cause lawyering is commonly associated with litigation, but it may encompass a wide range of practices, from community organising and community legal empowerment, to legislative lobbying and public policy advocacy, street protests, media campaigning, and more. Many of the common strategies of cause lawyering have already been mentioned in the discussions above, and as such I recap them only briefly here.

Cause lawyering is commonly associated with litigation. This is hardly surprising, given the education, socialisation and experiences of lawyers (McCann and Silverstein 1998, 262). Litigation may take the form of strategic impact litigation designed to reform the law or defend the rights of groups of people, or individual case defence (Chen and Cummings 2013, 209). As noted above, constitutional litigation has been described as “the bedrock” of cause lawyering (Scheingold and Sarat 2004, 130). But individual case defence can also be an important cause lawyering strategy. As this thesis will demonstrate, even when individual cases are taken on, they are usually used to make broader points about the cause. In the difficult Chinese context, for example, cause lawyers often actively seek out sensitive criminal cases, and use these cases to challenge state power, protect citizens' rights and promote due process and the rule of law (Liu and Halliday 2011, 832). In many of these cases, cause lawyers may have little hope of securing victory, but believe by exposing abuses of executive power, they can attract the attention of the media and hopefully reduce the possibility of similar incidents recurring (Meili 1998, 492). At times, cause lawyers may face a dilemma over whether they should pursue individual case defence or focus on impact litigation or class action type cases that will affect large groups of people. This is a problem LBH has grappled with throughout its history, and is a key consideration of its ideology of legal aid, ‘structural legal aid’. As this project will show, there appears to be an association between the quality of democracy and emphasis placed on big target strategies.

While litigation may be the most widely recognised form of cause lawyering, many cause lawyers spend little time doing “traditional” lawyering (Levitsky 2006, 147). Cause lawyers, including cause lawyers at LBH, are often well aware of the limitations of pursuing legal action and may choose to prioritise activities such as community organising, public legal education, rallying supporters, coalition building, and political strategising (Marshall and Hale 2014, 306; Levitsky 2006, 147; Cummings and Eagly 2001; McCann and Silverstein 1998). There is now a significant body of scholarly work looking at cause lawyers who work with social movements (Cummings 2020; Cummings and Eagly 2001; Cummings 2017; Sarat and Scheingold 2006a). Collaborating closely with communities, cause lawyers aim to strengthen awareness of legal rights, which may prompt

communities to organise and independently take action to advocate for the needs of their communities (Marshall and Hale 2014, 306; Sarat and Scheingold 2006b, 11). Many cause lawyers may even become actively involved in more disruptive direct action tactics like street protests, alongside the social movements and communities they represent (Levitsky 2006, 147; Marshall and Hale 2014, 306). Yet even cause lawyers who prioritise community organising or community legal empowerment over litigation recognise that litigation can offer some benefits. As Chapter 6 will discuss, cause lawyers are aware litigation can:

“...raise expectations, spark indignation and hope, and stimulate a rights consciousness among movement constituents and supporters; it can help legitimise a movement’s goals and values, publicise the movement’s causes, and provide leverage in bargaining with powerful elites” (Levitsky 2006, 147).

Since the early days of public interest law, advocating for policy change through legislative lobbying and drafting new laws and regulations have been core tactics of cause lawyers (Marshall and Hale 2014, 304). This is usually, but not exclusively, an option only available to cause lawyers working in democratic contexts. As discussed, democratisation may provide new legislative and administrative channels for cause lawyers to contribute to policy change without having to face off against officials in the courtroom (Goedde 2009, 86). There are many examples of cause lawyers using legislative strategies following democratic transition (Klug 2001; Ginsburg 2007; Hsu 2019). Chang, for example, notes that following democratisation in Taiwan, legislative lobbying became “equally, if not more, important to public interest groups” (Chang 2010, 140). Such strategies may not come naturally to lawyers used to facing off against government figures in court. Many LBH cause lawyers are certainly uneasy about pursuing more accommodative strategies, as Chapter 7 will demonstrate. Of course, public policy advocacy does not only entail lobbying lawmakers or drafting legislation, other tactics, such as public education about the need for policy change and engaging the media, are also critical strategies (Chen and Cummings 2013, 260).

Another important strategy for cause lawyers in all kinds of political and institutional contexts is use of the media (both traditional and, more recently, social media). The capacity to communicate effectively with the public has been identified as a critical feature of successful legal mobilisation efforts and is a key strategy of cause lawyers, even in repressive environments (Munger, Cummings, and Trubek 2013, 399–400; Fu 2011, 351). Many cause lawyers collaborate with, and rely on, the media to publicise the cases they handle, expose government abuses of power to wider public scrutiny, and rally public support for their causes (Fu and Cullen 2008, 124–25; Jigmiddash and Rasmussen 2013, 571). One of the defining features of LBH under the New Order, for example, was its close collaboration with progressive media outlets critical of the regime, as Chapter 3 will show.

2.7.1 Engaging with the state

Finally, this thesis will examine a core strategic question that confronts “virtually all” cause lawyers: whether they should work with, or at least in close proximity to, the state, or maintain an adversarial

stance (Scheingold 2001, 383). This is a serious consideration for cause lawyers, as decisions about working in collaboration with or in opposition to the state can have consequences for the political and policy impact of cause lawyering (Scheingold 2001, 385).

This question is only of consequence to cause lawyers working in democratic or transitional contexts. In authoritarian contexts, cause lawyering is always an oppositional project. In fact, most cause lawyering scholarship assumes cause lawyers work in opposition to the state (Klug 2001, 266; Sarat 2001, 186). State transformation can, however, usher in new opportunities for working in collaboration with, or indeed inside, state structures, rather than solely in an adversarial manner (Scheingold and Sarat 2004, 136). Following the democratic transition in South Africa, cause lawyers entered the state and played a major role in shaping its constitutional and political reforms (Klug 2001, 265). As mentioned, this was a key dilemma faced by cause lawyers at LBH following the fall of the New Order in 1998, as the following chapters will discuss. Post-Soeharto Indonesia offered multiple opportunities for cause lawyers to work within or in collaboration with the state. They have been recruited into independent state bodies, such as the National Commission on Human Rights (*Komisi Nasional Hak Asasi Manusia*, Komnas HAM), or special task forces, such as the Judicial Mafia Task Force and the Judicial Reform Team at the Supreme Court. Some cause lawyers have gone on to serve in high state advisory roles, in legislative bodies, and even in diplomatic posts, such as ambassadors.

Scheingold states that cause lawyers' relationship with the state can generally be plotted along a continuum, with participation in or cooperation with state institutions at one end and adversarial or confrontational strategies at the other. How far along this continuum should one place cause lawyers who work on legislative reform with state agencies? The most important consequence of proximity to the state is that it inevitably involves a degree of compromise (Scheingold 2001, 390). Collaboration with powerful state institutions or actors typically discourages confrontation (Marshall and Hale 2014, 315). It is not hard to imagine the temptation to attenuate or discard more radical demands to maintain a productive working relationship with state agencies.

Although working within, or in close proximity to, the state may lead to cause lawyers ratcheting down their more extreme goals, it can also involve considerable advantages. NeJaime identifies four main benefits of working within the state (NeJaime 2012). The most obvious advantage is that it can open up access to state institutions and allow cause lawyers to shape policy or introduce reforms in those institutions (NeJaime 2012, 672). This element of access is not restricted to the cause lawyers themselves. NeJaime notes that the second advantage of working within the state is that cause lawyers inside state institutions can extend access to other civil society or social movement actors (NeJaime 2012, 675). Third, cause lawyers working within the state can also use the power of the state to undertake action that directly benefits the cause with which they identify. This typically only occurs when there is at least some overlap between the agenda of the government and the goals of the cause (NeJaime 2012, 678). Fourth, cause lawyers in government can help shape the opinions of government actors toward civil society and social movements, pushing them in a more favourable direction (NeJaime 2012, 687).

2.8 Types of cause lawyers

The final section of this chapter draws on the previous discussion of political and institutional structures supportive of legal mobilisation, strategies pursued and motivations, and presents three typologies or categories of cause lawyering. These typologies are particularly useful for examining how democratic change affects cause lawyers and the strategies they pursue.

Scholars have proposed various typologies for thinking about and analysing cause lawyers and their practices (Fu and Cullen 2008; Kilwein 1998). These typologies share many broad elements, although this thesis draws on the framework offered by Hilbink (Hilbink 2004). Hilbink presents a typology consisting of three versions of cause lawyering: ‘proceduralist lawyering’, ‘elitist/vanguard lawyering’ and ‘grassroots lawyering’. Hilbink sets out these categories by analysing lawyers against three characteristics that interact with one another. The first is lawyers’ *vision of the system*, that is, their understanding and vision of the political system, and their vision of the law and its role in society (Hilbink 2004, 663). The second key difference between the types relates to their vision of the *cause* they are pursuing, and whether they emphasise procedural or substantive justice. The third characteristic is the lawyers’ vision of the practice of *lawyering*, encompassing aspects such as their professional ethics and their relationship with clients (Hilbink 2004, 663).

Lawyers in the **proceduralist** category believe in an ideal vision of the law as being above politics, that it is impartial and objective. Their visions of the legal system are consistent with traditional liberal ideas about the rule of law (Hilbink 2004, 666). They view the legal system as “essentially fair and just” (Hilbink 2004, 665). Proceduralist lawyers trust the legal system, and therefore, believe once procedural flaws are addressed, justice can be achieved. Hilbink notes this type of lawyer tends to believe the legal system can act as a stabilising force, directing political or social disputes in nonviolent directions (Hilbink 2004, 667).

For this group of lawyers, the cause is the legal system and the rule of law. They aim to strengthen the legal system so it functions in a dependable, equitable manner, providing adequate representation to all clients who require it (Hilbink 2004, 668). Proceduralist lawyers’ work is not limited to expanding representation – they may also conduct advocacy designed to make sure the system functions fairly, for example, by seeking reductions in court fees. As Hilbink notes, this form of lawyering would seem to be at odds with definitions of cause lawyering that seek to alter some element of the status quo (Hilbink 2004, 668–69). Rather, proceduralist lawyers would appear to be working to legitimise the existing system and structures of power. He also recognises, however, when the state routinely neglects its obligations, this procedural emphasis can, in fact, be focused on altering elements of the status quo, by pushing the state towards meeting its promises to uphold rights (Hilbink 2004, 669).

Proceduralist lawyers’ vision of their role as lawyers is strongly influenced by traditional understandings of professionalism. They see the role of a lawyer as being defined by “moral neutrality and technical competence” (Sarat and Scheingold 1998a, 3). Proceduralist lawyers therefore tend to

view clients as individual cases and avoid personal identification with the causes of their clients (Hilbink 2004, 672).

A proceduralist approach to cause lawyering is therefore commonly associated with conventional legal aid, with its focus on expanding representation. As this thesis will show, LBH lawyers have often been uncomfortable with this kind of approach to cause lawyering, particularly during periods when Indonesian democracy has been weak or absent.

The next type of cause lawyering is what Hilbink refers to as **elite/vanguard**. These lawyers view the legal system as being capable of effecting broad social and political change. Hilbink notes they do not consider law and politics to be separate, and in fact acknowledge their legal activism as being a form of politics – albeit one they consider to be superior to demonstrations, protests or other forms of direct political activism (Hilbink 2004, 673). Given elite/vanguard lawyers strongly believe the legal system is capable of engendering change, they typically hold the courts and judges in high esteem (Hilbink 2004, 674).

Elite/vanguard lawyers also have a markedly different view of their cause or causes. As Hilbink states, “their goal is not to support professional values or the legal system, but to ‘change policy, law and social systems in such a way that the status of marginalised groups’ is improved.” (quoting Kilwein 1998, 189) (Hilbink 2004, 675). Their causes may therefore be manifold. Elite/vanguard lawyers emphasise litigation, believing this to be the most effective way to bring about change for a large population. They may often engage in broader advocacy work directed towards the legislature or the executive, although they pursue their cause through the use of legal arguments or strategies (Hilbink 2004, 677). Elite/vanguard cause lawyering is therefore directed up towards elites, and lawyers in this category may be less connected to their grassroots constituents (Hilbink 2004, 678).

Cause lawyers covered by this typology have a clear view of the lawyer’s role. They are professionals in that they have respect for formal procedures, such as the use of legislative challenges. However, they also transgress traditional understandings of professionalism to personally identify with their clients’ causes. Hilbink also notes in doing so, elite/vanguard lawyers select their clients and shape the approach used – the interests of individual clients can sometimes be subordinated to the broader political or ideological goals they are seeking to achieve (Hilbink 2004, 680).

As this project will show, the elite/vanguard form of cause lawyering has only been a viable cause lawyering strategy in Indonesia since the collapse of the authoritarian New Order in 1998. The introduction of new legal structures that followed raised hopes about the possibility of legal reforms to lead to social change.

The last of Hilbink’s types is **grassroots** lawyering. Grassroots lawyers, he notes, reject the lofty vision of the law as being above politics, and often view the legal system as “corrupt, unjust or unfair – an oppressive force” (Hilbink 2004, 681). Judges and the courts are viewed as acting in the interests of the powerful. Grassroots lawyers pursue social justice causes, but they recognise that the courts are

just one site where their activism may take place – “legal action is seen as only one weapon in a widespread assault on injustice” (Hilbink 2004, 681).

In their view of their cause, grassroots lawyers pursue substantive moral or political change. Their causes may be focused, such as in opposition to the death penalty, or gender inequality, or cast more broadly, such as the realisation of social justice (Hilbink 2004, 683). Hilbink notes grassroots advocacy is situated in the space between proceduralist and elite/vanguard lawyering in that it is concerned with the interests of the individual client but is also oriented towards achieving higher political goals. Individual cases may be used to draw attention to and provoke support for strategies to rectify broader patterns of injustice. Even when the chances of victory in the courtroom are slim, such cases may serve to pressure state or private sector actors to change their behaviour. In this way, their goals may be more modest than elite/vanguard lawyers, who see a major court victory as an important strategy for addressing injustice (Hilbink 2004, 684). As noted, not all grassroots lawyers pursue action through the courts, and some in fact question the value of litigation (Hilbink 2004, 685). They regularly combine traditional legal approaches with other strategies, such as community organising, public education and media engagement.

Grassroots lawyers have a distinctly different view of their role in comparison to the other categories. Grassroots lawyers work in an intimate and collaborative manner with their clients and their movements, blurring the lines between traditional understandings of the relationship between lawyers and their clients (Hilbink 2004, 688). They view themselves as “integrated into social movements, expressing a sense of belonging to something bigger than just a legal movement” (Hilbink 2004, 689). As Hilbink notes, in this way they are actively and consciously rejecting traditional notions of legal professionalism and moral neutrality to identify with the cause of their clients (Hilbink 2004, 689). Grassroots lawyers’ personal moral and political beliefs also influence the cases or clients they chose to take on. While proceduralist lawyers might take on any case provided it fits eligibility criteria (such as income level), and elite/vanguard lawyers might choose to defend an ‘uncivil’ civil society organisation to defend the higher principle of freedom of association, grassroots lawyers generally only take on clients they agree with or causes that reflect their values (Hilbink 2004, 689–90).

LBH cause lawyers most commonly fit within the grassroots typology. At the same time however, it is important to recognise these categories are not sharply defined – cause lawyers may adopt strategies from multiple approaches simultaneously. Indeed, as the next chapter will demonstrate, some Indonesian cause lawyers at LBH advocated a proceduralist, rule of law-oriented version of cause lawyering, while others were committed to an activist, grassroots version of cause lawyering that aimed to bring about transformative social change, and emphasised close collaboration with social movements.

It is not hard to see that cause lawyers’ views of the system, their causes and their roles as lawyers could vary with democratic change. I draw on these three typologies as I examine the trajectory of LBH from the authoritarian New Order period through to the present day, demonstrating that the quality of democracy appears to influence the form of cause lawyering practiced.

2.9 Conclusions

This chapter has provided a framework for the examination of cause lawyering in Indonesia, and how cause lawyering and cause lawyers have been affected by democratic change. In general terms, I understand cause lawyers as actors who use their legal skills in pursuit of moral or political causes in which they believe. This thesis follows the definition used by Marshall and Hale, who describe cause lawyering as “the set of social, professional, political and cultural practices engaged in by lawyers and other social actors to mobilise the law to promote or resist social change” (Marshall and Hale 2014, 303). This definition recognises that the work of cause lawyers encompasses more than just ‘lawyering’ – cause lawyers also work beyond the legal system, with governments and legislatures, in communities, and through the media. This broad definition captures the scope of activities conducted by cause lawyers at LBH, as the next chapter will show.

Acknowledging the US roots of the concept, this study argues that the form of cause lawyering that developed in Indonesia was mostly shaped by local political and institutional structures. As the following chapter will acknowledge, the founder of LBH, Adnan Buyung Nasution, was inspired to establish LBH following his experiences in legal aid organisations during his study in Australia. However, the form of cause lawyering that developed in Indonesia was not a transplant or directly derived from Australian, or indeed US, traditions. Indonesian cause lawyers developed their own theory of cause lawyering – ‘structural legal aid’ – as a distinctly Indonesian understanding and practice of cause lawyering.

The chapter also examined the political and institutional factors said to provide opportunities for cause lawyering. Broadly, the literature emphasises that liberal democratic constitutional systems involving strong legal protections of human rights, judicial independence and the rule of law (Cummings and Trubek 2008, 33), should provide more legal and political opportunities for cause lawyering. At the same time, the literature identifies many examples of cause lawyering in different (and often more limited) forms in authoritarian contexts, as LBH demonstrated under the New Order. The political and institutional factors outlined in this chapter are critically important, because the democratic transition in Indonesia involved the development of many of the factors thought to support cause lawyering. This thesis will argue, however, that in the case of LBH, liberal democratic reforms did not result in a more conducive environment for cause lawyering.

This analysis is strengthened by drawing on Hilbink’s three typologies of cause lawyers, which he devised based on lawyers’ views of the system, their causes and their roles as lawyers. Although these categories are not sharply demarcated, they are helpful for thinking about how democratic change has affected the choices made and strategies deployed by cause lawyers in Indonesia. This typology will aid examination of the extent to which cause lawyers adjusted their views and changed their approaches as different opportunities became available with democratic transition, and closed again with democratic regression.

The following chapter begins to apply these theoretical considerations to the Indonesian experience of cause lawyering. I start by focusing on the early development of Indonesian cause lawyering by LBH

under the authoritarian New Order. This discussion will provide the basis for examining how cause lawyers at LBH adjusted their views and practices once the state was no longer authoritarian.

Chapter 3: ‘Locomotive of democracy’ – LBH under the New Order

3.1 Introduction

In the previous chapter, I reviewed the literature on cause lawyering and legal mobilisation. In this chapter, I apply the theoretical framework established in Chapter 2 to the rich Indonesian tradition of cause lawyering practiced by LBH.²⁰ Established in 1970 as the Jakarta Legal Aid Institute, LBH, as mentioned, became the most prominent centre of civil society opposition to the authoritarian New Order regime and an outspoken critic of former President Soeharto. In addition to providing ‘traditional’ case-based legal aid for poor and marginalised Indonesians, LBH played an active role in advocating for democratic reform, and was often referred to in Indonesia as the “locomotive of democracy” (Nasution 2011, 12).

The chapter will examine LBH’s establishment in Jakarta in the 1970s, its aspirations for the rule of law, and the evolution of its approach as it developed more overtly political goals. LBH began by providing conventional legal aid to poor and marginalised Indonesians, particularly those affected by the New Order’s development projects. However, it quickly developed its own ideology of cause lawyering – ‘structural legal aid’ – which informed its approach to legal aid and political action.

This chapter will examine how cause lawyering was practiced by LBH under the authoritarian New Order, and explore the concept of structural legal aid and the extent to which it resonates with cause lawyering theory. The chapter will also describe the organisation’s evolution from a legal aid organisation to “the most prominent source of social-legal criticism in the country” (Lev 1987, 23). The chapter will also briefly discuss internal conflicts that emerged in the organisation during the 1990s, which resulted from tensions between lawyers who favoured a more conservative, strictly litigation-focused role and those committed to a more overtly political approach to cause lawyering.

3.2 The New Order regime

Before introducing LBH, it is important to first reflect on the political and social context of its establishment under the New Order, Soeharto’s right-wing military-bureaucratic authoritarian regime, which ruled Indonesia from 1966 to 1998 (Lindsey 2004a, 282). I do not intend to provide a comprehensive account of the New Order years, and there is insufficient space to do so. But as this thesis argues there is a strong relationship between the form of cause lawyering practiced and the nature of democracy, it is crucial to briefly look at the political and legal systems under which it was founded.

The New Order’s ascent to power began in the early hours of 1 October 1965, when a group of military officers known as the ‘30 September Movement’ killed six military generals in an apparent

²⁰ The most common English translation for the term YLBHI is ‘Indonesian Legal Aid Foundation’ but as noted in Chapter 1, I use the slightly awkward but direct translation ‘Indonesian Foundation of Legal Aid Institutes’ to emphasise that YLBHI is the central body that oversees 17 LBH offices in the provinces.

coup attempt (Melvin 2018, 2). General Soeharto, then the head of the Army's Strategic Reserve Command (*Komando Strategis Angkatan Darat*, Kostrad), blamed the attempted coup on the Indonesian Communist Party (*Partai Komunis Indonesia*, PKI) and used it as a pretext to gradually assume the presidency (Roosa 2006). What followed was a campaign of mass violence, which the military had been preparing for some time (Melvin 2018), which saw 500,000-1,000,000 alleged members of the PKI and its sympathisers killed and at least a million imprisoned. Buoyed by Cold War politics, the crushing of this supposed communist threat became the "founding myth" of the New Order (Lindsey 2021). It held onto power for the next 32 years through a combination of "terror and development" (Vickers 2013, 175).

Emphasising 'modernisation' and political stability, the New Order provided an oversized role for the military in social and political life, articulated through the doctrine of *dwifungsi* (dual function) (Aspinall and Fealy 2010, 5). This was the idea that the military had both a security and political role, and was used to justify the appointment of military officials to the legislature and senior positions in the civil service (Hadiwinata 2003, 52). Under the New Order, politics were tightly controlled. Elections were held, but victory for the government's military-sponsored political vehicle, Golkar (*Golongan Karya*, Functional Groups), was guaranteed (Hadiwinata 2003, 53). The regime permitted only two other political parties from the early 1970s on, and they were prevented from opening offices or campaigning at the local level, except in the period just before elections (Hefner 2000, 100–101; Hadiwinata 2003, 55–56). Despite early promises to observe the rule of law, the executive dominated the political system, "with the legislature and the judiciary firmly under its control" (Lindsey and Santosa 2008, 10).

Civil society was also under considerable pressure. The regime established corporatist organisations, which served as the only recognised representative (*wadah tunggal*) for various social groups (such as farmers, workers, fishermen, and journalists), effectively subordinating them to the regime (Beitinger-Lee 2013, 60–61). The New Order regime was suspicious of conservative Islam and sought to repress it (Lindsey and Pausacker 2016a). In the early 1980s, the government implemented a policy requiring all political and civil society organisations to adopt the national ideology, *Pancasila*, as their sole foundation (Hefner 2000, 121). Public gatherings and discussions were restricted (Hadiwinata 2003, 56–57). The media was tightly controlled, with media producers required to hold permits that could be easily revoked if they angered the government (Kakialatu 2007, 63).

At the same time as imposing these controls over political and social life, Soeharto presided over a period of spectacular economic growth. Reforms to liberalise the economy saw growth rates consistently above 5% for the three decades he was in power. Poverty fell dramatically, life expectancy rose and there were major improvements in infrastructure (Aspinall and Fealy 2010, 5). But alongside this economic growth, Soeharto developed a system of "institutionalised corruption" that benefited himself and his inner circle (Lindsey and Santosa 2008, 10).

One of the defining features of the New Order regime was significant violence and political repression, and a major factor in its longevity (Aspinall and Fealy 2010, 6). In addition to the horrific

events that saw the New Order come to power, the Soeharto period was marked by several major incidents of political repression and violence, such as the ‘Malari Incident’,²¹ the repression of student politics through the Normalisation of Campus Life measures (*Normalisasi Kehidupan Kampus*, NKK) in 1978,²² the *Petrus* killings of the 1980s,²³ and brutal crackdowns on Muslim protestors in Tanjung Priok, Jakarta, in 1984,²⁴ and Talangsari, Lampung, in 1989.²⁵ It was in this repressive environment that LBH was born.

3.3 Birth of the Indonesian legal aid movement

LBH is one of the oldest and most prominent CSOs in Indonesia. It was founded by Adnan Buyung Nasution (1934-2015), one of Indonesia’s most distinguished lawyers and statespeople. A skilled advocate, Buyung was known for being “voluble, articulate, flamboyant” and liked “to call a spade a spade” (Jenkins 1994). He was also well-connected politically and maintained ties with senior military and government officials throughout his career (Aspinall 2005, 111), even if he often drew their ire.

LBH’s origins extend back to the late 1950s, when Buyung, then a young assistant public prosecutor, studied at the University of Melbourne Law School. During his time in Australia, Buyung undertook an internship with the Supreme Court of Victoria and spent time with the office of the Public Solicitor in Sydney,²⁶ where he learned about the provision of free legal aid (Nasution 2011, 4). Inspired by his experiences in Australia, Buyung returned to Indonesia determined to introduce free legal aid and a public defender’s office in Indonesia (Nasution 1994, 115).

²¹ The ‘Malari’ incident (Malari is a contraction of the Indonesian phrase ‘*Malapetaka Lima Belas Januari*’, ‘The Fifteenth of January Disaster’) began as a student protest against the influence of foreign capital in Indonesia coinciding with the visit to Indonesia of Japanese Prime Minister Kakuei Tanaka. The demonstration quickly got out of hand, however, and devolved into anti-Chinese and anti-Japanese rioting. The military eventually put an end to the rioting, shooting dead 11 people. The Soeharto administration depicted the protests as an attempt by student and anti-regime protesters (especially those associated with the Indonesian Socialist Party (PSI)) to overthrow it, although it later emerged that infighting among New Order elites played a role in inciting the violence. (Leifer 2001, 173).

²² Following widespread student demonstrations in 1978, Minister of Education and Culture Daoed Jusuf introduced Decision No. 0156/U/1978 on NKK. This decision banned student political activity and expression on campuses, and limited student activities to those associated with student welfare or strictly academic discussions. Later regulations put student activities under the direct supervision of university rectors (Director General of Higher Education Instruction/002/DK/Inst/1978) and banned campus-wide student councils (Minister of Education and Culture Instruction No. 1/U/1978 and Minister of Education and Culture Decision No. 037/U/1979) (Human Rights Watch 1998a, 148).

²³ *Petrus* is a contraction of the Indonesian phrase *Penembakan Misterius* (Mysterious Shootings). These killings involved the murder of thousands of petty criminals and gangsters by military-linked death squads (Cribb 2000).

²⁴ This event is discussed in detail below, in relation to the HR Dharsono case.

²⁵ In this incident, which occurred on 7 February 1989, the military reportedly killed, tortured, and displaced residents of Talangsari village, Lampung, following allegations they planned to establish an Islamic state (Kuswandini 2008).

²⁶ The office of the Public Solicitor was the precursor to what is now known as Legal Aid NSW (Legal Aid New South Wales 2020).

When Buyung departed for Australia in 1958, Indonesia's first president, Soekarno, was still in power and Indonesia was at the end of its brief period of parliamentary democracy (1950-1957). During the parliamentary democracy period, constitutionalism and the rule of law (known in Indonesia as *negara hukum*, although the German term *Rechtsstaat* is also used) seemed assured (Lev 1987, 5). While they were only few in number, lawyers enjoyed a relatively secure status (Lev 1978, 44; 1987, 5). The political elite appeared generally committed to the ideas of constitutional democracy, the state mostly respected civil liberties, and "used coercion sparingly" (Nasution 2011, 6). On 5 July 1959, however, while Buyung was still in Australia, Soekarno disbanded the Constituent Assembly and issued a decree to reinstate the brief, original 1945 Constitution, which placed considerable power in the hands of the president. This put an end to the parliamentary democracy period and consolidated the introduction of his so-called 'Guided Democracy',²⁷ a period when "President Soekarno was the guide, and there was no democracy" (Palmier 1973, 296). This marked the beginning of authoritarian rule in Indonesia, which would extend through to 1998, when Soekarno's successor, Soeharto, finally stepped down.

Soekarno dismantled many of the structures that lawyers held dear. There was an erosion of the separation of powers and judicial independence (Lev 2000, 397). Law enforcement institutions, including the police, Prosecutor's Office and the Supreme Court, were brought under Soekarno's control (Nasution 2011, 6–8). Soekarno even passed a decree allowing him to intervene in the legal process in matters of national interest (Lev 1987, 6). The legal profession was significantly weakened and became quickly disillusioned with the status of *negara hukum*. According to Daniel Lev, "advocates suffered the most professionally, politically, and ideologically" under Soekarno (Lev 2000, 397). When he arrived back at the Public Prosecutor's Office in 1959, Buyung was deeply disappointed by the erosion in political freedom and judicial independence that had occurred in his absence (Nasution 2011, 8). Buyung lamented that prosecutors no longer seemed united by a shared professional lawyerly ideology – the Prosecutor's Office had become bureaucratic and hierarchical (Nasution 2011, 8).

Soekarno's 'Guided Democracy' lasted less than a decade, with the events of 1965 putting an end to the first president's rule by March the following year.²⁸ Despite the horrific violence marking Soeharto's ascent to the presidency, the New Order initially made promises to undo some of the excesses of the Guided Democracy period. There was renewed enthusiasm for bringing Indonesia closer to the *negara hukum* ideal that had been abandoned under Soekarno, with *negara hukum* ideas discussed regularly in the media, and among professionals and academics (Lev 2000, 309).

Lawyers were therefore optimistic about the New Order's capacity to bring about change. But this optimism faded quickly. Lev (1987, 11) notes that the New Order regime and private lawyers had

²⁷ Soekarno had declared martial law in 1957, generally considered the beginning of his 'Guided Democracy' period, although Buyung said he believed the demolition of constitutional democracy really only occurred after the 1959 decree (Nasution 2011, 6).

²⁸ As discussed in Chapter 1, most scholars date Soeharto's time in power from 1966, after Soekarno was compelled into signing the *Supersemar*.

very different understandings of *negara hukum*. While lawyers interpreted the concept to involve limitations on state power and the implementation of legal process, New Order leaders viewed law as “a state resource” (Lev 2000, 288). The New Order’s notion of rule of law was more like rule *by* law, with the law expected to serve the interests of the state, not act as a check on its power (Carothers 1998, 97). Growing disenchantment with state repression and the fact that New Order efforts to move Indonesia closer toward the *negara hukum* were more rhetoric than substance, were driving forces that inspired the birth of the legal aid movement.

After returning from Australia, Buyung increasingly came into conflict with prosecutors he felt were abusing their power (Nasution 2011, 8). When he was eventually dismissed from the Prosecutor’s Office in 1969, Buyung set about establishing a legal aid service in Indonesia. He took his proposal to the third annual congress of the Indonesian Advocates Union (*Persatuan Advokat Indonesia*, Peradin), the leading professional association for lawyers in Indonesia, the same year. Established by about a dozen prominent lawyers in 1963 (Lev 2008, 55), Peradin had become known for its commitment to judicial independence, due process and reform (Lev 2000, 287–88). Some members of the association were reportedly reluctant to provide support for Buyung’s proposal, fearing pro bono legal aid could encroach on their activities (Lev 1987, 13). In the end, however, Buyung received the backing of Peradin head Lukman Wiriadinata and secretary Suardi Tasrif (Kusumah 1995) and LBH was established in October 1970 as a pilot project of Peradin, with Buyung as its first director. It quickly became clear there was a great underserved need for legal services. For example, in its first year of operation, in 1971, LBH handled 595 cases (LBH Jakarta 2015, 13). According to one estimate, by 1985, more than 100,000 individuals had come to LBH seeking its assistance, and 30,000 of these cases had been represented in court (Lubis 1985a, 135).²⁹

The primary motivation for the establishment of LBH was to provide legal assistance to poor and marginalised Indonesians but even from its early days, the organisation defined its purpose in broader terms (Aspinall 2005, 100). A powerful motivational factor for lawyers at LBH was limiting abuses of state power through the (re)instatement of the *negara hukum* (Aspinall 2005, 101).

In setting up LBH, Buyung also sought and secured the support of progressive Jakarta Governor Ali Sadikin, who agreed to provide initial funding of about Rp 300,000 per month (Lev 1987, 13) (about US\$2,800 today), and issued a decision (*surat keputusan*) formalising the establishment of the institute (Nasution 2011, 8). Buyung also sought the endorsement of President Soeharto, through his powerful personal assistant, Major General Ali Moertopo (Aspinall 2005, 101). At the time, Moertopo was deputy head of Bakin, the State Intelligence Coordination Agency (*Badan Koordinasi Intelijen Negara*), and head of the intelligence mechanism Opsus (Special Operations, *Operasi Khusus*), which both played leading roles in stifling political opposition to the New Order regime (Nasution 2011, 9). Not only did Moertopo offer his backing, but he also even donated 10 motorcycles to support the organisation (Nasution 2011, 9). Buyung later noted this support was likely window-dressing,

²⁹ Todung Mulya Lubis, chair of YLBHI from 1983 to 1987, acknowledged this 30,000 figure was a rough calculation, based on LBH Jakarta’s average annual caseload of 2,000 cases over a period of 13 years, plus 4,000 cases from LBH’s provincial offices (Lubis 1985a, 135).

designed to placate international critics concerned about the democratic and human rights situation in Indonesia. In fact, just a few years later, Moertopo had Buyung arrested during the *Malari* riots of 1974, along with several other activists and government critics (Nasution 2011, 9; Leifer 2001, 173). Buyung was wrongly accused of playing a role in instigating the rioting, and spent nearly two years in prison before being released without charge (Tempo 2014a).

Although LBH was established in part as a response to growing repression under the New Order, Aspinall notes it was initially somewhat sympathetic to the government's modernisation project and early organisational documents included references to New Order-style terms like *modernisasi hukum* (legal modernisation), and *pembangunan hukum* (legal development) (Aspinall 2005, 101). This was also reflective of theoretical trends in development studies at the time, discussed in Chapter 2. Indeed, when established under Peradin in 1970, LBH even included a reference to modernisation in its organisational mission. LBH was founded to:

- Provide pro bono legal aid to all citizens who are unable to afford legal fees
- Develop and increase holistic legal awareness in the community and increase citizens' awareness of their rights
- Develop the law and law enforcement in accordance with the modernisation program (Winarta 2013, 50).

In accordance with these modernisation tendencies, Aspinall also noted that during these early years, LBH leaders often stated that deficiencies in the rule of law were the result of "feudal ideas" in the community, caused by "economic backwardness" (Aspinall 2005, 102). Documents produced around this time contain somewhat paternalistic language consistent with modernisation theories of development. While the term is in less popular use now, many earlier LBH documents refer to the target of legal aid as being poor Indonesian citizens who are *buta hukum* (ignorant of the law) (Lubis 1985b, 41; Nasution 1985, 32).

In light of these references to modernisation, it is worth reflecting briefly on the extent to which LBH's approach was derived from or inspired by theoretical debates occurring in the United States at the same time. As discussed, during the early years of the New Order regime, there was considerable enthusiasm for law reform and achieving the *negara hukum* ideal, a goal to which Buyung and other senior LBH figures were sympathetic. One of the most significant figures in articulating the New Order's vision of legal development was legal academic and eventual Minister of Justice and Minister of Foreign Affairs Mochtar Kusumaatmadja. He had spent time studying in US law schools during the latter years of Soekarno's rule, and returned to Indonesia inspired by Roscoe Pound's ideas about the use of law as a tool for social change (Katz and Katz 1976, 336). Kusumaatmadja was also a trustee of the Ford Foundation-funded International Legal Centre (ILC) in New York and ran its programs in Indonesia before becoming Minister of Justice in 1974 (Linnan 1999, 10). The ILC was established in 1966 with a US\$3 million grant from Ford to promote 'law and development' programs in the developing world (Frühling 2000, 56). Notably, in the 1970s (after he had established LBH), Buyung was also selected as a member of the ILC, attending annual meetings over several years with

Kusumaatmadja, where they discussed the development of the rule of law and human rights in Indonesia (Nasution 2004, 31).

As mentioned, the short-lived and now discredited law and development model focused on law reform as a means of promoting economic development (Cummings and Trubek 2008, 10). It was an approach anchored in modernisation theory. Intrinsic to the approach was a belief that a stronger legal profession would promote development (D. Trubek and Galanter 1974, 1075). Consequently, law and development programs aimed to reshape legal education, providing lawyers with the skills to use law for policy ends. Significantly, many advocates of the approach emphasised reforms to foster economic development, believing strengthened democratic values and human rights would then follow (Cummings and Trubek 2008, 11). In Indonesia, the Ford Foundation supported the placement of teaching fellows in the law faculties of several state universities, in an attempt to reform teaching and research practices (Linnan 1999, 10).

Although Buyung and other influential figures within LBH were clearly aware of, and conversant with, debates around law and development and public interest law occurring in the United States, it is important to note that LBH was founded without the support of the major backers of the law and development movement, such as the Ford Foundation or USAID (although LBH did eventually receive some Ford Foundation funding (Ford Foundation 2003, 80)). The legal aid model developed in Indonesia by LBH was not a project of the Ford Foundation or other donors. As noted, LBH emerged from Peradin, the main professional organisation for lawyers at the time, and for the first decade of its operation, LBH was largely funded by domestic sources. Although nods to modernisation and legal development may have been present in early LBH documents, this type of language soon disappeared.³⁰ In fact, several years later, senior LBH lawyer Todung Mulya Lubis explicitly rejected the law and development model, stating that law and development programs were “really intended to preserve order, security, and/or capitalism” (Lubis 1985a, 136). This rejection also reflected the growing influence of the dependency theory of development in postcolonial societies like Indonesia, discussed further below. Despite this rejection of law and development as an approach, LBH continued to retain a point on legal reform in its mission statement, in addition to its strong focus on the struggle for social justice, the *negara hukum*, and democracy.

LBH’s strong focus on the struggle for *negara hukum* was based on an understanding that if poor people were to obtain justice, if their rights were to be protected, then constraints on the state were essential (Aspinall 2005, 101). At the same time, however, aspirations for *negara hukum* were motivated in part by self-interest – an attempt to regain some of the security and status lawyers had enjoyed in the parliamentary democracy period. As noted in Chapter 2, “strong autonomous courts, binding procedural codes that allow space and leverage to attorneys – litigators above all – the *Rechtsstaat* itself and the public values that surround it, make for a lawyer’s paradise” (Lev 1998, 447).

³⁰ See, for example, Decree of the Board of Trustees of the Indonesian Foundation of Legal Aid Institutes No.: TAP 01/V/1985/YLBHI on the Guide to Core Struggle Values of the Indonesian Foundation of Legal Aid Institutes.

There is no doubt self-interest played a role but lawyers also had an ideological commitment to the *negara hukum* as a force for tackling injustice. Placing these ideas within the context of cause lawyering, LBH's primary "cause" in these early years was the rule of law and the legal system. Returning to Hilbink's three typologies of cause lawyering, LBH was initially strongly proceduralist in its orientation. As discussed in Chapter 2, lawyers in the proceduralist category believe "in the fundamental soundness of the legal system itself (if not at present, then in the system's future promise)" (Hilbink 2004, 666). If the legal process functions as it should, they believe, then it is capable of delivering justice. Notably, given their proceduralist focus, lawyers in this category define their cause in procedural terms too. As Lev once observed of LBH lawyers, "it is largely procedural justice, fairness of institutional treatment that dominates their imaginations" (Lev 1998, 447). Notably, lawyers in the proceduralist category tend to view clients as individuals, and not connected to any larger group or set of principles (apart from the cause of proceduralism) (Hilbink 2004, 672). The cause is advanced through the act of individual client representation (Hilbink 2004, 672). Cases are generally received passively in accordance with need. Given these features, a proceduralist approach is consistent with most mainstream understandings of legal professional norms and ethics (Hilbink 2004, 672). It is perhaps unsurprising LBH had such a strong proceduralist orientation in its early days, given its inception as a legal aid project of Peradin.

It is overly simplistic, however, to represent LBH as ever being solely proceduralist in its approach. Although many lawyers within LBH remained sympathetic to, and were motivated by, proceduralist ideas (Lev 1987, 20), from the beginning, LBH also took on highly controversial, politically imbued cases. LBH was founded at a time when Soeharto's New Order was beginning to undertake large scale investments in development projects, many of which had significant and damaging consequences for local people. Two of LBH's most important early cases challenged the forced eviction of families for the Simprug luxury housing estate in South Jakarta and the Beautiful Indonesia in Miniature Park (*Taman Mini Indonesia Indah*, TMII) in East Jakarta, both of which put LBH in direct conflict with the Jakarta government. Both occurred within just a few years of LBH's founding.

In the Simprug case, LBH defended 108 families (or about 700 people) who were to be displaced by the Simprug housing estate (Saptono 2012, 2). This was the first time LBH lawyers "got their boots dirty" (literally as well as figuratively) and put their professionalism on the line (Saptono 2012, 1), and, as such, occupies a special place in LBH folklore. LBH lawyers transgressed conventional understandings of lawyerly professionalism and openly expressed solidarity with their clients – they even stood alongside the community as bulldozers, accompanied by the military, rolled in (Nasution 2011, 9). It was a clear example of the moral and political commitment and identification with the causes of clients that are considered key attributes of cause lawyering. It was also one of the first cases where LBH went beyond representing individuals to use an approach more typically associated with class actions, advocating on behalf of many individual clients (Lev 1987, 18). In addition to standing alongside the community, LBH also made efforts to educate locals about their rights, and there were early attempts at community organising – LBH supported the establishment of a People's

Defence Committee (*Komite Pembelaan Rakyat*) to facilitate discussion of advocacy approaches (Nasution 2011, 9). LBH's work, while not successful in preventing the Simprug development from going ahead, was able to force the government to engage in more meaningful dialogue with the community, and secured relocation land and compensation for the affected families (Saptono 2012, 2).

Taman Mini, meanwhile, was a pet project of Soeharto's wife, Siti Hartinah (known as Tien Soeharto), designed to be a theme park showcasing Indonesian culture. About 500 families were evicted from their land in East Jakarta when construction began in 1972 and offered minimal compensation. The case put LBH in confrontation with not only with the president's wife (and, by extension, the regime) but also with Jakarta Governor Sadikin, who Tien had asked to be project director (Lev 2000, 292). Again, LBH's efforts were not able to prevent the project from going ahead, but they were able to force the government to increase the amount of compensation offered, and provide residents with priority access to job opportunities (LBH Jakarta 2015, 22).

Despite a high demand for its services, LBH had only one office, in Jakarta, for nearly a decade. The New Order government initially resisted Peradin's attempts to establish regional LBH offices – partly because the government had been caught off guard by LBH's success in community organising outside the courtroom in the Simprug case, as well as its success in securing increased compensation for the affected families (Saptono 2012, 18). In 1972, the Soeharto era security and intelligence body Kopkamtib³¹ reportedly published an instruction ordering its regional officers to put an end to LBH efforts to establish offices in cities including Yogyakarta, Solo, Tegal, Bandung and Palembang (Saptono 2012, 18). It was not until 1978, after the government relaxed this initial resistance, that a second office was established in Medan, North Sumatra. LBH then expanded quickly, and by 1990 had 13 regional offices located in major cities across the country, as well as legal aid posts in 'hotspots', such as Aceh and Lampung (Nasution 1994, 117; Kusumah 1990, 134).³²

As noted, Jakarta Governor Sadikin provided initial funds for the establishment of LBH, and the amount provided by his administration increased steadily over the decade. In the 1977/1978 Jakarta administration budget, LBH Jakarta was reportedly allocated Rp 2.5 million per month (about US\$7,000 today) (Sadikin 2012, 257), a significant sum at a time when the starting salary for civil servants was just Rp 12,000 per month.³³ Other regional LBH offices, for example in Medan, Padang (West Sumatra), Palembang (South Sumatra), Bandung (West Java), Semarang (Central Java), and Surabaya (East Java), were also able to secure some local government funding (Kohn 2010, 82). While these funds were crucial for covering LBH's operations, they were also a sign of the political protection the organisation enjoyed at this early stage.

Receiving government funds did not mean LBH was co-opted or their more political demands blunted (Lev 1987, 13). Perhaps to prove as much, LBH vigorously pursued the Jakarta administration – and

³¹ Command for the Restoration of Security and Order (*Komando Pemulihan Keamanan dan Ketertiban*).

³² Aceh and Lampung were both sites of military violence against civilians during the New Order era.

³³ Government Regulation No. 7 of 1977 on Regulation of Salaries for Civil Servants.

not only in the landmark Simprug and Taman Mini cases. In his biography, Sadikin commented that he was taken to court “about 200 times” by members of the community over the state’s development policies, with these cases facilitated by LBH lawyers (Sadikin 2012, 258). Although he “was often annoyed with Buyung Nasution”, Sadikin said that, as governor, he thought it was important there was an organisation like LBH to “control” the government (Sadikin 2012, 259).

One might ask why the New Order government not only tolerated LBH but actively funded it when it was so confrontational. But LBH served a useful role for the government – it allowed the New Order to claim it was tolerant of (a degree of) political dissent, and it directed potentially bothersome conflicts into the courts. LBH recognised this, with Lubis commenting that the government had allowed LBH to survive because it was a means of reducing conflict (Lubis 1986, 88). This recognition was also reflected in Lubis’s later call for “continually creating conflict” to change unfair social structures (Lubis 1986, 60), and his push for a more activist interpretation of the role of the legal aid movement, discussed further below. Whatever part LBH might have played in absorbing political dissent, however, local governments eventually showed they were not able to submit to such sustained and spirited criticism, and government support for most LBH offices had dried up by the late 1980s (Kohno 2010, 82).

In 1980, LBH separated from Peradin and the Indonesian Foundation of Legal Aid Institutes (YLBHI) was established to serve as the central ‘umbrella’ organisation responsible for coordinating and distributing funds among the various regional LBH offices. While this aimed to improve institutional strength and efficiency, it was also a political strategy. As discussed, one of the means by which the Soeharto regime attempted to depoliticise civil society was through establishment of corporatist organisations (Beitinger-Lee 2013, 60). In its efforts to domesticate the legal profession, in 1985, the New Order established a government-sponsored bar association, Ikadin (*Ikatan Advokat Indonesia*, Indonesian Advocates League), which Peradin and other professional legal associations were forced to join (Lev 2000, 315–16). Establishing a *yayasan* (foundation) structure separate from Peradin allowed YLBHI to act with relative autonomy, free of government intervention (Nasution 1994, 115).³⁴

Under the *yayasan* structure, which remains in place today, a 17-member unelected Board of Trustees, comprised of prominent intellectuals and statespeople, oversees a Board of Directors (*Dewan Pengurus*), which is responsible for overall management of YLBHI (Nasution 1994, 118). The Board of Directors is led by an executive director (a position now held by Asfin), who sets the broad programmatic priorities for the organisation, and can decide on budget allocations to the regional offices. Importantly, the Board of Directors also has the power to approve (or reject) staffing changes in the regional offices. The Board of Trustees is responsible for issuing policy guidance and has the final say over decision making. It was also historically (and at times controversially) responsible for

³⁴ Perhaps influenced by YLBHI’s separation from Peradin, but also because of the political conditions at the time, in the late 1980s and 1990s, the organisation began recruiting more non-lawyers, many from the student movement. Many of these non-lawyers had a distinctly political, oppositional vision of the organisation’s role (Aspinall 2005, 110). This is discussed further below.

selecting the executive director – a policy that has recently changed to allow the directors of regional LBH offices to vote for this position alongside the board members (Riana 2016).

3.4 Structural legal aid

In the late 1970s, a time when the authoritarian nature of the New Order state had become increasingly clear, LBH lawyers began to reflect more broadly about the meaning and function of legal aid, and the type of organisation LBH wanted to be. There was growing frustration with a legal system they viewed as only responsive to the needs of the wealthy, and largely immune to the problems of the poor (Nasution 1985, 36). These frustrations were well expressed by Todung Mulya Lubis:

“Legal aid... can itself be trapped into doing the work of preserving the status quo, of keeping social, economic, political, legal and cultural resources out of reach of the people. Legal aid will be a rubber stamp or an instrument of the Establishment if it fails to evaluate the varieties of its work, and fails to identify the laws that are responsive to the needs of the majority. Legal aid of this kind no longer has the right to call itself legal aid (Lubis 1985a, 136).”

It was these ideas that underpinned the development of ‘structural legal aid’, a concept that gained popularity among LBH lawyers in the late 1970s and has since become LBH’s trademark approach to legal aid. Senior LBH lawyers, including Buyung, Lubis, Mulyana W. Kusumah, Abdul Hakim Garuda Nusantara, and Fauzi Abdullah, produced a great deal of writing during the 1980s that was conversant with emerging international theories around legal aid, public interest law and development, and sought to articulate LBH’s distinctive approach to legal aid (Kusumah and Nusantara 1981; Nasution 1981; Lubis 1986). Buyung and Lubis, in particular, did considerable work in building the intellectual and theoretical heft behind the structural legal aid approach, through their influential works *Bantuan Hukum di Indonesia* (Legal Aid in Indonesia) (Nasution 1981) and *Bantuan Hukum dan Kemiskinan Struktural* (Legal Aid and Structural Poverty) (Lubis 1986). LBH documents state it was, in fact, Netherlands-based Indonesian academic Paul Moedikdo Moeliono who first introduced the term ‘structural legal aid’ to Buyung in the 1970s. Buyung travelled to the Netherlands on a fundraising trip in 1976, where he met with Moedikdo and discussed LBH’s approach to the Simprug case. Moedikdo reportedly said LBH was putting structural theory into practice, even if LBH did not describe it in these terms (Saptono 2012, 14).

The structural legal aid concept has never been neatly defined but Buyung comes close to a succinct definition when he describes structural legal aid as “a series of programs aimed at bringing about changes, both through legal means and in other lawful ways, in the relationships which form the bases of social life, towards more parallel and balanced patterns” (Nasution 1985, 36).

While LBH lawyers did not necessarily situate structural legal aid within law and society studies, or connect it to dependency theory, there was clearly significant correlation. For example, Buyung described the law as an “ever-changing superstructure” that is influenced by, and results from,

patterns of relations in society. As long as patterns of relationships in society remain unequal, he wrote, it will be difficult to produce just law. According to this view of the law, injustice and oppression was not solely the result of individuals who consciously abused human rights but was structurally determined (Nasution 1985, 36). There was a clear rejection of the notion of law as being autonomous and apolitical, and increasing attention to the ways in which law and the legal system could perpetuate inequality. Whether LBH leaders were aware of it or not, these ideas closely mirrored the arguments of the critical legal studies (CLS) scholars, which were emerging around the same time (Galanter 1974; Hunt 1986; Kelman 1987). The ideas behind structural legal aid also paralleled Galanter's influential work observing that, despite being formally neutral, the legal system often perpetuated the advantages of privileged groups (Galanter 1974, 104). Notably, although LBH lawyers may have made few references to these theoretical texts at the time, LBH staff now connect structural legal aid to CLS (Interview, Muhammad Rasyid Ridha, Jakarta, 2019).³⁵

Lubis posited structural legal aid in contrast to a traditional or mainstream proceduralist understanding of legal aid. "Individualistic" legal aid that viewed the legal system as neutral or egalitarian, he wrote, would not be able to deliver justice in Indonesia (Lubis 1985b, 42). In advocating for a structural approach to legal aid, Lubis, Buyung and their contemporaries aimed to "transform the legal aid movement from being legalistic-professional, as if it were simply charity from the professional class, to a more political movement, an oppositional movement to change the system" (Saptono 2012, 49). Structural legal aid, therefore, was a distinctly political understanding of legal aid. Clearly, elements of the approach emphasised distributive justice, but the approach also had more overt political goals. As the Soeharto regime was considered the source of many of the problems faced by the poor and marginalised, it had a strong focus on changing the structure of the authoritarian New Order state to a more democratic structure.

Consistent with definitions of cause lawyering, LBH lawyers were not afraid of being accused of acting politically. As Buyung commented: "The nature of the cases involved, the very outlook and concept of legal aid, confirms the charge that the LBH (has to) adopt a political position. This is the thing about which I am particularly proud." (*Tapol* 1981). Legal aid work was conceived as a means or tool for precipitating broader social, political, economic and cultural change (Aspinall 2005, 104). Consider Lubis's explanation for the structural approach:

"The concept of structural legal aid is tied to the destruction of injustices in the social system. It is directed not merely towards aiding individuals in specific cases, but towards an emphasis on cases which have a structural impact. Legal aid becomes the power to move in the direction of restructuring social order so that a more just social order can be established. Law, in and of itself, cannot address the question of injustice. Indeed, it often strengthens the status quo because it is obliged to be neutral. Once one accepts that society is neither just nor egalitarian, then one must reject neutrality in favour of supporting the weak who form the

³⁵ Similarly, I could not find any references to Galanter's work in LBH documents produced during the New Order period, although later documents do refer to Galanter, for example, YLBHI Report No. 10, 2005.

majority of the population. The legal struggle must be oriented towards creating a law that is supportive of the weak” (Lubis 1985b, 42).

In articulating the concept of structural legal aid, Lubis was heavily influenced by Norwegian sociologist Johan Galtung’s “structural theory of imperialism” (Galtung 1971). Galtung’s work was part of the broader field of dependency theory popular at the time. Galtung was concerned about inequalities in the distribution of power within peripheral and core countries, and this was particularly influential for Lubis in articulating the goal of structural legal aid in redistributing power resources to the periphery (Lubis 1986, 58).

Although considerable work was done in developing the conceptual foundations of structural legal aid, its meaning in an operational sense was never precisely articulated and that has allowed it to continue to evolve over the course of LBH’s existence. It can sometimes appear to be quite a vague or loose concept. For example, former senior LBH Jakarta staff member Henny Supolo Sitepu (1980-1984) described the concept as being about a humanitarian approach to legal aid, with an emphasis on client education (Hukum Online 2015). Meanwhile, Bambang Widjojanto (head of YLBHI from 1996-2001) emphasised how structural legal aid demanded LBH lawyers develop a comprehensive understanding of the social and political roots of the problems faced by their clients (Hukum Online 2015). In his book, Lubis described seven characteristics of structural legal aid:

1. Directed toward groups in society, rather than individuals. This does not mean that there is no room for the representation of individuals, but individual cases must contain a structural element.
2. Increased focus on the problems of the rural poor, rather than urban groups. There are more oppressed groups in the peripheral regions than in the centre.
3. Active rather than passive approach to case identification. Legal aid organisations should not function simply like “hospitals waiting for patients” (Abdurrahman 1984, 20), but should actively seek out new cases.
4. A greater focus on extra-legal approaches
5. Legal aid organisations must be willing to collaborate with non-legal social organisations, including organisations for labourers, farmers and fishermen, and the press.
6. There must be an effort to advocate for legal reform to allow for class actions and representation of structural cases. Procedural regulations must ensure the community can obtain cheap, timely, simple, and transparent resolution of their disputes.
7. Legal aid must become a “social movement” and empower people at the local level (Lubis 1986, 55–57).

While structural legal aid no longer has an explicit focus on the rural poor, and there is less emphasis on procedural concerns, these characteristics continue to be influential for how the concept is understood. Under the New Order, a structural legal aid approach to case management typically involved cause lawyers travelling to the field and working directly alongside the community, where they encouraged community participation in the development of a larger campaign (Aspinall 2005,

105). A key element of this approach was conducting consciousness raising activities, or ‘conscientisation’, which involved educating community members about their rights and responsibilities (Nasution 1985, 37), as well as sometimes training community members as paralegals (Aspinall 2005, 105) (see Chapter 6). These community education and organising efforts were combined with other nonlitigation activities, such as research and publication, often with savvy use of the media, aiming to generate widespread publicity about the injustices faced by the community (Nasution 1985, 37). As Buyung explained:

“LBH is less concerned about drafting winning briefs and racking up legal precedents than about choosing cases that have a major ‘structural’ element... ‘winning’ this or that case on the crazily tilted playing field of the New Order’s legal system is likely to be impossible or meaningless anyway. Therefore the most prudent thing to do is to choose cases that offer an entrée into a pressing issue and provide occasions for community organising and education. The goal is not to achieve a technical victory in court (which would in all likelihood be unenforceable anyway, given the impunity with which the regime and its officials operate), but to focus domestic and international attention on abuses and to mobilise people to press for the reform of laws or procedures that discriminate against the poor and vulnerable (Nasution 1994, 119).”

While one could certainly argue about the extent to which LBH was ever solely proceduralist in its approach, structural legal aid marked a clear shift towards an approach to cause lawyering Hilbink would describe as falling within the grassroots category. To recap, lawyers of the grassroots type often view the legal system as “corrupt, unjust, or unfair – an oppressive force” (Hilbink 2004, 681). Grassroots lawyers are motivated by a desire to achieve social justice but place less emphasis on litigation as a means to reach this goal – in fact, they are relatively sceptical about the ability of the legal system to bring about meaningful change (Hilbink 2004, 683). They reject the conventional professional understandings of the lawyer-client relationship and openly express solidarity with clients and their causes (Hilbink 2004, 689). Grassroots cause lawyers see themselves as active participants in social movements. As the discussion above has demonstrated, these characteristics correlate closely with the structural legal aid approach.

‘Proceduralist’ cause lawyers generally speak favourably of the law’s ability to be a stabilising force. Proponents of the structural legal aid approach argued against this conservative function of law and legal assistance. Mulyana W. Kusumah, for example, wrote that traditional legal aid organisations do not threaten the status quo, and “may even localise structural conflict so that it does not become a national level conflict, accommodate the needs of privileged groups, even stem or suppress social conflicts and divert them into the legal system” (Kusumah 1990, 137). As mentioned, Lubis also argued for “continually creating conflict” to break down patterns of social relations that were becoming more established (Lubis 1986, 60). There was therefore a shift to a more activist, even radical, understanding of the legal aid movement’s purpose and goals. This view essentially held that, in the face of an oppressive state, dissipating conflict by channelling it into the legal system would only serve to perpetuate inequality. There was instead a conscious effort to bring local level conflicts

and injustice to national attention, and to use these cases to make broader points about government hypocrisy and injustice, a strategy discussed further below. The New Order would have been happy with a proceduralist LBH, but it got a grassroots version, and that eventually led to increasing conflict between them.

Notably, the development of structural legal aid was prompted in part by growing frustration with litigation focused, or proceduralist, forms of cause lawyering under authoritarianism. While many accounts of cause lawyering around the world emphasise the opportunities for legal mobilisation provided by democratisation, LBH showed that cause lawyers can still find opportunities to mobilise the law for social change – and arguably even thrive – in repressive environments.

3.5 The HR Dharsono case

One of the most famous cases handled by LBH during the New Order period was that of former military general turned outspoken government critic, Hartono Rekso Dharsono, commonly known as HR Dharsono. The pretence for the case against Dharsono was the so-called ‘Tanjung Priok tragedy’ but the former general had become a persistent source of irritation for the government long before this event.

On 12 September 1984, the military opened fire on a group of Islamic protesters in Tanjung Priok in North Jakarta. The incident began a few days earlier, when four men were arrested following a dispute with a local military official, who they had accused of insulting Islam (Butt and Lindsey 2018, 276). Days after the arrests, demonstrators gathered to hear a sermon rejecting the Soeharto government’s plan to require all Indonesian social and political organisations to adopt the national ideology, *Pancasila*, as their sole ideological basis,³⁶ and protest against the arrest of the men. The planned introduction of the *Pancasila* requirement prompted a strong backlash from Muslim organisations, which rejected the notion that any ideology could replace Islam as their core guiding principle (Bourchier and Hadiz 2013, 140). The National Commission on Human Rights (Komnas HAM) reported 24 people were killed and 54 others injured in the Tanjung Priok tragedy, although other reports suggest as many as 400 individuals died (Woodward 2007, 90; Butt and Lindsey 2018, 276). Meanwhile, the commander of the Indonesian Armed Forces at the time of the Tanjung Priok incident, General LB (Benny) Moerdani, claimed only nine had died (Pratama 2019).

Soon after the Tanjung Priok incident, on 4 October, bombs targeting ethnic Chinese-owned banks and a small grocery store were detonated across Jakarta (Hail 1985). The bombings were widely seen as retaliation for the Tanjung Priok massacre. Ethnic Chinese Indonesians have often been made scapegoats throughout Indonesian history, particularly during times of political unrest and economic stress. General Benny Moerdani was not ethnically Chinese but he was a Christian, like many Chinese Indonesians. The Tanjung Priok massacre fuelled conspiracy theories popular among some

³⁶ Soeharto pushed for this requirement from the early 1980s, but it was eventually passed into law as Law No. 8 of 1985 on Mass Organisations (Bourchier and Hadiz 2013, 98).

Indonesian Muslims about a Catholic-Chinese conspiracy to weaken the Muslim community (Human Rights Watch 1998b). Dharsono, a Muslim, was accused of having a hand in these bombings.

Although he played a key role in Soeharto's rise to power, HR Dharsono had, as mentioned, become an outspoken government critic (Vatikiotis 1990) and was closely associated with the 'Petition of 50'. This was a group of 50 prominent figures, including other former military leaders, as well as politicians and academics, who signed an 'Expression of Concern' in 1980 about Soeharto's use of *Pancasila* to suppress dissent. In September 1984, Dharsono and several other members of the Petition of 50 group signed a 'white paper' (*lembaran putih*) challenging the military's version of events at Tanjung Priok. Soon after the Tanjung Priok incident, Dharsono also attended a meeting at which he reportedly discouraged Islamist radicals from seeking revenge for the military's actions (Cribb 1986). However, officials claimed the meeting was used to plan the BCA bombings (The Times 1985).

On 8 November 1984, Dharsono was arrested and charged with subversion over his role in drafting the white paper and attending the meeting. The head of YLBHI at the time, Todung Mulya Lubis, formed a defence team, excluding himself. When Dharsono was arrested, LBH founder Buyung was undertaking doctoral study in the Netherlands. In his autobiography, Buyung wrote that Amartiwi Saleh, director of LBH Bandung, convinced him to return to take on the case. Dissatisfied with the team Lubis had created, Buyung encouraged him to allow him to form a new defence team, with Lubis as a junior member (Nasution 2004, 48).

The trial began on 19 August 1985, and immediately attracted huge public and media attention. The defence was given "unusual freedom" in presenting its case (Cribb 1986). It called on several signatories of the white paper to testify in Dharsono's defence, including former Jakarta Governor Sadikin (Nasution 2004, 51). It was also able to present a witness to the Tanjung Priok incident, Wahyudi. Rather than simply addressing the subversion charges in a narrow legal sense, the defence used the trial to expose the real events of the Tanjung Priok incident and publicly excoriate the Soeharto regime (Cribb 1986). The testimony by the much-respected Sadikin, on 31 October 1985 in the 13th hearing, attracted massive public attention (Nasution 2004, 58). More than a thousand spectators gathered outside the courtroom, cheering as he criticised President Soeharto for failing to meet his promise to govern constitutionally (Routledge 1985).

Despite the sensational nature of the trial, as Cribb wrote at the time, there was never much doubt that Dharsono would be convicted under the loose provisions of the 1963 Anti-Subversion Law.³⁷

Dharsono had long been a thorn in the government's side over his association with the Petition of 50 and his criticism was seen as particularly potent because of his key role in bringing Soeharto to power (Cribb 1986).³⁸ On 8 January 1986, Dharsono was duly sentenced to 10 years in prison for helping to

³⁷ Law No. 11/PNPS/1963 on the Eradication of Subversive Acts.

³⁸ Dharsono provided troops that Soeharto used to overcome the leaders of the coup attempt, who were using the main Jakarta airport as a base.

draft and disseminate the white paper, and for addressing Muslim youths at a meeting where he “might have” encouraged them to take further action against the state (The Times 1986).

Dharsono’s trial was to have long-lasting consequences for Buyung. Reading out the decision, one of the members of the panel of judges, Achmad Intan, said that, by painting the government in a negative light, the defence team had behaved inappropriately and unethically. Buyung was incandescent. He grabbed the microphone in front of him and interrupted the judge, asking why the allegations of unethical behaviour had not been raised earlier in the trial. When a policeman entered the courtroom, carrying a firearm and walkie-talkie, and told Buyung to stay quiet, he exploded, shouting “Hey you... get out! Out! This room is under the authority of judges, not police!” (Nasution 2004, 59). For these actions, Buyung was accused of having committed contempt of court, despite no such charge existing under Indonesian law.³⁹

Furious over the way Buyung had used the trial to expose government hypocrisy, Minister of Justice Ismail Saleh and judicial officials pursued him with great vigour (Lev 2000, 317). The then recently established Indonesian Advocates League (Ikadin) was resistant to government efforts to sanction a member of the profession, and established an Ethics Board (*Dewan Kehormatan*) to deal with the case. Following two hearings, Ikadin issued Buyung with a firm reprimand for interrupting the judge (Nasution 2004, 69). Considering the matter over, Buyung returned to the Netherlands to continue his study (Nasution 2004, 71). But this did not satisfy officials. Following pressure from the government, the Central Jakarta District Court heard the case (with Buyung not appearing) and on 17 March 1986 issued an “administrative decision” recommending the minister of justice revoke Buyung’s licence to practice. The Supreme Court later revised the decision to a warning (Nasution 2004, 73). This was not sufficient for Minister of Justice Saleh, however, who on 11 May 1987, revoked Buyung’s right to practice for a year. A couple of months later, Saleh and Supreme Court Chief Justice Ali Said signed a joint ministerial decision on the supervision of the legal profession,⁴⁰ clearly designed to address the issue of contempt of court and tighten restrictions on the profession. Article 3(c) of the regulation stated that measures could be taken against legal counsel who “act, behave, bear themselves, speak, or issue statements that indicate lack of respect for the law, statutes, public authority, the courts or their officials” (Lev 2000, 318). Although his licence was only suspended for one year, in light of the threats he faced while in Indonesia, Buyung remained in the Netherlands until 1993 and completed a doctorate (discussed below) (Nasution 2011, 10).

Dharsono, meanwhile, had his sentence reduced to seven years on appeal to the Jakarta High Court. He was eventually released in 1990, following remissions (Sitompul 2018). Courageously, he continued to promote democratic values following his release, establishing the People’s Sovereignty

³⁹ Point 4 of the general elucidation to Law 14 of 1985 on the Supreme Court, passed in December 1985, stated that a contempt of court law should be made to regulate acts that could denigrate or undermine the authority or dignity of the court. At the time of the Dharsono trial, however, no such law had been formulated. It still has not.

⁴⁰ KMA/005/SKB/VII/1987 and M.03-PR.08.05 of 1987, as cited in Lev 2000, 318.

Purification Forum (*Forum Pemurnian Kedaulatan Rakyat*, FPKR) in 1991, but died in 1996 at age 70, reportedly of a brain tumour (UPI 1996).

While the Dharsono case was one of the highest profile cases taken on by LBH in the New Order period, it was, in many ways, typical of its approach to political cases. These show trials, in which chances of securing an acquittal were virtually non-existent, were used as a forum for free speech, as a platform to expose government hypocrisy and advance notions of the rule of law and human rights. In his autobiography, Buyung recalled that either the *Straits Times* or *Asian Wall Street Journal* wrote that in his defence of Dharsono, Buyung broadened the scope of the trial. By exposing the real events of Tanjung Priok, the accused was no longer Dharsono – it was Soeharto (Nasution 2004, 63).

The Dharsono trial was also consistent with patterns of cause lawyering in other authoritarian contexts. As noted in Chapter 2, with civil society constrained, demonstrations banned or restricted, and the media tightly controlled, the courts may be one of the only avenues available for publicly advancing principles such as the rule of law and human rights. Under the New Order, there were so few opportunities for political contestation that the courts provided an almost unique platform for direct confrontation with the regime. In these circumstances, the case itself becomes of almost secondary importance to the broader cause. This is a commonly recognised feature of cause lawyers, who, although they serve their clients, “tend to see client service as a means to their moral and political ends” (Scheingold and Sarat 2004, 7). Buyung was aware the likelihood that Dharsono would be acquitted was negligible. Some have estimated that the New Order prosecuted more than 1,000 individuals using the Anti-Subversion Law after 1966, and reportedly no defendant was ever acquitted in the first instance (Heryanto 2005, 110).⁴¹ But the Dharsono case was the springboard with which Buyung and LBH were able to launch a highly public critique of New Order rule. Adapting Fu’s point on activist lawyers in China (Fu 2011, 355), if the courts are an instrument of state power in authoritarian regimes, Buyung was exercising dissent in the heart of the state.

In using the trial to make a passionate critique of Soeharto and the New Order, Buyung was in fact deploying a tactic used by Indonesia’s founding fathers. In 1928, Mohammad Hatta (who went on to serve as both vice president and prime minister) and other prominent students in the Indonesia Association (*Perhimpunan Indonesia*, PI), a nationalist organisation for Indonesian students in the Netherlands, faced trial in the Hague for sedition (M. Ricklefs 2001, 220). During the trial, Hatta gave a rousing defence speech, later published as *Indonesia Vrij* (Indonesia Free), in which he described Dutch repression in considerable detail and said Indonesian independence could only ever be achieved through violence (Elson 2008, 60; Legge 2010, 47). Hatta and the students were eventually released without charge. Similarly, when Indonesia Nationalist Party (PNI) leader (and soon to be founding president) Soekarno was arrested and put on trial in Bandung in 1930, he also used his defence to detail the harmful impacts of Dutch colonisation. His very lengthy defence speech, *Indonesia Menggugat* (Indonesia Accuses) (Soekarno 1951), was to become a landmark document in the Indonesian independence struggle (Rush 2014, 181–83). The speech has been published as a book and

⁴¹ Reportedly, only one defendant ever had a conviction for subversion overturned by the Supreme Court.

activists continue to draw inspiration from it decades later. Indeed, the phrase has become shorthand for standing up to abuse of power by state authorities.⁴² Both Hatta's and Soekarno's speeches were typical of the cause lawyering approach of "speaking law to power" (Abel 1998). The courts were used as a platform to expose illegitimate state actions to greater public scrutiny (Abel 1998, 92–93).

In authoritarian environments where legal autonomy is weak, the political environment constrained, and there is almost no hope of securing victory, the true significance of these cases lies in the opportunities they provide for making ideological points. In an environment where there are few opportunities for political dissent, law may be used "to push the limits of authoritarianism by exposing inconsistencies between legality and practice" (Munger, Cummings, and Trubek 2013, 378). There is, of course, a limit to this form of judicial activism in authoritarian environments. As discussed, the New Order may have tolerated LBH's cause lawyering because it was a way of modulating "potentially politically explosive issues" (Fu 2011, 357). As the Dharsono case demonstrated, however, the New Order's tolerance had its limits. Munger, Cummings and Trubek are essentially describing Buyung's experience when they note that "a weak environment may channel political grievances into courts, but still imperil the lawyers who advance them if they overstep political bounds" (Munger, Cummings, and Trubek 2013, 378). In any case, as the New Order period progressed, LBH became despondent with the idea it would be able to achieve change through the legal system and became increasingly political in its outlook.

3.6 Increasing activism and laying the foundations for democratic transition

From the 1980s on, lawyers including Todung Mulya Lubis (YLBHI chair from 1983-1987), Abdul Hakim Garuda Nusantara (chair from 1987-1993), and Mulya W. Kusumah (executive director from 1993-1996) pushed the organisation in a more activist direction (Collins 2007, 29). LBH's more political activities were not restricted to the community organising and community legal empowerment work associated with 'structural legal aid'. The organisation continued to evolve from an organisation that provided case-based legal assistance to a more conventional rights-focused CSO, with large advocacy and research and publication divisions (Aspinall 2005, 103). As the 1980s and 1990s progressed, LBH held regular public seminars and discussions about human rights and democratisation, arguing for rights such as freedom of expression, freedom of assembly and association, and often airing vocal criticism of the New Order regime.

From its establishment through to the early 1990s, LBH was divided into "litigation" and "nonlitigation" divisions (Khor and Lim 2002, 227–28).⁴³ Lubis, who served as the head of the nonlitigation division before becoming YLBHI chair, played a critical role in LBH's transformation

⁴² For example, one-time playwright and activist Ratna Sarumpaet created a political performance in the late New Order period in support of murdered labour activist Marsinah titled *Marsinah Menggugat* (Marsinah Accuses) (Hatley 1998). In a recent example, workers and students protesting against the so-called Omnibus Law on Job Creation in Semarang, Central Java, gathered under the banner of *Aliansi Gerakan Rakyat Menggugat (Geram)* (The Alliance of People's Movements Accuse) (Mulyono 2020).

⁴³ These divisions were occasionally sources of significant tension in the organisation (Winarta 2013, 60; Saptono 2012, 30–31).

into a human rights advocacy organisation. In 1979, LBH set up a human rights division, with Lubis as its head. The division began producing an influential Human Rights Report, which documented the rights violations of the regime (Aspinall 2005, 103). Lubis soon became one of the most prominent voices helping to shape the national conversation on human rights. His activities (including his involvement in the defence of Dharsono) increasingly provoked the ire of the New Order regime and he was eventually banned from speaking at public events and teaching. As a form of political exile, in 1987, he undertook a second Master of Laws at Harvard Law School (he had completed his first masters at University of California Berkeley in 1978) and then completed his PhD at the University of California, Berkeley, in 1990.⁴⁴

By the 1980s, LBH had been attracting some of Indonesia's best and brightest activists. While it was once staffed almost exclusively by lawyers, it began to attract a broader spectrum of politically engaged young people. Many were recruited from the student movement, the political activities of which had been suppressed on campuses since the late 1970s.⁴⁵ Prominent non-lawyers included Fauzi Abdullah, Mulyana W. Kusumah and Hendardi. Abdullah, in particular, had a reputation as a skilled labour organiser, and made a major contribution to the practice of structural legal aid on the ground. He devoted considerable efforts to promoting legal awareness among workers, and supporting them to form and lead their own organisations (Saptono 2012, 22–25). According to former LBH lawyer Luhut Pangaribuan, non-lawyers were recruited because the organisation recognised a strictly legal approach would not achieve their goals (Saptono 2012, 83). Consistent with the trajectory of cause lawyering in other authoritarian contexts, LBH thrived because of the limited alternative opportunities for expressing political dissent and limited opportunities to work in the public sphere. As Lev observed, “as political parties were hemmed in to the point of meaninglessness, legal aid blossomed as an attractive outlet for young (and not so young) men and women committed to change and at all inclined to political and social activism” (Lev 1987, 27).

One case considered influential in LBH's transition to a more activist organisation was that of the Kedung Ombo reservoir. Kedung Ombo was a World Bank-funded project that involved the flooding of a valley in Central Java for a massive dam. Reportedly, 5,268 families were displaced for its construction and offered only minimal compensation of Rp 800 per square metre for their land (Pompe 2005, 149). While the Simprug case included early efforts at community organising, the Kedung Ombo case involved deeper connections with social movement groups. The LBH office in nearby Semarang took up the case, building alliances with farmers and organising protests at the local level, including in collaboration with other prominent CSOs like the Indonesian Forum for the Environment (*Wahana Lingkungan Hidup Indonesia*, Walhi). This emphasis on community organising has since become a trademark of LBH Semarang's approach to cause lawyering (see also Chapter 6). YLBHI drew on its connections in the recently formed International NGO Forum on Indonesia (INGI), which linked Indonesian organisations with NGOs from Indonesia's foreign donors, as well as international NGOs with an interest in Indonesia (Uhlin 1993, 526). International

⁴⁴ Lubis' doctoral dissertation, *In Search of Human Rights: Legal-Political Dilemmas of the New Order 1966-1990*, published as a book in 1993, proved to be a major and influential text in Indonesia.

⁴⁵ See discussion above.

NGOs focused global attention on the role of the World Bank in displacing local farmers, while LBH Semarang supported affected families to launch a class action. Unsurprisingly, their efforts were unsuccessful at the district court and Semarang High Court on appeal. Miraculously, in July 1993, the Supreme Court decided in the farmers' favour, ruling they should be offered compensation of Rp 80,000 per square metre, well above the Rp 10,000 the families had requested (Pompe 2005, 150).⁴⁶ The decision was a rare short-lived display of judicial independence at a time when courts were largely subservient to the ruling regime.

Sadly, the decision did not stand for long. Soon after it was made public, President Soeharto called the head of the Supreme Court, Purwoto Gandasubrata, to the Palace, and said he hoped the court would make "the most just decision" when the case went up for reconsideration (*peninjauan kembali*) to a different bench at the Supreme Court (Pompe 2005, 151). Just two days before his retirement, in October 1994, Purwoto heard and decided the case. The Supreme Court nullified the earlier decision on the suspect grounds that the court should not have awarded compensation greater than the amount requested (Pompe 2005, 152). The message to LBH was clear. It became increasingly convinced it was near futile to achieve meaningful change through the New Order's rigged legal system (Collins 2007, 30).

The shift to greater human rights activism and a bolder stance in support of democratisation (in addition to its ongoing litigation work) was assisted by the fact that, by the late 1970s, LBH had also started to attract significant funding from foreign donors, which funded CSOs in Indonesia as one of the few outlets for supporting human rights under the repressive New Order (Aspinall 2010, 2; Winarta 2013, 76). LBH Jakarta started receiving funds from Novib (the Netherlands Organisation for International Assistance, a Dutch government-funded international NGO, now part of Oxfam) in the late 1970s (Lev 1987, 13–14). By 1992, Novib grants accounted for about 88% of YLBHI's US\$650,000 operating budget (Nasution 1994, 120). This reliance on Novib funding eventually proved problematic for LBH when the Indonesian government rejected all Netherlands development assistance. In April 1992, Home Affairs Minister Rudini announced that CSOs like LBH could no longer accept development assistance from the Netherlands (Schwarz 1992)⁴⁷ and LBH faced a funding crisis (Bunnell 1996, 184). However, foreign donors were eventually able to get around such restrictions by channelling funds through international human rights organisations (Ford Foundation 2003, 80).

In fact, foreign funding increased throughout the 1990s, along with growing international support for human rights-focused organisations in the Global South. According to YLBHI data, between 1994 and 1998, LBH received Rp 8.18 billion (about US\$4.6 million today) in grants, from donors including Novib, the National Endowment for Democracy (NDI), USAID, the Canadian Government,

⁴⁶ Supreme Court Decision No. 2263/Pdt/1991 dated 18 July 1993

⁴⁷ The decision came on the back of suspension of development assistance by the Dutch in response to the execution of four political prisoners in 1990 and the Dili massacre in 1991 (Rich 2004, 325). The Soeharto regime accused the Dutch of interfering with Indonesian sovereignty by attempting to attach human rights conditions to its assistance.

the Swedish Development Coordination Agency, the ‘Triple 11’ collective from Belgium, and the Quaker Service of Australia. From the late 1970s, it also received funding from The Ford Foundation (Ford Foundation 2003, 80). The expansion in funding by international donors from the late 1970s provided LBH with greater freedom to become more adversarial (Aspinall 2005, 93; Aspinall and Mietzner 2008, 19). Donors, too, increasingly looked to LBH because of its integrity, strong focus on human rights, and because it had developed a reputation as a site of resistance to the Soeharto regime. Notably, much of the funding it (and many other CSOs) received during the New Order period was in the form of ‘block grants’, providing the organisation with considerable autonomy in determining its programmatic priorities (Zen 2004).⁴⁸ This funding was delivered to YLBHI as the central organisation, which then distributed it to the regional offices.

Notably, LBH’s growing political and human rights advocacy occurred during a brief window of relaxation in the Soeharto regime’s social control, known as the *keterbukaan* (openness) period. Beginning in the late 1980s, conflicts among members of the ruling elite provided more room for open expressions of opposition and demands for democratisation (Uhlir 1993, 519). Soeharto allowed a degree of economic liberalisation and political freedom (Beittinger-Lee 2013, 65). The New Order loosened its control over the press and was willing to tolerate a degree of political debate and criticism, allowing protests from students, labour and farmers’ groups. In 1993, Soeharto permitted the establishment of the National Commission on Human Rights (Komnas HAM). This was mainly done to deflect growing international criticism of Indonesia’s human rights record, and was timed just one week before the World Conference on Human Rights in Vienna (Butt and Lindsey 2012, 191–92). Media reports at the time even suggested Komnas HAM was established in part to create an alternative to LBH (Aspinall 2005, 115), a sign of LBH’s growing influence.

Throughout this *keterbukaan* period, the CSO movement gained increasing confidence and momentum. The military allowed some student protests to go ahead, including a few at which there were open calls for Soeharto’s removal (Beittinger-Lee 2013, 66; Aspinall 2005, 137). However, the period of openness did not last long. *Keterbukaan* ended in 1994, with the government’s revocation of the publishing licences of critical news magazines Tempo, Detik, and Editor (Beittinger-Lee 2013, 66).⁴⁹

Although LBH staff like Lubis, Abdul Hakim and Hendardi ramped up criticism of the New Order and helped to push the organisation in a more activist direction, it was eventually Buyung who sought to position LBH as a force for democratic change (Aspinall 2005, 106). As mentioned, Buyung had completed a doctorate during his time in the Netherlands, a detailed analysis of the work of the Indonesian Constituent Assembly from 1956–1959. Buyung’s dissertation resulted in a highly influential book, *The Aspiration for Constitutional Government in Indonesia*, which argued for urgent constitutional reform in Indonesia. Buyung returned to Indonesia in 1993, “rejoiced to find” that LBH was taking a leading role in the growing opposition to the New Order regime (Nasution 2011, 10).

⁴⁸ This type of block grant funding was relatively common at the time, particularly for CSOs that resisted New Order repression.

⁴⁹ See discussion on Tempo below.

LBH labelled itself a “locomotive of democracy” and began determined efforts to further elaborate its ideas for democratic change. At the time, Buyung wrote there was a need to broaden the understanding of structural change to encompass a complete restructuring of the political system in line with “national aspirations for democracy, human rights and law” (Aspinall 2005, 106–7). In 1994, YLBHI prepared a four-year plan in which it laid out its plans for a more democratic system (Aspinall and Mietzner 2008, 20) and Buyung set about promoting the ideas elaborated in his book about the need for constitutional reform, again putting him into conflict with the regime. During this period in the early to mid-1990s, working alongside LBH executive director Mulyana W. Kusumah, Buyung toured the country, delivering discussions at universities and CSOs on democratic change, and building networks with students and activists (Nasution 2011, 11). The New Order banned Buyung’s book almost immediately and often frustrated his attempts to hold public discussions.

Throughout the 1990s, LBH developed into Indonesia’s most prominent human rights group. It was a hub of reform activity, a symbol of the civil society movement, and an icon of resistance against the Soeharto regime (Saptono 2012, 90). As Buyung commented, “in the period when the reform movement was strong, YLBHI became a key gathering point for human rights activists, students, workers, women and other components of the pro-democracy community” (Nasution 2011: 12). In the wake of Kedung Ombo, YLBHI sought to strengthen networks between students who had been mobilised by the highly public Kedung Ombo campaign, and connect them to labour activists and farmers’ groups (Collins 2003, 158). Former senior YLBHI figure Luhut Pangaribuan describes how in the constrained New Order environment, LBH attempted to provide an outlet for political action.

“In the past, LBH was highly political in its use of structural legal aid. We did not want an authoritarian government that practiced rule by law, rather than the rule of law... We organised masses to add pressure. So, in other words, we were taking on the role of political parties.” (Interview, Luhut Pangaribuan, 2019).

Along with several other CSOs, YLBHI promoted collective action to challenge the Soeharto regime, including through protests and street demonstrations (Hadiwinata 2003, 100–101). With the support of foreign donors,⁵⁰ YLBHI also held regular discussions, workshops and seminars, during which it fleshed out and refined its approach to democratic transformation, covering issues like elections, political party reform, human rights, the rule of law and more (Nasution 2011, 12).

YLBHI also formed alliances with (and recruited from) elements of the leftist and more radical youth movements (Aspinall 2005, 108). Notably, the leftist Democratic People’s Party (*Partai Rakyat Demokratik*, PRD) was established at the LBH office on 22 July 1996. Dissident poet Wiji Thukul even read his famous poem *Peringatan* (Warning) at the event – reportedly his last public performance before he went into hiding and was ‘disappeared’ in early 1998 (Tempo 2013, 177). The fact that such an open display of resistance was tolerated by the regime was a sign of how important LBH had become. But this tolerance was ephemeral. PRD was blamed for violence that occurred

⁵⁰ Such as the International Commission of Jurists (ICJ), the National Democratic Institute (NDI), Human Rights Watch (HRW), Friederich Ebert Stiftung (FES), and Friederich Naumann Stiftung (FNS).

during the 27 July 1996 Incident (*Peristiwa 27 Juli*).⁵¹ This was an attack by military-backed thugs on protestors who had gathered to support Megawati Soekarnoputri, daughter of the first president, Soekarno. As a result of regime interventions, Megawati had been removed a month earlier from the leadership of the opposition party, the Indonesian Democratic Party (*Partai Demokrasi Indonesia*, PDI), and replaced with a government-supported candidate (Hadiwinata 2003, 73–74). The New Order government labelled PRD a “subversive, neo-communist organisation” and arrested its leader, Budiman Sudjatmiko, several other senior PRD figures, and Mochtar Pakpahan, head of the independent Indonesian Workers Welfare Union (*Serikat Buruh Sejahtera Indonesia*, SBSI), who had also long been an irritant to the regime (Ismartono 1996; US Department of State 1997).

As LBH assumed a more prominent role in civil society resistance to the New Order, it was assisted in its efforts by a receptive media. Invigorated by *keterbukaan*, media organisations became more confident in exposing elite mismanagement (Beittinger-Lee 2013, 65). The media provided greater room for alternative and critical voices that deviated from the official government position (Romano 1996, 159). LBH cultivated productive relationships with major national media organisations *Kompas*, *Sinar Harapan* and *Tempo* (Winarta 2013, 63) and *Tempo*’s influential dissident journalists Goenawan Mohamad and Bambang Harymurti. Such was LBH’s importance as a gathering point for activists and anti-regime resistance activities, for certain periods journalists were even assigned to cover LBH activities on a daily basis. There was, in effect, an ‘LBH beat’. As former YLBHI lawyer Robertus Robet explained to me:

“Even though the media was tightly controlled, there were still major organisations that wanted to cover LBH. Anything that happened at LBH was reported on by the big papers. Even the reporting of Kompas [which has a reputation for being cautious] at that time had a political impact” (Interview, Robertus Robet, 2020).

With its frequent coverage in the media, LBH was also able to rely on considerable public support, in particular from the growing middle class (Lev 1987, 29; Aspinall 2005, 108). As Lev noted, the middle class were mainly supportive of LBH’s efforts to advance the rule of law, even if they were ambivalent about democratic change. Nevertheless, without this public support, there would be little stopping the government from simply squashing LBH “in a moment of impatience” (Lev 1987, 29).

Not all LBH lawyers were happy with the new activist direction of the organisation. On two occasions, in 1993 and 1996, tensions between activists and those who continued to favour a proceduralist approach (including, significantly, the conservative Board of Trustees), erupted into open conflict. Both conflicts coincided with leadership transition.⁵² These conflicts have been covered

⁵¹ On 27 July, not far down the road from the LBH office, military-backed thugs attacked the headquarters of the Indonesian Democratic Party (*Partai Demokrasi Indonesia*, PDI), where hundreds of supporters of Megawati Soekarnoputri had gathered. The headquarters were burned and riots and confrontations broke out in several areas across Jakarta. Five people were killed, 23 went missing and 149 were injured in the violence.

⁵² Leadership transition has consistently been a significant source of tension within YLBHI, a point I return to in Chapter 4.

in considerable detail by Aspinall (2005) and Kohno (2010), and will be discussed only briefly here.⁵³ In 1993, a group of former LBH lawyers, members of LBH regional offices, and non-LBH civil society activists protested against the undemocratic nature of the selection of the new chairperson by the Board of Trustees, with some CSOs even demanding that organisations external to LBH be allowed to elect the new chair (Kohno 2010, 106). The conflict was influenced in part by the nature of the *yayasan* structure YLBHI had adopted in 1980 (Aspinall 2005, 109). The *yayasan* structure means frequently “self-perpetuating” boards of trustees (unelected, and typically senior) have significant control over organisations (Eldridge 1996, 28). Recognising this, regional LBH offices demanded to have a greater say in how YLBHI was run (Eldridge 1996, 28). The Board eventually selected Buyung, who was still considered to represent a relatively more proceduralist approach, to return as chair. To ease tensions, Buyung created a new executive director position underneath the chair, and installed his more activist-inclined rival for the chair, Mulyana W. Kusumah (Kohno 2010, 107). The two ended up working well together, as discussed above.

During the conflict in 1996, Buyung aligned himself with the more conventional, proceduralist group. By this point he was reportedly already beginning to express some doubts about the locomotive of democracy idea (Aspinall 2005, 110). While this could be interpreted as a reversal of his previous position, it likely also reflected the degree to which the organisation had shifted in a more radical direction (Aspinall 2005, 111). The conflict in 1996 was particularly acrimonious and extended over several months (Aspinall 2005, 109). In early March 1996, the Board of Trustees selected Bambang Widjojanto as the next leader, Buyung’s preferred candidate (Aspinall 2005, 112). Several LBH offices boycotted the results of the election, arguing the method of election was undemocratic. The conflict was finally resolved in September, with significant losses for the organisation. Some of LBH’s most respected and vigorous campaigners, including Mulyana W. Kusumah, Hendaridi, Benny Harman, Abdul Hakim Garuda Nusantara and Nursyahbani Katjasungkana, left the organisation (Kohno 2010, 112). They went on to found and lead some of the most influential and important CSOs in the late New Order and early democratic era. Mulyana W. Kusuma established the Independent Election Monitoring Committee (*Komite Independen Pemantau Pemilu*, KIPP) in 1996, Hendaridi founded the Indonesian Legal Aid Association (*Perhimpunan Bantuan Hukum Indonesia*, PBHI) in 1996 and is now the director of the influential Setara Institute for Democracy and Peace, Benny Harman joined Hendaridi at PBHI and is now a Democratic Party politician, Abdul Hakim Garuda Nusantara established the prominent human rights organisation Elsam (*Lembaga Studi dan Advokasi Masyarakat*, Institute for Policy Research and Advocacy) in 1993, and Nursyahbani founded the women’s rights-focused legal aid organisation LBH Apik in 1995.

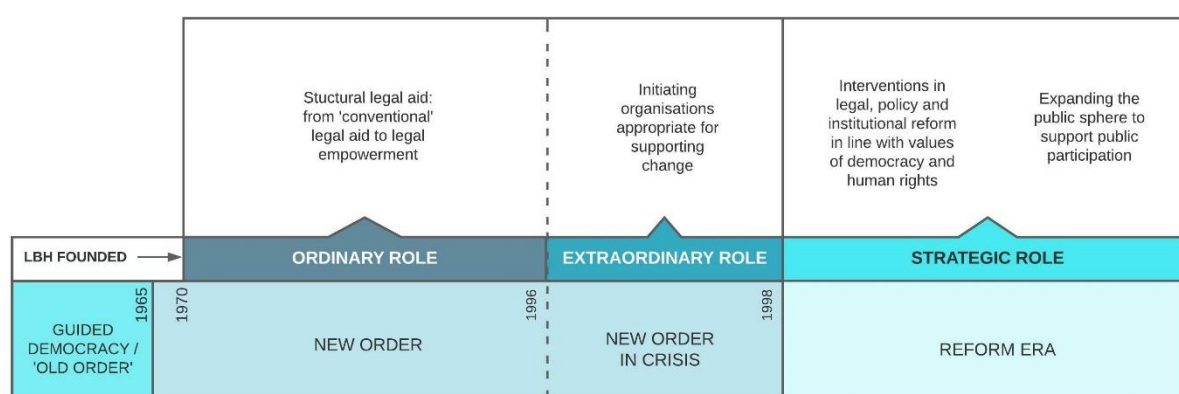
3.7 Cause lawyering organisation or incubator of civil society?

In this period of the mid to late 1990s, LBH became, in the words of the one-time head of its labour division, Surya Tjandra, “the centre of Indonesia’s civil society movement” (Botz 2001, 136). LBH

⁵³ Kohno depicts the conflict as occurring between “legalism” and “activism” arms of YLBHI, while Aspinall describes the conflict as occurring between the “litigational” and “political” oriented poles of LBH. The terms may differ but the arguments are essentially the same.

relished the convening role it was able to play and saw itself as an incubator of civil society. As the student movement, prominent pro-democracy figures, and CSOs began making louder demands for *reformasi*, LBH saw itself as occupying an important middle ground (Isnur, n.d.). Although LBH offices continued to provide legal aid throughout this period, LBH documents demonstrate it no longer saw its primary business as providing legal aid, see Figure 3.1 below. As the figure demonstrates, from its establishment in 1970 through to the leadership crisis of 1996, LBH was operating much as it always had, focusing on implementing its strategy of structural legal aid. But from 1996-1998, at a time when opposition to the Soeharto regime was growing, LBH believed its primary role was to cultivate civil society resistance to the New Order. In doing so, it still aimed to ensure resistance to the regime was expressed in line with principles of democracy and human rights (Isnur, n.d.). During the crisis phase of the mid-1990s, LBH encouraged and facilitated the establishment of five specialised CSOs, which it felt would be more agile and effective in responding to the particular challenges of the time.⁵⁴ According to then-YLBHI director Bambang Widjojanto, LBH felt it needed to escape from the “trap” of its initial format (Saptono 2012, 109). There was a need to diminish the dominant role of YLBHI as the central umbrella organisation, and provide greater autonomy to the regional offices, and other specialised organisations.

Figure 3.1: The changing role of LBH (Isnur, n.d.)



Recognising the huge potential for corruption in government and the lack of effective oversight mechanisms, LBH felt there was a need for an institution that could expose dirty officials and increase public pressure on the executive. This led to the birth of Indonesia Corruption Watch (ICW), now Indonesia’s highest profile anti-corruption CSO. YLBHI labour division leader Teten Masduki became its first leader, while other respected figures were recruited to serve on its founding board. During 1997-1998, several pro-democracy activists were kidnapped or disappeared. In response, YLBHI helped to support the establishment of the Commission for the Disappeared and Victims of Violence (*Komisi untuk Orang Hilang dan Korban Tindak Kekerasan*, KontraS).⁵⁵ KontraS, too, remains one of the most influential human rights organisations in Indonesia. Indonesian human rights

⁵⁴ The five organisations established were ICW, KontraS, KRHN, Leraï and Voice of Human Rights. Only ICW, KontraS and KHRN are discussed here. Leraï focused on conflict resolution and was established in response to growing tensions in Maluku. Voice of Human Rights, meanwhile, was a media organisation.

⁵⁵ The capital ‘S’ is intentional. Reflecting the tensions of the time, the acronym had a double meaning – Kontra S could also be read as “against Soeharto”.

icon Munir Thalib Said,⁵⁶ then head of information and documentation at YLBHI, was selected as its first leader (Saptono 2012, 109). The third major civil society organisation supported by YLBHI at this time was the National Consortium for Law Reform (*Konsorsium Reformasi Hukum Nasional*, KRHN). As demands for *reformasi* intensified through the 1990s, LBH recognised civil society needed to contribute to law reform proposals. But LBH felt its main capacity was in legal aid and was not confident about its ability to formulate democratic legal and policy proposals. It gathered together respected legal academics under the KHRN, and the result of their discussions were then delivered to the legislature, including proposals for the development of a Constitutional Court and a Judicial Commission (Saptono 2012, 110).⁵⁷

Although LBH might have seen itself more as an incubator of civil society opposition to the New Order in the late 1990s, it continued to represent some of the highest profile political cases of the late Soeharto years, using them to continue to put forward its case for the rule of law, democracy and strengthened protection of human rights. Consistent with the grassroots style of cause lawyering LBH practiced, LBH was “sceptical of the value of litigation” (Hilbink 2004, 685) but used individual cases to make broader points about the injustices of the New Order regime. Even if it knew it had no chance of success, LBH used the courts as a safe platform to educate the public and expose the often-ridiculous nature of the charges made against political dissidents. The courts were used “not as a legal forum, but as a political forum” (Hilbink 2004, 687). These politically sensitive cases often resulted in LBH lawyers facing considerable threats and reprisals, as the HR Dharsono case also demonstrated. Indeed, as Scheingold and Sarat have noted, even when cause lawyering is oriented toward litigation, under authoritarian regimes, claiming basic liberal rights may be viewed as a “confrontational and hostile *political act*” (Scheingold and Sarat 2004, 132).

Among the many key political cases LBH took on during the late New Order years was the case against PRD leader Budiman Sudjatmiko and the 11 other PRD members charged with subversion following the 27 July Incident. The defence team was somewhat pointedly named “Team of Defenders of Law and Justice in Indonesia” (*Tim Pembela Hukum dan Keadilan Indonesia*, TPHKI). (These somewhat flowery names for defence teams were common at the time, perhaps reflective of the fact that lawyers knew they were unlikely to be successful, and that the cases were used to make broader points about democracy and the rule of law.) Senior YLBHI lawyers Buyung and Bambang Widjojanto were part of the team that took on the high-profile case of Muchtar Pakpahan, the labour leader charged with subversion along with the PRD members after the 27 July Incident. Buyung and Widjojanto also defended outspoken politician Sri Bintang Pamungkas, a former member of the national legislature who in 1996 established his own political party, the Indonesian United Democracy Party (*Partai Uni Demokrasi Indonesia*, PUDI). Pamungkas was eventually sentenced to nearly three

⁵⁶ Munir was killed by arsenic poisoning in September 2004 on a flight to the Netherlands, where he was to undertake a master’s degree. See Chapter 4.

⁵⁷ Notably, two of the academics who served on the KRHN, Abdul Mukthie Fadjar and Harjono, went on to serve as judges at the Constitutional Court.

years in prison after being accused of calling Soeharto a dictator during a lecture in Germany (The Jakarta Post 1996).⁵⁸

Senior YLBHI figures Buyung and Lubis also represented *Tempo* in one of the landmark cases of the Soeharto era, when the magazine challenged Information Minister Harmoko's decision to revoke its publishing licence in June 1994. YLBHI supported the establishment of an advocacy coalition called Indonesian Solidarity for Press Freedom (*Solidaritas Indonesia Untuk Pembebasan Pers*, SIUPP),⁵⁹ which included organisations closely affiliated with YLBHI. To the surprise of many, on 3 May 1995, the State Administrative Court (*Pengadilan Tata Usaha Negara*, PTUN) found the minister had acted unlawfully and ordered that *Tempo*'s licence be reinstated (*Tapol* 1995). The decision was upheld by the State Administrative High Court in November 1995, but unsurprisingly, reversed by a compliant Supreme Court in June 1996 (*Tapol* 1996).

As Lindsey and Butt have explained, through its defence of political detainees such as the PRD activists, Pakpahan, Pamungkas and others, YLBHI made a concerted effort to maintain the 'memory' of constitutional democracy, which Indonesia had briefly experienced from 1950 until 1957, when Soekarno declared martial law (Butt and Lindsey 2012, 16–19). In criticising executive pressure on the courts, as they did in the *Tempo* case and many other political trials, Buyung and others invoked arguments about democracy and *negara hukum*. Lawyers like Buyung recalled fondly – even celebrated – the liberal democratic period of the 1950s, and attacked the New Order for “failing to fulfil the promises it made after Soekarno failed to deliver the *negara hukum*” (Butt and Lindsey 2018, 18). As discussed, grassroots lawyers are not above taking on individual cases, but when they do so, they use them to bring attention to broader patterns of injustice (Hilbink 2004, 684). The massive media and public attention these cases attracted helped to keep democratic discourse alive during a time of significant state repression. As will be shown in subsequent chapters, LBH continues to perform this vital role as the quality of democracy has deteriorated over recent years.

3.8 Conclusions

This chapter introduced LBH and the forms of cause lawyering it established and developed under the New Order. While cause lawyering and legal mobilisation literature suggests cause lawyering is more likely to flourish under more open political regimes, LBH was born under authoritarianism. It was founded in 1970 in part as a response to state repression, and the realisation that the New Order was not going to fulfil its early promises to restore the rule of law. Under the New Order, the courts were subservient to executive pressure, there were few guaranteed legal rights, with even the few protections outlined in the Criminal Procedure Code (KUHP) routinely ignored by authorities, and there was little safe public space for discussion of political issues. Yet LBH showed cause lawyering could still exist, arguably even thrive, in this repressive environment.

⁵⁸ See Zifcak 1999 for a detailed discussion of this case.

⁵⁹ The acronym also mirrored the acronym for publishing licences, *Surat Izin Usaha Penerbitan Pers*.

Although it engaged with international theoretical and intellectual debates around public interest law occurring at the time, LBH developed its own understanding and practice of cause lawyering. In LBH's very early years it practiced a more conventional version of cause lawyering, one that could be described as proceduralist and one that was focused on extending representation to poor and marginalised Indonesians and strengthening the legal system and rule of law. As the New Order period progressed, however, LBH developed a more political, grassroots style of cause lawyering, articulated through the concept of 'structural legal aid'. The notion of rights was used to educate and mobilise communities and encourage them to take action to make demands on the state. LBH cause lawyers believed the demand for the rule of law had to come from the people.

As the New Order attempted to cling to power and ratcheted up pressure on civil society, LBH in turn tended towards a highly political, oppositional version of cause lawyering. Throughout the 1990s, LBH became increasingly activist, as it built alliances with broader civil society, students, labour groups, and farmers, and its role expanded into more straightforward human rights and democratic advocacy. To the extent that such activities were still interpreted through the prism of structural legal aid, structural legal aid became more focused on changing the structure of the authoritarian state to a more democratic one. The key point for this thesis, however, is that there were already indications of a relationship between the openness of the state and the form of cause lawyering practiced. Rather than retreating into 'safer' versions of cause lawyering, LBH was invigorated by its opposition to the Soeharto regime, and became more openly adversarial.

This is particularly important to consider in reflecting on how LBH has been affected by democratic change over the past two decades. Sweeping changes occurred in the *reformasi* period that followed the fall of Soeharto in 1998, unimaginable to most while the New Order was in power, and there were new opportunities for LBH to contribute to the restructuring of Indonesian state and society. These changes forced LBH to begin to rethink its entire reason for being, and the form of cause lawyering it wanted to pursue. Deterioration in democratic quality over the past five to ten years has prompted further reflection on the most appropriate form of cause lawyering. It is to these changes, and how they affected LBH, that I turn in Part Two of this thesis.

PART TWO: CAUSE LAWYERING IN A FRAGILE DEMOCRACY

Introduction to Part Two

Part One of this thesis reviewed key literature on cause lawyering and introduced LBH as Indonesia's most prominent and influential cause lawyering organisation, examining its efforts to mobilise the law to promote social change under an authoritarian regime. Before I continue to examine how cause lawyering and cause lawyers at LBH were affected by the demise of this regime in Part Two of the thesis, I will briefly recap the key changes in the political and institutional settings that occurred after the New Order collapsed.

Although the New Order faced considerable challenges to its authority during the 1990s, few thought there was any real chance of Soeharto stepping aside until the Asian financial crisis struck in 1997-1998 (Lindsey and Santosa 2008, 11). When Soeharto was reappointed for another five year term as president in March 1998, student protests broke out in major cities across the country (Hadiwinata 2003, 77). Rising food and fuel prices led to demonstrations and violence. Calls for *reformasi* grew stronger. On 13-14 May, widespread rioting and looting broke out across Jakarta, much of it targeting ethnic Chinese owned businesses. Some reports estimated more than 1,000 people were killed, many burned to death in shopping malls that had been set on fire (Purdey 2008, 518). A combination of economic collapse, student protests, rioting by the urban poor, splits within the military, and the loss of support from domestic cronies and then former Cold War ally the US eventually spelled the end for Soeharto (J. S. Davidson 2018, 1-2; Lindsey and Santosa 2008, 12). On 21 May 1998, Soeharto announced his resignation, marking the end of the New Order and the beginning of the *reformasi* period, setting in motion major changes for Indonesian state and society. Soeharto's vice president, Bacharuddin Jusuf Habibie, replaced him and enthusiastically embraced reform.

Habibie had a close relationship with Soeharto and was former minister of research and technology under the New Order, so few imagined he would have much of an appetite for instituting sweeping change. But after the corruption and nepotism of the final years of Soeharto's rule, the government desperately needed to regain political legitimacy. There was a genuine desire for institutional and regulatory reform and "little open resistance from within the state to notions of democracy, accountability, supremacy of law, even civil society itself" (Aspinall 2004, 84). Although it was only in power for about 18 months, the Habibie government instituted significant and lasting changes. Among its most significant achievements were the release of dozens of political prisoners,⁶⁰ the lifting of restrictions on freedom of the press, the revocation of the 1963 anti-subversion law, ratifying ILO Convention No. 87 on Freedom of Association, the cancelling of the requirement for all organisations to adopt Pancasila as their 'sole foundation', allowing new political parties to be established, and holding the first democratic elections since 1955 (Anwar 2010; Lindsey and Santosa 2008, 12; Beittinger-Lee 2013, 73-74). Responding to the New Order's highly centralised rule, Habibie began a "radical" decentralisation program involving devolution of political and fiscal power to regional (district and municipal) administrations, which was implemented from 2001 (Anwar 2010, 109). In

⁶⁰ Including labour leader Muchtar Pakpahan, discussed in Chapter 3.

the legal realm, the vital ‘One Roof’ policy was introduced, with the passage of Law No. 35 of 1999 on Judicial Power, which strengthened judicial independence by removing the Ministry of Justice’s control over the judiciary (Lindsey and Santosa 2008, 13).⁶¹ Crucially, under Habibie, barriers to constitutional amendment were removed, initiating a transformative constitutional reform process that was eventually completed in 2002 (Anwar 2010, 101; Horowitz 2013). The incremental reform process introduced expansive new human rights protections, stronger separation of powers between the executive and the legislature, limitations on presidential terms to two five-year periods, and provisions establishing an independent Constitutional Court, among other changes. These vital constitutional amendments provided the basis for transition to a liberal democratic system – even if the result was “a long way from being satisfactory” (Butt and Lindsey 2012, 24).

Important reforms continued under the two presidents following Habibie, Abdurrahman Wahid (commonly known as Gus Dur) (1999-2001) and Megawati Soekarnoputri (2001-2004). Under Wahid, the police were formally separated from the military,⁶² and significant strides were made in judicial reform (Beittinger-Lee 2013, 77; Lindsey and Santosa 2008, 15; Yon and Hearn 2016). Under Chief Justice Bagir Manan (2001-2008), the Supreme Court began a comprehensive reform process, and in 2003 published five ‘blueprints’ for reform, prepared in collaboration with CSOs (Yon and Hearn 2016, 9).⁶³ Wahid is also remembered fondly among human rights activists for dismantling Soeharto-era restrictions on Chinese language and culture, and permitting the celebration of Chinese New Year (J. S. Davidson 2018, 22). Megawati, meanwhile, presided over the establishment of the Corruption Eradication Commission (KPK), a new anti-money laundering agency, the Financial Transaction Reports and Analysis Centre (PPATK), and an independent Judicial Commission (Lindsey and Santosa 2008, 18). Of considerable significance to cause lawyers, Megawati’s presidency saw the establishment of the Constitutional Court, as mandated by the third constitutional amendment of 2001. Despite these major achievements, Megawati’s presidency was also marked by her closeness to the military and a deteriorating human rights situation (Beittinger-Lee 2013, 79).

Susilo Bambang Yudhoyono assumed the presidency in 2004 as the first directly elected president in Indonesian history.⁶⁴ Most scholars now consider the decade of the Yudhoyono presidency a wasted opportunity (Aspinall, Mietzner, and Tomsa 2015). Although he maintained political stability, he did little to advance the quality of Indonesia’s democracy and “slowed the pace of reform to a halt” (J. S. Davidson 2018, 7). There is no universally agreed definition for the period of *reformasi*, but most scholars would say it was well and truly over by the end of Yudhoyono’s first term (Lindsey 2018).

⁶¹ This amended Law No. 14 of 1970 on Judicial Power, under which the Ministry of Judicial Affairs had authority over the general and administrative courts (the Ministry of Religious Affairs oversaw the religious courts and the Ministry of Defence the military courts). The revised 1999 Law stated the Supreme Court was to have exclusive authority over the organisational, administrative, and financial affairs of the judiciary. The Ministry of Judicial Affairs was required to transfer this authority within five years, which it did, in April 2004.

⁶² Through the passage of two decrees of the People’s Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR): MPR Decree No. VI/MPR/2000 and Decree No. VII/MPR/2000.

⁶³ Notably, LBH elected not to engage in this reform process as it remained sceptical about efforts to strengthen the state (see discussion in Chapter 4).

⁶⁴ Direct elections for president were introduced in the third amendment to the constitution, in November 2001 (Article 6A).

Mietzner, for example, states that Indonesia reached its democratic peak between 2004 and 2008 (Mietzner 2021a, 11–16). One of the defining features of the Yudhoyono era was the rise of conservative Islam. Attacks on religious minorities and restrictions on their places of worship became more common (Lindsey and Pausacker 2016b) and, as such, defence of religious minorities became an increasingly important component of LBH’s work (see discussion in Chapter 5). Although the Yudhoyono years are often described as a missed opportunity, his government was open to collaboration with civil society (particularly in its first term), and some progressive reforms were passed under his watch. These included Law No. 14 of 2008 on Freedom of Information and Law No. 15 of 2011 on Legal Aid, both of which were formulated with the active involvement of CSOs, including LBH in the case of the Legal Aid Law. Moreover, the KPK, established in 2003, began pursuing corruption suspects with gusto under Yudhoyono, and claimed several high-profile scalps, including senior members of Yudhoyono’s own party (Butt and Lindsey 2018, 290–91).

President Joko “Jokowi” Widodo came to power in 2014 on the back of a deeply polarised and, at times, poisonous election in which he defeated Prabowo Subianto, a New Order-era general and one-time son-in-law of Soeharto. In Indonesia and among foreign observers, the election was cast as a choice between ongoing democratisation under Jokowi versus a reversion to New Order-style authoritarianism under Prabowo (Aspinall and Mietzner 2014). Prominent human rights, pluralist and anti-corruption activists, including some former LBH staff, publicly backed Jokowi’s campaign. Conservative Islamists, meanwhile, rallied behind Prabowo, inflaming a longstanding ideological divide between pluralists and Islamists in the country (Mietzner 2021b, 166–67). Jokowi was the first president with no direct links to the New Order elite, and had a reputation as a no-frills and corruption-free mayor of Solo (Central Java) and governor of Jakarta, so there were enormous expectations that he would reinvigorate Indonesia’s moribund reform project (Muhtadi 2015, 349–50). It was not long, however, before the high hopes progressive civil society had for Jokowi were dashed and he was revealed to be much more of a pragmatist than his supporters in civil society had assumed (Muhtadi 2015, 350). Jokowi also quickly abandoned promises to resolve historical human rights violations (K. Setiawan 2016).

As his presidency progressed, disquiet about democratic regression in Indonesia continued to grow. Seemingly spooked by massive Islamist protests in late 2016 and early 2017 against the ethnic Chinese governor of Jakarta Basuki “Ahok” Tjahaja Purnama (a one-time ally of Jokowi), Jokowi responded with a mix of accommodation and criminalisation, selecting a conservative Islamic figure as his running mate in the 2019 elections at the same time as outlawing hard-line Islamist groups (Mietzner 2020b, 233; 2018; Fealy and White 2021; Power 2018). The 2013 Law on Mass Organisations was revised to provide the government with the authority to outlaw CSOs without needing judicial approval, and the government has since banned the conservative Hizbut Tahrir Indonesia (HTI) and the Islamic Defenders Front (*Front Pembela Islam*, FPI).⁶⁵ Politicians and other

⁶⁵ Through the passage of Emergency Regulation in Lieu of Law (Perppu) No. 2 of 2017 on Revision of Law No. 17 of 2013 on Mass Organisations. The revised 2017 Law on Mass Organisations provided the minister of law and human rights with the authority to dissolve organisations, a power used to ban HTI in July 2017 and FPI in 2020.

powerful figures have increasingly used prosecution, or the threat of prosecution, under defamation and blasphemy provisions to silence their opponents, activists and citizens (Warburton and Aspinall 2019, 260–61; K. Setiawan 2020). In 2019, the president and legislature agreed on revisions to the 2002 Law on the KPK that effectively gutted the body (Butt 2019),⁶⁶ prompting the *Reformasi Dikorupsi* protests discussed in Chapter 1. One year later, as Covid-19 spread across the nation, the government rushed through a massive ‘Omnibus’ Law on Job Creation that combined 79 existing laws and critics said weakened environmental protections, as well as threatened workers’ and indigenous peoples’ rights. A hasty and opaque drafting process led to the impression the government was more focused on the needs of big business than the public (Argama 2020). Mass protests again erupted across Indonesia, this time under the banner of *Mosi Tidak Percaya* (Motion of No Confidence) (although the *#ReformasiDikorupsi* hashtag was also used again),⁶⁷ and police again responded excessively, arresting thousands of protesters (BBC Indonesia 2020).

These and other developments have resulted in increasingly pessimistic academic assessments of Indonesia’s democratic quality, discussed briefly in Chapter 1.⁶⁸ Scholars have drawn attention to growing efforts among the political elite to wind back democratic reforms (seen clearly in the *Reformasi Dikorupsi* and Omnibus Law on Job Creation protests), attacks on minority rights (especially religious minorities and LGBTIQ+ Indonesians), shrinking civic space, worsening political polarisation along Islamist and pluralist lines, the weakening of political parties, and the growing role of the military and police in social and political life, among other concerns (Power 2018; Warburton and Aspinall 2019; Aspinall and Mietzner 2019; Marta, Agustino, and Wicaksono 2019; Fealy 2020; Mietzner 2020b; Power and Warburton 2020; K. Setiawan 2020; Sambhi 2021; Mietzner 2021b; 2021a). Scholarly accounts of the erosion of Indonesian democracy are also mirrored in international measures of democratic quality. Freedom House now considers Indonesia only ‘partly free’ after ranking the country ‘free’ from 2006 to 2013 (Freedom House 2013; 2020). Similarly, Indonesia has experienced a sharp decline in the Economist Intelligence Unit’s Democracy Index, where it is now considered a ‘flawed democracy’, with its ranking falling from 49 in 2015 to 64 in 2019 (Economist Intelligence Unit 2016; 2020).

Although there is no question anxiety about democratic regression in Indonesia has grown over recent years, scholars have long raised concerns about the extent of Indonesia’s democratic transition. These concerns have generally focused on the ability of New Order-era elites to survive the transition and go on to capture the state’s new democratic institutions (Aspinall 2013, 102). Oligarchy scholars, such as Jeffrey Winters (Winters 2011) and Richard Robison and Vedi Hadiz (Robison and Hadiz 2004), have been particularly influential in advancing aspects of this argument. While there are differences in

⁶⁶ Among the most controversial amendments were those requiring the KPK to seek approval from a new ‘Supervisory Board’, appointed by the president, before it can conduct wiretapping, searches and seizures (Butt 2019).

⁶⁷ The rallying cry ‘Motion of No Confidence’ was borrowed from the title of a song by indie band Efek Rumah Kaca that had become the unofficial anthem of the *Reformasi Dikorupsi* protests a year earlier (Taufiqurrahman 2019).

⁶⁸ See, for example, Power 2018; Aspinall et al. 2020; Aspinall and Mietzner 2019; Diprose, McRae, and Hadiz 2019; Schäfer 2019; Warburton and Aspinall 2019; Power and Warburton 2020; Mietzner 2021b; Mujani and Liddle 2021)

these scholars' conceptualisations of oligarchy, they all generally contend that "democratisation has changed the form of Indonesian politics without eliminating oligarchic rule" (Ford and Pepinsky 2013, 3–7). Or in other words, the social and political elites that emerged under the New Order have readily adapted to new democratic structures and shaped policy formulation and implementation to their benefit (Aspinall 2013, 102; Winters 2013, 18–19). I do not wish to dwell on these arguments at length here, but Winters' comments on the rule of law are particularly relevant for understanding the predicament faced by Indonesian cause lawyers in the post-Soeharto period:

"There is an expectation in the scholarly literature that as democratic consolidation progresses, gains will be made in the rule of law (typically portrayed as a 'quality of democracy' matter). But there is no inherent reason for this to be so. A democracy thoroughly captured by oligarchs has no strong inherent incentives to impose independent and punishing legal constraints on itself. Nor is a democracy necessarily unstable or vulnerable to crippling illegitimacy just because the legal regime is feeble at the top. Evidence from a broad sample of transitions to democracy globally suggest that 'democracy without law' can persist for decades. It is a scenario Indonesia has been playing out since 1998." (Winters 2013, 33)

A result of this situation is that "on matters of property, wealth, economy, corruption, and criminality of all kinds, the law bends to individual oligarchs and elites rather than the reverse" (Winters 2013, 19). This may be an overly pessimistic view, but it is a view to which many LBH lawyers subscribe. LBH lawyers now view the state as utterly captured by oligarchs.⁶⁹

This truncated overview of political and institutional developments since 1998 aims to provide the context for examination of how cause lawyering and cause lawyers at LBH have been affected by democratic change in the following chapters. As this brief discussion has shown, many of the reforms implemented in the period immediately after Soeharto fell were those the literature identifies as being supportive of legal mobilisation – constitutional rights protections, the establishment of a constitutional court, judicial independence, political openness, and a vibrant civil society sector and free media. But the last decade has been characterised by serious democratic backsliding. As the next few chapters will show, this decline in democratic quality has had a major impact on the form of cause lawyering practiced by LBH.

⁶⁹ A simple demonstration of this is that YLBHI's last two annual reports were titled "Reform Corrupted by Oligarchs" (*Reformasi Dikorupsi Oligarki*) and "Authoritarians and Oligarchs Agitate in the Midst of the Pandemic" (*Otoritarian dan Oligarki Membunah di Tengah Pandemi*).

Chapter 4: Organisational challenges post-Soeharto

4.1 Introduction

This chapter focuses on organisational issues and how they shaped the form of cause lawyering practiced by LBH in the post-Soeharto period. Chapter 2 introduced the concept of cause lawyering and factors considered supportive of cause lawyering and legal mobilisation. Chapter 3 then applied this theoretical framework to analyse the experience of LBH under the authoritarian New Order. This chapter continues from Chapter 2 and Chapter 3 to support the central argument of this thesis – that the form cause lawyering takes is closely related to the quality of democracy – by beginning to examine how LBH was affected as an institution by the transition to democracy. Specifically, it looks at how democratic change affected organisational factors crucial for supporting cause lawyering work, and how these factors in turn affected LBH and its efforts to promote social change. These organisational issues are important, but rarely discussed, factors influencing the shape of cause lawyering.

There is considerable literature on how organisational factors affect the work of CSOs generally, including in the Indonesian context (Lewis 2014; Ahmed 2021; Antlöv, Brinkerhoff, and Rapp 2010; Antlöv, Ibrahim, and van Tuijl 2006; Davis 2015; McGlynn Scanlon and Alawiyah 2015; Lassa and Li 2015). This work covers considerations of funding, leadership, organisational culture, operational systems, human resources, organisational learning, networking and relationship management, and more. Cause lawyering literature is mostly silent on these factors, apart from the crucial role of funding (Epp 1998; Ellmann 1998; Cummings 2008; Meili 2009). As this chapter will show, many of these organisational factors had a major influence on LBH and its approach to cause lawyering in the period after Soeharto fell. Most, but not all, of these factors were also connected to democratic change.

The chapter begins by reflecting on how the momentous collapse of the authoritarian Soeharto regime – which had been in power since LBH's establishment in 1970 – affected the organisation. With the fall of the New Order, LBH was suddenly forced to reflect on its organisational identity and its role in a more democratic Indonesia (Mann 2020). For some time, it struggled to define its place in a dramatically different political context. I then continue to examine leadership and organisational management issues. Historically, leadership transition was associated with significant internal organisational turmoil at LBH, as Chapter 3 showed. Major leadership squabbles continued in the democratic era, and most reflected underlying tensions about the most appropriate strategy of cause lawyering for the time.

Another change precipitated by the democratic transition was that it prompted LBH's international donors to rethink their approach to assistance. There were new opportunities to support the institutions of the transitional state and promote democratic consolidation, and the type of human rights and democracy activism conducted by LBH fell out of favour. Donors' changing priorities had significant implications for LBH, which experienced significant financial stress.

Finally, the chapter will also briefly cover other critical organisational aspects that are less connected to democratic change, such as staff recruitment, training, gender equality and research and knowledge management. It will reflect on how these aspects of organisational management and capacity have shaped LBH's cause lawyering work.

4.2 Reckonings with organisational identity post-Soeharto

Cause lawyers at LBH had long defined themselves in opposition to the New Order state. For much of civil society, and LBH as one of its leading actors, the state was viewed "as the primary problem of political life and its constraint as a foremost political goal" (Aspinall 2004, 91). Indeed, LBH's ideology of legal aid, structural legal aid, could be said to have been focused almost entirely on bringing about changes to the authoritarian system of the New Order.

This was a relatively uncomplicated position to maintain for the first couple of years after Soeharto fell. Although Soeharto's successor and long-time protégé, BJ Habibie, surprised many observers with his attitude to reform, civil society still considered him a continuation of the old regime. In these early years of the democratic transition, LBH remained a powerful voice calling out state violence and pushing for democratic reform. For example, YLBHI led vocal campaigns over disappeared activists and students killed by security forces (The Jakarta Post 1998e; 1998c; 1998a; 1998b) and state-sponsored violence in Aceh (The Jakarta Post 1999a; 1998d). YLBHI, LBH Jakarta and the National Consortium for Law Reform (KRHN), the law reform organisation established by YLBHI, were members of the Civil Society Coalition for a New Constitution (*Koalisi Ornop untuk Konstitusi Baru*), which advocated for constitutional reform (Yadav and Mukherjee 2014, 295; Butt 2015, 25). But with the collapse of the New Order, the locus of power had shifted, and patterns of relations quickly became more complex. Although figures hostile to democratic change remained in government, there were far greater opportunities for civil society to contribute to reform.

At the same time as this was occurring, the lifting of New Order restrictions on associational life led to an explosion in CSOs. By some accounts, the number of Indonesian CSOs had swelled to 70,000 by 2000 (Hadiwinata 2003, 113). New organisations emerged with similar mandates to LBH, such as the Indonesian Centre for Law and Policy Studies (*Pusat Studi Hukum dan Kebijakan Indonesia*, PSHK), the Indonesian Institute for an Independent Judiciary (*Lembaga Kajian dan Advokasi Independensi Peradilan*, LeIP), and the Indonesian Court Monitoring Society (*Masyarakat Pemantau Peradilan Indonesia*, MaPPI). Donors encouraged and facilitated organisations like these to play a role in strengthening Indonesia's new democratic institutions. For example, LeIP and PSHK prepared the landmark Blueprint for Reform of the Supreme Court, which was then adopted by the reform-minded Chief Justice Bagir Manan in 2003 (Cox, Duituturaga, and Sholikin 2012, 31; Yon and Hearn 2016, 9). In 2004, Bagir Manan even established a 'Judicial Reform Team Office' (which still exists today), comprised of Supreme Court officials, ministerial and civil society representatives, to implement the blueprint. Not only were there new opportunities for civil society to contribute to the

drafting of legislation but there was now even room for cause lawyers to enter and work within the state.

On the whole, however, LBH cause lawyers were either poorly equipped or uninterested in strengthening state institutions. They were not inclined to build the legitimacy of a state they considered contained too many elements of the former authoritarian regime they had spent decades opposing and which, they believed, had little interest in improving the welfare of the people.⁷⁰ LBH offices in regional areas, especially, struggled to move beyond the oppositional role they had established over many years. This is understandable, given regional LBH offices were often on the frontlines of advocacy against the Soeharto government's major development projects. YLBHI's director of organisational development, Febi Yonesta (commonly known as Mayong), summarises this well:

“LBH was involved in the pushing for the birth of independent institutions, and organisations that were born from LBH did that sectorally, and were engaged in policy reform.⁷¹ Meanwhile, LBH offices [in the regions] didn't do that. They were actually very sceptical of efforts to collaborate with the government. The institutional reform agenda was viewed by many LBH offices as a futile effort that would only expend a great deal of funds, and only end up strengthening the state, which is capitalist in nature, and not focused on improving the prosperity of the people. This was a common discourse among LBH offices when we had national level meetings.” (Interview, Febi Yonesta, 2019)

This tension between maintaining an adversarial role and engaging with the state on policy reform is a challenge common to cause lawyers in newly democratic states (Klug 2001, 265; Meili 2009) and as such is a significant focus of Chapters 5, 6, 7, and 8. As stated in the introduction, many of LBH's reflections in this period focused on how to use the law and for what cause. Mayong's comment above is an example of this. It also touches on the anti-capitalist sentiment that had infiltrated some LBH offices in the late New Order years (Aspinall 2005, 108). This highlights the deeply complex and sometimes divisive nature of these kinds of questions.

My main concern in this section, however, is how the changes that accompanied democratic transition forced LBH to think more deeply about its reason for being. Among civil society circles in Jakarta it is common to hear that LBH suffered an identity crisis following the collapse of the New Order. Indeed, it is a view often expressed by former YLBHI and LBH staff themselves. Luhut Pangaribuan, a senior YLBHI lawyer during the Soeharto era, said the change from a closed authoritarian system to a more open system led to LBH losing direction. “It became disoriented,” he said. (Saptono 2012, 85).

Another factor contributing to LBH's apparent identity crisis in the years following the fall of Soeharto was the fact that, under the New Order, YLBHI had acted as a ‘generalist’ organisation. LBH had become accustomed to acting as a *rumah demokrasi* (home of democracy) (Walhi 2017;

⁷⁰ Stephen Meili (2009, 62) has noted cause lawyers in Argentina faced a similar dilemma.

⁷¹ Here he is referring to organisations like ICW and KRHN.

Isnur, n.d.), a place that welcomed a broad range of civil society groups and activists. As Chapter 3 discussed, LBH worked politically on issues as diverse as labour rights, agrarian reform, freedom of expression, democratic reform, corruption, state violence, criminal law and procedure, and more. As former LBH lawyer Mas Achmad Santosa said: “At that time, YLBHI stood alone as a CSO that was brave. Now that everything is more open, LBH no longer dominates the civil society movement as it did under Soeharto” (Saptono 2012, 90). Following the transition, a range of specialised organisations sprung up. In addition to those already mentioned, organisations with sharply focused issues of concern and strong technical skills emerged, such as the Association for Elections and Democracy (Perludem), the Indonesian Forum for Budget Transparency (Fitra), and (later) the Institute for Criminal Justice Reform (ICJR). Meanwhile, LBH remained somewhat of an all-rounder. Herlambang Wiratraman, formerly of LBH Surabaya, explains:

“The crisis at LBH was related to the development of civil society. CSOs thrived in the *reformasi* period, and other organisations in the civil society network started to fill the roles that were once filled by LBH... LBH experienced a phase where it wasn’t able to position itself correctly.” (Interview, Herlambang P. Wiratraman, 2019).

LBH had become accustomed to a political, oppositional form of cause lawyering less suited to a more open regime. Structural legal aid, with its strong focus on changing the structure of the authoritarian New Order state, dipped in relevance or was neglected (see Chapter 8). As YLBHI’s Mayong explained:

“With the passing of time, the structural legal aid concept was interpreted differently, and there were even some LBH offices that left it behind completely” (Interview, Febi Yonesta, 2019).

For some of the older guard of LBH, it was time for the organisation to return to providing conventional legal aid, and abandon the highly political form of cause lawyering that had developed under the New Order. Consistent with his proceduralist inclinations, LBH founder Adnan Buyung Nasution tried to push the organisation in a more professional lawyerly direction. “LBH should return to its true nature as a professional institution. LBH is not a CSO that just does demonstrations,” Buyung said in 2001 (Hukum Online 2001). Similar views were also expressed to me by Hendardi, the more activist inclined lawyer who founded PBHI following the 1996 leadership dispute in YLBHI.

“After *reformasi*, I always said, ‘we have to reorientate ourselves’. Although this country is not fully democratic, the transition is progressing. As small as that progress may be... LBH should return to providing more conventional legal aid. There are still so many poor and oppressed people who do not get representation. We can still prioritise communal cases, but there is no need to be so political, to play a political role.” (Interview, Hendardi, 2019).

In the most extreme demonstration of this belief in a return to ‘conventional’ legal aid, in 1999, LBH founder Buyung chose to lead the defence team for former Armed Forces Commander General Wiranto and other senior military figures accused of human rights abuses in East Timor during the turbulent period surrounding its vote for independence from Indonesia in August 1999 (England 1999). The decision to represent Wiranto put Buyung in direct conflict with LBH. Respected former YLBHI staff Todung Mulya Lubis, Nursyahbani Katyasungkana, and Munir Said Thalib had been appointed to a fact-finding team that reported that Wiranto, as Armed Forces commander, should bear responsibility for crimes against humanity in East Timor (Commission to Investigate Human Rights Violations in East Timor (KPP-HAM) 2000; The Jakarta Post 1999b). While Buyung was no longer part of the YLBHI leadership team and did not represent Wiranto as a YLBHI lawyer, he still sat on its advisory board, and in the eyes of the public (and YLBHI’s donors) he was forever associated with YLBHI. Buyung’s colleagues at YLBHI-LBH were livid, and there was almost immediately a move to dismiss him from the YLBHI board (The Jakarta Post 1999b).

Buyung’s decision to represent Wiranto was difficult for many to understand, given Buyung had often squared off against the military under the New Order. But Buyung was “unrepentant” and said he was motivated by attempts to promote a professional legal culture (England 1999). In deciding to defend Wiranto, Buyung had returned to a purely proceduralist position. As noted, proceduralist understandings of cause lawyering emphasise a separation between law and politics and are characterised by a belief that the legal system is capable of delivering justice (Hilbink 2004, 665). In line with this proceduralist understanding, Buyung’s cause was the rule of law and strengthening the legitimacy of the legal system, an important goal in a newly democratic state. Buyung had moved away from the classic cause lawyering position of identifying with the cause of his client, and toward more mainstream professional ideals of non-partisanship (Hilbink 2004, 665). This was a fundamental shift compared to Buyung’s highly political approach in the HR Dharsono case, but it is a shift only made possible by the democratic transition.

Buyung’s defence of Wiranto was not a one-off either. Buyung went on to defend controversial figures such as accused Bali Bombing mastermind Abu Bakar Ba’asyir, for terrorism related offences, and former Democratic Party chair Anas Urbaningrum and tax official Gayus Tambunan in corruption cases. He repeatedly asserted that, despite the charges against them, they had a right to a fair trial. But Buyung moved too quickly for his colleagues at YLBHI, who still considered the legal system to be corrupt and unjust (Mann 2020). Buyung’s defence of Wiranto, even if he was doing it in a professional capacity (BBC 1999), and his closeness with the military, continued to resonate and cause problems for LBH well into the future, as I explain below.⁷²

It is natural that YLBHI would reassess its organisational identity following such a fundamental change to the nature of the state. However, the tension between returning to a more conventional legal

⁷² In line with his commitment to promoting professionalism, in his later years, Buyung tried, and failed, to establish a united and professional bar association, which he long believed was a major missing piece in the rule of law puzzle in Indonesia (Lindsey 2015). Indonesia’s legal profession remains divided, with repeated tension and conflict between the country’s multiple bar associations, hampering professionalism and contributing to public distrust (Butt and Lindsey 2018, 110).

aid role and the grassroots style of politically motivated cause lawyering associated with structural legal aid continued for several years. But as I will demonstrate in subsequent chapters, YLBHI has been invigorated by the democratic regression that has occurred in Indonesia over the past decade, and seems to have developed a renewed clarity about its role. As the state has become more repressive, the type of political, adversarial lawyering practiced by YLBHI under the New Order has become vital again. The deterioration in democratic quality has helped put aside questions about whether LBH should revert to a more conventional style of legal aid. Against a backdrop of creeping authoritarianism, LBH lawyers see little point in providing conventional legal aid alone, as the root causes of injustice remain unaddressed. These discussions are a major feature of subsequent chapters.

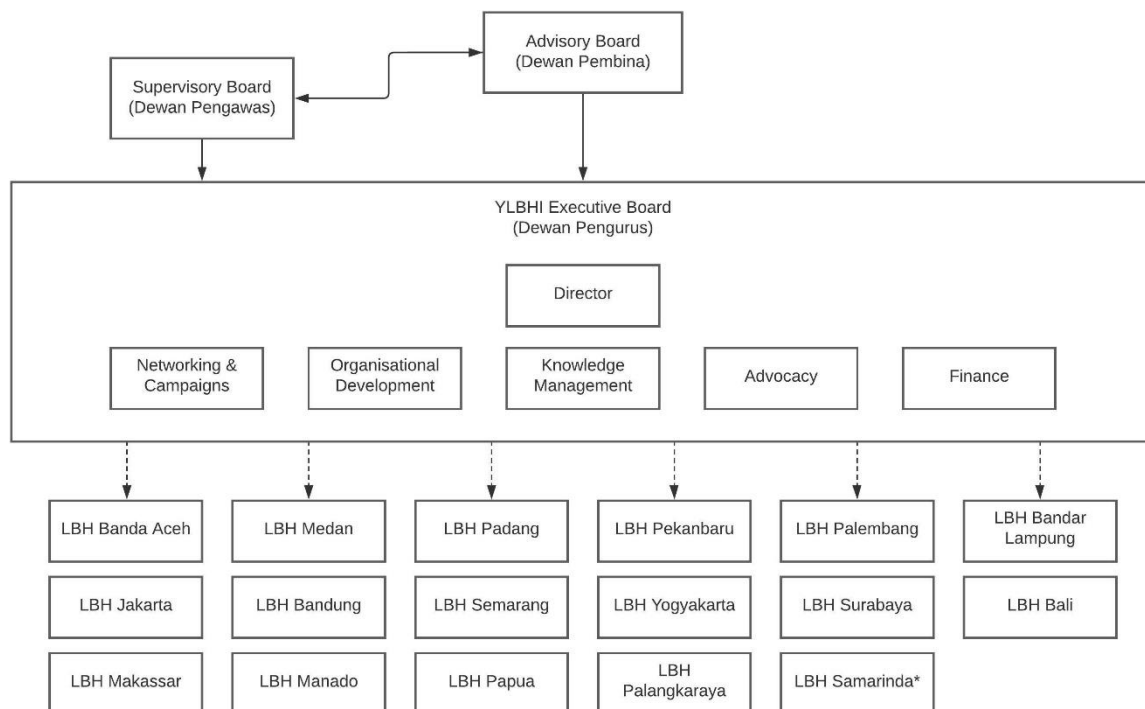
For the remainder of this chapter, I focus on leadership and organisational management issues, funding constraints and the changing priorities of foreign donors, the government sponsored legal aid system as a potential new avenue of funding, training, female representation and gender equality, and research capacity. These factors help to explain why LBH struggled in the period following the transition to democracy, despite the presence of institutional structures considered supportive of cause lawyering.

4.3 Organisational structure and governance

Before reflecting more closely on the organisational factors that have affected cause lawyers at YLBHI, it is important to recap YLBHI's organisational structure and governance. In accordance with the Indonesian Law on Foundations (Law No. 16 of 2001 as amended by Law No. 28 of 2004), YLBHI is comprised of an advisory board (*Dewan Pembina*), a supervisory board (*Dewan Pengawas*) and an executive board or leadership team (*Dewan Pengurus*), which is responsible for day-to-day management of the organisation. The roles of each of the bodies are laid out in YLBHI's foundation document (*akta pendirian*) and articles of association or constitution (*anggaran dasar*). Briefly, the unelected and unpaid advisory board consists of senior statespeople with legal expertise and commitment to YLBHI's organisational priorities, and it is responsible for appointing members of the supervisory board and executive board. The advisory board meets at least twice annually but does not have a major role in the daily running of the organisation. The supervisory board, meanwhile, consists of at least three people (preferably with backgrounds in law, accounting and management), and is tasked with providing oversight and advice to the executive. It can temporarily suspend members of the executive if they have breached the articles of association, but the advisory board makes the decision on whether a member will be dismissed or retained. LBH lawyers are also guided by organisational bylaws (*anggaran rumah tangga*) and a 'Guide to YLBHI Struggle Values and Code of Ethics'.⁷³

⁷³ *Pedoman Pokok Nilai-Nilai Perjuangan YLBHI dan Kode Etik Pengabdian Bantuan Hukum*

Figure 4.1: Simplified organisational structure



In the media and among the public, YLBHI and LBH Jakarta are often equated with one another, especially because they are both housed in the same building. But recall YLBHI is the ‘Foundation of Legal Aid Institutes of Indonesia’. As the diagram above demonstrates, it serves as the umbrella body for 17 regional Legal Aid Institutes (LBH).⁷⁴ Although YLBHI does not involve itself in direct service provision to the same extent as the regional offices, it does take on cases from time to time, usually those of national importance, as is indicated by the existence of its advocacy division.

4.4 Leadership and organisational management issues

It is common to read that LBH failed to thrive after the democratic transition because of leadership turmoil and internal conflict (Antlöv, Ibrahim, and van Tuijl 2006, 156; Ford Foundation 2003, 80). It is too simplistic to depict leadership turmoil as the primary cause of LBH’s struggles but it is true that repeated leadership friction has been a defining feature of YLBHI in the post-authoritarian period. Almost every leadership transition has resulted in significant organisational turmoil. These leadership disputes have almost always reflected conflict over underlying organisational priorities and debates about the most appropriate form of cause lawyering for the political context.

⁷⁴ At the time of writing, LBH Samarinda had been in operation for less than one year, and was still considered a ‘project’. It was expected to achieve formal status as an LBH office by the end of 2021.

Figure 4.2: YLBHI directors of the post-Soeharto era⁷⁵

YLBHI leader	Photo	Period in office
Bambang Widjojanto		1996-2001
Munarman		2002-2006
Patra M Zen		2006-2010
Erna Ratnaningsih		2010-2012
Alvon Kurnia Palma		2012-2017

⁷⁵ Photo sources: Bambang Widjojanto (Corruption Eradication Commission); Munarman (Johannes P. Christo, Tempo); Patra M Zen (Adri, Tempo); Erna Ratnaningsih (Seto Wardhana, Tempo); Alvon Kurnia Palma (Dasril Roszandi, Tempo); Asfinawati (Arimacs Wilander, Tirto.id).

Asfinawati		2017-2021
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Following the major conflict in 1996 between the proceduralist and more grassroots arms of the organisation discussed in Chapter 3, the next leadership crisis occurred in late 2001. This conflict was reportedly sparked by efforts from YLBHI director Bambang Widjojanto and other senior figures, including YLBHI deputy Munir Said Thalib, Dadang Trisasongko and Poengky Indarti, to reform the organisation to bring it closer to the people it represented (Simanjuntak 2001). Those in favour of reform proposed changing the structure of the organisation from a foundation (*yayasan*) to an association or federation, allowing academics and members of YLBHI and LBH's target groups, such as labourers, farmers, and the urban poor, to sit on the advisory board, and have a role in determining the direction of the organisation (Interview, Poengky Indarti. 2019). This was therefore, in part, a conflict over reforming the somewhat undemocratic *yayasan* structure to an organisational form more appropriate for the (democratic) times. Those advocating for change also reportedly pushed for greater financial transparency, more power for LBH offices in the regions, and were strongly critical of the close relationships Buyung and YLBHI board member Victor Sibarani maintained with military figures (The Jakarta Post 2001; Hukum Online 2001).

The advisory board and Buyung rejected the proposed reforms, reportedly because of the foundation's "historical values" (Simanjuntak 2001). Although Buyung was no longer a member of the board, as founder, he remained highly influential. The conflict came to a head with the resignations of the respected director Widjojanto and deputy Munir. Widjojanto went on to work in private practice, while continuing to be involved in legal reform and governance issues, eventually serving as a deputy head of the Corruption Eradication Commission (KPK) (Kompas.com 2015). Munir, meanwhile, helped found and played leading roles in human rights organisations KontraS and Imparsial, but was murdered by arsenic poisoning in 2004 on a Garuda Indonesia flight to Amsterdam, in a case that has become one of the most notorious human rights abuses of the democratic era in Indonesia (Human Rights Watch 2017).⁷⁶

The 2001 leadership conflict was widely covered in the media, with legal portal Hukum Online lamenting the 'locomotive of democracy' had "lost its democratic spirit" (Hukum Online 2001). Widjojanto's comments on exiting the organisation are significant. The Jakarta Post quoted him as saying: "I have chosen to quit... I will work together with other people to promote democracy. I refuse to work with people who love playing in the grey area. I respect my seniors, but none of you here is

⁷⁶ State Intelligence Agency (*Badan Intelijen Negara*, BIN) officials were implicated in planning his murder but were never convicted. A Garuda Indonesia pilot and suspected BIN agent, Pollycarpus Budhi Priyanto, was eventually imprisoned for his role in the case (Wahyuningroem 2014; Tempo 2014b).

good enough to be my role model,” he said. His comments were clearly directed at Buyung, but they also reflect the broader organisational tensions that emerged following the transition to democracy. Some LBH lawyers were open to closer engagement with government figures, while others continued to favour an uncompromising, oppositional approach.

Leadership turmoil again returned to the organisation in 2006. In September 2002, the advisory board had appointed Munarman as YLBHI director, following nine months during which the organisation had been led by a temporary caretaker team. Munarman was previously head of YLBHI’s civil and political rights division and former coordinator of KontraS in Aceh (Simanjuntak 2002). Munarman proved to be a highly controversial figure. Lindsey and Crouch have charted his evolution from a cause lawyer concerned with the promotion of democracy, human rights and the rule of law, to an Islamist openly hostile to the rights of religious minorities (Lindsey and Crouch 2013, 637–42). They suggest Munarman was deeply affected by the death of his friend and colleague Munir (Lindsey and Crouch 2013, 638).

In any case, Munarman became increasingly close to Hizbut Tahrir Indonesia (HTI),⁷⁷ the Indonesian arm of the Islamist organisation that seeks to establish an Islamic caliphate. He increasingly brought his religiously conservative beliefs to bear on his work with YLBHI (Fitzpatrick 2008) and became quite erratic and difficult to deal with. He was openly combative with LBH’s foreign donors and at one point spoke at an HTI protest outside the US Embassy in Jakarta (Antara 2006). This was too great a deviation from LBH’s core values for Buyung, who had returned to chair YLBHI’s advisory board in 2002, and he asked Munarman to resign voluntarily (Siboro 2006a). Although Munarman was asked to leave because of his growing relationship with HTI, other factors were also at play in the 2006 leadership turmoil. Munarman’s time in power coincided with a significant decline in organisational funding (partly of his own making), discussed further below. There was, once again, significant tension between other members of the leadership team and the advisory board, and Buyung as its dominant figure (Detik 2006). This time, conflict was sparked by the advisory board’s decision to accept a Rp 200 million (US\$20,000) donation from oligarch Tomy Winata to renovate the YLBHI building (Ardiansyah 2006).⁷⁸ In May 2006, 10 senior YLBHI staff left the organisation, including Munarman, and prominent figures like deputy Robertus Robet, director of research Daniel Hutagalung, and director of advocacy Syamsul Bahri Radjam, claiming that accepting the donation conflicted with YLBHI internal rules banning donations from environmentally destructive organisations or individuals (Siboro 2006b).

Munarman was replaced by Patra M Zen, an LBH lawyer from Palembang, South Sumatra, who had also worked in Aceh, East Nusa Tenggara and Papua (Musthofid 2006). Patra was considered intelligent and was well liked by international donors, in part because he was receptive to

⁷⁷ HTI was banned by the government in 2017 (see discussion in Introduction to Part Two).

⁷⁸ Tomy Winata is a notorious businessman with longstanding links to the Indonesian military and political elite. His massive Artha Graha Network has interests in property, plantations (including oil palm), hotels, banking and more (Braithwaite, Charlesworth, and Soares 2012, 239). Winata is also alleged to be a major figure in organised crime in Indonesia, and often faces rumours of involvement in activities including prostitution, gambling, and drugs (Chua 2008, 131).

collaborating with the government on legal reform and because he went out of his way to heal the rifts with donors Munarman had created (Interviews, confidential, 2019; 2020). This was significant given the political context of the time, during Indonesia's "democratic peak" between 2004 and 2008 (Mietzner 2021a), a time when donors were enthusiastically promoting governance programming in collaboration with state institutions. But despite improved relations with donors, Patra was not strong on internal organisational management. Just a year into his leadership, YLBHI was again struck by crisis. Eighteen staff signed a motion of no confidence in Patra's leadership. Staff were highly critical of his authoritarian leadership style, lack of transparency and behaviour towards women (Hukum Online 2007; Interviews, confidential, 2019; 2020). The 18 staff took their concerns to the advisory board and threatened to leave unless Patra was replaced. The board was unmoved and said Patra had not broken any internal rules (Hukum Online 2007). The 18 left. YLBHI was decimated, and lost many talented young staff who cared deeply about using the law for social justice. Taufik ('Tobas') Basari, who had represented the 18 staff in discussions with the board, Ricky Gunawan, and Yasmin Purba went on to found LBH Masyarakat (Community Legal Aid Institute).⁷⁹

Patra remained director of YLBHI for another three years but ended his term early, in 2010. Erna Ratnaningsih was selected to serve out the remaining portion of his term as leader (Detik 2010b). Despite his managerial failings, Patra played a key role in helping to develop the 2011 Law on Legal Aid (KUBAH 2010), and was willing to work with Deputy Law and Human Rights Minister Denny Indrayana in preparing the draft bill (Interviews, Yasmin Purba, 2019; Tim Lindsey, 2020). Donors enthusiastically backed YLBHI's efforts to formulate the draft. Yet few within YLBHI look back on this period with much fondness. In fact, while YLBHI staff acknowledge that collaborating with the government on legal reform issues is a viable cause lawyering strategy, during fieldwork I heard comments that Patra had been too accommodative. In any case, the organisational turmoil and loss of staff eventually discouraged donors, and by the end of Patra's time in the top job YLBHI was in a difficult financial position.

Alvon Kurnia Palma was selected by the advisory board as the next director for the 2012-2017 period, which covered the final years of the Yudhoyono presidency and part of Jokowi's first term. Alvon was a former director of LBH Padang, and the only candidate who nominated for the YLBHI leadership. There is a broad consensus from YLBHI's donors and its staff that the organisation stagnated under Alvon. While Alvon is a good person and strongly committed to the legal aid cause, he was widely considered to be a weak leader (Interviews, confidential, 2019; 2020). He reportedly had a limited understanding of the donor landscape and was not adept at communicating his vision for the organisation to regional offices. As a result, Alvon lacked the support of regional offices and was largely ignored by donors (Interviews, confidential, 2019). While in the past, YLBHI had looked for donor supported projects and channelled funds to regional LBH offices, since the mid-2000s, LBH offices were largely left to fundraise on their own (Interviews, confidential, 2019). Given the weaknesses in YLBHI, many donors began looking to the stronger regional LBH offices like LBH Jakarta, LBH Bandung and LBH Surabaya, funding them directly. While Alvon was at the helm of

⁷⁹ Despite its name, LBH Masyarakat is not a member of the YLBHI network.

YLBHI, LBH Jakarta rose in prominence, and to some degree displaced YLBHI. In the words of one donor, LBH Jakarta “ended up being the peak body for international projects on legal aid” (Interview, confidential, 2020). While some regional LBH offices thrived under this arrangement, others barely managed to stay afloat. As a result, some LBH offices ended up acting as organisational ‘shells’ for the pro bono work of directors.⁸⁰ Under Alvon’s leadership, YLBHI continued efforts to support the implementation of the 2011 Law on Legal Aid and coordinated a prominent civil society challenge to the 2013 Law on Mass Organisations at the Constitutional Court. Even so, after five years where organisational management took a back seat, donors had begun to lose faith in YLBHI (Interviews, confidential, 2019, 2020).

Asfinawati (Asfin) was elected leader of YLBHI in early 2017 under new leadership rules that gave the directors of regional LBH offices a vote alongside the members of the advisory board (Riana 2016). Asfin had previously served as head of LBH Jakarta and was well known and respected among broader civil society, especially among organisations working on the rights of religious minorities.⁸¹ Asfin assembled a strong team around her, including former LBH Jakarta director Febi Yonesta (Mayong), former LBH Jakarta senior lawyer Muhamad Isnur, former LBH Semarang director Siti Rakhma Mary Herwati (Rakhma), and former LBH Bandung director Arip Yogiawan (Yogi). Although Yogi was Asfin’s main rival for the leadership position, they have worked well together. When Asfin assumed the leadership, YLBHI was several hundred million rupiah in debt (Interviews, Nursyahbani Katjasungkana, Siti Rakhma Mary Herwati, 2019) but she turned the organisation around. YLBHI has regained the trust of international donors and is now in the best financial position it has been in for many years. Asfin is a passionate, consultative, and egalitarian leader. Unlike many other civil society leaders, she is not particularly interested in building a public profile. These qualities were repeated often by her colleagues at LBH and in broader civil society during fieldwork (Interviews, Nurkholis Hidayat, Ricky Gunawan, Mohammad Doddy Kusadrianto, Sandra Hamid, 2019; Robertus Robet, 2020). One former LBH Jakarta lawyer offered a particularly blunt assessment of why YLBHI is now in a stronger position:

“Before Asfin there was no work being done. After Bambang Widjojanto, YLBHI experienced a decline. YLBHI is stronger now because Asfin is there, and she is doing the work! (Interview, confidential, 2019)

The current leadership team recognises the YLBHI network has faced almost a decade of neglect and has dedicated significant energy to promoting strengthened systems and procedures, improved knowledge and data management, and a shared understanding of structural legal aid, gender and minority rights among the LBH regional offices. Donors have supported them in these revitalisation

⁸⁰ LBH internal regulations allow LBH senior staff to take on paid work separate to LBH for the survival of the organisation. Some directors took on this paid work, in addition to pro bono work at LBH, to ensure their offices could survive.

⁸¹ Asfin is well known for representing Lia Eden (Lia Aminuddin), the leader of a new religious movement, who was convicted for blasphemy in 2006 in 2009 (Makin 2016, 17), and Tajul Muluk, a Shi’a Muslim convicted of blasphemy in 2012 (BBC Indonesia 2012).

efforts. Since Asfin has been leader, YLBHI has conducted a strategic planning process, assessed the organisational capacity of regional offices, updated its standard operating procedures, and opened two new regional offices, in Palangkaraya, Central Kalimantan, and Samarinda, East Kalimantan, both significant sites of conflict between local communities and plantation and mining companies (Interviews, Asfinawati, 2019, 2021; Renata Arianingtyas, 2019, 2021). Asfin has also made an effort to visit regional LBH offices, some of which had reportedly not had visits from the YLBHI director for several years (Interview, Asfinawati, 2019). YLBHI has also tried to strengthen the quality of its public reports and products, such as fact sheets and policy papers. Having visited the YLBHI office several times around 2012-2014, and then again for fieldwork in 2019, it was remarkable to see the extent of changes to the library and knowledge management more broadly. Organisational strengthening efforts have resulted in an improved division of roles and responsibilities between YLBHI as the central umbrella body and the LBH offices in the regions. Asfin has also sought to re-establish YLBHI as a 'hub' for civil society, opening YLBHI's doors for members of its network who wish to hold discussions there, and hosting meetings with civil society groups to plan joint advocacy activities. This would not be possible, of course, if Asfin were not so liked and respected across a broad range of groups in Indonesian civil society.⁸² It is worth noting Asfin is the first leader elected following the death of YLBHI's charismatic founder Buyung in 2015. Given many CSOs falter following the loss of founder-leaders (Lewis 2014, 135–36), YLBHI's improved position is a testament to the current leadership team, as well as the organisation's maturity.

It is not hard to see how leadership can influence the form of cause lawyering practiced. There is vast literature on the role of leadership in the organisational effectiveness of CSOs (Fowler 1997; Hailey and James 2004; Amagoh 2015; Smillie and Hailey 2001) and I do not intend to dwell on it here. Briefly, visionary leadership is said to be important for setting long-term organisational direction, and for motivating staff around a cause (Amagoh 2015, 229). Asfin took up the leadership of LBH at a time when concerns over democratic decline in Indonesia were getting louder. In response to this democratic backsliding, Asfin and the team around her have promoted a clear vision of a grassroots, oppositional approach to cause lawyering, one that has little faith in elite-focused strategies in delivering social change. There has been a renewed focus on promoting structural legal aid across the LBH network (Asfinawati 2017), with a strong emphasis on the community organising and community legal empowerment aspects of the approach. The next few chapters will examine how this vision of cause lawyering plays out in practice, by looking at the strategies of cause lawyering that have been adopted.

Not all the leadership tensions described above were directly connected to democratic transition, but many were. As noted, following democratic transition, when the government was more open, LBH experienced a period of disorientation where it experimented with more accommodative versions of cause lawyering involving closer collaboration with the government, for example in the formulation of the 2011 Legal Aid Law. Some within LBH even suggested reverting to more proceduralist or conventional forms of legal aid. This was not always well accepted by cause lawyers within the

⁸² I look further at this convening role of LBH in Chapter 8.

organisation who continued to favour more political, oppositional approaches. However, cause lawyering strategies are not influenced by leadership orientation alone. Another critical organisational factor is funding.

4.5 Funding and donor relations

As discussed in Chapter 2, funding is a key factor influencing the shape of cause lawyering, and is particularly relevant in Indonesia, where cause lawyering is mainly conducted from CSOs, which are highly dependent on donor funding (Antlöv, Brinkerhoff, and Rapp 2010, 427).⁸³ There is no doubt repeated leadership turmoil and weak organisational management affected YLBHI's financial position, particularly during the decade from 2006. But the democratic transition, and the political and institutional developments that accompanied it, altered the way donors viewed their approach to civil society support, and this also had implications for LBH and the forms of cause lawyering donors wanted to support.

In the immediate aftermath of the fall of the New Order, international donor funds for Indonesian CSOs were plentiful. Donors poured money into civil society to support the consolidation of democracy (Davis 2015, 6; Aspinall 2010, 2–3). Yet after the initial explosion in funds for democracy assistance, donor funds for civil society fell sharply, particularly from the early 2000s (Davis 2015, 6). Many donors considered the hard work of democratisation largely over and began to view Indonesia as a democratic success story (Aspinall 2010, 6, 11). Also influential was Indonesia's designation as a lower middle-income country in 2006, which prompted many donors to reduce their commitments to Indonesia and shift focus to lower income countries (Davis 2015, 3). Indonesia's growing economic prominence also altered donors' attitudes, leading major donors like Australia to place greater priority on building strong government-to-government relationships, rather than supporting CSOs that were likely to be critical of the Indonesian government (Aspinall 2010, 7–8). A trend tied to these developments was that, since the early 2000s, there has been a growing preference among international donors for governance programming and strengthening government institutions (Aspinall 2010, 6). These factors combined had negative implications for YLBHI's financial situation.

Under Soeharto, YLBHI had enjoyed a charmed relationship with its main donor Novib, the Netherlands development organisation that has been an affiliate of Oxfam since 1994. It was flush with organisational funds and it was allowed considerable freedom in determining its program priorities. In the early 2000s, however, Oxfam Novib decided to conduct an evaluation of its assistance to YLBHI, a decision that was apparently prompted by Buyung's defence of General Wiranto (Interview, confidential, 2019; Saraswati 2003).⁸⁴ The evaluation concluded YLBHI had not developed sufficiently detailed plans to ensure organisational sustainability and recommended discontinuing support for the organisation (Interviews, confidential, 2019). YLBHI leader Munarman

⁸³ Some studies suggest Indonesian CSOs derive about 85-90% of their funding from foreign donors (Davis 2015, 4).

⁸⁴ At the same time, however, Oxfam Novib was facing its own financial constraints, and increasing pressure to demonstrate results back home in the Netherlands for expenditures abroad (Scheffer and Benning 2018, 11).

and deputy Robertus Robet travelled to the Netherlands to plead YLBHI's case but were only able to secure "bridging funds" through to the end of 2003 (Interview, Robertus Robet, 2020). Mainly because of the loss of Novib, but also some of its other donors (Saraswati 2003), YLBHI saw its funding plunge from Rp 16.2 billion in 1999, immediately after the fall of Soeharto, to a mere Rp 4.9 billion in 2003 (Munarman et al. 2004, 53).⁸⁵

Table 4.1: Funds received by YLBHI from 1996-2003⁸⁶

Year	Total funds (Rp)
1996	2,371,090,732
1997	3,484,909,401
1998	7,750,405,841
1999	16,217,881,388
2000	9,407,839,088
2001	10,588,007,686
2002	7,776,198,566
2003	4,970,843,795

In its 2003 annual report, YLBHI reflected on these dynamics. It recognised repeated leadership skirmishes had undoubtedly dampened donors' enthusiasm for supporting YLBHI, but it also noted that the shifting priorities of donors described above had played a role. Donors "are increasingly focusing on consolidation of democracy, institutional governance and decentralisation", the report stated (Munarman et al. 2004, 56). While strengthening civil society was a focus under the New Order, YLBHI noted, after 1998, donors were more concerned with good governance. Therefore, it was not that donors did not want to back cause lawyering, rather donor funding was available for a certain version of cause lawyering. Donors were more interested in funding organisations like LeIP, MaPPI and PSHK to support, for example, reform efforts in the Supreme Court. There was a preference for the state-centred, elite/vanguard model of cause lawyering over the more explicitly activist grassroots model typically favoured by LBH. Tellingly, around this time, prominent former YLBHI member and board member Frans Hendra Winarta publicly argued for a more politically engaged, accommodative version of cause lawyering. Following loss of donor support, he said, the organisation should shift its focus to drafting legislation (Saraswati 2003).

These trends have largely continued. Donors remain more likely to encourage collaboration between civil society and state institutions on policy reform, strategies more typically associated with elite/vanguard models of cause lawyering. LBH staff comment there is comparatively far less funding available for case handling or representation (litigation) and community organising, activities LBH offices see as their core responsibilities (Interviews, Febi Yonesta, Eti Okataviani, Lasma Natalia, 2019). Civil society organisations (including LBH) also often complain it has become rare for donors

⁸⁵ Adjusted for inflation, Rp 16.2 billion in 1999 is equivalent to about Rp 59.7 billion (US\$4.1 million) in 2020 and Rp 5.0 billion in 2003 is equivalent to about Rp 13.3 billion in 2020 (US\$920,000).

⁸⁶ Figures from Munarman et al. (2004, 53).

to be willing to provide core funding for institutional support and development (Antlöv, Brinkerhoff, and Rapp 2010, 428).⁸⁷ A recent example of these dynamics can be seen in the approach of the Australian Department of Foreign Affairs and Trade (DFAT), one of the largest bilateral donors to Indonesia (Prizzon, Rogerson, and Jalles d'Orey 2017), which dropped the civil society strengthening component of the Australia Indonesia Partnership for Justice (AIPJ) when its second phase was launched in 2017.

One of the consequences of dependence on foreign donors is that organisations like YLBHI are vulnerable to the project-based and short-term funding cycles of international development. Studies on the CSO sector in Indonesia have suggested many Indonesian CSOs are generalist in nature, and adapt their missions according to funding availability (Antlöv, Ibrahim, and van Tuijl 2006, 156; Davis 2015, 5; McGlynn Scanlon 2012, 15). When meeting with LBH staff around 2013 in the course of my previous work, I occasionally heard LBH staff grumble about having to implement programs not in line with their core expertise or organisational priorities because of financial considerations. Yet during fieldwork in 2019, LBH staff repeatedly asserted they did not accept donor projects that were not consistent with their organisational priorities. Consider these comments from LBH Jakarta director Arif Maulana:

“LBH Jakarta is always strict on this matter. If donors are not able to align themselves with our vision and mission, we will not accept them... That is what caused the crisis [LBH Jakarta suffered a funding crisis in 2011]. There were many programs at the time. In fact, the conditions are even worse now. But LBH is very strict about this.” (Interview, Arif Maulana, 2019).

LBH Jakarta, for example, once rejected funds from the World Bank to collaborate on its access to justice focused ‘Justice for the Poor’ program. This was partly motivated by LBH’s longstanding ideological antipathy toward the World Bank, which burgeoned under the New Order, through cases like the Kedung Ombo reservoir conflict. But it also reflected a deeper distrust about the World Bank’s support for access to justice programming at the same time it backed neoliberal initiatives on privatisation and labour market flexibility (Wiratraman 2006, 65–66). Access to justice programs have been criticised for individualising communal problems and ignoring the underlying causes of inequality and injustice (Bedner and Vel 2010, 15). LBH lawyers have made similar comments to me, suggesting access to justice programs are often too focused on professionalising the paralegal class, or that they only end up legitimising the corrupt Indonesian justice sector, placing insufficient emphasis on legal empowerment. Again, these types of critiques are indicative of LBH’s aversion to proceduralist forms of cause lawyering they believe do less to address the substantive problems of the poor and marginalised.

⁸⁷ One recent exception is the USAID-funded MADANI project (2019-2024), which includes a major civil society strengthening element. Notably, it also has a strong focus on facilitating collaboration between CSOs and local governments on local policy issues (USAID MADANI 2021).

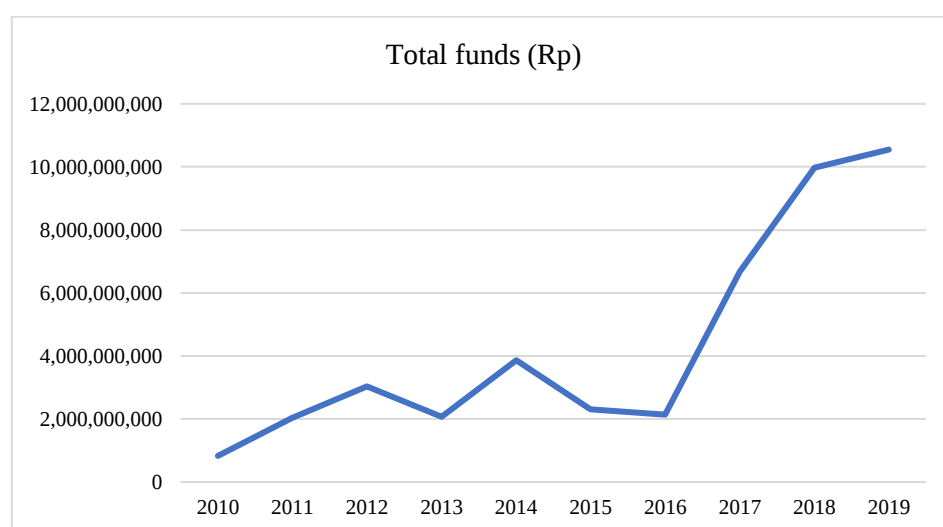
A consequence of the donor affinity for policy advocacy is that many LBH offices have created a dichotomy between ‘program work’ focused on policy advocacy (for donors) and legal aid and community organising. In some offices, this division is even institutionalised in staffing arrangements, with certain staff members assigned to implementing donor programs and others focused on case management. To some extent this is understandable, given proposal writing, engaging donors and report writing requires particular skills, but it can have the effect of demarcating donor work from other organisational activities. Mayong, the former head of LBH Jakarta and current head of organisational development at YLBHI, has a reputation for being more open to collaboration with government than many of his colleagues. Mayong reflected on these concerns.

“In the eyes of donors, case management is not a sustainable use of their funds, whereas policy reform is sustainable. Most LBH offices work on case management and community organising, and are reluctant to work on policy advocacy, unless they are forced to do so to implement programs. I have criticised this way of viewing things in this dichotomy. The core of case representation is policy change. We can’t always just work through legal channels to change policy. It is not reliable. Except if the Indonesian legal system were strong enough that we could change policy through legal decisions. Can we do this? No way! The reality is not like this.” (Interview, Febi Yonesta, 2019).

Mayong’s comments here demonstrate that despite what LBH lawyers say, there does seem to be some influence from donors in pushing LBH toward governance programming.

Whether a result of Asfin’s strong leadership, strengthened internal management or changing donor priorities, or, more likely, a combination of these factors, YLBHI’s financial situation has improved considerably over the past five years. In 2019, it received about Rp 10 billion in funds from donors including the International Law Development Organisation (IDLO) (managing funds for the Indonesia-Netherlands Rule of Law Fund of the Embassy of the Kingdom of the Netherlands in Jakarta), The Asia Foundation (which implements the Empowering Access to Justice (MAJU) program for USAID), and Tifa Foundation (an Indonesian affiliate of the Open Society Foundations).

Figure 4.3: LBH income over the past decade (Interview, Fanti Yusnita, 2020)



How has YLBHI been able to attract more funds when it continues to have limited interest in working on the kind of policy advocacy programming donors favour? According to Asfin, LBH has been able to secure more funding because of a recent international donor trend toward support for legal empowerment programming (Interview, Asfinawati, 2021).⁸⁸ The broad umbrella of legal empowerment provides enough flexibility for LBH to work on case management and community organising. LBH can also quite conveniently fit its pro-democracy work within the broader framework of legal empowerment (such as in 2020 protests against the Omnibus Law on Job Creation discussed in the introduction to Part Two). Having said this, YLBHI is willing to work on governance programming in areas in which it has a direct interest, or regarding which it believes the government is genuinely committed to reform, such as strengthening the national legal aid system (discussed below), and donors have supported them in these efforts.

4.5.1 Other sources of funding

Less dependence on foreign funding would provide LBH with even further autonomy over the form of cause lawyering it practices. However, like many other Indonesian CSOs, LBH has faced a persistent challenge identifying viable sources of funding other than foreign donors. Private sector donations are minimal and, in any case, LBH would have difficulty accepting donations from most major corporations in Indonesia for ethical reasons, such as involvement in environmental destruction or violations of workers' rights. Similarly, there is little culture of philanthropy in Indonesia that could support the work of LBH. YLBHI and regional LBH offices have therefore regularly leant on former staff who have gone on to more lucrative private legal practice asking them to donate small sums to support organisational stability. There has also occasionally been talk about trying to set up an endowment fund to fund YLBHI's work, but these discussions have never progressed far (Interview,

⁸⁸ I discuss LBH's legal empowerment work in Chapter 6. Broadly, it encompasses efforts to empower poor or marginalised individuals and communities to use the law to assert their rights or interests (Domingo and O'Neil 2014, 4).

Febi Yonesta, 2021). At various points throughout its history, LBH Jakarta has experimented with public fundraising. For example, during a funding crisis in 2011, LBH Jakarta raised more than Rp 242 million, effectively saving the organisation (Tempo Magazine 2011). This is a strategy that LBH Jakarta turned to again approaching its 50th birthday in 2021, calling on its supporters to donate the small sum of Rp 10,000 each (about US\$0.7).⁸⁹ While important, these initiatives have unfortunately never come close to matching the funding available through foreign donors. A promising recent development, however, has been the introduction of government funded legal aid.

In addition to affecting donor funding priorities, democratic change also provided new space for formal recognition of legal assistance provided by CSOs, and new opportunities for accessing government funds. Law No. 15 of 2011 on Legal Aid introduced a robust legal framework for government supported legal aid (Butt and Lindsey 2018, 217). As stated, YLBHI, with the support of donors like AusAID and TIFA Foundation, was heavily involved in drafting the law (Yon and Hearn 2016, 9–10). This law recognised the state had a responsibility to provide free legal aid to poor citizens. Rather than establishing a new central legal aid commission or agency to deliver legal aid, as occurred in other countries, such as South Africa, Indonesia elected to accredit existing legal aid providers in civil society and reimburse them for services provided. This decision recognised the tradition of legal aid established by LBH offices and other CSOs over several decades (Yon and Hearn 2016, 10). YLBHI also favoured this model because it did not feel it could trust any government provider to deliver legal aid at an appropriate standard and without corruption (Interview, Patrick Burgess, 2020; Rizaldi 2019).

The National Law Development Agency (*Badan Pembinaan Hukum Nasional*, BPHN), a body under the Ministry of Law and Human Rights, was tasked with implementing the system. When the scheme was launched in 2013, there was considerable debate within LBH about the degree to which it should participate in a government-managed system. Many LBH staff were concerned government-supported legal aid could distract them from their core mission of supporting structural legal aid, with its emphasis on communal cases and addressing unbalanced power relationships.

“We were worried that if we became dependent on the government legal aid scheme, then structural legal aid would be abandoned. We would end up busy dealing with the minor everyday cases of poor people.” (Interview, Febi Yonesta, 2019).

Some LBH offices complained they did not want to become “administrators for the government” and worried their autonomy could be threatened, or that they would be less willing to challenge the government if it were also providing them with funds (Interviews, Arip Yogiawan, Eti Okataviani Mohamad Soleh, 2019). In fact, experienced providers like LBH Bandung, LBH Surabaya and LBH Manado initially failed the verification and accreditation process, reportedly because of

⁸⁹ LBH Jakarta (@LBH Jakarta) “Menjelang #50tahunLBHJakarta mari kita terlibat dalam #10000untukKeadilan utk layanan bantuan hukum gratis bagi masyarakat miskin, buta hukum dan tertindas...” [Approaching #LBHJakarta50Years Get Involved in #10000forJustice to Support Free Legal Services for the Poor, Legally Ignorant and Oppressed...] 15 March 2021, 6:20 pm. Tweet.

communication and administration issues (Yon and Hearn 2016, 16). But speaking to the directors of LBH Bandung and LBH Surabaya at the time, I remember there was not much enthusiasm for accessing the scheme. Several years later, however, many LBH offices have now been accredited, and regularly access BPHN funds to support their work (Interviews, Febi Yonesta, Haswandy Andy Mas, 2019).

The government allocated Rp 53 billion (US\$ 3.6 million) to the scheme for the 2019-2021 period (Elnizar 2019), a small amount given Indonesia's population and needs for legal services (World Bank 2020).⁹⁰ While state funding may eventually become an important source of support for LBH, several other fundamental aspects of the system mean it has yet to work in LBH's favour. Chief among these is that the system is heavily weighted in favour of litigation. This disadvantages organisations like LBH, which tend to take on cases that can extend for months, sometimes years, and involve a considerable amount of nonlitigation activity. LBH could quite easily send a lawyer to a prison, pick up 'simple' cases requiring litigation and minimal work outside the courtroom, and be reimbursed for the litigation costs. But it does not do so, because this is not in line with a 'structural legal aid' approach to case selection. Further, there are other nonlitigation aspects of LBH's work not covered under the state scheme, such as community legal empowerment, strategic litigation at the Constitutional Court, and reporting cases to independent institutions like the National Ombudsman or Komnas HAM (Asfinawati et al. 2019, 22). Although the scheme does cover some nonlitigation legal aid activities, the amounts available are small. For example, the total amount available for research is just Rp 2.5 million (\$US167) per project, with only Rp 1 million available to cover fieldwork costs.⁹¹

The government-funded legal aid system has provided LBH with a new important stream of funding. But it has yet to have much influence on LBH's strategies of cause lawyering. The new Indonesian system, unsurprisingly, is focused on expanding access to justice for individuals, and offers comparatively less support for political, activist versions of cause lawyering. For LBH to have its work supported by government funding, it would need to practice a largely proceduralist version of cause lawyering. For most LBH cause lawyers, this is unacceptable. As long as LBH still has access to foreign donor funds, which provide it with enough freedom to practice grassroots versions of cause lawyering, they are likely to continue to see the government system as complementary, at best.

4.6 Staffing and training

This chapter has so far focused on how the democratic transition affected key organisational factors at LBH, and the impact these factors have had on the forms of cause lawyering practiced. But there are other critical organisational factors that influence forms of cause lawyering less affected by

⁹⁰ In 2020, the World Bank estimated there were about 25.1 million Indonesians living below the poverty line. Of course, not all these people will have a need for legal services over the 2019-2021 period, but a budget of Rp 53 billion is equivalent to just Rp 2,100 (AU\$0.20) for each poor person for the three-year period. Some other government ministries have budget items for legal aid and advocacy, but it is difficult to get accurate details on amounts and expenditure.

⁹¹ See Law and Human Rights Ministry Regulation No. M.HH-01.HN.03.03 of 2017 on Payments for Litigation and Non-litigation Legal Aid.

democratic change – such as the ability to recruit, train and retain capable staff. The recruitment process at LBH offices is conducted through an intensive process known as Kalabahu (*Karya Latihan Bantuan Hukum*, or Legal Aid Training). Kalabahu was affected by democratic change only to the extent that funding challenges and management weaknesses in YLBHI – precipitated partly by the democratic transition – meant some regional offices did not implement Kalabahu for several years (Interviews, Renata Arianingtyas, Eti Oktaviani, 2019). This has since changed since Asfin was installed as leader and YLBHI’s financial position has improved.

The Kalabahu process varies slightly at each regional office, but generally, prospective participants must submit an application, sit an exam, submit a writing sample, or pass an interview before they are selected as trainees (YLBHI 2018b). This process can be extremely competitive. LBH Jakarta reportedly can have more than 300 applicants for the 50 positions it offers (Interview, Alghiffari Aqsa, 2019). Kalabahu typically runs for about two weeks (although in some offices it is longer), and involves in-class and ‘out-class’ components. The in-class component involves training on LBH values, human rights, structural poverty and structural legal aid, social analysis, and aspects related to target communities, such as land and environmental law, religious freedom, gender and sexual orientation.⁹² The out-class component involves activities such as participatory action research, visits to communities, and, usually, a period of living with a community (YLBHI 2018b). The live-in component is designed primarily to encourage humility and solidarity with the poor and marginalised people LBH typically represents, but it also serves as an introduction to community organising. Eti Oktaviani, from LBH Semarang, explains the purpose of this live-in process.

“Sometimes there are LBH lawyers who think, ‘I am a lawyer, I am on a higher level than the community’. We ask people like that to live in more often. We won’t let them go to court. They have to be brought down to earth, to learn how to listen to community complaints. These are the principles we learn when we first start at LBH.” (Interview, Eti Oktaviani, 2019).

The process aims to break down perceptions of the “lawyer-as-expert” (Daicoff 2011, 17) and promote less hierarchical interactions between lawyers and the community. LBH documents describe the importance of Kalabahu participants developing *keberpihakan* (literally partisanship, but perhaps more accurately translated as ‘concern for the rights of...’). This choice of language is illustrative. If one of the key defining features of cause lawyering is identification with the causes of clients (Scheingold and Sarat 2004, 8–9), this live-in process is designed in part to encourage participants to understand and identify with the causes of their clients. It is a key part of the process for them becoming cause lawyers. Further, given the emphasis on working closely alongside clients, the process encourages them to become a particular type of cause lawyer: grassroots cause lawyers.

⁹² The basic Kalabahu syllabus is divided into 17 units: structural poverty; militarism; identity politics and impacts on injustice; LBH history and LBH lawyers; rule of law and democracy; structural legal aid; introduction to human rights; social analysis; community organising; advocacy strategies; participatory action research; economic, social and cultural rights; agrarian law; indigenous peoples’ rights; the right to religious freedom; gender equality, sexual orientation and gender identity; and campaigning (Putri et al., n.d.).

Grassroots lawyers are obliged to work among and alongside social movements, and not act as directors. They are often “expected to reject the special status and treatment attorneys often expect” (Hilbink 2006, 72).

Following successful completion of Kalabahu, participants may then be invited to join the selection process to become an LBH volunteer. Typically, only a handful of Kalabahu participants are accepted as volunteers. Volunteers then work at the respective LBH office, usually spending up to a year rotating through the various divisions (labour, land, minority rights, women and children, research and documentation, and so on, depending on the office). If a volunteer’s progress is deemed satisfactory, he or she may then be promoted to ‘assistant legal aid lawyer’ (*asisten pengabdian bantuan hukum*). Notably, as mentioned in Chapter 2, LBH uses the term *pengabdian bantuan hukum* (legal aid servant) to describe its legal aid lawyers. This is another method used to convey LBH values of humanitarianism or volunteerism to staff, and differentiate LBH from commercial firms (Febry 2019; Isnur 2017). As LBH staff acknowledge, it is also an implicit recognition of the modest remuneration available to LBH lawyers.

The Kalabahu process therefore selects for, and encourages the development of, staff who are inclined toward social justice activism over conventional legal aid or policy oriented legal research. The lengthy training process (in Kalabahu and on-the-job) is an important strategy to inculcate shared values. To some extent, this process is designed to rectify the lack of a public interest perspective in most Indonesian law schools. And it is effective – there is no question of LBH lawyers’ commitment to social justice. As noted in Chapter 2, legal education is often described as a crucial factor in the development of cause lawyering. Cause lawyering in Indonesia would look very different were it not for the longstanding influence of LBH’s Kalabahu program.

Another aspect of staffing to consider is LBH’s ability to attract the right staff. Since the democratic transition, LBH is no longer one of the only options for progressive lawyers interested in social justice and policy change. For graduates of the ‘top five’ law schools, LBH is no longer the drawcard that it was under the New Order (Interviews, Ajeng Wahyuni, Windu Kisworo, 2019). Graduates interested in using their legal skills to contribute to social change now have other options, like PSHK, LeIP, MaPPI, the Institute for Criminal Justice Reform (ICJR), or the Indonesian Centre for Environmental Law (ICEL), which are focused on legal research and policy advocacy.

“These organisations seem to be more attractive for young people compared to shouting, demonstrating on the roads, or arguing in court [at LBH]. They can make a meaningful contribution to policy [in these other organisations] but the offices are cleaner, and the salary would be better too.” (Interview, Windu Kisworo, 2019).

The democratic transition and the expansion of civil society therefore provided different opportunities for cause lawyering. Although legal graduates who go on to careers in organisations like PSHK or LeIP would rarely spend time in court (unlike their colleagues at LBH), they are still practicing a form of cause lawyering. Yet these organisations are more focused on an elite/vanguard version of cause

lawyering, one that views legal reform as capable of bringing about social change (Hilbink 2004, 673). Lawyers in these organisations typically are more willing to collaborate with or work in closer proximity to state institutions. In a sense, this confirms what is reported in the cause lawyering and legal mobilisation literature discussed in Chapter 2 – a more open political structure and free civil society provided more room for cause lawyering to thrive. However, it is an elite/vanguard version of cause lawyering, not the grassroots style favoured by LBH. These discussions are a major focus of Chapter 7.

4.7 Female representation and awareness of gender concerns

Another organisational factor that has been only loosely affected by democratic change but remains a crucial element in consideration of the form of cause lawyering practiced by LBH is female representation and gender equality. LBH has a reputation as a masculine organisation, something LBH staff and donors recognise (Interviews, Renata Arianingtyas, Ajeng Wahyuni, Asfinawati, Rezky Pratiwi, 2019). Indeed, LBH's masculine culture was one of the reasons that led Nursyahbani Katjasungkana to leave and set up LBH Apik in the 1990s (Interview, Nursyahbani Katjasungkana, 2019). During fieldwork in 2019, aside from YLBHI director Asfin, there was only one other female director among the then-16 LBH offices, Ni Kadek Vany Primaliraning, the director of LBH Bali.⁹³ In 2020, across the entire YLBHI-LBH network, there were only 57 women among the 189 lawyers appointed to permanent staff status.⁹⁴ LBH offices strive for gender parity when conducting Kalabahu but they often struggle to retain female staff. When I visited LBH Surabaya, for example, the only female lawyer was an intern, who had yet to be appointed to permanent staff status (this has also since improved). Difficulties in retaining female staff may reflect low levels of female participation in the labour market in Indonesia. In 2013, 51.4% of Indonesian women over 15 participated in the labour market (barely up from 50.2% in 1990) – low by global standards. By contrast, the male labour participation rate was 84.2% (Cameron and Contreras Suarez 2017, 7). Yet other factors are likely at play in LBH's case. LBH's historical association with direct action tactics like street-level demonstrations and the also typically masculine labour and farmer movements, and an organisational culture that has in the past been tolerant of sexist language and jokes were mentioned as factors that may be behind low levels of female representation.

Over recent years, Asfin and the current leadership team have put considerable effort into promoting a more consistent approach to Kalabahu across the LBH offices in the regions. Kalabahu training modules have been updated to provide more thorough instruction for new recruits on gender, sexuality and minority issues, in part with support from donors (Interviews, Renata Arianingtyas, Ajeng Wahyuni, 2019). Beyond the fact that this is something senior YLBHI staff believe in, it is also a recognition that if LBH is to continue to attract donor funds and be able to criticise the government, it

⁹³ This situation has since changed. In early 2020, Lasma Natalia, a woman, was selected as director of LBH Bandung for the 2020-2024 period, and later that year, Eti Oktaviani, another woman, was selected as the new director of LBH Semarang for the 2020-2024 period.

⁹⁴ This includes legal aid lawyers (*pengabdian bantuan hukum*) and assistant legal aid lawyers (*asisten pengabdian bantuan hukum*). The proportion is higher among volunteers/interns (*volunteer/pemagang*), with women comprising 37 of 78 (47%) volunteers/interns (YLBHI Forthcoming, 10).

must not only respond to the “call of the times” (Interview, Asfinawati, 2019), but it must also walk the talk. As Asfin explains:

“Gender, minority rights, it must be a perspective. We realise that LBH is very masculine. We have no legitimacy to speak to the state on these matters if we don’t do it ourselves. If we are corrupt, how can we shout at the government about corruption? It is the same thing with gender and minority rights.” (Interview, Asfinawati, 2019).

Although there has been more attention to gender equality over recent years, for some LBH staff it is still not enough. As Rezky Pratiwi, from LBH Makassar, explains:

“Students [in Kalabahu] don’t get enough information on mainstreaming gender, gender equality, what kinds of behaviours are discriminatory, or how to make programs gender responsive. These issues are very rarely discussed. The emphasis is on formal equality, equal rights to work and education, for example. But the special needs of women, sexist language, how to make situations safe, or discussions that are safe and friendly toward women, these issues are almost never discussed.” (Interview, Rezky Pratiwi, 2019).

Recent efforts to strengthen attention to gender will take some time to have an impact. It is clear, however, that this aspect of organisational culture affects the way LBH cause lawyers approach their work. Historically, many LBH offices referred gender-based violence or women’s rights cases on to other organisations outside the YLBHI network, such as LBH Apik (Interview, Renata Arianingtyas, 2019). Similarly, the presence of a ‘women’s and children’s rights’ division in LBH offices can mean gender concerns are siloed in this division. As such, other divisions may fail to consider how forced evictions or land conflict, for example, affect men and women differently. Lack of sufficient gender awareness can also result in the exploitation of women on the frontline of protests, as they are considered less likely to be treated violently by law enforcement officials (see Chapter 6). Despite these historical problems, the increased focus on gender issues has resulted in some noticeable changes. For example, during 2020, YLBHI hosted a ‘People’s Forum’ (*Sidang Rakyat*) on the importance of passing the proposed bill on the eradication of sexual violence (RUU PKS) (CNN Indonesia 2020b). This was a rare example of YLBHI attempting to take a leading role on a gender issue of national importance.

4.8 Research capacity

A final organisational challenge that has emerged at LBH since the onset of *reformasi* relates to research. Research products can provide critical evidence to support cause lawyering (Goldston 2006, 497), are a key part of policy advocacy work, and are important marketing tools for an organisation to shape its profile and legitimacy among donors, the government, broader civil society, and the public. There is a common perception that YLBHI has experienced an “intellectual decline” since the late Soeharto period, when scholar-activists such as Adnan Buyung Nasution and Todung Mulya Lubis were helping to shape national discourse on the rule of law and democratisation (Interview, Indro

Sugianto, 2019; Saptono 2012, 35–36). Given YLBHI was one of the few outlets for progressive thought during the repressive New Order period, it is unfair to expect YLBHI to be driving discourse around democracy, human rights, and the rule of law in a similar fashion in the contemporary era – times have changed. Nevertheless, there is a perception that YLBHI’s research capacity is weaker than it once was, and the organisation is not attracting or producing prominent thinkers in the same way (Interview, Abdul Fatah, 2019).

This decline can be partly explained by the matters of funding and donor priorities discussed above. Former YLBHI deputy Robertus Robet, now a prominent political science scholar, complained donors no longer wanted to provide funding for publishing books, contributing to a decline in the academic tradition at YLBHI over recent years (Interview, Robertus Robet, 2019). Indeed, given the funding models and outcome orientation of international donor supported programs, donors rarely want to support research unless it has a clear policy goal, and often do not want to fund the organisational overhead costs associated with producing research (Suryadarma, Pomeroy, and Tanuwidjaja 2011, 25).

In addition to funding concerns, the degree to which the organisational leadership prioritises research is also influential, and this is connected to the leader’s vision of organisational identity. Former YLBHI leader Alvon (2012-2017) reportedly firmly believed YLBHI was not a research organisation (Interviews, Carolina Martha, Siti Rakhma Mary Herwati, 2019). YLBHI still produced a few research products under Patra M Zen (2006-2010), particularly related to the development of the 2011 Legal Aid Law, but there is little doubt YLBHI’s research output has declined significantly from the mid-2000s.

Alvon’s position is completely understandable. YLBHI should not have to ‘compete’ with research and advocacy focused organisations in civil society like Elsam or PSHK. Organisations like these are staffed by dedicated researchers, and do not have the additional responsibility of service provision for marginalised communities. Nonetheless, there are areas in which YLBHI could be making a much stronger contribution. YLBHI has an enormous wealth of case data, but it has struggled to compile and analyse this data. Under the current leadership team, particularly Knowledge Management division head Rakhma, YLBHI has actively tried to gather data from regional offices, and play a larger role in synthesising and analysing data from the regions (Interview, Siti Rakhma Mary Herwati, Nurkholis Hidayat, 2019). For example, its regional offices have gathered data, mainly from the media, on local violations of freedom of expression and association, which, as discussed, have been a major element of anxieties about declining democratic quality in Indonesia over the past five years. The public release of this data made a major splash in the media (Aditya 2021a). In early 2021, YLBHI also released a report on ‘Practices of Detention in Indonesia’ (YLBHI 2021a). This excellent study was based on the cases handled by YLBHI-LBH in its then-16 offices, and detailed the reasons investigators gave for detaining suspects, the length of detention, and its impacts. This is the kind of case-based evidence few other organisations could contribute. These are both examples of the use of research products to highlight state repression and demand greater accountability from those in power. Yet it would be overstating things to suggest this stronger focus on research was linked to democratic

regression. Rather, recent efforts to bolster the quality of LBH's research outputs can be credited to Rakhma, a serious researcher who also works as a lecturer in addition to her work at YLBHI.

4.9 Conclusions

This chapter has examined the often-overlooked organisational factors critical for supporting cause lawyering work. Most of these factors (although not all) were affected by democratic change. Cause lawyering literature suggests the collapse of the authoritarian New Order regime and transition to democracy should have provided the conditions for LBH to thrive. But LBH did not flourish after Soeharto stood down. This chapter found there were four main reasons why LBH struggled in a more democratic Indonesia.

First, the transition to democracy forced YLBHI to reckon with its organisational identity. So much of its cause lawyering work, directed through the framework of 'structural legal aid', was focused on changing the structure of Soeharto's New Order state to a more democratic structure. With Soeharto and the New Order gone, YLBHI had to rethink its mandate in relation to the state and legal system. Many within LBH were not comfortable with more accommodative versions of cause lawyering focused on strengthening the state and, for some time, LBH struggled to define its role.

The second critical factor was funding. During the authoritarian Soeharto years, international donors supported LBH's highly oppositional, grassroots approach to cause lawyering. But the democratic transition ushered in major changes, and donor funds flowed toward programs geared toward strengthening Indonesia's new democratic institutions. LBH found there was less donor appetite for supporting the kind of oppositional pro-democracy advocacy that had become YLBHI's trademark under Soeharto.

A third, related, factor was that the opening up of civil society also meant YLBHI no longer dominated civil society to the same extent. New, specialised organisations emerged, some of which filled the advocacy space formerly taken up by YLBHI. Many of them were more prepared to engage directly with the government on reform. Crucially, these new organisations did not face the same competing demands of service delivery faced by LBH and could also dedicate more time to research and policy advocacy.

Finally, repeated leadership tensions and organisational management concerns, related partly to the factors above, resulted in losses of staff and further discouraged YLBHI's donors. Funding and management challenges also affected YLBHI's ability to recruit and train new staff and conduct research to supplement or strengthen other cause lawyering strategies.

The combination of these factors resulted in a weaker YLBHI, with subsequent impacts on its strategies of cause lawyering. It is too simplistic, however, to depict the story of LBH in the post-New Order period as a straightforward story of decline. The transition to democracy resulted in stronger legal protections of rights, new legal forums in which to claim these rights, and improved judicial

independence. These factors provided new opportunities for legal mobilisation. LBH has explored these new legal opportunities, with varied success. These strategies are the focus of the following chapter.

Chapter 5: Legal strategies

5.1 Introduction

This chapter focuses on the litigation strategies used by LBH to advance their causes. The central proposition of this thesis is that the form cause lawyering takes is closely related to the quality of democracy. Chapter 3 showed how under the repressive New Order, LBH developed a deeply political, oppositional approach to cause lawyering, combining litigation, community organising and community legal empowerment and direct political action. Chapter 4 then examined how the changes involved with the democratic transition had a significant impact on many of the organisational factors that can influence the shape of cause lawyering. These organisational factors contributed to LBH struggling, despite the other institutional advantages provided by the democratic transition. This chapter now shifts from organisational issues to begin examining the cause lawyering strategies deployed by LBH in the post-authoritarian era, focusing initially on litigation.

Elements of the democratic transition that began in 1998 – in particular, reforms to the constitution guaranteeing a broad array of rights, the establishment of the Constitutional Court, and strengthened judicial independence – provided LBH with new space to experiment with elite/vanguard strategies of cause lawyering. Recall that elite/vanguard cause lawyers typically believe in the transformative power of law, or at least that progressive legal decisions can lead to social change (Hilbink 2004, 673–81). This is a form of cause lawyering that has much in common with the style of strategic impact litigation practiced in liberal democratic contexts and commonly associated with cause lawyers there.

This chapter is comprised of five case studies examining different legal strategies undertaken by LBH. After providing a brief overview of the main types of cases seen across the LBH offices, I first examine an example of individual case defence – LBH’s defence of leaders of the minority religious community Gafatar – a cause lawyering strategy that has changed little since the New Order years.⁹⁵ I then examine four examples of strategic impact litigation that have only become available in the post-authoritarian era: challenges to book banning and blasphemy provisions at the Constitutional Court; the challenge to the internet shutdown in Papua in 2019; and the Jakarta air pollution citizen lawsuit.

5.2 Legal strategies: overview

Cause lawyers at LBH have a complicated relationship with the formal legal system. They are dependent on it and attempt to use it strategically, but they also are wary of its deficiencies – of which there are many, despite the changes of the post-Soeharto years.

At the fall of the New Order, the courts were regarded as corrupt, poorly skilled and little more than “servants of the executive” (Pompe 2005, 471). Poor educational standards, low wages, and the

⁹⁵ Gafatar is a portmanteau of *Gerakan Fajar Nusantara* (Archipelagic Dawn Movement). The development and history of this novel Indonesian religious movement is explained below.

absence of effective performance assessments contributed to a judiciary that was not only lacking in status but also largely incompetent (Pompe 2005, 472–73; Lindsey 2004b, 21). The Supreme Court therefore had much to gain from democratisation but in the first few years of *reformasi*, it was highly resistant to reform and refused to acknowledge responsibility for its weaknesses (Pompe 2005, 474).

Reformasi did result in several important changes. The so-called ‘One Roof’ reforms, mentioned above, which transferred authority over the judicial system from the government to the Supreme Court, have been considered largely effective (Butt and Lindsey 2018, 83). The recruitment of non-career judges, in particular Chief Justice Bagir Manan (2001–2008), helped to drive reform, including through the publishing of the reform ‘blueprints’ with civil society and the establishment of the Judicial Reform Team Office (Pompe 2005, 475; Yon and Hearn 2016, 10). A new, detailed, blueprint was published in 2010, with greater Supreme Court ownership of the process, covering the 2010–2035 period (Yon and Hearn 2016, 10). There have been notable improvements in transparency, with millions of court decisions uploaded to a publicly accessible database (Yon and Hearn 2016, 15–16), and the courts have been much more willing to assert their independence and make decisions against the government (Assegaf 2018; Butt and Lindsey 2018, 83), as this chapter will show. On the whole, however, the judicial system remains deeply dysfunctional.

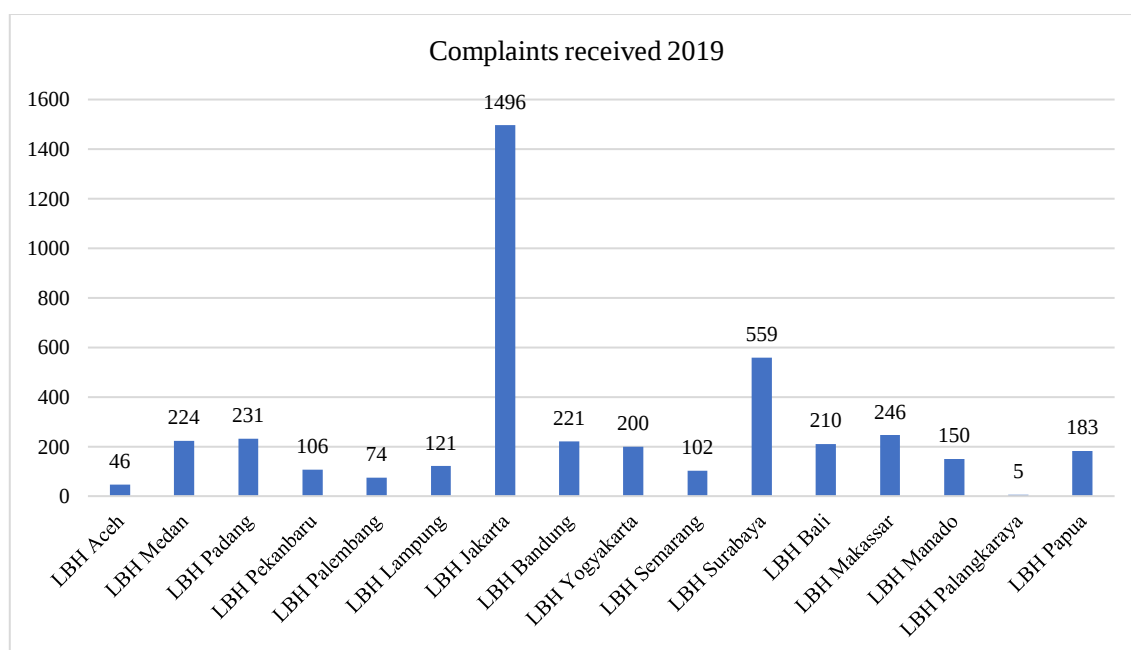
One of the problems is that judges have been highly resistant to efforts to impose oversight and increase accountability (Crouch 2017b). Pushback from judges neutered the oversight function of the newly established Judicial Commission,⁹⁶ and the Supreme Court escaped any meaningful supervision. This ensured that in the democratic era, as Nadirsyah Hosen succinctly puts it, Indonesian courts “moved from non-independence to independence without accountability” (Hosen 2017, 187). Consequently, judicial corruption has barely been touched by post-Soeharto reforms – in fact, it may have become worse. Judges, court administrators, prosecutors and police collude in patronage networks described as “the judicial mafia” (*mafia hukum* or *mafia peradilan*) (Butt and Lindsey 2018, 299–303). Bribery is widespread. It is even said judges sometimes “auction” off decisions to the party willing to pay the largest bribe (Butt and Lindsey 2018, 300–301). This is the system in which LBH cause lawyers – who steadfastly refuse to engage in corrupt practices – are forced to operate.

Despite these significant challenges, LBH continues to view litigation as an essential cause lawyering strategy, as I describe below. But before looking in closer detail at the types of legal strategies deployed by LBH in the post-authoritarian era, it is helpful to provide a broad overview of the types and numbers of cases handled. From January to mid-December 2019, the LBH network received 4,174 complaints, up from 3,455 in 2018 (YLBHI 2020, 16). LBH Jakarta received just over a third of

⁹⁶ As noted, Constitutional reforms established an independent Judicial Commission, tasked with oversight of the performance and behaviour of judges and proposing Supreme Court judge candidates to the national legislature (DPR). In 2006, a group of 31 judges challenged the provisions in Law No. 22 of 2004 on the Judicial Commission that provided for this oversight function in the Constitutional Court (Decision No. 005/PUU-IV/2006). The Constitutional Court decided that review of judicial decisions could only be conducted by the courts, essentially limiting the Judicial Commission’s role to the proposal of judge candidates to the DPR (Butt and Lindsey 2012, 96–99).

the complaints in 2019, with 1,496. The following chart demonstrates the spread of complaints across 16 offices, including the newly established office in Palangkaraya, Central Kalimantan.⁹⁷

Figure 5.1: Complaints received by LBH offices during 2019 (YLBHI 2020, 16)



This thesis is largely concerned with the strategies deployed by LBH to advance social change, but the importance of this daily ‘grunt work’ of providing legal counsel for people who would otherwise struggle to access it should not go understated. Former YLBHI senior staff member Robertus Robet summarises this well:

“Having been questioned by police, I know firsthand that if we are accompanied by a lawyer, we feel so much more secure. This feeling cannot be replaced. This is one of LBH’s main advantages. People know that LBH provides free legal aid and does so sincerely. They know LBH wants to protect our fate.” (Interview, Robertus Robet, 2020).⁹⁸

Resource constraints and organisational priorities mean not all the complaints listed above are handled by LBH – for example, after an initial consultation, some cases may be referred on to other providers. It is important to note, too, that if a complaint is followed up on by LBH, it might be addressed through litigation or nonlitigation means, or both.

In the post-authoritarian era, LBH continues to focus on the kinds of social and economic rights cases that made it such a prominent organisation under the New Order: those involving land and natural

⁹⁷ At the time of writing, no data was available for the ‘project office’ in Samarinda, which had yet to achieve formal status as an LBH office.

⁹⁸ Robertus Robet was questioned by police in 2019 after singing a protest song critical of the military, leading him to seek temporary exile for a few months in Australia (Sudaryono 2019).

resource conflict, labour rights, and cases of the urban poor facing forced eviction. But it has also made a name for itself defending the most marginalised people and the most unpopular causes in Indonesia (Mann 2020), such as religious minorities, people accused of communism, gender and sexual minorities, indigenous and traditional belief communities, and women and children. LBH states its key priorities for case handling are as follows:

1. Land rights and agrarian conflict
2. Labour rights
3. Rights of the urban poor, including forced evictions and the rights of informal street traders (*pedagang kaki lima*)
4. Environmental rights
5. The rights of minority and vulnerable groups, focusing mainly on religious freedom and tolerance (but also the rights of other minority groups and vulnerable people, such as sexual and gender minorities, women and children)
6. Right to a fair trial, covering issues such as false arrests, mistrials and torture (YLBHI 2020, 8–9)

Many of the regional LBH offices structure their offices around these issues, or their associated target groups of focus (for example, farmers, labourers, the urban poor), depending on local dynamics. Others, however, structure their offices more broadly, for example, into civil and political rights and economic, social and cultural rights divisions (YLBHI 2020, 9).

As discussed in Chapter 3, LBH's ideology of structural legal aid involves an approach to case selection that emphasises cases involving communities over those involving individuals. This also plays a role in determining whether a complaint will be followed up. But individual cases are still regularly taken on when they can be connected to a broader cause. Notably, one of the LBH's priority causes is 'the right to a fair trial'. Therefore, although I characterise LBH as falling predominantly within the grassroots typology of cause lawyering, it is still clearly concerned with proceduralist (or rule of law) goals, where the focus is on improving the functioning of the system. It is important to underline again that these categories are not sharply demarcated, and cause lawyers may adopt multiple approaches at the same time or, indeed, change approaches over time.

5.3 Individual criminal case defence

LBH's core reason for being is to provide legal assistance to poor and marginalised Indonesians, so there will always be an important role for defence of criminal cases in its work. Despite the often-individual nature of criminal case defence, however, LBH tries to connect these cases to higher causes and broader principles, in particular, human rights and democracy. Since its establishment, and into the post-authoritarian era, LBH has developed a reputation for being one of the few organisations in Indonesia willing to take on politically sensitive, unpopular and controversial cases. Knowing the social and political circumstances are often not in their favour, LBH cause lawyers nevertheless use individual case defence to expose illegitimate or insufficient state action to public scrutiny, as well as pressure the state to ensure constitutional rights do not remain merely rhetoric (Munger 2008, 799).

For example, YLBHI and LBH Jakarta were key members of the coalition that came to the defence of the more than 140 gay men who were arrested in a police raid on a Jakarta sauna in 2017 (Taher 2017; Mann 2020). Police denied many of the men access to legal counsel, and reportedly leaked photos of them naked or partially clothed, which then went viral (Taher 2017). In the end, only 10 of the men were sentenced for violating the Pornography Law (Law No. 44 of 2008) (Pausacker 2021, 450).⁹⁹ At the time of their arrest, LBH Jakarta spoke out strongly in defence of the men's rights, describing the arrests as a "bad precedent" for the rights of sexual and gender minorities in the country that could be "treated as a reference [justification] for violent actions by the public" (Maulia 2017). It also stressed the accused men's right to privacy and criticised the police for degrading their humanity (Riana 2017). The raid came just months after a national moral panic over LGBTIQ+ rights, when multiple senior public officials condemned the gay community and 93% of the population said "homosexuality should be rejected" (Pew Research Center 2013). There is therefore little to be gained in terms of public or political support by defending such cases, but LBH is consistent in taking them on, as part of its commitment to defending the poor and marginalised and also to articulate values of democracy and human rights.

Similarly, almost all the major cases targeting religious minorities in the democratic era have involved LBH lawyers. For example, LBH lawyers defended religious movement leader Lia Eden,¹⁰⁰ a member of the unorthodox Muslim minority Ahmadiyah sect that was attacked in Cikeusik, Banten,¹⁰¹ Shi'a community leader Tajul Muluk, from Sampang, East Java,¹⁰² and Alexander Aan, from West Sumatra, who was convicted after publicly expressing his atheism in a Facebook group.¹⁰³ Much like the raid on the Jakarta sauna, many of these cases generated widespread media attention but negligible public support.

As these examples suggest, one of the defining human rights challenges of the post-authoritarian era in Indonesia has been escalating intolerance and persecution of minority religious groups. The relaxation of Soeharto-era restrictions on public expressions of Islamic identity has increasingly seen conservative groups seek to impose their conservative vision of religion on state and society (Lindsey and Pausacker 2016a, 31). In one manifestation of these efforts, conservative Islamists have pursued minority and unorthodox groups, often drawing on legal provisions (such as those relating to blasphemy) to target them (Lindsey and Pausacker 2016a, 32). I now look at how LBH responded to the persecution of one such minority group, the new religious movement Gafatar. This case study will

⁹⁹ Homosexuality is not a criminal offence in Indonesia.

¹⁰⁰ Lia Eden (also known as Lia Aminuddin) claimed to have received divine revelations and sought to establish a new religion of Eden. She was sentenced to prison for blasphemy in 2006 and 2009 (Makin 2016, 17).

¹⁰¹ In February 2011, Islamist vigilantes attacked the Ahmadiyah community in Cikeusik, Banten, killing three Ahmadiyah members, and injuring five others. LBH lawyers represented an Ahmadiyah "security advisor" who was eventually convicted for resisting arrest and assault (Crouch 2012b, 56).

¹⁰² In December 2011, Sunni Muslims attacked the Shi'a community in Sampang, Madura, East Java. A Shi'a leader, Tajul Muluk, was eventually convicted for blaspheming Islam, while the attackers escaped prosecution (Suaedy 2016).

¹⁰³ Alexander Aan made comments in an atheist Facebook group that were deemed insulting to Islam. He was sentenced to two years and six months in prison for "spreading information that could incite hatred and hostility based on an ethnic group, religion, race or group" (Hasani 2016).

show that although the transition to democracy might have seen LBH's causes change (or causes like religious freedom becoming more prominent), the strategies used by LBH in individual case defence differ little from those deployed under authoritarianism.

5.3.1 Case study: *Gafatar blasphemy trial*

Freedom of religion and belief is clearly outlined in the Indonesian Constitution. Article 29(2) of the original constitution guaranteed "all persons the freedom to embrace their religion and to worship according to their own religion or belief". The constitutional reforms implemented after 1998 reinforced this right. Article 28E of the amended Constitution states that: "(1) Each person is free to embrace their religion and to worship according to their religion... and (2) Each person has the freedom to possess beliefs, and to express their thoughts and attitudes according to their conscience". Article 28I of the amended constitution even states that the right to a religion is a non-derogable right.¹⁰⁴ It is significant that the constitution makes a clear distinction between 'religions' and 'beliefs'. Indonesia officially recognises only six religions: Islam, Protestantism, Catholicism, Hinduism, Buddhism and Confucianism.¹⁰⁵ Yet it is also home to hundreds of beliefs, commonly called *aliran kepercayaan* or *aliran kebatinan*, encompassing traditional or indigenous beliefs, as well as emerging new religious movements.

Many followers of unorthodox religious groups have been charged under the so-called Blasphemy Law, which was enacted in 1965, as Presidential Decree No. 1/PNPS/1965 on the Prevention of the Misuse and or Insulting of a Religion.¹⁰⁶ The Blasphemy Law only recognises the six official religions, and, in fact, describes beliefs as constituting a danger to the recognised religions.¹⁰⁷ It inserted an article into the Criminal Code (*Kitab Undang-Undang Hukum Pidana*, KUHP) stating that "Any person who intentionally and publicly expresses sentiments or conducts acts that (a) involve enmity, abuse or insulting of a religion adhered to in Indonesia; or (b) are intended to stop a person from believing in a religion based on an Almighty God" faces up to five years in prison.¹⁰⁸ The Law was used only a handful of times under the New Order, but since the fall of Soeharto, at least 120 people have been convicted (Crouch 2012a, 11).

The 1997-1998 Asian Economic Crisis, and the political turmoil associated with the collapse of the Soeharto regime, saw the emergence of a range of new 'prophets' who claimed that they could save Indonesians from the troubles they faced (Makin 2016, 5). One of those who claimed to be a prophet was Ahmad Mushaddeq (also known as Abdussalam), who, with Mahful Muis, founded Qiyadah

¹⁰⁴ At the same time, however, Article 28J(2), states that rights may be limited on the basis of morals, religious values, security and public order. Article 28J has been particularly contentious and is discussed further below.

¹⁰⁵ This is described in Elucidation to Article 1 of Law No. 1/PNPS/1965. See also Lindsey and Pausacker (2016a, 3).

¹⁰⁶ It was then converted into law in 1969, by the same law that converted the Attorney General's authority to ban books into law, Law No. 5 of 1969 (see below).

¹⁰⁷ See point 2 of the General Elucidation to Law No. 1/PNPS/1965.

¹⁰⁸ Article 4 of Law No. 1/PNPS/1965 and Article 156a of the KUHP.

Islamiyah in 2001, which later became Komar (*Komunitas Milah Abaraham*, Abrahamic Religion Community), and then Gafatar.

The history of the movement is convoluted and the teachings of Mushaddeq and Mahful have evolved over time, but controversially, since about 2007, they advanced the idea of a return to the religion of Abraham (which they called *Milah Abraham*), and read the Qur'an alongside the Old and New Testaments (Makin 2019, 92–94). After establishing Gafatar in 2011, Mushaddeq began urging his followers to migrate to regional areas of Indonesia, and purchase land, where they would establish a new centre of world civilisation (Makin 2019, 91, 96). The movement raised suspicions among both conservative Muslims who considered its teachings a threat to Islamic orthodoxy,¹⁰⁹ and the government, which was worried about it challenging the authority of the state (Makin 2019, 96). In response to increasing pressure, Gafatar held an emergency congress in August 2015, and agreed to disband and form a new organisation: *Negeri Karunia Tuan Semesta Alam Nusantara* (NKTSAN), which translates roughly as Archipelagic Nation of the Grace of the Lord of the Universe. This new organisation had a strong focus on food security and self-sufficiency, and encouraged its members to migrate to Kalimantan, where they purchased land to conduct their activities. From August 2015 to January 2016, more than 8,000 former Gafatar members moved, including about 230 from Yogyakarta, who established a settlement in Pasir village, Mempawah, West Kalimantan (Rahman 2018, 7).

Following escalating media coverage of the group (Syaifullah 2016a; 2016b; 2016c; The Jakarta Post 2016; Susanto and Adi 2016), mobs attacked two Gafatar communities in Mempawah district, West Kalimantan, on 18 January 2016, destroying their settlements and crops, as police and military officials reportedly watched on (Human Rights Watch 2016). Military officials then evacuated hundreds of Gafatar followers from West Kalimantan to government shelters in Java (Reuters 2016). A Gafatar spokesperson said almost 8,000 followers were forcibly evicted to unofficial detention centres in Java during January and February (Human Rights Watch 2016). Not long after the attack, on 3 February 2016, the Indonesian Council of Ulama (*Majelis Ulama Indonesia*, MUI) issued a fatwa declaring Gafatar to be a deviant sect,¹¹⁰ and then on 29 February, the Religious Affairs Ministry, Attorney General's Office and Home Affairs Ministry issued a joint decision formally banning the organisation from spreading its teachings (Ribka 2016).¹¹¹

In May 2016, three senior figures in the organisation were named suspects for alleged blasphemy and treason and detained by police: Mahful Muis, the former head of Gafatar and deputy of NKTSAN,

¹⁰⁹ Previously, in 2007, the conservative quasi-state agency the Indonesian Council of Ulama (*Majelis Ulama Indonesia*, MUI) issued fatwa declaring Qiyadah Islamiyah to be a deviant sect (Makin 2019, 89–91; Crouch 2017a, 8). Fatwa can be defined as the opinion of a suitably qualified religious scholar on a question of Islamic law. Although fatwa have no basis in Indonesian law, they can be highly influential on how state and society view minority religious groups (Lindsey and Pausacker 2016a, 32). Soon after the fatwa was issued, Mushaddeq was charged and convicted of blasphemy, and sentenced to four years in prison. On appeal to the High Court, the sentence was later reduced to two-and-a-half years. South Jakarta District Court Decision No. 227/Pid/B/2008/PN.JKT.SEL and Jakarta High Court Decision No. 135/PiD/2008/PT.DKT.

¹¹⁰ MUI Fatwa No. 6 of 2016 on the Gafatar Sect, dated 3 February 2016.

¹¹¹ Joint Ministerial Decision No. 93 of 2016; No. KEP-043/A/JA/02/2016; No. 223-865 of 2016.

spiritual leader Ahmad Mushaddeq, and Andry Cahya, Mushaddeq's son and president of NKTSAN. YLBHI and LBH Jakarta lawyers took on the case. From the beginning, public opinion was firmly against Gafatar. Yet LBH repeatedly asserted the group had a right to practice their religion, as guaranteed by the Constitution. YLBHI director Asfin spoke to the media immediately after they were named suspects: "According to the Constitution, religious freedom and belief is guaranteed by the state. As such, naming them suspects is a form of criminalisation of religious freedom and belief," she said. She cited Article 28E of the Constitution, and described the right to a religion as a non-derogable right (Kompas.com 2016). As discussed below, however, this is not how the government and Constitutional Court have interpreted this right.

The trial heard from 24 witnesses. Several of the witnesses brought by the prosecution contradicted the accusations against the ex-Gafatar followers, saying the focus of the community was on food security, they did not oppose the government or have any inclination towards violence, and even that they had good relations with local officials and the community.¹¹² The most controversial allegations against the community came from witness statements collected during the investigation stage, which were then read by prosecutors in court.¹¹³ These witnesses were never called to appear in court.

Prosecutors sought sentences of 12 years in prison for Mushaddeq and Mahful, and 10 years for Andry. The panel of judges ultimately handed down sentences of five years for Mushaddeq and Mahful and three years for Andry. The judges concluded the group's teaching that prayer, fasting, zakat and the hajj are not compulsory conflicted with Islamic teaching and therefore "it can be concluded that Milah Abraham [referring to the group and their religious beliefs] have offended Muslims and simultaneously desecrated the purity of the teachings of Islam, which are followed by the majority of Indonesians".¹¹⁴ The court found them not guilty of the charges of treason.

LBH lawyers were highly critical of the process, especially the judges' apparent reliance on the written statements of witnesses obtained during the investigation stage over the oral statements of witnesses who provided testimony in court. LBH lawyers repeatedly stressed that the ex-Gafatar followers had a right to freedom of expression and belief. As LBH Jakarta's Pratiwi Febry said:

"Do they deserve this? What is behind this criminalisation? Have they really defamed religion or the existence of the government? As an independent nation, where do we place freedom of thought, belief and expression?" (Kusuma 2017).

Many Gafatar followers are middle class, and many previously had professional jobs. Although Gafatar could have paid for lawyers, LBH took on the case because of its commitment to the cause of religious freedom – and the fact that few other lawyers would take on such a politically sensitive case (Interviews, Pratiwi Febry, 2019; Asfinawati, 2021). This is typical of the grassroots approach to

¹¹² Decision No. 1107/Pid/Sus/2016/PN.Jkt.Tim, see, for example, statements of witnesses Muhammad Hadi Suparyono (22-25), Radix Rusdiyanto (25-26), Anton Susanto (28-29), Rio Putra (29-30), Sujito (32-33).

¹¹³ Decision No. 1107/Pid/Sus/2016/PN.Jkt.Tim, 34-136.

¹¹⁴ Decision No. 1107/Pid/Sus/2016/PN.Jkt.Tim, 197.

cause lawyering adopted by LBH, in which “representation is both means and end, simultaneously helping the individual and seeking broader change” (Hilbink 2004, 684). As Asfin told me, in the Gafatar case, LBH was “defending values, not just the person” (Interview, Asfinawati, 2021).

These kinds of cases are a key means by which LBH continues to advance and defend ideals of liberal democracy, the rule of law and human rights, and it consistently framed its defence of the Gafatar members in these terms. LBH has never won an acquittal in a religious freedom case (Lindsey and Crouch 2013, 634). Indeed, until early 2020, no person charged with blasphemy in Indonesia had ever been acquitted.¹¹⁵ According to LBH Jakarta lawyer Muhammad Rasyid Ridha, pursuing religious freedom cases through the courts is “...the road to hell, because, from the outset, the legal norms are not compatible with human rights, democratic values and justice” (Interview, Muhammad Rasyid Ridha, 2019).¹¹⁶ Yet LBH still takes on these cases because it is committed to the causes of religious freedom and freedom of expression.

Even if LBH lawyers view the courts as unjust and are sceptical about the likelihood of securing victory, they continue to see litigation as a vital strategy. Typical of their grassroots approach, they recognise that the law can be “both a constraint and a resource” (Hilbink 2004, 682). Much as was the case under the authoritarian New Order, the courts are used as a space to deliver public education, to highlight the problems Indonesia is facing, to criticise and oppose the government and to strengthen democratic discourse. As noted, the courts provide a forum for the open discussion of politically sensitive issues, such as blasphemy. As LBH Jakarta director Arif Maulana says:

“The unique thing about LBH is that it makes use of the courts to deliver a variety of criticisms and arguments about human rights, democracy. This is the legal realm. Whatever we say in court, as long as it is for case defence, can’t be challenged with legal sanctions.” (Interview, Arif Maulana, 2019).

YLBHI director Asfin agreed:

“[L]itigation can put us on an even playing field, although in many cases it is far from even because the judges will always pressure us. We can oppose the government and show how it is not ‘in order’ (*beres*). The courts can be a stage for delivering facts that it would be impossible for us to discuss outside the courtroom without being arrested... Litigation can also mobilise the public, to attend, to listen, to be informed, to see injustice.” (Interview, Asfinawati, 2019).

¹¹⁵ A mentally ill woman charged with blasphemy for bringing her dog into a mosque was acquitted in February 2020 (ABC News 2020). According to Melissa Crouch, in 2017, all persons charged with blasphemy in Indonesia had been convicted (Topsfield and Rompies 2017).

¹¹⁶ Here he is referring to the fact that the law applicable to religious freedom is already discriminatory toward minorities, because the Blasphemy Law only recognises six official religions.

Defending the rights of marginalised individuals and groups like Gafatar against abuses of state power remains one of the most common strategies of LBH cause lawyers in post-authoritarian Indonesia. It is an approach to cause lawyering that has changed little since the democratic transition in 1998. Indeed, as Asfin and Arif Maulana's comments suggest, their conception of the importance of litigation differs little from descriptions of cause lawyering practiced under authoritarian regimes, with the courts used as a safe public forum to "speak out legally and politically" (Fu 2011, 355). As discussed, it is also consistent with the grassroots typology of cause lawyering. Because grassroots lawyers typically view the legal system as "an oppressive force", when they do represent individual cases, they make efforts to connect the case to higher level principles (Hilbink 2004, 681), in this case, the cause of religious freedom. In typical cause lawyering fashion, they go beyond individual case defence to defend the public interest.

LBH's approach to criminal case defence might have changed little since the New Order era, but the democratic transition did offer new opportunities for strategic policy-focused litigation, directed at the state, to defend or advance human rights protections. These types of strategies are associated with the elite/vanguard category of cause lawyering (Hilbink 2004, 673–81). LBH has had some success with these strategies, as the next section shows, but they never really took root.

5.4 Constitutional litigation

As Chapter 2 discussed, cause lawyering scholarship describes the presence of constitutional guarantees of rights as one of the most crucial factors supporting the development of cause lawyering, so reforms to the Indonesian constitution should have altered the form of cause lawyering in Indonesia too. The landmark reforms to the Indonesian Constitution between 1999 and 2002 saw the insertion of a new chapter (Chapter XA) based largely on the Universal Declaration of Human Rights. Under the original 1945 Constitution, human rights were only covered under Article 28, which stated that "freedom of association and assembly and the like shall be prescribed by law". As Lindsey notes, rather than guaranteeing rights, this provision was intended to provide the government with the freedom to restrict or suspend these rights if it wished (Lindsey 2008, 29). The insertion of Chapter XA therefore marked "a radical shift in Indonesia's constitutional philosophy from essentially authoritarian to liberal democratic in nature" (Clarke 2008, 432). It provided Indonesia with some of the strongest protections of human rights in the region, and indeed, granted protections "extending well beyond those guaranteed in many developed states" (Lindsey 2008, 29). This provided cause lawyers not only with a strong basis on which to launch rights claims, but also helped to boost the persuasiveness of these rights claims (Andersen 2006, 12), given these rights were guaranteed by the constitution.

Constitutional litigation has been described as "the bedrock of cause lawyering" (Scheingold and Sarat 2004, 130). The constitutional reform process in Indonesia included a provision on the establishment of an independent constitutional court with the power to review the consistency with the Constitution of statutes (*undang-undang*) enacted by the national legislature (*Dewan Perwakilan Rakyat*, DPR) (Article 24C). The 2003 establishment of the Constitutional Court dramatically

expanded the opportunities for public interest litigation in Indonesia, just as such courts have done in other jurisdictions (Baik 2010, 119; Chang 2010, 136).

Briefly, the Constitutional Court is comprised of nine justices who can serve for up to 15 years.¹¹⁷ The president, DPR, and Supreme Court nominate three justices each, with their appointment officially confirmed by the president.¹¹⁸ The court has no appeal function and cannot alter decisions of any other court, but enjoys first and final jurisdiction for constitutional review of statutes.¹¹⁹ It has additional responsibility for hearing disputes about the constitutional authority of state institutions, deciding on dissolution of political parties, hearing disputes over contested election results, and deciding on an opinion of the DPR requesting the president or vice president be impeached (Dressel and Inoue 2018, 162).¹²⁰ Notably, the Court only has power to review the constitutionality of statutes – it cannot rule on lower-level government regulations (*peraturan*) (Hendrianto 2018, 42), which remain the jurisdiction of the Supreme Court. This means the Court can have little or no say in how statutes are implemented by government or ministerial regulations and decisions (Hendrianto 2018, 42).

The Court has taken a relaxed approach to the standing of CSOs in submitting petitions for constitutional review. It generally grants standing to CSOs if their organisational charters are related to the issue at hand, while organisations working on the rule of law, human rights, democratisation or the broader public interest are offered standing “almost as a matter of course” (Butt 2015, 49). The first Constitutional Court chief justice, Jimly Asshiddiqie, encouraged LBH to file judicial reviews to “test” the new institution (Interview, Muhamad Isnur, 2019; Nardi 2018a, 254). Jimly recognised the Court needed to quickly generate its own jurisprudence and so wanted the Court to hear a large number of cases as soon as possible (Butt 2015, 48). Before the emergence of the Constitutional Court, the unreliable and often inconsistent administrative courts, discussed below, were one of the few options available for cause lawyers to directly challenge state power. As stated, the Supreme Court has the power to review whether regulations violate statutes, but during the New Order era it was reluctant to exercise this function (Fenwick 2009, 333), a pattern that has continued in the post-authoritarian period (Butt 2021, 536).¹²¹ The relaxed approach the Constitutional Court has taken to standing rules has allowed LBH to help establish a practice of public interest litigation not previously possible under the New Order.

¹¹⁷ In 2020, the national legislature passed Law No. 7 of 2020, amending Law No. 24 of 2003 on the Constitutional Court. This removed the previous term limit for serving judges of five years with the possibility of re-appointment for a second term (by deleting Article 22 of Law No. 24 of 2003). The revised 2020 Law introduced a new minimum age for judges of 55 (Article 15(2)(d)), but also stated judges can serve on the bench until they turn 70, unless they meet certain conditions for dismissal (Article 23).

¹¹⁸ Article 24C(3) of the Indonesian Constitution, Article 18 of Law No. 24 of 2003 (as amended by Law No. 7 of 2020).

¹¹⁹ Article 24C(1) of the Indonesian Constitution, Article 10(1) of Law No. 24 of 2003 (as amended by Law No. 7 of 2020).

¹²⁰ Article 24C(1),(2) of the Indonesian Constitution, Article 10(1)(2) of Law No. 24 of 2003 (as amended by Law No. 7 of 2020).

¹²¹ According to former YLBHI leader Bambang Widjojanto, the Supreme Court decided just five of 26 cases submitted to it between 1992 and 1999. Of the remainder, one was struck out while 20 were never decided (Butt 2015, 30).

Since it began operations in 2003, the Constitutional Court quickly built a reputation for independence and integrity. It has been willing to take on sensitive political matters, and the government has largely complied with its decisions, even if the DPR has not (Butt and Lindsey 2018, 100–107). These factors arguably encouraged a degree of optimism about the ability of litigation-driven legal reforms to lead to social change, consistent with an elite/vanguard vision of cause lawyering (Hilbink 2004, 673), as indicated by the popularity of the court among CSOs. The court’s reputation was severely tarnished by the conviction of Chief Justice Akil Mochtar for corruption in 2014, and Justice Patrialis Akbar in 2017 (Kahfi 2017), although it still remains the best regarded of Indonesia’s courts (Butt and Lindsey 2018, 108).

Since the establishment of the Court, lawyers from YLBHI and LBH Jakarta have played central roles in coordinating some of the most high-profile civil society challenges to legislation, and have recorded major victories to extend and strengthen rights protections and protect the public interest. Some of the landmark decisions of the Court during the democratic era (not all of which involved LBH lawyers) have included cancelling notorious *lèse majesté* and ‘hate sowing’ provisions in the KUHP used by the Soeharto regime (and Megawati Soekarnoputri’s post-authoritarian government) to pursue its critics (Butt and Lindsey 2018, 199, 438),¹²² and deciding in favour of indigenous peoples’ rights over customary forests.¹²³ Key challenges submitted by LBH lawyers have related to higher education, traditional markets, population administration, the management of coastal regions, book banning and religious freedom, among others. I focus on two of these examples, both of which have significant implications for the protection of first order rights. They are also indicative of how democratic transition has affected cause lawyering in Indonesia, as is discussed below.

5.4.1 Case study: book banning

The ‘book banning’ decision (Decision No. 6-13-20/PUU-VIII/2010) is one of the most prominent victories LBH has had at the Constitutional Court in its short history. The case was sparked by an escalation in book banning by the Attorney General’s Office in the early 2000s. The Attorney General relied on a decades-old presidential regulation as the legal basis for banning the books: Presidential Decree No. 4/PNPS/1963 on Security of Printed Products That Could Disturb Public Order, which was converted into law by Law No. 5 of 1969.¹²⁴ This instrument was enacted during the turbulent final years of Soekarno’s ‘Guided Democracy’ regime, but used extensively under Soeharto (Utama 2016). The law was not applied in the immediate post-Soeharto period, but from 2006 to 2009, the

¹²² The so-called *lèse majesté* provisions, Articles 134, 136 *bis* and 137 of the KUHP, described offences for intentionally insulting or defaming the president or vice president. These provisions were struck down by the Constitutional Court in Decision Nos. 013/PUU-IV/2006 and 22/PUU-IV/2006. The ‘hate sowing’ provisions, Article 154 and 155, prohibited “public expressions of hostility, hatred or contempt towards the Government of Indonesia” and were struck down in 2007, through Decision No. 6/PUU-V/2007. See also Butt and Lindsey (2018, 199–200).

¹²³ Constitutional Court Decision No. 35/PUU-X/20.

¹²⁴ Law No. 16 of 2004 on the Public Prosecution also allows the office to ‘supervise’ printed materials.

AGO banned at least 22 books it deemed a threat to public order.¹²⁵ In 2009, it banned two books that presented counter-narratives to official accounts of the 1965 anti-communist violence: the Indonesian translation of John Roosa's "Pretext for Mass Murder: The September 30th Movement and Suharto's Coup d'Etat in Indonesia" [*Dalih Pembunuhan Massal: Gerakan 30 September dan Kudeta Suharto*]; and *Lekra Tak Membakar Buku: Suara Senyap Lembar Kebudayaan Harian Rakjat 1950-1965* ["Lekra Didn't Burn Books: The Silenced Voice of the People's Daily 1950-1965"] by Rhoma Dwi Aria Yuliantri and Muhidin M. Dahlan. It also banned a book on Papua and two books on religious pluralism.¹²⁶ In early 2010, there was also a public debate about banning another book critical of then-President Yudhoyono (Hukum Online 2010a).¹²⁷ These events catalysed a vigorous civil society campaign against book banning and prompted three simultaneous challenges to Law No. 4/PNPS/1963.¹²⁸ YLBHI and LBH lawyers were a major component of the 'Advocacy Team Against Book Banning' that represented the Indonesian Institute of Social History (*Institut Sejarah Sosial Indonesia*, ISSI) and Rhoma Dwi Arya Yuliantri in their challenge (No. 20/PUU-VIII/2010).

In criticising the banning of the books, YLBHI-LBH and ISSI figures repeatedly framed their critiques with references to democracy and human rights. YLBHI director Patra Zen, for example, said "banning books is an act of authoritarian and totalitarian regimes" (Kompas.com 2010a). Similarly, then-LBH Jakarta director Nurkholis Hidayat said: "Law No. 4/PNPS/1963 violates the principles of the rule of law and democracy that are guaranteed by the Constitution" (Kompas.com 2010b). As he told me:

"Everyone knew the Attorney General's authority to ban books was derived from a problematic legal framework. It was based on an emergency presidential decree issued in a context very different to the democratic system we were in... At LBH at that time, there was a lot of enthusiasm for getting rid of the legal products that were no longer relevant for the [democratic] situation. If there is a problem with a publication, there should be due process, respect for the rule of law. Our argument was as simple as that" (Interview, Nurkholis Hidayat, 2021).

In addition to the legal challenge, other members of the 'Civil Society Coalition for Defence of Freedom of Expression' organised public campaigns to support these legal efforts. A public exhibition was held at the Taman Ismail Marzuki cultural centre, examining the history of book banning in

¹²⁵ Constitutional Court Decision No. 6-13-20/PUU-VIII/2010, 48.

¹²⁶ *Suara Gereja Bagi Umat Tertindas: Penderitaan, Tetesan Darah, dan Cucuran Air Mata Umat Tuhan di Papua Barat Harus Diakhiri* ["The Voice of the Church for the Oppressed: The Suffering, Bleeding, and Tears of God's People in West Papua Must End"] by Socratez Sofyan Yoman, *Enam Jalan Menuju Tuhan* ["Six Paths to God"] by Darmawan MM, and *Mengungkap Misteri Keragaman Agama* ["Revealing the Mystery of Religious Diversity"] by Syahrudin Ahmad.

¹²⁷ *Membongkar Gurita Cikeas: Di Balik Skandal Bank Century* ["Unmasking the Cikeas Octopus: Behind the Century Scandal"] by George Junus Aditjondro. The book was never formally banned.

¹²⁸ Three simultaneous challenges to the law were submitted and decided together. The other two challenges were submitted by Darmawan MM and (No. 6/PUU-VIII/2010), and Muhidin M. Dahlan and members of the Islamic Students Association-Assembly to Save the Organisation (*Himpunan Mahasiswa Islam-Majelis Penyelamat Organisasi*, HMI-MPO) (No. 13/PUU-VIII/2010).

Indonesia (Detik 2010a). Murals and posters also promoted the campaign. Crucially, LBH cause lawyers and their allies in civil society did not view litigation in isolation. There was a recognition of the importance of these broader campaign efforts to accompany the legal process. As Nurkholis explains:

“This is part of our strategic litigation strategy. We are not simply hoping to change the law, we also aim to encourage political support for change, from the public, academics, public figures and so on. When we launch a judicial review, in fact, even before, it is essential to conduct a public campaign.” (Interview, Nurkholis Hidayat, 2021)

As Nurkholis’ comments indicate, even when LBH engages in elite/vanguard strategies of cause lawyering, it attempts to incorporate efforts to strengthen legal awareness in the community – a manifestation of its structural legal aid approach.

The Constitutional Court ultimately ruled Articles 1-9 of Law No. 4/PNPS/1963 were unconstitutional, and as such the entire law was unconstitutional.¹²⁹ It stated that in a rule of law state like Indonesia, there is due process of law, and as such, any decision to remove a book from circulation must be made by the courts. It ruled that providing the Attorney General with the power to ban books without a legal process was “the approach of an authoritarian government, not a rule of law state (*negara hukum*) like Indonesia”.¹³⁰ The Court’s decision also referred to book banning as conflicting with citizens’ right to communicate and obtain information (as guaranteed by Article 28F of the Constitution) and right to freedom of belief and expression (as guaranteed by Article 28E).¹³¹ It was striking the degree to which the language used by the court mirrored the arguments put forward by the civil society team.

This was a vitally important decision to strengthen freedom of expression in Indonesia. But raids on leftist books still occur, largely conducted by the military. In early 2019, for example, weeks after the Indonesian military confiscated leftist books from bookshops in West Sumatra and East Java, then-Attorney General Muhammad Prasetyo advocated a “massive” seizure of leftist books (Siddiq 2019). Despite continued government and military efforts to control the public narrative around communism and leftism, the loss of the legal basis for banning books does make it easier for LBH and broader civil society to challenge these kinds of acts or statements (Interviews, Nurkholis Hidayat, Muhamad Isnur, 2021). As Muhamad Isnur said, “Confiscating books is now illegal, so the community can resist or criticise these actions... we are on firmer ground” (Interview, Muhamad Isnur, 2021). This is one of the few examples where elite/vanguard methods of cause lawyering have had some impact. Another critically important, but far less successful, example was the challenge to the Blasphemy Law.

¹²⁹ Constitutional Court Decision No. 6-13-20/PUU-VIII/2010, 244.

¹³⁰ Constitutional Court Decision No. 6-13-20/PUU-VIII/2010, 239-240.

¹³¹ Constitutional Court Decision No. 6-13-20/PUU-VIII/2010, 242.

5.4.2 Case study: Blasphemy Law

The ultimately unsuccessful challenge to the Blasphemy Law is one of the highest profile cases decided by the Constitutional Court since its establishment. The challenge was launched by civil society in recognition of the fact that the law was increasingly being used to target minority religious communities. But several other threats to religious freedom preceded the challenge to the law. In 2005, the MUI issued a fatwa condemning secularism, liberalism and pluralism and re-issued an older fatwa condemning the unorthodox Islamic sect Ahmadiyah as heretical (Menchik 2014, 610). While fatwas have no legal basis in Indonesian law, they contributed to an environment of growing intolerance of minority religious communities, especially Ahmadiyah. On 1 June 2008, a group of human rights and religious freedom activists held a rally at the National Monument (*Monas*) in support of pluralism and the Ahmadiyah community. They were violently attacked by Islamist protestors, in an event now known as the ‘Monas Incident’ or the ‘Monas Tragedy’ (*Insiden Monas* or *Tragedi Monas*). About a week after this incident, the government published a joint ministerial decision that banned the Ahmadiyah community from spreading their beliefs.¹³²

With this as the backdrop, a large group of human rights organisations and senior liberal Muslim intellectuals submitted a challenge to the Blasphemy Law at the Constitutional Court. Former President Abdurrahman Wahid (‘Gus Dur’) was the most prominent of these challengers, and had reportedly encouraged LBH to submit a petition for judicial review as far back as 2005, when Asfin was head of LBH Jakarta (Interview, Asfinawati, 2019). Some 54 lawyers, including Asfin and several other current and former YLBH-LBH staff, represented the case.

As stated, the Indonesian Constitution provides several protections for religious freedom, under Articles 28E and 29, and Article 28(I) describes the right to religion as a right “that cannot be limited under any circumstances”. Nevertheless, Article 28J goes on to state that:

“In carrying out his/her rights and freedoms, every person is obliged to abide by the restrictions in legislation issued to protect the rights and freedoms of others and which accords with moral considerations, religious values, security and public order in a democratic society”.

Article 28J is closely based on Article 18(3) of the International Covenant on Civil and Political Rights (ICCPR), although it notably adds “religious values” to the list of permissible reasons for restrictions on religious freedom in the ICCPR. The applicants’ arguments have been well described by Melissa Crouch (Crouch 2012a, 18–23), and I will not repeat them at length here. Briefly, they included that: the Blasphemy Law conflicted with the principle of freedom of religion as guaranteed by Articles 28E and 29 of the Constitution (Crouch 2012a, 18–19); although Article 28J(2) of the

¹³² Joint Ministerial Decision No. 3 of 2008, No. Kep-033/A/JA/6/2008 and No. 199 of 2008 on Warning and Order to Followers, Members and Administrators of Jemaat Ahmadiyah Indonesian (JAI) and to the General Public.

Constitution permits some limitation on the practice of religious freedom, the Blasphemy Law was not a permissible restriction on this right (Crouch 2012a, 20–21); and the Law was inconsistent with the rule of law and the principle of equal treatment before the law described in the Constitution (Articles 1(3) and 28D(1), respectively) (Crouch 2012a, 21–23).

The court heard from a large number of organisations and expert witnesses, including Muslim organisations and government officials in support of the Blasphemy Law, as well as submissions by religious minorities and ‘progressive’ Muslims against the Law, although, notably, no representatives from the Ahmadiyah community testified, despite reportedly being asked (Crouch 2016b, 5). The case attracted a huge amount of publicity, some of which was encouraged by the LBH lawyers themselves. Islamist groups attended the court in large numbers, occasionally disrupting proceedings (Menchik 2014, 612–13). Reflecting on the process years later, Asfin commented they realised that if they were going to win, they needed to support litigation with extra-legal activities, such as a ‘roadshow’ to mainstream Muslim organisations Nahdlatul Ulama and Muhammadiyah to get them on side. Ultimately, however, both Nahdlatul Ulama and Muhammadiyah representatives also testified in support of the Law (Menchik 2014, 613–15; Crouch 2012a, 27–28). As Asfin explained:

“Because we suspected we were not going to win, we split up and some handled the nonlitigation aspects, for example by conducting a ‘roadshow’ to religious institutions. But this aspect did not run as planned. Even the representatives of Confucianism testified in support of the law!” (Interview, Asfinawati, 2021).

The court ultimately rejected the challenge to the Law. It stressed that the first point of Indonesia’s national ideology, Pancasila, was “Belief in One Almighty God” and this principle must be accepted by all Indonesians.¹³³ Referring to the Constitution and several other statutes, the court noted that “Indonesia is a “Godly nation” (*bangsa yang bertuhan*), and not an atheist country” (Crouch 2012a, 40; Menchik 2014).¹³⁴ The court emphasised the “Indonesianness” of the right to religious freedom in Indonesia, stating “the practice of religion in Indonesia was different to other countries” (Crouch 2012a, 40).¹³⁵ It noted that Indonesia “does not recognise separation of state and religion”; it is “a rule of law state that places ‘Belief in One Almighty God’ as its primary principle, and that religious values inform the life of the people and the state”.¹³⁶ The court noted that a fundamental difference between the Indonesian rule of law state (*negara hukum*) and western rule of law states was that in Indonesia, in matters of “governance, formulation of laws, and in the courts, religious teachings and values help to determine which laws are good and which are bad”.¹³⁷ While the constitutional amendment process might have restructured the state on liberal democratic principles, there was an attempt to define an Indonesian “version” of liberal democracy, one that did not extend to the full enjoyment of religious freedom.

¹³³ Constitutional Court Decision No. 140/PUU-VII/2009, 271–272.

¹³⁴ Constitutional Court Decision No. 140/PUU-VII/2009, 273.

¹³⁵ Constitutional Court Decision No. 140/PUU-VII/2009, 274.

¹³⁶ Constitutional Court Decision No. 140/PUU-VII/2009, 275.

¹³⁷ Constitutional Court Decision No. 140/PUU-VII/2009, 275.

The court made a distinction between the private freedom to hold a religious belief (which it termed *forum internum*) and the freedom to express or manifest this belief in public (*forum externum*) (Lindsey and Butt 2016, 53–54). The Court said Article 28J of the Constitution allows this external expression of religious freedom to be limited by “religious values”, and acknowledged this article was different to Article 18 of the ICCPR.¹³⁸ The court noted everyone was free to interpret religious teachings or rules, but such interpretation should use “appropriate methodology” and be based on “relevant holy books”.¹³⁹ According to the court, “interpretation not based on methodology recognised by followers of a religion or on relevant holy books could threaten security and public order if expressed in public”, and as such, the public expression (*forum externum*) of belief could legitimately be restricted by the state.¹⁴⁰ According to the court, the Blasphemy Law “did not place limitations on an individual’s personal faith (*forum internum*), it only limited publicly expressing statements and attitudes (*forum externum*) that deviated from the fundamental teachings of a religion adhered to in Indonesia, [or] expressing feelings or engaging in behaviour that is hostile, abuses or insults a religion adhered to in Indonesia”.¹⁴¹

Further, the court also recognised the role played by religious leaders, in particular Islamic scholars (*ulama*), in restricting religious freedom. Ulama, the court said, led and represented their religious communities, and had the authority to interpret religious teachings. The court said if individuals interpreted or conducted activities that deviated from those promoted by ulama, this would disturb the peace of that religious community, who would feel their religion had been insulted or desecrated, resulting in social unrest (Lindsey and Butt 2016, 54).¹⁴²

The relationship between Islam and the state has been a near constant source of debate in Indonesia, even before the birth of the republic (Lindsey and Pausacker 2016a, 30). Yet the Blasphemy Law case prompted one of the most serious and sustained debates on the role of religion and the state in Indonesia for many years. There were deep discussions about the role of law and human rights in regulating this relationship. Ultimately, however, the Constitutional Court came down on the side of maintaining the status quo, as it so far always has in cases on religion (Lindsey and Butt 2016, 48), affirming the government’s role in determining religious orthodoxy. Regardless of the protections of religious freedom in the amended constitution, the limits of this formal change to a more liberal democratic system became apparent.

Religious freedom advocates now consider the Blasphemy Law case to be a “significant setback” for their cause (Crouch 2016b, 12). LBH is now much more careful about how it approaches cases relating to religious freedom, preferring to limit public campaigns and advocacy where possible, to avoid attracting the attention of Islamist opponents (Interview, Asfinawati, 2019). This is not its

¹³⁸ Constitutional Court Decision No. 140/PUU-VII/2009, 276.

¹³⁹ Constitutional Court Decision No. 140/PUU-VII/2009, 289.

¹⁴⁰ Constitutional Court Decision No. 140/PUU-VII/2009, 288–289.

¹⁴¹ Constitutional Court Decision No. 140/PUU-VII/2009, 288.

¹⁴² Constitutional Court Decision No. 140/PUU-VII/2009, 291.

typical approach, however, which tends to combine litigation with other efforts, as Chapter 6 will discuss in more detail.

5.4.3 Legitimising the amended constitution

Constitutional litigation such as in the book banning and blasphemy cases is the closest LBH has ever come to an elite/vanguard version of cause lawyering, a version of cause lawyering that has only become possible in Indonesia since the democratic transition. This version of cause lawyering aims to affirm high-level constitutional principles on behalf of unrepresented groups, and believes legal reform is capable of precipitating change in society (Hilbink 2004, 683). Cause lawyers practicing this form of cause lawyering are typically much more removed from grassroots social movements, and tend to play a dominant role in determining strategy (Hilbink 2004, 678, 679). It is significant that the Blasphemy Law challenge was submitted by a group of elite progressive religious scholars (including a former president) and prominent Jakarta-based CSOs. Asfin's comment above suggests a degree of regret over the challengers' insufficient engagement of social movements before the challenge was launched.

LBH now recognises that a purely elite/vanguard version of cause lawyering that views legal action as the most appropriate means of enacting social change is not appropriate for contemporary Indonesia, where the rule of law remains poorly developed. While cause lawyering and legal mobilisation literature often refers to institutional structures like rights frameworks and constitutional courts as important for supporting the development of cause lawyering (see Chapter 2), the Blasphemy Law case demonstrated that such a formal focus is insufficient. LBH recognises that strategic litigation at the Constitutional Court is not an effective means of bringing about change in itself. As Muhamad Isnur explains:

“The target is not only to win the case or to change policy, but also to create space for consolidation of civil society... We establish broad networks, involving many institutions, and victims of the policy and involve them in public campaigns. Every time there is a hearing, we will hold a press conference, a public discussion, a public campaign event, a demonstration. [Constitutional litigation] is a forum for us to educate the public, and judges, about human rights.” (Interview, Muhamad Isnur, 2021).

As Isnur's comments suggest, one advantage of constitutional litigation is that these cases often attract significant media attention, and are sometimes streamed live on television or online (Butt 2015, 294). Even if challenges fail, they can set or influence the political agenda, initiating debate around the need for legislative reform and introducing constitutional and rights discourse into the public consciousness. This point is a critically important function of constitutional litigation in the Indonesian context. For much of Indonesian history, the constitution was “a rather nebulous document” (Butt 2015, 294) that was easily manipulated by Soekarno and Soeharto to justify authoritarian rule. The original 1945 Constitution contained no meaningful acknowledgement of rights. Constitutional litigation by LBH and other CSOs is therefore a crucial means to legitimise and

give substance to Indonesia's democratic constitution. In light of only minimal rights awareness among the general public (and many judges), constitutional litigation can "give practical meaning" to the seemingly extensive rights protections offered by the amended constitution (Meili 2009, 55). It can be a strategy to demand the state live up to the promise of rights protections offered by the constitution.

Some authors have suggested larger coalitions and public pressure can influence the court's decisions (Mietzner 2010, 400; Nardi 2018b). LBH is acutely aware of this fact, hence its tendency to submit challenges as part of broad coalitions and mobilise civil society in conjunction with its legal efforts. Again, Isnur explains the rationale behind this strategy.

"We view the courts as a place not only for the debate of legal theory, but also for the debate between the will of the people versus the will of those in power. We have a problem with judicial accountability in Indonesia. Providing opportunities for the community to pressure the courts is part of our efforts to increase independence and accountability in the courtroom. Even the Law on Judicial Power states that judges must consider the 'community's sense of justice'.¹⁴³ We try to create this sense of justice by providing opportunities for the community to share their voice." (Interview, Muhamad Isnur, 2021).

When opportunities to engage with the executive and legislature in an equal and genuine manner on legal reform are limited – and LBH cause lawyers have largely given up on this as a strategy anyway (as Chapter 7 will show) – constitutional litigation is a vital forum for LBH to achieve progressive legal reforms and defend democracy from further regression.

Yet recent developments have seen some scepticism emerge. It is notable that the two case studies here are drawn from 2010 – a time when democratic stagnation was only beginning to be discussed (Tomsa 2010). The conviction of judges Akil Mochtar (in 2014) and Patrialis Akbar (and 2017) for corruption were a major stain on the institution. But the Constitutional Court's decision in 2018 to reject a civil society challenge to the DPR's power to launch special inquiries (known as *hak angket*) into the Corruption Eradication Commission (KPK) was felt as a particularly painful blow.¹⁴⁴ For LBH, the decision indicated the court was willing to collaborate with the legislature to actively weaken anti-corruption efforts (Interviews, Asfinawati, Muhamad Isnur, 2021). When it comes to

¹⁴³ The elucidation to Article 5(1) of Law No. 48 of 2009 on Judicial Power states that judges' decisions should be consistent with the law and the sense of justice in the community.

¹⁴⁴ The details of this complicated case do not need repeating at length here. Briefly, the DPR has attempted many times to weaken the KPK, undoubtedly because of the KPK's arrest and prosecution of dozens of lawmakers for corruption. The DPR's so-called *hak angket* power is described under Article 79(3) of Law No. 17 of 2014 on the People's Consultative Assembly (MPR), People's Representative Council (DPR), Regional Representative Council (DPD) and Regional People's Representative Council (DPRD) (often called the MD3 Law). In 2017, it used this power to launch an inquiry into the KPK that seemed designed to weaken it at a time when the KPK was investigating a massive corruption scandal in the DPR. The petitioners argued that because the KPK was an independent body, it should not be subject to the DPR's *hak angket* power. The Constitutional Court controversially ruled that the KPK was not an independent body but was part of the executive, and as such, the DPR had the right to launch inquiries into it. Simon Butt offers an excellent, clear summary of the case (Butt 2018).

matters of corruption, or the financial interests of those in power, LBH lawyers now have little faith in the Constitutional Court. As Asfin said, “for cases related to corruption, or issues like the Omnibus Law on Job Creation, there is no hope” (Interview, Asfinawati, 2021).¹⁴⁵ While constitutional litigation is still considered an important strategy, LBH cause lawyers are a more circumspect about its benefits.

5.5 Administrative Courts

The administrative courts were established under the New Order, through Law No. 5 of 1986, and began operating in 1991 (Bedner and Wiratraman 2019, 136), during a brief period when the New Order was making small nods toward openness (*keterbukaan*), as discussed in Chapter 3. These courts introduced a new venue for citizens to challenge government decisions, defined as “decisions in writing produced by a state agency or official, based on applicable law, containing concrete, individual and final determinations, and having legal consequences for specified individuals or legal entities” (Article 1(9)).¹⁴⁶ However, just as cynical observers predicted, the New Order was never going to allow the judiciary to have any real control over its actions, and indeed, the number of cases seen by these courts under the New Order was small (Bedner and Wiratraman 2019, 137). There were only a few notable examples of the court ruling against the government in sensitive cases, such as when the court ruled the government did not have the power to cancel the licence of *Tempo* news magazine (Crouch 2016a, 265). Yet even this decision was overruled on appeal to the Supreme Court, and the judge responsible for the original decision punished with a transfer (Pompe 2005, 165).

The administrative courts have therefore only really been available as a viable forum for challenging state action since the democratic transition. Like constitutional litigation, using the administrative courts is consistent with elite/vanguard models of cause lawyering. Under the Law on the Administrative Court, which was amended in 2004 and 2009, there are two grounds for challenging government decisions. These are that the decision breached ‘applicable law’ or ‘principles of good governance’ (Article 53(2)). The principles of good governance are elaborated in the elucidation to

¹⁴⁵ To the shock of many, on 25 November 2021, the Constitutional Court ruled that the so-called Omnibus Law was “conditionally unconstitutional” in response to a petition submitted by three individuals and three civil society organisations (not including LBH) (Decision No. 91/PUU-XVIII/2020). The petitioners argued that the drafting process of the law was flawed, as public participation was limited and several articles in the final law differed from the text agreed by the legislature and president in the drafting process. The court ruled the law conflicted with the principles of [good] legislative formulation and was therefore procedurally flawed (*cacat formil*) (Decision No. 91/PUU-XVIII/2020, 412). Although the Court seemed to rule in favour of the applicants, Asfin’s scepticism is justified. Rather than declare the law unconstitutional and revoke it, the Court provided the government with two years to repeat the legislative process for the law, allowing the law and its implementing regulations to remain in force while this occurs (Decision No. 91/PUU-XVIII/2020, 416-417). The court even referred to the law’s aim of increasing investment as a reason for its decision to declare it “conditionally unconstitutional” (Decision No. 91/PUU-XVIII/2020, 413). Since its establishment, the court has somewhat problematically avoided striking out provisions and creating a legal vacuum, instead declaring provisions to be “conditionally unconstitutional” or “conditionally constitutional” unless interpreted in a certain way (Butt 2015, 73).

¹⁴⁶ Law No. 30 of 2014 on Government Administration broadened this definition to include decisions of a general nature as well as factual acts by the government (Article 87) (Bedner and Wiratraman 2019, 140).

Article 53(2)(b) of the Law on the Administrative Court (as amended in 2004) as “legal certainty, orderly state administration, openness, proportionality, professionalism, and accountability”.

LBH has found the courts useful forums to further its causes. Notably, after 1998, “outright government refusals to execute injunctions and judgments became rare and government pressure on judges greatly declined” (Bedner and Wiratraman 2019, 138). In 2017, LBH Padang won a suit against the West Sumatra government, ordering the governor to cancel 26 problematic mining permits,¹⁴⁷ and in 2019, LBH Surabaya won a case against the East Java governor to protect workers’ rights to a fair wage.¹⁴⁸ Overall, however, the administrative courts have remained somewhat disappointing in democratic Indonesia (Butt and Lindsey 2018, 98–99), because of persistent corruption and limited consistency of legal interpretation (Bedner and Wiratraman 2019). The following case study looks at an example of LBH successfully using the courts to defend freedom of expression.

5.5.1 Case study: Papua internet shutdown

On 15 August 2019, ethnic Papuans held demonstrations in multiple cities across Indonesia to mark the anniversary of the New York Agreement between Indonesia and the Netherlands over the administration of West Papua, by which Indonesia ultimately annexed the territory.¹⁴⁹ In Malang, East Java, one of these demonstrations ended in violence, with clashes between ethnic Papuans and counter-protesters (CNN Indonesia 2019d). The following day (the day before Indonesian Independence Day, which falls on 17 August), nationalist protestors surrounded a Papuan student dormitory in Surabaya, East Java, claiming Papuan students had desecrated the Indonesian flag. Protesters yelled racist insults, which were captured on video and shared widely online.¹⁵⁰ Police forced their way inside and arrested 43 Papuan students (H. Davidson 2019).

Over the following days, anti-racism and pro-Papuan independence demonstrations erupted in multiple cities across Indonesia. The protests in Papua were particularly large, and were accompanied by significant destruction of property (H. Davidson and Doherty 2019; Reuters 2019). In response, the Indonesian government sent more than a thousand military personnel to Papua and implemented an internet slowdown, followed by a complete shutdown, apparently to stop the sharing of “provocative”

¹⁴⁷ Padang State Administrative Court (PTUN Padang) Decision No. 2/P/FP/2017/PTUN.PDG. The 26 permits were held by companies that had failed to obtain compulsory ‘clean and clear’ certificates. To get a certificate, companies need to demonstrate that they have no taxes owing, they have met their environmental commitments, and their concessions do not encroach on protected forest, or those of other companies, among other requirements (Mongabay 2017).

¹⁴⁸ PTUN Surabaya Decision No. 44/G/2019/PTUN.SBY.

¹⁴⁹ The 1962 New York Agreement provided for the transfer of administration of the territory from the Netherlands to Indonesia, following a seven-month period of UN administration. No Papuans participated in the negotiations for the agreement (Musgrave 2015, 217). Under the agreement, Indonesia was required to implement an act of self-determination before the end of 1969. This so-called ‘Act of Free Choice’ has been extremely contentious because only 1,022 Papuans selected by Indonesian officials were able to participate, and all voted in favour of incorporation into Indonesia (Musgrave 2015, 220).

¹⁵⁰ Koman, Veronica (@VeronicaKoman). “Hey monyet, ke luar!” “Hey monkeys, get out!” “Hey, monkeys! Monkeys!” 19 August 2019, 11:36 pm. Tweet.

messages that could prolong unrest (Lamb and Doherty 2019; Reuters 2019). The internet was slowed on 19 August in multiple regions across Papua, then shut down completely from 21 August-4 September in 29 districts and municipalities in Papua province and 13 districts and municipalities in West Papua province. The shutdown was then extended in four districts and municipalities in Papua and two in West Papua until 9 September.

The Administrative Court case emerged from civil society activism. A coalition of Indonesian CSOs, consisting of YLBHI, the Alliance of Independent Journalists (*Aliansi Jurnalis Independen*, AJI), the Southeast Asian Freedom of Expression Network (SAFEnet), KontraS, the Legal Aid Institute for the Press (LBH Pers), Elsam, and the Institute for Criminal Justice Reform (ICJR), criticised the shutdown immediately. On 23 August, the coalition issued a ‘summons’ (*somasi*), describing the shutdown as a violation of the right to information and right to communicate as guaranteed by Article 28F of the Constitution and calling on the Ministry of Communications and Technology and President Joko Widodo to immediately lift restrictions (Bernie 2019).

SAFEnet initiated a public campaign and Change.org petition calling on the government to #KeepItOn (or #NyalakanLagi). YLBHI staff also spoke regularly in the media, at one point describing the shutdown as racist, noting such shutdowns are never used in other areas of Indonesia when demonstrations or unrest occurs (Marvela 2019). In early September, YLBHI also hosted a public discussion at its office in Jakarta, exploring policy, legal and rights concerns related to the shutdown (YLBHI 2019). Papua is a highly sensitive issue in Indonesia – individuals and organisations demonstrating public support of human rights in Papua are often accused of supporting separatism. YLBHI and LBH Surabaya’s support for the Papuan university students saw both their offices targeted by nationalist protesters (Faizal 2019). For example, one afternoon during fieldwork, we were trapped inside the office as a group of clearly hired protestors¹⁵¹ – some were just teenagers who seemed to not understand what they were protesting about – blocked the road outside the LBH Jakarta/YLBHI office.

In any case, after the internet shutdown ended, on 21 November, the CSO coalition submitted a challenge to the shutdown in the Jakarta State Administrative Court (PTUN Jakarta).¹⁵² The challenge was submitted by AJI and SAFEnet, with the ‘Team for the Defence of Press Freedom’ (*Tim Pembela Kebebasan Pers*) providing legal representation. YLBHI’s Muhamad Isnur was head of the legal team.

The first hearing was held on 22 January 2020. In court, the government argued it had the authority to slow and restrict internet access under Article 40(2)(a)(b) of Law No. 11 of 2008 on Information and

¹⁵¹ Paying protestors to attend political demonstrations is common in Indonesia (Andrews 2017)

¹⁵² The administrative courts were chosen not only because the issue related to a government act but also because, according to LBH, these courts tend to be disciplined in terms of their administration, and decide cases quickly (Interview, Muhamad Isnur, 2021). Significantly, after the administrative court decided the case, the CSO coalition then challenged Article 40(2)(b) of the Information and Electronic Transactions Law at the Constitutional Court (Case No. 81/PUU-XVIII/2020). At the time of writing, this case remained undecided.

Electronic Transactions (as amended by Law No. 19 of 2016),¹⁵³ as well as Presidential Regulation in Lieu of Law (Perppu) No. 23 of 1959 on States of Disaster. Following multiple hearings over several months, the judges decided against the government. Their decision was significant in that it made lengthy and considered reflections on human rights standards. It acknowledged that the right to information was guaranteed by the Constitution under Article 28F, as well as by Law No. 39 of 1999 on Human Rights (Article 14(1)(2)) and the ICCPR (Article 19(2)), which was ratified into domestic law in 2005. It also noted the internet aided the fulfilment of freedom of expression, which is connected to many other rights guaranteed by the Constitution.¹⁵⁴ Judges stated that Article 29(2) of the Universal Declaration of Human Rights, Article 28J of the Constitution, Article 73 of the Human Rights Law and Article 19(3) of the ICCPR allowed the restriction of rights under certain circumstances. The decision acknowledged that the government had the authority to restrict internet access under Article 40(2b) of Law No. 19 of 2016, but only for content that violated the law, not the entire network.¹⁵⁵ It also noted that although Perppu No. 23 of 1959 allows the restriction of rights, this is only the case when a state of emergency has been declared, which had not been done. The judges ruled the restriction of internet access in Papua and West Papua constituted an illegal act by a government agency and or official.¹⁵⁶ Judges stated that had President Joko “Jokowi” Widodo declared a state of emergency under Perppu No. 23 of 1959, the shutdown would not have been in violation of the law, and as such, this omission was also a failure of governance.¹⁵⁷ It was largely a symbolic victory – the ministry and president were ordered to pay the cost of the case, which was just Rp 457,000 (US\$31).

Although the case did not have any concrete outcomes in Papua – the decision was handed down on 3 June 2020, close to a year after the shutdown occurred – it had much deeper significance. First, it generated significant publicity. When the general population has so little knowledge of what occurs in Papua, the case was used by YLBHI and the civil society coalition to highlight how Papuans are treated unfairly by the central government. As Isnur said:

“...the public, and Papuans in particular, got some form of rehabilitation, a small victory. It is part of their claim to truth, that the way the government treated the community was wrong” (Interview, Muhamad Isnur, 2021).

Second, it was used to make a vigorous defence of internet freedom at a time when freedom of expression is under serious threat in the country (Freedom House 2019; K. Setiawan 2020). The judges made strong statements in support of internet access as a human right, highlighting its importance for the enjoyment of rights such as the right to education and learning, the right to obtain

¹⁵³ Article 40(2)(a): “The government is obliged to prevent the dissemination and use of electronic documents and information that contain content prohibited by law”.

Article 40(2)(b): “In conducting prevention as described in point 2(a), the government is authorised to cut access or order operators to cut access to electronic documents and information that contain content prohibited by law”.

¹⁵⁴ Decision No. 230/G/TF/2019/PTUN-JKT, 245-246.

¹⁵⁵ Decision No. 230/G/TF/2019/PTUN-JKT, 255.

¹⁵⁶ Decision No. 230/G/TF/2019/PTUN-JKT, 276-277.

¹⁵⁷ Decision No. 230/G/TF/2019/PTUN-JKT, 275-276.

benefits from science and technology, arts and culture, the right to work, political rights, freedom of association and assembly, and the right to health services. It was also a major public embarrassment for the government, especially President Jokowi. Seemingly, the challenge has been effective. The government did not appeal the decision, and – quite remarkably – has since made no attempts to slow or block the internet.¹⁵⁸

As the Gafatar and Blasphemy Law examples also demonstrated, the courts were used as a safe forum to make broader points about the rule of law, democracy and human rights. This was particularly significant in this case given the controversial nature of Papua issues. Following the verdict, YLBHI continued to frame the civil society complaint in these terms of rights and the rule of law, saying the Constitution states Indonesia is a rule of law state, and, as such, any government act in violation of the law is essentially defying the Constitution: “If the president insists [on taking action] without legal basis or breaks the law, he is declaring that he opposes the Constitution,” Isnur said (Yahya 2020). YLBHI was performing its role as a check on state power. As Isnur told *The Jakarta Post*: “We don’t want to attack the government nor disrupt the nation. We want good governance. The government should listen to us and obey the court’s ruling” (Nurbaiti 2020).

The Papua internet shutdown case was a clear example of YLBHI deploying an elite/vanguard form of cause lawyering. The primary goal of litigation was to vindicate constitutional principles and embarrass the government by exposing its unlawful actions “to public and legal scrutiny” (Meili 2005, 397). Although there were some efforts to educate the public about rights abuses in Papua, the real audience for the challenge was the state and political elite (Hilbink 2004, 677). Litigation had little, if any, substantive outcomes for people in Papua, although it may affect how the government approaches similar issues in the future. This is a form of cause lawyering that was made available through the strengthened rights framework and judicial independence introduced with democratic transition. If cause lawyers were lucky enough to get a favourable outcome during the New Order period, there was every chance the government would simply ignore or circumvent the court’s decision. While this risk has diminished, it remains present today.

Another form of legal activism associated with elite/vanguard models of cause lawyering – and one introduced by LBH in the post-authoritarian era – is citizen lawsuits. This is the final legal strategy examined in this chapter.

5.6 Citizen lawsuits

Citizen lawsuits are a new legal strategy in Indonesia. Modelled largely on the form of citizen lawsuits practiced in the United States, citizen lawsuits allow citizens to sue in the public interest if the government violates the law or fails to meet its obligations in implementing the law (Sundari

¹⁵⁸ Notably, in the Constitutional Court’s review of the Information and Electronic Transactions Law, the government’s expert witness, Professor Henry Subiakto, testified he thought the PTUN made the correct decision, and the government did not have the authority to block the internet under Article 40(2)(b). See Summary of Court Proceedings [*Risalah Sidang*] Case No. 81/PUU-XVIII/2020, 3 August 2021, 34.

2018, 329–30; Mahkamah Agung Republik Indonesia 2009, 49). The Indonesian legal system does not regulate procedures for citizen lawsuits explicitly, although the Supreme Court has been quite supportive of them.¹⁵⁹ Citizens do not need to prove they have suffered direct losses as a result of government action or inaction (Mahkamah Agung Republik Indonesia 2009, 49). Because citizen lawsuits are filed in the public interest and applicants do not need to show they have suffered direct losses, they do not seek monetary compensation. Instead, they typically call on the government to change its policy (Mahkamah Agung Republik Indonesia 2009, 63).

LBH pioneered the strategy in Indonesia in the years following the fall of Soeharto, beginning with the case of thousands of undocumented Indonesian migrant workers who were deported from Malaysia to the East Kalimantan district of Nunukan in 2002. The Indonesian government made few serious efforts to respond to this crisis. Many deported migrants fell seriously ill and dozens died (Ford 2006, 238–39). In response to the case, LBH and a group of other CSOs filed a citizen lawsuit on behalf of 53 citizens against nine government officials, including then-President Megawati Soekarnoputri, claiming they had failed to protect and fulfil the rights of the returned migrants (Ford 2006, 240). The Central Jakarta District Court agreed the government had failed to adequately provide protection for the returned migrants, a decision that was overturned at the Jakarta High Court (Hukum Online 2006).¹⁶⁰ Even though the lawsuit ultimately failed, the case, and the publicity it generated, as well as ongoing legislative advocacy by the broader civil society coalition, resulted in the introduction of a bill on the protection of migrant workers, passed soon afterwards as Law No. 39 of 2004 on the Placement and Protection of Indonesian Workers.

The Nunukan case established citizen lawsuits as a new model of public interest litigation in Indonesia. Several other prominent citizen lawsuits have since been filed in Indonesian civil courts, including on issues such as the environment, education, fuel prices and elections (Sundari 2018, 328–29). One of the more significant environmental cases over recent years has been the citizen lawsuit filed against the government over worsening air pollution in Jakarta.

5.6.1 Case study: air pollution citizen lawsuit

Jakarta is recognised as having some of the worst air quality in the world (Greenstone and Fan 2019, 3). Civil society organisations had conducted public advocacy on worsening air quality for a couple of years, but the government was unresponsive. On 5 December 2018, 19 citizens, in collaboration with representatives from LBH and other CSOs, announced that they would file a citizen lawsuit against the government if it did not act against air pollution in the next 60 days (Swaragita and Aqil 2018). Then in early 2019, Jakarta's air pollution levels reached worrying new heights. Media attention to the

¹⁵⁹ The Indonesian legal system does, however, deal with the slightly different mechanism of class action lawsuits, which are detailed in Supreme Court Regulation No. 1 of 2002 on Procedures for Class Actions. They are also mentioned in Law No. 23 of 1997 on Environmental Management (as amended by Law No. 32 of 2009 on Protection and Management of the Environment), Law No. 8 of 1999 on Consumer Protection and Law No. 41 of 1999 on Forestry.

¹⁶⁰ Central Jakarta District Court Decision No. 28/Pdt.G/2003/PN.Jkt.Pst and Jakarta High Court Decision No. 480/PDT/2005/PT DKI.

issue escalated as mobile phone apps like IQAirVisual placed Jakarta as ranking within the worst cities in the world for the quality of its air, and social media users began posting photos of thick smog (Lamb 2019). In April 2019, LBH Jakarta and YLBHI announced they would be going ahead with the citizen lawsuit and opened a post for one month for citizens to register to be included in the case (Prireza 2019).

The case was filed with the Central Jakarta District Court on 4 July, against the president, the minister of forestry and environment, the minister of health, the minister of home affairs, and the governors of Jakarta, West Java and Banten provinces, arguing they had engaged in unlawful conduct, and had failed to fulfil the rights of citizens to a clean and health environment (Interview, Muhamad Isnur, 2021). Thirty-two citizens eventually joined the citizen lawsuit. Legal action was combined with a lively public campaign, involving public demonstrations and discussions. On one day when I was in the office, YLBHI held a public discussion and rooftop concert, with popular indie musicians performing, live streamed on social media.

The citizen lawsuit dragged on for two years. A mediation process was held in late 2019, but the parties ultimately failed to reach any agreement and the case continued through to 2021. Despite the sluggish legal process, the case prompted significant policy change. Almost immediately after the case was filed, on 8 July, the Jakarta government issued a revised decision on its strategic priorities to include air pollution.¹⁶¹ On 1 August, Jakarta Governor Anies Baswedan also issued Governor's Instruction No. 66 of 2019 on Controlling Air Quality. And on 24 August 2020, the governor signed Jakarta Governor Regulation No. 66 of 2020 on Emissions Testing of Motorised Vehicles. In 2021, the government also published Government Regulation No. 22 of 2021 on Environmental Protection and Management.¹⁶²

Admittedly, LBH and the other members of the CSO coalition cannot take sole credit for the changes in policy. This was nonetheless a clear example of LBH's adversarial style of cause lawyering holding the government to account, and strengthening citizens' awareness of air pollution issues, creating political impetus for change. As YLBHI's Muhamad Isnur explains:

“Of course, there is no guarantee we will win the case. But the courtroom is made into a space for applying pressure [on the government], for campaigning, for education. So, if, during the court case, the Jakarta government ends up publishing new regulations on air pollution, that is a good result. Were we successful in achieving our goals? We were! The government published new policies in direct response to our lawsuit. What happens later, if the case is rejected? It could occur. But our goal was achieved, there was a change. Policy responded quickly.” (Interview, Muhamad Isnur, 2019).

¹⁶¹ Jakarta Governor Decision No. 1107 of 2019 on Revision of Jakarta Governor Decision No. 1042 of 2018 on Regional Strategic Activities.

¹⁶² This was issued in part as an implementing regulation for the Omnibus Law on Job Creation. But it also replaced Government Regulation No. 41 of 1999 on Control of Air Pollution, and included increased detail on management of air pollution.

The panel of judges postponed the sentencing hearing seven times, and it was not until LBH Jakarta reported them to the Judicial Commission for breaching ethics guidelines by delaying for so long that they finally announced their decision.¹⁶³ On 16 September 2021, the court ruled in favour of the citizen complainants, finding the five government figures had committed unlawful acts (*perbuatan melawan hukum*) in violation of Law No. 32 of 2009 on Environmental Protection and Management.¹⁶⁴ At the time of writing, President Jokowi, the Ministry of Forestry and Environment, Ministry of Health, and the Ministry of Home Affairs indicated they planned to appeal the decision (Prireza 2021).¹⁶⁵ Whatever the ultimate outcome of this appeals process, as Isnur's comments indicate, LBH cause lawyers are less concerned with the outcome of the case, or even necessarily establishing a legal precedent. Their primary focus is pressuring the government to publish improved policy. Even if LBH lawyers are sceptical of their chances of legal victory, they still see much to be gained from engaging in citizen lawsuits. In this case, the threat of litigation was enough to push "uncooperative foes" into making political concessions (Cummings 2006, 327).

Despite their name, citizen lawsuits are largely focused upwards, toward elites, with litigation (or the threat of litigation) used to force the state to concede ground. Recall too, that they do not seek financial compensation. Although LBH engaged in a vigorous public advocacy campaign designed in part to educate the public about their rights, it appeared less concerned with client empowerment than it was with speaking back to the state and attempting to establish legal or policy change (Meili 2005, 399). It is significant that rather than working through legislative or administrative channels, publishing policy papers, lobbying legislators or government officials, or drafting legislation in collaboration with the government, LBH feels one of the most viable means to deliver policy change is through the adversarial method of litigation. This is a sign of the more closed political environment over recent years, explored in detail in Chapter 7. Indeed, these kinds of legal tactics have much in common with the form of cause lawyering practiced in authoritarian contexts, an approach LBH adopted during the New Order years.

5.7 Conclusions

As this chapter has shown, the democratic transition in Indonesia after 1998 involved several factors supportive of litigation-focused models of cause lawyering. Reforms to the constitution, the establishment of the Constitutional Court and increasing judicial independence made possible elite/vanguard forms of cause lawyering focused on securing progressive reforms in the courts. LBH cause lawyers have taken advantage of these new opportunities and used strategic impact litigation in the Constitutional Court, and in the administrative courts, to give substance to Indonesia's new democratic constitution, and in efforts to push reforms further. These efforts have met with some

¹⁶³ Although there have been no suggestions of bribery in this case, delaying decision making is a common tactic used by corrupt judges in Indonesia, and is thought to be a "sign" for parties to come forward and make contact with the judges (Butt and Lindsey 2018, 301).

¹⁶⁴ Unfortunately, the decision had not been made publicly available at the time of writing and media reports did not provide any additional detail.

¹⁶⁵ Jakarta Governor Anies Baswedan said he would not appeal (Ridwan 2021).

success. Leaning on litigation like this to change policy (or the threat of litigation, as in the Jakarta air pollution case) is an inherently adversarial approach. This may be a more natural fit for an organisation like LBH, with a long history of opposition to the state, compared to other more collaborative strategies of policy change like legislative lobbying, discussed further in Chapter 7.

While this chapter has focused primarily on the new elite/vanguard strategies of cause lawyering that have been made available by democratic transition, there are also several aspects of LBH's approach to litigation that appear little changed since the New Order years. In the Gafatar case, for example, LBH cause lawyers were aware that acquittal was virtually impossible, but used the courts as a safe public forum to bring illegitimate government actions to public attention, to highlight injustice, popularise human rights and democratic discourse, and, in particular, to further the cause of religious freedom.

It is important to stress that despite the cases described above, LBH cause lawyers remain mostly sceptical of litigation, especially when used in isolation. Their relationship with the courts is best described as ambivalent – they recognise litigation can be effective but have an intimate understanding of its limitations in the deeply dysfunctional Indonesian legal system where even a thin version of the rule of law is a work in progress. Of course, individual case defence will never be abandoned, no matter how high the odds are stacked against LBH lawyers. In politically sensitive cases like Gafatar, LBH cause lawyers work within the confines of this dysfunctional system to get the best outcome for their clients, while using the courts as a platform to advance their causes.

However, LBH lawyers' understandings of the many pathologies of the Indonesian legal system mean the elite/vanguard strategies described in this chapter have never really taken hold. LBH cause lawyers are aware that strategic litigation in the Constitutional Court, for example, is unlikely to be successful if it threatens the economic interests of those in power. As noted in the Introduction to Part Two, LBH cause lawyers recognise that despite the introduction of new democratic structures and stronger protections of human rights, the rule of law continues to bend to the power of political and economic elites. Likewise, the discussion of religious freedom showed that a focus on formal rights can be misleading when substantive change guaranteeing religious freedom remains lacking.

Consequently, LBH cause lawyers rarely use litigation strategies in isolation. In an environment where LBH is somewhat wary of the courts, it places considerable emphasis on community organising and community legal empowerment work. These strategies have grown in prominence with the democratic regression of recent years, and are the central concern of the following chapter.

Chapter 6: Social movement strategies

6.1 Introduction

This thesis argues there is a clear relationship between the form of cause lawyering practiced and democratic change. Part One of the thesis introduced cause lawyering and the highly oppositional, grassroots form of cause lawyering LBH practiced under an authoritarian regime. Part Two began by exploring how organisational issues – some of which were precipitated by democratic transition – contributed to LBH struggling in the post-authoritarian period. Chapter 5 then examined LBH's litigation strategies, finding that the democratic transition provided new opportunities for LBH to engage in elite/vanguard models of cause lawyering. But that chapter also described how the deficiencies of the legal system and recent democratic regression have meant that LBH has never fully embraced these elite/vanguard strategies. This chapter builds on Chapter 5 to focus on LBH's social movement strategies, which it often deploys in concert with litigation.

Community legal empowerment and community organising strategies have been part of the 'structural legal aid' approach since it was first articulated under the New Order, as Chapter 3 discussed. The fall of the New Order did not see these strategies left behind completely – they are too embedded in LBH's 'organisational DNA'. However, there is no doubt that the democratic transition, and the decline in some regional LBH offices created by funding challenges post-Soeharto, saw community organising and community legal empowerment approaches fade, or at least implemented inconsistently across the LBH network. Over the past five years or so, however, as Indonesian democracy has faltered, YLBHI has encouraged a renewed focus on community legal empowerment and community organising at the grassroots. Because these strategies have risen in prominence, they are worth examining in some detail, and that is the focus of this chapter.

This chapter also includes a detailed case study of the conflict between farming communities in the North Kendeng Mountains region of Central Java and cement companies seeking to establish mines and factories in the area. The Kendeng conflicts have involved lengthy and complicated legal tussles, as well as intensive investments in community legal empowerment and community organising by LBH. The case encapsulates how LBH deploys these social movement strategies in concert with litigation strategies, in the context of declining democratic health.

6.2 Community organising and community legal empowerment

In line with its grassroots approach to cause lawyering, LBH views the role of cause lawyers as extending beyond securing legal victory on behalf of marginalised communities to "non-traditional" strategies more commonly associated with social movements (Hilbink 2004, 686–87; 2006, 72). Grassroots community legal empowerment and organising may not come naturally to lawyers, who are likely to feel more at home in the courtroom (Sarat and Scheingold 2006b, 2), or at least in a legal office. However, as discussed in Chapter 4, LBH makes a determined effort to foster community legal empowerment and organising skills among its lawyers, through the live-in component of its Kalabahu

training program, and the lengthy ‘volunteer’ process required before lawyers are formally accepted as LBH staff.

Broadly speaking, LBH’s community legal empowerment and community organising activities aim to support oppressed groups to develop the knowledge, skills and institutional strength to independently advocate for the needs of their own communities. Community members are supported to understand the power structures that have a role in the problems that they face and develop skills to address them. YLBHI director Asfin strongly emphasises the community empowerment aspects of LBH’s approach to legal assistance.

“The notion that CSOs are intermediaries between the government and the people needs to be eliminated. LBH is an accelerator of power in the community, so that communities can be more agile. If there is no power in the community, we help to develop it. But the community must be agents themselves. They are the most important. This is actually an old perspective in YLBHI and LBH, but because of the [post-Soeharto] situation, people forgot about it. They lacked the skills, or were focused on finding funds. As you know, YLBHI has had periods of decline, when many people left.” (Interview, Asfinawati, 2019).

Asfin and the leadership team around her have been instrumental in promoting a stronger focus on community legal empowerment and community organising as an essential component of the structural legal aid approach. The recent erosion in Indonesia’s democratic quality has left the YLBHI leadership increasingly unconvinced about the merits of elite-focused strategies in achieving real change for the communities they represent (as Chapter 5 showed, and Chapter 7 will elaborate further). They believe that demands for democracy and the rule of law must come from below and it is LBH’s role to facilitate and empower communities to make these demands.

6.2.1 Community legal empowerment and critical legal education

As part of the community legal empowerment approach to case handling, LBH cause lawyers spend time with communities, facilitating small scale community meetings, discussions and workshops, during which they provide ‘critical legal education’ (*pendidikan hukum kritis*). At the most basic level, critical legal education aims to provide simply a forum for discussion, a space where community members can describe the problems they are facing, strengthen community awareness of rights, and provide the basis for community organising and consolidation (LBH Semarang 2016). Typically, LBH lawyers provide basic information on the legal system, the legislative process, human rights, and democracy, as well as techniques for conducting basic social analysis, involving analysis of power structures in society. Sometimes discussions will focus on a particular legal product and its potential impacts for the community, and the risks or benefits of certain courses of legal action. In some cases, community members are even provided with citizen journalism training, to encourage documentation of the problems they face (Interviews, Eti Oktaviani, 2019, 2020).

A goal of legal empowerment work is to help make the community aware of their rights, and therefore legitimise the feelings of injustice that they may have endured for years. Community members are encouraged to see the divergence between formal legal rights and their lived experience (Chen and Cummings 2013, 252). As discussed in Chapter 2, rights contain notions of entitlement, and can help to activate political consciousness among oppressed citizens who may have otherwise seemed resigned to their fates (Scheingold 2004, 131–32). Sarat and Scheingold explain the impact of rights consciousness.

“The base is activated not so much by grievances, as such, which in all likelihood have been long experienced – or even by giving voice to those grievances. Instead, activation is a product of identifying grievances with the sense of legitimacy, entitlement, and the collective identity attaching to legality” (Sarat and Scheingold 2006b, 11).

In other words, LBH recognises that injustice may be longstanding in the community, but hopes that the community will be moved to take action when this injustice is connected to the sense of entitlement built through rights consciousness (Sarat and Scheingold 2006b, 10).

“We don’t position ourselves as advocates who just inform clients about the technical aspects of the case. We position ourselves as a ‘stove’ – we agitate or provide enthusiasm for the clients, so that they can handle the case themselves. And so that they can see that the problems that they face are also faced by others, and this is the root of it” (Interview, Asfinawati, 2019).

As Asfin explains, the intention is to provide communities with the knowledge to understand the causes of the problems they face and equip them with the skills to be better able to handle their disputes into the future. At the same time as educating communities about their legal rights, however, LBH also encourages communities to look critically at the law. Community members are encouraged to “understand that the source of their problems may actually be the political or legal system rather than a product of their own misfortune” (Chen and Cummings 2013, 252). Consider this LBH description of critical legal education:

“[P]ositive law is a political product. That is, law that was created as a compromise among power holders, and as such, often ends up serving the interests of these power holders. [This type of law] is far from community values of justice. It is here that law has to be viewed critically” (Wijardo and Perdana 2001, 103).

These kinds of statements reflect the CLS arguments that often implicitly underpin the structural legal aid approach.

There are, of course, serious questions over just how much knowledge can be conveyed in sporadic public discussions and workshops (Ellmann 1998, 373). In many communities, LBH lawyers go beyond basic legal awareness discussions to train local community members as paralegals. This is a

strategy that LBH has deployed since the 1980s, although it only began using the term ‘paralegal’ in the 1990s (Berenschot and Rinaldi 2011, 3; ILRC 2018, 3). This more intensive process involves strengthening community member understandings of issues such as social justice, constitutional rights, democracy, the legal system, power relations and social analysis. Advanced paralegal training may involve aspects such as investigating facts, documentation, drafting legal documents, and public advocacy and campaigning. Depending on the LBH office, paralegal training may last a few months, and be implemented in several phases. In LBH Bandung, for example, the process takes about three months. The goal is that these paralegals then work in their communities to further strengthen rights awareness among their fellow community members, as well as strengthen connections between the community and LBH, assisting LBH lawyers in case management (ILRC 2018, 3). Because the paralegals are drawn from the communities affected by injustice, they are considered to better understand the needs of their communities, and better able to bridge the gap between communities and cause lawyers (Ellmann 1998, 374).

Crucially, LBH does not view the role of community-based paralegals as simply increasing access to the formal legal system for the community. This would be consistent with a proceduralist approach to cause lawyering that considers the legal system capable of delivering justice – LBH lawyers are too cynical about the Indonesian justice sector to promote such a simplistic approach. Rather, LBH-supported paralegals also perform roles common to cause lawyers who work closely with social movements, promoting feelings of empowerment, encouraging community organising and galvanising activism (Cummings 2020, 127–28). Tellingly, LBH has been resistant to government efforts to formalise paralegals through the establishment of a formal accreditation system or stringent competency standards, recognising that they play other important roles not strictly legal in nature (Interviews, Febi Yonesta, Ajeng Wahyuni, 2019).

6.2.2 Community organising

Another benefit of rights awareness is that it can promote community organisation. In addition to public education and consciousness-raising activities, LBH lawyers conduct a range of activities designed to build or strengthen community-based organisations. Under Soeharto, communities were organised to resist the state, recognising that collaboration was essential if they were to offer any real challenge to the repressive New Order. As Asfin’s comment above suggested, community organising dipped in prominence following the democratic transition. This may have been partly because LBH cause lawyers considered organising in opposition to the state was no longer important under a more open political environment. But it was also because of issues not directly connected to the democratic transition, such as funding constraints and decreased oversight from YLBHI as the central body. As stated, however, the past five years have seen a stronger focus on community organising as a vital part of the structural aid approach, driven in part by the current YLBHI leadership team. Rakhma, director of knowledge management at YLBHI and previous director of LBH Semarang (an LBH office known for its community organising work), has been a strong voice pushing for community organising:

“What determines whether you are successful or not at LBH is your ideology, your defence of human rights, and of poor and marginalised Indonesians. Community organising is at the core of this. If you are not doing community organising, then you are not LBH! What is the difference with private lawyers, who just receive cases from clients? They don’t do community organising, community education, [or work toward] policy change. This is structural legal aid.” (Interview, Siti Rakhma Mary Herwati, 2019).

LBH Jakarta director Arif Maulana also stressed the community organising aspects of structural legal aid:

“[P]ublic interest lawyers from LBH or YLBHI must be involved in social movements, and even play a role in encouraging the activation of social movements. Structural legal aid can never be solely about case management. Case management must be accompanied by legal education, going into the field with the community, strengthening community organisations and movements, student organisations, labour organisations, urban poor groups, or farmers in the regions. They need to be strengthened because it is not possible for LBH Jakarta to act alone without the support of the public, as the holders of sovereignty.” (Interview, Arif Maulana, 2019).

Rakhma said that when she began at LBH Semarang in 2000, most of her time was spent on community organising, rather than litigation. She explains how community organising work operates in practice:

“My work involved going from village to village, meeting with communities. There were many agrarian [conflict] cases at that time. We conducted critical legal education, explored how the community understood the law and the cases they were facing, things like what do we actually mean by ‘law’, [and how to conduct] social analysis. This was done so that communities could critically analyse their cases and recognise the role of certain policy or laws, or actors, in the cases they were facing. We read laws together critically, exploring whether particular laws could be used for advocacy or not... The goal was that communities would eventually form an organisation. Because if they fight for their rights without a strong organisational basis, it will be difficult. LBH is clear that, through structural legal aid, it aims to empower local communities, so that they develop critical awareness, so that they can change uneven power relations, with companies or the state, themselves. (Interview, Siti Rakhma Mary Herwati, 2019).

As both Arif and Rakhma explain, LBH recognises that when community organisations are consolidated and strong, they are more likely to achieve their goals. This is a basic principle of law and organising, and it is a belief that is widely held across the YLBHI network (Interview, Eti Oktaviani, 2019; LBH Makassar 2018). As Luban says:

“[A group] ...needs to make its presence felt directly before a legal strategy will be of any use. It needs to garner community support, to gain publicity, to gather momentum, to let indifferent officials know that they have a problem on their hands... The group must first become powerful, for powerful and well-known groups win lawsuits that enthusiastic little sects and month-old coalitions lose” (Luban 1988, 387–88).

In addition to supporting or encouraging local communities to form organisations, LBH lawyers sometimes use their technical skills and networks to assist community organisations to formally register as organisations, or develop strategic plans (Interview, Asfinawati, 2019). LBH lawyers may also play an important role in resolving disputes among organisations or conflicting elements of social movements, such as the often-fractious labour movement, a role to which cause lawyers are suited because of their mediation skills (Interviews, Asfinawati, Febi Yonesta, 2019). LBH lawyers also play a key role in supporting community organisations to conduct advocacy, for example by facilitating meetings with government officials, or providing strategic advice and supporting community organisations to conduct street demonstrations and protests.

In some cases, LBH lawyers may join street protests and other types of direct action alongside the communities they represent, such as in the *Reformasi Dikorupsi* protests described in Chapter 1. This is a distinctly political interpretation of cause lawyering, in line with a grassroots approach. While elite/vanguard cause lawyers look down on direct action tactics and view legal action as a superior means of bringing about social change, grassroots lawyers view themselves as political actors (Hilbink 2004, 673). They see themselves as deeply embedded in social movements (see discussion below), but they also serve a critical function external to social movements. For example, when members of social movements or community organisations are arrested for participating in direct action campaigns, LBH lawyers will be there, ready to defend them (see also Sarat and Scheingold 2006b, 9). Again, this was a key function of LBH during the *Reformasi Dikorupsi* demonstrations.

As mentioned, some donor organisations and other CSOs have derided LBH for relying too much on direct action tactics. The typical image of LBH is leading a protest on the streets, or outside a courtroom, with an LBH lawyer delivering a fiery oration using a megaphone. It may be a somewhat blunt advocacy tool, but it is one LBH has used to press for accountability from the courts, to remind judges that they are being watched. (Interviews, Eti Oktaviani, Zainal Arifin, 2019; Muhamad Isnur 2021). One indication of its effectiveness is that it is an approach that has been replicated by LBH’s opponents, such as hard-line Islamists, who often use similar tactics in blasphemy trials involving religious minorities.¹⁶⁶

These kinds of direct action and community organising strategies were used by LBH Makassar in one of its landmark cases – its support for the residents of Kassi-Kassi as they struggled to defend their land in a case that extended from 2006 to 2011 (Mukrim et al. 2015). Initially, two local CSOs

¹⁶⁶ For example, in 2019, I attended the trial of Suzethe Margaret, the woman charged with blasphemy for bringing her dog into a mosque (see also page 127). The local mosque board mobilised dozens of members of the local community to pack the courtroom.

supported residents to establish a community organisation, Kassi-Kassi Residents Alliance (*Persatuan Warga Kassi-Kassi*, Perkasi). LBH Makassar and other CSOs supported Perkasi to broaden its networks with other CSOs and university student groups, conducted paralegal training and community discussions, and designed litigation and nonlitigation strategies in collaboration with the community (Mukrim et al. 2015, 34–44). In an example of the direct action tactics described above, approaching the announcement of the verdict, residents, along with about 60 CSOs and their networks, occupied the Makassar District Court office, giving speeches and holding theatrical performances (Mukrim et al. 2015, 47–48). The court decided in the community’s favour, a decision upheld on appeal to the Makassar High Court and on cassation appeal to the Supreme Court. I discuss another example of community legal empowerment and community organising in relation to the Kendeng case, below.

6.3 Social movement work and the lawyer-client relationship

Community legal empowerment and community organising is designed to empower communities to advocate for their own rights. This constitutes a shift in the conventional relationship between lawyers and clients. LBH lawyers often posit themselves in opposition to ‘professional’ lawyers in conducting this type of work. This may be expressed in its most basic level, for example, by emphasising the importance of wearing simple clothing (Interviews, Zainal Arifin, Abdul Muit Pelu, Poengky Indarti, 2019). In general, however, LBH makes efforts to create a more equal relationship between lawyers and community members. This aspect of LBH’s work has not been altered dramatically by democratic change – recall that as far back as the Simprug case, LBH lawyers “got their boots dirty” beside their clients (Saptono 2012, 1). Nevertheless, as community legal empowerment and community organising has risen in prominence over recent years, it is important to consider how LBH lawyers view their relationship with justice seekers now. Consider the following comments from current and former LBH lawyers.

“New LBH lawyers are educated that LBH is not superior to justice seekers. It is not a patron-client relationship. We are partners and we struggle together. It is not simply LBH ‘injecting’ them with legal knowledge or social movement strategies. We study from justice seekers as well. They provide inspiration and knowledge to us, the spirit to fight, a collective spirit.... We provide legal assistance, of course, but LBH is about more than just assistance. We move together.” (Interview, Muhammad Rasyid Ridha, 2019)

“For professional lawyers, when the client gives them authority to represent him or her, then that’s the end of it, the lawyer takes over the case. But with LBH, the client is asked to join. This is so that they can directly monitor the work of their lawyer, and second, so that they develop capacity, and potentially become a paralegal for others facing similar problems.” (Interview, Yunita, 2019).

“If a community only needs assistance with litigation, and they only want to sit and be passive, they can go and look for a law firm. Because if you want to be with LBH, we will

discuss the case together, evaluate what we can do together, and act together.” (Interview, Eti Oktaviani, 2019).

Some might see this closeness to the community as violating standards of professional distance. In fact, senior YLBHI lawyer Febi Yonesta (Mayong) mentioned that foreign colleagues at a regional conference once criticised LBH’s approach, saying that LBH was too political, that LBH lawyers were too close to the community. Yet LBH is firm in its approach. LBH sees itself as part of social movements, and involvement in social movements as an inherent characteristic of being an LBH lawyer (Interviews, Haswandy Andy Mas, Robertus Robet, Febi Yonesta, 2019).

Although LBH lawyers assert that the community is in control, there is some question about the extent to which community members ever truly drive advocacy for their communities when lawyers are involved. Even if LBH lawyers profess to playing an equal or even subordinate role in relation to the community, lawyers’ professional status and more expansive knowledge of rights and the legal system can result in lawyers playing an outsized role in determining strategies, with clear impacts on client autonomy (Cummings and Eagly 2001, 496). This is evident in the following statement from LBH Surabaya director Abdul Wachid Habibullah (Wachid):

“LBH lawyers must be able to do it all, they must ‘pioneer’ social movements, play a role in political movements in the community, everything. That is the difference between LBH lawyers and professional lawyers. Professional lawyers are pure litigators. But LBH lawyers must develop social movements. They must be prepared to get out on the streets or in communities, lead demonstrations, empower communities, negotiate with officials, or lobby powerholders. LBH lawyers therefore must have lots of skills, not just litigation. Actually, I would have to admit that our litigation skills are not that strong, because we are so rarely in the courtroom.” (Interview, Abdul Wachid Habibullah, 2019).

Although Wachid emphasises the importance of LBH lawyers being on the streets and working among communities, he appears to place LBH lawyers in somewhat superior position in relation to community members. As discussed in Chapter 2, the other complicating factor is that the cause of the community may not always align directly with the causes of lawyers. One example often mentioned by LBH lawyers relates to religious minorities who face conflict over construction or use of their houses of worship:

“Often we find that our goals are different to theirs. Their goal is to practice their faith. We also hope for that, but we want more. And this is sometimes where there is conflict. For example, they might be happy to pay bribes if it allows them to continue to practice their faith [for example, to ensure the construction of a disputed church can go ahead]. But we don’t want to do that. We want the case to be known by the public so that they learn about the principle of freedom of religion. We have to be careful. There must be informed consent. We can’t just do it because we have idealism, or make them into an object for LBH’s goals... Consciousness raising (*penyadaran*) has to happen.” (Interview, Asfinawati, 2019).

Asfin's comments reflect the tension between elite/vanguard models of cause lawyering and grassroots approaches. While Asfin is clearly concerned with advancing the cause of religious freedom, and shares elite/vanguard lawyers' desire to vindicate substantive principles in elite legal structures (Hilbink 2004, 683), she also retains a grassroots lawyer's commitment to client empowerment. Again, it is clear that while these typologies are useful for tracking LBH's strategies over time, they are not absolute – lawyers can adopt multiple approaches at the same time.

6.4 Community organising and gender and minority rights

As discussed in Chapter 4, LBH is a notoriously masculine organisation. Although democratic change has not had a significant impact on how gender and minority concerns feature in LBH's community organising and community legal empowerment work, they remain worthy of brief reflection here. The typical cases and target groups handled by LBH have related to people who are marginalised economically, for example, farmers who face losing their land, the urban poor facing eviction, labourers, and fishermen. This can lead to these issues of economic injustice being emphasised at the expense of other identity issues (Cummings and Eagly 2001, 489). Further, as discussed, the presence of a 'women's and children's rights' division in some LBH offices can mean that gender equality concerns are sequestered in this division. Other divisions may pay scant attention to the gendered aspects of the cases they manage, considering gender issues to be already "dealt with" in the women's and children's rights division (Interview, Rezky Pratiwi, 2019). Nevertheless, these concerns are not ignored altogether. LBH cause lawyers recognise that they face significant challenges in ensuring participation of women in decision making when working with the labour movement (Interview, Pratiwi Febry, 2019). Likewise, several LBH lawyers mentioned that they recognise women often suffer the most when communities lose access to land (Interviews, Adi Anugrah Pratama, Mohamad Soleh, 2019). However, much more could be done to address gender across LBH's areas of focus.

The marginalisation of gender and minority rights in community organising affects not only analysis of community problems, it can also affect process. Community organising activities frequently fail to consider the different needs of men and women. For example, community meetings may not be organised at a time that encourages the active participation of women. In November 2019, I attended a community meeting and introduction to paralegal training conducted by LBH Surabaya with a community on Madura Island that faced potential eviction for a government 'revitalisation' project. The only community members who attended were men, and the older, senior men in the community dominated the discussion. On several occasions during the meeting, LBH facilitators expressed frustration that no women were present and said that they hoped more women community members would attend the next session. However, the cause of the poor turnout of women was that the community meeting had been organised the day before celebrations for the prophet's birthday (*Maulid Nabi*). In Madura, this is usually marked by community members visiting their relatives' and neighbours' houses, where food is offered to guests. In a patriarchal society where women are primarily responsible for domestic tasks, this meant women were busy cooking, and were unable to attend the community meeting. Stronger gender awareness (and probably stronger representation of

women among the staff at LBH Surabaya) would have likely prevented this kind of simple scheduling error from occurring.

Another concern relating to the participation of women is that simplistic understandings of gender can see them exploited in service of movement goals. For example, several LBH staff mentioned they involved women in community organising activities by ensuring they were on the frontline of public demonstrations. This approach assumes that the police or military will be less likely to act violently to break up demonstrations with women on the frontline (Interviews, Adi Anugrah Pratama, Edy Kurniawan Wahid, 2019). This is not an approach that sits well with all LBH staff, such as the head of the YLBHI board, Nursyahbani Katjasungkana.

“Look at the Kendeng case [see below], the advocacy was done in collaboration between the community and LBH Semarang. The majority of those leading the advocacy were women. But reports on the case never explored why the women were the ones out front. Is it only because they were women and exploited? There is a common perception that mothers will result in feelings of pity and compassion. But in my experience, it is rarely like this... Do [LBH lawyers working with communities] ever ask the extent to which the project will affect men and women differently? They never do this type of analysis.” (Interview, Nursyahbani Katjasungkana, 2019).

As noted, over recent years, YLBHI as the central umbrella body, with financial support and encouragement from international donors, has put considerable effort into strengthening the capacity of LBH lawyers at the regional level to understand gender and sexuality issues and promote a more intersectional approach to their work with communities (Interviews, Asfinawati, Renata Arianingtyas, 2019). Although LBH Semarang was criticised by Nursyahbani, in my fieldwork it appeared to be one of the more progressive offices in its approach to gender issues. As LBH Semarang director Zainal Arifin said:

“We have a division on minorities and vulnerable groups. But you can’t just deal with these issues separately in their own division like that. You can’t deal with gender equality only in relation to gender-based violence. In the farmers’ movement, for example, if there are women who are not being involved in decision making, then it is LBH’s responsibility to push for women and women’s organisations to be involved.” (Interview, Zainal Arifin, 2019).

Some LBH offices have attempted to promote solidarity among minority groups by bringing them together in community organising and legal awareness training activities. This is an approach that has been encouraged by YLBHI’s international donors. For example, LBH lawyers have conducted community paralegal training activities that bring together minorities like transgender women, factory workers, members of the Ahmadiyah and Shi’a minority Islamic sects, and farmers, to try to break down prejudice, build solidarity between these groups, and encourage them to conduct joint advocacy activities together. This approach recently saw transgender women paralegals working with paralegals

from religious minority communities to support of the Shi'a community's right to conduct Ashura celebrations in Semarang (Interview, Zainal Arifin, 2019).¹⁶⁷

6.5 The limits of social movement approaches

A focus on community legal empowerment and community organising is consistent with structural legal aid's emphasis on cases involving large numbers of victims, or where it is hoped that a win will have benefits for large numbers of people, for example, by changing the law, or by winning a class action. A focus on communal cases is understandable to a degree. LBH has limited resources, it needs to prioritise cases somehow. The problem becomes a little murky, however, when structural legal aid is used to justify declining to take on a particular case or category of case. The example of drugs cases is illustrative.

Historically, drugs cases were not considered structural, and were not taken on. For the older generation of LBH, representing individual drugs cases was too close to conventional legal aid, a "charity" service from the professional class (Interview, Luhut Pangaribuan, 2019). Lawyers with this view felt it was difficult to connect the cases and use them to drive larger, structural change. A further complicating factor is that drugs have long been highly contentious in Indonesia. Many LBH staff do not have a problem with drug use, but many others consider drugs to be a moral issue. I could not find any prohibition on representing drugs cases in LBH founding documents or codes of ethics, but LBH staff commonly state that they are bound by a commitment to not defend people accused of corruption, human rights violations, gender-based violence, and narcotics crime (Fajarlie 2019; see also Interviews, Mohamad Soleh, Habibus Shalihin, Barita N. Lumbanbatu, Abdul Wachid Habibullah, 2019).

It is true that if LBH offices took on every drug case that came through their doors, they would quickly become overwhelmed. To put this in perspective, about 60% of Indonesia's 200,000-strong prison population is comprised of drug convicts.¹⁶⁸ Without treating drugs as part of a broader strategy, one could reasonably argue that dealing with individual drug cases is not an effective use of LBH's limited resources. Nevertheless, there are ways that LBH could address the seemingly individual problem of drug use in a structural way, for example, by challenging the criminalisation of marijuana use. It might not be a politically feasible approach now, given widespread political hostility toward even the most minor drug crimes, but if successful, it would result in major positive change in

¹⁶⁷ Ashura is commemorated on the 10th day of Muharram, the first month of the Muslim calendar. For Shi'a Muslims, Ashura is a day of mourning, marking the martyrdom of Ali Hussein. Ashura celebrations in Indonesia have faced bans from some regional administrations and been subject to protests by some hard-line Sunni Muslim groups (Dipa 2015).

¹⁶⁸ Referring to Indonesia's publicly accessible corrections database, *Sistem Database Pemasyarakatan* (SDP), in October 2020, there were 238,442 total detainees and inmates, including 94,546 drug dealers and 44,369 drug users.

the lives of thousands of mainly poor Indonesians, and dramatically reduce prison overcrowding, a serious problem in Indonesia.¹⁶⁹

Over the past five years or so, there has been a shift in how many LBH offices approach drugs cases. There is now a broader acceptance that drug cases are indeed structural, although the reasons provided seemed to vary greatly among the LBH lawyers I spoke to. Some suggested drug users were victims (of drug dealers, because they were addicts, or because of the government's "war on drugs"),¹⁷⁰ others suggested users' right to health was being violated, or that drugs cases should be considered structural because they contribute to the massive overcrowding problems in prisons (Interviews, Abdul Muit Pelu, Muhammad Rasyid Ridha, Asfinawati, Willy Hanafi, 2019). Most LBH offices appear to have settled on a middle position of providing assistance for drugs cases when children are involved, or there are elements of false arrest, entrapment or torture (Interviews, Alghiffari Aqsa, Arif Maulana, Asfinawati, Abdul Wachid Habibullah, 2019).

These examples highlight one of the key shortcomings of emphasising community organising and community legal empowerment over litigation, which is that it can divert resources and energies away from addressing the immediate legal needs of the poor (Chen and Cummings 2013, 257). LBH lawyers recognise this but argue structural legal aid, with its focus on representation of groups, seeks to bring about change for larger sections of society than individual representation could ever achieve. But as Cummings and Eagly note, when lawyers are encouraged to act as organisers, facilitators and educators, it requires "less time be spent providing conventional representation to low-income clients, who are already drastically underserved" (Cummings and Eagly 2001, 491). This is a dilemma that LBH has often struggled with.

It is important to recognise that structural legal aid is not the same as organisational priorities. As Asfin explains:

"From 1,400 cases, for example, about 1,000 would be structural cases. We are not capable of handling them all. Even for labour rights cases, cases that have been associated with LBH for decades, we still reject them if they only involve one or two people. Instead, we will equip them with knowledge, or link them to a labour union. Often people think that if a case is not followed up at LBH, or it is rejected, it is because it was not a structural case. But often it is simply a matter of priorities." (Interview, Asfinawati, 2019).

¹⁶⁹ The number of inmates in Indonesian inmates swelled by more than 400% between 2003 and 2019. Harsh approaches toward drug crime have been a major contributor to this explosion in the prison population (Sudaryono 2020a). As of October 2020, Indonesian prisons were at 176% overcapacity. They housed 238,442 detainees and inmates but had capacity for only 135,647.

¹⁷⁰ Soon after he came to power in 2014, President Jokowi adopted hard-line rhetoric of a "drugs emergency". He resumed execution of narcotics prisoners on death row, executing 14 drug prisoners in six months, including Australians Myuran Sukumaran and Andrew Chan. While executions have since been paused, Jokowi later commented approvingly about police and National Narcotics Agency (BNN) fatal shootings of drug suspects (McRae 2017). As stated, this "war on drugs" rhetoric is also thought to be a major factor behind prison overcrowding (Wicaksana 2018; Sudaryono 2020a).

While the representation of all poor clients would of course be in line with LBH values, it is unreasonable to expect the organisation to see all the individual cases that come through its doors. All the responsibility for serving poor clients should not fall on LBH. Private firm lawyers (through pro bono work) and other legal aid organisations could be doing more to serve the community's needs for legal assistance. In efforts to promote greater uptake of pro bono cases by private lawyers, in 2018, LBH Jakarta set up a 'pro bono clearing house', and has recruited about a dozen firms to which it can refer cases (Prasetyo 2020). But these kinds of initiatives are still in their infancy. In the meantime, the provision of government funding for legal aid over the past five to 10 years may help to promote the expansion of legal aid, by encouraging more civil society legal aid providers to take on simple, individual cases (as discussed in Chapter 4). Nevertheless, there is such a vast need for legal services that even doubling or tripling the number of accredited providers, and the funding available to each, would likely make little difference.

I now move on to the final part of this chapter, a case study of the Kendeng farmers case, which allows examination of how many of these social movement issues play out in practice. It demonstrates how LBH combines litigation with nonlitigation social movement strategies, such as community organising and community legal empowerment.

6.6 The Kendeng farmers' case

The struggle of farmers in the North Kendeng Mountains of Central Java is one of the most prominent environmental and land conflicts in Indonesia over the past decade. It has featured multiple lawsuits, community organising and public education, collaboration (and some tension) among a broad network of CSOs, and dramatic headline-grabbing protests in Jakarta. It is an excellent illustration of LBH's approach to cause lawyering. The media might sometimes refer to 'the Kendeng case' but there are two district governments (Pati and Rembang), and two cement manufacturing companies (Indocement and Semen Gresik – which changed its name to Semen Indonesia) involved.

The North Kendeng Mountains are a karst formation that extends through several districts of Central Java and East Java. The porous limestone rock of the mountains serves an important water store, providing water for drinking and irrigation of crops for the farming communities in the area. The rocks are also a key ingredient in cement. One of the communities that calls the North Kendeng Mountains home is a traditional belief community known as the Sedulur Sikep, sometimes also called Saminists, after the founder of their faith, Surontiko Samin (Benda and Castles 1969, 210–11). The Samin movement began in the late 1800s, when Indonesia was still under Dutch colonial administration. Samin's teachings involved respect for nature and the role of farmers in society, as well as prohibitions on stealing, lying and adultery. The movement recognised no authority and aimed to abolish taxes and allow communities to have free access to forests (Korver 1976, 250). After attracting the attention of the Dutch authorities, Samin was arrested on charges of sedition and exiled to Sumatra, where he died in 1914 (Korver 1976, 249–50). The movement endured after his death, and followers continued to encourage defiance of the government and refusal to pay taxes (Benda and

Castles 1969, 213). The Samin community therefore has a long history of resistance to authority, one on which they have drawn in their recent struggles.

Pati district

Tension between Samin followers and cement factories began in 2006, when state-owned cement producer Semen Gresik announced plans to establish a quarry and cement factory in Pati district, Central Java. On 5 November 2008, the Pati district government issued a regulation allowing Semen Gresik to mine limestone in Sukolilo subdistrict, Pati (Kompas.com 2009).¹⁷¹ However, the decision was issued without the required environmental impact assessment (known in Indonesia by the term *analisis dampak lingkungan*, or *amdal*).¹⁷² By 2008, a range of community groups and organisations had formed to oppose the mine, including the Community Network for the Kendeng Mountains (*Jaringan Masyarakat Peduli Pegunungan Kendeng*, JM-PPK), a network of local farmers and Samin followers, which remains the most prominent of these community organisations today. Local and national CSOs also joined the campaign (Crosby 2009). National CSO the Indonesian Forum for the Environment (Walhi), lawyers from LBH Semarang, and the YAPHI Legal Services Agency (*Lembaga Pengabdian Hukum Yekti Angudi Piadeging Hukum Indonesia*, LPH YAPHI) challenged the Pati district decision at the Semarang State Administrative Court (PTUN Semarang). Surprisingly, the court ruled in their favour.¹⁷³ When the decision was appealed to the Surabaya State High Administrative Court (PTTUN Surabaya), however, the community was not so fortunate.¹⁷⁴ But in 2010, in a cassation appeal to the Supreme Court, the civil society coalition was successful again.¹⁷⁵ The court ordered that the 2008 Pati regional decision be revoked, and Semen Gresik was forced to look elsewhere.

However, this did not stop the efforts of cement companies in the area. Soon after the 2009 decision, the Pati district head issued a regulation rezoning certain areas in the district for mining.¹⁷⁶ Sahabat Mulia Sakti (SMS), a subsidiary of Indocement (whose main shareholder is the German multinational HeidelbergCement), began efforts to establish a mine in the area, by preparing an *amdal*. In September 2014, about three thousand Pati residents came in 80 trucks to protest a public hearing on the *amdal*. They drew attention to the fact that even the *amdal* noted that two-thirds of local residents rejected the establishment of the plant (Apriando 2014). But just a few months later, in December 2014, the Pati district head issued Decree No. 660.1/4767, providing SMS with an environmental licence to mine in the area. There was much debate among the organisations that were close to the communities in Pati about whether challenging the environmental licence in court was the best course

¹⁷¹ Decision of the Head of the Pati District Integrated Permit Service Office No. 540/052/2008

¹⁷² As required by Environment Minister Regulation No.11 of 2006 on Types of Businesses or Activities Requiring an Environmental Impact Assessment. Provisions on *amdal* have been significantly diluted with the passage of the passage of the highly controversial Omnibus Law on Job Creation, in October 2020 (Jong 2020b).

¹⁷³ PTUN Semarang Decision No. 04/G/2009/PTUN.SMG, 6 August 2009.

¹⁷⁴ Surabaya State High Administrative Court Decision No. 138/B/2009/PTTUN.SBY, 30 November 2009.

¹⁷⁵ Supreme Court Decision No. 103 K/TUN/2010, 27 May 2010.

¹⁷⁶ Pati District Regulation No. 5 of 2011 on Pati District Spatial Plan 2010-2030.

of action. Walhi, the YAPHI Legal Services Agency and some other CSOs thought litigation was risky, as the licence was granted for an area now zoned for mining. If the lawsuit failed, they reasoned, it would only end up legitimising the mine (Interview, Zainal Arifin, 2019). LBH Semarang consulted with communities in Pati and warned them of the risks and the other organisations' reluctance to go to court. Yet the community insisted they wanted to proceed. LBH Semarang also recognised there were other benefits of going to court.

“If they go to court then they have a reason to discuss the case every week, discuss opposition to the factory, hold environmental discussions and so on. Every week there is a hearing, but on the other six days of the week, they invite their neighbours, prepare readings, and then every Wednesday attend the hearing and hold a demonstration. This was the initiative of the community.” (Interview, Zainal Arifin, 2019).

This is a classic approach of social movement lawyering, and in line with the grassroots approach to cause lawyering that LBH has favoured over recent years, a time when democracy has come under threat and LBH has developed hesitations about the potential impact of legal victory. Despite these hesitations, grassroots lawyers recognise that litigation can be an important catalyst, helping to invigorate collective action (Hilbink 2004, 686). Note, too, how Zainal's comments mirror Muhamad Isnur's reflections in Chapter 5 about how constitutional litigation can help consolidate social movements.

With the decision made to proceed, in 2015, a group of five Pati farmers, Jasmo, Wardjo, Paini, Samiun, and Sarjudi, challenged the environmental licence. A team of LBH and other civil society lawyers provided representation. Ironically, SMS was represented by the private firm of former senior YLBHI figure Abdul Hakim Garuda Nusantara.¹⁷⁷ In conjunction with litigation, a broad range of nonlitigation strategies were deployed, driven largely by the JM-PPK network. Approaching the hearing, hundreds of Pati residents embarked on a “long march” from Pati to Semarang (Purbaya 2015), a strategy that farmers from Pati and Rembang have used multiple times throughout their struggles against the cement firms. Outside the courtroom, they displayed the results of their harvest, gave speeches and put on theatrical performances (Apriando 2015).¹⁷⁸

In March 2015, PTUN Semarang ruled in favour of the community.¹⁷⁹ The court found that the environmental licence conflicted with the Pati District Spatial Plan 2010-2030, Environmental Ministry Regulation No. 17 of 2012 on Involvement of the Community in the Environmental Impact

¹⁷⁷ Abdul Hakim Garuda Nusantara was also the head of Komnas HAM from 2002 to 2007. As discussed in Chapter 3, under the New Order, Abdul Hakim was associated with activist, more grassroots approaches to cause lawyering. It is difficult to know whether his firm's representation of the mining company constituted a cynical abandonment of his principles for financial gain, or whether it represented a shift to a more proceduralist approach to cause lawyering, similar to Adnan Buyung Nasution. Unfortunately, Abdul Hakim died in early 2018, and it was not possible to interview him for this project.

¹⁷⁸ Later, in 2017, a Kendeng farmer, Gunarti, even travelled to Germany and spoke about the community's struggle at the HeidelbergCement shareholder meeting (Knight 2017).

¹⁷⁹ PTUN Semarang Decision No. 015/G/2015/PTUN.SMG, 476-477.

Assessment and Environmental Licencing Process and principles of good governance.¹⁸⁰ SMS and Indocement appealed the decision to the PTTUN Surabaya. More than one year later, on 1 July 2016, PTTUN Surabaya reversed the decision of PTUN Semarang, finding in favour of the company.¹⁸¹ This decision was then upheld by the Supreme Court on cassation appeal on 6 March 2017.¹⁸² Even though the community lost, the long legal process has stalled progress in Pati.¹⁸³ The community was able to delay the project, make it politically controversial, and arguably even threaten its commercial viability. This tactic of using litigation and protest to throw sand in the gears is a classic strategy used by cause lawyers, particularly in contexts where the political and legal odds seem stacked against them (Klug 2001, 267; Sarat 1998, 334–35).

Rembang district

Communities in neighbouring Rembang district have also been engaged in a long, high-profile struggle against cement companies. After failing in its attempts to establish a mine in Pati in 2009, Semen Gresik, which, as mentioned, changed its name to Semen Indonesia in December 2012 (I will now refer to it as Semen Indonesia), began looking to Rembang. In 2010 and 2011, the Rembang district head issued three decisions in preparation for the company establishing a mine and factory in the area.¹⁸⁴ Semen Indonesia completed its *amdal* in April 2012, and in June of the same year, Central Java Governor Bibit Waluyo issued an environmental licence for Semen Indonesia to mine and establish a factory in the region.¹⁸⁵ The community subsequently claimed that they only discovered that the *amdal* and environmental licence had been issued two years later, in June 2014.¹⁸⁶ Almost immediately after they became aware of the company's progress, on 16 June 2014, the community set up a tent protest at the proposed site of the mine and factory, as a method of peaceful resistance to the company (Apriando 2016; Firdaus 2016). This tent site served as an important community hub, until it was destroyed on 10 February 2017 by a group of unknown assailants that the community, understandably, suspected were connected to Semen Indonesia (Mukti 2017).

In September 2014, Rembang community members, as well as Walhi, represented by LBH Semarang, YLBHI and other civil society cause lawyers, submitted a challenge to the environmental licence to the Semarang PTUN. Like the Pati case, Semen Indonesia was represented by the private firm of a

¹⁸⁰ PTUN Semarang Decision No. 015/G/2015/PTUN.SMG, 477-478

¹⁸¹ PTTUN Surabaya No. 79/B/2016/PT.TUN-SBY.

¹⁸² Supreme Court Decision No. 4 K/TUN/2017

¹⁸³ According to Government Regulation No. 27 of 2012, if no activities have commenced three years after an environmental licence is issued then the company must request a new one.

¹⁸⁴ These included a Mining Business Licence Area (*Wilayah Izin Usaha Pertambangan*, WIUP), through Rembang District Head Decision No. 545/68/2010, a Mining Business Exploration Licence (*Izin Usaha Penambangan (IUP) Eksplorasi*), through Rembang District Head Decision No. 545/4/2011, and a Location Licence (*Izin Lokasi*), for the construction of a cement factory, through Rembang District Head Decision No. 591/040/2011.

¹⁸⁵ Central Java Governor Decision No. 660.1/17/2012. This was followed by the Rembang district head issuing Decision No. 545/0230/2013, on 15 February 2013, providing Semen Indonesia with a Mining Business Production Licence (*IUP Operasi Produksi*).

¹⁸⁶ PTUN Semarang Decision No. 064/G/2014/PTUN.Smg, 26.

former LBH lawyer, in this case, Adnan Buyung Nasution and Partners Law Firm. Representation of a mining company would be consistent with Buyung's proceduralist tendencies in the years following the fall of the New Order. But the fact that both mining companies sought out former-LBH lawyers to represent them suggests a deliberate strategy on behalf of the mining firms to counter their opponents from LBH. On 16 April 2015, PTUN Semarang ruled in favour of the company, stating that the fact that there was so much community resistance indicated that the *amdal* had been sufficiently publicised. Judges also found that the community knew about the planned mine and factory from early 2013, and as such the case was filed in excess of the 90-day limit for submitting challenges to the administrative courts.¹⁸⁷ The community appealed to the Surabaya PTTUN, but in November 2015, it upheld the decision of PTUN Semarang.¹⁸⁸ Despite the ongoing legal tussles, the company continued with its plans to establish the factory.

Frustrated with this process, the community decided more drastic measures were needed. On 12 April 2016, a group of nine Kendeng women cast their feet in cement in front of the Presidential Palace, demanding to meet President Jokowi. The women dubbed themselves the 'Kartinis of Kendeng', adopting the name of Indonesian feminist symbol Kartini (Erdianto 2016). The protest attracted massive media attention and resulted in dramatic images being shared across the country. Although the women were not successful in meeting with the president, the head of the Office of Presidential Staff at the time, Teten Masduki (yet another former YLBHI figure), met with the women and promised to arrange a meeting with Jokowi (Erdianto 2016). On 2 August, the community finally got their chance to meet with the president. Following the meeting, Jokowi reportedly ordered the Office of Presidential Staff to coordinate a 'Strategic Environmental Study' (*Kajian Lingkungan Hidup Strategis*) and requested that the construction of the factory be paused until this was completed (Istman MP 2016; Sinuko 2016b).¹⁸⁹ Almost immediately after this announcement, Central Java Governor Ganjar Pranowo (who replaced the previous governor in 2013) said the project could not be stopped, as it was already 95% complete (Sinuko 2016a).

Around the same time of the meeting with Jokowi, in August 2016, the community submitted a reconsideration request (*peninjauan kembali*, PK), the final avenue by which a court decision can be challenged in the Indonesian system.¹⁹⁰ Remarkably, on 5 October 2016, the Supreme Court ruled in the community's favour. In its decision, the court found that the strong community opposition to the project was evidence that community participation was insufficient and the project had not been appropriately communicated to all elements of the community.¹⁹¹ The panel of judges also ruled that the *amdal* did not contain sufficient protections to ensure that mining would not negatively affect groundwater and the livelihoods of local people, which would have been consistent with the principles

¹⁸⁷ Article 55 of Law No. 5 of 1986 on the Administrative Courts (as amended by Law No. 9 of 2004 and Law No. 51 of 2009). See also PTUN Semarang Decision No. 064/G/2014/PTUN.Smg, 208-209.

¹⁸⁸ PTTUN Surabaya Decision No. 135/B/2015/PT.TUN.SBY

¹⁸⁹ A KLHS is a study that should be completed by regional governments to ensure that their spatial plans, development planning, policies and programs are consistent with sustainable development principles. See Articles 15-18 of Law No. 32 of 2009 on Environmental Protection and Management.

¹⁹⁰ Supreme Court Decision No. 99 PK/TUN/2016, 5 October 2016.

¹⁹¹ Supreme Court Decision No. 99 PK/TUN/2016, 111-112.

of good governance.¹⁹² As such, the court found the *amdal* was procedurally flawed, and should be cancelled.¹⁹³

The community's victory was short lived. After a lack of action from the Central Java government, on 5-8 December 2016, about 100 farmers walked the approximately 150 kilometres from Rembang to Semarang, to demand Central Java Governor Ganjar implement the court's decision (Bina Desa 2016). However, he simply issued a new environmental licence on 23 February 2017 (Nurdin 2017).¹⁹⁴ In March 2017, Kendeng community members travelled to Jakarta again, and again set their feet in cement. This time, several activists joined the protest, including YLBHI's Rakhma. On 22 March, President Jokowi met with Gunarti, one of the Kendeng women, but this time he was less receptive to the community's demands. He reportedly told the community to stop bringing their concerns to him, and that they should take up their issues up with the Central Java governor (The Jakarta Post 2017).¹⁹⁵

Figure 6.1: Kendeng women, their feet cast in cement, preparing to depart from the YLBHI/LBH Jakarta office to protest in front of the Presidential Palace on 14 March 2017 (Photo by Andrey Gromico for Tirto.id).



¹⁹² Supreme Court Decision No. 99 PK/TUN/2016, 112-114.

¹⁹³ Supreme Court Decision No. 99 PK/TUN/2016, 114. Semen Indonesia later submitted a reconsideration request of this reconsideration request, but it was rejected, on 20 June 2017 (Supreme Court Decision No. 91 PK/TUN/2017).

¹⁹⁴ Central Java Governor Decision No. 660.1/6/2017.

¹⁹⁵ In May 2017, Walhi submitted a new challenge to the new environmental licence (Decree No. 660.1/6/2017) but this time, the community decided not to join the lawsuit. The challenge was dismissed by PTUN Semarang. PTUN Semarang Decision No. 039/PEN-DIS/2017/PTUN.SMG, 16 June 2017, and PTUN Semarang Decision No. 039/G.PLW/2017/PTUN.SMG, 16 August 2017.

Three years later, the mine has begun operations but the struggle of the Kendeng farmers continues. They continue to resist the mine and factory in Rembang, through efforts such as ongoing demonstrations, media outreach and demands that the government implement the recommendations of the strategic environmental study (JM-PPK 2019; Nuswantoro 2020; CNN Indonesia 2019a).

6.7 Social movement strategies in action

The Kendeng case demonstrates many of the key elements of LBH's approach to cause lawyering in the contemporary era, and the renewed focus on the grassroots strategies of community organising and community legal empowerment that has occurred as LBH has become more sceptical of the state. It is vital not to overstate the role of LBH in conducting community organising and community legal empowerment in Kendeng. At one point, according to LBH Semarang, there were 27 CSOs working with communities in the region (Interview, Zainal Arifin, 2019). At times, LBH performed a role typical of cause lawyers in broad coalitions, focusing on the legal realm, while other organisations and individuals played other supportive roles, such as policy-focused research to support advocacy efforts (Interview, Eti Oktaviani, 2020). It is also important not to minimise the agency of the Samin followers, who as discussed, have a very long history of resistance to state power. LBH did, however, invest considerable time in building a close relationship with the JM-PPK network, which helped to facilitate closer connections with residents. This close relationship continues today. LBH Semarang director Zainal Arifin reported that when he first started at LBH in 2012, its initial attempts at offering environmental awareness training to the Kendeng farmers were not successful (Interview, Zainal Arifin, 2019). But LBH's patience and persistence eventually saw it gain the trust of the community. This was essential when legal challenges were launched in 2014.

A crucial role of LBH Semarang was to provide critical legal education. Many Kendeng community members had no previous interaction with the formal legal system. LBH Semarang conducted village-level discussions, where it explained aspects such as the trial process, the presentation of evidence, and the accused parties in each case (Interview, Eti Oktaviani, 2019). It also conducted environmental awareness training (which covered environmental law and the process of conducting environmental impact assessments), as well as human rights and even safety and security training for human rights defenders and environmental activists (LBH Semarang 2015). As discussed, these community legal empowerment activities were designed in part to encourage collective action, but they are also a key element of the structural legal aid approach, particularly in an environment where LBH lawyers are somewhat sceptical of litigation. In the years following the court cases, LBH has remained connected to the JM-PPK movement, and has continued to provide community legal empowerment, such as discussions on planned revisions to the Rembang spatial plan. LBH and Walhi even facilitated the network to meet with the district legislature to discuss the revised plan (Walhi Jawa Tengah 2021).

Community education activities were accompanied by efforts to support community mobilisation, so that when hearings were held, hundreds of community members attended. As discussed, this has long been a common method used by Indonesian CSOs to promote accountability in the courts. In a situation where judicial bribery is widespread (Butt and Lindsey 2018, 299–303), “the judges have to

feel that they are being watched” (Interview, Zainal Arifin, 2019). Although he is not speaking about the Kendeng case, this comment from LBH Makassar’s Ady Anugrah Pratama explains the LBH approach.

“[T]he formal legal process and social movements are united and cannot be separated. In many cases, community organising must function at the same time, because the legal strategy in the courtroom will never be enough. We organise and encourage the community to be involved and monitor the legal process as part of this united process.” (Interview, Ady Anugrah Pratama, 2019).

Another important social movement strategy deployed by LBH Semarang was facilitating relationships with other CSOs and cause lawyers. If it did not have the resources to provide legal representation, for example, LBH connected the community to other cause lawyers in Jakarta or Yogyakarta. Although divisions occasionally emerged among community members, LBH also played a mediating role, supporting respected community and religious leaders to travel from village to village to resolve misunderstandings or concerns ahead of legal action (Interview, Zainal Arifin, 2019). LBH Semarang (as well as the other organisations that accompanied the community) connected the Kendeng farmers to CSOs in Jakarta, including YLBHI. Notably, the Kendeng farmers have often featured in the ‘Kamisán’ (Thursdays) human rights protests held every week in front of the Presidential Palace, as well as other human rights protests in Jakarta (Siddiq 2018; Nugroho 2019).

Consistent with broader LBH views on the lawyer-client relationship discussed above, LBH Semarang saw itself as acting in the service of movement goals, not driving the movement. LBH Semarang lawyers consistently stress that the community controlled public advocacy efforts. The movement’s most prominent acts of protest – such as the establishment of the tent protest site in Rembang, the long marches, and the cementing of Kendeng women’s feet in front of the Presidential Palace – were initiatives that came from the community.

“Are we public interest lawyers, movement lawyers, or legal aid lawyers? It’s an interesting discussion. There are several identities within LBH... in the Kendeng case, we are movement lawyers. We never acted without the community’s blessing. We did things like providing legal education, organising the community. When we engaged in litigation, it was really a tool for community organising.” (Interview, Zainal Arifin, 2019).

Zainal’s comments here are consistent with the approach of movement lawyers, who often emphasise the importance of community education and empowerment over legal victory (Luban 1988, 388). This is also in accordance with LBH’s grassroots approach to cause lawyering (of which movement lawyering is a part). Recall that grassroots approaches put little faith in the courts to lead to meaningful change. Litigation was used not only to challenge problematic government acts, but also to galvanise the community. Rather than seeking to vindicate rights in the courts, such as might have

occurred through elite/vanguard models of cause lawyering, rights were used “strategically and flexibly to build collective power at the grassroots level” (Cummings 2020, 122).

In the case of Rembang, at least, scepticism about litigation strategies was entirely justified. Despite the community’s win at the Supreme Court, the Central Java government simply cynically circumvented the decision by issuing a new licence. The community’s efforts might have failed in Rembang, but in Pati, the community legal empowerment and organising approach has thus far prevented the factory from going ahead. There is of course no guarantee that this situation will be sustained, but it does seem to vindicate the efforts that LBH and other CSOs put into strengthening the community.

Distinct from an elite/vanguard style of cause lawyering, which might see cause lawyers keeping a distance from the community, handling technical legal aspects, or advising on the most appropriate course of legal action, LBH lawyers clearly see themselves as existing in an equal relationship with community members. LBH’s interaction with the community was not limited to periods when the community needed legal assistance. During fieldwork, Kendeng women would occasionally even sleep in the YLBHI office when they came to Jakarta. It is telling that senior YLBHI lawyer and former LBH Semarang director Rakhma also cemented her own feet in front of the Presidential Palace in the March 2017 protest. It is hard to imagine a more obvious visual metaphor for being integrated into a social movement.

6.8 Conclusions

This chapter aimed to provide a detailed examination of LBH’s approach to community organising and community legal empowerment in the contemporary era. Although this political, grassroots-focused approach to cause lawyering has long been associated with LBH’s structural legal aid approach, these strategies were implemented inconsistently after the democratic transition began in 1998. The causes of this were varied but had as much to do with the funding challenges and management weaknesses in YLBHI discussed in Chapter 4 as with cause lawyers’ perceptions of the state and their roles as lawyers. In any case, the current leadership team has placed increasing emphasis on community legal empowerment and community organising approaches as the quality of Indonesian democracy has come under attack.

LBH strongly believes that it is not enough to represent communities in court, they must also be aware of their rights and the broader political or legal issues that have a role in the problems that they face. A strong focus on grassroots legal empowerment does not mean that litigation strategies are abandoned or minimised. But LBH is under no illusions about the transformative power of litigation. Rather, litigation is combined with a broad range of other strategies, such as community education, coalition building, protests and demonstrations, and political advocacy, as the case of the Kendeng farmers demonstrated. Litigation was viewed as an important catalyst; it provided opportunities for strengthening community awareness about their rights and for promoting community organising. LBH views itself as integrated into social movements and sees its legal strategies as being closely

connected to these other equally important forms of action. In the Kendeng case, at least, LBH viewed the community as being in control, and responsible for determining strategies. This kind of approach is clearly situated within the grassroots category of cause lawyering.

Yet such categories are not sharply demarcated. LBH continues to deploy some strategies more accurately described as elite/vanguard. As Chapter 5 noted, the democratic transition provided new opportunities to mobilise the law and engage in strategic litigation. The following chapter looks at another elite/vanguard approach made possible by democratic change – direct engagement with the state, for example, in policy advocacy and institutional strengthening efforts. LBH cause lawyers have struggled much more with the question of the extent to which they should deploy these more accommodative, elite-focused approaches, as the next chapter will show.

Chapter 7: Engaging with the state

7.1 Introduction

This chapter is primarily concerned with LBH lawyers' relationship with the state. The central argument of this thesis is that the form cause lawyering takes is closely related to democratic change. Chapter 4 examined the impact of the democratic transition on organisational factors affecting cause lawyering and Chapter 5 looked at opportunities for engaging in elite/vanguard forms of cause lawyering. Chapter 6, meanwhile, described how democratic regression and lack of faith in litigation when used alone have seen LBH place increasing emphasis on community legal empowerment and community organising work. This chapter continues to build on the central argument of this thesis, showing there is a clear relationship between the openness of the government and the approach of Indonesian cause lawyers to engaging with the state.

The chapter focuses on the strategies of cause lawyering that are only possible in more democratic settings, where there is greater room to bring about reform without having to resort to legal action – strategies such as legislative lobbying, drafting of laws and regulations and collaborating directly with state institutions to reform their internal practices. These strategies are consistent with an elite/vanguard form of cause lawyering. They are focused up, toward elites, and they are based on a belief in the capacity of law reform to engender broader social change. Although, as stated, elite/vanguard cause lawyers typically privilege court-based strategies like strategic impact litigation, they may also work through these legislative and administrative channels but tend to speak in the language of the law when they do so (Hilbink 2004, 677).

The chapter begins by examining the impact of democratic transition on LBH's attitude toward engagement with the state. As the state became more open in the years following the fall of Soeharto, cause lawyers at LBH had to decide whether they would participate in state structures or maintain a more confrontational approach. I then examine some selected examples of LBH's attempts to collaborate with the justice sector and work within state structures to further its goals. This is followed by a deeper exploration of LBH cause lawyers' attitude toward engaging with the government and legislature on policy formulation, showing that, as the government has become more closed, LBH has returned to a more political, confrontational approach to cause lawyering.

7.2 Cause lawyers and the state

As discussed in Chapter 2, the relationship between cause lawyers and the state is sometimes described as existing on a continuum. One of the key dilemmas for cause lawyers is deciding the degree to which they wish to engage with the government. Of course, cause lawyers under authoritarian regimes face no such dilemma. But as the state becomes more open, cause lawyers must decide whether they participate in state structures or maintain a more confrontational approach (Scheingold 2001, 389).

There are many examples of cause lawyering being transformed by democratic transition. In South Africa, for example, the transition saw cause lawyers move into the state, and into policy-making roles. After vigorously opposing apartheid-era land policy, cause lawyers helped to shape land policy under the newly democratic state (Klug 2001, 280). In South Korea, too, the democratic transition and the election of a former cause lawyer, Roh Moo-hyun, as president saw more cause lawyers recruited into senior government positions (Goedde 2009, 83). With a more reformist regime in power, South Korean cause lawyers in the People's Solidarity for Participatory Democracy (PSPD) prioritised policy advocacy measures over litigation (Goedde 2009, 85–86). Litigation was not abandoned, but legislation was “a primary strategy” and their legislative drafting and lobbying efforts saw more than 70 pieces of legislation passed in just five years (Ginsburg 2007, 52–53). In Taiwan, the period of democratisation in the late 1980s and 1990s saw increasing use of constitutional litigation to bring about significant policy change, in particular for women's rights (Chang 2010, 136). However, constitutional litigation was combined with intensive legislative lobbying and policy advocacy, which were “equally, if not more important to public interest groups facing an unprecedented political liberalisation in a rapidly democratising society” (Chang 2010, 140).

These developments were also observed in Indonesia and by cause lawyers from LBH. Although no Indonesian cause lawyers reached the same heights as in South Korea, for example, after 1998, they were certainly presented with new opportunities to work inside the state. In the early years following the fall of Soeharto, several former LBH staff moved into the legislature, the courts, and senior government roles. Some of the more notable examples include the current head of the YLBHI board Nursyahbani Katyasungkana, YLBHI founder Adnan Buyung Nasution, and Abdul Rahman Saleh (known as ‘Arman’), head of LBH Jakarta in the early 1980s. Nursyahbani was a member of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR) from 1999 to 2004 and a member of the House of Representatives (DPR) from 2004 to 2009. She played a major role in working with other women's activists to pass the landmark Law No. 23 of 2004 on Domestic Violence. Buyung, meanwhile, was appointed to the Presidential Advisory Council (*Wantimpres*) under President Susilo Bambang Yudhoyono, from 2007–2009, and was responsible for providing guidance and advice on legal affairs. Abdul Rahman Saleh went on to serve as a judge in the Supreme Court, and eventually as attorney general from 2004–2007. These were important moves, but as mentioned in Chapter 4, it was typically cause lawyers external to LBH who were happy to work in close proximity to the state. Other law-reform focused groups seemed much more comfortable moving inside the state, where they had a major role in shaping state institutions. As stated, organisations like LeIp, MaPPI and PSHK put a major stamp on the reform process in the Supreme Court, helping to craft the crucial reform blueprints. Some civil society activists even sat on the team responsible for implementing the blueprints.

One might question whether a cause lawyer can ever really conduct cause lawyering from inside the state – is it “a contradiction in terms” (Scheingold 2001, 390)? As discussed in Chapter 2, however, cause lawyering can occur from inside the state and scholars describe several advantages of cause lawyering from the inside. For example, cause lawyers who enter the state may expand access, “facilitating and mediating relationships between the movement and the state” (NeJaime 2012, 654).

They may also help to shape priorities within the state, ensuring greater attention to the problems of the poor (Meili 2009, 65; NeJaime 2012, 654). Some LBH lawyers would have some affinities with these arguments; they would likely argue that they have been able to promote a pro-poor perspective in the National Law Development Agency (BPHN) (see below). However, they remain mostly unconvinced about the merits of cause lawyering inside the state.

Over the past five to ten years, more former LBH lawyers have taken up strategic positions in state institutions. The most prominent is former YLBHI labour division head Teten Masduki, who at the time of writing was Minister of Cooperatives and Small and Medium Enterprises, after serving as head of the Office of Presidential Staff during Jokowi's first term. Teten had previously gained a national profile after serving as director of Indonesia Corruption Watch (ICW) (the anti-corruption organisation founded by YLBHI in the late New Order period). Another prominent former YLBHI figure who moved into the state is Taufik 'Tobas' Basari. Tobas is a popular member of the National Democratic (Nasdem) Party, and sits in DPR Commission III, which has responsibility for legal, human rights and security affairs. Todung Mulya Lubis, YLBHI's most famous living alumnus, has held a range of short-term appointments from the state, and was briefly touted as a potential minister of law and human rights during Jokowi's first term and previously as attorney general under Yudhoyono. He was appointed to neither position, but now serves as the Indonesian ambassador to Norway and Iceland. Other former LBH and YLBHI staff have been appointed to independent quasi-state institutions, for example, Mohammad Choirul Anam, who is a commissioner at Komnas HAM, Poengky Indarti, who is a member of the National Police Commission (*Komisi Kepolisian Nasional*, Kompolnas), and Indro Sugianto, who is a commissioner at the Prosecutors Commission (*Komisi Kejaksaan*, Komjak). These examples are by no means exhaustive, and there are many examples from the regional levels, where former LBH staff have gone on to have active roles in politics at the local level (Interviews, Robertus Robet, 2020, Indro Sugianto 2019).

LBH is mostly doubtful about the ability of its alumni who have entered the state to drive change from the inside. This pessimism is also partly a result of poor past experiences in trying to take advantage of these relationships. As Asfin commented:

“[W]hen Teten Masduki entered the Presidential Palace, we saw it as an opportunity. Although we are cautious, we used his channel, until we discovered that it was not effective. So we broke off communication.” (Interview, Asfinawati, 2019).

LBH sometimes extends its oppositional approach even to its own alumni who have entered state institutions. Tobas mentioned, with a degree of disappointment, that LBH did not seem to want to take advantage of his position in the DPR.

“The people who have sought to take advantage of my position are actually from other CSOs that have chosen a strategy of working with the legislature. But for LBH, I think their antipathy to ‘practical politics’ is too strong to approach me. It is as though once you have entered the political realm then we must be prepared to become opponents, even as alumni of

LBH. From the beginning, before I was officially installed in the legislature, I reached out and contacted CSOs and said that I was prepared to become an agent on the inside. The people who were most enthusiastic were actually from other organisations, not from LBH. This is because of LBH's decision to take a confrontational strategy, not taking advantage of my position." (Interview, Taufik Basari, 2019).

One might question the wisdom of such a hard-line approach to institutional independence. Even under the New Order, YLBHI founder Buyung maintained relationships with senior military and regime officials. Although Buyung's colleagues at LBH were highly critical of these relationships,¹⁹⁶ Buyung defended them, stating that for 30 years, he had attempted to maintain dialogue with people in government, believing there were still people in government who would be open to proposals for reform (Aspinall 2005, 111). As Aspinall also notes, Buyung's receptiveness to engaging with senior military officials was likely influenced by his background as a member of a small elite,¹⁹⁷ and his experiences helping to shape ideas about the restoration of the *negara hukum* in the very early New Order period (Lev 2007, 397; Aspinall 2005, 111).

These types of backdoor relationships are no longer maintained by the current leadership of YLBHI, even under a regime ostensibly more open than the New Order. Of course, this can be explained partly by the dramatically different social and political context. The 'elite' is much broader, and LBH lawyers do not have the same stature as the small number of lawyers did half a century ago. But as noted, there are opportunities for maintaining direct contact with officials that are not being taken up by LBH. Several of my respondents commented they felt other CSOs were far better at taking advantage of behind-the-scenes relationships with senior police, for example (Interviews, confidential, 2019). By not engaging, however, LBH can maintain a degree of 'moral purity'. It can continue to stand beside its clients without any concerns about being compromised. The cost of not engaging, on the other hand, is lack of influence. Yet in an environment of democratic regression, when police readily ignore human rights protections, when the national legislature passes problematic laws in violation of its own formal procedures, one might ask: what is the benefit of such influence?

7.3 Experimentations with accommodative strategies

Under the authoritarian New Order, taking a strong, ideological position in opposition to the government was an uncomplicated position to take. But as the constellation of power changed with the fall of Soeharto, patterns of relations became more complex (see Klug 2001). As discussed in Chapter 4, this forced LBH to reflect more deeply on its reason for being and how it wanted to use the law for social change. In the early years of the democratic transition, LBH experienced a period of disorientation, where it grappled with the dilemma of maintaining a strong adversarial role that kept

¹⁹⁶ Recall that during the 2001 leadership dispute, Bambang Widjojanto made a veiled criticism of Buyung operating in a "grey area" (see Chapter 4).

¹⁹⁷ During Soekarno's Guided Democracy period, when Buyung was a young lawyer, the private legal profession numbered only about 250 (Lev 2007, 397).

the government at arm's length while taking more accommodative role involving engaging with legislatures and bureaucracies (Scheingold 2001, 389).

It is hardly surprising that an organisation established under an authoritarian state and that spent its first three decades attempting to radically restructure that state developed a deeply embedded oppositional organisational culture. This was particularly the case for LBH offices in the regions, which were often on the frontline of efforts to defend communities against forced evictions, farmers from land grabbing by the state, and labour rights at a time when labour organising was severely constrained. The LBH Bandung poster below offers a succinct visual representation of the kind of emphatically oppositional culture common across the LBH network.

Figure 7.1: 'Militancy without limits' – LBH Bandung poster (Photo by Tim Mann, 2019).



LBH's affinity with oppositional approaches to cause lawyering may also be partly determined by its inherent nature as a legal, rights-focused organisation. As Adriaan Bedner has recognised, a strict allegiance to human rights principles might be easier to maintain for reform-focused CSOs than getting into the murkier waters of political compromise (Nardi 2018a, 250). Indeed, YLBHI's Mayong is aware working with the government and legislature on policy reform does not come naturally for many of his colleagues:

“LBH offices [in the regions] are not used to doing ‘soft advocacy’. Because these methods of advocacy have certain characteristics, such as compromise, being softer about delivering your message. But case management, litigation, let alone community organising, is much more confrontational. Most LBH staff are not practiced in doing soft advocacy like that.” (Interview, Febi Yonesta, 2019).

As discussed in Chapter 5, LBH has recently (and successfully) used litigation to push the state to make concessions, rather than working within state structures to encourage policy change. It is also a strategy that makes more sense if the state is largely closed to their demands.

Nevertheless, despite a firmly embedded oppositional culture, in the period following the fall of Soeharto, LBH did make some efforts to engage with the government. The most notable was its support for the development of the 2011 Legal Aid Law. Over several years, during Yudhoyono’s first term, when Indonesian democracy was seen by some to be at its healthiest (Mietzner 2021a, 11–16), YLBHI, supported by donors, engaged in activities like expanding the knowledge base on legal aid (KUBAH 2010), drafting legislation, preparing a ‘policy paper’ (*naskah akademik*) to accompany the draft legislation, meeting and collaborating with the national legislature and government officials, and conducting public advocacy activities.¹⁹⁸ YLBHI even engaged directly as a member of a government-formed joint team tasked with drafting a government version of the legal aid bill to be submitted to the legislature (YLBHI 2009).

Since the national legal aid program was launched in 2013, YLBHI has developed a productive working relationship with BPHN, which is responsible for implementing the legal aid scheme. YLBHI sits down regularly with BPHN to discuss methods for improving the provision of legal aid, and worked closely with the agency to prepare service standards for legal aid and a regulation recognising the role of community paralegals (Interview, Febi Yonesta, 2019).¹⁹⁹ YLBHI director Asfin was also selected as part of a joint BPHN and civil society ‘Team of Seven’ that evaluated legal aid providers for the 2019-2021 period (BPHN 2019). This process resulted in 73 unethical legal aid providers, which had reportedly falsified documents to be accredited, being dropped (Peradi Tasikmalaya 2019).²⁰⁰ YLBHI staff comment there are people within BPHN who share its commitment to making the legal aid system work for poor people.

“There are two state institutions that are still willing to work with us: BPHN and Bappenas [Ministry of National Development Planning]. They are responsive. We can have a mature debate with them and if our argument is strong, they will accept it. Several people in BPHN are ideologically similar to LBH, because they understand the problems. Because they work with legal aid providers, they understand that police often refuse access to lawyers... They

¹⁹⁸ For examples of such activities see Kompas.com 2008; Hukum Online 2010b; 2011; Ratnaningsih 2011.

¹⁹⁹ Law and Human Rights Ministry Regulations No. 3 of 2021 on Paralegals in the Provision of Legal Aid and No. 4 of 2021 on Legal Aid Service Standards.

²⁰⁰ A consequence of government funding becoming available is that many less ethical providers have emerged with the purpose of chasing reimbursement for simple cases, which they may only represent half-heartedly (Interviews, Asfinawati, Ajeng Wahyuni, Febi Yonesta, 2019).

involve us when they do not have the expertise, for example, in preparing service standards for legal aid, or the regulation on paralegals.” (Interview, Asfinawati, 2021).

LBH is, of course, invested in the system, in part because it played such a prominent role in bringing the law that established it to fruition, but also because it may one day become an important source of funding for its operations. It is also undoubtedly in the best interests of its clients to have a strong, well-funded, functional legal aid system.

The 2011 Legal Aid Law is arguably the most success LBH has had with engaging in more ‘traditional’ forms of policy advocacy. But the overall story of LBH’s attempts at more accommodative or inside-the-state versions of cause lawyering has largely been one of disappointment. As mentioned, following the democratic transition, international donors encouraged civil society to collaborate with state institutions like the Supreme Court and the police, to strengthen their internal capacity and work with them on reforming their internal procedures.

In 2014 and 2015, YLBHI director Asfin, for example, worked with a group of civil society representatives to collaborate with the National Police (Polri) to develop a police chief circular (*surat edaran*) on guidelines for police in the field to address hate speech.²⁰¹ This was considered important at the time, given escalating attacks on religious minorities and the violent hate speech that often preceded these attacks, typically without consequences.²⁰² The police elected to use an expansive definition of hate speech that included slander, defamation, blasphemy, antisocial behaviour, provocation, incitement, and spreading fake news.²⁰³ Since the circular has been published, instead of focusing on hate speech against minorities, police have seemed much more interested in acting on behalf of the government and other powerful figures, exploiting the loose definition to pursue their critics, who are typically accused of defamation (K. Setiawan 2020).²⁰⁴

Similarly, Polri previously issued Police Chief Regulation (*Perkap*) No. 8 of 2009 on Implementation of Human Rights Principles and Standards in Policing Duties.²⁰⁵ LBH Jakarta worked with the National Police’s counter-terrorism unit, Special Detachment 88 (*Detasemen Khusus 88*, or Densus 88), on a program designed to mainstream human rights principles among anti-terror police, with funding from the United Kingdom. Despite the time and effort expended, however, LBH saw little results. For LBH Jakarta, the negative experience of attempting to work with Densus was enough to prompt it to cease working on activities designed to strengthen the capacity of state institutions.

²⁰¹ Police Chief Circular No. SE/6/X/2015 on Hate Speech.

²⁰² A famous example was former Islamic Defenders Front (FPI) leader Ahmad Sobri Lubis who was recorded publicly urging his followers to kill Ahmadiyah members, stating that it was *halal* (permitted under Islam) to spill their blood (Albanna 2021).

²⁰³ Circular No. SE/6/X/2015, 2.

²⁰⁴ I could only find one example of police targeting a member of the majority community for “hate speech” against minorities, Islamic preacher Muhammad Yahya Waloni, who was arrested after describing the bible as “fictitious” and “fake” in a recorded sermon (Rahma 2021).

²⁰⁵ *Perkap* are regulations that guide police operations in the field.

“We worked with Densus. The policy was there, we tried to increase their awareness of human rights, but there was no significant change. So we decided from that point that we will no longer work with the state.” (Interview, Pratiwi Febry, 2019).

Despite formal commitments to human rights principles, police clearly had little intention of changing their behaviour. Examples of the police failing to adhere to human rights principles are too many to mention. As mentioned, during the *Reformasi Dikorupsi* protests in 2019, police arrested hundreds of student protesters and denied many of them access to legal counsel. When the students were eventually released, many complained of being tortured in detention (CNN Indonesia 2020a). Police have often also targeted LBH itself. In September 2017, for example, the LBH Jakarta/YLBHI office was set upon by Islamist and nationalist protestors after it hosted an academic discussion with survivors of the 1965 anti-communist violence. Police backed the protestors, forced their way into the building and tore down a backdrop banner for the discussion (Hidayat 2017). Perhaps most egregiously, from 2015 to 2021, 20 legal aid lawyers in the YLBHI network were arrested while doing their jobs, with three of them later charged (YLBHI 2021b). Why would LBH seek to engage with an institution that seeks to prevent it from doing its legally protected work?

As a result of these disappointments, LBH has concluded there is little to be gained from expending considerable funds and energy strengthening the capacity of state institutions when they do not bother adhering to the human rights principles to which they have formally agreed. Decisions continue to be made on the basis of corruption, nepotism, political alliances, or simply institutional cultures accustomed to impunity and marked by an unwillingness to submit to greater public scrutiny. LBH looks at the vast sums donors have poured into promoting reform in the Supreme Court and National Police and concludes that engaging with the state to try to promote reform ‘from within’ has resulted in little meaningful change (Interviews, Nurkholis Hidayat, Asfinawati, Muhamad Isnur, Yasmin Purba, 2019). Reflecting on the decisions of law-focused CSOs to collaborate with, and attempt to strengthen, state institutions, like the Supreme Court, following the fall of Soeharto, Asfin is highly critical:

“We can’t judge that decision based on the situation now. But whatever the strategy, it is crucial to involve the community. If bureaucratic reform, engaging with policymakers or reform from within, does not involve the community, it will not result in substantial change. For example, everyone knows judges are corrupt. The approach [of civil society at that time] was as if they did not understand this. They gave them training, aimed to ‘inspire’ them. It’s not that [judges] do not understand, however, they are evil. So we missed the momentum and the evil forces reconsolidated. And we can see the result 20 years later.” (Interview, Asfinawati, 2019).

For the current leadership of YLBHI, any dilemma about the degree to which they should engage with the justice sector has been resolved. The police, the courts, the prosecution are irredeemable. Why devote their limited resources to working with elements of the state to reform the system when it is unlikely state institutions will ever genuinely implement these reforms? History agrees with this view.

Twenty years after the fall of Soeharto, “there is no evidence that the entrenched system of corruption” that characterised Indonesia’s justice system under the New Order has been meaningfully altered (Lindsey and Pausacker 2021, 5).

7.4 Firming of an oppositional identity

The pessimistic attitude of LBH toward the justice sector also extends to the government and legislature. While LBH might have been more open to accommodative versions of cause lawyering in years past, LBH is now very wary of engaging with the government and legislature on reform. The views of Alghiffari Aqsa, the former head of LBH Jakarta, are broadly representative of the views of many LBH staff about the current administration:

“In the five years of Jokowi’s presidency, democracy has declined. Indonesia’s democratic index has fallen dramatically. Our freedom of expression index, as measured by Reporters Without Borders or Freedom House, has also fallen. Militarism has increased. The appointment of military and police figures to civilian posts has also increased. The things that we protested about and successfully prevented during SBY’s [Susilo Bambang Yudhoyono’s] time have just sailed through under Jokowi. Including the revisions to the law on the KPK.” (Interview, Alghiffari Aqsa, 2019).

As the Jokowi presidency has progressed, a deep scepticism about the regime has developed among the YLBHI and LBH network. Consider these comments from Asfin:

“This is the worst government in Indonesia since *reformasi*. When Megawati [Soekarnoputri] was in power, many people were also charged with insulting the president. But this government is the worst. Reports from Freedom House and so on confirm this... Maybe in 2015-2016, the changes were not too dramatic. But from 2018, and especially in 2019, deterioration has been incredibly rapid. It is now almost exactly like living under the New Order.” (Interview, Asfinawati, 2019).

While LBH’s claims of a reversion to authoritarian rule are overstated, there is little doubt Indonesian democracy is in decline. They are right that since President Jokowi came to power, the government has taken active steps to constrain democratic space (Aspinall and Mietzner 2019, 314), and has allowed, even backed, the efforts of the political elite to neuter the KPK (Mietzner 2021b, 168). As Asfin’s comments suggest, democratic regression has contributed to a solidification of the oppositional identity LBH forged during the New Order period. In fact, LBH is unapologetic about performing a more confrontational version of cause lawyering. Democratic regression has provided LBH with a greater degree of clarity about its role. YLBHI’s director of organisational development, Mayong, explains:

“I see LBH as a counterweight to all types of power. We are a watchdog organisation. For as long as community members are victims, we will be in opposition to the government.” (Interview, Febi Yonesta, 2019).

This is not a particularly controversial position. Cause lawyering is, by nature, an oppositional project. As Luban puts it, “cause lawyers are a nuisance to the state and they mean to be a nuisance” (Luban 2012, 705). Cause lawyering is designed to bring about changes to “some aspect of the social, economic and political status quo” (Sarat and Scheingold 1998a, 4) and inevitably, this will involve opposing the government. As cause lawyering is an inherently oppositional project, it could be said LBH is returning to its roots after several years of experimenting with other alternatives. LBH Jakarta director Arif Maulana was also extremely cynical about the Jokowi regime.

“I think you would be naïve if you engaged with or collaborated with the government now. LBH Jakarta’s position is that it is impossible to work with the government. Because the government does not have a vision of democracy, a vision of human rights. Our values are different. How could we possibly work with people whose values, principles, and vision are different to us? It is not possible. And if you still think Jokowi offers hope, that is stupidity. With all the facts that are available. Not only naïve, but stupid.” (Interview, Arif Maulana, 2019).

Arif’s position is a principled one to take but some might dismiss it as too uncompromising, or even lacking maturity. Every day, politicians need to sit down and discuss matters with people who believe entirely different things to them. Even defence lawyers still need to be able to work with prosecutors, even if they do not trust or respect them. Collaborating with the state will invariably involve a degree of compromise. By deciding not to engage with government actors, however, cause lawyers at LBH do not have to worry about moderating their approach, a common consequence of proximity to the state (Scheingold 2001, 390). It allows them to avoid the “moral complexity” of cause lawyering within the state and the unavoidable compromises this involves (Luban 2012). As Luban puts it: “compromise is simultaneously a partial realisation and a partial abandonment of one’s goals”. Purists focus on the abandonment, while those who are willing to compromise focus on the achievement (Luban 2012, 713). Former YLBHI deputy Robertus Robet captures the LBH position:

“People who are working on the inside can no longer speak with one voice with victims. If they are on the outside, they can still speak with one heart, with one voice with victims. This is a very clear, pure, position.” (Interview, Robertus Robet, 2019).

A stringently oppositional approach allows LBH to claim the moral high ground, a certain ideological purity. Other CSOs might collaborate with the government on drafting legislation, and they may gain concessions for their constituents. Yet LBH would argue these small concessions are only tinkering around the edges, and distract social movements from demanding more transformative change. Worse still, in the minds of many LBH lawyers, these kinds of incremental reforms may end up legitimising a corrupt and unjust system, or perpetuating the status quo – the antithesis of cause lawyering. As

Marshall has observed, the incremental policy concessions achieved through institutional strategies rarely address the deeper structural problems that motivate social movements, and these incremental reforms are just as likely to be revoked when the state is no longer under pressure (Marshall 2006, 165). Asfin's comments are illustrative:

“...there must be a limit to engaging with the government. If not, then we are legitimising evil people, or an authoritarian regime... Do we seriously want to engage with murderers, human rights violators? There is no problem with [others] working from inside, and indeed it is needed. LBH has benefited from our friends who work on the inside, we get information and so on. But there needs to be a limit.” (Interview, Asfinawati, 2019).

Indeed, choosing to take a more adversarial position is a perfectly reasonable decision for LBH to make. Not all organisations have to work ‘inside the tent’. YLBHI's head of networking and campaigns, Arip (Yogi) Yogiawan, makes similar observations about the national legislature, or DPR.

“Democracy in the legislature is closed, the oligarchs have control. Look at the percentage of businesspeople in the DPR. PKS [Islam-based Prosperous Justice Party (*Partai Keadilan Sejahtera*)] is the only opposition party, they are too small, and their legislative agenda is very different to ours... We have conducted activities ‘inside the room’ several times but we are not heard. It is closed. So, the next option is to take action outside. If there is no space for us inside the room, we have to take action outside. What does that mean? First, on the streets, and second, on social media. (Interview, Arip Yogiawan, 2019).

Yogi's comments refer to the fact that Indonesia's political parties are widely known to be hopelessly corrupt and under the influence of oligarchs (Mietzner 2015). The legislature is dominated by anti-democratic actors who have increasingly sought to wind back many of the key reforms of the post-authoritarian era (Mietzner 2020b, 241), as demonstrated in the reforms to the law on the KPK. Yogi also mentions the lack of an effective opposition. As Jokowi's presidency has progressed, he has sought to strengthen his power base. After his election in 2014, he had the backing of just 37% of parties in the legislature. But following the election, the government intervened in conflicts in two then-opposition parties, Golkar and the United Development Party (*Partai Persatuan Pembangunan*, PPP), backing pro-Jokowi contenders in leadership tussles (Mietzner 2020a, 1029). By bringing these parties into the coalition, Jokowi was able to secure support from 69% of the legislature (Mietzner 2016, 211). Since being re-elected in 2019, Jokowi strengthened his position further, bringing his presidential and vice-presidential rivals, Prabowo Subianto and Sandiaga Uno, into the government as minister of defence and minister for tourism and the creative economy, respectively. And by 2021, his government had secured the backing of seven out of the nine parties in the DPR, equivalent to 81% of the 575 seats available (The Jakarta Post 2021). Only the Democratic Party and the Islam-based PKS remain outside the coalition. The result is many within LBH view the DPR as being occupied by

political parties that collude to further their own interests, while ignoring the needs of the people they supposedly represent.²⁰⁶

Instead of engaging with the government or legislature directly itself, LBH is much more likely to leave this work up to its colleagues in civil society. It recognises that engaging with the state is a valid strategy, however it is not an approach it chooses to follow. Instead, LBH typically participates in civil society coalitions but allows other members of the coalition to engage with state structures. As Pratiwi Febry from LBH Jakarta explains:

“We know the DPR is a mess. There is significant horse-trading involving exchange of money to pass laws. So intervening in the legislature, lobbying political parties, we don’t do it. We think it can be strategic, of course, but we don’t want to interact with political parties, we leave it up to the [broader civil society] network. Why? To protect our independence. We choose to do political work on other levels, not by approaching parties.” (Interview, Pratiwi Febry, 2019).

Civil society, including LBH as a key member, was heavily involved in the formulation of a draft bill on the protection of migrant workers, which eventually became Law No. 18 of 2017 on the Protection of Indonesian Migrant Workers (YLBHI 2018a, 106–8). Likewise, LBH Jakarta was also involved in the civil society coalition that prepared the draft bill on the eradication of sexual violence (*RUU PKS*). Although LBH Jakarta did not lobby the legislature, it still provided support in drafting the civil society prepared bill. To provide another example, YLBHI and LBH Jakarta are members of the ‘National Alliance for Reform of the Criminal Code (KUHP)’ (*Aliansi Nasional Reformasi KUHP*). The Institute for Criminal Justice Reform (ICJR) and Elsam take the lead in managing this network. Since 2005, ICJR has analysed the government and DPR prepared draft bills on a new revised criminal code, prepared policy papers, formulated lists of key concerns, and delivered its feedback to legislators.

Despite this longstanding engagement, in September 2019, the national legislature came very close to passing a highly problematic version of the revised code, despite vociferous criticism from civil society. It became clear that regardless of civil society’s efforts to meet regularly with the legislature and explain flaws in the draft code and the risks associated with its excessive reliance on criminal sanctions, the DPR was prepared to pass a problematic version. Only massive street-level protests were able to stop it being passed. Around this time, I spoke to Muhamad Isnur, head of advocacy at YLBHI.

“Evaluating the history of civil society engagement with the government, has working from the inside been significant? That is our big question to them. Our friends who have worked with the police on reform, what do you say about the police now? The next question is, are

²⁰⁶ This type of view broadly mirrors the party cartelisation argument proposed by Dan Slater. He argues parties engage in “promiscuous power sharing”, which has impeded the emergence of an effective political opposition (Slater 2018).

you guaranteed to get anything from engaging with the government? We realise they are facing powerful interests. Ultimately, we understand and respect their role. As long as they don't become a part of government, as long as they can guard their critical engagement, we can still work with them. So, we share responsibilities. For example, on the issue of the KUHP, ICJR works from the inside and lobbies the DPR. We respect this. But in the end, the DPR does not respect their lobbying. We understand and respect their decision, and we are still friends with them. They are still members of our larger coalition. In this time of democratic regression, we understand the importance of their role, the importance of working together.” (Interview, Muhamad Isnur, 2019).

As noted, one of the risks of conducting cause lawyering in close proximity to the state is co-optation (Scheingold 2001, 388). By deciding to maintain a distance and let its colleagues in civil society take a more prominent role in negotiating with legislatures and the state bureaucracy, LBH can claim it is completely loyal to its causes.

Isnur's colleague, Rakhma, had even stronger words for LBH's civil society colleagues from the Consortium for Agrarian Reform (*Konsorsium Pembaruan Agraria*, KPA) who have worked with the state on agrarian reform (Saptowalyono 2021). The 2019 *Reformasi Dikorupsi* protests were largely focused on the attacks on the KPK and the deeply problematic revised KUHP, but student and civil society demonstrators also objected to legislators' plans to pass a revised land law (*RUU Pertanahan*) and revised mining law (*Pertambangan Mineral dan Batu Bara* or *RUU Minerba*). In late September 2019, at the height of the protests, KPA and other farmers' groups met with the head of the Office of Presidential Staff and former head of the Indonesian military (*Tentara Nasional Indonesia*, TNI), Moeldoko (CNN Indonesia 2019c) to discuss agrarian reform. Rakhma was livid. I asked her about it again in 2021.

“The agrarian reform movement cannot be separated from how we view state policy as a whole. On one hand, the state passes laws like the Omnibus Law on Job Creation and the Mining Law,²⁰⁷ but on the other, to placate civil society, they are invited to the Presidential Palace, and offered a role in agrarian reform. It is like a child being offered a lollypop – ‘There, there, no need for you to be so angry’. Members of our network accepted this, and that's why we were so disappointed.” (Interview, Siti Rakhma Mary Herwati, 2021).

This example is critical for understanding how the LBH position has developed over recent years. Arguably, by working with the state on agrarian reform, KPA and other groups might secure some minor wins for local communities grappling with land conflict. Of course, LBH also wants to see better outcomes for local communities too. But LBH has its sights fixed on larger, and what it would argue are more substantive targets – the protection of Indonesia's democratic gains.

²⁰⁷ In 2020, when Indonesia was grappling with the consequences of the Covid-19 pandemic, the legislature passed the revised Mining Law (Law No. 3 of 2020 amending Law No. 4 of 2009) it had failed to pass in 2019, as well as the highly contentious Omnibus Law on Job Creation, discussed above. Both laws were roundly criticised by civil society for dismantling environmental protections (Mietzner 2020b, 242–43).

As discussed in Chapter 2 and Chapter 3, taking a defiant adversarial position in opposition to the state may entail some risks for lawyers. Some cause lawyering scholars have suggested that under authoritarian regimes, lawyers would be expected to pursue less confrontational approaches, and work within the limits of the authoritarian system to secure the small changes they can (Chen and Cummings 2013, 455). This does not seem to be the case for LBH. Throughout its history, it has been prepared to take a bold, political stance, in the courtroom and beyond, despite the risks of backlash. As noted above, over recent years, LBH has often faced the threat of arrests or criminal charges when it touches on politically sensitive matters. To take another recent example, during fieldwork in 2019, YLBHI director Asfin (along with KPK Spokesperson Febri Diansyah and ICW Coordinator Adnan Topan Husodo) was reported to police for “spreading fake news” after making comments critical of the selection process for the new leader of the KPK (Ramadhan 2019). The report was never followed up, and following a familiar pattern, seemed designed to silence civil society criticism. While physical threats are rarer, they also occur. In September 2021, for example, a Molotov cocktail was thrown at the office of LBH Yogyakarta, the first time the office had faced such an attack in its history (S. Maharani 2021).²⁰⁸ As the next chapter will discuss in further detail, these kind of threats have only seemed to harden LBH’s resolve. It has been energised by a more repressive environment.

7.5 Independent quasi-state institutions

If LBH is so cynical about the state, what about the new independent institutions, such as the National Commission on Human Rights (Komnas HAM), the National Commission on Violence Against Women (*Komisi Nasional Anti Kekerasan Terhadap Perempuan*, Komnas Perempuan), the Indonesian Ombudsman (*Ombudsman Republik Indonesia*), the Witness and Victim Protection Agency (*Lembaga Perlindungan Saksi dan Korban*, LPSK), the National Police Commission (Kopolnas), the Judicial Commission (*Komisi Yudisial*, KY), and the Prosecutors Commission (Komjak)? Aside from Komnas HAM, which was founded in 1993, these institutions are direct outcomes of the transition to democracy after 1998.²⁰⁹ One might therefore expect these new institutions would have an impact on the shape of cause lawyering practiced after the democratic transition. However, they do not feature prominently in this thesis simply because LBH has found them disappointing. It is true LBH lawyers repeatedly identified Komnas HAM, Komnas Perempuan and the Ombudsman as the institutions most helpful for supporting their work but they also said these institutions were constrained by their limited ability to coerce the government to follow up on their reports. YLBHI’s Yogi summarises the LBH position:

²⁰⁸ At the time of writing, it remained unclear who was behind the attack. LBH Yogyakarta was defending a range of land conflict cases involving government, military and business interests (S. Maharani 2021).

²⁰⁹ Komnas Perempuan was established in 1998 in the wake of widespread sexual violence during the May 1998 riots that accompanied Soeharto’s fall; the Indonesian Ombudsman was established by law in 2008; LPSK was established by law in 2006; Kopolnas was established through a presidential regulation in 2011; the Judicial Commission was established in 2001 as a result of constitutional amendment; and the Prosecutors Commission was established through a revision to the Law on the Prosecution Service in 2004.

“We had a lot of hope for these independent institutions. In the early 2000s, they were proactive. If there was an incident, we would report it to them, and they would respond quickly. Now Komnas HAM is slow – we even published a report on [declines in] freedom of expression before they did... The Ombudsman is committed, it wants to work, but its reports are usually ignored... Komnas Perempuan is progressive but it is highly centralised and can really only have an impact on issues involving women and children.” (Interview, Arip Yogiawan, 2019).

LBH cause lawyers have little faith in these institutions as institutions, although there are individuals in these organisations on whom they rely as allies or sympathisers (Interviews, Muhamad Isnur, Pratiwi Febry, 2019). However, even the presence of former LBH staff in these institutions has not been enough for them to live up to LBH’s expectations.

“Organisations like Kompolnas, the Prosecutors Commission, LPSK, they have all had former LBH members on staff, but they have not been able to achieve anything. We hoped that [the former LBH staff] would introduce the LBH perspective into these organisations, but they ended up sinking in the organisational culture.” (Interview, Adbul Fatah, 2019).

As a result, LBH does not depend on these institutions in its cause lawyering work, although it does recognise they can help bolster advocacy activities by lending their institutional support to LBH’s goals, in the form of joint statements or collaboration in public events. More commonly, however, if these institutions are approached, it is usually as a box-checking exercise, to demonstrate all avenues have been attempted (Interviews, Nurkholis Hidayat, Pratiwi Febry, 2019). Clearly, the fact that these new democratic institutions have not emerged as critical sites for cause lawyering is another sign – and consequence – of the democratic backsliding that has occurred over the past decade.

I now look at how LBH’s oppositional approach to engaging with the government plays out in practice, with a brief example from a civil society-led conference.

7.6 National Conference on Legal Aid

On 20 August 2019, I attended a civil society-run national conference on legal aid on the outskirts of Jakarta. The conference was organised by YLBHI in collaboration with the Indonesian government and several CSOs,²¹⁰ with funding support from USAID, through the Asia Foundation-managed MaJU program, the Dutch government and the International Development Law Organisation (IDLO). It was attended by more than 350 representatives from legal aid-providing organisations (in addition to the offices in the YLBHI network), paralegals and CSOs.

The plenary session on the first day discussed government policy on expanding access to justice and legal aid, and took the format of a talk show, with representatives from BPHN, Bappenas, the

²¹⁰ LBH Apik, the Indonesian Legal Resource Center (ILRC), PBHI, Community Legal Aid Institute (LBH Masyarakat), LBH Jakarta, and MaPPI.

Ministry of Research and Higher Education, the National Police, the Attorney General's Office, and the Supreme Court, as well as Asfin as head of YLBHI. When asked about how police are ensuring access to legal aid during the investigation process, the police representative gave a normative response, saying that when a community member faces legal troubles, police are required to provide access to legal aid in accordance with the Criminal Procedure Code (KUHAP). If they don't have a lawyer, he said, police send a letter to local legal aid providers to request representation. Likewise, the representative from the prosecutor's office claimed that if prosecutors received a file from the police where the suspect faced a sentence of five years or more, then they would immediately remind police the suspect must be represented. For Asfin, these kinds of platitudes were insulting, and she reacted accordingly. Speaking loudly and passionately, Asfin asked the crowd:

“How many of you provide legal aid in criminal cases? [most but not all attendees raise their hands]. So, not all legal aid organisations defend criminal cases. Of those of you who raised your hands, how many of you have been prevented from accessing your client by police or prosecutors? [more than half of those who raised their hands raise their hands again]. I'm sure that for all of you who raised your hands, there would be others not in this room with the same experience, and many would have been rejected more than once. Equality before the law for people like me and my friends here is like a bedtime fairy tale – repeated every night but never eventuating. We have memorised it, we are familiar with it, but equality before the law is never realised.”

The room erupted in rapturous applause, with many of the legal aid lawyers and paralegals jeering and laughing. Of course, Asfin was completely right. A study by Indonesian CSO the Institute for Criminal Justice Reform (ICJR) reported only 2% of detainees have legal counsel present during police questioning (Domingo and Sudaryono 2016, 25).²¹¹ And according to Indonesian scholar of corrections Leo Sudaryono, in interviews with 56 inmates in prisons in Banten, Jakarta, Central Java, South Kalimantan and West Kalimantan, 41 (73%) reported being convicted without ever having access to a lawyer (Sudaryono 2020b). Police and prosecutors should be called out when they claim otherwise. However, some CSOs and LBH donors would question whether shaming police and prosecutors in a public forum like this is a strategic approach. These were state officials who were willing to attend a civil society-run event, suggesting they were at least open to the idea of engaging with civil society in discussions on reform. Embarrassing them in public like this would likely shut down any possibility for future collaboration, at least with the individuals on the panel. On the other hand, Asfin's response was entirely consistent with Abel's depiction of cause lawyers “speaking law to power” (Abel 1998). I am sure Asfin felt a responsibility to respond in the way she did. It was the truth, and an expression of LBH's ideology of legal aid, of holding power to account. At the same time, it reinforced LBH's position as an outsider.

²¹¹ Police claim they offer representation but detainees often reject it. There is reportedly a common belief among detainees that legal representation could lead to a worse experience in detention, or police will pursue harsher charges against them (Domingo and Sudaryono 2016, 25).

These theatrical shows of defiance have a long history at LBH. Consider how Asfin's public excoriation of officials mirrored Buyung's outburst in court during the Dharsono case described in Chapter 3. These techniques of political theatre are also reflected in the criminal defence trials that LBH is aware that it is going to lose, such as the Gafatar blasphemy case described in Chapter 5. As discussed, these methods are common to cause lawyers operating in authoritarian contexts. When the odds are stacked against them, cause lawyers use the safe space of the courtroom (or in this case, the shared stage of a conference) to make principled points in defence of human rights, democracy and the rule of law. While other organisations might be more wary of preserving their relationships and access, LBH is prepared to engage in confrontational strategies that could quite easily see them being ostracised by lawmakers and other officials.

There is another way of looking at Asfin's response. As the only civil society figure on the panel, Asfin knew she faced the additional burden of representing, or providing a voice for, the many civil society legal aid providers and community paralegals in attendance. Many junior legal aid lawyers and community paralegals would have had little or no opportunity to deliver complaints about lack of procedural fairness to senior government officials. I suspect Asfin's response was as much driven by outrage at the dishonesty of police and prosecutors as it was about building solidarity among the paralegals and legal aid lawyers, providing them with a rare public acknowledgement of the challenges they face daily in the field. It was partly about tending to and building 'the legal aid movement'. This is also consistent with an approach to cause lawyering that emphasises community organising over proceduralist approaches that seek to improve the functioning of the system, as discussed in Chapter 6.

7.7 Criticism of LBH's oppositional strategies

Some of LBH's contemporaries in civil society have argued maintaining a stridently oppositional position does not make as much sense following the transition to democracy, now there are new avenues to contribute to legal reform. Consider these comments from Windu Kisworo, from IDLO (one of YLBHI's donors) and the former deputy director of the Indonesian Centre for Environmental Law (ICEL), an organisation that has a history of collaborating with the state on reform:

"During Susilo Bambang Yudhoyono's first period [2004-2009], it was like the tap was opened for civil society to be involved in the decision-making process. We used to call it the honeymoon period for CSOs. Yudhoyono's government needed legitimacy as a government that was democratic and open, and CSOs got more room... There was a time when people looked at LBH and thought 'What are you doing? Aren't we all trying to build the country?' But in Yudhoyono's second period, it became clear LBH was right to be hesitant about collaborating with the state." (Interview, Windu Kisworo, 2019).

Although Windu is now sympathetic to LBH's confrontational strategies, his initial comments reflect a narrative about LBH expressed not uncommonly among foreign donors. When I was working in Jakarta, there was a perception LBH had failed to adapt to the times, that the democratic transition had

provided new opportunities to contribute to policy reform and LBH was not taking advantage of them (see Davis 2015, 4). Or that LBH's ideology of opposing authoritarianism had been carried over from the New Order, and it had failed to develop more sophisticated analysis about patterns of power relations in the democratic era. Donors were still expressing these kinds of views during fieldwork in 2019 (Interviews, confidential, 2019). As Carolina S. Martha, formerly of YLBHI herself, but now at The Asia Foundation, said, "They shouldn't just blindly oppose [*babi buta melawan*]. They should oppose with strategy." (Interview, Carolina S. Martha, 2019).

Abdul Fatah, a former senior lawyer at LBH Surabaya, was also critical of LBH taking a purely adversarial approach:

"Some LBH offices still see the government as the enemy... If we want to work on policy reform in Indonesia, want to or not, we must enter the system. We have to prepare policy briefs, to enlighten them. If we want to push for a legal aid regulation at the local level, for example, we can't just work from outside, we will never be successful. The government should be our partner in pushing for legal reform." (Interview, Abdul Fatah, 2019).

Notably, much of the criticism of LBH's approach comes from international donors, which, as discussed in Chapter 4, have a strong preference for governance-focused programming and are less inclined to support vigorous activism in opposition to the state. Donors also tend to be conservative and somewhat slow to respond to political developments, and may not have the same appreciation of the extent of democratic backsliding as LBH. Their funding parameters also tend to be fixed years ahead and are not very flexible. They are predisposed to elite circles and are more comfortable operating in them, so it is little wonder they favour elite/vanguard strategies of cause lawyering focused on collaborating with the state to change the law.

7.8 Conclusions

In this chapter, I examined LBH's efforts to engage with the state in accommodative, elite-focused forms of cause lawyering. There is no question the democratic transition in Indonesia provided new opportunities for elite/vanguard strategies of cause lawyering. This meant that after the fall of Soeharto's New Order, cause lawyers were faced with the choice of participating in state structures or maintaining a confrontational approach. As this chapter has demonstrated, LBH has largely retained the oppositional approach to engaging with the state it cultivated under the New Order. This was particularly the case in regional LBH offices, which were reluctant to temper their "militancy". This meant LBH has missed some opportunities to contribute to policy reform. In LBH's case, at least, it was never as simple as democratic transition providing the conditions for cause lawyering to thrive.

Although LBH has mostly maintained an oppositional stance in terms of its relations with the government, it did explore collaboration with state institutions to some extent. Indeed, YLBHI's contribution to the passage of the 2011 Legal Aid Law is one of its most important policy achievements in the democratic era, providing its network with more reliable access to government

funding. But aside from this, LBH has had limited success engaging with legislatures and the executive on policy reform. Much like Gordon observed of cause lawyers seeking to strengthen the rights of immigrant workers in sweatshops in the United States, they have realised that “in a setting where every law on the books is flouted, the incentive to add one more rule to the list of those already ignored is minimal” (Gordon 2005, 27).

The picture has become more complicated over the past five to 10 years. Reform has ground to a halt and opportunities for cause lawyering through legislative and administrative channels are narrowing. Indonesian democracy is under pressure. While there was a period when LBH was open to exploring engaging with government agencies on reform initiatives, the past five years have seen a crystallisation of LBH’s oppositional approach. LBH cause lawyers now shy away from – if not reject completely – elite-focused strategies. They are deeply sceptical of efforts to collaborate with the government and legislature on reform. LBH has concluded that more accommodative strategies are the wrong approach in this environment of democratic regression, and perhaps were never appropriate until liberal democracy was truly in place.

A healthy democracy needs CSOs that can both criticise and collaborate with the state. But LBH does not need to do both itself. LBH collaborates with broader civil society, including with those organisations that are more willing to work with government agencies, the courts, and the legislature.

The erosion of Indonesian democracy has seen LBH return to a more stridently oppositional position on engaging with the government, similar to the position it took under the New Order. Not engaging might mean LBH lacks direct influence over those in power, as its critics sometimes point out. LBH is aware of this but guards its independence out of a moral concern for its clients, and a belief that maintaining a distance allows it to avoid the risk of co-optation. It has decided that being able to stand on the side of justice seekers is more important than winning small concessions that are unlikely to be implemented. Its uncompromising position is also consistent with an approach that is consistent with seeking broader, transformational change. It has no hesitation about taking this stridently oppositional approach, even if it may sometimes risk backlash from elements of the state.

Structural legal aid is also an approach focused on achieving transformational change. I now continue to reflect more broadly on LBH’s strategies of work, examining how structural legal aid has been implemented since the fall of the New Order, and its relationship with democratic change.

Chapter 8: The ‘revival’ of structural legal aid and return as an oppositional force

8.1 Introduction

This chapter synthesises discussions in Chapters 5, 6 and 7, returning to take a closer look at the concept of structural legal aid and how it has been applied in the post-Soeharto period. Previous chapters reflected on the main cause lawyering strategies adopted by LBH cause lawyers in the post-authoritarian era, covering litigation-focused approaches like case defence and strategic litigation (Chapter 5), as well as nonlitigation strategies, including both grassroots strategies like community organising and community legal empowerment (Chapter 6) and elite-focused strategies like policy advocacy (Chapter 7). This chapter takes a broader view, drawing these strands together and reflecting on how they resonate with LBH’s approach to legal aid and activism, structural legal aid, and how this concept has been implemented over time. The chapter also looks at a strategy connected to structural legal aid – convening and coalition building in civil society. This was an important role played by LBH in the late New Order period, and it is becoming important again now, as Indonesian democracy is unravelling.

8.2 Structural legal aid in post-authoritarian Indonesia

Structural legal aid was largely focused on changing the ‘structure’ of the highly centralised Soeharto regime. That is, it was a defiantly oppositional project aimed at breaking down authoritarian political and legal structures that repressed the poor (Nasution 1985, 36). It sought to change the law and policy, but it also had a strong focus on strengthening ‘power resources’ at the grassroots, and so sought to make change through community organising and community legal empowerment, believing a mobilised grassroots was essential in the drive for change (Lev 1987, 16).

The collapse of the New Order meant structural legal aid could no longer be solely concerned with the power relationship between the people and the state, rather it had to consider the relationships among communities, among individuals within communities, and between people and corporations. The power relationships that resulted in the legal problems of the poor were now more complex. Some within LBH questioned whether structural legal aid was even relevant anymore (Interview, Febi Yonesta, 2019). With the fall of the New Order, the key threats to poor and marginalised Indonesians (and opportunities for civil society to contribute to reform) had changed, but structural legal aid had not. The result was LBH offices began to interpret structural legal aid in different ways, while some even abandoned it. As former head of LBH Jakarta Nurkholis Hidayat explains:

“One of the challenges with structural legal aid in the *reformasi* era [after 1998] is that there are too many targets to address. In the past, all our efforts were focused on taking down the regime. That is why LBH was organising farmers, laborers, academics, cultural figures and so on. The goal was to unify them to change the political situation. But after *reformasi*, there were too many systems and problems, and we were pushing for change here, there and

everywhere. This resulted in structural legal aid being understood or translated in different ways.” (Interview, Nurkholis Hidayat, 2019).

Another factor resulting in the diminished prominence of the structural legal aid approach in the post-Soeharto years was the decline in the influence of the central YLBHI umbrella body over the regional LBH offices. As discussed, financial constraints and leadership tussles within YLBHI resulted in a weaker central body and provided room for LBH offices in the regions to become more autonomous. From about the mid-2000s until the current leadership team was installed in 2017, there was little oversight from YLBHI of how structural legal aid was being implemented by regional offices. Many LBH offices had their own interpretations of the best way to implement structural legal aid.²¹² Some offices neglected the structural legal aid approach altogether and retreated into a more conventional, litigation-focused approach to legal aid. This is a development of which the current YLBHI leadership team has been quite critical.

“LBH lawyers are educated not just to be lawyers, they must be the ‘axis’ of social movements. LBH is a social movement, it will always be a part of social movements. LBH lawyers are always encouraged to accelerate the achievement of social movements’ aspirations. This is a competency all LBH lawyers must have. It is a challenge. At times, some LBH offices have been too focused on litigation, and we have criticised them for this.” (Interview, Muhamad Isnur, 2019).

It might seem odd for a legal aid organisation to be critical of litigation. But Isnur’s comment speaks to the political understanding of LBH’s role that is dominant among the YLBHI leadership. There is now a stronger effort from YLBHI to work with its regional offices to advance a common understanding of structural legal aid, one that emphasises the grassroots community organising and community legal empowerment aspects of the concept.

As discussed, during the 1980s, senior YLBHI and LBH lawyers produced a considerable amount of work attempting to articulate the theory and methods of structural legal aid. While structural legal aid has remained a broad guiding principle for the work of LBH cause lawyers in the period following the fall of Soeharto, there have been limited attempts to revisit or revitalise the theory behind it for the current context. As Abdul Fatah, formerly from LBH Surabaya, explains:

“Structural legal aid is a living product. The interpretation of structural legal aid should be continually perfected and contextualised. When we speak of structuralism, we can’t just look at the relationship between the people and the state, because the government is not the only perpetrator of injustice, the market, for example, can also be a perpetrator. We have yet to focus much on that. Structural legal aid needs to be renewed. There are few people studying structural legal aid at the moment.” (Interview, Abdul Fatah, 2019).

²¹² Interviews, Muhamad Isnur, Prawiti Febry, Siti Rakhma Mary Herwati, Yunita, 2019.

When Asfin assumed the YLBHI director's position in 2017, she and her team immediately set about promoting a more unified approach to structural legal aid across the LBH offices. YLBHI's 2017 strategic planning meeting, for example, involved efforts to revitalise the concept, and included reflective presentations on structural legal aid from respected figures like former Komnas HAM member MM Billah and academic Donny Danardono. A special edition of YLBHI's *Bantuan Hukum* (Legal Aid) bulletin was published on the topic, in which Asfin reflected on the theoretical and philosophical basis of the concept, and attempted to update it for the post-Soeharto period (Asfinawati 2017). This was a dense, theory-heavy document that referred to the work of sociologists including Jean-François Lyotard, Jean Baudrillard, Pierre Bourdieu and Anthony Giddens. I doubt LBH lawyers in the regions would have found much of use in this, and in any case, there has been no fundamental shift in the way structural legal aid is being understood. In fact, senior YLBHI lawyers recognise there is not much to be gained from these theoretical ruminations for cause lawyers on the frontline. Rather, it is more important that LBH offices across the country share a similar approach to their practice of cause lawyering. As YLBHI's Mayong explains:

“When we gathered to formulate a structural legal aid guide [for regional LBH offices], we decided we were not too interested in continuing to explore the theory or the concept, we were more focused on what it means practically. It was like, ‘This is what we mean by structural legal aid, the approach that LBH has practiced for years’.” (Interview, Febi Yonesta, 2019).

In practice, the core elements of structural legal aid have changed little since it was first formulated in the New Order period. It continues to prioritise the cases of communities over individuals, and if the cases of individuals are taken on, they must contain a structural element, that is, there must be a rights violation or an element of structural inequality that resulted in the victim's suffering. As stated, in recent discussions on structural legal aid, there is a strong emphasis on the importance of community organising and community legal empowerment as part of the process. When a case is managed using the structural legal aid approach, there are attempts to ensure individuals or communities emerge stronger from the process, and develop the skills to independently advocate for the needs of their communities. Consider these comments from the current and former directors of LBH Jakarta:

“The thing that differentiates structural legal aid from conventional legal aid is that LBH promotes community legal empowerment, it encourages broader society to take action to realise social justice. To change policy, to create spaces for the full participation of the community in a democratic country, want to or not, public interest lawyers cannot act alone. They need public support. Structural legal aid is not just an activity but a movement. And as a movement, it must be able to push for the involvement of the broader community” (Arif Maulana, 2019).

“In implementing structural legal aid, we are often stuck in thinking that as long as we do paralegal training, research, and strategic litigation or citizen lawsuits, then we are implementing structural legal aid. In my opinion, that is not enough. Because requesting a

judicial review, for example, without mobilising political strength, is just strategic litigation, it is not yet structural legal aid.” (Interview, Alghiffari Aqsa, 2019).

Structural legal aid under the New Order, while still promoting community organising and community legal empowerment, was also oriented toward changing the law, to push for a more democratic legal structure. As discussed in Chapters 5, 6 and 7, over recent years, cause lawyers at LBH have developed a deep scepticism about the ability of legal reforms to lead to actual change in the lives of the community. To borrow the words of Freeman and Freeman, they have learned through harsh lessons “that even the most progressive policies are little more than words on a page to their communities if the underlying power dynamics are not altered” (Freeman and Freeman 2016, 150). This is why they consider there is little to be gained from working with the government or legislature to draft legislation, as was discussed in detail in Chapter 7. Mohamad Soleh, of LBH Surabaya, reiterates this point:

“In the past, LBH would prepare alternative drafts of laws. We would tell them, ‘this is a better version of the regulation’, and so on. But in our current political system, where the oligarchs are growing in strength, this approach is not very effective. For example, our input in the draft local regulation on legal aid was ignored. In the end, yes, we should still do things like preparing alternative drafts, but encouraging the public to participate and act is also very important... Because the legislature and the executive do not want to listen to the aspirations of the community. Want to or not, we have to strengthen the community.” (Interview, Mohamad Soleh, 2019).

Despite the occasional wins in forums like the Constitutional Court or administrative courts (described in Chapter 5), there is also considerable scepticism about the benefits of strategic impact litigation in an environment of democratic regression. The comments of LBH Jakarta director Alghiffari Aqsa demonstrate this view:

“The consolidation of elites or oligarchs in their efforts to forget about democracy and human rights has been extraordinary. Legal efforts create a stage, create a moment. They are useful as an accelerator only but should not be the end goal, because legal efforts will not resolve the problem. Structural legal aid needs to change its perspective now. In the past, if litigation efforts were effective and provisions were changed, then we would say that structural legal aid was successful. But it turns out that was not the case. The regime ignored the law.” (Interview, Alghiffari Aqsa, 2019).

These comments from Alghiffari and Soleh are critical. They reflect views almost universally shared across the YLBHI network. They also reflect an affinity with the views of leading oligarchy scholars, Jeffrey Winters (Winters 2011), Richard Robison and Vedi Hadiz (Robison and Hadiz 2004; Hadiz and Robison 2013), discussed briefly in the Introduction to Part Two. Hadiz and Robison define oligarchy as “a system of power relations that enables the concentration of wealth and authority and its collective defence” (Hadiz and Robison 2013, 37). They state the New Order period saw the

emergence of a form of oligarchy involving a fusion of economic and politico-bureaucratic power (Hadiz and Robison 2013, 38), and the institutional reforms implemented after the fall of Soeharto were unable to dramatically alter this organisation of social and economic power (Hadiz and Robison 2013, 35). They observe that:

“[A]ccess to and control of public office and state authority continues to be the key determinant of how private wealth and social power is accumulated and distributed. Many of the old faces continue to dominate politics and business, while new ones are drawn into the same predatory practices that had defined politics in Indonesia for decades” (Hadiz and Robison 2013, 35).

Winters, meanwhile, defines oligarchy as “the politics of wealth defence by materially endowed actors” (Winters 2011, 7). He describes oligarchs as “actors who command and control massive concentrations of material resources that can be deployed to defend or enhance their personal wealth and exclusive social position” (Winters 2011, 6). According to Winters, oligarchs only emerge in situations where the accumulation of massive personal wealth is possible (Winters 2011, 6). New Order-era oligarchs easily adapted to the new democratic structure instituted following the fall of Soeharto. With their extreme wealth, media empires and influence over political parties (by nature of having the money to create positions for themselves in parties or fund others), they have been able to “capture and dominate Indonesia’s money-driven electoral politics” (Winters 2013, 18–19). During the New Order years, Soeharto was able to keep oligarchs in check. But with Soeharto gone, this task was left up to the legal system – and the legal system has demonstrated it is incapable of performing this role (Winters 2013, 19).

A key feature of both Winters and Hadiz and Robison’s analyses is that the transition to a formal democratic structure has not been able to dismantle oligarchic power. Or, to borrow again from Hadiz and Robison, “the disintegration of authoritarian rule and the introduction of democratic and market institutions do not in themselves give rise to a broader liberal transformation of society and politics” (Hadiz and Robison 2013, 36).

LBH rarely makes detailed reference to such academic works in its analysis of political events or in the design of its programs and I do not wish to suggest a sophisticated knowledge of, or close adherence to, the views of a particular thesis of oligarchy (or, for that matter, critiques of the oligarchy approach to analysis of Indonesian politics from scholars like Thomas Pepinsky or William Liddle (Pepinsky 2013; Liddle 2013)). Nevertheless, it is clear that, despite the democratic reforms of the past two decades, LBH believes democratic change has only occurred in a formal or institutional sense – and the substance of liberal democracy remains shallow. LBH cause lawyers point to examples like the 2019 revisions to the Law on the KPK, or the controversial 2020 Omnibus Law on Job Creation, to highlight that the government and legislature readily and routinely ignore the interests of citizens when it suits them. Returning to the matter of structural legal aid and its connection with oligarchy, I will leave the last words to YLBHI’s Isnur.

“The problems Indonesia is facing are the result of the growing power of oligarchs. Indonesia is an oligarchic country, controlled by a handful of people... It is a system that perpetuates oligarchy. Structural legal aid sees this as a problem that needs to be solved, so of course it is becoming relevant again. The community at the grassroots suffers more when the oligarchs are stronger... LBH is correct in pursuing structural legal aid in a system like this.” (Interview, Muhamad Isnur, 2019).

8.3 The dynamics of structural legal aid over time

Given structural legal aid is re-emerging as an important approach guiding LBH’s work, it is worth looking closer at how it has been implemented over time. Under the New Order, structural legal aid was a relatively straightforward concept. It was designed to oppose authoritarianism and focused on breaking down the legal structures that oppressed the poor. Things were bound to change when this authoritarian regime was removed.

As discussed, from 1998 through to the mid-2000s, the government was more actively engaged in liberal democratic reform. The constitution was amended, new statutes on human rights were passed, there were vast improvements in judicial autonomy, a Constitutional Court was established, restrictions on media freedom were lifted, and CSOs had new opportunities to be actively involved in contributing to the democratisation process. Many cause lawyers at LBH found the structural legal aid concept to be less relevant.

“In the early years of *reformasi*, people still had hope, so maybe structural legal aid was forgotten. But after we evaluated how we have done 20 years after *reformasi*, we realised that there has been a failure of the civil society movement to be faithful to the goals of structural legal aid. And that’s why we have ended up where we are today.” (Interview, Pratiwi Febry, 2019).

Perhaps, as LBH Jakarta lawyer Pratiwi seems to suggest, democratic transition meant LBH took its eyes off the sources of power for a while. Following the fall of Soeharto, many LBH offices in the regions settled into a more conventional approach to case representation, and community organising and community legal empowerment strategies decreased in prominence.

“Regional [LBH] offices’ work with social movements has become weaker. They don’t use community organising much as a strategy for change. This is very clear... I have seen this when I have delivered sessions in Kalabahu trainings at several offices. There are still offices committed to a movement strategy, but there are also those that do not use it at all, and all their focus is on lawyering. Community organising has been left behind.” (Interview, Herlambang P. Wiratraman, 2019).

Following the democratic transition, senior YLBHI figures like founder Buyung sought to push the organisation in a more proceduralist direction. As mentioned, proceduralist lawyers believe in the

promise of the legal system to deliver justice if it functions as it should (Hilbink 2004, 666). The focus was on pushing the legal system to meet its responsibilities in democratic Indonesia, to achieve even just a thin version of the rule of law. This focus on procedural justice is a valid and important goal in a newly democratic state in which the courts were emerging from decades of executive interference. Another feature of a proceduralist approach is a tendency toward the representation of individual clients, without connecting them to a larger cause (Hilbink 2004, 672). As discussed in Chapter 4, this might have been a view to which Buyung subscribed, at least in the latter part of his career, but it was certainly not shared by most other LBH lawyers. I suspect the reversion to a more proceduralist approach that occurred in some LBH offices was caused by a combination of the ‘identity crisis’ precipitated by the loss of a common enemy in Soeharto, a lack of oversight from YLBHI in encouraging a consistent approach based on structural legal aid, and the simple fact that a proceduralist or litigation-focused approach comes naturally to many lawyers – given their education, litigation may be “the line of least resistance” (Sarat and Scheingold 2006b, 2).

Although some LBH cause lawyers moved in a more proceduralist direction, in the decade following the fall of the New Order, other LBH cause lawyers experimented with strategies consistent with the elite/vanguard typology of cause lawyering. Recall that the elite/vanguard cause lawyering is based on a belief in law’s capacity to contribute to social change (Hilbink 2004, 674). There is an emphasis on test-case litigation and substantive law reform over other forms of political action, such as demonstrations or protests (Hilbink 2004, 673). As discussed, in the mid-2000s, when many believe Indonesia was at its democratic peak (Mietzner 2021a, 11–16), lawyers from YLBHI and LBH Jakarta in particular launched several challenges along with other CSOs to problematic legal provisions, as a way of testing the newly established Constitutional Court. There were also significant efforts to work with state institutions like the police, to reform their internal procedures, as well as collaborate on legislative drafting, as discussed in Chapter 7.

Over the past five to ten years, however, as the government has actively targeted its critics and constrained civic space, LBH staff have become increasingly disillusioned with the government and legal system, and the capacity of legal reforms to lead to social change. This has seen renewed attention to the type of highly political structural legal aid practiced under the New Order, with a stronger emphasis on community organising and community legal empowerment. Consider these comments from Nurkholis Hidayat, former director of LBH Jakarta.

“Over the past 20 years, some have said that structural legal aid means changing policy, but others said it means empowering the community so they develop a political perspective and can take the lead themselves. Now the political situation is returning to what we faced under the New Order, structural legal aid will naturally return to its previous function. With the Presidential Palace as the source of all the problems we are facing, structural legal aid will become more sharply focused... In the past, all energy was focused on getting rid of the New Order regime, and [donor] funding support backed these efforts. After the New Order fell, people had their own definitions of structural legal aid and [the relative importance of] litigation versus nonlitigation approaches. There were many changes, wins in the courts. I

won a few times at the Constitutional Court, for example in the book banning case. But it is now clear *reformasi* has been derailed, or even failed. We were never able to drastically change the political structure. This gave the old powers the opportunity to reconsolidate. There was a time when they were afraid but now they have created a fortress of impunity. We have no choice but to try to destroy this structure again.” (Interview, Nurkholis Hidayat, 2019).

Nurkholis’s comments clearly reflect a shift from an elite/vanguard mode of cause lawyering, in which there is faith in the power of the law to change society (Hilbink 2004, 673), to an overtly political, grassroots approach. Lawyers in the grassroots category typically view the legal system as “corrupt, unjust or unfair” and view legal action as “only one weapon in a widespread assault on injustice” (Hilbink 2004, 681). These comments from academic Robertus Robet, formerly of YLBHI, also reflect this shift from a more elite/vanguard approach to a more grassroots style of cause lawyering.

“When the legal infrastructure of the state is no longer the most appropriate arena, when it can no longer be used fairly by civil society in the struggle for justice, then, want to or not, almost instinctively, organising the community and involving social and marginalised groups, becomes more important.” (Interview, Robertus Robet, 2020).

These reflections from former LBH Jakarta director Alghiffari Aqsa also serve to illustrate this change in perspective.

“In the early 2000s, the situation was *reformasi*. LBH was more involved in research, engagement with the government, lobbying in relation to policy formulation, and some strategic litigation. But with conditions becoming more repressive, with stagnation in resolution of [historical] rights abuses, we have to take an approach combining litigation, mobilisation, and the debate of ideas. The thing that is lacking now is mobilisation.” (Interview, Alghiffari Aqsa, 2019).

It is important not to paint the developments described above too simplistically. Typologies of cause lawyering are not sharply circumscribed and, of course, cause lawyers can share characteristics or approaches from multiple categories at the same time. For example, LBH cause lawyers continue to conduct strategic impact litigation, for example, in relation to the Papua internet shutdown or the Jakarta air pollution cases, both discussed in Chapter 5, even if they have little faith in the ability of the courts to constrain state power. They also continue to frame their work with reference to constitutional and human rights principles, also consistent with an elite/vanguard approach (Hilbink 2004, 676). However, at the same time, they view real transformation as coming from the grassroots, not just by affirmation of these human rights or constitutional principles in the courts, as would be typical with an elite/vanguard approach (Hilbink 2004, 683). Further, LBH offices vary considerably in their approach to cause lawyering. For example, LBH Jakarta has long had a reputation among the

LBH offices as being the most inclined toward strategic litigation, while LBH Semarang has typically been known for its strength in community organising.

Despite these qualifications, the recent revival of structural legal aid points toward the central argument of this thesis – that there is a clear relationship between the reform orientation and openness of the regime and the style of cause lawyering practiced. Now the government is becoming more repressive, and the challenges faced are more like those faced under the New Order, LBH is, in a sense, reverting to type. The fact that there was little effort to update the structural legal aid concept after the democratic transition has ended up being inconsequential. As democracy has begun to erode, LBH has been able to revive the approach, and found it quite well suited to the current moment.

8.4 Return to a ‘locomotive of democracy’ role?

Another surprising reversion to type that has occurred over the past two years is that the threats to Indonesian democracy have seen LBH return to playing the convening, coalition-building role it played under the New Order (Mann 2020). Chapter 3 described how towards the end of the New Order period, LBH became the centre of Indonesia’s human rights and pro-democracy movement, a hub of resistance to the Soeharto regime (Mann 2020). Chapter 4, meanwhile, described how the transition to democracy led to YLBHI suffering an identity crisis of sorts, as a broad range of reform-oriented CSOs emerged and YLBHI’s influence waned. But in light of the democratic backsliding evident under President Jokowi since about 2015, YLBHI has developed a renewed clarity about its role. It would be wrong to suggest YLBHI has assumed a leadership role in civil society, however, it is playing a more confident convening role, facilitating connections, and actively seeking to build coalitions of pro-democracy organisations. Nowhere are these developments better demonstrated than in the *Reformasi Dikorupsi* protests of 2019.

As discussed in Chapter 1, threats to Indonesian democracy reached a crisis point in September 2019. During the tense period surrounding the *Reformasi Dikorupsi* protests, the YLBHI and LBH Jakarta offices were a hive of activity. They hosted discussions and press conferences almost daily, usually in collaboration with other pro-democracy CSOs, covering issues such as the controversial RKUHP, the proposed land law, attacks on the KPK, and Jokowi’s pro-business approach to governance that often neglects human rights. Even if YLBHI or LBH Jakarta did not always take the lead in press conferences or discussions, YLBHI provided a safe space, and helped to coordinate relations between organisations. YLBHI gathered academic and civil society experts to provide updates for journalists and other civil society actors, and YLBHI and LBH staff spoke at university campuses, providing students with information on problematic legislation and informing them about recent developments (Interview, Arip Yogiawan, 2019). Asfin appeared regularly on television, squaring off against government ministers and legislators (“Ujian Reformasi” 2019). LBH also played a role in encouraging other social movement groups like labour groups to join the protests when they did not take part in early demonstrations (Interview, Alghiffari Aqsa, 2019). LBH took its role as a gathering point seriously:

“We should not be leading the movement, but we should be a hub. In the movement there are labour groups, the urban poor, farmers, LGBTIQ+ groups, women, environmental groups. We must become a hub for them. Ultimately, the leaders of the protest movement are the students, but we need create opportunities for these groups to meet, to connect ideas.” (Interview, Arip Yogiawan, 2019).

Figure 8.1: Photoshoot of YLBHI director Asfinawati



Although the protests in late September were largely driven by student groups, the rallying call *Reformasi Dikorupsi* was coined at a late-night meeting of dozens of civil society representatives in the YLBHI office in Jakarta (Mann 2020). As discussed, activists wanted a term that conveyed frustration over the gains of *reformasi* crumbling away, while highlighting the attacks on the KPK (Interview, Arif Maulana, 2019). The use of the word *dikorupsi* had additional advantages. Activists recognised corruption was one of the few issues that had motivated large numbers of people to get out onto the streets in protest in the past. Using the word ‘corruption’ was shorthand for government abuse of power – “it is like mentioning Satan” (Interview, Alghiffari Aqsa, 2019). Similarly, LBH and

other CSOs were responsible for drawing up the broad list of seven demands circulated by protestors (Interview, Arif Maulana, 2019).²¹³

As mentioned, LBH even engaged in direct action tactics itself, joining the students on the streets. This was when, as discussed in the opening to this thesis, Asfin delivered a rousing speech to demonstrating students, railing against legislators who were willing to ignore citizens' demands. I was in the office on the morning of one of the largest protests, as YLBHI staff coordinated their clothing, and packed their bags with toothpaste, which they smeared under their eyes as a remedy for tear gas.

It was striking the degree to which LBH was able to bring diverse civil society groups together. While LBH's generalist orientation has sometimes been described as a weakness in the post-Soeharto period (see Chapter 4), it was an asset as LBH sought to play a convening role again during the protests. As LBH Jakarta's Arif Maulana said:

“LBH provides a space that can be accepted by all parties, by all elements of civil society. We are considered ‘neutral’, not just focused on labourers, or women, or religious minorities. We advocate for them all. The role of LBH Jakarta in *Reformasi Dikorupsi* is therefore to unify these elements of civil society.” (Interview, Arif Maulana, 2019).

Former YLBHI lawyer Robertus Robet also recognised LBH's broad networks were a key factor.

“LBH pays attention to its networks. I interviewed people in Lampung and Yogyakarta, and LBH had strong relationships with students there. The old traditions were being maintained. In Jakarta, Asfin has good relations with the KPK union and many other CSOs. This combination meant that during *Reformasi Dikorupsi*, LBH/YLBHI could still play – I don't want to say ‘locomotive of democracy’ role, that was Buyung's term – but it was a hub, a gathering point. Because it has strong networks and has maintained its ethos as a social movement, a movement for human rights, using the law.” (Interview, Robertus Robet, 2020).

Cause lawyers are well placed to build coalitions on the basis of rights – the universal nature of human rights, and cause lawyers' skill and knowledge of human rights, mean they can be a tool to cut across narrower interests and help to form diverse coalitions (Cummings 2008, 1018). Human rights were certainly a central element of the *Reformasi Dikorupsi* protests, but it was largely LBH's democratic advocacy that was able to unify diverse groups. Importantly, despite experiencing about a decade of decline, LBH has retained significant legitimacy among broader civil society because of its

²¹³ The demands, widely circulated on social media, were: 1) Reject the planned revisions to the Criminal Code (RKUHP), the revised Mining Law, the revised Land Law, the revised Corrections Law, the revised Labour Law; Cancel the [revisions to] the Law on the KPK, the Natural Resources Law; Pass the anti-sexual violence bill and bill on the protection of domestic workers; 2) Cancel the appointment of the problematic KPK chief; 3) Reject the appointment of military (TNI) and police figures in civilian posts; 4) Stop militarism in Papua and other areas, and release all Papuan political prisoners immediately; 5) Stop criminalising activists; 6) Stop forest fires in Kalimantan and Sumatra, prosecute responsible corporations and revoke their licences; 7) Resolve human rights violations, try rights violators, including those in positions of power, and restore victims' rights immediately (Tani 2019).

reputation as a ‘locomotive of democracy’ under the New Order. As former YLBHI lawyer and Nasdem legislator Taufik Basari said, “LBH’s greatest strength is its legacy, its reputation. With its big name it is still capable of unifying issues and movements. This is its key advantage” (Interview, Taufik Basari, 2019).

As has been observed of other human rights lawyers (Baik 2010, 130), through LBH’s historical opposition to Soeharto and its defence of political detainees, it also developed a degree of moral legitimacy. LBH lawyers are considered representative of the public interest. Subsequently, in times of crisis, when there are serious threats to human rights and democracy, civil society and the media (and, to a smaller extent, the public) look to YLBHI. There is little doubt LBH’s oppositional nature, its reluctance to compromise with the government, discussed in Chapter 7, has meant it can be more easily accepted by a broad range of civil society groups as a site of resistance. It is an obvious ‘home’ for opposition to the state.

LBH also has the advantage of being considered politically neutral. As mentioned in the Introduction to Part Two, a feature of Indonesia’s democratic backsliding has been growing polarisation along pluralist and Islamist lines. Although this ideological divide has long roots, it has become particularly pronounced since 2014, exacerbated by the fiercely contested 2014 presidential election, the 2017 Jakarta governor’s election and the 2019 presidential election (Warburton 2020, 25). A result of these contests has been that President Jokowi has come to be seen as representing the pluralist camp. As discussed, Islamist mobilisations in late 2016 and early 2017 rattled the Jokowi regime, and it responded in part by targeting Islamist leaders and revising the Law on Mass Organisations to allow it to disband CSOs without having to go through the courts (Mietzner 2021b, 167). When this occurred, it became clear that polarisation had also extended to civil society (Mietzner 2021b, 167). Some religious freedom-focused CSOs stayed silent about this serious threat to freedom of association, and some individuals even praised the government’s efforts, demonstrating they were willing to prioritise defence of religious pluralism over defence of democratic principles (Mietzner 2021b, 167). By contrast, LBH, despite being a fierce advocate of religious freedom, has remained highly critical of the government’s anti-democratic actions (Iswinarno and Isdiansyah 2020). It even publicly defended the right of the public to abstain from voting (*golput*) in the 2019 presidential election (R. Setiawan 2019), at a time when other pluralists were openly backing Jokowi (Mietzner 2021b, 167–68). This has meant LBH has largely avoided accusations of partisanship, allowing it to play this convening role in civil society.²¹⁴

Another crucial reason LBH has maintained legitimacy among broader civil society is because of its role in giving birth to other prominent CSOs, such as ICW and KontraS. Further, many former LBH staff have left the organisation and gone on to establish or lead other influential CSOs. This includes those organisations founded in the late New Order and early *reformasi* period (discussed in Chapter

²¹⁴ An important caveat is that former YLBHI director Bambang Widjojanto served as lead lawyer for Jokowi’s opponent in the 2019 Presidential Election, Prabowo Subianto, as he challenged his election loss at the Constitutional Court. Nevertheless, this development did not seem to affect perceptions of YLBHI as an institution.

2),²¹⁵ as well as more recent examples, such as LBH Masyarakat or ILRC. Consequently, as former YLBHI lawyer Ricky Gunawan said, YLBHI is considered a “mother” to the democratic civil society movement (Interview, Ricky Gunawan, 2019). It is often said that one of the normative roles of civil society is to recruit and train future political leaders (Diamond 1994, 9). LBH has performed this role, that is true. More important, however, has been its contribution to the development of civil society. While Buyung’s claims of LBH being a ‘locomotive of democracy’ were somewhat inflated, it can certainly claim to be an ‘incubator of civil society’.

Other factors contributing to LBH’s convening and coalition-building power are more practical. The YLBHI office is located in Central Jakarta, an easily accessible gathering point for organisations from across the city. Its large open ground floor is a convenient venue for press conferences, public discussions, exhibitions and meetings. Further, the YLBHI office has historically been considered a safe space. Even though it is under close supervision – every day presumed undercover intelligence officers work conspicuously on laptops in a simple food store across the road from the entrance – its legacy, and the fact that the building is occupied by lawyers, offers a degree of protection. This has largely, but not entirely, prevented it from attacks.²¹⁶

Another undeniable factor that has allowed YLBHI to return to playing a convening role in civil society is Asfin and the strong leadership team around her. In fact, Asfin’s leadership was described as pivotal:

“Asfin’s leadership can be accepted by all other organisations in civil society. It would be a different story if the leader were a sexist male, for example. He would not be accepted. [Asfin’s leadership] has allowed YLBHI to play that role, to focus and protect the *Reformasi Dikorupsi* movement... Sometimes there are egos and competition between CSOs, that is difficult to avoid. Asfin’s leadership means ego problems can be overcome. On one hand, she can rally everyone but, on the other, there is a huge burden on her. If we rely too much on YLBHI, the movement could be threatened. But if it is not YLBHI, which other organisation has that kind of legitimacy? Who else can lead? (Ricky Gunawan, November 2019).

Ricky’s final comments here are important. YLBHI’s coalition-building role can also be a significant burden for the organisation when other organisations in civil society expect it to take the lead. An experience during fieldwork was illustrative of this dilemma. In December 2019, YLBHI organised a workshop for CSOs working on palm oil issues, seeking to gain input from members of its network about how it should best approach its advocacy around palm oil. There was a broad representation of civil society groups in attendance, including environmental, human rights, and women’s organisations. Each organisation presented on their area of expertise, providing a detailed elaboration of a variety of human rights, environmental and health problems associated with palm oil plantations. However, when YLBHI asked how, in light of its strengths in legal aid, human rights and rule of law advocacy, it could support their work, and what kind of advocacy activities they could do together to

²¹⁵ Such as PBHI, KIPP, Elsam, and LBH Apik.

²¹⁶ Recall the 2017 attack on the LBH office, discussed in Chapter 7.

address the main problems, the other organisations mostly struggled to rise above the detail of their individual organisational priorities and see the issues from a higher level. There was an expectation by the other organisations that YLBHI would take the lead.

Finally, it is crucial not to forget about the lawyering LBH does in this context. A key role of cause lawyers in broad coalitions is providing defensive litigation, especially in those campaigns that rely on protests (Cummings 2020, 118). As mentioned, when hundreds of students were arrested and charged during the *Reformasi Dikorupsi* protests, there was no question which organisation would be there to defend them (Mann 2020). For example, a few days after the major protests on 24 September, police arrested former journalist and musician Ananda Badudu, who had been active on Twitter at the time of the demonstrations and had raised money to support demonstrators on the crowdfunding site kitabisa.com (BBC Indonesia 2019). The same evening, police also arrested Dandhy Laksono, an activist filmmaker, for tweeting about tensions in the Papuan provinces (Galih 2019). Police and legislators were clearly shocked by the scale of the protests and, recognising many students had been mobilised online, hoped to reduce the size of protests planned for 30 September. However, Ananda and Dandhy were close to many activists who rushed to their defence, including lawyers from LBH and YLBHI (Asih 2019). Ananda was released the next morning without charge after an enormous backlash on social media and, tellingly, the charges against Dandhy were never pursued after the protests died down in October. LBH's role in defending these prominent political cases not only prevented them from progressing further but also positioned LBH at the centre of the pro-democracy movement.

This convening and coalition-building function was one of YLBHI's most vital roles under the New Order. LBH sought to promote collaboration among pro-democracy groups, believing a consolidated movement was essential in the drive for democratic change. This role is re-emerging as an important function of LBH as Indonesian democracy has begun to falter. Although I was not in Indonesia to witness the developments firsthand, LBH also played a similar role in October 2020 student and civil society protests against the Omnibus Law on Job Creation. Clearly, convening and coalition-building approaches are associated with grassroots approaches to cause lawyering that reject the notion that law is capable of changing society (Hilbink 2004, 682). LBH sees itself as deeply embedded within social movements and believes change will ultimately come from an empowered grassroots (Hilbink 2004, 688–90). LBH cause lawyers firmly believe that if marginalised groups and CSOs are ever going to exert any influence over oligarchic power, they must be well organised, in broad coalitions. Muhamad Isnur's comments underscore this point:

“In the future it will be vital to consider how we can encourage the community to organise, to act, and exert pressure. We shouldn't be too egocentric; these movements should not be led by CSOs. But we should encourage students, farmers, workers, and so on, to access information, to increase their awareness, strength, and independence to take action. We should encourage them to become a new force and apply pressure, and they may even be able to balance the power of the oligarchs.” (Interview, Muhamad Isnur, 2019).

In fostering pro-democratic opposition to the state in this way, LBH starts to move beyond grassroots cause lawyering and into pure political activism. Although LBH usually deploys the language of law, there is often very little lawyering involved. The line between cause lawyering and political activism becomes much harder to distinguish. Recall that this was one of the key functions of LBH under authoritarianism. When political parties were not representative, it was LBH that helped organise groups in society and channel political action (see Chapter 3). In the current day, in the near-complete absence of any meaningful political opposition, civil society – and LBH as one of its most prominent actors – offers one of the few voices of resistance against further democratic backsliding.

I want to be careful not to overstate the role of LBH and YLBHI in the *Reformasi Dikorupsi* protests. Indeed, LBH cause lawyers themselves are wary of making bloated claims about their influence (Interviews, Muhamad Isnur, Arip Yogiawan, 2019). They note that many students were mobilised on social media and had little direct contact with civil society. But LBH was effective in fostering collaboration among CSOs, and there is no doubt that CSOs provided an intellectual contribution to the protests – creating the rallying cry *Reformasi Dikorupsi* and formulating the list of seven demands. It is also vital to recognise that even if the protest movement represented a strong student and civil society defence of Indonesia’s democratic gains, it was ultimately unsuccessful. The protests were effective in preventing the regressive revised criminal code from being passed but that was the limit of their success. At the height of the protests, Jokowi attempted to placate demonstrators, saying that it was possible he would use his presidential authority to cancel the amendments to the Law on the KPK. However, as soon as the heat dissipated, he quietly acknowledged that the amendments would stay (Gorbiano 2019). Similarly, legislators pushed through their contested revisions to the 2009 Mining Law in May 2020, when Indonesia was grappling with the early stages of the Covid-19 pandemic and social distancing restrictions limited the possibility of street protests (Jong 2020a). Lawmakers also ultimately had no trouble passing the Omnibus Law on Job Creation in October later that year, despite a deeply flawed deliberation process and the return of street demonstrations (Argama 2020; A’yun and Mudhoffir 2020).²¹⁷

Putting aside considerations about the effectiveness of these civil society protests, it is clear that, as the discussion on structural legal aid above showed, LBH has been reinvigorated by democratic regression. To the extent it had an identity crisis, this has now been resolved. Although LBH might be reluctant to call itself a locomotive of democracy now, it certainly comes to life when its main cause is democracy and the rule of law. Or to put it in other words, as democracy has begun to evaporate, LBH has found its relevance again in its defence. Pro-democratic groups in civil society, and the media, have responded positively. Senior LBH staff are now sought regularly for comment in the media on rule of law and democracy issues, just as they were in the past (The Jakarta Post 2020). YLBHI director Asfin has become a respected national figure. At times, the return of LBH as a strong civil society voice against state repression has seemed like muscle memory. It is as though LBH instinctively knows what to do under a more repressive regime.

²¹⁷ As noted in Chapter 5, this flawed deliberation process ultimately saw the Constitutional Court decide the Omnibus Law was “conditionally unconstitutional”. Decision No. 91/PUU-XVIII/2020.

8.5 Conclusions

This chapter has examined the approach of LBH to structural legal aid over time, demonstrating it is possible to trace a distinct arc to structural legal aid. Under Soeharto, it was a highly political concept. LBH aimed to dismantle the authoritarian structures of the New Order state and believed an empowered grassroots (achieved through community legal empowerment and community organising strategies) was essential in pushing for change. In the first decade after the fall of the New Order, a period when the government was more open and engaged in reform, many within LBH found the concept less relevant. Some LBH offices left structural legal aid behind completely, and retreated into more conventional, litigation-focused roles. Others experimented with direct engagement with the state, working on policy reform or capacity building within state structures.

However, as the quality of Indonesia's democracy has deteriorated, LBH has developed a deep pessimism about the state and the capacity of legal reforms to lead to real change in the lives of its clients. LBH recognises democratic transition has brought several important changes supportive of cause lawyering, but change has only occurred in a formal, institutional sense – the substance of democracy remains poorly developed. In this context, LBH has realised that elite focused strategies designed to change the law, either through strategic litigation or via accommodation with the state through legislative or administrative channels, will never work on their own. This has seen structural legal aid, and in particular its community organising and community legal empowerment aspects, grow in prominence again. LBH still demands the state uphold the rule of law, but believes this demand must come from the grassroots – it will not come from working with state structures.

LBH now sees it has little alternative but opposition. A surprising development that has accompanied democratic regression has been LBH's reversion to the kind of coalition-building, convening role it played during the late New Order years. Its legacy as a site of resistance to the Soeharto regime, and its credibility for remaining consistent to human rights and democratic discourse, has allowed it to be accepted by broader civil society and once again play this convening role.

In a way, LBH's lack of attention to revitalising the structural legal aid concept in the years after the fall of Soeharto has almost been a blessing. As the government has, once again, headed in a more authoritarian direction, empowering the community at the grassroots has been revived. LBH has been able to simply pick up the old concept and use it again for the current moment.

Chapter 9: Conclusion

9.1 Introduction

In September 2021, as this thesis was being finalised, LBH released a slick, 39-minute video documentary to commemorate the 50th anniversary of its establishment in 1970, titled “*LBH – Meniti Jalan Terjal Demokrasi*” (LBH – Climbing the Steep Path to Democracy). The documentary was made by Watch Doc, the production company of activist filmmaker Dhandy Laksono, who, as discussed in the previous chapter, was defended by LBH figures in 2019 when he was briefly arrested for tweeting about unrest in the Papuan provinces. The film focused primarily on the major cases represented by LBH under the New Order, and LBH’s emergence as a centre of civil society resistance to the Soeharto regime. There was a brief discussion of democratic change and the efforts of the organisations established by YLBHI, like KRHN,²¹⁸ to make an impression on the early post-authoritarian reforms. The film then jumped forward to the presidency of Joko “Jokowi” Widodo, noting how since he came to power in 2014, Jokowi has presided over the erosion of Indonesian democracy, despite the hopes of civil society. Against a stirring soundtrack, the film presented footage of the 2019 *Reformasi Dikorupsi* student and civil society protests, including Asfin’s fiery speech to demonstrators quoted at the beginning of this thesis, as well as the 2020 protests against the Omnibus Law on Job Creation. It was almost as though the intervening 15 years or so between the fall of the New Order and the election of Jokowi never happened. LBH was only depicted as existing in relation to authoritarianism. This is an overly simplistic narrative that ignores several of the important reforms secured by LBH in the post-authoritarian era. But there is hardly a better representation of how LBH views its return to relevance under a more repressive regime. LBH has come to life in its defence of democracy and the rule of law.

This thesis tells a more complex version of this story, through investigation of the impact of democratic change on cause lawyers and the practice of cause lawyering in Indonesia. Cause lawyering exists in a variety of forms and practice contexts in Indonesia, but this study focused on LBH as the most prominent cause lawyering organisation in Indonesia. Examining the trajectory of LBH and its practice of cause lawyering from the authoritarian New Order era through to the current moment, I have argued there is a clear relationship between the quality of democracy and the form of cause lawyering practiced. In particular, recent democratic backsliding has prompted LBH to reject direct engagement with the state and prioritise a confrontational and deeply political, grassroots style of cause lawyering, similar to the style of cause lawyering it practiced under Soeharto.

This concluding chapter elaborates this argument in further detail, beginning by reviewing key elements of the thesis. I start by briefly reviewing LBH’s establishment under the New Order and the development of the grassroots version of cause lawyering that became its hallmark approach. I then summarise how the democratic transition, and more recent democratic decline, has affected cause lawyers at LBH and their strategies of cause lawyering. The chapter reflects more broadly on what

²¹⁸ The law reform organisation established by YLBHI in 1998.

LBH's experience can illustrate about cause lawyering in transitional or fragile democracies like Indonesia, and looks at some of the challenges that lie ahead.

9.2 LBH: a uniquely Indonesian cause lawyering organisation

There is no more appropriate organisation for the study of cause lawyering in Indonesia than LBH. As Chapter 3 explained, the organisation was established in 1970 under Soeharto's authoritarian New Order to provide legal aid to poor and marginalised Indonesians. Yet even in those early days, it never viewed its mission in such narrow terms (Aspinall 2005, 100). In establishing LBH, founder Adnan Buyung Nasution was also motivated by a struggle to limit state power through instatement (or reinstatement) of the *negara hukum*. LBH quickly developed a distinctly political understanding of the role of legal aid. Mirroring arguments popular in Law and Society studies at the time (Galanter 1974; Hunt 1986; Kelman 1987), it recognised that providing conventional legal aid under the New Order's grossly unjust system would only end up legitimising the status quo (Lubis 1985a, 136). It believed legal aid should be directed at addressing the structural causes of inequality that were at the root of the legal problems of the poor (Aspinall 2005, 104). These ideas served as the foundation for the development of 'structural legal aid', LBH's distinctive ideology of legal aid, which continues to guide its practice today.

As Chapter 3 showed, structural legal aid was an overtly activist, political, grassroots approach to cause lawyering (Hilbink 2004, 681–90). As the New Order state was considered the source of many of the problems faced by Indonesia's poor, it was also infused with a deeply oppositional ethos, and was focused on dismantling the authoritarian New Order system and replacing it with a more democratic framework. As the New Order period progressed, LBH began actively advocating for democratic reform, styling itself as a "locomotive of democracy" (Nasution 2011, 12). It developed into a focal point for opposition to the regime, a gathering point for activists, journalists, students, and other pro-democracy forces (Nasution 2011, 12). The New Order eventually collapsed in May 1998. Even if civil society (and LBH as one of its most prominent pro-democratic elements) could not claim to have toppled Soeharto, its key contribution was that it "eroded the ideological foundations of authoritarian rule" (Aspinall 2004, 82). This history of political struggle is key to understanding how LBH adapted to the democratic transition that followed, and how it sees the role of cause lawyering in Indonesia's current flawed and fragile democracy.

This thesis examined LBH through the framework of cause lawyering and legal mobilisation. Cause lawyering and legal mobilisation literature suggests democratic transition should provide the conditions for cause lawyering to thrive. Developments associated with democratisation described as being supportive of cause lawyering include the introduction of constitutional and other legal guarantees of rights, the presence of constitutional courts, judicial independence, political openness, the development of a strong civil society sector and free media, among other political and institutional factors (see, for example, Baik 2010; Chang 2010; Chen and Cummings 2013, 454–83; Cummings and Trubek 2008; Ginsburg 2007; Goedde 2009; Meili 1998; 2009; Munger, Cummings, and Trubek 2013; Rekosh 2008; Vieira 2008). These formal factors are important, but so too is the quality of

democracy, or in other words, whether there has been transition to a more substantive form of democracy.

Consideration of cause lawyering and democratic change is particularly relevant for examination of LBH because when the New Order collapsed in 1998, Indonesia transformed the authoritarian systems built by Soeharto and reconstructed them on liberal democratic principles (Lindsey 2004b, 19). The democratic transition in Indonesia involved the development of many of the institutional factors identified in the literature as supporting legal mobilisation. Yet the experiences of cause lawyers from LBH after 1998 demonstrate that the introduction of liberal democratic institutions alone do not necessarily provide a more conducive environment for cause lawyering.

As Chapter 4 detailed, there are several reasons why LBH struggled after Soeharto fell, despite institutional changes supportive of legal mobilisation. One of the most significant was that following the fall of the New Order, LBH suffered from what has been described as an ‘identity crisis’. So much of its identity, and its approach to legal aid and activism, structural legal aid, was tied up in opposing authoritarianism. Structural legal aid faded in relevance, and some regional LBH offices neglected it completely. LBH had to reassess its reason for being. It is little wonder LBH faced an identity crisis. The world began treating Indonesia as a democratic country, while LBH viewed the new democratic structures as still being dominated by New Order-era elites. LBH had a lot of difficulty reinventing itself as an organisation open to more accommodative, elite-focused forms of cause lawyering in this environment.

Another critical factor was funding. Following the democratic transition, there was less donor support for adversarial forms of cause lawyering and a greater emphasis on governance programming designed to strengthen the institutions of the newly democratic state (Aspinall 2010, 6). A related factor was that a very large number of new human rights and law reform-focused organisations were established after Soeharto fell. Some of these new organisations were more comfortable about taking up accommodative forms of cause lawyering and building the legitimacy of the state, and they attracted donor attention. Donor funds were therefore available for a certain version of cause lawyering; there was a preference for the state-centred elite/vanguard versions of cause lawyering over the grassroots version historically favoured by LBH.

In the two decades since the fall of Soeharto, YLBHI also experienced multiple debilitating leadership crises and related weaknesses in organisational management. These leadership crises often reflected disputes over the most appropriate form of cause lawyering for the political moment, but they also had roots in the organisational challenges that occurred following democratic transition. Once the organisation lost donor funding and began questioning its organisational identity, tensions arose.

However, the story of LBH in the post-authoritarian era is more than a story of funding shortfalls, management weaknesses and internal conflict. As Chapter 5 mentioned, since 1998, LBH has remained an essential provider of legal assistance to Indonesia’s marginalised, disadvantaged and unpopular communities.

Notably, in the years following the fall of Soeharto and through to about 2010, when the government was more engaged in reform, there was broader civil society enthusiasm for the ability of legal reforms to lead to social change. Cause lawyers, including some from LBH, hoped to reform law and policy to improve the position of marginalised groups, consistent with an elite/vanguard typology of cause lawyering (Hilbink 2004, 675). LBH was always somewhat ambivalent about this elite-centred version of cause lawyering, although it did attempt to engage in some activities consistent with an elite/vanguard approach. LBH's identity crisis was connected to these issues. LBH was being encouraged to work on elite/vanguard models of cause lawyering before it believed the substance of democracy had caught up with formalistic change (and public rhetoric).

Even so, Chapter 5 described how LBH, along with other CSOs, spearheaded efforts to develop a new tradition of strategic impact litigation at the Constitutional Court (established in 2003, just five years after the fall of Soeharto) (Mann 2020). LBH lawyers launched a successful challenge to the Attorney General's legal authority to ban books in 2010, and were central players in the high-profile, but ultimately unsuccessful, challenge to the so-called Blasphemy Law in 2009. Chapter 5 also showed how LBH has continued to use strategies like citizen lawsuits and litigation at the administrative courts to demand the government meet its obligations, legal strategies that would have been almost certain to fail under the New Order. LBH has used cases like these to make "principled constitutional arguments" typical of an elite/vanguard approach (Hilbink 2004, 677; Scheingold 2001, 297). It aims to inform the public, and challenge those in power, about rights violations. This kind of strategic litigation is a key means by which LBH attempts to give practical meaning to the 'new' democratic constitution, and demand the state live up to the promises of the democratic constitution. While it might have reservations about the impact of legal victory, it engages in these efforts to push forward deeper change in the quality of Indonesian democracy.

As the state became more open following the democratic transition, LBH was also presented with new opportunities to engage directly with the legislature and the state bureaucracy on policy reform, and strengthen the capacity of state institutions. Chapter 7 detailed how cause lawyers at LBH experimented with these elite-oriented strategies, and had some success in securing progressive reforms, most notably the 2011 Legal Aid Law. YLBHI has since developed a productive working relationship with the national legal aid system's implementing agency, the National Law Development Agency (BPHN), and they continue to collaborate to strengthen the implementation of the scheme.

On the whole, however, LBH has found efforts to collaborate with the government and legislature on drafting laws and regulations, or strengthening the capacity of state institutions, to be deeply disappointing. For example, YLBHI and LBH Jakarta made genuine attempts to strengthen knowledge of and attention to human rights among police, as discussed in Chapter 7. But the police as an institution clearly had no real intention of ever changing their behaviour and continue to regularly violate the rights of citizens, as the 2019 *Reformasi Dikorupsi* protests brought into stark relief. YLBHI and LBH now look at the huge sums donors have spent over the past two decades attempting

to promote reform in state institutions like the Police, the Attorney Generals' Office, and the Supreme Court and have concluded these efforts have resulted in very little meaningful change. Donors funded elite/vanguard strategies as if they were operating in a functional liberal democracy, but as LBH recognised, elements of Indonesia's authoritarian regime were able to survive and continue to dominate state institutions following the transition.

LBH's scepticism about collaborating with the state has only increased as the quality of Indonesian democracy has declined over recent years. Democratic backsliding has helped LBH put aside questions about the degree to which it should engage with state structures. It has settled on a highly oppositional, political form of cause lawyering, in which it keeps a distance from the state. LBH is less interested in the incremental, moderate changes that can be achieved through collaboration with the government. LBH lawyers see little incentive in securing piecemeal legal reforms when the state will just ignore reforms when it wishes.

As the responses of LBH lawyers in Chapter 7 demonstrated, however, the organisation acknowledges engaging with the state can be a valid approach – it is just not a strategy LBH wishes to pursue itself. The blossoming of civil society with democratic transition has allowed other organisations to take up more accommodative strategies, leaving LBH free to oppose the state without having to worry about maintaining relationships with state officials or institutions. As my respondents also noted, LBH's reluctance to compromise has also provided it with a certain moral weight – there is no question that LBH remains on the side of victims.

As Chapter 8 explained, democratic regression has prompted LBH to return to a strong focus on structural legal aid as its guiding approach to legal and political action. Along with deep distrust of the state, in an environment where the rule of law remains underdeveloped, LBH lawyers have also become disillusioned about the capacity of legal victory to lead to substantive social change. With its emphasis on community legal empowerment and community organising, structural legal aid is closely associated with a grassroots typology of cause lawyering.

This strong grassroots orientation does not mean LBH eschews litigation altogether, but rather it views the courts as a political forum, a safe space to raise and debate sensitive issues, to pressure state institutions to take action, or to promote mobilisation of marginalised communities. Legal action is seen as beneficial for its ability to spark public education activities, community organising, public protests and media campaigning, as Chapter 6 showed (see Hilbink 2004, 686–87). In pursuing grassroots strategies, LBH continues to demand that the state uphold the rule of law but believes pressure must come from the grassroots. It identifies with and considers itself to be part of social movements. It believes elite-focused reform strategies will never be successful unless there are concurrent efforts to empower local communities and shift unequal power relations.

Another sign of LBH's reversion to a more oppositional, political role is that it is beginning to play a convening, coalition-building role, similar to the kind of role it played under the New Order. Partly because of its legacy as a hub of resistance to the Soeharto regime, LBH has maintained a degree of

legitimacy among broader civil society. Now democracy is under threat, civil society is again looking to YLBHI as a pro-democratic force. Further, by keeping a distance from the state, LBH has been able to avoid having to compromise with power holders. This has meant it has broad acceptance among broader civil society.

9.3 Cause lawyering and democratic change

My research into the experience of LBH in the post-authoritarian period demonstrates there is a clear relationship between the type of cause lawyering practiced and the quality of democracy. It is not surprising that cause lawyering adapts to the nature of the state. But in the case of LBH, the relationship between cause lawyering and democratic quality is not what one might expect. As discussed in Chapter 2, cause lawyering and legal mobilisation literature suggest institutional developments associated with democratisation should provide more fertile terrain for cause lawyering. This research instead found that democratisation involved significant challenges for LBH, while democratic regression has reinvigorated it.

The trajectory of LBH after 1998 demonstrates the need to be realistic about what can be achieved through formal institutional change, particularly in post-authoritarian states where even a thin version of the rule of law has yet to be established. Cause lawyering and legal mobilisation literature might emphasise legal opportunity structures for cause lawyering but in a country that is transitioning to democracy like Indonesia, the presence of appropriate institutional structures for legal mobilisation is not sufficient. It is critical to pay attention to the quality of democracy when considering the relationship between cause lawyering and democratisation. One of the central problems in the Indonesian case is that political and economic elites have easily adapted to, and dominated, new democratic structures (Winters 2011; Hadiz and Robison 2013). The power relationships that result in many of the legal problems of the poor remain relatively unchanged in democratic Indonesia. Powerful government and business interests routinely override the rights of local communities, and the justice sector almost routinely comes down on the side of the powerful (Winters 2013, 19; 2011, 187). The legal system has been – to borrow Winters’ pessimistic phrasing – “relentlessly trampled by oligarchs” (Winters 2011, 210). In such a system, new opportunities to mobilise the law made available by the democratic transition do not mean as much.

There are important lessons to be learned from the funding challenges LBH faced following the democratic transition. The Indonesian case suggests donors should be careful about promoting strategies to meet form when function is not yet there. This is what LBH’s identity crisis was about. LBH was being asked to work on elite/vanguard models of cause lawyering before it believed substantive democratic change had caught up with formalistic change. In new or transitional democracies, donors should be wary about prematurely leaving behind support for pro-democracy CSOs focused on deeper structural change and placing too much emphasis on strengthening government institutions.

These considerations help to explain LBH's strategies of cause lawyering in the post-New Order period. After tentatively experimenting with elite/vanguard models of cause lawyering, the weak rule of law and democratic decline has prompted LBH to develop a deep pessimism about the courts and the possibility of legal victory to lead to social change. LBH is aware the government may simply ignore or circumvent decisions that are not in its favour. Further, it believes elite-focused strategies involving collaboration with the state to achieve incremental reforms will not have any significant impact so long as oligarchic power structures remain in place. LBH is focused on achieving transformative change, and LBH lawyers recognise that to achieve that requires a broader range of strategies than litigation or law reform alone. Scholars are sceptical about the ability of civil society forces to ever offer a serious challenge to oligarchy (Hadiz and Robison 2013, 45, 55), but LBH persists, viewing itself as an important bastion of Indonesia's fragile democracy.

One might assume a repressive state would lead cause lawyers to retreat into less confrontational strategies. But in Indonesia, democratic decline has led to an adversarial, political form of cause lawyering that places greater emphasis on working with social movements at the grassroots, despite the risks this entails. This is a strategy focused on promoting substantive democratic change, on tackling the unjust power relationships that have persisted following formal democratic change. Maintaining a distance from the state and working to empower grassroots social movements is an essential cause lawyering strategy, and arguably the most appropriate, for fragile democracies like Indonesia, where the rule of law is deficient.

Although donors and other elements of civil society have occasionally derided LBH for failing to sufficiently update its model of cause lawyering following the democratic transition in 1998, it is precisely this 'failure' to adapt that has put the organisation in good stead as democracy has unravelled. Indeed, as Indonesia's democratic gains have come under attack, it was vital LBH was there, ready to spring back into action.

9.4 Emerging challenges

LBH's charismatic founder, Adnan Buyung Nasution, died in 2015. In the days before Buyung died, Todung Mulya Lubis, the other towering LBH figure of the New Order years, visited him in hospital. Buyung was unable to speak, but between tears, he scrawled a dramatic and moving final message to Lubis on a piece of paper, which read: "Keep watch over LBH/YLBHI. Keep thinking and struggling for the poor and oppressed" (*Jagalah LBH/YLBHI. Teruskan pemikiran dan perjuangan bagi si miskin dan tertindas*) (Kuwado 2015). It is clear now Buyung need not have worried about LBH ever fading from relevance – its ability to bounce back after years of decline has proved as much. However, the future will certainly offer major challenges for LBH.

In late 2021, YLBHI selected a new leader for the 2022-2026 period to replace Asfin after her leadership term expires. As noted, almost every leadership transition at YLBHI has resulted in significant organisational turmoil. Asfin and her team were acutely aware of this, of course, and held the selection process earlier than in previous years, to allow for a longer transition period. The

leadership team was also aware that succession planning has been a weakness in the past, and spent time investing in and preparing strong regional LBH leaders as potential future leaders, such as the former director of LBH Padang, Era Purnama Sari, and the former director of LBH Semarang, Zainal Arifin. In the end, there were two contenders for the top job: Era and Muhamad Isnur, head of advocacy under Asfin. Although only regional LBH leaders and advisory board members can vote, in another sign of how YLBHI sees its role in Indonesian civil society, the organisation held a public debate, accessible online, between the two candidates. Isnur eventually won the contest and commenced as leader in January 2022. He will offer important continuity. Nevertheless, the transition to a new senior team will demonstrate how much LBH's return to prominence can be attributed to the composition of the 2017-2022 leadership team. Asfin, Isnur, Febi Yonesta, Siti Rakhma Mary Herwati, and Arip Yogiawan are smart, serious, and committed, and put a lot of effort into strengthening the organisation. LBH has been reinvigorated by democratic regression, there is no doubt, but it is unlikely it would have been able to return to prominence were it not for the work of this senior team.

Another challenge that has not been captured by this thesis is the impact of Covid-19. Indonesia has experienced a devastating Covid-19 outbreak, with more than 140,000 deaths recorded by late 2021 (Ritchie et al. 2021). After initially denying it even had a problem (Lindsey and Mann 2020a), the government's response has been piecemeal and disorganised, characterised by a privileging of economic activities at the expense of public health measures (Fealy 2020; Lindsey and Mann 2020b). A particularly worrying feature of Indonesia's Covid-19 response has been the prominent role offered to the Indonesian military (TNI) and State Intelligence Agency (*Badan Intelijen Negara*, BIN) (Fealy 2020, 306–9). Senior TNI figures were appointed to manage the official Covid-19 response, TNI was tasked with joining the police in enforcing Covid-19 social restrictions, and BIN was offered a role in testing and vaccine development (Fealy 2020, 306–9). This expanded role for the security forces in handling the pandemic is a continuation of the concerning trend toward securitisation that has occurred under Jokowi (Sambhi 2021). Another worrying development that accompanied this growing role for the security forces was that individuals and media outlets critical of the government, particularly in relation to the Covid-19 pandemic, have been targeted by cyberattacks (Fealy 2020, 309). For example, the Twitter account of prominent University of Indonesia epidemiologist Pandu Riono, and the websites of leading news outlets *Tirto* and *Tempo* were hacked after they criticised BIN and TNI efforts to develop a Covid-19 vaccine (Arbi 2020). Although no direct link was ever made to state forces, many suspected the attacks were designed to silence critical voices (Fealy 2020, 309). It remains to be seen whether this encroachment of security forces into political and civilian life will continue beyond the pandemic, but it is a troubling signal for further democratic decline.

A point worth considering in relation to the pandemic is that, as noted, the government and legislature used the cover of Covid-19 to pass the controversial revisions to the Mining Law and the Omnibus Law on Job Creation (Mietzner 2020b, 241–42). While moderate protests erupted in response to the Omnibus Law, social restrictions and concerns about coronavirus meant mass mobilisations on the same scale as the 2019 *Reformasi Dikorupsi* protests could not occur. Undoubtedly, political elites will continue their efforts to roll back democratic reforms when Indonesia emerges from the

pandemic. In fact, the government and legislators have indicated that they intend to pass the regressive draft criminal code (RKUHP) they failed to get across the line in 2019 as soon as possible (Aditya 2021b; Alfons 2021). It is impossible to know whether mass resistance to this or other future threats to Indonesian democracy will occur again once the pandemic recedes, or the role LBH will play in any future protests. However, civil society will at least have more freedom to mobilise once social restrictions ease. LBH's convening power will soon be put to the test again.

9.5 Final thoughts

When I first began thinking about this thesis, I imagined I was going to be telling the story of LBH's decline – that despite all the institutional advantages and opportunities provided by democratisation, LBH had, paradoxically, struggled. While LBH certainly did struggle for a period, it is not struggling now. LBH remains a vital organisation, as the 2019 *Reformasi Dikorupsi* protests showed. It was vital not only because of its efforts to protect the rights of demonstrating students when they were arrested, but also in helping to bring civil society groups together and continuing to hold the state to account.

As scholars have noted, one of the most worrying aspects of recent democratic regression has been the “absence of intra-elite resistance” (Power and Warburton 2020, 11). Civil society – however weak, fragmented and ineffective in the face of oligarchic power – is really the only source of resistance to democratic decline in contemporary Indonesia. And LBH remains one of civil society's most important voices. Back in 1994, Buyung commented that:

“As long as the LBH and groups like it exist, the people cannot be stripped entirely of an independent voice. If they cannot have a say *in* government, at least they can occasionally talk back to it, announcing their aspirations for freedom, justice, and self-rule...” (Nasution 1994, 117).

While the public have far more channels and opportunities to speak back to the state now than they did under the New Order, Buyung's comments remain relevant, nearly three decades later. In a sense, this thesis is a positive story for LBH and structural legal aid, in that it has returned to relevance again. But it is a depressing story for Indonesia. LBH and structural legal aid has become so important again because of the bad reasons that led to its creation in the first place.

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