Labour law and development in Indonesia

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Introduction

This study is about the process of creation and enforcement of social and labour rights, in the form of labour law, in Indonesia; and how this has reflected the actual broader process of social and political change, and struggle, in the country. It is not a sweet and cosy process. Three decades of rapid economic growth under the so-called 'New Order' was achieved by extreme political and economic subordination and exclusion of many of those who made it happen. Low wages, poor working conditions, and high levels of informal employment marked the daily lives of millions of Indonesian workers. Indeed, Indonesia under the New Order was notorious for its harsh and unsympathetic behaviour towards working people (see, e.g., Indoc report series, 1981-1988; Harris, 1995). Seeking to provide an appropriate framework within which policies of industrialisation and economic growth could be pursued, the New Order used the concept and structures of corporatism to control labour. The strong authoritarian state managed to tame most of the resistance. Meanwhile, a corporatist labour law framework was specifically designed to assure managerial ascendancy and the restraint of labour costs, often with repressions, for the sake of 'economic growth' under the broad term of 'development'.

The fall of President Soeharto in May 1998 marked a new epoch for the country. The powerful authoritarian New Order state was suddenly no longer there, leaving the way open for different forces to influence the formation of the country's new social and political structures. Habibie, the Vice President and Soeharto's intimate, was appointed as the successor president. Despite some doubts about his government's willingness to bring about reforms, Habibie's government, mainly due to the desire to separate itself from the previous regime, initiated some reforms (Bourchier, 2000), including labour policy reform. The cabinet's Minister of Manpower, Fahmi Idris, played an important role; starting by releasing a Ministerial Decree concerning Trade Union Registration, and allowing workers more freedom to establish unions, after three decades of single and government dominated union structures. In June 1998, one month after his appointment, Habibie decided to ratify International Labour Organization (ILO) Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise. This complemented ILO Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, which had been ratified in 1956, although without implications in practice. Within only six months of Soeharto's fall, in December 1998, the transitional government of President

Habibie launched the so-called 'labour law reform programme', under the auspices of the ILO, with the ambitious goal of changing the whole structure of Indonesia's labour law regime towards one that was more 'modern' and 'relevant' with the 'changing times' and the necessity of the 'free market economy' (ILO, 1999).

There is little doubt that Indonesian labour law reform was neo-liberal in nature, in the sense that the main aim of the reform was to make the labour law system a means by which to promote economic efficiency, by, among other things, reducing costs through a flexible labour market. It is apparent, moreover, that this reform was a requirement of economic and market liberalisation, which accelerated greatly in Indonesia (and throughout the region) with the onset of the Asian economic crisis in 1997-1998 (Rosser, 2002). This was due particularly to the need to follow the prescriptions of the international financial institutions, notably the World Bank and the International Monetary Fund (IMF), which became the main actors in Indonesia's efforts to regain its economic development and growth. Having been relatively untouched for more than three decades under the New Order,[1] Indonesia's labour law regime was thus suddenly transformed from a corporatist labour law model with a strong and powerful state behind it, towards one that was largely market-oriented. Although the development of a market-based economy had begun in the early 1980s and 1990s, it was only in the last few years, under the so-called *Reformasi* (reform) era, that the law changed dramatically. As the new political arrangement began to emerge, the Indonesian economy shifted from guided or state-led development to market-oriented reform and external liberalisation.

All of this suggests a typical neo-liberal transition, but the present research examines whether that is the whole story. Despite the neo-liberal and market-oriented labour law reforms many pro-labour regulations have actually been adopted; giving space for the development of a trade union movement within the country. While some outcomes of the reforms include the shifting of responsibility from the executive to other institutions – such as the judiciary – the government still appears to be involved in many labour relations issues. How can this development best be understood? How have these developments arisen, and why? What are the implications for labour? What challenges and opportunities come up for the country's newly (re-)established trade union movement? What lessons can we learn from the development of these changing labour laws, in regards to the relationship between labour law and economic development in Indonesia?

1 The idea of changing the labour laws had actually been discussed quite intensively in the late 1970s (Oesman, 1981), during the early phase of the New Order government's effort to further contain trade unions' activism in the country. For reasons that will be discussed further later, this did not eventuate until recently.

The present study seeks to address these questions, and to explain the labour law reform process. In so doing, it is divided into two major parts. The first section presents an empirical analysis about the development of labour law in Indonesia, historically and politically, and offers suggestions about what can be learned from the development of Indonesia's labour law. The discussion in this part of the study will be informed predominantly by theories from the fields of political economy and law; and analyses the roles of labour laws in a comparative way. Here the study will base its discussion upon various comparative labour law approaches, in order to locate and analyse Indonesia's labour laws within a wider perspective.

The second part of the study focuses on the three most important issues in labour law: (1) the trade union; (2) the minimum wage; and (3) the Industrial Relations Court. These three issues will be examined in separate chapters. The trade union is crucial in any modern industrial capitalist society, as it represents one of the few institutions capable of promoting some measure of equity and social justice in society. The minimum wage is an important subject in labour law because it is a policy tool for poverty reduction that can also be an indicator of the extent of a government's commitment to social justice. The Industrial Relations Court is important because it is the manifestation of the instrumental aspect of law; which requires enforcement as well as formal examination and adjudication in the event of a dispute. Each issue also involves the two main facets of labour law, i.e. collective labour law (trade union, minimum wage) and individual labour law (minimum wage, industrial dispute settlement), and will be examined using three different illustrative cases related to the three major pieces of labour legislation enacted since the *Reformasi*. The historical background and theoretical considerations discussed in the first section of this book will inform the discussion of these three cases. On this basis the final chapter provides provide reflections, lessons and recommendations.

1 Labour law and development: 'competing conceptions'

The main issue of the study is the relationship between what is generally known as the role of labour law and the development process. It has been argued that there is a close relationship between the two (ILO, 1974; Schregle, 1982). Traditionally and conceptually, labour law has performed a protective function, consisting of setting standards for the protection of workers in their jobs and workplaces, as well as affording them a minimum level of living conditions.[2] There is another function of labour law which may be particularly important on this regard, which is to establish a frame-

2 As we will discuss further later, the works of Hugo Sinzheimer and his disciple Otto Kahn-Freund and their supporters inspired this approach.

work within which constructive industrial relations can occur between employers and workers and their organizations, as well as the government, in order to achieve maximum benefit for the parties and society (ILO, 1974: 25).

History has shown us, however, that such 'idealistic' notions of labour law and its relationship with particularly the latter function appear difficult to realise in practice. These 'competing conceptions' of labour law (Deakin and Morris, 2001: 4) to protect the fundamental social and economic rights of the workers on the one hand, and on the other to promote economic efficiency – have often ended to the benefit of the latter. It is evident that labour law has often been used and manipulated as a tool to restrict the freedom of workers (for example their freedom to organise and to bargain collectively), furthering managerial rights and investment interests (Deery and Mitchell, 1993). This phenomenon takes place both in developed countries (e.g. Deakin and Morris, 2001: 1-55) and in developing countries (e.g., Siddique, 1989). The developing countries' workers, however, probably face more challenges than their counterparts in developed countries, due to the different histories of the development of labour legislation in the two worlds. In developing countries, labour law was already in place before the growth of industry and economic planning. Unlike in the developed countries, the labour legislative patterns there were not indigenous to the social requirements of the country but inherited, borrowed or transplanted from abroad (Cooney et al., 2002; Thiagarajah, 1986: 24).

Despite these obvious differences, there are also similarities between the two worlds' labour laws, namely the dominant notion of 'collectivisation' and 'protection' for labour, which has marked the mainstream development of labour law in the course of the 20th century.[3] Analysis of the history of the development of the legal system and labour law regimes in Indonesia supports this proposition. During the early development of labour legislation in the country, the notion of 'protective legislation' for labour was dominant. This was due partly to the influence of the mainstream labour law discourse at the time and the growing ideology of nationalism and anti-colonialism; and perhaps more importantly, due also to the involvement of many labour unions in the struggle for the country's independence. The labour influence in the legislative process continued from the 1950s to the mid-1960s. Over this period, several labour laws, which were arguably in favour of workers, were enacted.

3 See, e.g., van Peijpe, 1998 [comparing protective labour legislation in Sweden, Denmark, and the Netherlands]; Edwards and Lustig, 1997 [discussing the Latin American contexts]; ILO, 1975 [one of the early accounts of the development of labour law in Developing Countries], and ILO, 1986 [for a later account focusing on the impact of protective labour laws in the ASEAN countries].

However, after the emergence of the New Order in the mid-1960s, with its emphasis on economic stability and stable political conditions, the labour law regime severely restricted independent trade unions. This was not an abrupt effort – in fact, the Indonesian government, with the support of the military and business, systematically and effectively planned a new labour law regime over many years. Rather than developing this new regime as a means of achieving fair distributive goals, and embodying the notions of industrial justice, under the New Order the labour laws were used as a tool to promote the economic interests of the elite. Despite the fact that protective labour legislation existed formally, a big gap was evident between 'law in the books' and 'law in practice' (see, e.g., Fehring and Lindsey, 1995; Lindsey and Masduki, 2002).

Confident with his power, President Soeharto did not consider it necessary to change the labour laws; indeed, he used the law as another tool to enhance his control over society within the state's corporatist structure.[4] Thus, although the New Order's labour law was generally supportive of labour *vis-à-vis* industry, the law was often not applied, and the institutions in place were manipulated in such ways that they could not overcome the reluctance of the government to actually enforce the regulations. Meanwhile 'labour law', (*hukum perburuhan*), as a distinct field of legal research, was in hibernation for over three decades. This can be seen clearly by considering the mainstream labour law books published during the New Order era (Orde Baru): these books were trapped in merely technical explanations of the laws (in the forms of commentaries), with minimal attention directed to the context surrounding the written laws, nor any discussion of the implementation of the laws in practice.[5]

Soeharto's fall in 1998 brought some changes to the ruling elites' strategies towards labour. The 'labour law reform programme', which started in 1998 as a follow-up to the Direct Contact Mission of the ILO Geneva, resulted in the enactment of a new labour regime consisting of a package of three major laws. Together these replaced Indonesia's entire labour law system, as developed from the 1945 proclamation of independence until the mid-1960s.

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4 As further discussed later, the national ideology, *Pancasila*, or 'Five Principles', played an important role on this regard (Hadiz, 1997).

5 See, for example, Budiono, 1995; Djumadi, 1992; Djumialdji, 1987; Halim, 1987; and Kartasapoetra, 1986. Interestingly, all were published by the time labour repression reached its peak during the New Order, culminating in the murder of Marsinah, a labour activist in Surabaya, 1993 (for an historical record, particularly on the role of the military in the murder, see Supartono, 1999). Several earlier opposing efforts were also made, however, (see Masduki *et al*., 1999), and this opposition continued strongly over the last few years after the *Reformasi*, including through the efforts of a small number of Indonesian labour lawyers and activists (see, e.g., Tjandra and Suryomenggolo, 2005, Samsa, 2005, Tjandra, 2004).

Despite early criticisms of their enactment from labour activists,[6] in reality there has been some adoption of the protective notion within the laws inherited from the previous laws (see in particular Caraway, 2009).[7] As we shall see, such a situation, combined with the weakening of the state, has opened the door to democratization; which has given labour the chance to regain its influence in the political arena.

2 The political economy of law and the approach of this study

The foregoing discussion shows that labour law and development are, indeed, 'competing conceptions'. The process of making laws involves contending groups in society, which compete with each other to influence the formulation of a particular law to meet their particular interests. Further, the enforcement of those laws depends on the political and economic situation, as well as on the interactions between different actors at different levels, from the workplace level to the level of the national economy (Wever and Turner, 1995: 2; Bacungan and Ofreneo, 2002: 91-92; also Hepple, 2002). For the purposes of this study, in addition to the standard legal approach (which this study follows predominantly), this necessitates the adoption of a political economy (of law) approach, in order to better understand such dynamics. This additional approach involves analysing the development of law within the so-called 'critical legal theory' tradition. As critical legal scholars have argued, law is basically a manifestation of the economic, political and ideological conflicts in a society (see, e.g., Kennedy, 1997). This certainly applies to the field of labour law (Edie et al., 1992). It is apparent that labour law reflects not only the obvious economic balance of power, but also the political and ideological balance; in particular between the working class and the other classes in society. These other classes include not only employers and the business community, but any proponents of conservative, anti-egalitarian ideologies and supporters of the interests of the so-called 'higher' classes, – the 'neo-liberals,' to use the current term.

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6 For example the *Komite Anti-Penindasan Buruh* (KAPB – Anti-Repression of Labour Committee), a group established in 2000 and comprising more than 40 labour organizations and NGOs, criticised the new laws as a form of 'labour repression' by law, due to the absence of any notions of protection. The provision of the laws contained many problems (see Kolben, 2002; Uwiyono, 2004), and they mainly served the interests of liberalising the labour market, rather than developing a sound and fair labour relations framework in Indonesia, as they claimed to intend to do.

7 According to the OECD Indicators of Employment Protection, Indonesia has always been considered one of the most protective countries towards workers in its legislation, together with China, Brazil, Saudi Arabia, Latvia, and some OECD members such as Turkey and Germany, based on its legislative protection of regular workers against individual and collective dismissal and regulation of temporary contracts (see http://stats.oecd.org/Index.aspx?DataSetCode=EPL_R accessed in October 2013).

In this regard, labour law is, like 'economic development', a contested concept. As noted by Frederic Deyo (1997: 205), in a discussion on the relationship between labour and economic development in the Southeast Asian context:

> [E]conomic development is typically a contested process, one in which shifting and emergent groups and coalitions contend for favourable economic positions in a changing and uncertain social order and in which the very nature and extent of development is an outcome of social and class contention.

Deyo also noted that such a political economy view is useful, in order to understand the role that organised labour has played during the rapid industrialisation in the region. As he further writes:

> Of particular importance here are changes in the 'labour systems' through which labour is socially reproduced, mobilised for economic ends, utilised in production, and controlled and motivated in support of economic goals. These changes are joint products of the economically driven labour strategies of government and business elites, of global political and economic pressures and constraints, of the process of industrialisation itself, and in some cases of the individual and collective responses of workers to elite strategies and industrial pressures (1997: 205).

Such approaches to exploring labour and other laws and economic development, and their inter-relationship, lead to the theoretical position that law making is seldom a neutral process, based on rational and objective considerations. In many cases it is rather a contest between competing interests within society, and these interests are often not evenly matched. This position accords with the study of political economy which stresses the distribution and use of power in society in analysing the policy-making processes. As noted by Robison et al. (1997: 14-15):

> [S]tate policy cannot be neutral, nor can it be the outcome of a process of professional decision making based on an analysis of interest group inputs. Policy is a reflection of the nature of domination in society. The issue is not to identify 'good' and 'bad' policy choices, but to understand why it is that particular policy agendas emerge and hold sway under particular political and economic regimes.

Although the present study agrees with some of the above approach – particularly the importance of the 'why' question, in order to understand the nature of competing interests behind policy-making processes – it also takes the view that it makes sense to look at right or wrong policies, if we want to reach the goal of legal certainty and predictability. This study considers that the position stated above may be too simple, given the complexities in policy-making processes. From this standpoint, in order to understand the complexity of the evolution of labour law in Indonesia and its relationship with economic development, it is important to understand the situation and problems with Indonesia's labour law in the context of the changing economic strategies of the Indonesian government. For this reason the political economy of law approach may be useful to further our understanding

about the role of law in this specific context; namely, the role of labour law in a developing country. It is, moreover, beneficial to examine the contents of the labour policies, in order to best envisage particular regulatory solutions for particular problems. This approach is in line with the efforts of some noted law and development scholars, including Yash Ghai, Robin Luckham and Francis Snyder in their edited book *The Political Economy of Law: A Third World Reader* (1987). The main questions raised in the book are: 'to what extent may law be used as an instrument of state policy to promote social change?', and 'what roles, either intended or unintended, does law play in social processes such as the development of capitalism, the reproduction of established social relations or radical social transformation?' (Ghai et al., 1987: xi).

Taking a Marxian perspective,[8] the editors of the aforementioned book emphasise the role which law plays in relations between rich and poor nations in the world economy, and the functions of law within developing countries (p.xi). They perceive the legal situation in developing countries as a complex combination of legal systems; and their theoretical perspective begins with an analysis of the impacts of global capitalism and the legal forms which it requires. Their approach is, therefore, general rather than specific. The book also does not pay close attention to micro-political arrangements and the impact of changing government policies on these arrangements, or on people's lives. It is more concerned with the macro processes that structure micro and/or local problems, rather than the influence of micro and/or local struggle in structuring the extent of domination of the national legal system.

The approach of this study is a combination of these two perspectives of macro and micro. Although it starts with a broad general analysis of labour law and development in Indonesia, historically and politically, it also recognises the need to look closely at specific issues. For this reason the study focuses partly on the historical records of the political development of labour law in Indonesia, using the political economy of law approach; and partly on particular, specific issues and cases (namely trade union legislation, minimum wage setting and labour dispute settlement mechanism), using more of a labour law and comparative labour law approach.

8 This approach has been developed mainly since the mid-1970s, based on the theories of dependency and under-development, as critiques the early law and development on studies which, according to Ghai *et al*. (1987: xi), had been 'based on ethnocentric, ahistorical assumptions'. For discussions on the changing paradigms in law and development studies, see Newton, 2004; also Trubek, 2003. The latter scholar once proclaimed the 'crisis' and even the 'death' of the law and development movement in the USA (see Trubek and Galanter, 1974; Trubek, 1990), which led to many changes in law and development discourses. For a recent account on the debate, see Trubek and Santos (2006).

3 Focus and framework of the study

The focus of this study is the development of Indonesia's labour law, particularly during the period from 1998 to 2006 during the so-called *Reformasi* (reform) era, marked by the fall of President Soeharto in May 1998. This study also considers that an appreciation of the historical development of Indonesia's labour law system is essential, in order to understand the legal system's current form and content. The research therefore also includes the historic development of Indonesia's labour laws, from independence in 1945 and the transfer of sovereignty in 1949, through the Parliamentary Democracy period (1949-1955) and the so-called 'Guided Democracy' era (1955-1965). Most of Indonesia's labour legislation was enacted and framed during these periods. The 'New Order' era under President Soeharto gets special attention, due to its dominance in the history of modern Indonesia since the country's proclamation of independence in 1945. In power for more than three decades, the New Order presided over almost all of Indonesia's current predicaments. Even in the current 'transitional' era under the *Reformasi*, the New Order legacy remains dominant. Indeed, it has been argued that rather than reforming, the New Order's players have simply been 'reorganising' power; in a form more fitting to the current political situation (Robison and Hadiz, 2004).

The focus and approaches chosen for this study are particularly relevant because of the lack of publications on the political and economic history of the development of labour law in Indonesia, especially since the 1960s. Even more importantly in a country with a large population (Indonesia has over 245 million people), most of whom need to work to survive, labour law is an important tool for evaluating the way in which a government in a developing country treats its workers. Such an approach has been used in some other developing countries, such as South Africa (DuToit, 1979), the Philippines (Villegas, 1988; Bacungan and Ofreneo, 2002), and Chile (Ietswaart, 1978); however in Indonesia this approach has been rare. There is currently a single book on the issue: Iskandar Tedjasukmana's *The Development of Labor Policy and Legislation in the Republic of Indonesia* (1961), which is primarily a description and historical documentation of the development of Indonesia's labour law and labour policy between 1949-1959.[9] Since then, there has been no systematic work published on the issue.

This study will address the need for the systematic documentation and analysis of the evolution of labour law and policy in Indonesia, particularly during the New Order era and its aftermath; as well as the need for an analysis

9 The book has been translated into Indonesian, with the title *Menelisik Hukum Perburuhan di Indonesia: Analisa Gerakan Ekonomi Politik 1950-1960* (Tjandra (Ed.), 2012), published jointly by *Yayasan Pembangunan dan Pendidikan Dr Iskandar Tedjasukmana* and the Trade Union Rights Centre.

of the potential future role of labour law in the context of Indonesia and the globalisation of its market economy. Moreover, an important question within law and development studies is whether law can function as a stabiliser in society; and labour law is difficult to deal with, and rarely investigated. This study will contribute to addressing that question also. With regard to the aim of the study – to examine the relationship between labour law and economic development in a developing country – labour law is a field of research that involves direct economic influence; with the interests of the parties involved usually being in direct competition with each other. These parties include not only workers and their unions, but also political elites and business people at national and regional levels; not only national actors but also global players, buttressed by the globalisation of the economy.

4 Theoretical and comparative considerations

How can we understand Indonesia's labour law and its development within the wider systems of labour law in the world today? This is the main question that this dissertation would like to explore. The next section in particular will focus on the theories and debates that are helpful in explaining the genesis and implementation of the current labour law regime in Indonesia. It starts with an examination of the character (the form and content) and impact (the capacity to influence outcome) of labour law, using the theories developed by Sean Cooney et al. (2002), which focus on the East Asian countries' contexts. It then continues with a discussion of the structural limitations of labour law reform in the country. The chapter ends with an exploration of the origins of the concept of labour law, as we know it.

4.1 The character of labour law in East Asia

In its original version, labour law has been designed – and thus interpreted – in light of its goal, which is to protect employees. According to this traditional view of labour law, employees were in need of protection because they suffered from inequality of bargaining power *vis-à-vis* their employers.[10] The idea is derived from the writings of German jurists published mainly in the early decades of the twentieth century. One of the most prominent figures was Hugo Sinzheimer, the 'father' of German labour law. As noted by his student, Kahn-Freund (1981: 14), Sinzheimer saw the employment relationship as a power relationship characterised by domination and subordination, by which labour law came into its own as a new discipline as it rejected the liberal assumption that the contract of employment is a product of the parties' autonomous choices. Sinzheimer, follow-

10 For a classic account, see Davies and Freedland (1983), chapter 1, and more recently see Davidov and Langille (2009).

ing Karl Renner (1949),[11] adopted the Marxian idea that the subordination of the worker resulted from the capitalist ownership of the enterprise (or 'means of production' in Karl Marx's words). According to Renner, the assumed contractual equality between the legal persons of employer and employee was in fact a fiction, which then reinforced the employer's domination and the employee's subordination. Sinzheimer wanted to defeat this mystification of the worker's actual state of dependency, by contrasting the 'contract of employment' – in which human beings exchange themselves, – with 'ordinary contracts,' in which the transfer of things or their uses or services are promised.[12] According to Sinzheimer, by explicitly recognising these contracts in statute law, this legal mystification could be destroyed. At this point, labour law became the law of 'dependent' labour, and became an attempt to moderate the employer's power to command through the infusion of legal elements (see Clark 1993: 83, also Kahn-Freund 1981: 79).[13]

The concepts of 'subordination,' 'dependency,' freedom of association, and the right to collective bargaining together predominantly framed the development of labour law during the industrial revolution in Europe, which was the formative period of labour law (Hepple, 1986). Several general principles, with 'labour is not a commodity'[14] as the most important one provided a moral basis on which the relationship between employer and worker should stand, based on equality. The main expression of this principle was the struggle for contractual equality between the dependent or subordinated worker and the employer. This was realized in all European countries before the Second World War by protective legislation; notably for children, young persons and women (Hepple, 1986: 6-12). The legislation has been described by van der Heijden (1994: 135-36, also cited in Hepple and Veneziani, 2009: 5) as 'inequality compensation', whereby 'the legislator has considered it useful and necessary to compensate the economic inequality existing between employer and employee through law.' In a practical sense, the

11 The English version of Karl Renner's classic book, *The Institution of Private Law and Their Social Function* (1949), was edited and introduced by Otto Kahn-Freund.

12 Sinzheimer, as well as Kahn-Freund, used to exemplify this by quoting Marx's sentence in *Wage-Labour and Capital* (1847-9): 'Labour has no other container but human flesh and blood' (see Kahn-Freund 1981: 77-8).

13 This is the essence of what Kahn-Freund has called Sinzheimer's 'anthropology'; that is: '[T]he belief that the true objective of labour legislation was to advance the freedom, dignity and personality of the individual worker and workers as a whole, to assist in the emancipation of the human being as distinct from the fictional "legal person". The ultimate practical purpose of academic labour law was to promote legislative reforms to that end.' (in Lewis and Clark 1981: 39).

14 The term was coined by an Irish economist, Dr. John Kells Ingram, at the British Trade Union Congress (TUC) meeting in Dublin in 1880 (see O'Higgins, 1997: 53-54), which echoed Karl Marx's insight that capitalism has turned labour power into a commodity. Later it was adopted as the first principle of the Declaration of Philadelphia 1944, which embodied the work of the ILO (International Labour Organization), and was reflected in the 'Workers' Chapter' of Pope Leo XIII Encyclical *Rerum Novarum* (1891).

main focus of labour law is the problems emerging from the employment relationship between the employer and employee, and the relative power of the two parties, normatively ordered by the nature of the contract and conditions of employment; statutory conditions of employment; state systems for the settlement of industrial disputes; and the right to collective organization and industrial action.

In an edited compilation of articles on labour law in a number of East Asian states, including Indonesia, Cooney et al. (2002)[15] have argued that labour law in East Asia had been characterised by combining a more 'traditional' focus on the protection of employees in the employment relationship, and a focus on the broader labour market dimensions of state policy-making and regulations. Thus, apart from addressing the problems emerging from the employment relationship and the inherent inequality of power between the employer and employee, labour law has also paid attention to broader employment issues such as human resources planning, job training and replacement, and social welfare.[16] Cooney et al. (2002: 5-9) identify three important and interlinked influences that shape the contents of labour laws in many East Asian countries: (1) 'legal transplants' or borrowing from Western states and from international institutions; (2) economic development policies; and (3) strategies of political control. As they note: 'most of the developed or developing East Asian states have adopted, in broad outline at least (and some more recently than others), systems of labour law that reflect the form and content of the systems of Western countries' (Cooney et al., 2002: 3). This has been a legacy of colonial powers, and more recently the efforts of the ILO, both through standard-setting and through technical cooperation. Such borrowings from external sources, in particular the Western systems, have continued even after the countries gained independence.[17]

Concerning the influence of economic development policy on the form of labour law in East Asian countries, Cooney et al. refer to the work of Sarosh Kuruvilla (1996, 1995), who argues that a country's industrialisation strategy largely determines its industrial relations and human resources policies, or at least, that they are 'closely intertwined and mutually reinforcing' (Kuruvilla 1996: 635). Summarising his findings by comparing Singapore, Malaysia, the Philippines and India, Kuruvilla writes:

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15 In this regard and in the discussion about Cooney et al. (2002), the chapter has benefited from an article by Fenwick and Kalula (2005) which discusses labour law in East Asian and South African countries from a comparative perspective, using Cooney et al.'s (2002) approach.

16 As we shall discuss later in the chapter, the Manpower Law No. 13/2003 reflects this in its contents.

17 Cooney *et al.* (2002: 4) describe a number of reasons why this continued borrowing happens: including the need of the state (or, often, a particular political party) to secure political legitimacy or self-assessment as a 'modernizing' state; pressures from other states, in particular the US and European Union; and pressures from NGOs.

> The author finds that import substitution industrialization was associated with Industrial Relations/Human Resources policy goals of pluralism and stability, while a low-cost export-oriented industrialization strategy was associated with Industrial Relations/Human Resources policy goals of cost containment and union suppression. In countries that moved from a low-cost export-oriented strategy to a higher value added export-oriented strategy, the focus of Industrial Relations/Human Resources policy goals shifted from cost containment to work force flexibility and skills development.
>
> (Kuruvilla 1996: 365)

Another 'domestic contribution' to labour law in East Asian contexts, according to Cooney et al., is political control. Cooney et al. refer to this as the 'regime stability' strategy common to all East Asian countries that have been ruled by authoritarian regimes after World War II. As they note: 'These regimes have implemented labour laws which, to varying degrees, have been aimed at repressing and/or co-opting labour, and sometimes capital, in order to prevent challenges to their rule or to the implementation of their policies' (Cooney et al. 2002: 7). To support their argument about the use of labour law for political control in East Asian states, Cooney et al. refer to two theoretical contributions provided by Kanishka Jayasuriya and Frederic Deyo. Jayasuriya (1999), whose concerns are with the nature of state-based law in East Asia, argues that the rule of law in East Asia, different from the liberal notion of the rule of law in the Western countries, has reflected the corporatist structure of East Asian societies. It is enforced not only by specific laws but by the whole architecture of the legal system, which, he argues, has recreated the political rule established by the colonial state; particularly with respect to the ideological notions of 'security and order' (Jayasuriya, 1999: 147-173).[18]

In an earlier article, Jayasuriya (1996) has termed this 'rule through law', or 'rule by law', in his discussion on the relationship between the development of the rule of law in East Asia and the rise of capitalism. With respect to labour law, 'rule by labour law' took place in the sense that labour law – as with all laws under authoritarian regimes – became an 'instrument to pursue the objectives of the state' (Jayasuriya, 1999: 2-3). Jayasuriya's argument is in line with Deyo's explanation on the corporatist attidude towards labour in the East Asian states (Deyo, 1989).[19] Deyo's main concerns are to identify the relationship between economic and social structure, and the weakness and

18 In this regard, Jayasuriya refers to Daniel Lev's important article in 1978 about the Indonesian *Rechtsstaat* or *negara hukum*. In another article, Lev argues that the Indonesian political system, under the New Order in particular, 'shared much with that of the colony, but was even rawer in its lack of institutional controls and abuse of power' (1999: 92; also cited in Lindsey and Masduki. 2002: 38).

19 Deyo focuses his study on four countries: Hong Kong, South Korea, Taiwan, and Singapore. By corporatism he means 'authoritarian' or 'state' corporatism, as opposed to the more voluntarist 'societal' corporatism characteristic of many Western European nations, notably Germany (Deyo, 1989: 107).

subordination of organised labour in the region. He argues that East Asian states have employed either repressive or corporatist methods of controlling labour. As he notes, repressive controls aim at 'containing, demobilising and restricting' workers, while corporatist controls endeavour to 'organise, channel and encourage certain types of individual or collective behaviour on behalf of elite-determined economic or political objectives' (Deyo, 1989: 107).

Legislative measures play an important role in the mechanism of controls as discussed by Deyo. In the words of Cooney et al. (2002: 8):

> Repressive provisions include those prohibiting the formation of unions in key industry sectors; rendering strikes effectively illegal; imposing compulsory arbitration of disputes; banning union involvement in politics, and conferring extensive discretionary powers on state bureaucrats in relation to union registration and deregistration procedures; collective bargaining; and the appointment of union officials. Corporatist provisions, more common in the later phase of industrialisation, include those establishing welfare funds; conferring privileges on state-endorsed union federations; and atomising or decentralising unions to further enterprise and state paternalism.

Deyo's analysis in his 1989 work was convincing, but it has become less relevant in the 1990s (see also Frenkel, 1993: 12) as it has not placed much attention on the democratization processes that have been underway in the regions since the 1990s (Jayasuriya, 1999, Cooney, 1999; Cooney et al., 2002: 8-9).[20] Democratization has weakened the authoritarian corporatism, which further destabilised the structure of labour law and thus its effectiveness. We shall discuss this further in the next section.

4.2 The impact of labour law in East Asia

Cooney et al. (2002) want to explain the so-called 'gap' between law and practice, which they argue is an obvious phenomenon in many East Asian countries. Although extensive labour laws exist in East Asian countries (see also Cooney and Mitchell, 2002: 246-274), there remains in all cases a large gap between law and practice. According to Cooney et al. (2002: 9), labour law regimes in East Asia have not been 'invoked in the same ways or utilized to the same ends as in the West during the comparable period of economic development'. The law/practice gap in East Asia, they argue, is different not only in degree but also in nature from the law/practice gap that is the focus of socio-legal scholarship in developed countries. Several examples provide evidence for this claim: for example, despite the fact that democratization

20 Wang and Cooney (2002; see also Cooney 1996) argue in the context of Taiwan, when authoritarian corporatism of the Nationalist (*Kuomintang*) government weakened the structure of labour law has been increasingly unable to respond to the more democratic context of labour relations. This is particularly true in the context of collective labour relations, and workers enjoy greater freedom to organise themselves through unions, while strikes and other industrial actions become legal, at least in principle.

has allowed labour movements to increase their ability to challenge the state, this capacity remains well below that of their Western counterparts; and despite growing numbers of trade unions, the levels of collective bargaining remain relatively low, as does the frequency of industrial action under legal procedures.

Referring to the rhetorical question in Donald Clarke's article on China: 'What's Law Got to Do with It?' (Clarke, 1991), Cooney and Mitchell point out: '[It] is not that law doesn't exist but that it has little capacity to significantly influence other social systems, such as the state or the market.' However, they also note that labour laws are not uniform or consistent in effect; similar laws have different effects in different countries and over time. Different areas of labour law are associated with different gaps: for example the adjudication of 'interest' disputes (disputes over entitlements of future working conditions during collective bargaining) is utilised in different ways in Malaysia, the Philippines and Taiwan (Cooney and Mitchell 2002: 247-248). Similarly, laws on the formation of trade unions have influenced the shape and activity of workers' organizations to different extents in different countries: for example, laws limiting trade union formation in South Korea and Taiwan became ineffective, because most unions were actually formed outside the parameters provided by law, while in China, employment contract laws had a marked influence, radically altering that country's employment practices.

In explaining how such a gap occurs between law and practice, the work of Otto Kahn-Freund (1974) is particularly important in Cooney et al.'s (2002) analysis. Cooney et al. (2002) critically examine Kahn-Freund's notion of 'legal transplantation' as a tool in examining whether or not it is possible for laws developed in one jurisdiction to function effectively in another (Kahn-Freund, 1974: 1). Kahn-Freund argued that political factors, in particular the power structure of the state, have the biggest impact on whether or not a transplant will succeed (Kahn-Freund 1974: 11-13).[21] For Kahn-Freund, it was 'how closely [the transplanted law] is linked' with the power structure of the original system that would determine its success or failure (Kahn-Freund, 1974: 13). He considers success in legal transplants to be a process of 'naturalisation' of the foreign laws into the domestic legal system (Kahn-Freund, 1974: 18), or 'uniformity,' which other comparative legal scholars see as the main indicator of success of legal transplants (see Smits, 2002). Kahn-Freund

21 Here he referred to the three most important political differences: (1) differences between political systems (communist and non-communist, democracy and dictatorship in capitalist world); (2) differences in democratic themes and distributions of power in the government's branches (e.g., presidential type in the US, parliamentary type in the UK, and a mixture of both in France and Germany); and (3) differences in the roles played by 'organised interests' (economic and cultural) 'in the making and in the maintenance of legal institutions' (Kahn-Freund, 1974: 12).

also discusses the 'degrees of transferability'; that is, the degree to which a particular law is subject to 'rejection' by the new legal system (Kahn-Freund 1974: 5-6). In the case of labour law (see also Whelan, 1982), Kahn-Freund argues that individual labour law is much easier to transplant than collective labour law (Kahn-Freund 1974: 21). This he argues, is because collective labour law in any country is 'organised under the influence of strong political traditions' (Kahn-Freund 1974: 20). Moreover, decisions in particular cases in this area of law are often more political than those in other areas; so the allocation of decision-making power under the constitution (i.e. whether power is allocated to courts or the government) is particularly significant (Kahn-Freund, 1974: 20; also Fenwick and Kalula 2005: 198).

Cooney et al. (2002) criticise Kahn-Freund's claims that politics and the state's power structures are the determining factors in the success of legal transplantation. They base their criticisms on two arguments. Firstly, Kahn-Freund's dichotomy of collective/individual labour law has become too simplified, now that labour law scholarship is increasingly encompassing labour market regulation. Second, they contend that the reasons any particular transplant succeeds or fails should not be presumed, but should be examined empirically. As they note, (2002: 10):

> Kahn-Freund offered no supporting evidence for his contention about the relative importance of particular influences. It is true, of course, that the close interrelationship of a political power structure in a society and its laws makes such a position as that taken by Kahn-Freund intuitively plausible. Nevertheless there is no reason for supposing *a priori* that political power structure is always the dominating variable in accounting for difference. The relative influence of factors can only be addressed and resolved – if indeed it is possible to resolve such a problem – by empirical observation.

Further, drawing on Teubner (1998) and the idea of social systems,[22] Cooney and Mitchell (2002) suggest that in order to explain the law/practice gap in East Asia, there are two important applications of the law: the effectiveness of the law; and the consequences of transferring a legal concept from one system to another. The first application implies that if law is coupled loosely with a relevant social system, as is the case with labour law and labour

22 Gunther Teubner (1998) develops a more complex account of the relationship between law and its context. Teubner agrees with Kahn-Freund's notion of 'degrees of transferability', and thus law is no longer tightly bound in its entirety to its social context. However, for Teubner the different parts of the legal system vary in the intensity of their connection not only with a society's political systems, but also with its economic, technological and cultural systems (Teubner, 1998: 17–27). A central element of Teubner's approach is the concept of law as an 'autopoietic', self-distinguishing, social system (Teubner, 1993). Teubner builds his argument based on the social systems theory formulated by Niklas Luhmann (see Luhmann, 1995, which focuses on 'social system'; also Luhmann, 2004, which focuses on the 'law as social system'), by viewing the social world as consisting of systems of communication such as law, the market, politics, the various sciences and so on (see also Cooney and Mitchell 2002: 249).

markets in East Asia, its effectiveness, in the sense of 'capacity to "interfere with", or influence, them productively' will have a limited impact. The result would be 'mutual indifference' (Teubner, 1987), 'as if law speaks ("this is illegal!") and no one listens (because "this is efficient" or "this is good policy" or "this is moral").' (Cooney and Mitchell 2002: 250). The second application is particularly important, due to the fact that most East Asian labour law systems are transplanted from Western countries. This may lead to the presumption that they will operate very differently from how they did in their Western place of origin (Cooney and Mitchell, 2002: 251). Thus, this analysis of social systems suggests that a law/practice gap is inevitable; which opens up space for a more empirical investigation of the issue.

One important factor in East Asia which distinguishes it from Western states is the range of deficiencies in the internal structure of the legal systems (Cooney and Mitchell, 2002: 252-254), which lessens the law's ability to have an impact on other social systems:

> The weaknesses internal to the structure of labour law in East Asian states – unclear differentiation from policy, conceptual lacunae and low capacity to generate new norms – diminish labour law's capacity to operate as a self-sustaining system. It becomes relatively dependent on norms produced by other social systems. … These weaknesses suggest that law may have diminished regulatory capacity.
>
> (Cooney and Mitchell, 2002: 254, also cited in Fenwick and Kalula, 2005: 202)

In relation to this, Cooney and Mitchell examine three broad kinds of relationships between law and other social systems: law and politics and political structure; law and 'culture'; and law and economic structure. Of the three sets of relationships, according to Cooney and Mitchell, the relationship between law and culture is the most inconclusive,[23] while the relationship between law and politics and economic structure is the clearest. Most of the countries studied by Cooney et al. have been ruled by authoritarian regimes. The main goal of the state is to maintain regime 'stability', through policies controlling organised labour and policies of economic development and modernisation for legitimacy. Both have obviously characterised labour law in East Asia. In the most explicit cases, law 'simply translates political objectives into legal terminology: that which is contrary to the interests of the state is illegal' (Cooney and Mitchell, 2002: 256). But the law-politics relationship is more complex; in most cases it is a matter of accommodation. This includes cases involving state ignorance of the law (for example Taiwan, South Korea and particularly Malaysia); cases in which laws are expressed

23 While there is literature on China (eg. Zhu, 2002, also Peerenboom, 1993) and Vietnam (Nicholson, 2002) which suggest that indigenous legal cultures might have an impact to the functioning of Asian legal systems transplanted from Western models, analyses of Indonesia (Lindsey and Masduki, 2002), Malaysia (Sharifah, 2002) and Taiwan (Wang and Cooney, 2002) suggest the contrary.

in ways that allow the state to interpret and apply them as it wishes (the Philippines); and cases in which laws are reserved through administrative measures, with little or no opportunity for judicial review or other means to challenge the law (Vietnam, and Indonesia before 2003[24]). In these cases, law is not separated from politics to the same extent, or by the same means, as it is separated in the legal systems and countries from which it was adapted.

These variations in the relationship between law and politics have been examined in the context of the wave of democratization that has occured in the region, particularly in Indonesia, South Korea and Taiwan. There may be expectations that such development would have a positive effect on society. Cooney and Mitchell, however, observe that the impact is actually unpredictable and sometimes paradoxical. While democratic change has undermined the corporatist nature of the state and the exercise of political power in general, it may have had less impact on other social systems, such as industrial relations. In South Korea and Taiwan, although the law's capacity to influence state action has increased, and the unwillingness of labour law to accommodate state policies has been growing, in both countries collective labour law remains widely ignored. As pointed out by Cooney and Mitchell (2002: 257):

> One of the reasons for this may be that the relevant legislation is still closely linked to the superseded political form, and retains authoritarian elements incompatible with current political arrangements. The state is no longer prepared to back the law up with coercive force. Accordingly, in the world of industrial relations, they can safely be ignored.

As noted by Fenwick and Kalula (2005), one important finding from East Asia research is that labour law has been noticeably absent in the construction and functioning of labour markets. In Vietnam, it has been reported that around 80 per cent of workers in the country are not covered by relevant legal provisions, because they work in enterprises which employ fewer than the minimum number required for application of the law (Nicholson 2002: 133). In the Philippines and Indonesia, large portions of the workforce are in the informal sector,[25] and working in the informal sector means that workers are not protected by any laws (Cooney and Mitchell 2002: 259). As Cooney

24 On 15 October 2003 the Constitutional Court started to operate in Indonesia (based on Law No. 23/2003 on the Constitutional Court), providing access to Indonesian citizens to challenge the laws through judicial review.

25 As noted by Breman (1980: 4), the term 'informal sector' was first coined by anthropologist Keith Hart (1971) in his description of the part of the urban labour force which falls outside the organised labour market in Kenya (see Jolly et al. check footnotes for italics a required 1973). The term has since been greeted as a useful concept, and has been further refined by the International Labour Office (ILO) during a study of the employment situation in Kenya within the framework of the World Employment Programme (ILO, 1972). Indeed, in a recent publication, the ILO (2002) has stressed the importance of 'decent work' for workers in the 'informal economy', as a response to the proliferation of new forms of work relations that fall outside the definition of 'employee', which continues to be the basis for most labour protection legislation.

and Mitchell (2002: 258) note, it is almost to none that state-based law applies in a large portion of transactions in the labour market. A related finding is the important role played by non-state based 'informal' regulatory systems, as is the case in Indonesia and perhaps other countries, which have labour markets with large informal sectors (Cooney and Mitchell 2002: 263).[26]

Such findings require further empirical investigation in specific contexts, especially given the common criticism of labour law from neo-liberal economists that labour law has caused distortions in the labour market. Thus, legislation on minimum wages, in particular, would inhibit the effective functioning of labour markets, by, for example, raising wages higher than market rates, which may then create unemployment. The finding is significant because it directly addresses the relationship between state-based law and East Asian markets, and also contributes to a critical debate in socio-legal studies about the law's role in economic development (see, e.g., Ginsburg, 2000).[27]

According to Cooney et al. (2002), there are also other reasons why labour law has not been influential in labour markets in East Asia. One reason that they propose is ignorance: companies (and often employees) are often simply unaware of the relevant legal provisions. A second common reason is economic necessity: legal penalties may be too high for companies to bear, with the cost of compliance exceeding a company's capabilities, as is in early-1950s South Korea, and in Indonesia after the 1997-1998 crisis (Cooney and Mitchell 2002: 259). A third proposed reason is a lack of effective enforcement, with companies simply refusing to comply regardless of having the means to do so, if they know that there will be no sanctions any-

26 As indicated by Breman (1980: 4-5), the origin of the concept is linked to Julius Boeke's 'dual economy' (1953), as a classical explanation of the phenomenon of economic dualism, and of the reasons behind sustained underdevelopment in Indonesia. The concept refers on the one hand to an urban market economy, usually of a capitalist nature, and on the other hand to a rural subsistence economy characterised mainly by a static agricultural system of production. Such a position, which originated from the colonial situation, has long been dismissed as invalid, because it is based on the assumption of a particular socio-economic duality of different stages of development, and a contrast between modern and traditional, capitalistic versus non-capitalistic, industrial-urban versus agrarian-rural modes of production. As Breman (1980: 5) puts it: 'The urban dualism that is nowadays apparent in many developing countries is not due to any gradually disappearing contrast between a modern-dynamic growth pole and a traditional-static sector which has tenaciously survived in an urban environment, but rather to structural disturbances within the entire economy and society.'

27 Pistor and Wellons (1999), based on extensive studies in six countries in Asia between the years 1960-1995, conclude that there is generally a relationship between the development of legal and economic systems, although not necessarily between all parts of legal and economic systems. Jayasuriya (1999), however, argues that 'the East Asian example suggests that high levels of economic performance bear little or no relation to the development of a credible legal system' (Jayasuriya 1999: 7).

way, or if they know that there are insufficient labour inspection officials available, or that officials can be bribed (Cooney and Mitchell 2002: 260).

The option of private enforcement – such as through civil litigation procedures – as a way of curtailing opportunistic employers is perceived by average workers to be out of reach. The complexity of the law, the difficulty of undertaking legal procedures, and the high financial costs of the litigation process all hamper the opportunities for workers to use this option. Writing of the Philippines, Bacungan and Ofreneo (2002: 114) note:

> The legal complexity underlying the labour relations process … strongly favour[s] the powerful and informed who are in a position to take advantage of and manipulate the dense and detailed [regulations]. In such cases, of course, in the very large sectors of the economy in which employees are unrepresented by labour organizations, there is very little chance of employees being aware of their legal rights or having the ability to have access to them.

Cooney and Mitchell (2002) also observe that not only can law influence aspects of the economic system, such as labour markets; the economic system can also influence aspects of the law, such as the changing of the labour market structure. Malaysia, South Korea, and Taiwan have all expanded their regulatory scope of labour law to respond to the fact that their labour markets are net importers of labour; while the Philippines, and recently Indonesia, have responded to their status as labour exporters (Cooney and Mitchell 2002: 267). In the concluding remarks for their book, Cooney and Mitchell (2002: 267) point out:

> [W]hen regulators use the medium of state-based law they will, whatever their substantive objectives, encounter in East Asia configurations of relationships between law, politics, economics and other social systems which are alien to Western experience.

The findings of Cooney et al. (2002) are salient, especially when one recalls that a key function of labour law today is to contribute to the correction of market failures: on the one hand to protect fundamental social and economic rights of the workers; and on the other hand to promote economic efficiency. It is the intention of this dissertation to find out to what extent these findings are relevant to and help explain Indonesia's development since the *Reformasi* in 1998.

5 Labour law reform and its limits

The increasing exposure of countries to global free markets, in the globalization of the economy, has put national governments under pressure to relax restrictions on internal markets in order to become more competitive. The buzzword is 'deregulation', to get rid of restrictions on free market activity and lower barriers to the movement of goods and services across country

boundaries. Some prominent changes have included the removal or minimisation of tariff barriers (such as customs duties and taxes on manufacturing); free mobility of capital; rationalisation in the movement of commodities and manufacturers; and, particularly within the World Trade Organization framework, recognition of intellectual property rights. In the context of labour, market reforms mean labour market reform (Mehmet et al., 1999, Brassard and Acharya 2006), which aims at making labour markets more flexible and less expensive. The view that businesses should not have to carry the costs of labour when that labour is not fully utilised in the process of value-adding, has led to changes such as regulations to make it easier to 'hire and fire' workers (Standing, 1999; also Cook, 1998); abolishment of rigidities in wages fixing; and even the possibility of dropping wages (Brassard and Acharya, 2006). Geographical mobility of labour, however, has not been directly mentioned. There appears to be an implicit understanding, especially among the OECD economies, that free movement of labour exists, but this opportunity largely benefits highly skilled workers; which would result in developing countries being greatly disadvantaged compared to developed countries.

One risk of labour market reforms is that they may move in a direction other than that which society, workers in particular, have hoped for and expected. Reforms can threaten the livelihoods and economic security of workers, by shifting the costs of social reproduction and market risk from employers and states to families and communities. Various forms of labour market deregulation in developing countries have further weakened the already weak sources of income of millions of urban people in those countries (Deyo and Agartan 2003). As explained by Deyo and Agartan (2003: 57-58), there are two types of labour market deregulation: policy-based deregulation and structural deregulation. The first type, policy-based deregulation, refers to direct state action through regulation of labour markets and employment practices, as well as companies' efforts to casualise their 'in-house' work by outsourcing and informalising production and services previously conducted 'in-house'. The second type, structural deregulation, refers to deregulation which takes place indirectly; for example when privatisation of state-owned enterprises forces workers out of the regulated workforce into the relatively unregulated sphere of private employment; or when increasing mobile capital undermines the power of trade unions and governments' regulatory power in particular issues such as work rules and pay standards, employment benefit and severance pay; or when the expansion of export processing zones enlarges the extent of 'formal sector unprotected labour' in those zones.

Labour law plays an important role in this process, because labour law establishes the framework within which industrial relations and labour mar-

kets operate.[28] Legal change is generally by a new framework of labour law introduced in developing countries, as can be seen by the large number of laws regulating labour relations (Cooney et al., 2002). In this way, changes in labour law can indicate the nature of change in industrial relations systems in particular regions (Cook, 1998, Cordova, 1996). Since the early 1980s in East Asia (Cooney et al., 2002) and Latin America (Amedeo et al., 1995), and since the late 1990s in South East Asia (Deyo, 2006), labour law reform has occurred in conjunction with the countries undergoing a transition from authoritarian rule to democracy, along with a shift in economic development strategies away from import-substitution industrialisation toward the adoption of neo-liberal economic policies oriented toward exports. Indeed, as noted by Cook (1998: 312), democracy and neo-liberalism are the 'twin pressures' that act on the industrial relations systems. Behind labour law reform is labour market deregulation, the primary goal of which is to enhance labour market efficiency and flexibility for the sake of economic growth. The primary aim is to free labour markets, labour-protection measures, and the labour process[29] itself from the institutional rigidities imposed by government interference, trade unions and social obligations (Deyo and Agartan, 2003). In other words, the main goal of the reform is to replace existing labour market institutions with new ones, which are more efficient, and growth promoting, and which are based on market rationality free of the limitations and interventions imposed by the state and other social institutions.

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28 'Industrial relations' refers to a concept originally developed by John Dunlop (1958, 1993), describing a system which comprises three actors and their interactions with each other: management organizations; workers and their organizations; and government agencies. 'Labour markets' refers to the commodification of labour within the market function, through the interaction of workers and employers. As discussed earlier, in the last decade there have been efforts from some labour law scholars towards the 'reformulation' and 'reorientation' of labour law, to shift the focus from employment relationships towards broader labour market issues, and to see the law become 'the law of labour market regulation' (see Mitchell and Arup 2006; also Deakin and Wilkinson 2005, D'Antona 2002). It has been suggested that labour law should shift its focus from, for example, 'employees' to the broader inclusive term of 'workers'; and from 'workplace' to the 'world of work'.

29 'Labour process' theory is associated with Michael Burawoy's *The Politics of Production* (1996), which provides a thorough understanding of the transformation of labour, but highlights processes of control and expropriation in the production itself (see Burawoy, 1996, particularly Chapter 1). Deyo and Agartan (2003: 56, 75) have further suggested 'labour system' theory as an advanced interpretation of the labour process concept, that is: 'the institutionalised social processes through which particular types of labour are socially reproduced, protected, mobilised and allocated via markets or other social arrangements into productive activities, managed and motivated at sites of production, and valorised into profit or surplus'. The authors claim that this, 'offers a more balanced account of the full range of labour transforming processes including but extending beyond the site of production itself'.

Closely connected to the argument of institutional reform is the discussion about the inter-relationships between institutions, institutional change, and economic performance. These relationships have been analysed in the works of the economic historian Douglass North (1990; 1989; 1981), whose arguments strongly influenced development agencies during the so-called 'second wave' of law and development projects in the 1990s globally (Ginsburg, 2000: 833; Trubek and Santos, 2006).[30] In North's words, institutions are defined as: 'humanly devised constraints that structure human interaction'. They are made up of formal constraints (e.g. rules, laws, and constitutions), informal constraints (e.g. norms of behaviour, conventions, self-imposed codes of conduct), and their enforcement characteristics: 'Together they define the incentive structure of society and specifically economies' (North, 1994: 360, see also Rosser, 1999: 96). Since this dissertation focuses on changes in particular laws, it is the first type of institution (i.e., formal constraints) that is of primary concern here.

There is evidence that the process of instituting a free market economy has negative impacts on workers' livelihoods and economic security, in particular by 'shifting the costs of social reproduction and market risk from employers and states to families and communities' (Deyo and Agartan, 2003: 58). This process often leads to increasing institutional tensions and generates political opposition within the society (Polanyi, 1944; Everling, 1997). Other commentators have observed that the World Bank's and the IMF's debt-restructuring projects in developing countries, which have reduced state subsidies and social services, have undermined the social wage[31] of urban populations (see, for example, Everling, 1997; McMichael, 2000; Stiglitz, 2002).[32] It is also evident that in many developing countries, labour market deregulation – particularly in the form of policy-based deregulation – has

30 The 'first wave' of law and development, in the 1960s, refers to '[a] group of sociologically sophisticated, progressive academic lawyers' who wanted to help the states in developing economies to improve their legal systems, in order to help people modernise themselves (see Otto 2006: 161, referring to Newton 2004). The 'second wave' in the 1980s refers to the renewed interests of development aid agencies about law in the relationship with development, influenced by neo-liberal ideology focusing primarily on economic growth and private property (see also Trubek and Santos, 2006). Later, Trubek et al. (2006) argue that a new development wave has emerged (they prefer to use 'Moment' as a more specific term to define the moment that law and development 'doctrine' crystallises into 'orthodoxy'), which includes 'changes within the field of development economics, reactions to the failures of the neo-liberal Moment, changing policies and practice of the World Bank and other development agencies, development within legal theory in the centre, and the spread of a new legal consciousness to the periphery' (Trubek and Santos, 2006: 3).

31 Social wage refers to social benefits available to all individuals, determined by the basis of citizenship rather than employment, and funded wholly or partly by the state through taxation and received free or at subsidised cost.

32 Such criticisms come not only from outside (Everling uses a Marxist approach, and McMichael a non-Marxist approach), but also from inside; represented by Stiglitz, who was a senior adviser to the World Bank itself.

diminished the legal obligations of employers in areas such as workers' pay, benefits, job security, and pensions (Deyo and Agartan, 2003: 58).[33] This has happened through giving more power to employers to hire and fire workers, and to hire larger numbers of temporary workers rather than permanent staff. This development has had a direct impact on labour law, as it challenges the notion of labour law which held sway in industrialised market economies during the twentieth century (particularly between 1945 and the late 1970s), which was characterised by collectivisation and increasing protection for workers. Since the late seventies however, new developments in labour law have generally been taking a different course. In labour law literature, this change is described as including trends towards deregulation and increased flexibility for employers, which undermine the traditional collective-interest representation of workers, and threaten the content of labour law, as we have known it.

As Davies (2004: xv-xvi) has shown, two main perspectives are adopted to examine the subject of labour law today: the human rights perspective, and the economic perspective. These two perspectives offer different (and often contradictory) insights, yet together they can be useful to help understand the effects of labour law in practice. As noted by Dhanani et al. (2009), the key point of the debate is whether, and to what extent, labour can be treated as a commodity which can be freely traded (as with other commodities) in the market; and whether labour markets need to be regulated. In the words of Paul Krugman (1998: 15, cited in Dhanani et al. 2009: 150): 'while almost everybody concedes that, like it or not, most jobs must be supplied by private, self-interested initiatives, there is still much confusion about what this concession involves. Part of the problem is that many people are still unwilling to accept the idea that the labour market will not function well unless it is allowed to behave more or less like other markets.'

Thus, there are two different and contradictory positions regarding the need for labour market regulation: one for regulation, and one against (see also Manning and Roesad, 2007: 60-61, also Dhanani et al., 2009: 150-1). In the case of Indonesia, this debate has intensified since the economic crisis of 1997-1998. The IMF and other providers of foreign capital placed conditions on their financial injections during the crisis, putting significant pressure on the state to reform its economic and industrial policies; in particular its industrial relations system. This move towards neo-liberalism and global competition took the economy towards de-centralisation and de-institutionalisation, as state policy shifted to encourage labour market flexibility.

33 See also International Industrial Relations Association Congress reports, various years, which have discussed such trends for several years.

The situation faced by Indonesia right after the 1997-1998 Asian economic crisis was comparable to that of other developing economies in Asia at the time (Benson and Zhu, 2009)[34]: a situation characterised by declining union memberships, and the weakening of social and institutional support for workers. In an extensive volume on trade unions in Asia, Benson and Zhu (2008) examined union characteristics and related actions and strategies, in twelve economies in Asia that were facing increasing competition from globalisation and neo-liberalism during the period of their research. Using the historical-institutionalist perspective developed by Gospel (2005), Zhu and Benson (2008) identified different trajectories of institutionalisation and de-institutionalisation among these economies. They found that the ways in which different states responded to such pressures, through particular regulations and policy priorities, and the responses from trade unions varied markedly between countries (see also Frenkel and Kuruvilla, 2002).

There is, however, a converging trend; which is that trade union movements throughout Asia have generally adopted a market-orientated approach, as described in Hyman's (2001) typology. According to Hyman, who analysed the development of trade unionism in Europe, there are three models of unions, differentiated by their orientation: market unionism, class unionism, and social unionism (see also Gospel, 2008). Market-orientated unions see unions as economic actors pursuing economic goals ('business unionism') such as the welfare of members, especially through collective bargaining within the labour market. Class-orientated unions see unions as vehicles of class struggle, and their role is to promote working class interests and the transformation of society in a revolution direction. Society-orientated unions see unions as social actors and social partners, with labour pursuing constructive roles in society, such as by strengthening the voices of workers in society and acting as a force for social, moral and political integration. In practice, unions tend not to be wholly one of these three ideal models, but rather a mixture; although combining all three models would be extremely challenging within any one organization. As noted by Gospel (2008: 15), Hyman's (2001) triangulation between market, class, and social unionism is useful in mapping the trajectory of unions over time.[35]

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34 In their analysis, Benson and Zhu (2008) identify two categories of Asian economies: the 'developed Asian economies' – the more advanced economies in Asia, such as South Korea, Taiwan, Hong Kong, Singapore and Malaysia – and the 'developing Asian economies' – the less advanced economies in the region, including Indonesia together with China, Vietnam, India, Sri Lanka, and Thailand.

35 Some unions (such as in the UK, the US and Australia) started out with a strong market orientation, before moving in a more class-focused direction through the early twentieth century. Then, over the last quarter-century, some have shifted towards greater social partnership between society and the market or back towards market-focused goals. France, which had an early tradition of class-based unionism, still today provides examples of many different types of unions (market, society oriented, and class-focused), existing side by side. In Germany after the Second World War, unions moved from class to market and social orientations.

Drawing from Hyman's models, Zhu and Benson (2008: 261) argue that trade unions in East Asian developing economies 'have shifted from a political-oriented [meaning class-oriented – ST] union approach to a market-oriented form, with little society focus'. Given this shift, it may appear that Asian developing economies – including Indonesia – are following the Asian developed economies, which experienced market liberalisation earlier in the 1980s. However, Zhu and Benson (2008) warn that this apparent similarity may disguise major differences between the two sets of economies. As Zhu and Benson point out:

> [T]he developed [East Asian] economies enjoy a certain level of industrial and institutional maturity with relatively sound social, economic and industrial infrastructures in place. They exhibit strong social networks to support the basic needs of working men and women. In contrast, the developing economies have not built the necessary basic social and legal protections for vulnerable workers. The adoption of a neo-liberal policy framework so quickly, along with the abandonment of the move towards institutionalisation and social protection has meant that sustainable well-being for both society and individual citizens is less likely in the developing economies.
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> (Zhu and Benson 2008: 261)

Here lie the limits of neo-liberal labour law reform, in which 'the framework of decollectivized, deregulated, and deinstitutionalized neo-liberal labour law is here to stay because it matches the basic needs of a globalized capitalist market economy and of liberal democracy' (Hepple 1996: 626). In the case of developing economies such as Indonesia, undertaking decentralisation and de-institutionalisation before ensuring that both industrial and institutional stability have been achieved will be more likely to put the long-term sustainable development of the society under threat. Nor is this threat one-directional: development and change will, in turn, face challenges from society. As noted by Hepple (1996: 626), 'at the very moment of its apparent triumph, individualized market labour law faces political, industrial and judicial challenges.' It is the intention of this dissertation to examine these challenges in the Indonesian context, particularly from the perspective of those groups generally considered 'the weak and vulnerable groups' in society – the workers and their unions.