Theoretical and historical perspectives

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A system of exemptions

Historicizing state illegality in Indonesia

If Weber had been thinking of law rather than violence when he addressed the University of Munich in 1918, he might well have described the state as 'a human community that (successfully) claims the monopoly of the right to determine what is legal and illegal within a given territory'.¹ Although it is commonplace to say that the power of the state ultimately rests on violence, it might plausibly be argued that the creation and administration of law is more central to the nature of the state even than control of violence. The right to determine what is legal and illegal is a complex attribute, including the right to declare law, the right to investigate (suspected) breaches of the law, the right to determine guilt and the right to punish. Whereas some of these rights may be claimed (successfully) by other sections of society, only the state possesses the full range of these powers over legality and illegality. Indeed, so closely entwined are the concepts of state and law that a state which makes no claim to administer law is probably not to be regarded as a state at all.²

Classic conceptions of law interpret this right to determine legality and illegality in terms of the state's presumed capacity to translate the general interests of society into a legal system. According to Williams (1994:11), for instance, crime is:

¹ Weber, of course, actually referred to the state's 'monopoly of the legitimate use of physical force'; see Max Weber, 'Politik als Beruf', ('Politics as a vocation'), *Gesammelte politische Schriften* (München, 1921), pp. 396-450. Originally a speech at Munich University, 1918, published in 1919 by Duncker and Humboldt, Munich. <http://www2.pfeiffer.edu/~Iridener/DSS/Weber/polvoc.html>.

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² This issue is not a trivial one in the Indonesian context. At various times in Indonesian history, notably during the first weeks of the national revolution in August-September 1945, many groups of people claimed to represent organs of the Indonesian Republic, even though they had no connection with what were then the exceedingly rudimentary institutions of the new state. The argument in this chapter focuses on those periods when the state is powerful enough to grant and to withhold exemptions. A different kind of analytical framework is needed for circumstances in which state power is diffuse and subordinate to other sources of power.

a wrong to society involving the breach of a legal rule which has criminal consequences attached to it (that is, prosecution by the State in the criminal courts and the possibility of punishment being imposed).

For a rather long time, however, observers have been aware that the law also tends to uphold the social order, falling unevenly on different social groups. Anatole France (1905:87) memorably summed up this insight at the end of the nineteenth century: 'The poor must work [...], in presence of the majestic quality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread.' The Foucauldian approach takes this insight still further: the law can be seen as an arbitrary tool of authority, important less for its content than for the fact that it is law, to which people are subjected.

Remarkably sparse in the analysis of law, however, has been an appreciation of the role of discretion in determining the social impact of law. Discretion refers to the fact that the implementation of the law never fully follows the letter of the statutes, decrees or whatever other written or oral form the law may take. Rather, the law is always administered selectively, differentially, partially. Discretion on the part of police, prosecutors and judges is an essential part of the humane and effective administration of the law. At very least, discretion avoids clogging the legal system and afflicting the population with prosecution for actions which, although they may technically be illegal, are in fact trivial and not worth the attention of the legal apparatus.³ At its more creative, it may recognize that the breaker of a law may have been acting under unusual compulsion or that the prospects for rehabilitation would not be served by giving a criminal record to a young offender. Discretion, however, is also a key element in the use of law to uphold or change the social order. In every system, at least some of the decisions about which cases to pursue and which to ignore are made on the basis of social impact – certain individuals and groups who are considered in some way to be socially 'valuable' are protected from the force of the law while others, considered to be less useful or even dangerous, are not.

In every legal system, therefore, there is a gap between written law and the law that is actually applied in society. In Indonesia, this gap appears to be particularly wide. Other chapters in this book suggest the scope of the phenomenon. Politicians and government employees accept bribes, inducements, favours, commissions and kickbacks in a variety of forms in exchange for making decisions that favour one party over others in a dispute, examination or competition. They solicit and receive payment for overlooking regulations, and for providing routine government services, including licences. State

³ In the legal context, the principle is known as *de minimis non curat lex* (the law is not concerned with trifles).

funds are embezzled directly or are extracted by means of legal or quasi-legal devices such as commissions and uncompetitive pricing. Funds that might otherwise flow to the state are channelled into private pockets. State property and state facilities are used for private purposes. State security forces remain largely immune from prosecution for illegal acts of violence in the past against other citizens. All this illegal activity leads some observers into the impression that law matters little in Indonesia. This is a mistaken impression. The central characteristic of the Indonesian system is that law matters, but only to some people and only in some circumstances. Indonesia is not a law-less society, but rather one in which law is unevenly implemented. The legal system managed by the Indonesian state is above all a system of exemptions.

Understanding this system of exemptions requires attention to a range of underlying features of Indonesian society which work in favour of exempting some people from the full force of the law. These elements are: the weakness of the Indonesian state and its institutions; a mismatch between law and moral values; and the weakness of a sense of social contract in the Indonesian political order. None of these features is in any way inherent to Indonesian societies or cultures, but they are connected with features of Indonesian culture that have been reinforced by historical circumstances. For this reason, they do not lend themselves to simple remedies. In addition, the system of exemptions needs to be understood as a form of economic behaviour which persists not just for historical reasons but because it delivers profitable outcomes. Seeing exemption as an economic device highlights its connections with the current political order and suggests potentially useful remedies.

State weakness

For a complex range of historical, geographical and social reasons, Indonesia lacks the capacity to implement law evenly across the whole of its territory. Lack of state revenue, shortages of personnel, lack of equipment and training, and the social and geographical complexity of the country all make it difficult for Indonesia to carry out that suite of activities – statute drafting, surveillance, record-keeping and coordination, investigation, prosecution and punishment – that normally underpins a modern system of legal order. Laws and regulations are often not drafted with sufficient care so as to be readily implemented, or they may be inconsistent with other laws or regulations. Dutch colonial rule left Indonesia with relatively few trained lawyers and building a strong legal profession was never a high priority after independence. Knowledge of the law is weakly and unevenly spread though society. The police force has historically been understaffed and underfunded. Indonesia's rate of incarceration is 45 per 100,000 of national population, one of the low-

est in the world,⁴ but this rate reflects a lack of capacity to incarcerate rather than low levels of major crime. During the six decades since independence, moreover, Indonesia has come under domestic and international pressure to expand its repertoire of prohibitions. Colonial Indonesia was a relatively under-governed society, but the years since 1945 have seen the promulgation of laws prohibiting various activities in the name of environmental protection (pollution, toxic waste, endangered species), human rights and morality (trafficking in people, prostitution, extra-marital sex, drugs, gambling, medicines), heritage (protection of antiquities) and citizenship and residence. In addition new opportunities have emerged for criminal activity as a result of the closing of the resource frontier (making the theft of natural resources lucrative in a way that it has not been before). The expansion of welfare and development funding has also created a flow of funds available to be tapped criminally. Every legal system faces problems of capacity, and it typically cuts its losses by deciding not to devote resources to every sector. Over the whole of the period since independence in 1945, however, Indonesia's capacity to administer law has fallen dramatically short of what the law itself would seem to demand. Unevenness in law-keeping across the archipelago has been the consequence.

Law vs moral values

A second reason for the system of exemptions is a sense of mismatch between law and moral values. We see in many other countries that laws implementing values not shared by society are simply ignored. In some cases, the law may go beyond what is considered improper behaviour by the community at large and will thus be disregarded. Offending laws may simply be relics of past times whose values no longer apply. In other cases, thoughtlessly drafted laws arising from hasty over-reaction to a crisis may simply not be able to be implemented in a way that is consistent with social values. Conversely, laws may not go far enough to reflect social values. Then sections of society may take the law into their own hands if they feel that the legal system is failing to address some wrong to society. It is unlikely that there is a greater sense of mismatch between law and moral values in Indonesia than in many countries. Rather, it appears that Indonesians are more willing than many peoples to allow moral values to trump the letter of the law when a conflict becomes apparent.

The principle that law was subject to moral review was embedded into the legal system of independent Indonesia as early as 10 October 1945, when

⁴ By contrast, the incarceration rate per 100,000 of national population in Sweden is 82, in The Philippines 108, in Australia 126, in Singapore 350 and in the United States 738 (2006 figures). See Walmsley 2008.

Government Regulation no. 2 provided that laws promulgated in the colonial era would be valid only as far as they were consistent with the Constitution (Linnan 2008:75). Since the Constitution was a brief, often vague, document, this provision meant that the application of law was formally subject to political considerations. Sharp evidence of the gap between law and public morality includes the prevalence of market-place lynchings (*pengeroyokan*) of suspected thieves and Islamist attacks on bars and brothels (Colombijn 2002; Welsh 2008). This sense of mismatch was also evident in the decade-long reluctance to prosecute former President Suharto for his various economic and political crimes on the grounds that he had also made great contributions to the state. There was no doubt in the minds of citizens and opinion-leaders that Suharto had carried out many illegal acts during the course of his presidency, but proponents of leniency argued that his achievements on behalf of the nation ought to be set against these crimes and to render them unworthy of prosecution. In more recent times it has been argued publicly that the Corruption Eradication Commission (Komisi Pemberantasan Korupsi, KPK) should be bridled because its work is hampering the development process. The illegality of the acts that it pursues is not in question, but the proponents of a bridle believe that the application of law ought to be dependent on some external judgement of the likely consequences. We can recognize such arguments as self-serving, of course, but the fact that they can be made publicly indicates that there is in Indonesia a widespread belief that external arguments can trump legality. (Contrast this with the phenomenon, relatively common in the West, of otherwise competent politicians whose careers are ended by some form of misdemeanour unrelated to their overall performance.)⁵

The conviction that moral values ought to prevail in any mismatch between law and moral values probably has its origins in the colonial history of Indonesia. In contrast with most other colonial rulers, the Dutch in Indonesia were slow to move towards a system of universal law. Instead of a single set of statutes applying to all in the colony, they partly preserved, partly constructed a baroquely complex legal system which recognized a multitude of indigenous laws and separate indigenous legal jurisdictions under the broad heading of *adatrecht* (Von Benda-Beckmann and Von Benda-Beckmann 1980). This system had originally been a matter of convenience and parsimony for the Dutch East India Company (Verenigde Oost-Indische Compagnie, VOC); it spared the company the cost of running a legal system which would service all the people within their possessions. Over time, however, it became a matter of strategy: abjuring any idea of a civilizing mission, the Company, and the Dutch colonial state that succeeded it at the end of the eighteenth century, believed in the principle of ruling people as far as possible by their

⁵ The legal maxim in this case is *fiat justitia, ruat coelum* (let justice be done, though heaven falls).

own laws and under their own rulers. Most of these laws addressed family, property and religious issues, but the idea of culturally determined law even stretched into criminal law (Cassutto 1927). The existence of these multiple legal systems within the Netherlands Indies undermined the tendency, which universalist legal systems encouraged, to regard the law as an expression of common human moral values. Created by the colonial state for its own purposes, modern law in Indonesia bore its Western origins more obtrusively than did the law in many European colonies. As a consequence, when Indonesian national identity began to assert itself, the legal system lacked the moral authority which would have made obedience to it a natural consequence of citizenship.

The consequences of legal pluralism were exacerbated by the fact that the Dutch colonial administration paid relatively modest attention to administering law to Indonesians. Although the colonial state was vigorous enough in applying legal sanctions to its political enemies, it paid relatively little attention to the role of the law as an arena for arbitration between subjects and still less to its role as a forum within which subjects might obtain redress against the state. In consequence, Indonesians in general lacked day-to-day experience of a Western legal system. The vast majority of Indonesians simply did not feel the statute book, even indirectly, as a direct influence on their lives. This system encouraged the assumption that law should relate to specific local values, rather than to universal principles. It left open a strong sense of the appropriateness of correcting social injustice and unfairness without recourse to law.

When Indonesia achieved independence, therefore, the law was exceptionally weak as an arena for resolving social disputes. Most Indonesians had very little reason to imagine that the law would either punish them for infractions or come to their aid if they were being afflicted. Colonial Indonesia lacked a social class of lawyers and bush lawyers who would have made it their business to know the law and to turn it to their own advantage and to the advantage of their clients. Legal consciousness, in other words, and the penetration of legal skills in society were both weak. The law was distant and ill-defined, moral values were close and familiar. Small wonder that moral values prevailed.

If moral values had been shared, such a situation might naturally have produced a stable social order, but during the closing decades of the colonial era, the legal pluralism that had its roots in the VOC was matched by an increasingly explicit moral pluralism in politics. In the earliest years of the Indonesian nationalist movement, it had seemed to some Indonesian leaders at least that the aspirations of the non-European inhabitants of the archipelago would be satisfied if the Dutch would only treat everyone by the same standard. The 1912 essay by Soewardi Soerjaningrat, 'Als ik eens Nederlander was' ('If I were a Dutchman'), was a rebuke to the colonial hypocrisy which would allow the Dutch in the colony to celebrate the centenary

of their own liberation from Napoleonic rule while at the same time suppressing the freedom of colonized peoples (Soewardi Soerjaningrat 1913). Yet its tone implied at least a faint optimism that the Dutch would see the injustice of their ways and would accept a shared political morality with their Indies subjects. During the three decades that followed, however, such hopes were repeatedly dashed, as the colonial authorities adopted strategy after strategy to thwart the growth of nationalist strength.

The colonial authorities defined sedition in broad terms that made much nationalist activity illegal, and the political style of the figures who were to lead Indonesia after independence was shaped by the reasonable assumption that laws might need to be broken to achieve results. More specifically, one of the most important tools of Dutch political repression in the colony was a formalized system of executive discretion known as the extraordinary powers (*'exorbitante rechten'*) of the Governor-General to remove any European from the colony and to impose internal exile on any indigenous colonial subject. These powers dated from the nineteenth century and were explicitly intended to address the difficulty and expense of prosecuting political opponents of the colonial order. Initially they were employed against insubordinate local rulers and rebellious Islamic leaders, but in the twentieth century they became the device by which the colonial government exiled hundreds of communists to the Boven Digul settlement in New Guinea following the 1926-1927 communist uprisings, and by which the most prominent nationalist leaders – Sukarno, Hatta and Syahrir – were consigned to isolated corners of the archipelago for the last decade of the colonial era. This assumption was all the more deeply embedded by the armed struggle for independence in the 1940s. In the four-year tangled political and military struggle to secure independence that followed the foundation of the Indonesian Republic in 1945, nationalists operating in territories occupied by the Dutch routinely and unselfconsciously characterized their work as not legal (*'tidak legal'*), as indeed the Dutch resistance to Nazi rule in the occupied Netherlands had called itself the legality (*illegaliteit*). Legality and illegality were thus political categories, not deeper moral ones. The experience of nationalist struggle and independence war thus helped to embed assumptions that legitimized a high degree of discretion in implementing laws.

Weakness of the social contract

A third reason for the system of exemptions has been the weakness of ideas of social contract in Indonesia. At the heart of this concept is the idea that the sovereign people delegate to the state the right to govern in exchange for good government. Although we should not suppose the social contract

really underpinned the relationship between state and society in the West, the rhetoric and imagery of the contract was a powerful element in the emergence of state legitimacy in the West. In particular, it encouraged a discourse of government responsibility to the people which included a moral responsibility to behave properly in positions of authority. The social contract also replaced the notion that the ruler owned the state with the more modest notion that the ruler was entitled to proper recompense and respect for the task of governing; the very term 'contract' implied an economic dimension to the relationship. The Netherlands Indies of the nineteenth century, however, was a direct heir to the Dutch East Indies Company in its insistence that the sole purpose of the colony was profit. The open description of the colony as a region of profit (*wingewest*) persisted until the introduction of the Ethical Policy at the beginning of the twentieth century. There was virtually nothing in the idiom of colonial rule before the twentieth century that seriously suggested the colonial state's responsibility for the welfare of those it ruled.⁶

The colonial state's lack of quasi-contractual responsibility to its subjects was reinforced by its reliance on indigenous aristocratic elites as the formal source of political legitimacy for colonial rule. This reliance rested in turn on the convenient fiction that the indigenous peoples of the archipelago were less advanced than their European masters. They were scattered, so it was said, at various points on the scale of human development, from Stone Age to Mediaeval, but all these stages were located conveniently before the era which had led in European history to the emergence of the social contract idea. This is not to say that pre-colonial polities in the Indonesian archipelago lacked any notion of the rulers' responsibility to his (or occasionally her) subjects. Rather, such responsibility was conceived principally in terms of personal, patrimonial bonds, with indigenous aristocrats offering protection and favour in exchange for support and material tribute. But such benevolence was imagined in terms of the individual character of a particular ruler, rather than in the abstract terms of a social contract. Within the already lightly administered legal order of the Netherlands Indies, therefore, the colonial authorities were consistently indulgent towards the patrimonial privilege of indigenous aristocratic elites. They interpreted the patrimonial system as permitting traditional rulers considerable license to treat their subjects as they wished, as long as they did not exceed some indefinite, but always rather high, threshold of barbarity, greed or incompetence. The colonial native district chiefs (*demang, bupati*) and other indigenous office-holders of the regions did not enjoy a formal immunity from prosecution or litigation, but in practice they were brought to court only in the most extreme of cases.

⁶ Through much of the nineteenth century, there were strong criticisms of colonial rule from Dutch observers who did subscribe in one way or another to the notion of a social contract. Their criticisms, however, had no serious influence on government policy.

It is true that the Ethical Policy, announced by the Netherlands government at the opening of the twentieth century, had many of the characteristics of a social contract view of politics. Indeed, the essay that stood most clearly for the ethical approach in colonial policy was entitled 'A debt of honour' (Van Deventer 1899:205), implying precisely the kind of contractual relationship that was presumed to exist in Western polities. The Ethical Policy, however, was short-lived, undermined by the Depression and by its own inflated expectations, and its intellectual legacy was weak. In consequence, by the end of colonial rule in 1942, Indonesia had experienced only the early stages of the inevitable collision between traditional ideas of patrimonial government and modern universal law. In patrimonial government, there was no presumption of equality between citizens or subjects and a pronounced blurring, by contrast, of the distinction between public office and private interest that modern societies identify as corrupt. This blurring was most pronounced in the regions of the Netherlands Indies that were under indirect rule, but it applied also within the indigenous section of the Binnenlands Bestuur, the central organ of the colonial administration. It should be emphasized that the colonial system did not leave Indonesians tolerant of corruption as such, but rather that it left intact the cultural assumptions of privilege which led to corruption. The working out of the contradiction between assumptions of privilege and probity, which no society resolves quickly or easily, had barely begun when Indonesia achieved independence.

Villains and Heroes

The three sections above argue that the Indonesian state has been institutionally and politically weak, primarily for historical reasons, when it comes to consistently implementing the law. The state has been unable to marshal the government apparatus needed to implement law effectively, thus leaving serious gaps in the rule of law. The state has lacked unambiguous popular legitimacy to apply written law because the colonial tradition of legal pluralism, in combination with the legal expediency of the anti-colonial struggle, hampered the emergence of a sense of the universal moral value of law. And the colonial order failed to make a serious start with combating patrimonial assumptions about government, with the result that political values indirectly conducive to corruption, exemption from punishment and other forms of special treatment have tended to persist.

These arguments accord with the conventional view that the state, as the institution which creates law and defines crime, has a natural interest in implementing law and combating crime. In this view, a state's failure to do so is necessarily a consequence of weakness. The description of such weakness

typically refers both to structural weakness of the kind suggested above and to the role of what are commonly called 'rogue elements' (*oknum*⁷), individuals and groups who calculatingly exploit state weakness. The conventional view makes it almost impossible to imagine the state committing acts which it defines as criminal (unless the state as a whole has become a 'rogue state'). It provides no framework for analysing the systematic complicity of the state in illegal or criminal activity.

In recent times, Timothy Lindsey has made an important contribution to understanding this issue with his coining of the term '*preman* state' to characterize the Indonesian state. *Preman* is one of the common terms for Indonesia's vigorous community of (semi-)criminal toughs (Lindsey 2001, 2006). Lindsey's central proposition resembles parts of the argument set out earlier. He suggests that Indonesia missed out on the political presumptions surrounding the social contract and that the apparatus of state is a tool for the enrichment of power holders. This analysis is influenced by Lindsey's lawyerly instinct to look at the Indonesian Constitution to discern the essential character of the state. In examining that document, and the intellectual environment which produced it, he came to the disturbing conclusion that the basic document which is supposed to determine Indonesian governance demonstrates no real interest in the state's role as an arbiter between citizens, in other words, no real interest in keeping social order except as it relates to the state's own interests. The legitimacy which the state might have obtained by providing social order was, in his view, replaced by an ideological claim to state legitimacy as the embodiment of national identity and the popular will. In other words, the Indonesian state came into being with the presumption that it could by definition do no wrong.

The pioneers of national independence, therefore, paid little or no attention to creating a court system which might stand up for individuals against the state. This neglect had the consequence that the court system was unable to prevent a massive recruitment of state institutions to private purposes. In Lindsey's view, the whole of government in Indonesia came to resemble the territory of a *preman*, with officials collecting rent or tribute for whatever activity passed through their domain and enjoying something close to legal impunity while doing so.

Although Lindsey's argument suggests an important mechanism by which corporatist ideology could lead to self-serving individualism on a vast

⁷ The term *oknum* has a curious etymology. *Uqnum* is a Christian Arabic term originally used to translate the Greek '*hypostasis*', a term referring to the separate characters of the three elements in the Christian trinity. It does not appear in any recognizable form in the Malay Concordance Project (<http://mcp.anu.edu.au/Q/mcp.html>), which indexes most early Malay language texts; Indonesian-English dictionaries of the 1960s translate it innocuously as 'person', but by the 1980s it acquired an increasingly negative connotation and was used to refer only to people with bad intentions.

scale, his analysis remains broadly within the 'rogue elements/rogue state' framework. Because Lindsey's analysis rests on a broad characterization of the ideas underlying the Indonesian state, it implies a sweeping negative judgement of the Indonesia venture. It also implies a basically heroic solution. Indonesia will be redeemed, if that is possible, by individuals who are able to construct a legal system and a set of political assumptions that will shift the balance of power between the individual and the state. It is a tall order.

In portraying a world of (scarce) heroes and (numerous) villains, Lindsey accurately reflects a widespread Indonesian perception of corrupt officials as evil, or at least morally weak. This perception is a common one throughout the world and may be reasonably accurate, at least in its gentler form, but in Indonesia it tends to be paired with a somewhat unrealistic expectation of what it should mean not to be corrupt. The difficult years of nationalist agitation against an entrenched and obdurate colonial government, and the harsh challenges of armed revolution, entrenched a culture of self-sacrifice in Indonesian public life. There were no material rewards for being a nationalist leader in the colonial era. Those who campaigned for their country's independence gave up hope of government employment and faced harassment and exile. During the revolution against the Dutch, many lost all they owned and survived the struggle eating frugally, wearing old clothes, living simply. Those who resisted the Dutch often faced harsh conditions, and risked loss of life or crippling injury in an armed struggle in which they were almost always poorly supplied with weapons and ammunition. Indonesians in this era were capable of great sacrifice for the sake of their nation, and those who sacrificed much were deeply admired by their fellow Indonesians.

These examples of self-sacrifice, together with the absence of a social contract notion of proper reward for high government service, meant that Indonesians have tended to believe that holders of public office ought to serve from conviction and should not expect substantial material rewards for their service. This sentiment is common, of course, in most modern democracies, but it was particularly acute in Indonesia because the independence struggle had set such high standards of self-sacrifice. There was no attempt in post-revolutionary Indonesia, therefore, to set salaries for politicians or senior officials at a level that would enable them to maintain an elite lifestyle without engaging in some form of additional, often corrupt, means of income-seeking. These perceptions have led to an assumption that all that is needed to improve the situation is heroic behaviour, rather than attention to the structures that promote state criminality. It would be surprising, however, if criminality were only a consequence of a lack of heroic spirit. What, then, are the structures that promote state criminality? Specifically, what is the economic logic of the Indonesian system of exemptions?

State structure and the economic logic of exemption

To explain the economic logic of exemption, it is necessary to depart from the main conventional views of crime. The modern criminological understanding rests uneasily on two different paradigms. One is basically microeconomic: it sees each crime as an act carried out on the basis of a cost-benefit analysis, in which the key considerations are the likely benefit to be had from the crime, the likelihood of success in relation to effort, the risk of detection and the severity of punishment. Within this paradigm, the key to control of crime is to shift the cost-benefit calculation as far as possible against committing a contemplated crime. This shift is predicted to be achieved by enhancing prevention (through surveillance and physical barriers), by detection (through police work, forensics and the court system) and by deterrence (through punishment). The second paradigm is that crimes are committed by the 'bad, sad and mad', in other words by those who for some reason fit poorly with society. Such people commit crimes not out of any intention to profit but out of some flaw in their nature. The remedy for crime that this paradigm proposes is either reform (redemptive punishment, changes in the social environment that stimulates crime) or removal (normally execution, exile or incarceration, occasionally mutilation so as to make the criminal physically incapable of repeating his or her crime). Both these paradigms focus on the individual and therefore do not lead further than the 'rogue elements' argument which we have found wanting in the analysis of state crime.

An alternative approach is to shift the focus from criminals and criminal acts to what might be termed criminal niches, by analogy with the concept of ecological niches which support particular kinds of organism. The decision by a state to prohibit an activity does not make everyone cease to be interested in doing it, but rather raises the threshold for entry into that particular market. In effect, the state creates a criminal niche and paradoxically, by its policing activities, protects the criminals who are clever enough and powerful enough to occupy that niche from competition by other sections of society.

One would normally expect the state to have no involvement in the economic functioning or social life of these criminal niches. Indeed, the very absence of the state sometimes gives these criminal niches a state-like character: without a legitimate state to provide basic government services, criminal bosses themselves sometimes have to set up rudimentary systems to provide basic social services to their followers. There are three circumstances, however, in which a state might become complicit in activities that it has banned.

First, a state may recognize that a stable, segregated regime within an identifiable criminal niche is preferable to chaos. This argument helps explain, for instance, the long-term historical relationship between Chinese states and the warlike nomads beyond the northern frontier. Chinese emper-

ors generally preferred to deal with a single powerful Mongolian khan and a regulated system of protection payments which kept the nomadic hordes on their side of the Great Wall, rather than face a multitude of ambitious war leaders, each tempted to obtain fame and fortune by mounting an expedition against China (Barfield 1989; Waldron 1990).

Second, the state may have some additional use for the organizations which develop to exploit a criminal niche. This reason is particularly relevant in Indonesia, where the state has a long tradition of using criminal organizations as a violent auxiliary to state power. Although there is some evidence that the colonial state connived in violent clashes between the Islamic and communist nationalists in the 1920s in order to deploy violence that the state did not want to take public responsibility for, the long golden age of criminal recruitment to politics began early in the armed revolution against the Dutch, when the new Republican government found the violence of former criminal gangs a valuable element in their campaign for international recognition. Only by recognizing the Indonesian Republic, went the argument, would the international community assuage the anger of the Indonesian masses against colonialism that was leading to mass slaughter and the destruction of property (Cribb 1991). From that time on, there has been a consistent pattern in Indonesian politics of recruiting gangsters to carry out armed actions that the state authorities can deny responsibility for (Ryter 1998; Bourchier 1994; Cribb 1984). Bearing in mind the political value of these gangs, the state has diminished incentive to attempt to smash them.

Even more important, state connivance in illegality, particularly various forms of bribery, has permitted Indonesia to sustain a government apparatus very much larger than could have been supported out of legitimate forms of revenue. This dependence on extra-budgetary funding had its origins in the national revolution, when the new Indonesian Republic was simply unable to access the traditional sources of state revenue that had sustained the Netherlands Indies government. The central government could resort to devices such as the unrestrained printing of currency and the trade in opium (Cribb 1988), but most sections of the government, including the armed forces, depended for their continuing operations on the collection of contributions from local communities and from local business activities. Pressing need in the revolutionary era came to be institutionalized as routine practice in the 1950s, especially in the absence of strong countervailing ideological or social forces, and this routine practice was reinforced again during the economic chaos of the 1960s. Even when the resources boom of the New Order meant that these practices were no longer crucial to the survival of the government apparatus, they were so deeply entrenched that they did not disappear.

Third, the state's prohibition of an activity may be a device to restrict the market. In other words, the state exempts itself and its associates from rules

that it applies in other parts of society and uses that exemption as a source of profit. Put slightly differently, the state creates rules, sometimes primarily, sometimes incidentally, as an opportunity for its officials to collect rents (that is, unproductive levies on social activity). The vast system of exemptions – characterized by Lindsey as the *preman* state, by Ross McLeod (in this volume) as the Suharto Franchise and by just about everyone as rampant corruption – is an exercise in economic protectionism. Its enduring seductive power and its great political strength, lie in the competitive advantage that it gives to insiders. The underlying driving force behind the involvement of government officials in illegal activity is the consciousness of the huge advantage that state protection confers on any kind of economic activity. The advantage is the same whether those fields are legal or illegal.

The system of exemptions that still dominates the Indonesian political order is sustained by three distinct but inter-related factors. First is the durable sociocultural environment of state weakness, moral pluralism, and the weakness of the social contract described in the first part of this chapter. This complex factor profoundly undermines the institutional and moral capacity of the Indonesian state to attack illegal state activity. Nonetheless, the significance of this sociocultural heritage is diminishing with the strengthening both of state capacity and of political discourses favouring moral universalism and social responsibility. Second, state criminality is institutionalized. Having been necessary for the survival of the state for much of the Republic's first two decades of existence, the official habit of creating and exploiting exemptions from the law became too deeply entrenched to eradicate with simple measures. This second factor too, however, is diminishing in importance. There is a growing consensus that corruption cannot be defended as a form of subsidiary state finance and serious efforts are being undertaken to reduce it. Only the third factor remains undiminished. The simple advantage that comes from using state power to restrict the marker for private gain is a seductive one throughout the world. Except through enhanced surveillance and punishment, Indonesia is unlikely to be able to reduce this temptation.