Timothy Lindsey, ed. *Indonesia: Law and Society*. Sydney: The Federation Press, 1999. xxx + 418 pages.

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Law has been a relatively neglected topic in post-colonial scholarship on Indonesia.[2] This neglect is due in part to disciplinary conventions, which regard the formal legal system as fundamentally a professional rather than an academic concern. But the relative dearth of western scholarship on the Indonesian legal system is also partly a consequence of the perception that law and legal institutions, if not altogether unimportant in Indonesia, are not where the real action is. Within Max Weber's well-known typology of forms of legitimate domination, the Indonesian state is by consensus categorized as essentially "patrimonial" rather than "rational legal." The center of gravity within the Indonesian state is neither the legislature nor the courts but the administrative bureaucracy. As in patrimonial regimes generally, law in Indonesia is broadly characterized by a high degree of discretion in decision making, and an absence of clear boundaries between administration and adjudication.

The publication of *Indonesia: Law and Society*, which grew out of a conference on Indonesian law held at the University of Melbourne in 1995, is indicative of both a growing scholarly interest in the Indonesian legal system and the occurrence of important changes to Indonesian legal institutions. The volume consists of twenty-seven chapters plus an Introduction by Timothy Lindsey and a Foreword by Arief Budiman. As described by Lindsey, the purpose of the book is to provide a general introduction to the Indonesian legal system for use by both scholars and legal practitioners. The collection includes essays covering a wide spectrum of doctrinal subjects, as well as chapters that treat the legal system more generally from a historical or sociological perspective. The contributors represent a diverse array of disciplinary and theoretical approaches to the study of law, ranging from the humanistic to the rigorous—from discourse analysis and history to economic analysis and legal dogmatics. Some of the authors have long experience and deep familiarity with Indonesia and the Indonesian legal system, while others are relative newcomers to the field. The contributions are not of uniformly high quality; some of the chapters are rather narrow and some are somewhat superficial. But many of the chapters are very solid, and some are first rate. As Arief Budiman observes in the Foreword, the collection does not present the Indonesian legal system in a tidy, easily understood package. But law is a complex and often contradictory phenomenon, all the more so in a place as large, diverse, and dynamic as Indonesia. As Professor Budiman also writes, the failure of the book to offer a "comprehensive conclusion . . . is more the result of the complexity of the problem rather than any shortcoming of the book." (p. v)

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[1] I am grateful to Anne Lombard, Robert Lutz, and Jonathan Miller for comments on this Review.

[2] An important exception to this generalization is the work of Daniel Lev. For a comprehensive compilation of foreign language scholarship on Indonesian law see Sebastiaan Pompe, *Indonesian Law 1949 - 1989: A Bibliography of Foreign-Language Materials with Brief Commentaries on the Law* (Dordrecht, The Netherlands: Martinus Nijhoff, 1992).

The contributors to *Indonesia: Law and Society* describe different facets of Indonesian law, but the volume as a whole and the historical chapters in particular evince a consistent thread running from the colonial legal system and the drafting of the 1945 constitution through the Sukarno era and the New Order. The founding of the Indonesian state presented the opportunity for a conscious choice among alternative organizational forms and ideological foundations for the new state. The constitutional debates in 1945 focused on a choice between two contrasting visions of the social and political order, one essentially rational legal and the other essentially patrimonial. The principal exponent of the rational legal vision was Muhammad Yamin, who favored a US inspired, liberal constitutional structure based on separation of governmental powers, constitutional protection of individual rights, and judicial review of legislation. The other vision, championed by Raden Soepomo, was constructed out of German legal romanticism and a conception of indigenous Javanese political theory. Soepomo developed a state philosophy he called "integralism" premised on an organic unity between rulers and ruled, and emphasizing communalism and consensual decision making.

The debates in 1945 produced a constitution closer to Soepomo's conception than to Yamin's, but it was the liberal vision that prospered during much of the 1950s under the 1950 constitution and the era of parliamentary democracy. With the imposition of Guided Democracy and the return to the 1945 constitution at the end of the decade, however, Sukarno crushed the supports for a liberal social order, and disavowed the rule of law as a drag on his revolutionary struggle for a just and prosperous society. Guided democracy included a guided judiciary as well. Notwithstanding the regime's radical rhetoric, what actually emerged as Sukarno consolidated the power of the presidency was an institutionalization of Soepomo's reactionary vision of an organic state.

The Sukarno government was replaced in 1965 by the government of General Suharto. The new regime emphatically rejected the previous government's overt subjugation of law to politics, embraced the symbols of legality, and cast itself as the guardian of the rule of law. As the New Order took shape, however, it became apparent that the system of executive power and privilege developed under Guided Democracy would be preserved and reinforced. Although the Suharto government repealed two Sukarno-era enactments that expressly authorized the president to intervene in ongoing judicial proceedings, the 1970 Basic Law on Judicial Authority that replaced them stopped short of guaranteeing the full independence of the judiciary. Moreover, as the essays in the book repeatedly demonstrate, the New Order found ways of evading restrictions on executive discretion and subverting the principle of legality without the necessity of express legislative authorization. While the New Order never wavered in its professed commitment to the *negara hukum* or "law state," the interpretation attached to that concept by New Order ideologues, insofar as it was not simply cynical equivocation, was closer to the notion of rule by law than rule of law.

Thus, one theme that emerges in *Indonesia: Law and Society* is the predominance of patrimonial tendencies in independent Indonesia.[3] But the book also shows that

[3] It bears emphasizing that the terms patrimonial and rational legal refer to ideal types that do not now and never have existed in pure form anywhere. Indeed, it is now frequently argued that, because of the inherent

patrimonial assumptions have not gone unchallenged, and that the Indonesian legal system has from its beginnings been an arena of struggle among competing conceptions of the social and political order and the relation between law and state power. Moreover, the essays contained in the book provide ample evidence that the tensions within the Indonesian legal system and the pressures for fundamental change are growing, though none of the authors forecasts a speedy transition to the rule of law. In an essay on the Indonesian advocacy, for example, Daniel Lev shows that private lawyers in Indonesia have consistently promoted a vision of the social order premised on the legitimacy of private interests, separation of state and society, and an autonomous legal order capable of containing state power. The primary audience for such appeals has been those elements within society that lack political influence within the bureaucratic power structure—principally, the middle classes and ethnic and religious minorities. As the size and social and economic power of such groups has grown over twenty-five years of New Order economic expansion, calls for fundamental political and legal change have become more insistent. Bernard Quinn finds some evidence for the growing strength of middle class interests in an analysis of the administrative courts. The system of administrative courts, which was first promised in the 1970 Basic Law on Judicial Authority, formally chartered in the Administrative Courts Act of 1986, but finally brought into being only in 1991, has jurisdiction over claims against the government alleging illegality in administrative decision making. Quinn's analysis of the work of the courts leads him to conclude that the courts are in fact introducing principles of due process and administrative regularity into bureaucratic decision making, but that to date at least the courts have been responsive to middle class interests only, and not to the needs of Indonesia's poor.

Thus, one source of pressure for change to the Indonesian legal system is the changing configuration of social power within Indonesian society. Another force for legal change is the economy. In one of the book's more theoretical chapters, Gary Goodpaster suggests that the system of patronage-based social and economic ordering that produced more than two decades of economic expansion in Indonesia has played itself out. After a certain point, Goodpaster argues, patronage-based systems generate distorted incentive structures and "lead to major economic inefficiencies by creating a political market for income-shifting and redistribution services or excessive rent-seeking." (p. 23) Sustained economic productivity within a mature capitalist economy depends on the development of the rule of law and rule-based behavior, because it is only through the creation of "calculable structures of expectations" embodied in legal

limitations of language, the complete elimination of discretion or the personal values and preferences of the decision maker from legal decision making is not possible. See generally, Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, N.C.: Duke University Press, 1989). Cf. also Emerson H. Tiller & Frank B. Cross, "A Modest Proposal for Improving American Justice," *Columbia Law Review* 99 (1999): 215-34 (proposing that the current method of random assignment of judges to three judge appellate panels be replaced with a system in which assignment is based on the political affiliation of the judge's appointing president in order to achieve more idealogically balanced panels); McCleskey v. Kemp, 481 U.S. 279 (1987) (in which the United States Supreme Court rejected the claim that Georgia's death penalty scheme is unconstitutionally arbitrary, notwithstanding evidence, accepted by the Court, that a defendant charged with murdering a white victim is almost eleven times more likely to be sentenced to death in Georgia than a defendant charged with murdering a black). But while the ideology of the rule of law is partly mystification, a brief look around the world confirms that law works better at controlling state power in some places than in others.

rules enforced by independent and accountable judicial institutions that markets are able effectively to mobilize private initiative and take advantage of the decentralized knowledge of the entire society. Goodpaster and others also suggest that Indonesia's integration into a global economy is creating pressures on Indonesia's legal system. In a chapter on protection of intellectual property, Christoph Antons links recent reforms of Indonesia's intellectual property law to both pressure from the United States and changing domestic economic strategies driven by the increased mobility of global capital. Similarly, in a chapter on international commercial contracts, Veronica Taylor notes that as a consequence of globalization individual nation states no longer have exclusive control over the nature and content of their legal systems. Her empirical study of contract practices shows, however, that global economic integration does not necessarily bring about legal unification. She writes that "globalization will inevitably alter formal contracting and local legal infrastructure but powerful local political and cultural factors will also shape the extent and form that such change may take." (p. 281)

The essays addressing the causes of legal change in Indonesia call attention to the book's most general and pervasive theme, which is also the least tractable.[4] As suggested in the sub-title, the issue that occupies the collection as a whole, and is addressed either directly or indirectly by all the contributors, concerns the nature of the relations between law and society. From one perspective this raises questions about the actual, as opposed to the formal, sources of law—the role of culture, politics and the economy in shaping law and legal practice. From another angle it raises questions about the role of law in social life. To what extent, in what ways, and under what circumstances does law, as a set of institutions and practices distinct from social, political and economic institutions, make a difference?

As might be expected, the answers to these sweeping questions are far from settled. The book contains a wealth of information and insight into the cultural, social, political, and economic foundations of law and legal values in Indonesia, but no discernible consensus on where law comes from or how to make law matter. Instead, the book illustrates the complexity and variety of influences shaping the Indonesian legal system, and demonstrates the practical and theoretical difficulty involved in attempting to sort those influences out. Mention has already been made of the role of class structure and the form of economic activity in shaping the Indonesian legal system. Although class and the economy are probably the longest studied and most resilient explanations for legal change, the role of these factors and the dynamics by which they influence legal institutions are far from clear. The premises underlying currently popular theories that posit a correlation between economic development and the rule of law, which are drawn from the law and economics movement, are not

[4] Another prominent theme, anticipated in what has been said above, relates to the multiple influences and plural character of Indonesian law. This theme is reflected throughout the volume, but is particularly evident in chapters on Islamic doctrine and chapters treating various aspects of *adat* law. In my view, Indonesia's exceptionalism in this regard should not be exaggerated. All legal systems are hybrid creations and, if legal pluralism is defined broadly, all legal systems are also pluralistic. One of the messages that emerges from the present book is that rules whose original provenance is Islam or *adat* are being Indonesianized through incorporation into the national legal system.

universally accepted.[5] Likewise, the mechanism by which class interest affects legal institutions is also uncertain. While it is easy to appreciate why the middle class and other political outsiders should support the rule of law from the position of outsiders, it is less clear why any group would continue to endorse an arrangement that systematically favors no one once they are in a position simply to appropriate power for themselves. More fundamentally, the salience of class as the motor of legal change has been questioned in the Southeast Asian context, where state-society relations and the role of the state in the development of capitalism have historically differed in significant ways from the liberal legal model on which orthodox understandings of the rule of law are based.

One of the thorniest issues in law and society studies, about which the present volume has much to say but no definitive answers, concerns the relationship between law and culture and the role of culture in legal change. The problem with cultural explanations of law, like cultural explanations of politics, is that they are often circular and/or deterministic. As explained in a related context, at the extreme such explanations "com[e] down to a more sophisticated rendering of 'the French are like that!'"[6] On the other hand, the existence of deep affinities between a society's law and its larger culture is largely undisputed. "Law," moreover, is much more than the verbal formulae by which it is expressed; it comprises a layered social practice that includes formal legal rules and a large sub-structure of unarticulated informal assumptions, beliefs, attitudes, and techniques that shape and give meaning to the rules. In other words, there is ingredient in law a large element of what is commonly but unhelpfully thrown together into the unanalyzed grab bag of "culture." Once it is recognized (as it increasingly is) that culture, like other social phenomena, is embedded in history, and not the other way around, the question for studies of law and society is no longer whether law reflects the larger culture—it does, else either the law or the culture would change. The important question, rather, is how law and culture change. Changing legal rules is usually a relatively simple and straightforward process. Changing the rest of the legal edifice is almost never easy.

The economic collapse in 1997 and the political changes it precipitated have only made the issues addressed in the book more urgent. The "Reform Order" of President Habibie, like the New Order before it, has declared law reform and the establishment of the supremacy of law to be a first priority. Any government that emerges as a result of the 1999 elections is certain to do the same. Whether current commitments to upholding legality will prove any more meaningful than those of the past remains to be seen. Under intense pressure from international aid agencies and amid popular demands for reform, Indonesia has enacted a whole raft of new laws in recent months,

[5] Compare e.g. Katherina Pistor and Philip Wellons, *The Role of Law and Legal Institutions in Asian Economic Development: 1960–1995* (Hong Kong: Oxford University Press, 1999) (affirming empirical linkages between market-based economic policies and legal development in six Asian countries) with Kanishka Jayasuriya, ed., *Law, Capitalism and Power in Asia* (London: Routledge, 1999) (questioning any assumption of causal connection between markets, liberal politics, and the rule of law).

[6] Richard Robison, Kevin Hewison, and Garry Rodan, "Political Power in Industialising Capitalist Societies: Theoretical Approaches," in Kevin Hewison, Richard Robison, and Garry Rodan, eds., *Southeast Asia in the 1990s: Authoritarianism, Democracy and Capitalism* (St. Leonards: Allen & Unwin, 1993), p. 15, quoting Samuel Huntington, "The Goals of Development," in Myron Weiner and Samuel Huntington, eds., *Understanding Political Development* (Boston: Little Brown, 1987), pp. 22-23.

including a new law on regional government, a new bankruptcy law, and the country's first anti-monopoly legislation. The legislature also recently approved an amendment to the 1970 Basic Law on Judicial Authority that transfers control over the courts from the Department of Justice to the Supreme Court. The purpose of this change, which has been advocated by reformers for many years, is to promote judicial independence by eliminating a direct line of influence over the courts by the executive. The Presidential Commission report on which this legislation was based also recommends granting the Supreme Court the power to review the constitutionality of legislation.

The recent legal reforms have generally been welcomed as steps in the right direction. None of the changes, however, demonstrates an unequivocal determination to bring about fundamental institutional change. The essays in *Indonesia: Law and Society* illustrate that formal rules make up only a small part of the constraints by which social life is ordered, and that simply rewriting the law does not automatically alter deeply entrenched attitudes and practices. The book also shows that those who built and run the current system, most of whom have not been replaced, benefit by it, and therefore have a strong incentive to prevent or control change. That said, there may yet be grounds for optimism that Indonesia is moving in the direction of meaningful legal limits on state power. The optimistic assessment is based more on the changed political context than on the direct efforts at legal reform. Executive subordination of the judiciary is much more difficult to maintain when control over the executive is itself contested and uncertain.[7] Further, while the dynamics of cultural change are not well understood, it is safe to assume that a society's legal culture—the informal beliefs and assumptions that undergird the formal legal system—will be sensitive to changes in the structure of political power. From this perspective, what is most important for the future development of Indonesia's legal system is the preservation of an open political process, along with the protection of free speech and association rights on which party politics depends.

[7] See Sebastiaan Pompe, "The Reform Ideas of the Indonesian Judiciary: Some Basic Questions," *Indonesian Law and Administration Review* 3,1 (1997): 48-65 and authorities discussed therein.