CHANGING INDONESIA'S CONSTITUTION: A REVIEW ESSAY

Peter Burns. *The Leiden Legacy: Concepts of Law in Indonesia.* Verhandelingen van het Koninklijk Instituut voor Taal-, Land- en Volkenkunde 191. Leiden: KITLV Press, 2004. 307 pages.

Petra Stockmann. *Indonesian* Reformasi *as Reflected in Law: Change and Continuity in Post-Suharto-Era Legislation on the Political System and Human Rights.* Hamburg: Institut fur Politische Wissenschaft, Universitat Hamburg, 2004. 424 pages.

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Between 1999 and 2002, the Indonesian People's Consultative Assembly (Majelis Permusyaratan Rakyat, MPR) approved four rounds of amendments to the Indonesian Constitution. Taken together, the additions to the constitution more than tripled the length of the original text. Among the most important changes contained in the post-Suharto amendments are the establishment of procedures for the direct election of the president, limitation of presidential tenure to two five-year terms, transfer of primary legislative functions from the executive to the legislature (Dewan Perwakilan Rakyat, DPR), creation of a constitutional court with the power to review the constitutionality of legislation, transfer of significant governmental powers from the center to local institutions, and the addition of a broad set of individual rights.[1]

[1] For a discussion of these developments, see Tim Lindsey, "Indonesia: Devaluing Asian Values, Rewriting the Rule of Law," in *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the US*, ed. Randall Peerenboom (New York: Routledge Curzon, 2004), pp. 286–323.

The post-Suharto constitutional reforms took the form of amendments to the constitution of 1945. The authors of those amendments, however, could as easily have chosen to scrap the existing text and start fresh. The reformers retained the title and much of the language of Indonesia's first constitution, but the changes they made amounted to a repudiation of its essential philosophy and spirit. A principal objective of the post-Suharto constitutional restructuring was to prevent the rise of another repressive and open-ended dictatorial presidency. To achieve that objective the reformers drew clear boundaries between executive and legislative powers, created new centers of state power in local governments, and established mechanisms to avoid concentration of government power in any single institution.

The Leiden Legacy

The two books discussed here both speak to the significance of those constitution-building developments, albeit from very different starting points. Peter Burns's book addresses debates over legal policy for the Indies occurring in Holland during the early decades of the twentieth century. In particular Burns examines efforts by scholars associated with Leiden University to make Indonesian custom, or *adat*, the basis for colonial law. As indicated by his title, however, Burns is not so much interested in the debates themselves as in the consequences of those debates for thinking about law and the state in the independent republic. He shows that while the Leiden group failed in its effort to create an Indies legal system based on custom, their ideas became the ideological basis for Indonesian nationalism and have had a lasting effect on Indonesian legal and constitutional thought.

The book is divided into two parts. Section I—"Making the Myth"—details the development and substance of the theory of "*adatrecht*" and documents the eventual triumph of the doctrine in the 1920s and 1930s. Section II—"Dismantling the Myth"—exposes the European origins of the *adatrecht* doctrine, demonstrates the flaws and distortions of its essentializing methodology, and reveals the enduring and unintended consequences of *adatrecht* theory for Indonesian ideas about law.

The central figure in both the *adatrecht* debates and Burns's book is Cornelis van Vollenhoven. In 1901 van Vollenhoven accepted an academic appointment in colonial law and administration at Leiden University. Over the next thirty years, until his death in 1933, van Vollenhoven accumulated a following of Dutch and Indonesian disciples who advocated making *adat* the basis for Indonesian law. The Leiden School was opposed in its promotion of *adat* by a group of scholars identified with Utrecht University; the opposition favored a legal system for the Indies based on European models.

Burns illustrates the assumptions and methods of *adatrecht* theory and gives a flavor of the polemics between Leiden and Utrecht with a discussion of the debates over a proposed revision to Indies land law. A 1918 proposal to amend the Regeeringsreglement—the government regulation that had served as the basic law for the Indies since the middle of the previous century—would have added language stating that "All land for which no other person can show ownership is Royal Domain land." This "domain doctrine," which had served as the legal foundation for the nineteenth-century cultivation system, was based on a crude legal construct according

to which the Dutch monarch had acquired ownership of all unoccupied Indies lands through either conquest or treaty.

Van Vollenhoven ridiculed the domain theory as a symptom of its authors' "wretched attachment to European terminology." The "code-book jurists" who conceived the doctrine, he wrote, "do not know about ... and certainly will not recognize any system other than the Justinian and the Dutch-Napoleonic." Trapped in the categories of Continental European legal thought, they could only ask themselves: "Who here is the owner of this patch of undeveloped land?" Their answer: "'No one owns it,' whereupon the government declared, 'then I proclaim myself as owner and this patch as government domain.'" (18–19)

Contrary to the domain theory's premises, the Indies was not, van Vollenhoven wrote, "constitutionally 'barren and empty'" prior to Dutch contact; the region was "brimful with institutions of government and authority." (48) Among the more important indigenous legal institutions, and the one directly relevant to the proposed revision of the agrarian law, was the "right of allocation," which endowed the community with both rights and obligations over certain "virgin" lands. Members of the community could cultivate, settle, or garner from lands within its allocation area, and the community was entitled to compensation for use of its land by outsiders. Offenses committed within a community's lands imposed obligations on the community. Most importantly, lands subject to community rights of allocation were absolutely and permanently inalienable. Van Vollenhoven argued that the domain doctrine, which denied the existence of community rights over unoccupied lands, was descriptively mistaken, misguided as a matter of policy, and morally unpardonable.

> The Domain Declaration with all the necessary attendant statutory paraphernalia might indeed be imposed from above. It would strike no root, however, being so thoroughly out of its depth, over alien ground. Imposition would, in any case, be the act of an autocrat. (40–41)

Van Vollenhoven's identification of law with custom is based on the premise that all law must find its source and authority in the values of the people. Law is thus fundamentally an empirical phenomenon, but its quasi-metaphysical essence is not directly manifest. The beliefs, values, or "thought-world" that comprise the spirit of law are discernible, however, in the ordered behavior or custom of a particular people. The task of technical jurisprudence is one of discovery and explication—to identify and articulate the legal principles that are immanent in the consciousness of the community.

The evident diversity of human customs excludes the possibility of identifying laws having universal validity. The multiplicity of actually existing cultures dictates that the law of each community will be peculiar to that community. As it happens, however, the Southeast Asian region is characterized by substantial similarity. Despite van Vollenhoven's emphasis on the variety of local customary practice, he discerned "a single basic Ur-*adat* common to all regions of the Indonesian culture area."[2] (14) One institution around which he found a striking level of agreement is the right of

[2] One of the more questionable products of the Leiden School's otherwise impressive ethnographic accomplishments was the division of the Indies into 19 precisely defined *adat* regions.

allocation. The rights and restrictions relating to community lands were, according to van Vollenhoven, "as uniform in tenor and content as regulations from military commanders, dispatched from one centre." (24) The fact that the right of allocation was found to be pervasive across the archipelago was a crucial plank in van Vollenhoven's case against legal recognition of the domain doctrine. More importantly, the notion that island Southeast Asia comprises a distinct cultural and legal unity is central to Burns's argument about the enduring significance of van Vollenhoven's work.

Van Vollenhoven's arguments against the domain doctrine were successful in preventing its adoption as the basis for Indies agrarian law. The abandonment of the domain theory did not, however, settle the larger question concerning the proper foundation of colonial legal policy. Leiden naturally favored a plural legal system based on *adat*. Scholars identified with Utrecht advocated unification of Indies law through implementation of a comprehensive European-style code. A French-inspired civil code had been promulgated in the Netherlands in the middle of the nineteenth century, and the Dutch code had been given partial application in the colonies under the policy of "concordance." Among the advantages claimed for codification was greater legal certainty, which in turn was believed to promote the goals of economic development and modernization. Van Vollenhoven based his opposition to codification on both practical grounds—that it served Dutch commercial interests at the expense of native welfare—and out of an ideological conviction that an alien law not anchored in local cultural sensibilities would prove a dead letter.

The advocates of *adatrecht* ultimately prevailed. Legal unification was abandoned, and by the late 1920s the views of Leiden had become formal colonial policy. Burns dates the shift in policy from 1927 or 1928. But the most significant change associated with adoption of the new policy was the initiation of an investigation into Indies land-tenure practice. Apart from the fact that colonial administrators may have become somewhat better informed on matters of indigenous custom, legal practice on the ground proceeded pretty much as before.

The Leiden–Utrecht debates and the eventual triumph of *adat* after 1925 constitute the first four chapters of the book. (Chapter 2 digresses from the main story line for an exposition of the history of European legal philosophy to serve as background for the debates of the early twentieth century.) The remainder of Part I—Chapters 5 through 7—illustrates the scholarly achievements of the Leiden School with extended discussions of three important *adatrecht* doctrines. Chapter 5 summarizes Leiden dogma on Southeast Asian attitudes toward crimes or wrongs embodied in the concept of "adjustment." Chapter 6 presents Professor Hazairin's defense of the practice of *jujur* marriage among the Rejang of Sumatra, and Chapter 7 addresses the late-colonial judicial system and the articulation of *adatrecht* in the courts.

In Section II Burns first dismantles van Vollenhoven's intellectual edifice and then shows that, despite the flaws of *adatrecht* scholarship, the myth of *adat* has had enduring consequences for the Indonesian state. Chapter 8 begins the dismantling project by documenting instances where the fervor of the Leiden School's theoretical commitments distorted its scholarly analysis. It is shown, for example, that *adat* doctrines regarding crimes contradict the foundational premise that Asian cultures lack a concept of individual culpability. But despite evidence that the facts were being forced to fit the theory, the ideology of *adat* remained essentially unimpaired. Chapter

9—"The Deep Structure of the Leiden Legacy"—examines the *adatrecht* phenomenon from the perspective of the political and administrative realities of the Dutch colonial enterprise. Burns concludes that *adatrecht* was essentially an exercise of Dutch imagination, and that the Leiden School's interpretations of Southeast Asian law and culture were responsive to the circumstances of turn-of-the-century European colonialism. For one thing, the Dutch, along with other colonial powers, found it "necessary to establish among the native peoples ... laws and loyalty other than those already claimed and proclaimed by the main contender, international Islam." (212) The colonial construction of custom was also shaped by the fact that colonial law had to be rendered in a way that made it amenable to use as a tool of administrative regulation by a modern state. *Adat* was transformed into *adatrecht*, and in the process it was no longer *adat*.

The "legacy" bequeathed by Leiden referred to in Burns's title (*The Leiden Legacy*) is revealed in Chapter 10. It was not van Vollenhoven's intention to promote Indonesian nationalism. Indeed, as colonial administrators judged the matter, one of the advantages of using *adat* as the basis for Indies law, rather than either Islam or a European-style code, was that the diversity of *adat* would inhibit development of an archipelago-wide political consciousness. It is ironic, therefore, that the most significant outcome of the Leiden project was the fostering of Indonesian nationalism.

The title of Chapter 10 is "The European Roots of Indonesian Nationalism." The intellectual foundations of *adatrecht* theory are not Dutch, however, but German. Burns traces the methods and core assumptions of *adatrecht* theory to a nineteenth-century jurisprudential movement led by Friederich Karl von Savigny in Germany. The movement, known as the Historical School, grew up in reaction against the rationalism and universalism that dominated European legal thought following the success of the French Civil Code. Von Savigny rejected Enlightenment claims about the possibility for grounding law in a timeless universal reason, arguing that the sole source and exclusive measure of law is to be found in the life of the community. Because law is the spontaneous outgrowth of the lived history of a particular people, the law of each nation will be peculiar to that nation.

Van Vollenhoven (and von Savigny before him) was concerned with identifying an appropriate grounding for law. But the theory he constructed was obviously both jurisprudential theory and a theory about the foundation of nations. Because law is distinctive to each community, the boundaries of shared law give definition to the community. In their application of this approach to the Indies, the Leideners gave implicit endorsement to the idea of Indonesian nationhood. Von Savigny postulated the existence of an organic unity of law and community. Van Vollenhoven's research on law in the Indies claimed to have discerned a common core of custom across the archipelago. The inference from von Savigny's theory and van Vollenhoven's ethnography is that the inhabitants of the Indies make up a single nation.

One part of Leiden's legacy to Indonesia was the conceptual framework for imagining the nation. That same framework became the basis for a political–legal ideology that gave meaning to Indonesian nationalism and served to legitimate the rule of repressive regimes in the second half of the twentieth century. *Adatrecht* theory pre-supposes the existence of a body of shared ideas about law, and makes the people's subjective judgment regarding the content of those ideas the sole validating

principle for true law. This approach accords overriding value to consensus, and excludes the possibility of disagreement or dissent. This is because the dissenter who rejects the ideas that define the community thereby demonstrates that she is not among its members. As a result, the state is conceptualized and structured in terms of consensus, harmony, and unity. The role of the leader is to discern and realize the terms of the consensus in the life of the nation. Individual rights, social conflict, and fragmentation of state power are anathema.

The influence of *adatrecht* thinking is evident both at the founding of the Indonesian state and later critical points in the nation's history. The individual who played the leading role in transplanting and then cultivating Leiden scholarship in the Indies was Supomo. Supomo studied under van Vollenhoven in the Netherlands and served as chief justice during the Japanese occupation. He was also chair of the committee that drafted the Indonesian constitution. The premises of *adatrecht* are clearly evident in an address by Supomo to a meeting of the preparatory committee for Indonesian independence in May 1945. In a portion of the address quoted by Burns, Supomo described the Indonesian "national soul, the spiritual constitution of the Indonesian people" as characterized by a

> ... unity of life, unity of slave and lord [*kawulo dan gusti*], that is to say unity of the material world with the unseen internal world, unity between the micro- and macrocosm, between the populace and its leaders ...
>
> Given an atmosphere of unity between the folk and their leaders, between communal groups one with the other, all are caught up in [*diliputi*] a spirit of mutual assistance [*gotong royong*], the spirit of the family principle [*semangat kekeluargaan*].
>
> So, Honored Gentlemen, it is clear that, if we are about to set up an Indonesian State which is in accord with the distinctive quality and pattern of Indonesian society, we must base our state on the mindset [*Staatsidee*] of an integralistic polity, a state which is in unity with the totality of its populace, which is superior to the sum of its communal parts [*golongan*] in any field whatsoever. (247–48)

Burns's objective is to explore the historical roots and foundational assumptions of one strain of Indonesian nationalist thought. I do not understand him to be arguing that Leiden's romantic idealization of Javanese village life is the sole source of ideas about the meaning of Indonesian nationhood and the structure of the Indonesian state. Ruth McVey has argued that the central idea that animated the nationalist enterprise and still informs thinking about the character and legitimacy of the Indonesian state is the idea of achieving modernity.[3] The association of modernity with the future and with membership in a new political community arose out of a general sense of dislocation brought on by rapid social, political, and technological change during the first decades of the twentieth century. Because they were identified with the future, modernity and Indonesian nationalism came to be defined in terms of a conception of the past. In McVey's interpretation, the core meaning of Indonesian nationalism is *kemerdekaan*—freedom or liberation. The modern Indonesian future was understood as

[3] Ruth McVey, "Building Behemoth: Indonesian Constructions of the Nation-State," in *Making Indonesia: Essays on Modern Indonesia in Honor of George McT. Kahin*, ed. Daniel S. Lev and Ruth McVey (Ithaca, NY: Southeast Asia Program, Studies on Southeast Asia, 1996), pp. 11–25.

liberation from both Dutch rule and also from the constraints of indigenous social and cultural hierarchies.

The *merdeka* strand of Indonesian nationalism never found its Supomo and was never explicitly formulated as political–legal theory. As McVey shows, however, the association of Indonesianness with modernity, progress, and prosperity has nevertheless played a legitimating role in the independent republic. It is significant, moreover, that Supomo's was not the only political–legal ideology represented in the constitutional debates at the founding of the state. David Bourchier, who has researched many of the same issues addressed by Burns,[4] has shown that the positivist legal tradition that informed the thinking of Dutch advocates for codification was also represented among Indonesian nationalists who drafted the constitution. It is also noteworthy that the 1945 constitution that embodied Supomo's vision of an authoritarian "integralist" Indonesian state was discarded (albeit only temporarily) as soon as Indonesia achieved full sovereignty in 1949.[5] For much of the following decade, the Indonesian political and legal system was characterized by aggressive party politics, separation of governmental power, and recognition of the need for legal restraints on state power. The reality of 1950s Indonesia, in short, was a flat contradiction of Supomo's image of harmonious organic unity as the sole authentic expression of the Indonesian national character.

During periods of political openness, the political–legal tradition passed down to Indonesia from Leiden has competed for influence with other philosophies. Supomo's integralism, however, has been the undisputed ideology of choice for Indonesian dictators, and has proven to be a versatile vehicle for despots from both the left and the right. Sukarno relied on a version of Supomo's ideas in support of his left-leaning Guided Democracy. His successor, Suharto, perceived no contradiction in invoking a variation of the same tradition as justification for his authoritarian right-wing Pancasila Democracy. For me, the greatest value of Burns's book is that he gets inside these otherwise baffling claims. He shows, for example, that the New Order doctrine that "Pancasila is the source of all sources of law," however cynical, has its own internal logic.

Indonesian *Reformasi* as Reflected in Law

Petra Stockmann's book could be described as an inquiry into the fate of *adatrecht* political–legal ideology post-Suharto. Stockmann seeks to assess how far integralist thinking survived the New Order through an examination of legislation enacted

[4] See David Bourchier, "Positivism and Romanticism in Indonesian Legal Thought," in *Indonesia: Law and Society*, ed. Tim Lindsey (Annandale, Australia: Federation Press, 1999), pp. 186–96.

[5] Indonesia has had three constitutions in the sixty years since independence. Under pressure from the Dutch, a federal structure was created in a constitution promulgated in 1949. A provisional constitution establishing a parliamentary system was instituted in 1950, pending resolution of negotiations over a permanent constitution in the constitutional assembly or Konstituante. Sukarno reinstated the 1945 constitution in 1959 when he disbanded the Konstituante and declared Guided Democracy.

during the first few years after the regime's collapse.[6] The time frame covered in the study begins with the resignation of Suharto in May 1998 and runs through the MPR session of August 2000. This period encompasses the first two rounds of constitutional amendments and the passage of major new laws on elections, political parties, and human rights. Developments between August 2000 and November 2003 are treated in a brief Epilogue.

The study focuses on the content of positive legislation. The debates that preceded the enactment of new laws and the organization and operation of institutional mechanisms for enforcement of the law receive only passing consideration. As Stockmann explains, this approach is based on an assumption that legislation passed during a period of political transition "mirrors the power struggle of the political elite(s)" and reveals the way decision makers have acted upon their perceptions of domestic and international pressures and influences. (14–15)

Stockmann defines two frames of reference for evaluating the significance of the new legislation. The first, "internal" standard has two aspects. First, the post-Suharto enactments are examined against pre-1998 laws on the same subject. Here the aim is simply to determine how far the law has actually changed. Second, Stockmann analyzes *Reformasi*-era laws for evidence of ideological continuity with the New Order. For this purpose he defines what he calls the New Order "dominant discourse." This concept, explained more fully below, includes the regime's "main ideological support pillars and its main legitimization devices." (14)

Stockmann finds an external standard for assessing the significance of *Reformasi*-era legislation in the ideal of the rule of law. For purposes of the study, Stockmann conceptualizes the rule of law as a political–legal system in which, at a minimum, the human rights standards contained in international law are adhered to. In answer to the objection that this involves measuring Indonesian actions against standards that Indonesia has not embraced, Stockmann points to the recognition of the concept of the *rechtstaat*, or "law state," in the Indonesian constitution.

Chapter two is entitled "New Order Dominant Discourse and its Manifestation in Legislation." Stockmann begins by defining two "mutually exclusive" concepts of the state that informed the thinking of the drafters of the 1945 constitution and have competed for dominance ever since. On one side of the constitutional debate was Supomo's *integralistik staatsidee*. Stockmann explains Supomo's vision in line with Burns's analysis as representing an application of the methodological assumptions of the German Historical School to Indonesian *adat*. The other state concept put forward during the drafting of the constitution was that of the *rechtstaat*. The key features of the *rechtstaat* model, championed during the constitutional debates by Muhammad Yamin and Muhammad Hatta, include separation of powers, accountability of the executive and legislature in a parliamentary system, the power of judicial review, a constitutionally protected bill of rights, and a unified European-style legal system.

Integralist principles outweighed *rechtstaat* ideals in the New Order dominant discourse. Other elements included in the discourse are anti-communism, an emphasis on national unity and integrity, developmentalism, formal recognition of the military's

[6] Stockmann limits his examination of changes in the political system to institutional arrangements at the national level. The entire issue of decentralization is excluded from the analysis.

role in social life under the doctrine of *dwi-fungsi*, and essentially unlimited state power through elevation of Pancasila to the status of supreme source of all law. In the rest of Chapter 2, Stockmann summarizes manifestations of New Order dominant discourse in Suharto-era laws on the political system and human rights. This includes a description of the constitutional provisions on the structure of the state and human rights and a review of legislation on, among other things, political parties, the judiciary, the internal security organizations (KOPKAMTIB, Komando Pemulihan Keamanan dan Ketertiban, Operational Command for the Restoration of Security and Order, and, later, BAKORSTANAS, Badan Koordinasi Bantuan Pemantapan Stabilitas Nasional, Coordinating Agency for National Security), industrial relations, and the press. The picture that emerges is one of repression and *Gleichschaltung* or "forcing into line." Stockmann discerns a characteristic pattern of giving overt endorsement to *rechtstaat* ideals—unequivocal statements of basic rights, for example—and then covert subversion of those ideals in the same or related enactments. The Suharto-era Press Law, for instance, guaranteed "freedom of the press in accordance with fundamental citizens' rights" and unambiguously banned censorship. The transitional provision of the Press Law, however, preserved the requirement of a government publication license (*Surat Izin Terbit*, SIT) and thereby ensured the government's ability to silence speech with which it disagreed. A subsequent amendment abolished the SIT only to replace it with an equally effective censorship mechanism in the form of a requirement for a Press Publication Enterprise License (*Surat Izin Usaha Penerbitan Pers*, SIUPP).

After a summary of significant political developments in Chapter 3, Chapter 4 analyzes *Reformasi*-era enactments relating to the political system. The five principal topics addressed in the chapter are: the law on political parties; the election law; the composition, rights, and functions of the MPR and DPR; the powers of the executive; and the judicial system and law enforcement. The approach followed with respect to each subject is to examine all recent changes contained in MPR Decrees, constitutional amendments, and legislation, followed by an assessment of the extent of continuity or change reflected in those enactments.

Stockmann finds that the pattern identified during the New Order period of giving legislative lip service to *rechtstaat* ideals and then simultaneously qualifying or undermining those ideals is also evident in *Reformasi*-era legislation. Stockmann's analysis of the 1999 Election Law is illustrative. On the positive side, the law abolishes the New Order restriction that limited the number of political parties to three. The law also includes a variety of mechanisms designed to ensure that elections are fair and transparent, though these mechanisms are not entirely adequate. The significance of these changes is qualified by the fact that the law "includes numerous carryover provisions [from the prior law that] infringe upon the principles of a democratic *rechtstaat* in the same manner if not degree as under the New Order." (142) In support of this statement, Stockmann cites, *inter alia*, the prohibition of local or regional political parties, disqualification of parties that failed to achieve a minimal level of support in the 1999 elections, wide disparities in the ratio of elected representatives to population among the various provinces, overcompensation of disenfranchisement of the military and the police with the reservation of thirty-eight MPR seats, disqualification from candidacy for public office of individuals considered to have been affiliated with communist or other banned organizations, limitations on political speech, and the weaknesses in the sanctions and enforcement machinery of the law.

Stockmann's assessment of human rights legislation in Chapter 5 is similar to his assessment of reforms to the political system. One of the issues addressed in Chapter 5 will be discussed below. In general, Stockmann shows that, in the process of enactment, many of the rights contained in the Universal Declaration of Human Rights and the 1998 Human Rights Action Plan, which served as sources for legislation, were omitted, qualified, or watered down.

Chapter 6 summarizes the conclusions of the study. Stockmann's judgment of the early years of reform is generally negative. In answer to the question whether constitutional reforms altered the balance between integralism and *rechtstaat*, Stockmann concludes that the changes contained in the first two amendments failed to bring about "the much needed systematic overhaul of the Indonesian political system." (320) In support of this conclusion, Stockmann cites the failure to establish Regional Representative Councils, provide for direct election of the president, and create a Constitutional Court. It is acknowledged that the first two constitutional amendments effected a number of changes supportive of the development of a democratic *rechtstaat*. The second amendment, for example, imposes a requirement that the membership of the DPR be elected, thereby terminating the practice of padding the assembly with appointed members. With respect to the MPR, however, elimination of appointed seats for the military and police was postponed until 2009. The judgment on non-constitutional legislation on the political system and human rights laws is similar. Stockmann also finds that most of the elements of New Order dominant discourse survive. Anti-communism, Pancasila, commitment to national unity, and the dual function of the military all persist. The only plank of the discourse no longer in evidence is developmentalism.

In the Epilogue, Stockmann considers whether developments through November 2003 affect his earlier assessment of the chances for the emergence of democracy and legality. After reviewing the third and fourth constitutional amendments and several pieces of new legislation, Stockmann gives his assessment that the prospects for democracy, *rechtstaat*, and human rights protection had deteriorated between late 2000 and November 2003. Although the third and fourth amendments had put in place the key structural reforms that Stockmann found missing at the end of 2000, he found indications in non-constitutional legislation of backtracking on reforms and strengthening of Suharto-era ideology. A number of legislative changes are cited in support of this conclusion, but Stockmann singles out the enactment of the anti-terrorism law following the 2002 Bali bombing as the most serious setback.

Stockmann's analysis is careful, thorough, and well informed. His close examination of the details of recent legislation and his comparison of the terms of all recent enactments bearing on a particular subject clearly reveal the influence of the opponents of an open and transparent political process. That said, I do not believe that Stockmann's evaluation of five years of legislation provides an adequate basis for his ambitious conclusions. The problems resulting from the narrow and arbitrary time frame of the study (dictated, apparently, by the fact that the research was conducted for his doctoral dissertation) are only partially remedied by the update provided in the Epilogue. The more fundamental problem, however, is that positive law is too uncertain a measure of the institutional and structural determinants of legal and political development to serve as an accurate indicator of future change.

Stockmann uses legislation as his primary source, but he makes clear that his interest is not in law *per se*. Though not denying the importance of law to the process of reform, his analysis of legislation is not intended to reveal what the law is. As Stockmann obviously understands, any meaningful analysis of the actual state of legal protection for human rights would at least require consideration of the institutional structures for asserting, interpreting, and enforcing legislative norms regarding those rights. Stockmann's own analysis clearly shows that the "law" understood in terms of what the state will actually enforce is much more complicated than the terms of statutes and constitutions.

In Stockmann's analysis, legislation is not the object of inquiry, but is used instead as evidence of the relative influence of pro- and antireform elements at the time the legislation was enacted. This strikes me as unobjectionable from a purely methodological perspective. The question, though, is whether this snapshot of the terms of "the elite compromise at a given point in time" (14) appreciably advances our understanding of the progress of legal and political reform. It certainly seems reasonable to look to the intentions of those in power for evidence of the future direction of government change. Missing from Stockmann's analysis, however, is any explanation for why outcomes within the legislative process should be deemed decisive. Focusing on the legislature cannot be justified on the basis that legislators control the reins of power through their ability to control the law, since there is much more to law than the language of legislation. Nor can it be said that the results of legislative battles on politics and human rights indicate that the balance of power in general is weighted against change. Stockmann's demonstration of the continuing influence of opponents of reform in the legislative process provides a valuable window into ongoing battles over the future direction of political development in Indonesia. However, his inquiry takes in too narrow a segment of the political–legal landscape to support definitive judgments about the results of those struggles.

My misgivings with Stockmann's approach can be illustrated by taking a closer look at one of his examples. At several points in his study, Stockmann discusses the treatment in Indonesian law of the prohibition against prosecution under a retroactive criminal statute. As with other enactments on human rights, the MPR drew on the language of the Universal Declaration of Human Rights to draft its rule on nonretroactivity. Because of events occurring concurrently with the drafting of the second amendment, the precise formulation of the nonretroactivity principle assumed particular importance.

The second constitutional amendment was debated and approved in August 2000. At the same time that the MPR was considering the second amendment (which included the *ex post facto* ban), the DPR was debating a bill specifically authorizing retrospective prosecutions. The retroactive criminal statute before the DPR was contained in a proposal to create a human rights court. The proposal, which authorized prosecution for crimes committed during the 1999 independence referendum in East Timor, was in direct response to a threat from the United Nations Security Council that if Indonesia failed to prosecute the perpetrators of the East Timor crimes an international tribunal would be established for that purpose.

The Universal Declaration of Human Rights's provision on retroactive criminal statutes prohibits prosecution for "any act or omission which did not constitute a penal

offense, under national *or international* law, at the time when it was committed" (emphasis added). Adoption of this language by the MPR would have presented no bar to prosecution of the East Timor crimes since the penal provisions of the Human Rights Court Statute define as crimes those recognized in international law. The MPR chose not to use the language of the Universal Declaration of Human Rights, however, and the prohibition against retroactive penal laws is framed in seemingly absolute terms. Article 28I of the amended constitution includes the right against retrospective prosecutions with other nonderogable rights that "may not be interfered with under any circumstances."

The scenario thus far fits Stockmann's predictions to the letter. Investigations of the violence in East Timor placed principal responsibility for human rights abuses on the Indonesian armed forces. It was the armed forces that stood to benefit from the protection afforded against retroactive-prosecution statutes, and Stockmann is certainly justified in his suspicion that the MPR's generous definition of the right against *ex post facto* criminal laws was intended to shield the military from accountability.

Prosecutions were initiated under the Human Rights Court Law for human rights abuses committed in East Timor, and a number of military and police officials were found guilty of crimes against humanity. One of the convicted defendants appealed to the newly established Constitutional Court, claiming that his conviction violated the prohibition against retroactive prosecutions.

The legal posture of the case before the Constitutional Court fit a pattern common in constitutional adjudication. The arguments on one side emphasized the plain meaning of the constitutional text that appears to bar retrospective prosecutions without exception. Arguments on the other side focused on the general purpose of the *ex post facto* prohibition, which is to prevent punishment for acts that were not criminal at the time they were committed, rather than on the specific formulation of the rule in Indonesian law. Since the crimes for which the defendant was convicted have been recognized internationally for more than half a century, according to this approach, his trial and conviction did not violate any constitutionally protected right. By a six to three majority the Constitutional Court rejected the defendant's appeal and upheld the conviction. Though the decision is not a model of legal prose, the result is amply supported by legal reasoning that would be recognizable to any lawyer familiar with international criminal law. It is also significant that the same court reached the opposite result in a second case involving the same provision of the constitution. This case arose out of the prosecution of an individual accused of participating in the October 2002 bombings of two Bali nightclubs. The crimes for which the defendant was convicted were contained in an antiterrorism law that was enacted *after* the Bali bombings and made retroactively applicable to the bombings. In deciding that the prosecution violated the *ex post facto* prohibition, the Court relied on, among other things, the fact that there is no generally recognized definition of the crime of terrorism.

The Constitutional Court is not typical of the Indonesian judiciary generally. In its three years of operation, the court has established a record of independence and

principled decision making.[7] Independence and principled decision making do not characterize the rest of the Indonesian judiciary, however. Burdened by decades of corruption and domination by the executive, the courts have proven especially resistant to reform.[8] The current chief justice, Bagir Manan, is both capable and committed, but transformation of the courts will be a long process.

It may be wishful thinking, but I believe that Stockmann's assessment of the progress and prospects of legal and political reform in Indonesia is overly pessimistic. What is certain, though, is that the goals of protecting human rights and establishing accountable government will be achieved, if at all, not by passing laws or filling the ranks of the legislature with reformers (though some of both is obviously necessary) but in the creation of institutions that subject the exercise of state power to the constraints of law and principle.

[7] The court's most celebrated decision invalidated a provision of the 2003 election law that barred former communists and other presumed enemies of the state from candidacy for public office. In another important decision, the court struck down a portion of its own enabling legislation that imposed limits on the court's judicial review powers on the ground that the limitation contained in the statute conflicted with the powers granted to the court in the constitution.

[8] Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Ithaca, NY: Cornell Southeast Asia Program, 2005).