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Daniel S. Lev

Legal Evolution and Political Authority in Indonesia

Selected Essays

Kluwer Law International

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INTRODUCTION

In mid-1997, before Indonesia sank into an economic abyss, both foreign and local assessments of the New Order regime, initiated by a coup in October 1965, agreed that its economy had grown remarkably well but that its governing institutions were in woeful disrepair. In fact, as is now quite clear, the first assessment was seriously misleading, in part because the significance of the second were ignored. The assumption, too long accepted by the IMF and foreign investors, among others, that economics is one thing and politics another, proved to be foolish. Other countries in the region, among them Thailand and Malaysia, as well as Korea, faced serious economic problems, but remained in better condition than Indonesia for no reason more complex than that political and administrative institutions still commanded public trust. By contrast Indonesia's political system collapsed and is likely to remain in crisis for long.

Nowhere was this problem more manifest than in the legal system, the skeleton of the modern state. A central issue raised almost daily during the three decades of the New Order was that legal process barely worked: the courts were corrupt and politically submissive, the prosecution and police abusive, statutory law out of date but in any case often marginal and ineffectively enforced. At the heart of much of the criticism of the political system was the failure of the *negara hukum*, or law-state, Indonesia's version of the *rechtsstaat* or rule of law. All these complaints remain extant now, as Indonesia tries to find its way through a hugely difficult "transition" towards political renewal. *Reformasi*, reform, and *negara hukum* are key terms in the lexicon of Indonesian change.

The articles and essays selected for this volume trace a few lines in the evolution of these conditions and the debates they have set off. They can be read as studies either of legal change or political change, but are both. If any single theme runs through all the pieces, it is that legal systems are politically derivative and cannot be fully understood apart from political structure, interests, ideology, and the conflicts they incur. The research that produced them started in 1959 as an effort to map the terrain of the Indonesian legal system and to understand its development away from one political system, that of the colonial Netherlands-Indies, into another, that of independent Indonesia. Here the studies are offered as a contribution to Indonesian social-legal and political-legal history.

When I began the research, there was little theoretical help, except for the work of Max Weber and very few others, from either social science or comparative law. Neither had paid much attention to legal process in newly independent states; and what both had to say about European or North American legal history seemed too confined to illuminate legal evolution anywhere else. A problem that still burdens comparative legal research, it is rooted, I think, in a transmutation of ideology into theory. In much of the literature, for example, the elementary proposition above that law and

political authority are fundamentally interrelated is obscured by skewing the causal relationship: instead of law resting on political order, political order rests on law, which, as a pillar of legitimacy, is rendered autonomous and set upon a pedestal – literally as the blind goddess of justice.

The inclination until recently to accept this view uncritically made the study of law in Europe and North America duller, shallower, and less enlightening than it should have been, but its influence on social-legal studies in the rest of the world was debilitating.[1] The pristine "Western" law model, fully elaborated around a base of exclusive cultural attributes, made it difficult, at best, to take legal process seriously elsewhere. The subtle biases involved, imbedded in longstanding myths, remain as well camouflaged traps for researchers. A few of them are worth addressing briefly because of their relevance to the arguments in this book.

One such bias is that European and North American legal experience defines the criteria for evaluating (or judging) all other legal systems. Continental *rechtsstaat* and English rule of law concepts and institutions have spread around the world either by colonial imposition or conscious imitation; but their adaptation is naturally local, no less so than in Europe, whose variety of legal systems belies the glib notion of "Western" law, another bothersome trope that obscures the long histories that produced distinctive local institutions and legal habits.

For studies of comparative law in the post-colonial world, the problem is compounded by a tendency not only to accept an idealized European law-state as the ur-model, but also to take seriously the mythology of its origins. Historically there was nothing natural about the *rechtsstaat*. When law began to emerge as a defining value of European political systems, largely under pressure of an evolving capitalism and the new middle classes it generated, it hardly had universal social support. Were the assumed preconditions of law in Europe, as Unger has described them, for example, actually preconditions or rationales?[2]

It remains a common, though increasingly challenged, assumption that the

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[1] There are of course important exceptions to my overstatement about studies in European legal history, particularly perhaps among historians but also some social science and legal scholars. If the exceptions share anything noteworthy, it is their inclination to careful empirical research accompanied by a disinclination to accept "common knowledge." For a few examples, see E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (London: Allen Lane, 1975); Tigar and Levy, *Law and the Rise of Capitalism* (New York: Monthly Review Press, 1977); Franz Neumann, "The Change in the Function of Law in Modern Society," in F. Neumann, ed., *The Democratic and the Authoritarian State* (New York: Free Press, 1957). Although not directly concerned with legal evolution, Barrington Moore, Jr., *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World* (Boston: Beacon Press, 1966) is altogether relevant.

[2] Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York: Free Press, 1976).

foundation of law is fundamentally cultural.[3] One variation of this notion, stated simply, presupposes that the European law-state is culturally specific and therefore unlikely anywhere else lacking the same attributes. While this view has generated interesting analysis, as much as anything else it is an ideological conceit rooted in the "West-East" polarity, one that lends to a misconception of social-legal and political-legal change and diverts attention from other basic questions. It can as easily be argued that a "culture" oriented to law did not precede but followed the consolidation of legal order in England and later the Continental states; it was not "culture" that made the difference but accumulated political power equipped with an appropriate ideology and workable institutions. What distinguishes ideology, as the term is used here, is that it has to be conceived, elaborated, and tested in a struggle against other interests and their programs.

In my own research, as one or two of the essays here will make clear, at first I accepted cultural causes as a given. Gradually, however, the more familiar I became with Indonesian politics and working legal institutions, the less culture explained. The more one relied on it, moreover, the less attention was paid to other obvious causal factors. I do not mean to suggest that local values are not important. They are, but it is a mistake to suppose that such values anywhere are simple or singular, or that the range of them cannot support a wide variety of possibilities, or that they cannot change with remarkable speed.

Allowing "culture" analytical priority is more likely to obscure than to clarify reality, largely because of the enchanting capacity of cultural analysis to provide elegant post-hoc explanations of just about anything. Moreover, just as history is what historians say it is, so our understanding of culture, particularly elsewhere, is subject to the whims of whoever is in a position to say what it is: political leaders and scholars, among others. A simple example is the peculiar notion that Asians generally are prone to avoid conflict in favor of the harmonious resolution of tensions. For too long, I accepted and repeated *de rigueur* this received wisdom despite the evidence of a few hundred years of internecine wars in Indonesia, local rebellions against the Dutch and the independent state, daily political conflict and mayhem, village and urban violence, and statistical data indicating that, adjusting for demographic differences, Indonesia produced rates of litigation comparable to those of several European states. If Indonesians seek harmony and avoid conflict, they have not been

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[3] One of the most sophisticated and elegant recent arguments for this view is Clifford Geertz's Storr's lectures, available in his *Local Knowledge* (New York: Basic Books, 1983). One difficulty which his analysis shares with cultural approaches generally is that the level of abstraction about Islamic *hukum*, Hindu *Dharma*, and Indonesian *adat* renders the core ideas too pristinely distant from social-legal realities on the ground. It is easier simply to repeat the generalizations than to test them. In recent years, too, however, cultural givens have come under more skeptical scrutiny in social science research generally, partly perhaps because at some point enough knowledge accumulates to encourage challenges to accepted interpretations. For two examples: Frank Upham, *Law and Social Change in Postwar Japan* (Cambridge; Harvard University Press, 1987), and Andrew Harding, *Law, Government and the Constitution in Malaysia* (The Hague: Kluwer, 1996).

good at it.[4]

In many states today a struggle goes on to establish some controls over powerful governments by subjecting them to more or less autonomous legal process. To say this is not to predict an outcome, but merely to recognize that some groups are convinced that legal process is better or more advantageous than other means of governance, and have had enough influence to make a public issue of it. Wherever (and in whatever measure) legal process becomes more influential, as reality and ideological value, the outcome is no more likely to resemble any single European model than European outcomes resemble one another. The result of conflicts over change necessarily depends on local determinants and conditions, which differ from place to place and time to time, making comparison difficult but nevertheless useful so long as due attention is paid differences of context and opportunity. In many "new" states pressures towards constitutionalism and more effective legal process have advantages and suffer constraints quite different from those of old Europe, but for the rest the sources of the pressures, the ideological questions they raise, and the nature of the conflicts are hardly new. That the *rechtsstaat* emerged first in Europe does not mean that Europe laid the ground for every law-state argument that came later, but rather that similar conditions are likely to promote similar kinds of conflict and ideas. Nor is it to suggest anything like "Westernization," another particularly inane conceit, which misses the point that foreign ideas, in Asia as in Europe or anywhere else, take hold only when they make sense domestically and are adapted to domestic purposes.

Indonesia is an apt country in which to examine these issues, because the political turmoil that began with independence makes it impossible to avoid them. The articles in this volume address discrete developments in each of the three regimes that followed the revolution of 1945-1949. Without a compelling theoretical perspective to guide the research, the Indonesian legal system itself and the events surrounding it tended to dictate my attention. Consequently, during the parliamentary (1950-1957) and Guided Democracy (1958-1965) periods, when public legal institutions were most at issue, the focus was mainly on prosecutors, police, and especially judges – what they thought and did, or what others thought about and did to them. After 1965,

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[4] This illustration reveals a host of methodological traps with a long history in comparative research. The least of them is an inappropriate rendering of common values of personal behavior, mores, into a public "culture." A more basic difficulty rests in how we have defined culture, or perhaps not defined it clearly enough, which tempts us either to consolidate professed norms and values elsewhere into generalizations that easily transmute into stereotypes, or to misconstrue an interested version of "culture" as the thing itself. For one egregious example, see Adda Bozeman's *The Future of Law in a Multicultural World* (Princeton: Princeton Univ. Press, 1971). If we fail to distinguish clearly between ideology and culture, we may end up taking the pronouncements of leaders about their "culture" too seriously as descriptions – as many did with Soekarno's and still do even with Suharto's visions. Especially worrisome among comparatists, a fuzzy notion of culture may encourage students to compare realities elsewhere with ideals at home, which produces something like the old debate in anthropology about whether law actually existed anywhere at all except the "West." For one effort to distill the qualities of "Western" legal process, in an otherwise interesting study of Soviet and Russian courts, see Kathryn Hendley, *Trying to Make Law Matter: Legal Reform and Labor Law in the Soviet Union* (Ann Arbor: Univ. of Michigan Press, 1996).

however, as political leadership and its direction of the legal system drew intense criticism, my attention shifted increasingly to private lawyers and others committed to reform. The logic of this progression may become clearer in a sketch of the political changes that took place after 1950.

The revolution (1945-1950) changed the character of Indonesian politics but did little about the colonial legal heritage except to ratify the Japanese occupation excision of the courts prescribed for Europeans. The first article in this volume deals with the lasting influence of Netherlands-Indies legal organization and conceptions of public authority. It was written, however, during the mid-1980's, when its purpose was to unveil the colonial skeleton in the New Order closet.

During the early post-revolutionary years the parliamentary system took for granted a working legal order.[5] The judicial system suffered serious problems – shortages of trained personnel in the courts and especially the prosecution, inadequate facilities, and poor budgets – which the government neglected. Bureaucratic jockeying for advantageous position among official blocs began to change status arrangements among legal officials, a problem dealt with in the article on judicial development. But the judiciary was not much worse off than other bureaucratic sectors; while judges resented their declining prestige, yet by and large the courts worked reasonably well, confidently, and effectively. Comparing judicial decisions from the 1950's with those from the mid 1960's through the 1990's should demonstrate the point convincingly. What is striking about the Indonesian legal system during the 1950's is not that it spun into decline but that it was in fact fairly serviceable, despite huge difficulties.

The reasons why the courts and other legal agencies worked adequately then lie less in the legal system itself than in the political regime. For a time, the parliamentary elite accepted *negara hukum* principles as the most appropriate foundation of the modern state they wanted and believed would sustain their own authority. Many political leaders, especially from the parliamentary center made up of the Nationalist Party (PNI) and the Islamic party Masjumi, were themselves graduates either of the law faculty at Leiden or the *Rechtshogeschool* in Batavia. The elaborately liberal provisional Constitution of 1950 was a reasonable demonstration of their ideological orientation, which opened considerable space for the judiciary. Judges, some of whom were experienced in the colonial courts for Indonesians, took for granted their authority and independence, which successive Governments more or less respected. The articles here on judicial unification and the Supreme Court and

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[5] The seven years of the parliamentary system deserve a great deal more research attention than they have received. The standard study is Herbert Feith's *The Decline of Constitutional Democracy in Indonesia* (Ithaca: Cornell University Press, 1962). The beginnings of a reassessment appears in David Bourchier and John Legge, eds., *Democracy in Indonesia 1950s and 1990s* (Clayton, Victoria: Monash University Centre of Southeast Asian Studies, 1994). Very little has been done on the legal system during that period in any language, though substantial materials are available. On post-colonial law and legal institutions two useful bibliographies are Eddy Damian and Robert Hornick, *Bibliografi Hukum Indonesia 1945-1970* (Bibliography of Indonesian language literature on law. Bandung: LPHK, 1971?) and Sebastiaan Pompe, ed., *Indonesian Law 1949-1989: A bibliography of foreign-language materials with brief commentaries on the law* (Dordrecht: Martinus Nijhoff, 1992).

adat (customary) inheritance law give evidence of a legal system beginning to adapt to hard conditions in which its officials nevertheless found sympathetic support.

Far more problematic for the parliamentary system were unresolved ideological and political tensions that grew out of the revolution. Over these issues the governments of the 1950's had relatively little control. The charge often heard then that the law remained colonial, not "national," had less to do with statutory provisions (with a few significant exceptions) than with the more fundamental complaint that the revolutionary promise of political, social, and economic reformation went unfulfilled. The problem was not procedural justice, which the legal system provided more or less competently, but substantive economic and social justice, to which the legal system was essentially irrelevant and the political system inadequate.

For all that Guided Democracy is associated with Soekarno, who meant to address this promise of substantive justice, its central pillar was the army, whose pressure was primarily responsible for the collapse of the parliamentary order in early 1957, the dismissal two years later of the Constituent Assembly, and the reimposition in July 1959 of the strong executive constitution of 1945. While Soekarno promoted a political system putatively based on Indonesian traditions, the reality of it combined a version of the colonial administrative order for Indonesians, favored by army leaders, and a patrimonial political system that culminated in Soekarno's charismatic figure. Guided Democracy assumed a powerful presidency free of institutional controls, the concentration of authority in the state bureaucracy, and the restoration of the centrally directed regional administration, the *pamong praja*, which Parliament (in Law 1/1957) had tried to subordinate to elected local assemblies. The structure of Guided Democracy's political system, with Soekarno at its authoritative apex and daily power exercised predominantly by the civil bureaucracy and the army, had disastrous consequences for the legal system. Soekarno made clear his choice of revolutionary process – i.e., discretionary authority – over legal process, attacking his "liberal" critics by subordinating the courts to political will and contemptuously tossing out their founding principle, the separation of governmental functions.

The judiciary put up hardly any defense of its own independence; and one can only wonder whether any effort would have made a difference then, for the political and ideological tenets of Guided Democracy left little room for legal norms or relatively autonomous institutions. Having lost the support of the parliamentary *negara hukum*, the judicial establishment reluctantly went along with Soekarno. Supreme Court chair Wirjono Prodjodikoro's effort to adapt to the "revolutionary" tenor of Guided Democracy is taken up in the article on civil law change in Indonesia. By this time, in the early 1960's, a new generation of law graduates had begun to occupy the courts. Unlike their predecessors, with memories of judicial standards, integrity, and prestige in the colony, and a sense of pride in the judicial independence of the 1950's, younger judges settled into a lesser station. Pressured to do the Government's bidding, suffering from declining real income and loss of status, judges were easily enticed into corruption, not least by rising star prosecutors. Guided Democracy's bureaucracy became pervasively corrupt, though it proved capable of becoming even more so later, but no part of it was scarred more deeply and lastingly than the judiciary. Little in the experience of a generation of judges whose tenure spanned Guided Democracy and

the New Order made them a realistic repository of the hope that reformers nevertheless sought to vest in them.

The coup of October 1965 led to the obliteration of the Soekarno regime, along with hundreds of thousands of citizens, but not the essential structural features of Guided Democracy. As the army had been instrumental in shaping Guided Democracy, the officer corps, now led by General and soon to be President Suharto, saw no reason to sacrifice its political advantages in the New Order. Civilian critics of Guided Democracy, with whom army leaders temporarily allied against Soekarno and the Communist Party following the coup, sought fundamental political reform. It was denied them. Instead they were dealt economic growth supervised by a regime more powerful and efficient but less forgiving than Guided Democracy. Within the legal system a few senior judges and professional advocates pressed hard for reform, insisting on the restoration of the *negara hukum*. New Order leaders went along rhetorically but little more. By the early 1970's the formal legal system was securely bound by political authority, backed up by a military run security apparatus that subordinated civilian legal institutions whenever necessary.

By then the debate over reform had begun that continues still and is likely to endure long into the future. In this volume the essay on judicial institutions and legal culture, a transition piece that bridges Guided Democracy and the New Order, and the article on the struggle for an Indonesian *rechtsstaat*, deal with the basic terms of this conflict. Private lawyers quickly emerged as prominent reformers equipped with an articulate program of institutional demands. As the profession expanded and changed with economic growth, not all lawyers engaged politically, but several active seniors, many younger advocates, and a constant stream of new recruits maintained a perpetual beat of criticism founded on *negara hukum* ideology.

Private legal practice in Indonesia is complex, poorly organized, and volatile. The essay on *pokrol-bambu* (bush-lawyers) is included here because any treatment of the profession in Indonesia is incomplete without them. But it has always been formally trained lawyers, litigators especially, who have actively sought change. The article on the origins of the Indonesian advocacy seeks to locate the historical sources of their reform orientation, while the essay on lawyers and reform takes up their conflict with the New Order regime. One of their products, in 1970, was the *Lembaga Bantuan Hukum* (Legal Aid Institute), which became the institutional manifestation of the advocacy's commitment to the *negara hukum*. The essay on the LBH explores the reasons for its survival and influence. A pioneer among Indonesia's modern NGOs, the LBH's successes encouraged others in and beyond the law. The importance of these NGOs, evident in other countries in the region, lies substantially in their embodiment of the idea that society must not be subsumed by the state, a notion that inevitably threatens political authority with the imposition of constraints.

The angles of this tension are by no means defined by law alone, but the integrity of legal process is a principal issue of political contention, one that takes on constitutional dimensions. One side of the debate seeks to protect the privilege of state surrounding the elite in command of it, which the other insists on surrounding with constraints. The Suharto government had more than enough power to ward off challenges until early 1998, when it fell apart under the combined weight of economic

disaster, student demonstrations, and pressure by senior army officers. For many the only reason for going along with the New Order regime was its economic returns; when they stopped, so did the Suharto regime. What it lacked, by contrast with Malaysia, Thailand, and Korea, was legitimate authority, public trust, even among those who profitted from New Order economic growth, in part because it relied too easily on raw power, but also because its institutions had become hopelessly decrepit, corrupt, and self-serving. The judiciary, an obvious institutional symbol of justice no less in Indonesia than elsewhere, had long since become an object of angry contempt. Not all judges were (or are) corrupt, and a few courageously challenged the system, but on the whole the civil courts are burdened with a reputation reminiscent of the pre-revolutionary *parlements* of France.

The reforms that critics have long promoted center substantially around *negara hukum* values – stronger and more independent courts, a meaningful legislature, institutional controls, a freer press to keep the public informed and to maintain pressure on the government – but from 1959 through early 1998 they were up against a powerful regime founded on an army and bureaucratic prerogative. Still, it became increasingly difficult to stave off domestic demands for reform and the pressures of international criticism. A few concessions were made during the early 1990's, in the form of new administrative courts and a national Human Rights Commission, neither of which is dealt with in this volume. Their influence should not be exaggerated, yet both have proved to be significant institutional innovations capable of establishing their own precedents, more so perhaps than the Suharto regime intended or expected.[6] Their significance derives not from any major impact on government policy or behavior, but rather from the substantial public support and hope they have generated.

How serious the conflict over political and legal change has become is evident in the deepening ideological debate that surrounds it between public and private domains, state privilege and social leeway, centralizing authority and recalcitrant citizenry. The last essay on constitutionalism and human rights, comparing like questions in the unlike states of Malaysia and Indonesia, addresses a few of the issues that have arisen. In Indonesia the two sides of the argument have returned to revolutionary origins for support, initiating a constitutional debate of sorts, only the second Indonesia has had in the half century since independence.[7]

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[6] On the administrative courts (PTUN) see the essay by Adriaan Bedner, "Administrative Courts in an Executive-Dominated State: The Case of Indonesia," in Young Zhang, ed., *Comparative Studies on the Judicial Review Systems in East and Southeast Asia* (The Hague: Kluwer Law International, 1997). Also, A. Bedner, "The Bandung Administrative Court: a visitor's picture book," in *Indonesian Law and Administration Review* (Van Vollenhoven Institute, University of Leiden) vol. III, no. 1 (1997) 66-70; and H. Benjamin Mangkoedilaga, "Indonesian State Administrative Courts: existence, challenges and expectations," in ILAR, vol. II, no. 2 (1996) 16-21.

[7] Two particularly important and illuminating contributions to the debate are Marsillam Simandjuntak's *Unsur Hegelian dalam Pandangan Negara Integralistik* (Hegelian elements in the integralistic view of the state. Jakarta: Grafiti Pers, 1995); and the Utrecht dissertation by Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956-1959*

For the most part, they have been talking past one another, for distinct conceptions of state and of the relationship between state and society are imbedded in quite different interests and ideological positions. The government uncertainly put together by Suharto's successor, President B. J. Habibie, lacking public support and under extraordinary economic and political pressure, made several important political concessions by way of removing restrictions on the press and political parties, but undertook no significant institutional reforms. New commercial courts established in late 1998, largely under pressure from abroad to deal with bankruptcy issues, were at sea from the start. In late 1999, Indonesia's first free national elections since 1955 resulted in a new parliament and a new president, Abdurrachman Wahid, committed to change but in no position to achieve effective institutional reform as quickly as an impatient constituency wished. Quite apart from the distractions of urgent political problems – a recalcitrant army, outbreak of murderous social conflict in several provinces, political party tensions – and economic pressures, a consensus of sorts that legal reform is essential was accompanied by no obvious strategy for achieving it. By the time of this writing, in January 2000, only a few months into the government's tenure and too early for a sensible assessment, neither Indonesian reform circles, in or out of the administration, nor the rush of foreign public and private organizations eager to have a hand in constructing a workable legal system, had yet made much of a start.

If for no other reason than domestic and international pressures and exceptations, some headway may be likely soon, but it is a safe bet that the process of change will require more time than many suppose and most wish. There are some in Indonesia and and abroad who believe that the *negara hukum* must certainly win out. If so, it will only be as the result of a long and hard political contention, whose outcome in distinctive attributes of local legal process no one can foresee. Nor should it be assumed, though many do, that some future *negara hukum* will guarantee the quality of local justice. After all, the *rechtsstaat* per se does not necessarily assure justice anymore than elections per se guarantee democracy. About all that one can say now is that both legal process and justice have become major issues in a politically complex, socially diverse, and economically changing country. There is little point in trying to predict an outcome, because there are many uncertain outcomes in a process of unending conflict and change.

More important than prediction is the understanding of change itself that only research can generate. The political and legal history of Indonesia, in all its complexity, is magnificently rich but still barely examined, More empirical research, by Indonesian and foreign scholars alike, will no doubt increasingly break down the traditional presuppositions and assumptions, the givens, that too often pass for theory

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for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956-1959 (1992). See also the strong critique of existing conditions by the legal scholar J.E.Sahetapy, "Contradictive rhetorics?," in ILAR, vol. II, no. 2 (1996) 22-46.