Chapter IV

Democratization Process in Indonesia Through Law

In the previous Chapters we have come to realize, that the democratization process in Indonesia at the end of the 20th century went hand in hand with the legal changes needed for the establishment of a democratic society under the Rule of Law.

Although outsiders and even most students and activists would say, as if "nothing" has happened in the field of law, compared to the legal systems and legal institutions of European states and the United States established throughout the ages, whilst Indonesians are also dissatisfied and almost disillusioned with their contemporary legal situation and especially with the courts, police, public prosecutors and lawyers and civil servants in Indonesia[1], the discovery that only in 3 (three) years time so many fundamental legal changes have been made, both with respect to the political parties, the general elections, the relationship between the highest political state-and-legal institutions, the change of the role and relationship of the Armed Forces and the Police, the radical change of the decentralization process and institutions, the protection of human rights and establishment of Human Rights Courts (apart from previously non-existing Commercial Courts) and so many new economic laws, which are not the subject of discussion in this book, cannot but surprise us of the speed in which all this could have happened, if no previous preparations were made, long before ex President Soeharto stepped down in 1998.

I. Many more new laws are needed

True, there is still a lot to do, and perhaps even more than what already has been achieved in the last three years.

First, we will mention the need for: (a) the establishment of a clean, speedy, professional and independent judiciary, which will be able to (b) eradicate corruption, collation and nepotism and provide justice for all who bring their case to court.

Both processes may perhaps need more than a decade before we can observe tangible results.

Then we will have to establish the Third Amendments to the 1945 Constitution, amongst others establishing (c) the Constitutional Court, (d) the Regional Representation Institution and (e) the Ombudsman.[2]

Simultaneously, we will have to promulgate many new laws concerning the Protection of Witnesses, the Right to Information, the Recruitment and Appointment of Civil Servants, Recruitment and Appointment of Judges, the Ombudsman, and many more laws and governmental regulations, as well as regional regulations for good governance and the good functioning of the administration, the judiciary and especially the courts, local councils and regional administration, the relationship between Central and Local Government, the relationship between the National Ombudsman and the Local or Regional Ombudsman, and many others.

This, as we can read in Chapter II of this book, will be endeavored in 2002, to be continued in 2003 and further.

The laws, which are planned by Parliament (DPR) for the near future, are as follows:

1. Bill on proceedings to Establish Rules on Legislation
2. Bill on the Institute of the Presidency
3. Bill on Broadcasting
4. Bill on he Formation of the Province of the Riau Islands
5. Bill on Bank Loans
6. Bill on the Protection of Children
7. Bill on the National Education System
8. Bill on Sports
9. Bill on Doctor's Practice
10. Bill on the Protection of Witnesses and Victims
11. Bill on the National Ombudsman
12. Bill on the Office of the Attorney General of the Republic of Indonesia
13. Bill on the Freedom to Obtain Public Information
14. Bill on the Supreme Court of the Republic of Indonesia
15. Bill on the Protection of Indonesian Workers Overseas
16. Bill on Tax Exemption
17. Bill on State Secrets
18. Bill on Liquidation of Banks
19. Bill on the Rights of the Indonesian Parliament and members of Parliament
20. Bill against Violence in the Home
21. Bill against Discrimination, Ethnicity, Religion and Race
22. Bill completing Law No. 58 of 1962 on Citizenship in the Republic of Indonesia
23. Bill completing Law No. 23 of 1999 on the Bank of Indonesia

24. Bill on the Commission of Truth and Reconciliation
25. Bill on the Profession of Defending Lawyers
26. Bill on the Crime of Bribery
27. Bill on Civil Law Proceedings
28. Bill completing Law No. 1 of 1985 on Firms
29. Bill completing Law No. 9 of 1992 on Immigration
30. Bill of the Optional Protocol of the Convention on the Eradication of all forms of Discrimination against Women through Legislation
31. Bill on Investments
32. Bill on the Principles on Procedure for Legislation (replacing the colonial law on Legal Procedure for Legislation)
33. Bill on the Crime of Money laundering
34. Bill on the Criminal Code
35. Bill completing Law No. 4 of 1998 on Bankruptcy
36. Bill improving Law. No. 5 of 1986 on the Administrative Court
37. Bill improving Law No. 22 of 1997 on Narcotics
38. Bill improving Law No. 1 of 1950 on Clemency
39. Bill improving Law No. 15 of 1985 on Electric Power
40. Bill improving Law No. 2 of 1999 on Political Parties
41. Bill improving Law No. 3 of 1999 on the General Elections
42. Bill improving Law No. 4 of 1999 on the Structure and Position of MPR, Parliament and DPRD
43. Bill on Changes made to Law no. 9 of 1969 on the Establishment of Government Regulation replacing Law No. 2 of 1969 on State-owned Corporations into Law
44. Bill Ratifying the International Convention on the Prohibition of the Sale of Women and Children
45. Bill on the Ratification of the Convention on Refugees
46. Bill on the Indonesian Armed Forces
47. Bill on Changes to Law No. 12 of 1997 on Copyrights
48. Bill on the Commission to Fight the Crime of Corruption
49. Bill on the Ratification of the International Convention for the Suppression of Terrorist Bombing
50. Bill ratifying the International Convention for the Suppression of Financing of Terrorism
51. Bill on State Finances
52. Bill on the State Treasury
53. Bill on the Audit of State Accounts
54. Bill improving Law No. 1 of 1967 on the Principles of Mining
55. Bill on the Development and Protection of Labor
56. Bill on Changes to Law No. 23 of 1959 on the State of Emergency
57. Bill ratifying the International Convention on ILO No. 81
58. Bill ratifying the Treaty on Principles Regulating Activities of States in the Exploration and Utilization of Outer Space including the Moon and other Heavenly Bodies
59. Bill on the National System of Science and Technology
60. Bill on the Settlement of Industrial Dispute
61. Bill on the Duty to Register Companies
62. Bill on State Obligations
63. Bill completing Law No. 2 of 1986 on the General Judicature

64. Bill on the Construction of Buildings
65. (1) Bill on the formation of the Regencies of Aceh Jaya, Nagan Raya, and Tamiang in the Province of Nanggroe Aceh Darussalam;
    (2) Bill on the formation of the Regencies of Katingan, Seruyan, Sukamara, Lamandau, Gunung Mas, Puang Pisau, Murung Raya, and Barito Timur in the territory of the Province of Central Kalimantan;
    (3) Bill on the formation of the Regency of Banyuasin in the territory of the province of South Sumatra;
    (4) Bill on the formation of the Regency of Panajam in the territory of the Province of East Kalimantan;
    (5) Bill on the formation of the Regency of the Talaud Islands in the territory of the province of North Sulawesi;
    (6) Bill on the formation of the Regency of Rote Ndao in the territory of the Province of East Nusa Tenggara;
    (7) Bill on the formation of the Regency of Parigi Moutong of the Province of Central Sulawesi;
    (8) Bill on the formation of the Regency of Mamase and the Town of Palopto in the territory of the Province of South Sulawesi;
    (9) Bill on the formation of the Regency of Pariaman in the territory of the Province of West Sumatra;
    (10) Bill on the formation of the Regency of Kota Bima in the territory of the Province of West Nusa Tenggara.
66. Bill on Poisonous and Dangerous Substances
67. Bill on Changes to law No. 9 of 1985 on Fishery
68. Bill on Plantations
69. Bill on Changes to Law No. 11 of 1974 on Irrigation
70. Bill on the Free Port of Batam
71. Bill on Labour Arbitration
72. Bill on Changes to Law No. 3 of 1992 on Social Insurance
73. Bill on the Constitutional Court
74. Bill on Changes to law No. 8 of 1995 on Capital Market
75. Bill on Energy
76. Bill on Heat from the Earth
77. Bill on Changes to law No. 23 of 1992 on Health
78. Bill on Changes to Law No. 5 of 1997 on Psychotropical Substances
79. Bill on the Board of the Tax Court
80. Bill on the Posts

In 2004 we will have new General Elections., including the election of a new president and vice-president. Therefore the groundwork for this event, in order that they bring good results will have to start now, and will take most of 2003.

II. Capacity Building and Institutional Reform

Having all these new laws and legal institutions, albeit already quite a good achievement is worth nothing, if we don't prepare the right personnel to do the job. Therefore, capacity building for the implementation of all aspects and at all levels of the new constitutional and legal institutions are a must, lest Indonesia will become a democratic state under the Rule of Law on paper only, and not in reality.

Now, all of us are aware of the fact that education takes a long time and that capacity building towards experienced professionals take even longer. Fortunately, although the number of such Indonesian experts are not great, but during the last 50 years of our Independence, we have managed to have a number of old as well as younger experts in law, economics, technology, politics, sociology, communications, management, planning and other necessary professions. However, most of them outside the government or the judiciary and thus are not to be found in the legal or political institutions, which need them.

Therefore, the point is to find those honest, hardworking and expert professionals, and make them interested for the work within the judiciary, the governmental departments and other legal institutions. Unfortunately the salaries those experts enjoy at present are often ten times higher (if not more) than the Government is able to pay them, should they become ministers, director generals. High-ranking civil servants, judges or ombudsmen.

Whilst for the long term we will have to educate young experts and professionals, for the short term we will have to recruit law professors, businessmen and women, lawyers and private or corporate legal consultants or staff to do the job. Of course, they will only be interested if their salaries will be as good, or better than in their previous occupations. Hence the regulation on the salaries or remunerations of government officials should be very much improved, because without it no good expert would be interested to work for the government and judiciary, so that the state will have to be content with second rate, inexperienced and unprofessional or even immoral and unfair staff, officials and judges.

III. Independence of the Judiciary

After so many new laws have been established, still it seems as if any attempt to correct injustice or to achieve justice by bringing the cases to court, meets with

almost insurmountable difficulties. Not only is the police to whom the cases are first reported often very reluctant to handle the case, especially when it concerns former dignitaries who are accused of corruptive practices, collusion and nepotism, unless some exorbitant sum of money is paid to them for “administrative costs”. Also the public prosecutors, or the registrars of the courts will only act, unless the case has been published in the media, so that they have been put in a difficult position, whenever they are not doing anything about the case. Even then, they and consequently the lawyers of the accused, more often than not use all kinds of legal tricks, based on very narrow and legalistic interpretations of the law, in order that the investigation process and the trial can be prolonged and made very difficult, to the advantage of the accused. When the case finally comes before the judge, the accused is very often acquitted, or too sick to be punished, or for one or other reason, is only sentenced with the lowest punishment, often corresponding with the days the accused was held in custody.

Whilst in some cases it may be true, that because of insufficient evidence the accused should be rightfully acquitted or because the accused was indeed not guilty, or cannot be found guilty, or was only accused by the press for political reasons to be guilty of a crime or legal offense (trial by the press), the common feeling of the legal society as well as the people at large is that the judicial process, starting from the investigation by the police up to the verdict of the judges and the execution of the verdict is unprofessional, biased and smacks of practices of bribery, corruption, collation and nepotism, or fear for reprisals by the accused or his/her family or political supporters. In short, the judiciary in Indonesia and the whole judicial process seems to be the biggest stumbling block towards justice and democratization, good governance, and the enforcement of the principle of Supremacy of (just) Law in Indonesia.

Therefore steps have been taken to improve the judicial system, such as:

a. the establishment by law No. 39/1999 of the National Human Rights Commission;
b. the establishment of new courts, such as the Commercial Court, and the Human Right Courts, outside the existing courts;
c. the insistence that every verdict should have a full and complete report of the judges’ legal considerations which based the judge’s verdict;

d. the introduction of the possibility of a dissenting opinion of a judge, when he/she is part of a group of three judges sitting on the case;

e. the appointment of non-career judges, i.e. usually law professors or well-known practicing lawyers as judges;

f. the renovation of the process of selecting and appointing judges through a "fit and proper test" procedure by parliament, instead of the ordinary administrative procedure of lengths of tenure of the judges, and appointment by the President;

g. and other procedural changes and measures which have been introduced internally within the court offices, but also within the police-and-prosecutor's quarters.

The present Chief of Justice of the Supreme Court (*Mahkamah Agung*) Prof. Dr. Bagir Manan, SH, MCL was also a non-career judge, and a constitutional law professor at Padjadjaran University (Bandung) and the Rector of the Bandung Islamic University in Bandung. For a number of years before he became rector, he served as the Director General of Law and Legislations at the Department (Ministry) of Law of Indonesia, so that apart from his legal knowledge, he has for years participated and headed the legislative process in Indonesia.

The reason for his election by parliament and appointment by the President was because the new Chief Justice is expected to bring fresh ideas and new and better improvements in the courts, both as to the administration of cases, procedures and selection of good judges, as well as to the actions to be taken against bad and/or corrupt judges and other judicial personnel, including practicing lawyers and registrars.

With the assistance of the World Bank and the Partnership for Good Governance Reformation, and especially in anticipation of the work of the newly established Human Rights Courts, a number of judges have been sent to Europe for training courses on many aspects towards a good functioning and independent judiciary.

In Indonesia the role, task and status of the judiciary is regulated in Law No. 14 of 1970. Since 1970 it has been mandatory for Indonesian judges to delve and to discover the living values of the societies apart from applying the written law (See Article 1 Para 2 of Act No. 14 of 1970 on the Basic Competencies Judicial Power).

The elucidation of that article clarifies that in a transitional society recognizing the unwritten laws, like Indonesia, the judge acts as the discoverer and the formulator of the living values of the people. In other words, the independence of the judge is not absolute in Indonesia. It is limited by the conscience of the particular judge.

This appears to resemble the rule in Japanese Constitution, which according to Justice Shigemitzu Dando, determines in article 76 paragraph 3 that:

> "All judges shall be independent in the exercise of their conscience and shall be bound by this Constitution and the laws".

The independence of the judiciary to a certain extent is recognized by the 1945 Constitution, Article 24 of the Constitution declares, that:

(1) Judicial Power shall be vested in the Supreme Court and subordinate courts as may be established by law;
(2) The organization and competence of these courts shall be provided by law[3].

The elucidation of that article says more explicitly:

> "The Judicial Power is an independent power, and free from the Executive, or Government. Hence, the status and functions of judges shall be guaranteed by law."

Twenty-five years later, the independence of the Indonesian Judiciary is elaborated under the general elucidation of paragraph 2 point 4 of Law No. 14 of 1970 on the Basic Competencies of the Judicial Power as follows:

> The objective of "Judicial Power" as prescribed under Article 24 of the 1945 Constitution is the Independence of the State in administering justice to enforce the law and justice based on the [national ideology, or] *Pancasila*, for the interest of the people and the implementation of the laws of the Republic of Indonesia, as a state under the rule of law (*Rechtsstaat*).

Unfortunately, reality is often in contradiction with the rules. The Indonesian history recorded that under various regimes of government, i.e. both under Soekarno, Soeharto, Habibie or Abdurrachman Wahid that the meaning of the independence of the judiciary has been distorted either by judicial as well as extra judicial factors. It became known to the public at large that many judges and justices in Indonesia are neither impartial nor independent. Some were not impartial because of financial

factors and lucrative facilities, others were like that because they did not have the courage to go against the pressure of the authoritative Executive or the undemocratic Ruling Class. In the present situations, unfortunately many Indonesian courts eventually have lost their accountability[4].

Therefore, the recent reformation movement in Indonesia reaffirmed that the judicial system must also be reformed and cleansed from corruptive judges, registrars as well as corruptive prosecutors and police officers. It is now a must that the so-called "Mafia of Justice" must be eradicated as soon as possible. At the same time, the courts must be strengthened and restructured now and impartial judges and professional justices committed impartiality and fairness must be appointed as well as professional registrars and other judicial staff. Those efforts are *sine qua non,* not only to the recovery of the judicial and legal system as such, but also in support of the revival of the Indonesian economy as well as to the realization of good governance in the process of civil democratization[5].

IV. Steps of Judicial Reform

The steps taken in the context of Judicial Reform are amongst others:

(a) the reeducation of judges by the World Bank; through all kinds of seminars, training courses and even long distance discussions with judges from Sri Lanka, Thailand, and the Philippines;
(b) the introduction of the institution of judicial review;
(c) the recruitment and appointment of new non-career judges to bring "fresh blood" into the courts;
(d) to strengthen the internal supervision upon the judges by appointing a Deputy Chief Justice for Supervision at the Supreme Court;
(e) improvement of the method of judicial decision making;
(f) improvement of the court management system;
(g) improvement of the court administrative system;
(h) the establishment of the National Ombudsman Commission;
(i) and many more measures taken;

Hereunder a few of the most important changes will be discussed.

V. Judicial Review[6]

One cannot deny that the independence of the judiciary will be more significant when the courts have the power of judicial review. By using this power the courts may review acts and regulations whenever those laws are in contradiction with the Constitution. At the same time, this power will become hollow when the judges are not independent and in favor of the ruling class or those in power. Again, experience taught us that the power of judicial review becomes ineffective during an emergency situation and political instability whereby martial law is declared in Indonesia under the former regimes. Under such situations the independent judiciary is at peril, because the chief administrator or the martial law is vested with broader emergency powers. Under such situation, those in power suspend the basic human rights by claiming that the actions have been in the state's interest and for the people's welfare[7].

Indeed, the Supreme Court of Indonesia has never had the power of judicial review. It is true that this Court may nullify a government regulation and a provincial or local regulation, whenever it deems the regulation in contradiction with an act. Some people however are in favour of giving that power to the Supreme Court. This means that the Supreme Court should have the power to weigh whether an act is constitutional, or not. Despite of the pressure to change the *status quo*, there have been no hints that in the near future the power of reviewing the acts will be vested to the Supreme Court of Indonesia. Some even urge that a Special Committee in the People's Representative assembly (MPR) should be commissioned to review the acts. Others argue that a Constitutional Court has to be incepted for that purpose.

Evidently, when the *Majelis Permusyawaratan Rakyat* (People's Consultative Assembly of Indonesia) convened in August last year, the majority of the members insisted on creating a Parliamentary Commission of Constitution. Many however, were of the opinion that the political interest will make such a Commission biased. We must wait what will happen next in the immediate Annual Convention this year (2020).

In the meantime, compared to their government officials in Indonesia, Indonesian judges have better emoluments. Yet, compared to their colleagues in the neighbouring countries, the judges receive much lower salaries. Moreover, the Indonesian judges belong to the civil service with special high status as *pejabat Negara,* or *"state functionaries"*. On the contrary, in many other countries, judges are judicial servants. Therefore two branches of Indonesian Government control them.

Judicially, the Supreme Court controls their action and administratively, the Justice Department supervises their performance. In addition, the budget of the judiciary is prepared by the Justice Department too. Therefore, it has been an aphoristic phrase in Indonesia that "the brains of the judges are controlled by the Supreme Court, but the stomach by the Justice Department."

It is only natural if many of the opinion that the Supreme Court should judicially and administratively supervise the courts. Consequently, the judges should become judicial servants only and more independent. Fortunately, the Indonesian Government realized the negative impact of the situation and it has been decided recently, that starting from the year 1999, the Justice Department will gradually transfer its administrative supervision of judges to the Supreme Court in five years time.

VI. The administrative and Procedural Supervision of Courts by the Ombudsman

Last but not least, the courts now are under the scrutiny of an independent institution called the *Komisi Ombudsman Nasional*, or the National Ombudsman Commission. Almost all Ombudsmen, in the world eventhough vested with broad powers, more often than not use the "power of persuasion". [8] This has been the practice due to the fact that their recommendations are not legally biding. As Donald C. Rowat states that Ombudsman is no more than the Legislature's watchdog. It may bark, but not bite. [9] So much more, the Ombudsman of Indonesia, which at present is a new institution and not yet widely known, including in judicial and governmental circles.

Nonetheless, in the first year of its existence (2000), the Commission received not less than 1000 letters of grievance. The greater part of which (37%) is about the courts of all kinds and tiers. In the following year (2001), the complaints about the judiciary were still dominating and compared to the previous year, it increased by 8 %. This means that the majority of grievance about the judiciary is 45 % of all complaints. Chief Ombudsman Antonius Sujata concluded that these facts reflect "none other than how the Judiciary in Indonesia has failed to perform its duties in providing justice for

all. In short, the malpractices conducted by the courts have reached the point being intolerable."[10] He added, that:

> "[t}he impartial judges and justices in Indonesia apparently are now aware, that they cannot use the "independence of judiciary" as the shield or weapon for defence against public scrutiny or public charge that they are "selling" their judgments and rulings. They are aware that there is a new zealous watcher in Indonesia called the National Ombudsman Commission."

Actually, there are many who want to see a strong independent body to control the court system. Such institutions in some Anglo American countries are known as "Judicial Council" with the powers and jurisdictions stronger and broader than those of the Ombudsman, except in Sweden, Finland, and the State of Alaska in the United States.

The Government and the judiciary seems somewhat reluctant to response to the aspiration of many people previously mentioned. Instead, the Chief Justice of Indonesia created an internal institution for judicial supervision with the title of "Deputy Chief Justice for Supervision". A lady Justice was inaugurated to fill this position last year (2110). She is vested with the authority to control the behavior and performance of all judges as well as the court system in Indonesian and hence works in close cooperation with the National Ombudsman Commission, investigating the complaint forwarded together by the Ombudsman Commission and acting, if found relevant, upon its recommendations. Many are of the opinion, however, that her role and functions apparently will not be very independent; as she will be supervising her own colleagues. As a result, a very independent and impatient external judicial supervisor is needed badly.

One of the other issues about how to make the public more involved in scrutinizing the courts is the demand for being more transparent in the making of court judgments. Indonesia has never published dissenting opinions of judges. Therefore, many argue (amongst others one of the writers of this book, Prof. Dr. Sunaryati Hartono, S.H., who refused to be appointed as one of the ad hoc Commercial Court Judges, because at that time no dissenting opinion was tolerated, let alone published, that this court tradition must be ended and the Anglophone countries' tradition and practice of courts must be followed. The new rule which has now been introduced means that not only the parties, but also the public will know the

development and considerations of making court judgments, [11] so that it becomes clearer who the good judges are, and who aren't.

NOTES

[1] See for instance President's Megawati Soekarnoputri's statement, that she inherited a "waste basket" of administration.

[2] See J. Rammelink, *Past, Present and Future of the 'Hoge Raad der Nederlanden'* lecture presented at the office of His Excellency Mr. Singgih, SH, Attorney General of the Republic of Indonesia (A,hem" Gouda Quint B.V., 1992).

[3] "Undang-Undang Forum Previlegiatum" (UU No. 22 Drt. Th. 1951), *Kitab Himpunan Perundang-Undangan Negara Republik Indonesia* (ed. and trans. by K.H. Husin), 3 vol., Jakarta, Kementrian Penerangan RI, 1957.

[4] Antonius Sujata and RM Surachman, *"The Ombudsman and the Judicial System"*, paper submitted to the 5th Asian Ombudsman Association Conference, Manila, the Philippines, 2000, p. 4.

[5] The dialogue between the National Ombudsman Commission and the Senior Legal Advisor of the International Monetary Fund (IMF) in the Commission Office on 21st June 2000: see also Antonius Sujata and RM Surachman, *"The Ombudsman and the Judicial System"*, p. 5.

[6] The term judicial review is not used to mean: "The form of appeal from an administrative body to the courts for review of either the findings of fact, or of law, or of both or "The power of courts to review decisions of another department or level of government (see Black's Law Dictionary, op. cit. p. 849), but specifically used in the sense that "the Supreme Court (*Mahkamah Agung*) should have the power to review the decisions of the Executive or of lower judges against the norms of the Constitution".

[7] Haleem, *passim,* specifically p. 29 referring to Carl J. Friedrich and Guy J. Pauker.

[8] Sheila Guttehrer explained to the audience of the informal session in a two-day Workshop on Local Ombudsman (Den Pasar, Bali, 21-22 February 2002).

[9] Office of the Federal Ombudsman (Kingdom of Belgium), *Annual Report 1997*, p. 15.

[10] See Antonius Sujata and RM Surachman, *"The Ombudsman and the Judicial System"* in Antonius Sujata dan RM Surachman, *"Ombudsman Indonesia di tengah Ombudsman Internasional"*, Jakarta, Komisi Ombudsman Nasional, 2002.

[11] Cf. Tim Peneliti 2001, *Reposisi Lembaga Tinggi Negara,* kerjasama dengan Puslitbang Kemasyarakatan dan Kebudayaan LIPI dengan Hans Seidel Foundation, Jakarta, Maret 2001, h. 127.