International cooperation between politics and practice: how Dutch Indonesian cooperation changed remarkably little after a diplomatic rupture

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CHAPTER 7
Cooperation for legal development

The problem with most of the new Indonesian laws is that they are simply not correct, and they can be imperfect because they are implemented by incompetent judges, or judges who trifle with the rules anyway. There are no such things as legal security or equality before the law here in Indonesia (Interview with Prof. dr Sunaryati Hartono).

The four cases in this chapter recount the stories of Indonesian and Dutch jurists working together for legal development in Indonesia. Dutch-Indonesian cooperation in legal development may seem odd: nationals of the former colonial power assisting Indonesian jurists to change the legal system that the coloniser left. In the course of this chapter, it will become clear that the choice for Dutch-Indonesian cooperation in legal matters is quite logical, but that sensitivities from the past did affect the actual working together.

The first section presents areas of the political and policy management games of the legal system in Indonesia. These areas are: law development, the legal education system and the judiciary. The main Indonesian actors and the problems they aspired to solve are introduced here. The second section describes the efforts to come to a Dutch-Indonesian program for legal cooperation. Here the focus will mainly be on the Dutch political and policy management games. The third section is an intermezzo that addresses some specific problems of cooperation between the ‘elites’. The succeeding sections describe the implementation of four projects within the broader program for legal cooperation. Each of these sections ends with the events in 1992: what the consequences of the decision to end Dutch development cooperation were for each of the projects.

The structure of this chapter differs from the other two chapters, since the projects studied here had the same policy management structure: the Council for Indonesian-Dutch Legal Cooperation was the umbrella organisation. The Council managed ten projects, with different objectives and different counterparts. I have chosen the four longer lasting projects out of the ten projects the Council managed in the period 1985-1992.
The Indonesian legal system: constraints for many, resources for a few

The legal system in Indonesia is perhaps the most persisting reminiscence of Dutch colonial rule. Codified law is for a large part still based on the Dutch law (continental law), many legal terms are in the Dutch language, as well as much of the literature on legal matters. After the Declaration of Independence in 1945, the new leaders announced that a truly Indonesian legal system would replace the colonial legal system. The colonial legal system facilitated subjugation and exploration of the indigenous peoples of Indonesia, principles that had to be changed. The Constitution written before the Declaration of Independence contained transitional provisions with regard to the inherited colonial legal system.

Although the revolutionary leaders found the colonial laws contrary to the principles of independence, the option of abolishing them all in once was not feasible: such a vacuum could lead to legal uncertainty or even chaos. The Transitory Provision 11 of the Constitution of 1945 states that all existing institutions and regulations would remain valid, pending the enactment of new legislation in conformity with the constitution. However, a short sentence in the Constitution modified this transitional provision somewhat. It said that all legislation would remain valid, unless they were contrary to the Constitution itself. But what was contrary to the Constitution was not specified (Gautama & Hornick 1972: 181-184). These two sentences in the Constitution are in a nutshell the problem of the colonial inheritance with which the Indonesian judiciary and legal experts have to deal with. There are many gaps and uncertainties in the law, caused by doubt as to what the old rule is and whether it is contrary to the Constitution. New legislation is still not comprehensive and has many loopholes as well. Interpretation of the meaning of the law seems to be the main task of the judiciary. The legislative and the Ministry of Justice face the task of replacing the old laws with new, Indonesian laws. Despite some revolutionary initiatives, advocating a complete and sudden abolition, the approach for legal reform is piecemeal. At the turn of the century, a solid and complete legal system in Indonesia is still a far cry from reality.

Law development: plurality, choice and pressure

The archipelago with its many cultures, religions and ethnic groups, has a corresponding legal system: for each group and for separate areas there are different legal systems. In fact, one cannot speak of one legal system in Indonesia. Customary law, adat, applies to all indigenous Indonesians and is different per cultural group. Islamic law applies to the vast community of Muslims. Western law -introduced by the Dutch - applies to all foreigners, Christian Indonesians and people who submitted themselves to these laws. Military law applies to the army, but is in some cases applied to civilians. Indonesia is submitted to international law as well. Modern law as conceived by the new Indonesian leaders is applied in all other areas that are not concern private matters (religion, marriage, family).
Legal plurality in Indonesia originates from the unifying of the archipelago: the Dutch colonisers divided the inhabitants into different (racial) groups with different courts. Each group retained its own laws; the conflicts of law that arose were settled according to interracial private law. Applying different legal systems served two purposes, the first was obvious, to give the Dutch special rights, but secondly, to allow the indigenous people to live according to their own rules. Cornelis van Vollenhoven, a legal expert on adat law in the nineteenth century advocated the latter approach. The effect of his plea for 'letting the Indonesians live the Indonesian way' is that adat law is still a very important legal system in contemporary Indonesia, despite national and international demands for a modern and unified legal system (Fasseur 1992: 254-256).

The plurality in the Indonesian legal system is indeed exceptional, but not uncommon for former colonised countries (the United States have a plural legal system as well). Hooker argues that unified legal systems are more the exception than the norm (Hooker 1975). Despite the fact that plural legal systems are common in many countries, even a layman can see that such a system will cause problems with respect to the application of the law. If a Muslim wants to marry an American expatriate, which legal system will prevail? If a Madurese farmer wants to sue a Javanese plantation owner in a land dispute, will the local adat prevail or the new law on land mortgage? In many cases the judge has to decide which legal system will prevail, but due to other deficiencies in the legal system, this is not an easy task.

Growing political awareness and the vices of the development efforts (landownership, forced removals) have made Indonesians aware that their system of law is seriously lacking. Participation in regional organisations such as ASEAN and APEC make improvement of the Indonesian legal system imperative as well; the largest share of trade in Indonesia is intra-regional. Globalisation of the economy also makes legal reform in Indonesia imperative: foreign investors are never sure what the rules are and when they are applied. Foreigners often have no case when it comes to a legal dispute with an Indonesian counterpart. Foreign investors also complain about the excessive bribes that must be paid to several layers of government and the absence of rules and transparency to avoid the bribery. The World Bank emphasises in its reports that institutional development is a prerequisite for sustainable development (World Bank 1988; 1990; 1993b). Nevertheless, despite increasing international pressure, the Indonesian government has always been able to avoid true legal reform. The IMF austerity measures to settle the enormous debts that came to the fore in 1998 have time and again been neglected by both the Soeharto cabinet and the ‘reformasi cabinet’ of Mr Habibie (Pompe 1999). The Wahid government has up till 2000 not shown any concrete actions to solve the problems with the law.

A main theme in the debate amongst legislators and legal experts concerns the avenue towards a new Indonesian legal system. Some propose to revise the laws but remain within the Continental tradition. Other legal experts prefer a new system based on Common Law, which is the legal system of the neighbouring countries as well as the APEC. Others wish to stay as close to the roots as possible and advocate a new system
based on adat law. Bas Pompe writes that modern Indonesian law reflects to a significant extent Dutch legal thought, although many Dutch laws are being replaced, the spirit of the Dutch legal system is still alive (Pompe 1994).

Strategies to implement the transformation of the law are made by various governmental institutions, as well as legal experts at universities. The establishment of the National Institute for Legal Development (BPHN) in 1961 was the first serious attempt to come to grips with the enormous task of law transformation and legal development. This institute under the Ministry of Justice had as its main task the drafting of uniform legislation in accordance with the guidelines of the Parliament. The BPHN established special teams for the drafting of laws, organised courses in legal drafting and was assigned the task to review and improve law proposals from other ministries. The task to develop uniform legislation was difficult because the Ministry of Justice was and is one of the weakest departments, in comparison to for example the departments of Finance, Home Affairs or the State Secretariat.

In the early 1990s, the Ministry of Justice estimated that approximately 7000 laws are still based on colonial rules. Only 250 laws have been adopted by the New Order government. The procedures of the parliament (DPR) form one of the main obstacles for legal development. Because of its lengthy deliberation process, it can take years before a new law is accepted. Furthermore, each elected parliament has to decide on the laws. If deliberations on a law are not concluded before new elections, the DPR has to start all over.

In each of the five-year development plans of the New Order policy guidelines for the transformation of the legal system were included, but according to the legal experts, economy came always first. The National Guidelines for the sixth development cabinet (1993-1998) and Repelita VI seemed more promising for the efforts in legal development; a special minister (Asmen) for legal development was even added to the cabinet. In that same cabinet-period however, after a departmental reorganisation in 1995, most of the tasks of the BPHN became obsolete: each department now drafts its own laws.

After some fifty years of independence, one cannot speak of a uniform and Indonesian legal system. Legal reformers in Indonesia regard the coup of 1965, the economic depressions of the 1980s and late 1990s and the low priority of the legal system as important impediments to the legal reform processes. The road to unification through legal transformation seems to be paved with differences of opinion, powerplay and lack of resources.

Legal education and information

Only in 1924 the Dutch founded a Law College (Rechtsboogeschool) in Jakarta, then Batavia. The purpose of this school was not to educate legal experts but civil servants. Most of the students were Dutch; a small minority was Indonesian. The schooling system was typically Dutch. Higher education was intended for the intellectual elite, the responsibility for study progress lay foremost with the student. The curriculum
was divorced from politics: science was to be neutral, not a political instrument of the state. Scholars had to pursue truth and express it freely; practising applied science was ‘not done’. Gaining independence, Indonesia only had this one law school of which the curriculum and organisation were not fit for the developmental needs of the new country. Soon after independence new law faculties were established, but a new curriculum was yet to be developed (Seafullah Wiradipradja 1976).

However, the Old Order government of Sukarno, as well the New Order did not have higher education or legal development on their priority list: the nations’ economy should be built up first. Translations, jurisprudence and libraries were the last on the lists of the policy makers. Sufficient salaries for teachers could not be paid either. In the mean time, knowledge of Dutch by the students was waning; children born during or after the Second World War did not learn Dutch anymore. Some Dutch textbooks and laws were translated, but these were never officially sanctioned. Students and judges who could not read Dutch had to rely on these translated texts, even though they were unofficial.

In the early 1960s, the major law faculties in Indonesia formulated a masterplan for the establishment, improvement and coordination of the legal education system at university level. An expert team of scholars had been assigned by the government to formulate this masterplan. The expert team (Panitia Ahli) identified the major problems that had to be dealt with. The heritage of the colonial time in the field of Law was very present in the educational system. The curriculum and textbooks of the Rechtshoogeschool were not usable for an academic program of law that the Indonesian nation needed. A small number of Indonesians had studied in Dutch law faculties during the colonial times. These scholars were well-qualified, but their number was small and especially in the early 1960s, only very few Indonesian legal experts graduated. This was a serious problem because at the same time the new Indonesian law faculties were established and many academics were needed to staff the faculties. Furthermore, the lack of adequate legal information is a problem for all legal experts. Although the government publishes some of its legislation, the process of printing and dispersing is slow and the prints do not come in sufficient numbers for courts and libraries. There is no comprehensive system for jurisprudence and libraries are badly stocked. This causes three problems: lack of legal certainty for both the judiciary as the applicants, lack of equal and consistent treatment and ineffective legal research and education (Churchill 1992).

The legal education development plan was in the late 1960s assigned as the main task of the Konsorsium Ilmu Hukum (KIH). This is a consortium of representatives of the seven law faculties, its main task is the improvement and coordination of the legal education system at Indonesian universities. The KIH falls formally under the responsibility of the department of Education and Culture (P&K) and has an advisory and to some extent executive function. Scholars and deans of the seven building faculties are members of the KIH. The Panitia Ahli of the KIH, then headed by professor Mochtar Kusumaatmadja wrote the plan which set four objectives:

- to make the higher legal education fit for the needs of a developing country;
- to introduce a guided study, as opposed to the system of the free study, with compulsory attendance and written examinations, instead of oral examinations;
- to divide the college year in two semesters;
- to gear the content of the study to the needs of Indonesia's development government and to establish a new curriculum. To develop a standard curriculum for all universities in Indonesia, to enable eventually standardisation and unity of law all over the country.

These steps were directed towards the students at law faculties, but the upgrading of the teaching staff was also included in the plan. So-called *penataran* (seminars) were set up to upgrade the knowledge of sitting staff.

Political developments in the mid-1960s had put a brake on the initiatives of the group of experts. The coup of 1965 directed all attention to the domestic political situation. Only in the late 1960s, when the peace was more or less restored and normal life at universities was taken up, the legal experts could continue with the legal education development plan. Foreign aid was sought to finance the plan. However, foreign funding was unreliable: due to political waves in the donating countries, assistance to projects could be ended from one year to the other. In the 1970s and early 1980s, the major funding agencies of the KIH were the Asia Foundation, the Ford Foundation and USAID. In the mid-1980s, the Dutch Government became an important source of funds for the KIH-plans. In the fourth section this cooperation with Dutch counterparts via the Inter-university Project is described.

The judiciary: between the powers that be

President Sukarno had abolished the separation of powers when he introduced the Guided Democracy in 1959. The Soeharto regime did not change this, in contradiction of the promises made in 1965 (see also Chapter Four). Although in words the New Order committed itself to the separation between the legislative, executive and the judiciary power – as outlined in the Constitution of 1945 – in practice the President was Head of State and at the same time chief of the executive (Anderson 1983). The president nominated the judges and the Golkar orchestrated the election of the legislative. Since judges are government officials, their other head is the *Korpri*, the body of all state officials, whose head is the Minister of Home Affairs (Yap Thiam Hien 1990: viii). Administration of the courts is under control of the Ministry of Justice, as well as the budget of the courts. Judges were posted, transferred and promoted by the Ministry of Justice, but the State Secretariat and the president himself also 'advised' on matters of the judiciary. The dependency of the judiciary was perhaps the most serious problem of the Indonesian legal system. As noted Professor Askin Kusuma Armadja said, 'Judges in Indonesia are controlled in their heads by the Mahkamah Agung, but in their bellies by the Ministry of Justice'.

In particular in political court cases, the judiciary was reluctant to decide against the government. The vagueness and incompleteness of laws enabled decision-makers
to push any decision they wanted. Judges were bribed to interpret the laws in a certain way and even non-valid arguments were hardly contested. More often than not decisions have been in favour of the government. Many Indonesian interviewees were of the opinion that Indonesia was not a Constitutional State, as announced in the constitution of 1945, but a police state, favouring those in power and with wealth. A telling example of the dependency of the judiciary on the regime is the probe into Soeharto’s wealth. Third president Habibie announced that an investigation would be carried out, but the probe was halted twice, due to ‘lack of evidence’.

Corruption amongst judges was widespread; the low salaries were raised with briberies and other functions that hampered independent judgement. The appreciation of the judiciary was therefore very low amongst Indonesian citizens and many did not see the use of appealing for court. Delays until expiration of the case were furthermore a common phenomenon (Thoolen 1987: 61-62). In the late 1970s, increasing criticism by the public on the corruption of the judges led to an investigation by the military anti-corruption agency Opstib. This operation was led by the then Minister of Justice Madjono. One judge was suspended and others were put under house arrest. In general, if a judge accepted too much bribery for his own benefits and became untenable, he was transferred to the outer islands.

The wanting education system also had its effects on the judges. On-the-job training for judges was until the 1950s an important teaching method at the courts. Between 1950 and 1970 only a very small number of new judges were appointed. This led to a generation gap: when after 1970 new judges entered the courts, there were no seniors. Furthermore, there were no judges with thorough knowledge of the Dutch language to act as mentors for the new generation of judges. The new judges themselves had to find out what the law was and considering the deplorable state of legal information, this was an almost impossible task. Since the 1980s new judges received formal training at the training centre of the Ministry of Justice in Cinere, Jakarta. The Supreme Court (Mahkamah Agung, MA in the following) started a special course for sitting judges in the same period, on a very small scale and on a low budget. In the living room of a senior judge, intensive training sessions were organised to update the knowledge of the sitting judges. This initiative was not supported with funds from the authorities though. This program reached only judges in the surroundings of Jakarta. No one was obliged to participate in the course. Only when a Dutch offer arrived to assist in this program, mainly financially, the instigators of this program were enabled to extend the course to all judges in the archipelago.

In the New Order a few legal aid organisations were permitted, of which the Lembaga Bantuan Hukum (legal aid foundation – LBH) is well known. Foreign donors predominantly support the LBH. This organisation is devoted to fight injustice, but hampered in its activities by obstruction and the limited transparency of the law. In 1993 the Government installed the national Commission of Human Rights (KOMNASHAM). Surprisingly, because it is a governmental institution, the KOMNASHAM has operated quite independently and has gained some trust of the Indonesians. This has partly to do with the appointment of Marzuki Darusman as
chairman. In the course of years, as a Golkar member he had distanced himself from the New Order regime. In October 1999 he became General Prosecutor under the Wahid government. Darusman reopened the investigation into Soeharto’s wealth again in 2000.

**Good governance as foreign aid: a small initiative becomes a full-fledged program**

The issues of Indonesia’s legal system discussed above are not uncommon for developing countries. Many donor countries have given support for legal reform in the past decades. In the 1990s, such aid is headed under the term ‘Good Governance’, implying assistance to other countries with setting up efficient, clean and transparent civil services, including legal reform (*cf.* Dollar & Pritchett 1998). The transformation of the Indonesian legal system was preferred to be an entirely Indonesian affair: nationalism is in particular manifested when it comes to codifying the legal building blocks of the nation. Nonetheless, Indonesian jurists realised that assistance from abroad was needed. The numbers of legal experts were too small, there was no sufficient funding and there was too much Dutch material and too little people with knowledge of the Dutch language. Thorough understanding of the old laws is a requirement for writing the new ones. The assistance received from the Anglo-Saxon countries was welcome, but could in crucial areas not meet the specific needs of the Indonesian situation. Besides, jurists trained in common law cannot be expected to fully understand continental law.

The first contact with Dutch legal experts was made in the early 1970s. At that time professors Kleijn and Zevenbergen from Leiden University acted as advisors for a few Indonesian PhD candidates. These two Dutch professors headed the Foundation for Scientific Legal Cooperation¹⁸ (in the following: the *Foundation*), funded by the Dutch Ministry of Education and Sciences (*o&w*). In the 1970s plans had been proposed to enlarge this form of cooperation, but were rejected by the Dutch Parliament, which was dominated by left-wing parties. The political discourse in the 1970s was not favourable to the Indonesian regime: cooperation in legal affairs would imply handing instruments for suppression (*cf.* Baneke 1983; Malcontent 1998). In the early 1980s plans to expand the cooperation seemed to find more fertile ground: the political climate in the Netherlands had changed; the Dutch Parliament had a right wing majority. On the invitation of potential Indonesian counterparts — the KIH, MA and BPHN — professor Kleijn and Zevenbergen undertook a mission to investigate the needs and possible areas of cooperation. The mission of 1984 was supported by DGIS and in 1985 a proposal was approved to be a project under the Agreement of Technical Cooperation. What certainly helped the initiative to become an officially accorded project in the Blue Book of Bappenas was the fact that one of the members of State Secretary supported the initiative. Professor Hamid S. Attamini, advisor for the Cabinet, recognised the problems of the legal system and was of the opinion that the Dutch would be
a good party to assist with the solutions. Other officials, such as Teuku M. Radhie of the BPHN and professor Asikin Kusuma Atmadja from the Supreme Court were also favouring cooperation with the Dutch: they had friendly relations with several Dutch legal experts.

Soon after Kleijn and Zevenbergen returned from their Mission, a policy management structure was developed. The project would be financed and administered by DGIS, rather than O&W that had previously been responsible for the legal scientific cooperation. From the Indonesian side the MoU was to be undersigned by the ministry of EKUIN. Other possible counterparts were the Ministry of Education and Culture or the ministry of Justice, but in order to avoid competence strife between the two lower ranking ministries, the minister of EKUIN was assigned to bear the responsibility. This did not mean that in Indonesia the legal cooperation was seen as part of the development (pembangunan); how the project was perceived in Indonesia depended on the agency executing a specific project, which has to do with the fragmented organisation of the project on the Indonesian side.

For DGIS it was important that the project would have a developmental character. The Mission had already concluded that the project should not only have a scientific character, but also should include practical problemsolving elements. In a consultation with Dutch minister of Development Cooperation the then chairman Dunné explained that the meaning of the project should be interpreted as a project that could promote the state of law in Indonesia. To this end the co-operation should be extended from pure university cooperation to cooperation in the areas of legislation and jurisdiction. This required a change of name: from legal scientific co-operation to legal cooperation.

The Ministries of Justice were to be involved in the contents of the program, separate MoU’s on specific areas in which representatives of the ministries cooperated were undersigned. After the changes in 1984-5 the program of legal cooperation was thus removed from the Cultural Agreement to the Technical Agreement, but O&W remained responsible for the PhD-project in the program. However, P&K favoured the Cultural Agreement as the banner of the entire legal cooperation. Projects under this Agreement seemed to be less sensitive to political moodswings. The fears of P&K became true: criticism of the Dutch parliament had almost prevented the program to start (see below).

One condition had to be met before the plan was to be a recognised project: an independent organisation for the organisation and implementation of the program had to be set up. Such were the new rules after the outsourcing operation within DGIS (see the fourth section of Chapter Four). The Foundation did not have a secretariat that could take up the administrative and organisational matters. There had been complaints by PhD students that the staff of the Foundation lacked organisational skills. Jan Michiel Otto, the director of the Van Vollenhoven Institute (an institute for Law and Administration in non-western countries) was struck by the lack of counseling the Indonesian fellows received by the Foundation. They were left to themselves and often were not capable of finding their way in the scientific structures of the Neth-
erlands. Either the *Foundation* had to be extended or a new organisation had to be founded that could manage the implementation of the legal cooperation. One of the employees of *NUFFIC* — a subsidiary organisation under *DGIS* for international cooperation with institutes of higher education — was interested in being involved in the legal cooperation, but did not see many possibilities for the new project in the existing *Foundation*.

Having had experience with *DGIS* procedures and cooperation with Indonesia he advocated a new organisation.

While political discussions were still being held the Council for Legal Cooperation with Indonesia (the *Council*) was established in May 1985. Delegates of the Ministry of Foreign Affairs, o&w and Justice acted as representatives of the Dutch government. The management of the program was delegated to the Council. The newly established Council existed of an Executive Board, a General Board and an executive secretariat that handled the organisational and administrative matters. Jan van Olden became general secretary. The late Mr. Hugo Scheltema, formerly ambassador to Indonesia and permanent representative to the United Nations, became the chairman of the Daily Board. He has been the chairman from 1985 till 1992. With the establishment of the Council, the *Foundation* was sidelined; the Council took over the Sandwich Project as well. The *NUFFIC* was made responsible for the entire program, but has only organised evaluation missions and kept records. In practice, the Council interacted directly with *DGIS*. In effect, the Council had more policy management tasks than implementation tasks: it made the choices as to how the political choice for legal cooperation was to be given shape. With regard to implementation, the Council contacted and employed the jurists that (temporarily) worked in Indonesia in the projects.

In Indonesia the Council for Legal Cooperation with the Netherlands was founded, consisting of delegates from the *KIH, MA* and *BPHN*. Soon however it turned out that the Indonesian Council did not have any discretionary power and could not function as a full counterpart of the Council. The negotiation partners for the Dutch Council remained the three separate institutions. As two interviewees explained, in Indonesia it is not possible to have a functional organisation led by a manager. The hierarchical structure of Indonesian organisation prevents that an executive manager gives orders to for example a professor. And above all, which university or organisation should provide the members of this executive organisation? Any choice would be a choice against the rest.25 To have an office in Indonesia for the organisation and coordination, Pieter Evers, was employed in Jakarta as the permanent Dutch representative.26 He got an office in the *Universitas Indonesia*, next to the *KIH* office in the building of the Law Faculty. So the administration of finances and the organisation of the activities remained in Dutch hands.

Spirits were high in the Netherlands in the mid-1980s. As many as 21 Dutch legal organisations wanted to participate in the Board of the organisation. As one of the employees of the Council said: 'The organisation boomed, everybody wanted to participate. Everybody wanted to ‘do’ something with Indonesia'.27 That the program would be executed under the Agreement of Development Co-operation was not their
first concern. In fact, many of the implementing actors in the Netherlands and Indonesia took it for granted that their activities were labelled as a foreign aid project.

Political controversy in the Netherlands

The definitive MoU between Indonesian minister of EKUIN Ali Whardana and Dutch minister of Development Cooperation Eegje Schoo was to be signed on 25 May 1985. The Indonesian counterparts realised that cooperation within the Agreement on Technical Cooperation (foreign aid) ran the risk of being affected by political mood-swings. Nevertheless, the Indonesian government agreed to undertake this project under the Agreement. The legal cooperation did become a political issue, even before the MoU was signed. Early 1985 the Indonesian government announced it would have three alleged members of the Indonesian Communist Party (PKI) executed. Several debates in the Dutch parliament were devoted to the intended execution. The left-wing parties in the Dutch parliament demanded to end all Dutch foreign aid to Indonesia. According to these parliament members aid to Indonesia was an implicit approval of the authoritarian regime and human rights violations. Two members requested a postponement of the agreement on legal co-operation. Prime Minister Ruud Lubbers answered that the legal cooperation could be used as an instrument to contribute to the prevention of executions. He explained that '... it is a channel that should be used to make differences of opinion open for discussion. This can help as well...’ He added that 'it would be a rather awkward situation if such things could not be discussed and how the relate to the law'.

Foreign aid to Indonesia was not ended, but the signing of the MoU for legal cooperation was postponed. In a consultation with the Council minister Schoo explained that the postponement only had symbolical meaning. But in Indonesia this symbol was taken seriously and it was doubted whether the MoU and the cooperation could proceed. In January 1986 the MoU was signed at last and the formal framework was thus set: the political choice to cooperate with Indonesia had been made, although without full consensus.

In the mean time, the Council had already started some projects, despite the political controversies in the Netherlands (Sprang 1986). In the MoU for Technical Cooperation by DGIS and EKUIN it was stated that the ministries of Justice would work out the details of the cooperation. After the visit of mister Schoo the ministers of Justice Korthals Altes and Ismael Saleh ratified the MoU with the Agreed Minutes of Discussion on 24 January 1986. This agreement was reinforced again in 1987, after the first evaluations of the legal co-operation. Each minister of Justice signed bi-annually a MoU or Agreed Minutes.
Cooperation: the essence of assistance and the dilemma of dependency

'Participation of target groups' has been pointed out as a success-factor for development cooperation. For this program of development cooperation, the Indonesian counterparts had defined the program, its objectives and often the ways to solve problems. The Dutch and Indonesian counterparts were equal from a social stratification viewpoint: they were all part of the elite of society. This section shows how the mere fact that it is a development cooperation project frustrates the desire for equality and participation. Or, in other words, how rules regarding cooperation hinder actual cooperation.

Development projects are subject to two different systems of regulations of the governments involved. Bappenas, the Indonesian planning agency responsible for the coordination of all foreign aid projects, upholds the rule that all Indonesian costs should be born by Indonesian counterparts. These costs are personnel, lodgings, travel expenses, rents and equipment. DGIS rules are for a great part complementary to the Bappenas rules, in the sense that Indonesian costs have to be born by the Indonesian side. Pocketmoney for Indonesian counterparts, the costs of housing in the Netherlands or college fees may be drawn from Dutch funds. Another rule of DGIS is that spending of the funds must be transparent. Every year the implementing agencies or organisations have to deliver an approved accountants report of the financial status of the projects. Contrary to American funding agencies such as USAID, money that is not spent in the fiscal year may be put in a reservoir for the next year. While in theory the rules from Bappenas and DGIS are not contradictory, in practice the rather unilateral financing of development projects by the donor country did cause apprehension and feelings of inequality.

The total amount the Dutch government allocated for the legal cooperation during its implementation (1985-1992) was approximately 17 million guilders. The official figure of the Indonesian government was 745.000.000 Rupiah, which is about 5% of the Dutch amount. Added to that, the Indonesian implementing parties paid miscellaneous routine expenses such as administration and office rental. A notable difference between the financial planning in both countries is that in the Netherlands funds are more or less earmarked and then proposals are fitted in, while in Indonesia plans are made first and then money is sought. As professor Mochtar Kusumaatmadja chuckled: 'In Indonesia we never think of that [financing plans - ml]. We pray and hope that somehow they will find the money'. After 1992, when equality in financing cooperation was required, this practice lead to misunderstandings: when intentions to continue cooperation were written down in MoU's, the Dutch had already earmarked funds, while the Indonesians had yet to find them. The Dutch thought that continuation was settled, while in fact such was not the case at all.

The Indonesian counterparts (high-ranking officials or professors) are used in having decisive power over budgets. In this case, they did not have authority to decide over budgets, while the project meant an addition to their daily work. Mrs. Sunaryati Hartono, the director of the BPHN, recalls that every time she asked some information
about how the money was spent, she did not get an answer. She argued that if it was a joint project then the Indonesian counterpart should also be entitled to some funding for the extra work.\textsuperscript{36} But the DGIS and Bappenas regulations forbid that with Dutch money Indonesian overhead was paid. From the Dutch side, three reasons for not involving the Indonesian partners were given. One was that there was no administrative organisation such as the Council in the Netherlands, so they did not have a similar partner for technical matters such as the finances. Connected to that was the argument that the Dutch were responsible to DGIS for the accountants reports. A third justification was that all Indonesian costs had to be born by the Indonesian counterpart anyway and the Dutch did not deal with that either.

Often the Indonesian counterparts did find the funds, but in Dutch eyes in unconventional ways. It is not unusual that rich family members, private parties or other less likely sources donate the required funds. For example, professor Mardjono paid the secretary for the KIH and for the extra work with the Dutch-Indonesian project out of his own pocket. To complement his income, he had a private lawyers firm, a common second job for professors. The Dutch permanent representative in Jakarta told how he had to deal on the one hand with the DGIS rules and on the other hand with the real world in Indonesia. Often he had to label costs 'creatively'.\textsuperscript{37} Sunaryati Hartono was thinking aloud when she said that maybe the Dutch treat (everybody pays for him or herself in a restaurant) might be the solution for the problem of inequality. But at the time such was not possible, the Indonesian government simply could not assign an equal amount to the legal reform.

All participants in the project were from 'elite'-circles, but more so the Indonesian counterparts. The hierarchical culture and structure in Indonesian society sometimes clashed with the rather egalitarian way of doing things in the Netherlands. For example, the Indonesian judges could not understand that in the Netherlands people go to work on bicycle. This was a minor cultural clash, more serious were the problems with lodging and pocketmoney. When Dutch professors visited Indonesia, they stayed in expensive hotels. When Indonesians visited the Netherlands, they often had to take care of their own households, while in Indonesia they tend to have servants. Because they were travelling on Indonesian budgets, they had to comply with relative simple provisions; the costs of living in the Netherlands are much more expensive.\textsuperscript{38} When an Indonesian evaluator joined the evaluation committee, she did not receive a salary or even pocketmoney for the task. When she asked about the Council had assumed that the Indonesian counterpart would bear the Indonesian share of the costs. But that was not the case, since the evaluation was a demand from the Dutch funding agency DGIS.\textsuperscript{39}

Another complaint from the Indonesian side was that the Dutch organised too much. It was true that contrary to the Indonesian counterparts, the Dutch had set up a smooth organisation with the Council and the permanent representative(s) in Jakarta.\textsuperscript{40} Two factors, one more convincing than the other account for the difference in organisation. A requirement from DGIS is that a managing organisation is set up to administer the project and its finances. In Indonesia it is not a requirement and as was
mentioned above, given the hierarchic and fragmented structure of the counterparts it is virtually impossible to set up one organisation for a project entailing such different organisations. Many Dutch interviewees said that often they had the feeling that their Indonesian counterparts did not know exactly what they wanted. The Indonesian interviewees on the other had said that they did have objectives, but because of the hierarchy (one person may not promise things which haven’t been discussed with a higher-ranking person) and uncertain financial situation, they preferred not to say too much. The Dutch took this up as indecisiveness, and pressed by DGIS to present well-structured plans, they made the final decisions. Preferring the indirect way, the Indonesians did not object directly, but showed in the (lack of) actions that the plan was not approved of.

The issue of sensitivity – nationals of former colonising country assist formerly colonised- is briefly addressed here. It is true that some of the Indonesian counterparts had had bad personal experiences during the colonial times and during the war; many of them had lost close relatives in the war or have been treated badly by the Dutch. In the day to day practice not many such sentiments were felt; academic conduct and professionalism ruled. One Dutch interviewee explained sudden upsurges of nationalism as 'window-dressing' by Indonesians. They had to act as government officials and as academics at the same time: when they wore the hat of representatives of the Indonesian government, they acted nationalist, when they worked on 'technical' problems, the contrasts were merely scientific.41

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**Figure 7.1** The organisation of the legal cooperation in 1985

In sum, this project suffered of the dilemma of dependency: the purpose of the cooperation for the Indonesian counterparts was to become independent of Dutch legislation, but to achieve that situation, they had to be dependent on the Dutch finances. The organisational arrangements, the regulations of both governmental agencies re-
sponsible for this project seemed complementary, but due different interpretations and justifications for action the appreciation of the organisation and management was tainted by feelings of inequality. To conclude this section the program for legal cooperation is presented in the game metaphor. It is clear by the shading in the ellipses that the political game in the Netherlands was divided over the choice to cooperate with Indonesia. The set-up of the policy management games differed: the Indonesian Council only existed on paper. Also, the closeness of the games in Indonesia because of the double functions is depicted by the overlap in the ellipses. The next sections describe the projects in the implementation game and will each be concluded with a 'pictured' summary.

The Academic Program

The Academic Program consisted of two projects: the Inter-university Project and the Sandwich Project. The goal of the Inter-university Project was to upgrade the teachers at the seven Facultas Pembina of state universities in Indonesia, through seminars, the so-called penataran.\(^{42}\) The Sandwich Project aimed to assist individual PhD candidates with writing their dissertations. The PhD candidates, mostly staff from the legal institutions, were enabled to do parts of their research in the Netherlands and have both Indonesian and Dutch professors acting as advisors. On the Indonesian side, the KIH was the counterpart of both projects. On the Dutch side the Council was the counterpart and via the Council, individual Dutch scholars were selected to either participate in seminars in Indonesia or advice individual Indonesian PhD candidates.

The Dutch department of o&w funded the Sandwich Project: before the entire program became development cooperation, o&w had allocated funds to the Foundation and remained doing so for the Sandwich Project: funding PhD students from the budget of DGIS was not considered development relevant.

The Academic Project was an on-going endeavour in Indonesia, of which the plan of action has been described in the first section of this chapter. The Dutch joined for a short period of time, twenty years after the original design of the plan. The involvement of foreign counterparts was one element of the solutions outlined by the KIH. The Dutch contributions in finances and contents were welcome, also because the Dutch are more familiar with the Indonesian legal system and the curriculum than the other foreign donors (Australia, Canada and the United States). However, with regard to the characteristics of this plan – upgrading in the education field – this kind of knowledge was not so crucial that without Dutch assistance the program could not be carried out.

The Sandwich Project

The Sandwich Project dates from the early 1970s, as a project of the Foundation. When the Sandwich Project was taken over by the Council, the original goals were
not changed. The project gave Indonesian legal experts working for the government the opportunity to conduct a part of their PhD research in the Netherlands and advice from a Dutch professor. The PhD candidates eventually finished their dissertations in Indonesia, with an Indonesian promoter. The selected candidates received a scholarship for at least six months, some for lengthier period. A team of Indonesian professors, the permanent representative in Jakarta Pieter Evers and an advisor from the Council selected the candidates. Graduate students or individual professionals could apply for a Dutch scholarship with a proposal. Only when the topic of the proposal was qualified as feasible and requiring a research period in the Netherlands, the proposal was endorsed. The Indonesian aspirant fellows had to take courses in the Dutch language to be selected.

The fellows who went for study to the Netherlands were satisfied with the opportunity the project offered. In Indonesia it is much harder to obtain a PhD degree, because advice from possible promoters is hard to get. There were at the time not many people with a PhD degree and those who held a PhD degree had little time available. Devoting one's time to research is very hard in Indonesia, because next to research, a PhD candidate has to perform many other tasks; as a judge, teacher or civil servant he or she has to continue with the daily work. Doing a PhD means that other income generating activities cannot be done. The Dutch scholarships provided in the necessary funds to be able to concentrate on the research. The Council also provided assistance with the practical aspects of doing research in the Dutch libraries and archives. As far as P&K was concerned, the entire project was delegated to the KIH and the Council.

Although the Sandwich Project offered institutional support for the PhD candidates, it must be noted that the Sandwich Project was a project for and by individual academics. Opting to work towards a PhD is first of all a choice from the PhD candidates themselves. The support from the KIH and the Council consisted of services in finances and organisation after the choice. Nobody was asked to do a PhD by his or her own employer, unlike the other projects, where potential target groups were invited or obliged to participate as a part of an organised effort to improve the effectiveness and efficiency. There are a few more opportunities for Indonesian academics to obtain scholarships for a PhD: Australian and American universities have scholarship programs as well. The Dutch-Indonesian Sandwich program must therefore be understood as another opportunity in the demand by Indonesian academics and professionals for scholarships.

Approximately 30 fellows obtained their PhD degree within the Sandwich Project. Since every PhD candidate is welcome in a situation where there is an alarming scarcity of experts, the project was considered a success. According to professor Koesnadi no similar project had resulted in so many dissertations. No interviewee could or wished to comment on the quality of the dissertations. The first evaluation report mentioned some flaws in the organisation of the Sandwich Project. Especially the mastery of the Dutch language was a hindrance for a successful research period of the fellows. This resulted in a more stringent selection procedure in Indonesia and a more
personal guidance in the Netherlands and a weekly compulsory seminar for the fellows during their stay in the Netherlands.\textsuperscript{45}

The case of human rights lawyer Adnan Buyung Nasution provides an example of the closeness of interaction between the political and implementation game is in Indonesia. It also shows that the influence of the Indonesian government is limited to the national borders: despite the fact that the Indonesian government did not agree with this lawyer participating in the project, it could not be prevented that he stayed in the Netherlands.

Buyung is a person whose actions were attentively regarded by the New Order government and this explains for the greater part the sudden attention for the Sandwich Project. In the mid-1980s Buyung intended to obtain his PhD degree, preferably in the Netherlands. His topic was the political process on the \textit{Konstituante} and end of democracy in Indonesia. He had already decided do his PhD on his own expenses, although this would be difficult. Travelling from Yogyakarta to Jakarta he had met his old friend professor Koesnadi, who was now working for the ministry of P\&K and was involved the KIH. Professor Koesnadi told him about the possibilities the Sandwich Project offered, albeit that this facility was only meant for government employees, either in administration or at universities. Nonetheless, professor Koesnadi suggested he should try to apply and Buyung’s proposal was accepted. Three months after he had started his research in the Netherlands (his family had moved with him) he received a telephone call from Professor Koesnadi. He had to deliver the sad message that the then minister of P\&K, Nugroho Notosusanto, was very angry that Buyung had received the grant from a government-to-government project like the Sandwich Project. The argument was that this project was only meant for government employees, but the Indonesian government did not particularly like the topic and the person of the research either. After reviewing several options, going to the United States on another scholarship, going back or assembling individual funds, the surprising message came that he could stay in the Netherlands and finish his PhD with Sandwich funds: ‘I guess the Dutch government also had its own principles’. He finished his dissertation in 1992.\textsuperscript{46} Originally P\&K strongly advised the universities not to use this dissertation as study material. Since 1997 however it is used at all Law faculties and is considered as a new source of Indonesian history.\textsuperscript{47} Apparently the scope of power of the Indonesian government did not go as far as the Netherlands. Like the Indonesian government does not want meddling in its domestic affairs, the Dutch government seems to have been successful in applying the same principle: Buyung studied in the Netherlands on Dutch funding, and that was a Dutch domestic affair.

**The Inter-university Project**

As the name suggests, the Inter-university Project was meant to be a project of and between universities. The first aim was the upgrading of teachers at Indonesian Law faculties. The other related aim was bridging the relative isolation of the individual scholars at the widely dispersed faculties. By means of the so-called \textit{penataran}, compa-
rable with post academic summer courses that varied in duration from a few days to three weeks, staff of all faculties gathered on specific topics. Dutch professors were invited as guest lecturers, next to the Indonesian specialists in the particular field. The penataran were organised by the universities, the Council took care of the Dutch side: selection, organisation and financing the stay of the Dutch professors. Some 30 Indonesian and 20 Dutch professors acted as lecturers for the penataran. The following fields were chosen as topics for the penatarans: Civil Law, Commercial Law, Criminal Law, Criminology, Administrative Law, International Law and Law and Development. These fields were chosen in accordance with the plans of the KIH to establish the Fakultas Pembina. In a meeting in May 1986 the associated professors of the KIH agreed upon the program managers and topics from the Indonesian side. The Dutch project proposal perfectly complemented the plans of the KIH.

In the period 1986-1992 32 penataran were held in the selected fields. Per penataran approximately 30 participants were involved, usually teachers at the law faculties. The contents of the courses were meant to update and upgrade their knowledge, but most of the interviewees remained silent when I asked them if the courses had really contributed to the upgrading aim. The participants also received textbooks and other materials to improve their practice as teachers or researchers. Opinions differ about the actual usage of the material. An American lecturer remarked that if he asked the lecturers whether they had heard of a new publication, the answer was that ‘they did not really need new books because they had enough to teach.’ The limited enthusiasm for extra knowledge and extra books is understandable seen from the rather low financial rewards Indonesian scholars receive; most of the academics work on several universities or have other jobs as lawyers or consultants, little time is left for further study. The quality of the papers and discussion during the seminars was according to the Dutch participants rather low. They compared the penataran with the post graduate courses that are held in the Netherlands or other industrialised countries. The Indonesian professors involved also saw that the quality was still lacking, but they were satisfied with the accomplishment of another aim of the Inter-university Project: bringing together scholars from all over the country. The entire project raised furthermore the prestige of the KIH and the study of law in Indonesia. By setting up and establishing a well-organised initiative, the KIH received the recognition from higher institutions such as R&D and the planning agency Bappenas. This recognition became evident after 1992.

After an evaluation by the NUFFIC it was decided that more attention should be paid to educational aspects. Language problems hindered the optimal communication: the Dutch professors did not speak Indonesian and the Indonesian teachers were not sufficiently able to understand English. Nonetheless, the Indonesian and Dutch professors who led the seminars look back in satisfaction to the cooperation. For the Dutch professors giving lectures in Indonesia was an opportunity to broaden their horizon, test their didactic capacities and to discuss professional matters with colleagues abroad.
Few of the Dutch professors took much notice of the fact that they participated in a Dutch development aid project. The Indonesian professors enjoyed working together with the Dutch professors as well, for them the cooperation and discussions were a welcome contribution to their knowledge and outlook on their respective field of study. For the individual Indonesian participants the *penataran* meant an opportunity to meet colleagues in the same field.

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**Figure 7.2  The Academic Projects**

1992 and afterwards

Immediately after March 1992 the *KIH* and the associated universities realised that the decision meant an end to the Dutch funds and visits of legal experts. The *KIH* pressed the Indonesian authorities for continuation of the Inter-university Project. Bappenas surprisingly agreed to allocate funds for the *penataran* in April 1992, just after completion of the annual budget. At first, the activities were undertaken under the name *kerja sama ex-Belanda* ('formerly Dutch co-operation'), currently these *penatarans* are a regular activity of the associated Universities and no connection is made with Dutch involvement. According to professor Mochtar, the decision of 1992 was a blessing in disguise for the *KIH*. The fact that Bappenas immediately allocated funds was the proof of the pudding for the *KIH* that it was now fully recognised by the Indonesian government as an organisation fit for the implementation of the academic side of the law development policies of Indonesia. Now that the *KIH* had achieved what it wanted, institutionalisation of up-grading courses and allocation of funds, it was not necessary to keep the Dutch involved. Thus, continuation meant for this project continuation without the assistance of the Dutch Council. Only the University of Surabaya invited two Dutch lecturers with their own funds for a few seminars, after March 1992. The secretary of the *KIH* said that indeed he did not put that much
energy in trying to safeguard the Dutch involvement, 'I was and am busy as it is with just doing the things I have to do'.\textsuperscript{51} A Memorandum of Understanding between the Council and the KIH was made in May 1992, to stress the importance of further cooperation, for mutual benefit, but no concrete activities between the Council and the KIH have resulted from this MoU.\textsuperscript{52} The chairman of the KIH had one good advice for the Council: change the name to Council for International Legal Co-operation.\textsuperscript{53} With a change in name and purpose the Council could at least secure its own continuation as an organisation. The Council has followed the advice and has successfully redirected its activities to Eastern European countries and South Africa.

The Sandwich Project was not continued. This can be explained from the fact that there were no institutional interests involved, as was the case with the inter-university course for the KIH. Potential beneficiaries were not organised either in the implementation game, no lobby was formed. The Dutch department of O&W did not want to continue the funding of the (individuals) PhD candidates. The project was considered 'aid' by O&W and did not fit into the new era of Dutch Indonesian relations (see also Chapter Five).\textsuperscript{54} For Indonesians it is very costly to do a PhD abroad: only when a foreign institute offers a scholarship or when the family is very wealthy, students can go abroad for a longer period of time. It is much cheaper to have MA students obtain their PhD's in Indonesia. Now that there were 30 more PhD holders in Indonesia, having the students finish their dissertation at home was now a feasible option.\textsuperscript{55}

\textbf{The Judges Project}

From 1985 until 1992 the Indonesian Supreme Court (Mahkamah Agung – MA) cooperated with Dutch legal experts in the Judges training Project, including training of administrative judges and the Access to Law Project, the latter will not be described here.\textsuperscript{56} These projects enabled the Dutch to get a close look into the troubled judiciary system of Indonesia; it is therefore quite remarkable that the Indonesian and Dutch legal experts and judges were allowed to cooperate in such a close way. The way the projects were presented and who initiated them account for this approval. However, the Judges training Project had almost been ended mid-term because of severe political conflict. The way in which the project was implemented, how political conflicts were averted and the aftermath of the Judges Project are a fine illustration of the weight of the political games and implementation game for actual cooperation. After the decision of 1992, the Judges Project was continued by the MA's own means.

Like the Inter-university Project, the Judges Project had been an initiative from the Indonesian participants themselves. The Dutch assistance provided in the necessary means to implement their plans on a more extended scale. In the mid-1980s the top of the MA had instigated a course for a small group of judges. The then chairman of the MA, Ali Said, the vice chairman Purwoto and Court Judge Asikin Kusuma Atmadja designed a training scheme for small groups of judges from the MA. The course was to deal with the problems of unity in court decisions. By comparing court-
cases more consistency in decision-making would have to be generated, at least for the judges of the Supreme Court. The course was given to about 10 judges each time, in a small room with a daily budget of 10,000 Rupiah (then US$ 6). Professor Asikin was motivated for more reasons than merely the training of judges. He had a personal strife with his chief Purwoto and intended to bring the erroneous decisions of Purwoto to the fore. His colleague Mrs. Retnowulan, foreseeing trouble within the MA and for Asikin himself convinced him to changing the contents from examining existing decisions and jurisprudence to a fictitious case containing all kinds of legal problems. This proved to be an effective formula, and the project team realised that this course should be given to all judges in Indonesia. But with the means to their disposal an extension was not possible. The Dutch offer in 1985 to the MA came at the right time: it was time to extend the project. Support from high places was secured: Ali Said, the well respected chairman of the MA and Hamid Attamini from State Secretariat stood behind the change to make this a project of Dutch Indonesian cooperation. The Administrative Judges Project that started in 1990 was endorsed similarly. The late judge Indroharto had received a large mandate from president Soeharto himself to set up courses to train judges in the newly adopted administrative law. One of the Dutch lecturers for the courses for administrative judges found it remarkable that they were allowed to give courses on public administration, this being a discipline that directly relates to democratic governance.

The project: a neutral way to address a tricky problem

The central objective of the Judges Project was strengthening the professional capacities of Indonesian judges, in particular with regard to their skills in due application of law and in the solving of legal problems. Subsequent short-term goals were:

- providing opportunity to all Indonesian judges to review, refresh and up-date their basic judicial skills and knowledge of Indonesian law;
- providing an opportunity to Indonesian judges to develop and expand their knowledge, in particular with regard to new developments in law, both at a national and international level;
- increasing the skills and abilities in applying such newly gained knowledge.

These goals were to be reached by the following means: workshops in which general judicial knowledge for participating judges from all courts in Indonesia was communicated (Lokakarya); specialised courses on specific subjects for a selected group of judges and the establishment of a regular program for continuous education. Some of the judges participating in the project were sent to the Netherlands to make study of subjects and write education material for the workshops. These judges also visited and participated in Dutch institutions for the education of judges and in Dutch courts. In this way it was envisaged that these judges could make a comparative study of the differing legal system and practices. In order to be sent to the Netherlands, the judges had to take Dutch language courses.
In Indonesia the organisation of the project was in the hands of the so-called *Tim Pengkajian* (Study Team – *Tim P*), existing of four judges who reorganised the workshops and other arrangements. Contrary to the other projects within the Program Legal Co-operation, the Judges training Project had well-organised Indonesian counterpart, on the same organisational level as the Council in Leiden. The *Tim P* operated independently, Dutch involvement restricted itself to financial aid and on request a contribution to the contents of the course. Added to this was the attitude of the Dutch counterpart involved, professor Sterk, who is of the opinion that as an academic he cannot question the system itself. The only contribution he as a scientist should make is improving the quality and consistency of the system.60

Three evaluations have been made of the Judges Project. All three evaluations advised continuation of the project, be it with some adjustments in the contents of the workshops and in the organisations of the project.61 The workshops were from a quantitative point of view effective: they covered the whole archipelago and reached all Indonesian judges. This has been the most valued aspect of the project: an important problem perceived by the judges themselves is their isolated position. Because of the archipelagic character of the country, many judges have to operate individually without knowledge of the jurisprudence of colleagues in other places and without adequate communication means. The isolation of the judges is not only a hindrance for themselves: it results in differing sentences all over the country, which does not improve the reliability and trustworthiness of the Judiciary. Through the *Lokakarya* the judges had more opportunity to discuss their problems and learn from each other. The contents and the ways the workshops were given were not effective in the eyes of the Dutch evaluators; critical and independent thinking by the participants was not stimulated. Nevertheless, the Dutch and Indonesian evaluators were of the opinion that the general idea and structure of this project were promising and necessary for the judges.

In none of the official evaluations the problem of the dependency and corruption of the Indonesian judiciary was mentioned. The interviewees on the other hand frequently noted that even if a project like this would run perfect, it could in not improve the image and functioning of the judiciary, because the system in itself did not change.62 Decisions based on power or political interference or with an envelope will always be made, as long as the political system does not change. And also: as long as the system of nepotism is not replaced by a system of meritocracy, the wrong persons are appointed to the wrong places and judges who don’t co-operate with the system will be either fired, silenced or replaced to the outer regions. The involvement of the Dutch and the opportunity for Indonesian judges to compare their system with the Dutch system could not change much. Nevertheless, several foreign observers and Indonesian interviewees mentioned that although this project or Dutch involvement could not change things quickly, seedlings were sowed for another era, provided the project would not stop unexpectedly or due to political moods in the Netherlands or Indonesia. And these moods have definitely affected this project. As Mr. Asser said in his evaluation: ‘This project is one of the most difficult within the total program of
legal co-operation. Especially the enormous cultural differences between both countries and the fact that only in the long term effects will be apparent who require a lot of dedication and endurance of the involved parties. Administration of the law – organisation and contents – is closely connected to the structure of society … In other words, as a rule changes [in society] do not occur quickly. 63

A conflict of norms

A conflict between the Indonesian government and the Dutch parliament, press and minister of DGIS clearly reveals how the meaning of this project for both the implementing party and governments diverged. The argumentation and justifications by the parties involved show the antagonisms in the Judges Project.

The Indonesian judge Intan had been involved with the project from the beginning on, he had accompanied professor Asikin during the first orientation mission to the Netherlands in 1985. Intan wanted to participate in one of the courses in the Netherlands, but in 1986 he was dismissed from the list of judges who would go to the Netherlands because he was involved in a controversial trial. This was a trial against former general Dharsono who was accused of being involved in an Islamic organisation aimed at overthrowing the government. The trial received major coverage in the international press and was also closely followed by the Dutch media and politics. The attention of the Dutch press was drawn to the Judges Project and questions were raised whether cooperation with Indonesian Judges Project was morally justifiable. The Council defended the project by saying that precisely because the situation in the Indonesian judiciary was so bad, cooperating with the Dutch judiciary could provide eye-openers for the Indonesian judges.

Because of the sensitivity of the trial professor Sterk and Asikin had decided to remove judge Intan from the list of judges, with the legalistic arguments that he had not completed his Dutch course adequately and that he could not go because he was involved in the trial of Dharsono. But Intan was determined to go and somehow he had found a way to have himself listed in the second language-course. After application the Council it was agreed that a 'special' program would be prepared for Intan, in this way he would be out of the regular judges-program. He could not be 'selected out' for the second time, because in the mean time, this case had drawn the attention in Indonesian government circles as well. The issue for Indonesian politicians was whether due to Dutch criticism it was acceptable that an Indonesian judge was removed from a joint project. The new Dutch Minister of Development Cooperation Piet Bukman reacted to the press-reports, refusing to allow Intan into the country, not even via the adapted program.

Professor Asikin then had a meeting with Ali Said, the chairman of the MA, Ismael Saleh, the minister of Justice and Sudharmono, the secretary of State – known as a staunch nationalist. Asikin explained why it would be precarious to have Intan in the regular program because this would endanger the continuity of the project. Sudharmono is said to have answered that 'they would have to cancel the project
Asikin had moved himself into a more awkward position than before, he was known to be ‘good mates’ with the Dutch and was therefore opposed to nationalists as Sudharmono. Pieter Evers was summoned to the embassy in Jakarta and received a severe reprimand for having handled the case without soliciting the embassy or DGIS. Eventually the conflict was moved out of the attention, Intan did not go to the Netherlands and was replaced to an outer island. Fortunately for the Indonesian counterparts, the project could continue, warnings had been given from higher Indonesian authorities, but the project could continue.

For the judges responsible for the implementation the project was of more importance than for the higher executives. The ‘political game’ players can easily see this as a matter of principles because of their relatively distant position. It is easier to stick to principles if it does not affect your daily practice than if sticking to principles means the end of your job. The ‘take it or leave it’ attitude of Sudharmono seems to have been a precursor of the attitude displayed by the Indonesian government in 1992. This conflict showed that the differences of opinion on the ‘how to’ of the principles was still not resolved in the Netherlands. In the end Judge Intan was an offer from the Indonesian implementing party, for the unresolved question in the political games on how to deal with differing principles. The following figure summarises the limited patterns of interaction, the controversial meaning the project had in the political games and that the MA basically implemented the project itself.

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**Figure 7.3** The Judges Project
After 1992, continuation the Indonesian way

At the time of the decision, some changes in the project's management had just been made. Professor Asikin had withdrawn from the project because of his illness and Purwoto had taken over as project leader. In 1992 Purwoto became chairman of the MA and had for that reason not much time left to spend on the project. The other project managers took things in their own hands. They established a training and research centre of the Supreme Court. To conduct new activities, official approval in the form of a presidential decree is required. The project managers were so determined to continue the upgrading courses that they did not await the presidential decree: they just started with a chief justice decree. The judges involved argued that they first wanted to show how well the centre worked, what needs it fulfilled and then they would worry about the legal status. 'We want to be one of the most prestigious institutions of this country.' Contrary to the training centre for legal experts at Cinere, this training centre organised upgrading and refreshment courses for the sitting judges, in the same vein as the project with the Dutch had been set up.

In the course of years the training centre received more recognition. Since 1994 this centre is fully approved by Bappenas and receives a budget as well. Other donors such as the Australian government and the World Bank are very interested in participating in this centre, especially in courses on commercial law for judges. The reasons are obvious: Australia needs a neighbour with whom legal arrangements in trade can be made, the World Bank sees the development of a sound legal system in Indonesia as one of the next required steps for development. Compliance and knowledge by Indonesian judges is one of the requirements. This centre can however be seen as an offspring of the Dutch-Indonesian cooperation: one of the directors had been involved in the Judges Project and applied his knowledge in how to organise courses and run a continuous-learning centre. Nevertheless, the Indonesian project leaders are still sensitive to assistance from outside. When I asked them whether they would be interested in Dutch lecturers again the director of the centre replied: '... you mean to invite them to give the ideas on how to run this institution or just to give a lecture in a certain area of law?' However, in an interview two years later, when Professor Paulus Lotulung compared the training centre with the Dutch-Indonesian project he confided that 'in the time that it was a Dutch project, we had much more freedom to organise affairs to our own judgement. The Dutch gave money and we took care of our own affairs. Those were the times... Now that it is a Bappenas funded project, they are much more controlled.

Foreign assistance in legal affairs remains sensitive, also in the post-New Order era. As a part of the IMF austerity measures in 1998 a Dutch legal expert had written the new bankruptcy law and team of Dutch jurists trained the selected judges in the implementation of the new law. The implementation of the law by the judges was by all means faulty and controlled by the old forces of nepotism and fear. When the Dutch legal expert ventured his criticism in the press, an Indonesian lawyer intimidated him. The intimidation was directed to him as a Dutch person, accusing him of
being colonial by meddling into Indonesian affairs. The IMF was not even mentioned, although this is the organisation that virtually imposed the new law. The finger was not pointed to the debtors, nor the corruption, collusion and nepotism in Indonesian society and politics. Indeed, it will take some time for the new democratically elected government to change the ways and doings of the judiciary, because changes in society as a rule do not occur quickly...

Legal Drafting, codification and training

The objective of the Legal Drafting Project was to strengthen the Indonesian Ministry of Justice in its tasks to draft new laws. Two sub-projects were organised to reach these goals: assistance with the drafting of three new laws and a course for legal drafters. The counterparts responsible for the contents of the project were the BPHN and the Dutch Ministry of Justice. The Council was responsible for the organisation of the courses and selection of Dutch jurists and academics that gave the courses. For two years, a Dutch program manager was appointed in Jakarta, for the daily organisation of the training project. This project touched upon the heart of the legal development policy of Indonesia, laws and codification thereof. As was the case with the Judges Project, the involvement of the Dutch with codification of Indonesian (modern) law was highly politically sensitive. Different priorities over the games, differences of opinions on the courses at the level of implementation were the precursor of the end of the project in 1992.

In the codification and sectoral legislation project three teams of Indonesian legislative drafters were assisted by Dutch academics in the drafting of new legislation. The Dutch were to transfer knowledge of the Dutch laws and developments in these laws. New developments in Dutch legislation could be of use for Indonesian legislation, because of the common base. In the mid-1990s for example the Indonesian Minister of Justice Oetojo Oesman showed a keen interest in the new Dutch Civil Law. The new Dutch legislation took into account both international developments, while at the same time it took into consideration the existing base of the law, which is the same in Indonesia. To turn to the Dutch in developing new laws is the most logical step to take, many Indonesian jurists said that they and the Dutch only need one word to understand each other. At the same time though, working with the Dutch is contrary to the wish for a break with the colonial past. This tension has played a significant role for the effectiveness of this project.

The Indonesian-Dutch teams worked on three laws: mortgage, leasing and criminal law. The drafting process itself went slow: the Dutch participants complained that the Indonesian drafters gave little input, indecision from the Indonesian side frustrated the Dutch drafters. The Dutch then wrote parts of the laws themselves, but after handing a draft in, the Indonesian drafters did not agree. One of them compared the working process with buying a dress for his wife: even if he was told for what occasion the dress was, he would never be able to buy a dress that was exactly to the taste of
his wife. Law making is a very personal choice and in principle, no outsider is able to make that choice. The work on the drafts was finished in 1989 but only in 1991 they were sent to the DPR. State Secretariat took its time to read and rewrite these laws. In the mid-1990s, these laws were still not accepted by the DPR, because of the long time deliberation take, but most of all, because of the apprehension in government circles to accept laws that were written in cooperation with the former coloniser. A tale on the sad fate of one of the directors of the BPHN tells of the differences between the political game(s) of Indonesian policy-makers, the confusing work environment of implementing drafters and the difficult position of the Indonesian manager.

The late Teuku M. Radhie, director of the BPHN till 1988, was responsible for the drafting project from 1985 onwards. He delegated the work to the teams of lawyers and entrusted them with a lot of freedom to write the drafts. However, others in government criticised him for his style of management: the freedom given to the academics resulted in laws written by the Dutch again. From an academic standpoint, the drafts were of high quality, but from a political standpoint, these laws were not acceptable. Mr. Radhie was suddenly accused of corruption, parts of the budget could not be accounted for and he was dismissed. The fact was that he used BPHN funds for the administration costs of the project, which was not provided for in the project funds. According to the new director the accusation was false, to punish him for his leniency towards the Dutch. The new director, Sunaryati Hartono had learnt the lesson and strictly controlled the writing process and did not initiate new drafting when the other three were ready in 1989. As an intermediary manager between the political and implementation game, the director of the BPHN found herself between two fires, sometimes resulting in losing the goodwill of both sides.

Training course on Legislative Drafting

The aim of this project was to set up a regular training program in the training centre of the Ministry of Justice in Cinere. The five-month courses included legislative techniques for Indonesian government officials, from the central and regional government. A number of participants received special training, so that they could give the courses in the future. The specific aims were instructing the participants in the practical methods and techniques of codification; giving insight in the general theory of codification as developed in the Netherlands; and increasing the awareness of the requirements for making feasible and implementable laws.

Mr Hirsch Ballin, professor at Tilburg University (from 1989-1994 Minister of Justice) organised the first course for Indonesian participants. The course was planned in Tilburg, but the University Council protested: it did not want to be associated with a regime that violated human rights. The course was then moved to the Institute of Social Studies in The Hague. One week after the start however he realised that the Dutch course was not fit for the Indonesians: the contents of the course did not match with the knowledge the Indonesians had, they did not master the Dutch. Also, the
Indonesians had to adjust to the Dutch environment (culture shock) and it was cheaper to organise the courses in Indonesia itself.\textsuperscript{76}

Language courses were also provided for; especially in the beginning, when the courses were given in Dutch, these language courses were indispensable. Later on, the courses were given in English by the invited Dutch professors, but because also the English of the Indonesians is lacking, communication during the courses was far from satisfactory. One of the lectures doubted if anything he taught made a lasting impression.\textsuperscript{77} The Dutch coordinator, the late Karel Bongenaar did take the time to learn the Indonesian language. His permanent presence and the fact that he could give the courses in Indonesian, was a major improvement for the contents and organisation of the project. But, Bongenaar was also a critic of the project, precisely because he was so intimately involved. After a visit of minister Hirsch Ballin to Indonesia he put his practical and principle objections on paper, urging his old friend Hirsch Ballin to reconsider the plans made in the Agreed Minutes of 1991.\textsuperscript{78} After spending two years as a program co-ordinator and teacher, Bongenaar had come to the conclusion that the academic level of the Indonesian participants was too low for a project such as this to have any effect. The hierarchic organisation of the Ministry of Justice and the limited interest of the Indonesian project managers inclined him to propose that for a project such as this, cooperation with an academic institution would be better. Bongenaar's views on the feasibility and effectiveness of the project were supported by most of the Dutch participants in the program. According to a Dutch professor, legislative drafting is most of all a question of talent: teaching methods and techniques will contribute little to the eventual quality of a legal drafter. Professor Sunaryati Hartono wanted to develop a unique Indonesian methodology and theory of legal drafting, one of the prerequisites to come to a national law system. She said that the Dutch and Americans did not fully recognise how important it is to have an own theory and methodology, because they have a tradition of 500 years of law making. She regretted it that during the program, no efforts had been made by her Indonesian colleagues to develop such scientific tools.\textsuperscript{79}

Another detrimental factor was that after finishing this project, the participants could not even apply their knowledge. The Indonesian Department of Justice had virtually no role in the drafting process: most departments drafted the laws themselves and the drafters of the Department of Justice were only allowed to check technical errors. But the decisive argument for not continuing this project was according to Bongenaar that cooperating with the Indonesian regime was contrary to Dutch principles of foreign policy. He argued that Indonesia was far from a democratic legal state, but a 'clear power- and police-state, of which the governing system lacks any legitimacy'. The widespread corruption disturbs the legal process, but the culpability of it was that the corruption starts with the president himself. Foreign aid should not be stopped altogether, but at least the co-operation with the Indonesian government should end, because it 'gave the Indonesian government a pretence of respectability'.\textsuperscript{80} Although Hirsch Ballin agreed with the practical objections of Bongenaar, his reply reflected the official standpoint of the Dutch government upon which the entire legal
cooperation had been based. He reiterated that through legal cooperation with the
Indonesian regime, changes and improvement, albeit slow, can be made. Therefore
cooperaion in legal matters should continue. However, a few weeks before Hirsch
Ballin wrote the reply, the Dutch Parliament had called for a postponement of all new
aid to Indonesia, as a reaction to yet another human rights violation of the Indonesia
regime. Unexpectedly, Bongenaar’s call to discontinue the legal drafting project
became true in March 1992.

Figure 7.4 A difficult project in an unfavourable environment: the Legal Drafting Project

Other priorities after 1992

Immediately after it became known that Dutch development projects had to be
ended, Mrs Sunaryati Hartono proposed the dissolve the Indonesian committee for
legal cooperation. She also went to France and Germany to find out whether these
countries would be willing to cooperate with the bphn. She and the minister of Justice
Ismael Saleh were more difficult to approach than the counterparts from the kih,
who acted more independent than the representatives of the Department of Justice.
In the mean time, a similar program for legislation in economic law had started. The
Elips Project, funded by the World Bank and with the assistance of American scholars
in Law was implemented within the Department of Finance and resulted amongst
other things in a host of new laws and the automation of economic legislation. Mrs
Sunaryati was involved in the Elips Projects as well. Karel Bongenaar left Indonesia in
May 1992, he wrote in a fax to the Council that ‘with my objections to the project still
standing, I do regret that it has come to an end this way’. He then worked on the
Dutch Antilles as a legal advisor, until he passed away in 1999.

In the years following Mrs Sunaryati approached the Dutch department of Justice
again in her capacity as close advisor to the Minister. She had come to realise that
working together with France Germany or an Anglo-Saxon country would be even more difficult than with the Netherlands. The core problem in her view, namely that there was a lack of theoretical knowledge and basic material for the legal drafting process, could not be solved with the aid of other countries either.  

She did advocate for continuation of two other (smaller) projects with the Council: the Dictionary and Thesaurus Project. These two projects have been co-funded by the Indonesian department of Justice until 1999. She also started a large project within Indonesia for the translation from Dutch into Indonesian of some 400 old colonial laws, with a small number of Indonesian legal experts who were still able to read Dutch.

Attempts to restore some forms of cooperation after 1992

The decision of 1992 was a serious blow to the Council: its raison d'être [FdP]tre was the implementation of Dutch development assistance. Most of their projects had to be written of their portfolio, only two smaller projects (the Dictionary and Thesaurus Project, not described here) were allowed to continue. Attempts to safeguard some of the projects were to no avail. A new MoU was signed between the KIH and the Council when professor Mochtar visited Geneva. But this MoU has never led to joint activities anymore: the KIH was able to continue the project by itself. In the Netherlands new possibilities for continuing the co-operation were created after the visit of the Minister of o&ew Jo Ritzen to Jakarta (see also Chapter Five).

The Council submitted a new proposal for cooperation under the renewed Cultural Cooperation Agreement to the KNAW. The proposals were merited to their scientific and strategic value. In practice it meant that only joint research was eligible for funding within the Cultural Agreement. Scribbled in the sideline of a fax containing a new proposal for cooperation between the Council and its Indonesian counterparts, Pieter Evers advised the Council to add here and there the words 'mutual benefit'. He wrote that 'such terms were dragged in by the head and shoulders...'. The proposal by the Council was rejected, because the wordings of the text could not conceal that the proposal contained too much educational elements, in other words: aid. Apparently it took more rhetoric creativity than displayed in the text of the proposal.

Formerly involved Dutch jurists were not too eager to lobby for the upkeep of the Indonesian-Dutch cooperation either. For them, working with the Council for an Indonesian project was not that attractive anymore. They had seen it, done it, some of them had learnt that improvement of the Indonesian legal system was a lengthy and laborious task, but most of all, their own work environment was too demanding to spend too much time for a renewed legal co-operation. They simply had lost interest in such co-operation.

The Dutch ministry of Justice could not take over the funding for projects of the Council either. Justice has a small budget and spending two million guilders on was out of the question. Apart from the lack of funds, grants from other Dutch departments for Indonesia were not allowed either after 1992. Since 1993 this department did
support the Council with 150,000 Dutch guilders annually to continue legal co-operation with amongst others Middle and Eastern European countries. The Dutch department of Justice now sees the importance of having ‘legal families’ in the neighbouring countries. In the course of the 1990s it has assumed a larger role in Dutch foreign policy by initiating more international cooperation. The Council has successfully redirected its activities to other countries and receives many of its assignments from the Department of Justice.

Legal cooperation between Indonesia and the Netherlands did not become taboo though, a number of official visits have been made to reinforce the relations with regard to legal cooperation. During a conversation on the 2nd of April with the Dutch Ambassador van Roijen Minister Saleh Affif of the planning agency Bappenas said that Indonesia would like to continue the legal co-operation. In December 1992 Minister Ismael Saleh and Hirsch Ballin undersigned Records of Discussion, but at the time that did not lead to any activities. According to the Dutch Embassy Minister Ismael Saleh had showed a ‘minimalist attitude’. The successive ministers of Justice, Mrs. Sorgdrager and Mr. Oesman have also shown interest in continuing legal co-operation. During official visits in 1995, 1996 and 1997 MoU’s and Agreed Minutes were undersigned. Until 1996, Mrs Sunaryati Hartono has been the driving force behind these visits and prepared the MoU’s. However, because of the requirement of equal funding, the plans in these MoU’s were not implemented either. It is recognised by both the Indonesians as the Dutch policy managers that lack of finances from the Indonesian side is the main impediment to regain momentum in Dutch-Indonesian legal cooperation.

Meanwhile in Indonesia...

The political context in 1992 looked ambiguous for the legal reform activities. Especially after the elections of 1992, of which the outcome was yet another victory for Soeharto’s New Order, the seedlings sowed in the Dutch-Indonesian cooperation had an even harder environment to mature. The 1990s were also the heydays for the palace circles, making corruption and nepotism the standard rather than an aberration. The initiatives for legal reform concerning the rights of citizens and the curbing of corruption looked grim. The atmosphere for economic legislation was better, demonstrated by the efforts put into the legislation program of the ministries of Finance and EKUIN in cooperation with the Americans (Elips). The increased and strong call from international business for more, better and transparent legislation, which could not be denied any longer.

After the resigning of Soeharto, the political arena of law and legislation has completely changed. Support for legal reform has gained momentum since the financial and political crisis of Indonesia after 1997. The international funding agencies, the IMF in particular set as an important condition to a billion dollar aid program that Indonesia would make haste with its (economic) legislation, both codification and implementation. The political chaos that arose after president Soeharto resigned...
opened up the discussion on the establishment of a state of law, rather than a state of power. An increasing call is heard to take the practitioners of Korrupsi, Kollusi & Nepotisme to court, but the road to justice is slow and paved with twists and turns. When Soeharto was taken to court for an investigation into his personal wealth, Soeharto opened the meeting by asking how the general prosecutors’ businesses, residences and golf courts were doing. Essentially, a corrupt judiciary has to judge a corrupt executive. The powers that were and the judiciary have each other in a hold, making the rule of law (if codified at all) worthless.

If Indonesia takes the desire for democracy and economic development serious, then the rule of law and legislation in general must be established first. International business likes to be sure that law protects signed contracts. The international donor community has made ‘good governance’ as its cardinal condition to aid. The establishment the National Ombudsman Commission in March 2000 is one of the few steps towards a state of law that President Wahid has taken. The Commission should help develop a climate for the fight against corruption, collusion and nepotism, along with the protection of the rights of the general public in receiving public services, justice and better welfare. Two people who were involved in the Legal Drafting Project are now members of the Commission: Professors Sunaryati Hartono and Bagir Manan. Nevertheless, the question remains how strong the new government can be in pushing through genuine and total legal reform.