Comments on the Judicial Reform Program in Indonesia

Daniel S. Lev

A careful survey of legal/judicial reform and good governance programs in such complex conditions as those in Indonesia and a few other countries might show two contradictory realities. One is that by and large they fail. The other is that they are sometimes oddly successful despite themselves. They do not achieve what they hoped to achieve, certainly not in the short time frames established, but sometimes they have begun to lay the foundation of empirical knowledge and conceptual frameworks that are essential to such program but only recently have begun to be taken seriously—and that not always consciously. Legal reform is exceedingly important work in the modern state. It is also exceedingly frustrating, depressing, infuriating work, and it needs to be said bluntly that it requires exceedingly competent, thoughtful, imaginative people to do it. It is not easy to find figures as able as Sebastiaan Pompe, who has been in charge of the legal/judicial reform program in Jakarta, and his resident advisor colleagues. They deserve respect and encouragement, but also argument.

Indonesia stands out for the extent to which its state was reduced to institutional shambles over a period of forty years. (Comparable though differing examples might include Nigeria and Sudan as well as several other African countries, Burma in Southeast Asia. Contrasts in Asia would include South Korea, Thailand, and Malaysia, each of

which retained substantial institutional integrity during periods of rapid economic and social change.) In mid-1998, when President Suharto resigned his office, not a single principal institution of the state remained reasonably healthy. Corruption, incompetence, mis-orientation, and organizational breakdown were characteristic. The courts, prosecution, and police were underfunded and self-funded. All had been subjugated by political authority since at least 1960 and allowed substantial leeway, within the terms of their subordination, to fend for themselves. Legal process had little integrity left, as was equally true of public policy.

In these conditions, how conceive a sensible approach to reform, particularly legal reform? Many donor countries and agencies sought to engage: from 1998 onwards, substantial funds supported endless conferences on law—often enough in English—new NGOs oriented to legal reform, new programs usually concerned with specific legal issues or problems. Similarly, there were political reform supports run by the UNDP, USAID, AUSAID, the World Bank, and others. What lacked in most cases, apart from determined coordination among them, was a clear strategy of reform, a set of principles that provided starting points, and thoughtful consideration of how to mesh programs in support of one another. Many of the difficulties that arose almost immediately, as legal reform programs or projects were put in place, were rooted in misunderstandings, mythologies often, of state, of law, of political and legal process, and how they related to and intersected one another.

For relevant example, many (not all, by any means) concerned with legal reform evidently assumed that law and legal process stand on their own. Some (as in the Harvard projects of the 1970s and 1980s) simply sought to help draft new laws, or imported them from abroad as exemplary models, as if a law were somehow automatically enforceable, capable of exacting obedience simply by its existence. Others pre-supposed that judicial reform was largely a matter of allowing judges an opportunity to witness judicial operations in law oriented countries, particularly in Europe and North America. Still others, significantly the IMF, focussed as it was on economic stabilization and reform, set about changing the bankruptcy regime, establishing new commercial courts, and, equipped with knowledgeable expertise on the ground, hoping for the best.

Law does not stand alone, but rests on a political base, which implies that reform oriented outsiders and insiders alike must first analyze strategic possibilities for short term and long term progress, given potential support or resistance from political leadership and its organizational base. There are basically two approaches to deep reform. One is dramatic, quick, and effective, essentially Napoleonic, and consists quite literally in getting rid of old institutions, replacing them with new ones, and inventing new rules. This sort of approach depends on a rare opportunity, however, one in which an existing elite has disappeared or has surrendered its authority or fled, as in the French revolution of 1789 or, say, the Meji Restoration in late 19th century Japan. Otherwise, the process of change is slow, gradual, difficult, expensive, and in constant need of rethinking, readjustment, adaptation.

In the Indonesian case, the old elite did not disappear, and the army—the prime instrument of political control from the late 1950s through 1998—though chastised and in partial retreat politically, remained (and remains) significantly engaged. Political leadership had every interest in opposing or delaying effective political and legal reform, which inevitably would destroy or seriously undercut their authority. Given these realities, reform was bound to be gradual and uncertain, which required careful consideration of strategic possibilities for the short and long term, with little guarantee, however, that any given measure would take successful hold.

The IMF decision to assist in the creation of commercial courts suffered from two or three disabilities. Conceived as a substantial part of a solution to a difficult economic problem, the decision was made in awareness of and yet divorce from the realities of generally weak legal and judicial orders and a lack of full political interest and support. In this case, the capacity of the new courts was doubtful from the start. It is too easy to say this in retrospect, of course, but there were some questions that deserved to be posed (and were) and measures taken (that were not) that might have made the prospects of the commercial courts rather brighter.

The most problematic issues had to do with the selection of commercial court judges and their organizational direction. Given conditions in the civil courts, from first instance through the appellate courts and Supreme Court, it probably made sense to avoid commercial court appointments from among sitting judges and, as well, to avoid placing the new courts physically in existing judicial settings. There were capable judges, but established judicial habits and attitudes increased the likelihood of corruption

and of a too easy accommodation with private lawyers inclined to corruption and procedural manipulation. The alternative was to appoint ad hoc judges from among private lawyers with strong reputations and a willingness to devote time for the sake of judicial reform, and to place the new courts not in existing first or second instance courthouses but in their own headquarters to demarcate their distinction from existing judicial institutions. Originally, it seems, the idea was indeed not to rely on existing judges, but the judges association (IKAHI) appealed to the then Minister of Justice—the Department of Justice was then still administratively responsible for the courts—not to allow appointments from outside of the judicial corps.

He gave in, and the IMF/Netherlands program followed suit. It is worth asking whether, in the circumstances, it might have been justified to use IMF leverage through a Letter of Intent to insist on strategic leeway to appoint ad hoc judges. The objection is that to do so would, in effect, have been too intrusive. Many in and out of Indonesia would agree. After all, however, the very presence of the IMF and the use for other purposes of demanding Letters of Intent are equally intrusive. If a more effective bankruptcy regime was the imperatively hoped for result from the new commercial courts, then such pressure was presumably legitimate. As it was, however, resistance to reform won out for lack of strategic pressure.

As part of a solution for the bankruptcy problem, the new commercial courts failed. In relatively short time after their inception, there were reports of corruption, of questionable decisions—along with competent ones, and according to one analysis more so than was true of the Supreme Court—of too much influence by private lawyers

inclined to questionable tactics and bribery, of a divided receivers association that further complicated the work of the courts, and of administrative problems associated with the status of commercial court judges still linked to their home courts in the state judiciary. The point is not that the commercial courts are beyond hope—efforts to improve them continue—but rather that they did not serve the purpose for which they were intended when they were most needed.

They helped to serve another purpose, however, and one that may actually supersede in importance the original impetus for inventing the commercial courts. It is worth arguing that absent more fundamental legal reforms, the commercial courts would not in any case have been very useful to the program of economic recovery. It is to the credit of Pompe and his colleagues that they evidently understood, from the start, that the prior problem that needed to be addressed was not at the periphery but at the center of judicial institutions, in the Supreme Court, and that so long as judicial incompetence and corruption were not addressed, there would be little hope for legal reform generally. As grounds for dealing with the Supreme Court, on the one hand, and corruption on the other, the commercial courts served an incomparably more important problem that had to do, at its widest understanding, with reconstruction of the Indonesian state; or, in any case, with a significant portion of that problem.

This wider program of reform, particularly as it affects the Supreme Court of Indonesia, has been impressively complex and has engaged (and encouraged) promising and important NGOs, new ideas, new personnel, and new reform strategies in what may be one of the most intriguing and forward looking efforts one can imagine over the last

several decades. Netherlands funding of the program and IMF administration of it have been impressive, sophisticated, demanding, and in many ways effective. How successful they will turn out to be is now beyond prediction, and the difficulties they face are enormous, but there is little question that have made a significant mark, that they have momentum, that many in a new generation of lawyers and reformers have been engaged and will remain so.

Still, as programs of legal reform—not merely judicial reform linked singularly to economic repair, but legal-institutional reform that will of course serve much wider economic, social, and political purposes—one can argue that they fall short, for no other reason than that legal systems are complex and require broader attention than is satisfied by any single institution within a given system. To take one example, and to be brief about it, a program that addresses judicial institutions will necessarily fall short unless it also addresses legal education and, perhaps, the private legal profession. Legal education is the more basic and influential instrument of change, for the obvious reason that on its quality will depend the quality of future judges, prosecutors, notaries, private lawyers, certain police officials, corporate house lawyers, inevitably many members of parliament, and so on. It is of course easy to make an argument about limits on any program of change. Improving legal education is expensive and difficult. It is also worth it.

One last question that needs attention is this: why should the IMF do such work? By the time I revise this brief paper, the question may be beside the point, but there are two kinds of answer. One is that, in the Indonesian case at least, the IMF/Netherlands program in legal and judcial reform has been impressively effective in the most difficult

of circumstances. Indonesian professionals of various sorts who have bones to pick with the IMF are equally quick to state their admiration for the legal reform program. They appreciate its flexibility, the quality of its personnel, the adaptability and imagination of it, and the extent to which its leadership has understood the fundamental point that success in such programs depends on the extent to which they are locally oriented and rooted. Their approval and support constitutes impressive praise.

The other reason has to do with the IMF itself. It is that such programs, certainly this one engaged in an extraordinarily difficult effort of legal institutional reform in one of the world's most complex countries, may have the effect of demonstrating that economic problems are seldom economic problems alone.

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