

**KEYNOTE SPEECH:  
SOME OBSERVATIONS ON LEGAL REFORM  
AND LAW ENFORCEMENTS  
IN INDONESIA**

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- Purpose: to give a foreigner's perspective on law reform in Indonesia.
- "Foreigner's perspective" covers quite broad spectrum: donors, investors, creditors, those with commercial dealings, NGOs (like those concerned with forestry preservation), and development institutions: the Bank, ADB, the IMF etc.
- No surprise to state foreigner's v critical.
- The focus not really on the substance of Indonesia's laws - although of course there are concerns there. Also are concerns about the quality of the laws: their clarity. For example:
  1. Many investors are unclear about the uncertain policy environment for the sectors they are interested in - e.g. in transport, where new legislation is contemplated for roads, rail etc, in large part driven by the laws on decentralization, but where there is no overarching policy framework to provide a vision and a coherence to the sector.
  2. Typical Indonesian laws leave great deal of the substance; to regulations - and these are often very slow in materializing. For instance, under the Oil & Gas Law (2001) a downstream regulatory agency is to be established. Implementing regs have been issued setting up this body but the criteria by which it is to carry out its duties, and its operating "rules" have not yet been established.
  3. Mining companies are disturbed by the absence of a new law - which is needed, for example, to address conflicts between the existing mining law and forestry legislation.
  4. In a number of sectors, tariffs is a critical issue - and yet the law fails to provide certainty of methodology for making adjustments. May not always matter too much - in telecoms, declining costs lessen the pressure, for dealing with this issue. But for toll road investors, the lack of a professionally objective adjustment mechanism is a clear deterrent to new investors.
- And cutting across many sectors is the very thorny issue of eminent domain - the right of public authorities to compulsorily acquire land.
- The common complaint is "lack of legal certainty". Means many things, but for most foreigners, means knowing what the rules of the game are: knowing; what the policy framework is, knowing what the mechanisms by which policy is adjusted/changed, having confidence that these rules are applied reasonably and consistently - and, as many such rules are spelt out in contracts, having confidence that contracts will be honored. And it is this matter- the issue of legal certainty - which has most troubled most foreigners about Indonesia in recent years. This not surprising, for the issue of legal certainty becomes most obviously an issue in times of stress- and certainly Indonesia has been experiencing real stress in recent years. But precisely in such

times that the value of orderly, predictable and fair mechanisms for resolving problems becomes most obvious. And by and large foreigners concluded that Indonesia failed the test. And the most symbolic of institutions when it comes to "legal certainty" - the judiciary - is viewed as having been the biggest failure of all.

- Now, many Indonesians may dismiss such views of foreigners as being motivated by self-interest alone - and not by the larger interests Indonesia. Some merit to this criticism. Although why would you expect foreigners, indeed everybody, not to be most powerfully motivated by self-interest? And I would argue the interest of foreign investors should be the interest of Indonesians too - for investment means jobs and wealth creation.
- But in fact the criticism among foreigners about the inadequacy of legal certainty mirrors the complaint of many Indonesians about their own country. Only it is articulated somewhat differently: Behind the rallying cry of KKN lies almost precisely the same complaint: the lack of orderly, predictable and fair mechanisms for settling disputes, for applying the law, for ensuring decisions affecting the public do not just go to the highest bidder.
- Take the ManuLife case, for example. Clearly this featured prominently in the international press because it involved a big Canadian company. But the core concern about that case expressed by foreign commentators mirrors a core complaint Indonesians have about their justice sector institutions: a police investigation that, in the words of one senior Indonesia minister, appeared so misguided as to be only explicable if corruption was involved.
- What I am suggesting is that the complaints of outsiders and those of Indonesians about the Indonesian legal system and have enormous common ground: a basic lack of confidence in the integrity of the justice sector institutions.
- And it is the quality of efforts by policy-makers and senior public officials to address this issue that I think most disturbs many Indonesian commentators - and frankly disturbs me.
- I do of course recognize that some progress in this area has been achieved in recent years. And I am certain that many senior Indonesian public officials during the turbulent years of 1997 to 2000 also agreed with the view that reform of the justice sector institutions was an urgent priority:

For example, during those years:

1. The police were separated from the military.
2. New anti-corruption legislation was passed mandating, among other things, the establishment of an anti-corruption commission (this clearly stemmed from a recognition that the performance of the AGO was not satisfactory in this area).
3. KPKPN was established - potentially v potent weapon in the fight for integrity - Thailand example.
4. Ombudsman established. Again, potentially very valuable.
5. Joint Investigating Team established.

6. National Law Commission established.
  7. Audit of the AGO carried out.
  8. Establishment of commercial court (along with very desirable features: publishing of its decisions, provision for ad hoc judges).
  9. The mandating of a "one-roof" system.
  10. Mandating the establishment of a Judicial Commission Amendment).
- By any standards, this is an impressive list: but... look at the subsequent history:
    1. ACC not even set up yet (2 years after the law mandated this. IMP pressure appears major factor in getting as far as matters are at this time - satisfactory state of affairs?).
    2. JIT abandoned (disconcertingly triggered by the first case being against a judge).
    3. The Ombudsman appears highly marginalized - publicly questions its own value.
    4. Audit of the AGO appears to be just one more report gathering dust.
    5. KPKPN now being folded into ACC. But compliance with reporting regs seriously weak. And when it made formal findings of apparent irregularities - e.g. concerning the AG, these appear to be ignored by all but the press and NGOs.
    6. Very unclear what the fate is going to be of the Judicial Commission - appear to be moves within Supreme Court for itself to assume key responsibilities envisaged for the JC.
    7. Nat L Comm appears to be largely by-passed - its lack of involvement in this seminar an indication?
  - Of course there continues to be welcome initiatives. But overwhelmingly the impression, at least to this outsider, is that reform of the justice sector institutions simply isn't viewed by the country's leadership, by policymakers and other public officials, as a national priority.
  - One can speculate as to why this is so - and the answers would certainly help the many Indonesians who desire reform - and the many outsiders who consider themselves friends or partners of Indonesia - understand just what the prospects are for overcoming corruption and strengthening the rule of law in this country.
  - But that is a subject for another occasion. I would simply say that I do worry that the explanation lies less in the complexity of the challenge of institutional reform - which indeed is complex - and more in reform is too risky - too risky to the livelihoods of the many who have learned to live within and off the system.
  - However, there are - at least 2 reasons for thinking that the failure: to take up the challenge of justice sector reform is bad news for Indonesia. First, and in my mind the less important of the reasons, is that it is clear that along with globalization comes an almost inexorable demand for better governance, including better "public services" - the legal certainty I have mentioned earlier. Over the medium term I think it likely that the state of a country's legal system, including especially those institutions responsible

for administering that system, will be a major factor in determining the success with which such country is able to compete successfully for investment resources on any significant and sustainable scale.

- The other reason for being concerned at the very slow pace of justice sector reform in Indonesia is, to my mind, this:

\* a justice sector which is widely viewed by its own people as corrupt and lacking in integrity is highly likely to lead to a great distrust for state institutions and in government more generally - with one result being that a genuinely civic-minded society will be that much harder to bring about, and with a tendency to encourage anti-social ad, when under stress (as Indonesia so obviously was post-1997), destructive tendencies. I would further argue that in a country where power is fragmented - which is of course the very nature" of a democratic society - a trusted (trusted by the people) set of justice sector institutions is a more or less indispensable glue for maintaining cohesion and the sort of enduring stability that responsibly-minded people value.

- Finally, a few words about what we see as being an appropriate (needed) way forward:
  1. A national framework and action plan for overall legal reform needs to be fleshed out and adopted. Not rocket science: I think the basic ingredients are obvious and well-known to many in Indonesia - and that in fact there is a rather clear consensus on what is really needed. National Law Summit is only a limited part of the answer: a focus of the resource shortcomings, while understandable and real, misses the larger point: the key challenge is about integrity and trust. For this reason, the next stage must involve in a meaningful way stakeholders and civil society more generally.
  2. Concerted attention of the national leadership. Courage is needed. (Show Sicilian slide). This is a continuing challenge on the table for the Indonesian authorities. And one aspect of this is showing respect for one's own laws: the KPKPN experience needs to be reflected upon. Its findings, however flawed some may find them to be, need to be taken seriously (The AG example).
  3. The key law enforcement institutions clearly need to come up with their own comprehensive governance reform programs. But, given the lack of public trust, the involvement of civil society and stakeholders is essential. The action programs should be based on the outcome professional audits and a process of obtaining the broadest possible consensus of Indonesian citizens.
  4. The institutions created/mandated during the Habibie and Gus Dur years need to be strengthened and resourced in a way that allows them to fulfill their mandates; these were appropriate and designed to address correctly diagnosed needs.
  5. A needs assessment for each of the various justice sector institutions is appropriate: the bottom line is that these institutions are not appropriately resourced - and we all know it. While the challenge is much more complex than raising pay levels and providing better facilities, these are also indispensable parts of the solution.