

Chapter 4

Indonesian law reform, or once more unto the breach: A brief institutional history

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Reformasi is still on everyone's lips in Indonesia, with law prominently featured alongside economic and political reform. Less well recognised is the fact that law reform under the broader concept of 'legal development' has been an organised Indonesian preoccupation since at least the late 1950s. How and why has law reform been so long in the making in Indonesia; and what does this indicate about its present prospects? Traditional scholarship connects halting Indonesian legal development with continuing problems of patrimonialism and a bureaucratic class held over from the Dutch period. This chapter takes a somewhat different view, at least concerning legal development in Indonesia since the early 1970s. This differing view has had implications for Indonesian structural reform mandated under multilateral conditionality, as well as Indonesian perceptions of law reform.

Two mysteries and three interpretations of Indonesian law reform

There are two enduring legal mysteries for foreigners trying to understand Indonesian legal development. First, why the New Order state, by reputation an autocracy, tried so hard – and yet failed so long in its attempts – to change laws written in a colonial language, now spoken by increasingly small numbers of Indonesians, even among lawyers? Secondly, what explains the continuing chaotic state of an Indonesian world in which people talk incessantly about 'law' in terms of legality, but where the rule of law is lost from sight? Presidential and ministerial decrees proliferate, while legislative actions are few and far between. Answers to these questions are the Rosetta Stone of Indonesian law reform.

I distinguish among three competing interpretations to explain the quandary of Indonesian law reform. The three are not mutually exclusive. They may each possess more or less explanatory power during different modern Indonesian eras. All retain currency during the new post-Soeharto Reform Period to the extent that each counsels a different approach to nurturing the rule of law under *reformasi*. Ultimately, the interpretations boil down to:

- (a) a sociological *qua* political science approach, asserting that 'elite' preferences have trumped formal governance structures including law;

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concerns about Art 33 of the 1945 Constitution. Problems of law reform really reflect Indonesian difficulties with surmounting deeply-divided points of view in the midst of structural dysfunction. The operative question is what or whose assumptions underpin the rule of law in both the political and economic spheres? These are issues that have not been intensively discussed since the 1950s *Konstituante*. This question also illuminates a shortcoming of the *kebatinan* interpretation of law reform: it seeks to build a consensus for the rule of law but is so sparse on detail that the journey's direction remains unclear.

With a view to ongoing law-making, however, structural reform assuming a liberal economy driven originally by multilateral conditionality directly poses the question of what Art 33 of the 1945 Constitution means to Indonesians. From an Indonesian perspective the problem is that the answer is unclear. The issue is not whether Art 33 of the 1945 Constitution makes economic sense in the abstract. Indonesia's economic policymakers finessed this question from 1980s *deregulasi* through 1990s *globalisasi*, even while official politics embraced the *Pancasila* economy. Rather, the issue is whether the Indonesian public will jettison, during some very hard times, core values constitutionally enshrined by their founding fathers. Article 33 of the 1945 Constitution has redistributive or non-efficiency overtones, with obvious political implications for an election campaign conducted in the midst of what amounts to an economic depression. More than anything else, this contains the incipient nationalist seeds of a reaction against what may be perceived as externally-imposed law reform under a structural reform agenda. This dangerous problem is one that multilateral institutions do not seem fully to understand as they act on the rent-seeker interpretation of law reform.

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