Unraveling the New Order? Recent Developments in Indonesian Law Reform

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A. Introduction

The economic crisis and the political and social change it ushered in for many East Asian states opened up the possibility of rethinking the arrangements in place for law.

At the time of writing,[1] the government of President Abdurrahman Wahid in Indonesia is supporting a major programme of law reform, aimed at renovating Indonesia's dysfunctional legal system. This process commenced in the last months of Soeharto's rule as the crisis began to emerge in 1998 and continued under his successor, Dr. B.J. Habibie, in 1998 and 1999. The programme was originally driven in the main by multilateral conditionality requirements imposed on Indonesia as the price of the International Monetary Fund's (IMF) bail-out package. It has since, however, evolved into a larger domestic political struggle for institutional and legislative change, with a clearly stated, if sometimes ill-defined, 'rule of law' objectives.

This programme was reasonably successful in introducing a raft of new statutes, particularly in the commercial sector. For example, a new bankruptcy regime; an anti-monopoly statute; and major labour reforms have been passed, together with laws establishing a new human rights jurisdiction and anti-corruption commissions, to name a few major developments. Likewise, a new Banking Law and Code of Corporate Ethics are currently being drafted, as are major overhauls of Indonesia's archaic system of securities regulation and the operation of charitable foundations, notorious for corruption under Soeharto's rule.

Despite this impressive legislative agenda, law reform (*reformasi hukum*) has stalled, at least so far as institutional change is concerned. This reflects both continued opposition to change that threatens the entrenched interests of the old

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political and commercial elite; as well as the practical difficulty of forcing rapid change in the midst of political, economic and institutional uncertainty. It is ironic that the crisis which sparked change is now hampering its implementation. The complexity of Indonesia's legal system – which is both intricate and formalistic and thus not easily amendable to change – is another factor obstructing the rebuilding of the legal system.

Law reform in Indonesia is now both a critical need and a task of almost overwhelming complexity. At its narrowest, most statutes and regulations require revisiting – including those introduced over the last two years. At its broadest, Indonesian law reform will involve reconsideration of the organs and systems of state. Although work has commenced on all fronts – including Constitutional reform and amendment of the new bankruptcy system[2] – there are still no simple solutions, neither for the Indonesian government nor for the foreign donors and lenders supporting this programme.

B. The Problem: Depoliticizing Political Law?

The fundamental problem for Indonesia's legal institutions has long been the absence of an effective separation of the powers. Under Soeharto's New Order (1966–1998), constant executive intervention in the judiciary and the legislature meant that they functioned essentially as arms of the cabinet, with no real autonomy and a consequent lack of influence. Inevitably, this led to institutionalized corruption throughout the court system and among law enforcers – the police and prosecutors in particular. KKN (*Korupsi, Kolusi, Nepotisme*)[3] has been a source of public criticism for the last decade and is now the chief target of the post-Soeharto *reformasi* movement.

Ugo Mattei[4] has suggested a tripartite taxonomy of 'political', 'professional' and 'traditional' patterns of the operation of law as a method for comparative analysis of legal systems. Applying this model to Indonesia, it is clear that a vestigial 'professional' sector exists, represented by Jakarta's commercial advisers and some of the more sophisticated legal non-governing organizations (NGOs). There is also a significant 'traditional' sector, *adat* (traditional customary law) and its subset – in Indonesia, at least – *syariah* or Islamic law. Nonetheless Friedman's 'legal culture',[5]

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[2] T. Lindsey, 'Abdurrahman, the Supreme Court and Corruption: Viruses, Transplants & the Body Politic in Indonesia' in *Rethinking Indonesia* (A. Budiman and D. Kingsbury (eds)) (London, Routledge, 2000b).

[3] Corruption, collusion and nepotism.

[4] U. Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' in (1997) 45 *American Journal of Comparative Law*, at pp. 5–44.

[5] P.-L. Tan, *Asian Legal Systems: Law, Society and Pluralism* (Sydney, Butterworths, 1997) at p. 5.

the 'living law', as Ehrlich would have it,[6] is overwhelmingly 'political' and so, therefore, is most Indonesians' daily experience of the legal system.[7] This means debate over reform in virtually any sector in Indonesia usually focuses on the problem of transforming Indonesia's dominant 'political law' paradigm into a 'professional' one. The fundamental distinction between the two is, of course, enforcement: applying the 'rule of law' to every day 'political' circumstances. The absence of an independent judiciary and effective government legal departments are the root cause of the longstanding absence of enforcement in Indonesia.

This absence of enforcement can be dated back to President Soekarno's introduction of martial law in 1958 and his assumption of direct rule under 'Guided Democracy' in 1959. To strengthen his control of government, he systematically undermined the effective judiciary set up after independence; and attacked the rule of law itself as neo-colonial. Soekarno's system was maintained by his successor, President Soeharto, despite promises to the contrary and despite a radical ideological shift from the Left to the Right.[8] By the end of Soeharto's rule, the judiciary, like the legislature, was effectively an arm of the bureaucracy.[9] The consequences of this were, first, the removal of any formal avenue of opposition to the executive; secondly, the absence of functioning formal mechanism for rational transaction management or dispute resolution (whether between citizens or between state and citizens); and thirdly, the rise of alternative, irregular and informal methods of dispute resolution and transaction management to fill the vacuum created by popular fear of courts and politics. In other words, a new 'soft' law arose – alternative, informal norms – to deal with issues that would be resolved by 'black letter law' in a state with a functioning legal system.

At their lowest level, these informal alternatives took the form of petty corruption and facilitation payments, as well as sophisticated traditions of informal dispute resolution. At their highest level they constituted something approaching a shadow

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[6] C. Antons, 'Indonesian Intellectual Property Law in Context' in *Asian Laws Through Australian Eyes* (V. Taylor (ed.)) (Sydney, LBC Information Services, 1997) at pp. 417–418.

[7] Both *adat* and *syariah* leach, at different times and to different extents, into the dominant paradigm, for example, in dispute resolution: ILSAC, *Australia-Indonesia Contract Management: Dispute Avoidance and Resolution: A Handbook for Legal Practitioners and Business Managers* (Canberra, International Legal Services Advisory Council, Attorney-General's Department, 1996) at pp. 16–19; and, less commonly, into the professional pattern, for example, in marriage law: S. Butt, 'The *Eksekusi* of the *Negara Hukum*: Implementing Judicial Decisions in Indonesia' in *Law and Society in Indonesia* (T. Lindsey (ed.)) (Sydney, Federation Press, 1999b); or land disputes: D. Fitzpatrick, 'Beyond Dualism: Land Acquisition and Law in Indonesia' in *Law and Society in Indonesia* (T. Lindsey (ed.)) (Sydney, Federation Press, 1999) at pp. 74–93.

[8] T. Lindsey, 'From Rule of Law to Law of the Rulers' in *Indonesia: Law & Society* (T. Lindsey (ed.)) (Sydney, Federation Press, 1999).

[9] The next paragraphs draw on T. Lindsey, From Soepomo to Prabowo: Law, Violence and Corruption in the Preman State (2000, paper presented at the Asian Studies Association of Australia Conference, Melbourne, July 2000).

system, a 'secret' cronyist 'black' state, in which 'real' business and policy-making took place. The New Order state thus became one predicated on bad faith, that is to say, effective transacting, decision-making and politics at all levels were carried out in the shadow system, widely understood – a public secret – but not formally acknowledged.

One result of this was highly developed legal formalism (hard law) and public rhetoric; seemingly impenetrable and secretive politics; state sanctioned 'corruption' and legal informality in practice (soft law norms); as well as apparent irrelevance and absurdity in the practice of law by reason of it being the interface between the two systems. To put it a different way, there were many laws but, because only the politically powerful could ever win, they were reduced to nonsense.

The creation of this system was not principally the product of a inherent cultural propensity to informal systems, as is often argued. Nor was the cause the supposed Asian preference for harmonious and informal dispute resolution nor the supposed deep-rooted tradition of corruption or informality.[10] Rather it is was a rational response to the state's failure to provide a functional and relevant formal system: 'hard' law that works. As such the 'black' *aspal* state of soft law norms grew to monstrous, if often invisible, dimensions and permeated most aspects of Indonesian public life. It became the only effective way to 'do' politics and commerce, and thus law. And, as suggested at the beginning of this article, this 'political' system now seems to have rusted in place, despite the efforts of private and government reformers, many of whom have been advocating, and preparing for, *reformasi hukum* for decades.

C. The Response: Legal Infrastructure Reform to Date

The balance of this brief article now considers the progress of *reformasi hukum* in a selection of Indonesia's key institutions and the problems encountered. For the sake of convenience, these institutions are divided into three categories: the state (courts, ministries, quasi-judicial bodies); the private profession; and non-governmental organizations.[11]

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[10] V. Taylor and M. Pryles, 'The Cultures of Dispute Resolution in Asia' in *Dispute Resolution in Asia* (M. Pryles (ed.)) (The Netherlands, Kluwer Law International, 1997) at pp. 1–45.

[11] This section draws in part on R. Rich, with R. King, A. Elek and T. Lindsey, Report to AusAID of the Indonesia Governance Sector Strategy and Identification Mission (2000, unpublished report, copy in the possession of the author); and T. Lindsey, 'Abdurrahman, the Supreme Court and Corruption: Viruses, Transplants & the Body Politic in Indonesia' in *Rethinking Indonesia* (A. Budiman and D. Kingsbury (eds)) (London, Routledge, 2000b).

I. The State: the courts

An efficient and honest Supreme Court (*Mahkamah Agung*) is critical to legal reform in Indonesia because most cases are appealed to that level. Further, the Supreme Court controls the activities of most other courts and thus determines both legal culture and the enforcement of substantive law. In Indonesia, unfortunately, the Supreme Court is far from effective. Indeed it epitomizes the dysfunction of law in Indonesia. Its judges (with a few honourable exceptions) lack forensic skills and experience of effective adjudication. It notoriously suffers from institutionalized corruption and a widespread perception of incompetence. These problems have filtered through most of the judicial system beneath it.

A recent case perhaps indicates the full extent of the problem. In April 2000, a lawyer, Kamal Firdaus played a recording to the Jakarta press in the presence of Supreme Court Justice and Secretary-General Pranowo, in which a Supreme Court clerk, Mr Anhar demanded bribes. He:

> '... could be heard advising Mr Firdaus by phone that it was not the amount that counted in winning his case, but whether he offered more money to the court than his opponent. "If you give us 50 million rupiah but your opponent gives us more, then the case will be won by your opponent ..."'

Mr Anhar also told Mr Firdaus to 'hurry up' and place money into a Bank Central Asia account which he said was his wife's, if he wanted to speed up the case which had dragged on for five years.[12]

Likewise, around 25 per cent of the flood of 300 complaints received by the newly established National Ombudsman Council in its first month of operation have related to judicial corruption (*Jakarta Post*, 2000a).[13] Businessman Djohan Taniwidjaya, for example:

> '... lodged a complaint with the [C]ouncil alleging a substitute registrar at the Supreme Court in August 1999 had asked him for a RP 200 million payoff if he wanted to win his land dispute case. Djohan claimed the registrar told him the money would be give to several justices ... the female registrar gave him a time limit of one month to deliver the money, after she returned from visiting her children who were studying overseas'.[14]

Bribery on these levels makes the other frequently-mooted proposal to prevent corruption in the Supreme Court – increasing judicial salaries – seem farcical: a reward for corruption. And yet, without a living wage, how can judges be expected

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[12] (2000) *The Straits Times*, 'Judges verdict for sale? Indonesia's Supreme Court Embarrassed by Tape' (no author), 14 April.

[13] The majority relate to land disputes: (2000a) *Jakarta Pos*t, 'Businessman reports graft in Supreme Court', 28 April.

[14] (2000a) *Jakarta Pos*t, 'Businessman reports graft in Supreme Court', 28 April.

to be clean? Some increases have been granted over the last decade, with a significant rise awarded under Habibie. However, wages – at around around US$ 250 per month – still remain below living costs appropriate to judges of the nation's highest court. The increases have therefore achieved little either to prevent corruption or assuage the fears of opponents of increased judicial salaries.

Clearly, corruption in the judiciary has reached such proportions that it now defines that institution. Abdurrahman has flagged his intention to achieve a radical 'clean out' of the court by appointing a well-regarded 'clean' Chief Justice, Professor Bagir Manan and by appointing new junior judges to that court. As part of what is now obviously an orchestrated campaign to clean up the courts, the Minister for Law and Legislation, Yusril Ihza Mahendra, transferred all Chief Justices and Deputy Chief Justices of the State Courts[15] in Jakarta to provinces outside Java, together with judges considered to be performing badly.[16] In the meantime, however, the recent '*satu atap*' or 'One Roof' legislation (No. 35/1999) separating the Court from the former Ministry of Justice[17] has imposed an unresourced training and administration burden on the court with which it is still struggling.

The Commercial Court *(Pengadilan Niaga)* was established in 1998 to deal with the debt-recovery consequences of the financial crisis, as part of IMF conditionality. It is central to reform of debt-recovery mechanisms and thus, indirectly, to reconstruction of the banking and finance sectors. Its jurisdiction will soon expand to include intellectual property. So far, the court has not been successful and is widely regarded as little more than an extension of the Supreme Court, with the same problems. Political pressure, poor training and lack of skills have, predictably, contributed to bad decisions.

The Commercial Court remains, however, an essential component of the government's strategy for economic recovery.[18] Moves to appoint nine temporary *ad hoc* judges from senior commercial practitioners to clean up the image of the Commercial Court are, however, finally gathering force, after years of delay.[19]

The Administrative Courts (*Pengadilan Tata Usaha Negara*) were introduced in 1991 and although their powers were limited, they have confounded critics by proving to be relatively clean and effective. These courts have been under-resourced and are now suffering the consequences of success, with a backlog of cases.

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[15] *Pengadilan Negeri*, ususally translated as 'District Court'.

[16] (2000) *Jakarta Post*, 'Jakarta judges moved around in major government shift', 20 April.

[17] The former *Departemen Kehakiman* or Ministry of Judicial Affairs (usually translated as the 'Ministry of Justice') was replaced by the Ministry of Law and Legislation (*Hukum dan Perundang-undangan*) and then by the Ministry of Justice & Human Rights (*Kehakiman dan Hak Agasi Nannsie*).

[18] T. Lindsey, From Soepomo to Prabowo: Law, Violence and Corruption in the Preman State (2000, paper presented at the Asian Studies Association of Australia Conference, Melbourne, July 2000).

[19] (2000b) *Jakarta Post*, 'Four new commercial courts to be opened next week', 3 May.

Nonetheless, they demonstrate that a functioning judiciary is possible in Indonesia and they may emerge in the near future as an important check on government.

The proposed new *Human Rights Court* is supported by Abdurrahman and it could emerge as important judicial organ. In fact, the creation of the court may rationalize the current rash of *ad hoc* commissions and more general inquiries in this field, but it will take some time to become established. A key issue is whether the judges will be appointed from the ranks of existing judges or whether new, more skilled and 'professional' judges will be appointed. The current solution is for a mixture of 'non-career' and serving judges to be selected.

II. The State: legal ministries

Under Soeharto, the Attorney-General's or Public Prosecutor's Department (*Kejaksaan Agung*) had significant problems of corruption and inefficiency, operating as little more than an 'enforcer' for the executive. The current Attorney-General, Marzuki Darusman now faces significant resistance within his department and from the police and is said to be seeking a new portfolio. This Department has already come under significant political pressure, as the issue of charging Soeharto and New Order cronies and members of the military comes to a head. Clearly, effective reform of this Department, with the Supreme Court, will be a key determinant of whether any other legal infrastructure reforms make any difference.

The *Ministry of Law and Legislation* is shedding its responsibility for judicial administration, pursuant to Law No. 35/1999, and will become the principal policy and legislative drafting body for government. The Directorate General of Laws and Legislation will have key responsibility here, although it is severely overburdened by the current reform programme and under-resourced. A critical problem is training staff to handle the massive new responsibilities faced by this department, which was of relatively lesser importance under Soeharto.

III. The State: quasi-judicial bodies

The unsatisfactory performance of many of the formal legal institutions of state and, in particular, of the courts, has also led to the creation of a plethora of commissions of varying independence to provide alternative, untainted forums for investigation and adjudication. Some have been successful. Others remain to be tested.

The National Commission on Human Rights (*KomnasHAM)* plays a role in the legal sector well beyond its formal role. It has been an active champion of legal accountability and reform and has ever been used as an informal human rights 'court'. Although it has no judicial power or ability to enforce findings it has significant political clout; and it has also acted as a forum for legal debate and as an important 'think tank'. KomnasHAM faces structural and management challenges and, in particular, a major decision about how to decentralize its activities. However, as the new *Ministry for Human Rights* struggles to define its role, KomnasHAM will remain at the forefront of human rights law and initiate for the foreseeable future.

In 1999, President Abdurrahman selected Professor Sahetapy, an outspoken supporter of law reform, to chair the new *National Legal Commission (Komisi Hukum Nasional)*. It was intended to become the premier body to steer law reform in Indonesia and includes leading law reformers in its ranks. It has two roles: first to advise the President on legal issues; and secondly to co-ordinate reform through four working groups dealing with discrete legal issues (Administration of Justice (Judiciary); Governance and Administrative Law; Legislative Capabilities; Legal Profession). The KHN has already made it clear that it intends to target the judiciary and the Attorney-General's office for reform. Sadly, however, the KHN's potential has been wasted so far, due to the lack of interest in its activities shown by the President.

The Ombudsman Commission was established only in late March 2000 and has already been flooded with complaints, many of which (as indicated above) involve the courts. Established by Presidential Decree, a more detailed statute is in preparation. Currently, the Commission is reading its authority as broadly as possible and claims a power to investigate judicial conduct and virtually any other dispute between citizens and any branch of the state. This may allow it to become a sort of informal Administrative Court beyond the reach of the judiciary. The Ombudsman Commission may well take on a prominent role in the future once its powers are better defined, if its senior staff are prepared to take a more forceful approach.

As also mentioned above, recent anti-corruption statutes have set parameters for two Anti-Corruption Commissions. Law No. 28/1999 on State Administrators Free of KKN requires the President to establish an Investigation Commission to examine the wealth of state officials. Law No. 31/1999 on the Eradication of Corruption gives the Attorney-General the power to establish a joint inter-departmental investigatory team. An anti-corruption taskforce was established by the Attorney-General as a 'front line' investigator to tackle high-level corruption but it has faced determined institutional opposition, especially from the Supreme Court which has challenged its validity. As to the Commission, a steering committee has been established but it is yet to take concrete action. The ultimate relationship between the Commission, the taskforce, if it survives, and BPK (*Badan Pemeriksaan Keuangan*, the State Audit Board) has also not yet been defined. However, least one of these may emerge as a significant legal forum, as their clear mandate is to dismantle the old extra-legal and corrupt links by which Soeharto's New Order state operated.

IV. The private profession

The longstanding absorption of the judiciary and government lawyers by the executive described above has been enormously damaging for the private profession. Once real legal decision-making was taken out of the hands of the courts, *litigators* and *advocates* were left with no real role and therefore a low status. Certainly, *commercial lawyers* found a lucrative niche dealing mainly with international transactions but they had little contact with the courts, whose main business became crime, that is, state prosecutions, or uncritical enforcement of executive fiat. A

further consequence was that commercial lawyers dealt mainly with international colleagues or members of the Indonesian bureaucracy and thus drifted out of touch with other private lawyers and advocates.

As a Bar, the Indonesian profession has therefore been very weak. Today, it faces significant problems of internal rivalry and a lack of coherent standards and disciplinary procedures. In particular, bitter squabbling between competing professional associations originating from executive interference under Soekarno and Soeharto is long standing and deep-seated and continues to make assistance from foreign Bars difficult. A proposal backed by donor agencies is now in place to unify the Bars under a common disciplinary umbrella and, if successful, this could revolutionize the private profession.

IV. Non-governing organizations

With a subordinated judiciary and ministries and a divided private profession facing a consistently hostile executive, intellectual leadership in law under the New Order shifted to the NGO sector. These groups were the core of what opposition there was and most faced constant harassment. Since Soeharto's fall, however, the NGOs have begun to blossom and many have been forced to rethink their role, from 'resistance' to 'activism' and 'organising', often in conjunction with a new, reformist executive headed by many leaders with NGO backgrounds themselves. This has meant that old barriers between state and civil society are blurring in the legal sector. NGOs have begun to take an important role in both the formation of state policy, working with government departments and monitoring implementation.

This more benign environment has led to a proliferation of legal NGOs since 1998 although the acknowledged leader in the legal sector remains the *Legal Aid Foundation* (*Yayasan Lembaga Bantuan Hukum Indonesia* or YLBHI). Indonesia's many legally-interested NGOs now provide a skills base for the reform agenda, acting as project incubators, staff trainers and 'watchdogs'. One particularly effective NGO has been *Indonesia Corruption Watch,* which has claimed the scalp of one Attorney-General (Andy Ghalib) and has uncovered major corruption scandals such as the *Bank Bali* case (which forced Habibie from contesting the presidency), the *Texmaco* case and the Bulog scandal (which has implicated Abdurahman). NGOs are, however, in stiff competition for the limited resources available to fund legal infrastructure reform and it is likely that there will be a rationalizing of activity in this sector over the next few years.

D. The Challenge

Several diagnostic studies of the Indonesian legal system, by both Indonesian and foreign authors, are available, listing specific reforms required to create a functional

legal system in Indonesia.[20] The lists are invariably extensive; all agree, however, that the main problem – and the area in which reform is most urgently needed – is the administration of justice and the enforcement of laws. Without a strengthening of enforcement measures by reform of the front-line law enforcement institutions, the judiciary and the Attorney-General's Office, other reforms will be of only limited utility.

Indonesian lawyers argue that if the Supreme Court is reformed, this could transform the whole system and, in fact, a common experience of East Asian countries has been that of 'pivotal' law reform – the institutional legal change that became the point at which governmental and popular thinking about an entire system changed. In Korea, for example, a dramatic change in confidence in the legal system occurred when the constitutional court was established as a completely new, independent court in the early 1990s.[21] Nothing like this has yet occurred in post-Soeharto Indonesia

Regardless of the government's apparent determination to move on the judiciary the crucial question is whether it actually has the raw political power to achieve that shift in a complex, traumatized society in often-violent transition from authoritarianism to a still-evolving democracy. The former New Order elite is a formidable obstacle and they still have considerable influence within parliament, the military and the judiciary. This means radical change to the judiciary and other key institutions must still be delicately negotiated by Indonesia's new, relatively weak democratic coalition government, with some of its most committed opponents.

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[20] See, for example, Bappenas and World Bank, Diagnostic Assessment of Legal Development in Indonesia (1996, unpublished, copy in possession of the author); T.M. Lubis, and 'Economic Regulation. Good governance and the environment: an agenda for law reform in Indonesia' in *Reformasi; Crisis and Change in Indonesia* (Clayton, Monash Asia Institute, 1999b) at pp. 343–382.

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