

Ruler's Law

The Report
of the
International Commission of Jurists

Mission to Indonesia



International Commission of Jurists

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Introduction

The Mission's Formation

Through the Geneva-based International Secretariat and its Australian Section, the ICJ has exhibited a continuing interest in the rule of law and human rights in Indonesia for many years. During the 1980s this interest culminated in the publication of the book *Indonesia and the Rule of Law*.

During the 1990s, the Australian Section had sent delegates to monitor the trials of human rights activists under Indonesia's sweeping Anti-Subversion Law on several occasions. The outcome of these visits was summarised and published by the Australian Section in March 1998 as the *Report on the Anti-Subversion Trials in Indonesia*.

In April 1998, Professor Spencer Zifcak, from the Australian Section, visited Jakarta to monitor the trials of several imprisoned human rights leaders. In his report, reproduced as Appendix A, he expressed grave concern with respect to the partiality of the Indonesian judiciary and the suppression of freedom of expression.

In May 1998, the government of President Soeharto fell in response to popular dissent. The new government of President Habibie promised immediately to take action to preserve and enhance human rights.

In July 1998 at its meeting in Cape Town, the Commission agreed to a recommendation from its Indonesian Member, Dr. Adnan Buyung Nasution, that the ICJ send an international mission to Indonesia to review the situation with respect to the rule of law, judicial independence and human rights. Consequently, following discussion between the International Secretariat and the Australian Section, a mission was dispatched from March 20-April 3 of this year.

The mission consisted of the following members:

- Professor Dalmo Dallari (Brazil) (Vice-President, ICJ)
- Professor Maurice Kamto (Cameroon)
- Dr. Haydee Yorac (Philippines)
- Professor Spencer Zifcak (Australia)
- Ms. Liz Biok (Australia) (Secretary).

The Mission's Investigations

With the very considerable assistance rendered by the Indonesian Member of the ICJ, Dr. Nasution, the mission was able to speak with members of the government, the opposition, the judiciary, the legal profession, the media, non-governmental organisations, human rights activists and political prisoners. In all, the mission spoke individually or collectively with almost three hundred relevant individuals.

The new Government of Indonesia was generous in providing the mission with access to its senior ministers and officials, to political prisoners and to the Sumatran regions of Aceh and Palembang. The mission met with the President, Dr. Habibie, the Minister of Justice, the Attorney-General, the Minister for Women's Affairs and a Deputy Commander of the Indonesian military. It obtained further information and evidence from the many senior governmental and military officials who accompanied them.

The mission spoke with judges of the Supreme Court, the District Courts and the Administrative Court. It visited the National Human Rights Commission. It conferred with representatives of all the leading Bar associations, other professional lawyers organisations and legal academics. It heard from representatives of the National Electoral Commission.

Many members of the prominent non-governmental organisations were also interviewed. These organisations included legal aid bodies, human rights bodies, election watch bodies, prisoner support bodies and labour unions.

The mission was permitted to visit political prisoners including Mr. Xanana Gusmao, the leader of the East Timorese Independence Movement. It also spoke with three of the PKI leaders who were released from detention after thirty-four years at the time the mission was in Jakarta.

Three members of the Mission were permitted to visit the province of Aceh in Northern Sumatra. There they met with the Governor of Aceh, with legal aid organisations, with former political prisoners and victims of brutality and torture. They also observed a large demonstration in favour of Acehnese independence.

The two other members visited the southern Sumatran city of Palembang, where they met with the Governor, regional judges, legal aid organisations and victims of land disputes.

Conclusion

At all times, the mission was concerned to provide a fair and adequate hearing to all parties with whom it engaged, however powerful or however repressed. In doing so, however, we also made it clear that the members of the mission in particular, and the ICJ in general, remained fully committed to recognised international human rights standards.

For its part, the Government of Indonesia was fully cooperative with the mission and, through that cooperation, sought to impress upon us its new commitments to democratisation and the rule of law.

In the remainder of the report, the mission delineates its findings and makes recommendations for change. These recommendations will form the basis of discussions between the Secretary-General of the ICJ and the new Government of Indonesia which will be formed after the general elections on 7 June 1999.

Adama Dieng
Secretary-General

Chapter I

Background

Since its independence in 1945, the development of the Indonesian legal system has been heavily influenced by the philosophies and aspirations of the nation's first two presidents, President Soekarno and President Soeharto. As will clearly be demonstrated throughout this report, the power and strength of these two leaders created an environment in which Indonesia's constitutional and legal norms have been allied closely with the authority of the Presidency and the authoritarian character of the prevailing political order. This has resulted in a situation in which neither Constitution nor law acted as constraints upon Presidential power. The abuse of that power, in turn, created the preconditions for the establishment of an absolutist State in which the rule of law, judicial independence and human rights have been frequently disregarded.

In the remainder of this chapter, the political history of Indonesia is summarised briefly, in order to provide the context within which the following chapter on the Indonesian Constitution may best be understood.

The Old Order

A key objective of national law after Indonesian independence in 1945 was to end the discrimination and confusion, which had been created by the plurality of laws under the colonial government of the Netherlands. While European law and courts governed the legal rights of Europeans, Chinese, Arabs and other non-Europeans who had been classified as 'foreign orientals', the Indonesian people were subject to native law and native courts. Native law was the 'Adat' or traditional law of each region and varied throughout the archipelago. Consequently, a native litigant who commenced a legal action in East Java may have been judged quite differently from a Chinese litigant in Batavia or a native litigant in West Sumatra.

To end these divisions Article 27 of the Indonesian Constitution of 1945 provided that:

All citizens have equal status before the law and in government and shall abide by the law and the government without exception.

However, this initial impetus to establish a legal culture embodying the principles of legal equality and certainty was soon compromised by President Soekarno's desire to build a legal system that was distinctly Indonesian and relevant to the local people in the villages and urban kampongs. As one Indonesian legal scholar commented in 1953:

The widely divergent state of the Indonesian population does create difficulties in the evolving of uniform law. But, it is after all not necessary that uniformity of law be based upon the western legal system. The dogma, at the end of the nineteenth century, which said that Asiatic peoples are not regarded as awakened until they have adopted the Western institutions and Western ideas, does not hold good any longer in the twentieth century, this being the period in which one has learned to appreciate the significance of Oriental cultures...

As a consequence, adat law survived within the framework of national legislation. For example, the Basic Agrarian Law of 1960 provided an uncertain compromise between the two systems as it accepted the existence of adat law but limited it by the requirement that adat rights should not conflict with the national interest.

Colonial law was also permitted to remain after independence as legislators realised that colonial laws could not be repealed until new legislation could be enacted.

Thus, Article 2 of the Transitional Provisions to the 1945 Constitution provided that:

All existing state institutions continue to function and regulations remain valid as long as no new ones are established in conformity with this Constitution.

Consequently, all the colonial laws in force at the time the Republic was proclaimed continued, including the Criminal Code which contained heavy sanctions for acts or statements made in defiance of the colonial government.

The distinctively Indonesian basis of the government and laws of the new Republic was founded in the philosophy of Pancasila which had been expounded by President Soekarno in June 1945 and had become the driving ideology of the nationalist movement and then the new State. It was enshrined in the Preamble to the Constitution of 1945 and was said to create the "legal aspirations... which encompassed the basic law of the state, both the written... and unwritten"

The first decade of the Republic of Indonesia was fraught with legal and constitutional uncertainty. In 1949, a federal structure was adopted with the transfer of sovereignty to the Republic of the United States of Indonesia. Yet within three months all constituent units agreed to return to a unitary structure and a new Provisional Constitution came into effect on 15 August 1950. This provided for a Constituent Assembly to finalise the relationship between the Executive and the Parliament.

Following political instability after the democratic elections of 1955, President Soekarno proclaimed that Western principles of parliamentary democracy and law were not suitable for Indonesia. Instead, he proposed a system of "guided democracy" that would incorporate the Indonesian principle of *musyawarah* (discussion), *mufakat* (consensus), and *gotong royong* (mutual cooperation). Then, on 5 July 1959, President Soekarno invoked martial law and issued a presidential decree re-instating the 1945 Constitution, dissolving the Constituent Assembly and establishing a Provisional People's Constituent Assembly.

The period of Guided Democracy, 1959-1965, witnessed a substantial growth in presidential power principally through the enactment of legislation by Presidential Decree and a devaluing of legal processes and structures.

The Guided Democracy period was characterized by ongoing secessionist movements in various parts of the country and Islamic-inspired armed struggle against the central government, *Darrel Islam*. The continuance of armed threats to the nation's unity highlighted in the minds of many, especially in the armed forces, the costly implications of ideological disagreement on the *Dasar Negara* (the national philosophy).

Lawyers were exhorted to return to the indigenous traditions of *adat* law and to discard Western concepts of legal objectivity.

Further, it was argued that colonial laws did not continue in force as previously thought under Article II of the Transitional Provisions. Minister for Justice, Sahara, suggested in 1962, for example, that the colonial Civil and Commercial Codes were not binding laws, rather guides to interpretation of the law. Articles of the Civil Code which were considered colonial in character were declared invalid by the Supreme Court regardless of the failure to promulgate relevant national legislation. Concepts of legal certainty and independence were devalued, accompanied by a general acceptance of the active role of the President in authorising legislation by decree.

The infamous Anti-Subversion Law was re-enacted by presidential decree in October 1963 in an environment of popular discontent within the military, revolts in some outer islands and international confrontation with Malaysia. The law aimed to eradicate any activities that may endanger the nation. Subversion was defined broadly to mean, among other things, acts that distorted Pancasila, spread feelings of hostility or conflict among the population, or "stirred up trouble for industry, production, and transportation run by the government..."

Alongside the President, the military (Angkatan Bersenjata Republik Indonesia - ABRI) grew in influence and power during the period of Guided Democracy. It was regarded as integral to the foundation of the nation through its participation in the revolutionary war and critical to the protection of the new State against internal rebellion.

Accordingly, in its first two decades the Indonesian State witnessed the growth of centralized power focused principally on the Presidency while, at the same time, the legal system continued to engender uncertainty and hostility given its colonial foundations.

The New Order

On 30 September 1965, six leading Indonesian generals were killed in a military manoeuvre aimed to prevent a purported coup against President Soekarno. Amid rumours of a communist plan to seize control, General Soeharto was appointed Commander-in Chief of ABRI on 16 October 1965, after having unified the nation's military forces.

There followed a six-month period of massacres, communal terror and retribution in which members of the Partai Kommunist Indonesia (PKI), suspected members, sympathisers and many innocent villagers were killed. Based upon reliable reports, it is estimated that almost one million people died, approximately 800,000 in Java and 100,000 each in Bali and Sumatra. During the same period, some 120,000 suspected PKI members were imprisoned, many sentenced either to death or long term imprisonment. Ten PKI prisoners remained in prison for over thirty years and were finally released at a time that coincided with the ICJ mission to Indonesia in March.

In June 1966, a special session of the Provisional People's Consultative Assembly was called. It commenced the transfer of power from President Soekarno to General Soeharto in March 1967 with the appointment of

Soeharto as Acting President. The process was completed in March 1968 when the Assembly elected him as President for five years.

Although proceeding formally in accordance with the Constitution, the transition from the first to the second President of the nation had been politically managed rather than democratically achieved. Consequently, the hope that Indonesia might assume a less authoritarian and more democratic character as a result of the transition proved shortlived.

In 1971 the political structure was 'simplified' by reducing the number of political parties from nine to two. The governing party, GOLKAR, was accorded the status of a non-political or supra-political functional group while, at the same time, President Soeharto encouraged four Muslim parties to combine into the Development Unity Party (Partai Pembangunan Persatuan - PPP) and the five Christian and democratic parties to merge into the Indonesian Democratic Party (Partai Demokrasi Indonesia- PDI).

This reduction was given legislative authority in Law No 3/1975 which required all political parties to recognise the authority of Pancasila and the Constitution of 1945.

The emphasis on Pancasila as the unifying ideology of the nation was maintained and strengthened by President Soeharto in the years that followed.

In the early 1980s, the President had parliament introduce legislation to establish Pancasila as the sole foundation of all political organisations. However, Islamic groups opposed the legislation as it restricted opportunities to advocate specifically Islamic values. Members of ABRI also queried the need for the legislation, as senior officers were reluctant to have ABRI identified as Pancasila's defender. Popular discontent with the proposal resulted in military shootings at Tanjung Priok in October 1984. Soon after, the military's authority to suppress dissent was increased and several Muslim leaders were charged with subversion, President Soeharto's legislation was passed in December 1984. From then on all social and political organisations were required to accept Pancasila as their founding principle and could be dissolved by the government if considered to be acting in a manner contrary to governmental and, hence, the national interest.

At the same time, however, President Soeharto acknowledged the adverse effects of legal uncertainty associated with 'revolutionary law' and promised that he would pursue the rule of law through the period of his administration:

...We must inevitably uphold the law and develop it by positive

and creative action. In the final analysis it is to support social development so that it will bring material as well as spiritual happiness and be of great value to mankind.

The Five-Year plans that commenced in 1969 included the modernisation of the law and legal institutions as one essential component of economic development. The authority of the colonial Civil and Commercial Codes was re-established and judges were required to apply the provisions of these statutes appropriately.

In the 1980s, as Indonesia moved into the global economy, new laws were passed to deregulate the banking industry, stock exchange and shipping. Foreign investment laws were relaxed permitting joint and foreign ventures into most areas of production. After Indonesia ratified international conventions on intellectual property rights, corresponding national laws were promulgated: the Copyright Law of 1982, Patent Law of 1989 and the TradeMarks Law of 1992.

Unfortunately, however, it appears that the commitment to legal principle and practice did not extend far beyond the commercial arena. The New Order government took no steps to strengthen a weak judiciary and did not act in the face of widespread allegations of judicial collusion and corruption. The execution of judicial decisions remained problematic as no law was initiated to determine how long a court should take to call on an unsuccessful party to adhere to a decision after the successful party requested that the decision be executed.

The New Order government restricted press freedom in the Press Law of 1966. This law provided that every publication was required to obtain a licence from the government. Publications containing material that the government deemed inconsistent with the national ideology could be banned. Following further amendments to the Press Law in 1982, many publications were in fact prohibited and leading journalists and publishers were imprisoned. In March 1995, members of an independent association of journalists were imprisoned for ideas critical of government. Individual journalists were pressured to join the approved association of journalists or face unemployment.

The later years of the New Order regime were characterised by a callous disregard for international human rights standards. A leading Indonesian human rights lawyer stated in 1993:

The obsession with economic development has led the government to neglect and violate human rights because, in the

government's view, respecting human rights might obstruct the pace of economic development. As a result, the government has become accustomed to coercion and repression of basic human rights while safeguarding the economic development process.

Detention without charge, torture during interrogation and the criminal law were all used increasingly to silence political opponents or any other organisations that questioned adherence to the ideology of Pancasila.

The Anti-Subversion Law was invoked with increasing frequency against trade unionists such as Mughtar Pakpahan and Dita Sari, and student leaders such as Budiman Sudjatmiko. In addition, the criminal offences of insulting the President or expressing hatred against the State (which had remained largely unaltered and unused since colonial times) were used to imprison political opponents such as Sri Bintang Pamungkas. Independence advocates in East Timor, Irian Jaya and Aceh were labelled as members of illegal organisations that threatened national security and were sentenced to long terms of imprisonment. Human rights lawyers were arrested when meeting with their clients and found guilty of holding meetings without appropriate permission from the authorities. Political trials became frequent and were conducted in violation of even the most basic principles of legality and due process (see Appendix A).

The demise of legality occurred in a climate of increasing military authority and violence. During the period of the New Order government, ABRI has assumed a foundational position in many areas of political and commercial life. It assumed a dual function, first to defend the State and secondly to participate directly in all aspects of State administration. The police and military were combined. The military was linked closely to GOLKAR and was accorded special representation in the national parliament and consultative assembly.

It was in the regions, where separatist groups were in evidence, that the government and military acted most brutally. In Aceh, East Timor and Irian Jaya, gross violations of human rights were perpetrated in the aim of isolating and capturing separatist guerilla fighters. Throughout the 1990s international human rights organisations reported that arbitrary arrest and detention, torture, violence against women and disappearance had become routine.

These activities were carried out with impunity as there appeared to be no desire within government to bring the perpetrators to justice. The structures in place for the investigation of human rights abuses by military

forces were inadequate for the task since the relevant investigations were normally conducted by ABRI itself and any alleged perpetrators were tried in military courts.

The New Order government came to power in 1966 with the aim of ending the autocratic and repressive policies of Guided Democracy. Yet in its report on the final year of the New Order regime, the U.S. Department of State concluded that:

Despite a surface adherence to democratic forms, the Indonesian political system remains strongly authoritarian... The government requires allegiance to a State ideology known as 'Pancasila', which stresses consultation and consensus, but is also used to limit dissent, enforce social and political cohesion, and to restrict the development of opposition elements.

The Reformation Government

The Asian currency collapse of September 1997 demonstrated the frailty of the Indonesian economy, causing a rapid loss of confidence and the need for substantial economic assistance from the International Monetary Fund (IMF).

Notwithstanding his re-election as President for his seventh term in March 1998, Mr. Soeharto seemed incapable of negotiating with the IMF and providing the special leadership required to contain both economic and social crisis.

Throughout April 1998, thousands of students demonstrated against the regime calling for comprehensive and immediate political reform. With major price increases in May, student demonstrations became more widespread and increasingly gained support from the urban middle class. Tragically, four students were shot by the military at a peaceful demonstration in Jakarta on 12 May 1998. Two days later (14 May), Jakarta was engulfed by rioting and arson in which more than 1,000 people died. Despite concessions from President Soeharto, the students continued their demands for reform and occupied Parliament.

On 21 May, President Soeharto resigned and Vice-President B.J. Habibie was sworn in as the third President of the Republic of Indonesia.

President Habibie immediately acknowledged the calls for reform and committed his government to comprehensive political and economic reform.

In his State of the Nation address on 15 August, President Habibie expressed his intentions in the following terms:

The essence of the national reform movement is a planned, institutionalized and continuous correction of all the deviations which have taken place in the economic, political and legal spheres. The target is our ability to recover in a more open, well-ordered and democratic climate.

It is in this new climate of reform that the ICJ mission took place in March 1999.

Chapter II

The Indonesian Constitution

Constitutional Origins

The Constitution in force in Indonesia today is that adopted as the 'revolutionary' Constitution of 1945. This Constitution had its origins in the battle against Dutch colonial rule and had been in force briefly in Republican controlled areas during the postwar revolution itself.

This revolutionary constitution, however, was not the first adopted by the new Indonesian State upon the transfer of sovereignty from the Dutch in 1949. At that time, a federal constitution drafted with the assistance of the Dutch and sponsored by the United Nations was set in place. It was intended that the 1949 Constitution itself would be replaced in its turn by a parliamentary Constitution drafted by the nation's new Constituent Assembly. That Constitution, founded upon parliamentary democracy, was set in place in 1950. It proved incapable, however, of channelling or constraining the continuing political turmoil in the country and, not unnaturally, the search for new alternatives began.

This search ended with the reimposition of the 1945 Constitution. Worded broadly, and devised by the nationalist opposition in revolutionary political circumstances, it contained few limits to the exercise of unbridled executive power. As Dr. Timothy Lindsey describes the situation:

In 1959, President Soekarno, with the support of the armed forces, dissolved the (Constituent Assembly) and unilaterally declared a return to the 1945 Constitution. This coup allowed him to do away with both the parliamentary party system and secured him great personal power. With the resurrection of the revolutionary, wartime constitution, Indonesia returned to an authoritarian system similar in some ways to the colonial and traditional models of the ruler exercising control through a patrimonial bureaucracy backed by military force.¹

1 T. Lindsey, "An Overview of Indonesian Law" in *Indonesia: Law and Society*, (T. Lindsey, ed. 1999).

While it was thought that the New Order government of President Soeharto might reinstate the rule of law following his ascension to office in 1966, no constitutional amendments to effect that purpose were ever implemented. The Constitution readopted by President Soekarno in 1959 has remained in place ever since, with all the limitations it has with respect to effecting control of executive power.

The 1945 Constitution, therefore, has a curiously ambivalent character. On the one hand, it has provided the crucible within which an autocratic government in Indonesia has been permitted to develop, almost without restraint. At the same time, however, it has a certain legitimacy, being derived as it is from the revolutionary, nationalist and anticolonial aspirations of the indigenous Indonesian leadership during and after the Second World War. It is a document that can closely be identified with military struggles both to attain and maintain Indonesia's independence and with the heroism of the country's founding fathers, including President Soekarno himself. But that very identification has acted as a crucial factor in minimising subsequent opportunities for reconsidering the constitution's contents and procedures, for reforming its institutional structures and altering the nature of popular participation in the country's political processes.

The historical circumstances of the Constitution's birth, therefore, have tended to suppress later discussion with respect to the reform of political structures as such discussion, particularly when initiated in opposition circles, has been regarded as an attack upon the nation's political, economic and cultural achievements. The absence of such discussion, however, has meant that the Indonesian nation has possessed as its Constitution a document almost infinite in its capacity for manipulation in the hands of later, autocratic rulers. This constitutional deficit has had profound implications for the rule of law and human rights as the remainder of this report will amply demonstrate.

The Political and Juridical Meaning of the Constitution

From a political perspective, the Indonesian Constitution is symbolic of the nation's unity and independence. The Preamble makes it clear that the document is an anticolonial one, designed to elucidate and embrace the principles of new, free and post-colonial State:

Whereas freedom is the inalienable right of all nations, colonialism must be abolished in this world as it is not in conformity

with humanity and justice. And the moment of rejoicing has arrived in the struggle of the Indonesian freedom movement to guide the people safely and well to the threshold of the independence of the State of Indonesia which shall be free, united, sovereign, just and prosperous.²

The new nation is constructed upon the principles of 'Pancasila', the official State ideology. The principles of Pancasila are set out in the Preamble as follows:

...the national independence of Indonesia shall be formulated into a constitution of the sovereign Republic of Indonesia which is based on the belief in the One and Only God, just and civilised humanity, the unity of Indonesia, democracy guided by the inner wisdom of deliberations amongst representatives and the realisation of social justice for all the people of Indonesia.³

While these principles are unexceptionable in themselves, the combination of Constitution and national ideology, derived from anticolonial victory, appears to have had three undesirable political consequences. The first has been that governments have tended to regard the Constitution as a document of the past that, nevertheless, inspires the present. It is in the nature of a national treasure, which for that reason ought not to be tampered with. The document is owed respect and its continuing existence forms the foundation for national unity.

From this follows the second consequence which is that governments have not tended to take the document seriously as a guide to the institutional parameters and limits of State. Its value has been seen primarily in symbolic terms. The document itself does not stand for the 'rule of law' but in practice has permitted the development of 'rulers' law'. The Elucidation to the Constitution makes it clear that it should be treated flexibly in accordance with the needs of the times. There is no sense, except in ideological terms, that it is regarded as representing the overarching law of the State:

It is true that a written constitution is binding. Hence the more flexible its provisions the better. The Constitution must not lag behind the times. Laws should not quickly become obsolete. The important thing in government and State life is the spirit of the authorities, the spirit of government's leaders. Even though a

2 Preamble to the Indonesian Constitution, 1945.

3 Ibid.

constitution is characteristic of the family system, if the spirit of the authorities and the leaders of government is individualistic, then the Constitution is meaningless. On the other hand, even if a constitution is imperfect, but the spirit of the leaders is right, the Constitution will in no way hinder the process of government. So, what is important is the spirit. It must be a living and dynamic spirit. On the basis of these considerations, only the basic principles should be embodied in the Constitution while the instruments of execution should be left to the law.⁴

Thirdly, the insertion of a State ideology into the constitutional preamble has had enormously important effects. The ideology, known as Pancasila, is founded upon five broad principles. It is accepted in Indonesian constitutional theory that the Constitution's provisions and indeed the provisions of all statute law, should be interpreted so as to be consistent with these principles. The principles are so broad, however, that they can attain meaning only in the hands of definitive interpreters. While in normal circumstances one might expect that such interpretation would be within the sole jurisdiction of the courts, in Indonesia, where the Courts are very weak, the task of interpreting the principles has passed to executive government. It is thus made easy for the President to declare that actions or omissions are contrary to Pancasila and therefore contrary to the interests of the State. This power of interpretation, and its concomitant capacity for exclusion, has acted as a powerful force in the strengthening of absolute power in the hands of Indonesia's postwar rulers.

Given these circumstances, the Constitution has had little or no effect upon the constraint of executive power. It has not and cannot act as the foundation of a State based on the rule of law as this term is commonly understood. A vague and imprecise Constitution has been preferred to one that constitutes the supreme law of the nation. The open-textured nature of the constitutional document, the absence of effective judicial review, the very limited guarantees of human rights, the judiciary's dependence upon the executive in both legal and administrative terms and the heavy emphasis on breadth and flexibility in the exercise of Presidential power, have all contributed to a situation in which the Constitution is accorded symbolic respect but not practical effect.

4 Elucidation to the Indonesian Constitution, 1945, Section 5.

In a very real sense, then, political and administrative life in Indonesia has occurred outside well settled constitutional and legal boundaries. This has been accepted as normal and owing to that acceptance none of the usual understandings or presuppositions of constitutional and juridical life have been operative. Indonesia is a constitutional State because it has a formal constitution. But it is not authentically constitutional, in the sense of embodying the rule of law, since the constitutional document has no substantive, operational meaning.

Some Constitutional Characteristics

In its report on Indonesia, *Indonesia and the Rule of Law*, published in 1987, the International Commission of Jurists described the terms of the Indonesian Constitution in some detail. Here, therefore, we shall focus only on those elements having particular relevance to our present inquiry.

Article I of the Constitution declares that Indonesia is a unitary State which has the form of a republic. In the unitary State, the sovereignty of the people is said to be exercised by the Majelis Permusyawaratan Rakyat (MPR). The MPR is the sovereign deliberative assembly of the nation. The MPR, in turn, is comprised of members of the Dewan Perwakilan Rakyat (DPR), that is the Indonesian Parliament, together with other delegates from the regions and special interest groups provided for by statute. The most important of these, of course, is the representation of the Indonesian military forces. Article 6 of the Constitution provides that the President and Vice-President of the Republic shall be elected by the MPR for a renewable five year term.

The President has extensive powers. The President constitutes the executive power of government.⁵ He or she is the Supreme Commander of the Army, the Navy and the Air Force⁶. The President declares war, makes peace and concludes treaties with other States.⁷ The President may declare states of emergency and the power to do so is limited only by statute.⁸ He or she appoints and dismisses Ministers of State.⁹ The President may

5 Indonesian Constitution, Article 4.

6 Indonesian Constitution, Article 10.

7 Indonesian Constitution, Article 11.

8 Indonesian Constitution, Article 12.

9 Indonesian Constitution, Article 17.

exercise a veto over legislation submitted by the DPR.¹⁰ The President appoints and dismisses judges.¹¹ The President may issue decrees having the standing of law and in the event of an emergency, the President may issue regulations in lieu of laws.¹²

Although the President has extensive constitutional and legal powers, these powers are not unlimited. The Constitution provides that the President acts as Chief Executive of the nation under the MPR. Further, he or she must consult with and pay attention to the DPR. These controls on Presidential powers, however, have not been effective. The MPR meets only once every five years and cannot, therefore, exercise effective supervision over the exercise of Presidential power.¹³ Further, since the composition of the MPR is in part to be determined by statute, the President has in the past been able significantly to influence its membership by ensuring that interest groups favourable to his or her interests are represented there. Here, again the influence of the military has been crucial. The President's obligation to the DPR is simply to consult and to consider. As noted previously, should the President disagree with legislation emerging from the DPR, he or she may veto it.

It should be noted in addition that, by convention, the President is also the final arbiter of Pancasila's meaning and content. This, in turn, implies that the President will be the final interpreter of Islamic law since this is drawn into the Constitution through Pancasila's principles. Taken together, then, these ideological, constitutional, legal and religious powers, make the office of the Indonesian Presidency very powerful indeed.

As neither the MPR nor the DPR may place effective limits on the President's exercise of executive power, it might have been expected that the judiciary could play an important role in this regard. The judiciary, however, is also placed in a very weak position. The position of the judiciary is considered in detail in Chapter III. Here it suffices to say that the Supreme Court of Indonesia is established as a constituent element of the Indonesian constitutional framework.¹⁴ Its status, composition and powers, however, are not delineated in the Constitution but are left to be regulated by

10 Indonesian Constitution, Article 21.

11 Indonesian Constitution, Article 25 in association with Law 14/1970.

12 Indonesian Constitution, Article 22.

13 Indonesian Constitution, Article 2.

14 Indonesian Constitution, Article 24.

statute. The Elucidation to the Constitution suggests that judicial power is to be exercised independently. That is, it should be exercised free from government interference.¹⁵ However, the extent to which and manner in which judicial power will be exercised independently is capable of definition and change in legislation. When the relevant legislation is examined, it is apparent that the powers of the Supreme Court and judicial independence itself are severely constrained.

The Supreme Court is not permitted to review the constitutionality of legislation, although it may examine the legality of regulation. The Court is unable to enforce its own decisions. The judiciary is divided into four divisions, each of which is reliant upon the Minister responsible for its general sphere of activity. The general judiciary, for example, is reliant upon the Minister for Justice with respect to all decisions on promotion, transfer, remuneration and budgetary allocation. The military courts are similarly reliant upon the Minister for Defence.

Unlike many other established constitutions, in pursuit of desired political and executive flexibility the Indonesian Constitution leaves a great many important matters to be regulated by law, that is by legislation, regulation and Presidential decree. The Constitution's entrenched provisions are rare.

Thus, for example, the following powers among others are left to statute:

- the composition of special interest groups on the MPR
- the composition of the DPR
- the composition, structure and powers of the courts
- the appointment and dismissal of judges
- freedom of association, assembly and expression
- the rules governing the defence of the nation
- the structure and functions of the national education system

In defence of this arrangement, the Elucidation states that:

It is adequate if the Constitution only contains the fundamental provisions and guidelines as directives for the government and other State institutions to conduct State affairs and create public welfare. In particular for a new and vibrant country, such a basic

law is best to contain the essential provisions only while the operational procedures can be accommodated in laws which are easier to make, amend and repeal. Hence the system in which the constitution is drafted.¹⁶

While it is possible to empathise with the political needs and aspirations of a newly independent nation having only recently broken the shackles of colonialism, it would hardly appear adequate some 55 years later for a constitution so easily capable of manipulation by opportunistic leaders to remain the foundation of a genuinely democratic and law-based State.

Constitutional Amendment

During its time in Indonesia, the mission discussed the desirability of constitutional amendment with senior ministers and officials. It also considered the views of semi-governmental and non-governmental organisations. Certainly, during the mission's time in Indonesia, there was in almost every quarter real or apparent support for 'reformasi'. It might reasonably be concluded, therefore, that constitutional reform could take its place within the broader movement for social and political reform.

In governmental circles, however, there was considerable diffidence with respect to constitutional amendment. The nature of this diffidence was revealed clearly in our discussions with President Habibie. The President did not seem opposed to constitutional amendment. His concern was whether a wholesale revision of the Constitution was appropriate at this particular time. He pointed out, correctly in our view, that the period since the former President had stepped down had been a difficult one already characterised by large scale democratic transformation. With this change, however, considerable political and social instability had also emerged. The Constitution, he suggested, was a symbol of national unity. To question its foundations at a time of unrest, may be to generate new possibilities for conflict which could not be controlled effectively. For this reason, the President was inclined to think that democratic reform should proceed through legislation rather than constitutional amendment.

The President indicated clearly that it was his intention to re-establish the rule of law in his country. For that reason, he suggested that a clearer separation between the executive, legislature and judiciary should be

¹⁶ Elucidation to the Indonesian Constitution, Part V.

effected. Again, however, he thought that, at this time, this might best be achieved by legislation. The Constitution's terms were sufficiently general to permit significant reform of this kind to take place without the difficulties attendant upon constitutional amendment.

Using vivid metaphor, the President compared his country's position to that of a damaged jet aeroplane which needed repair and to test its wings at lower altitudes before attempting an ascent which if taken too early may endanger all its passengers. The overall position of the country had to be assessed with each step on the road to reform being taken at the appropriate moment.

The Minister for Justice was of a similar view. The period before and immediately after the nation's first genuinely democratic elections for 44 years was not, in his view, the appropriate time to suggest constitutional change. Once the election had been held and a measure of political stability had returned whether under the present government or a new administration, the question of constitutional reform might legitimately be raised. But current times were too uncertain and too troubled.

The Attorney-General expressed the view that the Constitution is adequate to the tasks of the nation. He believed that the Constitution provided the government with instruments, of power adequate and efficient to the tasks that it had now embarked upon. New legislation had ensured that public order could properly be maintained and that the cancer of corruption could be removed. There had been a considerable liberalisation in the laws regarding political participation and given this, any additional discussion of constitutional changes would be premature and perhaps counterproductive.

General Yudhoyono from the Indonesian military also believed that constitutional amendment would be premature. His view differed from those above, however, in that he felt the Constitution was cast in such broad terms that its interpretation created continuing problems. As soon as appropriate, therefore, he believed that the Constitution's terms should be clarified in order to provide greater certainty with respect to the powers of each of the respective arms of government including the military arm. The General was also open to the possibility that the military's representation on both the MPR and the DPR might be reduced. A progressive diminution in such representation might be considered over a five year period.

The National Human Rights Commission, by contrast, believed that the Constitution should be amended as soon as possible. The principal purpose

of such amendments should be to ensure an effective constitutional separation of executive, legislative and judicial power and the entrenchment of a Bill of Rights.

Once one moved from the government to the non-governmental sector, however, the position with respect to constitutional reform altered dramatically. While there was a similar recognition in many quarters that constitutional amendment should await the outcome of the democratic elections, its urgency after that was pressing. There was a general view among opposition political parties, professional legal associations, legal aid organisations, union bodies, women's organisations, students' representative councils among others, that the Constitution had permitted too much power to reside in the hands of an autocratic Presidency and that too little constraint had been placed on that power to the detriment of the national interest in democracy and good government. It was imperative, therefore, that the Constitution be altered as soon as circumstances permitted.

Recommendations

The mission accepts the general argument that constitutional amendment should not be contemplated in the immediate pre-election and post-election period. It would appear reasonable to give the new government elected on June 7, and the new President elected in November, at least six months grace prior to considering the prospect of wide-ranging constitutional reform.

Nevertheless, it will be apparent from the analysis above, and from the Commission's detailed consideration of the constitutional position in *Indonesia and the Rule of Law*, that we believe that constitutional reform is imperative in order to preserve and enhance Indonesian democracy and to ensure the human rights of the nation's peoples. Neither democracy nor human rights can be assured while the present Constitution remains in place. Its malleability in the hands of authoritarian Indonesian rulers has been demonstrated amply both in the Soekarno and Soeharto periods. The Constitution is and will remain a dictator's charter unless it is amended or replaced by one in which the rule of law is established as primary.

The Constitution places no realistic limits upon Presidential power. It permits both the sovereign assembly (the MPR) and the national parliament (the DPR) to be composed and ordered according to Presidential dictat. It places the Supreme Court in a position from which it can exercise no effective control over the constitutionality, legality or propriety of executive and

legislative action. Its failure to define and entrench core institutional relationships, leaves the way open for authoritarian rulers to manipulate politics and populace alike. Its malleability has enabled opportunistic rulers to suppress and exclude popular participation in the political and social life of the nation. The document provides no guarantee whatever either that the rule of law or fundamental human rights will be observed.

For these reasons, the ICJ is of the view that within twelve months of the election of the new President of Indonesia, that government should take steps to amend the Constitution so as to entrench democracy, the rule of law and human rights.

More particularly, the Commission recommends:

1. That within twelve months of the election of the new President of Indonesia in November 1999, the Government should convene a special sitting of the MPR the purpose of which will be to consider the amendment of the national Constitution.
2. That a Constitutional Commission be established immediately by the new President to engage in a complete review of the current constitution with a view to providing comprehensive recommendations to the MPR with respect to the constitution's alteration.
3. That special rules be introduced for the special sitting of the MPR so that it shall only be the democratically elected members of the MPR who shall be entitled to vote in relation to any proposed constitutional amendment. The non-democratically elected members of the MPR shall have speaking rights alone.
4. That the special sitting of the MPR be provided with terms of reference the purpose of which shall be to ensure that the constitutional reforms proposed shall be directed towards the achievement of:
 - the effective separation of executive, legislative and judicial power
 - the entrenchment of provisions establishing genuinely democratic elections
 - the entrenchment of provisions that guarantee the independence of the judiciary
 - the entrenchment of provisions that provide for the effective protection of fundamental human rights.

Chapter III

The Independence and Reform of the Judiciary in Indonesia

Introduction

The International Commission of Jurists takes judicial independence as one of its central concerns. For that reason, the mission placed great weight in its inquiries upon examining the nature and extent of judicial independence in the Republic of Indonesia and in considering what constructive steps might be taken to enhance the judiciary's standing and contribution. In this chapter, the constitutional and legal positions of the judiciary are outlined, an assessment is made of the current state of the judiciary, the government's proposed reforms to the judiciary are summarised, and finally recommendations are put forward to strengthen the judiciary's position in a reformed system of Indonesian democratic government.

A. The Constitutional and Legal Position of the Indonesian Judiciary

The Indonesian Constitution of 1945 makes reference to the judiciary in Articles 24 and 25. These articles are as follows:

Article 24

- (1) The judicial power shall be exercised by a Supreme Court and such other courts of law as are provided for by law.
- (2) The composition and powers of these legal bodies shall be regulated by law.

Article 25

The appointment and dismissal of judges shall be regulated by law.

It is apparent immediately from these articles that the nature of judicial power, the content of its exercise and the tenure of those who exercise it will be regulated principally by statute rather than by constitutional provision. The Elucidation to the Constitution, however, places some flesh on somewhat bare constitutional bones. In explaining the constitutional provisions, the Elucidation states that:

The judicial power is independent to such an extent that it is free from government interference. Thus, the status of judges should be guaranteed by law.¹

In the Elucidation, therefore, the significance of judicial independence is accorded recognition, even if the provision of that recognition is to be provided for only in legislation. Before proceeding to a consideration of the relevant legislation, however, the place of the rule of law in the constitutional framework will briefly be addressed for it underlies and accentuates important differences in constitutional doctrine having a direct bearing on the place of the courts in the Indonesian institutional scheme.

Traditionally, Indonesian constitutional theory has been founded upon the concept of the Integralistic State. This theory conceives of Indonesia as an organic unity modelled upon the village or the family. In such a unity, harmony between citizen and State is presumed. So, the interests of the individual are not only subordinate to the State but inherently consistent with the interests of society as a whole. From this it follows that it would be a mistake to distinguish between State and individual for their interests concur. Like the village or the family, individual interests under the Constitution may be reconciled to and accommodated within the collective interests of the larger social family. Government is perceived as paternal and benevolent, having the interests of individual citizen-family members at heart. The Constitutional document and the institutional arrangements it sets down, therefore, are to be informed by values such as order, harmony, unity and totality.²

At the same time, however, the Constitution appears to recognise at least a weak version of the rule of law or *Negara Hukum* as it is known in

1 Elucidation of the Constitution of the Republic of Indonesia with respect to Chapter IX, The Judicial Power, Articles 24, 25.

2 For an analysis of the Integralistic State see, for example, D. Bourchier "Positivism and Romanticism in Indonesian Legal Thought", in *Indonesia: Law and Society*, (T. Lindsey, ed. 1998).

Indonesia. So, the Elucidation to the Constitution declares in paragraph 6 that:

6. Indonesia shall be a State based on law (*rechstaat*, a legal State). As the Indonesian State is based on law, it is not founded on power alone.³

A State under the rule of law necessarily implies that there should be an effective check on the exercise of legislative and executive power - that there should be a constitutionally mandated body whose purpose is to ensure that the legislature and executive act in accordance with the law. It is normally the judiciary that is entrusted with this role and in order to exercise it, its independence must be assured. Even to state this, however, is to make it clear that constitutional conflict is possible if not probable. And in so far as such conflict assumes a legal character, its resolution is entrusted to the Courts. It is for this reason that in many constitutions the doctrine of the separation of powers is constitutionally embedded. Judicial independence is constitutionally guaranteed in order to ensure that where political authority and legal regulation conflict, it is the rule of law that shall prevail. The courts receive constitutional protection so that they may, to use Vaclav Havel's phrase, 'speak truth to power.'⁴

The Integralistic State, therefore, is built on the twin assumptions of benevolent rule and harmonious interaction. The *Rechstaat*, in contrast, takes a less sanguine view of power and assumes constitutional conflict. In the Integralistic State, the separation of powers and judicial independence are de-emphasised in favour of a unitary conception of governance. In the *Rechstaat*, the separation of powers and judicial independence are re-emphasised in recognition of and as a reflection of the plural character of governance.

With this conceptual cleavage in mind we are in a better position to understand the context within which and the assumptions upon which current Indonesian legislation with respect to the judiciary and judicial independence have been framed.

3 Elucidation of the Constitution of the Republic of Indonesia, Introduction, Paragraph 6(1).

4 For a comparison of the Integralistic State and the *Rechstaat* see D. Lev, 'Judicial Authority and the Struggle for an Indonesian *Rechstaat*,' 13 *Law and Society Review* 37 (1978); T. Mulya Lubis, 'The *Rechstaat* and Human Rights' in Lindsey, *supra* note 2. For a more general treatment of the East Asian perspective on human rights see J. Baeur and D. Bell (eds.), *The East Asian Challenge for Human Rights* (1998).

The principal statutes defining the structure and powers of the Indonesian judiciary are *Law 14/1970 Concerning the Basic Principles of Judicial Power* and *Law 2/1986 Concerning the General Judicial System*. Each will be considered in turn, paying particular attention to the understanding of judicial independence they embody.

Law 14/1970 Concerning the Basic Principles of Judicial Power replaced *Law 19/1964*. In this former statute, enacted under the Soekarno regime, judicial power had been marginalised in favour of executive power. As Professor Daniel Lev described the situation:

But the judiciary was nevertheless pressed into political service during those years. Explicitly rejecting the (separation of powers) for Indonesia, Soekarno ostentatiously appointed the Chairman of the Supreme Court to the Cabinet, to the dismay of many judges who perceived in the *trias politica* symbol some guarantee of judicial autonomy and dignity. Sukarno went further to demand, in a new statute (*Law 19/1964*) on judicial organisation, the right to interfere at any stage in the judicial process 'for the pressing interests of the Revolution, the dignity of the State and People or the interests of society'. (Article 19). This right was in fact used both before and after the passage of the law in 1964.⁵

To its credit, the New Order government repealed the former law and substituted the *Law Concerning the Basic Principles of Judicial Power* in its place. The new law was welcomed by judges and lawyers alike because it removed the power of the Executive to interfere directly in judicial affairs. Nevertheless, it retained certain elements more akin to the Integralistic conception of State than to the *Rechtsstaat* and in doing so laid the ground for further political intervention and subsequent national and international criticism in the decades to come.

Article 1 of *Law 14/1970* provides that:

1. The judiciary is the independent power of the State in administering justice to maintain law and justice based upon Pancasila, in order to uphold the rule of law in the Republic of Indonesia.

Article 4(3) then provides that:

4(3) Any interference in the exercise of the judicial function by

5 D. Lev, 'Judicial Institutions and Legal Culture in Indonesia' in *Culture and Politics in Indonesia* (C. Holt, ed. 1972) 268.

authorities other than the Judiciary shall be prohibited except for cases referred to in the Constitution.

The Elucidation of the legislation acknowledges frankly in its introduction that the spirit and provisions of Articles 24 and 25 of the Constitution had not been realised.⁶ In particular, the right of the President to intervene or interfere with judicial affairs stood in contradiction with the principle that the judiciary should be independent of the executive. The judiciary, as described in Article 24, says it aims at an independent State power to administer justice in order to maintain law and justice based on the philosophy of Pancasila and to uphold the rule of law in the Republic of Indonesia. Commenting on Article I of the new Act, the Elucidation states that:

An independent judiciary implies a judiciary which is free from interference from other powers of State and free from coercion, direction or recommendation flowing from extrajudicial bodies, except in cases approved by law. The task of the judge is to maintain law and justice based on the philosophy of Pancasila by interpreting the law and seeking the grounds and principles which form its base through the cases which the judge is handling, so that his decisions reflect the sense of justice of the Indonesian nation and People.⁷

Taking judicial independence, a core component of a *Rechtsstaat*, as the focus of our concern it can be seen that this formulation contains two critical weaknesses. First, it explicitly contemplates interference in judicial affairs so long as such interference is authorised by statute. Secondly, it defines the judge's task as deciding cases in accordance not only with law but also by reference to Pancasila and the people's sense of justice, a more political conception of decision-making than is perhaps desirable. From the perspective of the Integralistic State, however, this explanation makes perfect sense because the judiciary may be seen as forming part of a broader, institutional and familial umbrella. Within this institutional family, the judiciary may from time to time be corrected and its perspective altered so as to better reflect paternal attitudes and values.

6 Elucidation, Law 14/1970, Introduction.

7 Ibid. Article I.

Under the 1970 law, the Supreme Court stands at the apex of the judicial system. Beneath the Supreme Court four branches of the judicature are created:⁸

- the General Courts of Justice;
- the Islamic Courts of Justice;
- the Military Courts of Justice; and
- the Administrative Courts of Justice.

Article 11, however, operates as a substantial restraint on judicial independence. It provides that each of these branches of the judicature shall be subject in their organisation, administration and finance to the ministry in relation to which their jurisdiction is primarily concerned. The General Courts of Justice, therefore, are responsible to the Minister of Justice, the Military Courts to the Minister of Defence and so on. Where the Courts are required to review the laws and actions of their parent ministry, a potential conflict of interest will clearly and inevitably arise.

Another clear indication that the courts of justice shall occupy a secondary rather than primary place in the constitutional scheme is given in Article 26 concerning judicial review. This article provides that the Supreme Court is empowered only to review the validity of regulations and other inferior statutory instruments. The Court is not accorded power to review the constitutionality of legislation, a function reserved to the People's Assembly (MPR). The Elucidation makes this abundantly clear by stating that:

in the Unitary State of the Republic of Indonesia the right to review a law and its executive regulation against the Constitution is not awarded to the Supreme Court as its main function. Should judicial review be awarded to the Supreme Court, this should be done by amendment to the Constitution.⁹

Again, the position of judges may be prejudiced when their mode of appointment and dismissal is considered. In accordance with Article 31 of the law, judges are to be appointed and dismissed by the President alone without further consultation with or approval by either the legislature or the judiciary itself.

8 Law 14/1970 Article 10.

9 Elucidation Law 14/1970, Article 26.

Two additional examples of the judiciary's weakened legal position may also be cited. First, Article 25 of the law provides that State bodies may request the courts to provide them with information, counsel and advice on legal matters. This is more in the nature of a bureaucratic rather than a judicial function. Secondly, it is a consistent feature of the legislation that many important aspects relating to the exercise of judicial power including matters concerning judicial promotion, salary, pensions and allowances are left for elaboration either to other laws or to regulation. This creates the possibility that judges may be influenced during their tenure by governmental alterations to their terms and conditions of office and such alterations may be effected not only by primary but also in subordinate legislation.

That such influence may be brought to bear in a manner inconsistent with common understandings of judicial independence is made clear when one considers the provisions contained in the second major law with respect to the judiciary, *Law 2/1986 Concerning the General Judicial System*. This law elaborates the provisions of *Law 14/1970* and has as its primary task the specification of the jurisdiction of the various Courts in the Indonesian judicial hierarchy and the delineation of their method of administration.

Article 3 of *Law 2/1986* provides that the Supreme Court shall be the highest State court and shall exercise judicial power. In doing so it acts in a supervisory capacity over the High Courts and District Courts within the General Judicial System. Article 5, however, provides that organisational, administrative and financial supervision of the courts in the General Judicial System shall vest in the Minister of Justice. In practice, this means that the Minister of Justice assumes responsibility for all matters concerning the promotion, demotion, transfer and remuneration of judges and for the capital and recurrent budgets of the Supreme, High and District Courts respectively. The Minister's power is therefore a substantial one and may be exercised in a manner which contradicts accepted conventions of judicial autonomy.

That this autonomy is at best contingent is made clear also in the provisions of the law with respect to appointment to judicial office. Article 16 elaborates upon Article 31 of *Law 14/1970* by providing that:

16. A judge of a Court is appointed and discharged by the President in his capacity as Head of State on the proposal of the Minister of Justice and based on consultation with the Chief Justice of the Supreme Court.

Thus, appointment and dismissal are placed entirely in the hands of the executive albeit that there is a requirement for consultation with the Chief Justice of the Supreme Court as the head of the judicial branch. That such consultation may be formal at best is illustrated by the fact that for most of the period of the New Order government all three senior judicial posts concerned in the appointment process were held continuously by former or existing officers of the military forces. We shall return to this theme presently.

The judiciary's somewhat compromised position is further entrenched by the provisions of the law concerning qualification for appointment. Articles 14-15 set down the qualifications for appointment to the District and High Courts. To be appointed, a judge must be an Indonesian national; devoted to God Almighty; loyal to Pancasila; a lawyer; a civil servant; and be of honest, just and good behaviour.¹⁰ In this context, the Elucidation to the Act makes it clear that:

a judge is a civil servant, which means that Law 8/1974 on the Principles Concerning Civil Servant is applicable to him. Accordingly, the Minister of Justice is obliged to supervise judges with respect to their efficiency and effectiveness in the same manner as applies to other civil servants.¹¹

On this matter, Daniel Lev has observed that:

Indonesian judges conceive themselves as *pegawai negeri*, officials, and as such, members of a bureaucratic class to which high status has always attached. One implication of the role of *pegawai negeri* is that it is patrimonially associated with political leadership, to whose will it must always be responsive. It is this, as much as anything else, that underlies the issue of judicial independence. Whatever the daily effects of the Ministry's responsibility, it is symbolically important as a reminder of the judiciary's conceptually limited authority and the direction of its loyalties.¹²

In addition, promotion within the judicial hierarchy proceeds entirely from within that hierarchy. Thus, for example, appointments to the High Court and Supreme Court within the General Judicial system can be made

¹⁰ Law 2/1986, Article 14.

¹¹ Elucidation, Law 2/1986, Article 13.

¹² D. Lev (1978) *supra* note 4, 55-56.

only from the ranks of judges in the Courts immediately below. This means that one's performance in an inferior judicial office is a core component of one's promotion to a more senior judicial office. One's decisions and general effectiveness as a judge, therefore, must be such as to be satisfactory to the Minister of Justice and the President, if one's promotion to higher courts is to be considered. Unlike many other judicial systems, there is no provision for the appointment of a judge to senior judicial office from outside the ranks of the existing judiciary, for example from the ranks of private legal practitioners whether solicitors or advocates. In short, judges' prospects for promotion rest entirely upon their ability to satisfy the Minister of Justice and President that they are suitable candidates for elevation. No further criteria for promotion, except that related to time spent in office, are legislatively specified.

To conclude this brief discussion of the legal position of judges, the question of dismissal requires delineation. Judges may be dishonourably discharged from office where they have:

- a. committed a crime;
- b. engaged in improper behaviour;
- c. neglected their duties; or
- d. violated their oath of office¹³

The definitions of improper conduct and neglect of duty in the Elucidation, however, are very vague. Improper conduct is defined as meaning that a judge, whether in court or out of court, dishonours a judge's dignity. Duty, with respect to neglect of duty, is defined simply as all duties entrusted to the judge concerned. The decision as to whether these criteria are met and whether dismissal should follow rests entirely with the Minister of Justice and the President as Head of State.

It remains only to say that the provisions with respect to appointment, dismissal, promotion, transfer and remuneration of judges in the other three branches of the judicial system: the Islamic Courts, the Administrative Courts and the Military Courts proceed on the same legislative foundation except that, for example, such questions in the Military Court are the province of the Minister of Defence rather than the Minister of Justice, and so on.

13 Law 2/1986, Article 20.

As with *Law 14/1970 on the Basic Principles of Judicial Power*, therefore, the residual influence of the Integralistic State in the *Law on the General Judicial System* may readily be perceived. The control by the Minister of Justice of appointment, promotion, transfer, dismissal and remuneration of judges remains in essence unimpeded. Indeed, in introducing the 1986 legislation into the Parliament, the then Minister of Justice, Ismail Saleh, emphasised that, in his view, the legislation should contribute to the creation of harmony between the different branches of government in resolving disputes between the government and its citizens.

B. The Mission's Observations with Respect to the Judiciary

During its visit to Indonesia, the Mission spoke with a very large number of judges, lawyers, academics and NGOs, as well as with Ministers and many senior governmental officials. It is not possible to recount the evidence received from every one of our discussants. What follows, therefore, is a systematic report of observations that Mission members made individually and collectively regarding the description and analysis of the Indonesian judiciary provided to us. Many more matters were raised with us than can be summarised here. The matters that are delineated are those to which the Mission gives credence and which, in our view, require action as part of a general reform of the judicial branch of government. The government has already indicated to the ICJ that several of the matters of concern will be the subject of reform either prior to or immediately after the upcoming general election in June 1999. The government's proposals are set down in the next section. Our specific recommendations for change are then outlined in the final section of this chapter.

During our visit, two principal issues were raised with us by almost everyone with whom we spoke. The first was the lack of independence associated with judicial decision-making. The second was the pervasiveness of judicial corruption. We deal with each of these in turn.

(a) Judicial Independence

While it is clear that the two laws with respect to the judiciary discussed previously had the effect of removing legislative provisions which permitted blatant and legislatively sanctioned interference with the judiciary,

the new legal framework has not yet been successful in removing such interference or in dealing with the central sources of judicial conformity. In this context, the most persistent complaint related to the actual and potential influence that the Minister of Justice could exercise over members of the judiciary by utilising the powers he possesses under Article 11 of the *Law 14/1970*.

As previously considered, Article 11 gives control over the organisation, administration and finance of the general judicial system to the Minister. Jurisprudential supervision remains with the Supreme Court. This bifurcation of function was the subject of vigorous criticism by almost everyone with whom the matter was discussed. The dual system of supervision provides not only the potential for governmental interference with judicial decision-making but many cases of actual interference were provided to us. Here it should be said that the most strident criticism of the Minister related generally not to the present Minister, Professor Muladi, but to actions taken by his predecessors.

The most persistent complaint we received was that the Minister of Justice had used his authority with respect to the appointment, promotion, transfer, and remuneration of judges in order to reward judges whose decisions the Minister approved and penalise those whose decisions he disapproved. In the alternative, the complaint was framed in terms of judges at all levels below the Supreme Court having been unwilling to take difficult decisions adverse to the government for fear of having their prospects for promotion and desired geographic location prejudiced by adverse Ministerial response. As one advocate told us:

Indonesia is a big country. The Minister can choose to throw judges anywhere. Most do not want to go to far flung provinces. This is a powerful disincentive to the independent exercise of judicial decision-making.

In the past, this situation had been aggravated by the extensive influence of the military in senior ministerial and judicial positions. So, for example, from the late 1970s onwards, every senior judicial position, the Office of Chief Prosecutor, the Ministry of Justice and the Presidency of the Supreme Court was occupied by retired Lieutenant Generals from the armed forces. This dominance was diminished somewhat from the early 1990s onwards but even today the Office of the Attorney-General and President of the Supreme Court are filled by former military officials.

The conflicts of interest which the dual supervision of the judiciary may create have been illustrated graphically by the trial of those expressing political dissent. As the Appendix to this report concerning the political trials of prominent activists charged with subversion illustrates, before the ascension of the Habibie administration, there was no sense in which the judges responsible for overseeing such trials had exercised their discretion independently. In fact, their discretion had been exercised at every turn in a manner prejudicial to and contemptuous of the interests of the accused (See Appendix A). That such trials were little more than elaborate charades has been given retrospective credence by the release of almost all political prisoners. We note in this regard, however, that as far as we are aware the judges who acted so reprehensibly in such cases have not yet been subject to formal inquiry or disciplinary proceedings.

Within the Indonesian administration generally, and in the judiciary in particular, issues of social status and standing are regarded as critical. Judges wear the mantle of bureaucratic privilege and not unnaturally are reluctant to disrobe. The presence of status and standing, and the monetary benefits that accompany them, when combined with the Minister's substantial powers of favour and disgrace, represent a potent combination of factors contributing to the diminution of any effective judicial autonomy.

That judicial autonomy has not yet been seriously considered by government is demonstrated, secondly by the position of the Supreme Court with respect to judicial review of legislative action. As previously outlined, the Supreme Court has not been given the power to review the constitutionality of legislation. Its powers of review are limited to determining whether regulation, other subordinate instruments or administrative action are considered to be inconsistent with the legislation under which they are made or conducted. Among those with whom we spoke, including judges, there was strong support for the Supreme Court to assume the power of constitutional review. Often, however, such support was predicated upon a more general reform of the judiciary generally and of the Supreme Court in particular.

Until recently, however, political and governmental support of constitutional review has been non-existent. There appear to be two reasons for this attitude. First, the conferral of a power of constitutional review upon the Supreme Court is regarded as inconsistent with the tenets of the Integralistic State. To accord one branch of government the jurisdiction and authority to control another, would be to incorporate in the Constitution an adversarial conception of the rule of law at odds with the idea that each

branch of government should act in cooperation and harmony with the other in the interests of the larger unity of the Indonesian State.

The second reason for the absence of support for constitutional review is that it has not been in the Indonesian government's political interests to enhance the jurisdiction and standing of the Supreme Court. In a country dedicated to the rule of law, it is judicial review by the highest court in the land which acts as the final constraint upon arbitrary government. The New Order government of President Soeharto was clearly unprepared to accept such a constraint and hence showed little if any interest in the enhancement of the Supreme Court's powers in this regard. Ministers of government have emphasised continuously that, consistent with the tenets of the Integralistic State, the Indonesian Constitution embodies not a 'separation of powers' but rather a 'division of powers.' While such a position may have some conceptual support, its political convenience has also been self-evident.

As might be expected, however, the Supreme Court itself is now enthusiastic about the possibility that it might be given the power to review the constitutionality of legislation, this despite the fact that the Court has rarely exercised its power to review the validity of subordinate legislation. Private advocates too appear to support the enhancement of the Court's authority. Their support, however, is qualified by the observation that the Supreme Court, as presently composed, has been overly compliant with governmental policy and dictate. Three examples of complicity cited frequently before us were: the Court's decision to overrule itself in the political trial of the labour leader, Dr. Mughtar Pakpahan, certain aspects of its decision reviewing the withdrawal of the magazine *Tempo's* licence to publish, and its recent decision advising the government that under the new electoral law it was beyond the power of the Electoral Commission to make regulations forbidding Ministers from campaigning in the June elections.

The Court's apparent collusion with government with respect to the non-implementation of decisions having an adverse effect on the administration has also become a matter of considerable concern.¹⁴ In order for a decision of a Court to be enforced, that enforcement must be directed by the Chief Justice of the District Court in which the matter first arose. Where the Chief Justice chooses, for whatever reason, not to order a judicial decision's implementation, he or she may be directed to enforce the decision by the Supreme Court. Without this directive, the District Court

¹⁴ See S. Butt, 'Implementing Judicial Decisions' in T. Lindsey (ed.) *supra* note 2.

will not implement a decision including a decision of the Supreme Court itself. The Supreme Court appears to have used this awkward procedure to prevent cases being implemented when either its own decisions, or those of lower courts, have been contrary to the interests of the government. More specifically, the Chief Justice of the Supreme Court has employed the power he has to supervise lower courts to instruct a District Court either to delay or invalidate the implementation of the Supreme Court's own decisions. To make matters worse, on at least one occasion in the *Hanoeh Hebe Ohee Land* case in 1995, the Chief Justice of the Supreme Court had consulted with the Ministry of the Interior prior to having recommended that the decision in the case not be executed.

Thirdly, genuine judicial independence is compromised by the civil service status of Indonesia's judges. Not only does the governing legislation make it explicit that judges are civil servants and are, therefore, to be subject to the same reviews of their effectiveness and efficiency as ordinary civil servants, but judges are also required to become members of an association of civil servants (KORPRI). The head of this organisation is the Minister for Home Affairs. By virtue of that membership they constrain the breadth of their judicial discretion by reference to the rules of the relevant association.

Speaking generally, judges appear to take it for granted that they are bound, like the rest of the administration, to the purposes of executive leadership. Their acceptance of this leadership and the direction that it implies results in their receipt of bureaucratic privilege and reward. The exercise of independent discretion, particularly where this involves the legal interests of the government itself, may equally result in a loss of standing and the institution of well established bureaucratic sanctions.

That judges derive the source of their authority from a bureaucratic rather than judicial source does much to explain the antagonistic relationship between the judiciary and the private bar, particularly as that antagonism has been revealed in the trial of political dissidents.¹⁵ It is unsurprising that judges, whose understanding of themselves is principally as the employees of government, resent the independence of private advocates particularly when such advocates are involved in making accusations with respect to judicial bias, incompetence and corruption. There is a sense in which the lack of tolerance of private advocates, so amply demonstrated in political trials, is a reflection of a broader judicial attitude that advocates represent a

15 See D. Lev, 'Between State and Society: Professional Lawyers and Reform in Indonesia' in T. Lindsey (ed.), *supra* note 2.

private intrusion upon the space of public authority. The harmony that integrated public authority may provide is constantly under the threat of disintegration at the hands of advocates schooled in the adversarial mode of presentation and bent upon the reinterpretation of laws and procedures that might otherwise present a settled, if flawed, foundation for the resolution of legal disputes. Staged political trials, which provide the most potent and public forum within which defendants and their advocates may challenge the existing paradigm of public control and governmental repression. They represent therefore not only a threat to existing understandings of the law but to the carefully cultivated, bureaucratically conferred privileges and status of the presiding judges themselves.

Here we note in passing that one of the most formidable obstacles to the reform of the Indonesian judiciary is likely to be the enculturated attitudes of many judges themselves. Having been reared in a system which has conferred considerable benefits upon them, and having become used to the conduct of legal proceedings and the exercise of judicial discretion in a manner which is calculated to maximise such benefit, it is understandable that the desire for reform of the judicial system among judges is likely to be muted at best. This is not to say that there are no advocates for reform within the ranks of the judiciary. We met and admired several. But the general sentiment within the judiciary with respect to a reformation of the courts would appear to be neutral if not antagonistic. As one leading advocate said to us:

Suppose there is in government a will to alter the balance of power. There is no such intention among the judges. They accept the situation as it is. They are used to it. It is to their personal advantage. You should not be surprised that most will support the existing holders of power.

The independence of the Indonesian judiciary is weakened, fourth, by the absence of effective accountability. At present, judges are accountable principally to the Minister of Justice and, through him or her, to the President. Jurisprudential accountability to the Supreme Court may at best be regarded as weak. From time to time there have been suggestions that a Judicial Commission should be established, independent of government, with the specific task of providing a forum in which complaints against the judiciary may be heard and where judicial performance may be monitored and assessed. But the proposal has received scant support from the executive branch. Judicial discipline, apart from that exercised by the Minister, appears to be non-existent. A statutory code of ethics for judges, and indeed for lawyers, is absent. Yet without such an enforceable code of

proper behaviour, abuses of judicial power, in particular those that relate to corruption, appear destined to continue. It is to the issue of corruption that we now turn.

(b) Judicial Corruption

Judicial corruption is by its nature a clandestine and conspiratorial crime. Its nature and extent are difficult to gauge since its participants are unlikely to advertise their complicity. Yet almost everyone with whom we spoke, including some judges themselves, acknowledged the existence of widespread corruption within the Indonesian judiciary. It is on this basis that we regard the matter seriously. The general view of the problem has been summarised recently by a prominent human rights advocate, Dr. Todung Mulya Lubis:

Economic commercialism breeds corruption and this remains the worst disease of the Indonesian judiciary, although they are not alone among State agencies in this regard. Judges frequently 'trade' their decisions prompting sceptics to invent cynical jokes about the judiciary... Everything is seen from a business perspective and it is no secret that the most prosperous judges live in the big cities where they can 'earn' substantial amounts to augment their relatively low salaries. The term *Mafia Pengadilan* (Court Mafia) is now commonly used to describe the activities of the Indonesian judiciary.¹⁶

Within government, views as to the prevalence of judicial corruption appear to differ. The present Minister of Justice, Professor Muladi, has accepted the existence of corruption and indicated that one of his objectives will be to minimise if not eradicate it. On the other hand, when we spoke with the Attorney General, Mr. Ghalib, he indicated to us that his Office had not received a single complaint with respect to corrupt judicial behaviour. With respect, to infer from this that judicial corruption does not exist would be to draw a mistaken and artful conclusion.

To deplore the existence of corruption alone, however, is insufficient without an exploration of its probable causes. The cause most frequently cited is that of inadequate judicial remuneration. Judicial salaries in Indonesia are very low by comparison with those drawn by similarly qualified and

16 T. Mulya Lubis, 'The Rechtsstaat and Human Rights' in T. Lindsey (ed.), *supra* note 2 at 181.

experienced professionals in the private sector. To take but one example, the salary of a judge of a High Court judge is approximately 300,000 rupiah (US\$ 330) per month. A commercial arbitrator, however, will earn approximately 700,000 rupiah (US\$ 670) per month. The income of successful private advocates can be many times higher still. To remunerate judges so poorly diminishes their standing in the general community and invites those lacking in integrity to abuse their position of authority and enrich themselves at others' expense.

We were informed of cases, for example, where judges had converted criminal proceedings to less severe civil proceedings in exchange for financial reward. Similarly, litigants had been threatened with the prospect that civil proceedings would be converted to criminal proceedings unless a secret payment was made. In another case, a judge had suggested that he may be harsher with a criminal defendant if that defendant approached a private lawyer to represent him. Similar threats had been issued to deter the calling of witnesses. In rural areas, the inducements tended to differ. So, we were told that in one instance a local District Court judge had sought to trade one defendant's freedom for four new tyres for his car. At the other end of the spectrum we were informed that judges in major commercial cases had requested a payments of up to US\$500,000 in exchange for a favourable decision. We are, of course, unable to confirm the veracity of any of these examples. Nevertheless, we are prepared to accept that they are characteristic of a wider problem of corruption of which we were most strongly and persistently made aware.

Secondly, corruption within the ranks of the judiciary, as well as amongst prosecutors and private lawyers, will tend to have a self-perpetuating effect. Once it is accepted that bribery has become a characteristic feature of the judicial process and that not to participate in the provision of financial rewards and inducements will be to disadvantage oneself as well as those whose interests one represents, a culture of deceit and conspiracy may develop. It now appears as if just such a culture is present in Indonesian legal and judicial circles. As one informed observer remarked:

We are all corrupted, in business, the media, government and the judiciary. It is sad but that is the point at which we have arrived. Unfortunately judicial corruption is perhaps the worst and is corrosive of the fabric of our society. Favourable judicial decisions depend upon the payment of money, this is a matter of custom and habit. Judges live luxuriously on their informal salary. Lawyers too have their luxury cars and false registration papers.

To rectify this problem we need strong governmental commitment. Our historical task is the regeneration of democracy. But governments wish to govern again and I fear that they will not support the measures that are required.

Many of our discussants expressed scepticism with regard to the willingness of government to address the issue of corruption. Corruption, they believed, was characteristic of every level of government from the street level to the Presidential palace. Symbolically, we were told, it was highly unlikely that corruption would be prosecuted adequately unless and until charges of corruption were brought against former President Soeharto and his family. We make no comment on the appropriateness of such action except to note that the first charges of corruption against one of General Soeharto's sons were brought during the course of our visit to Jakarta. The fairness and independence with which such charges are dealt will provide an acid test of the judiciary's commitment to judicial reformation. The case will, in addition, be of considerable interest to the international legal community.

It is apparent that while corruption remains rife in juridical life, the effective independence of judges and lawyers will continuously and insidiously be undermined. The eradication of corruption and the prosecution of its practitioners will be one of the great challenges of the political leadership that emerges following the June election. In the meantime, an attitude of despair with respect to the problem remains widespread. As another of our interlocutors described the matter:

The state of the judiciary is a major disaster of the New Order government. Yes, it provided us with temporary economic well-being. But it failed to provide us with a single good judge...In my view, our judges can have no self-respect. In fact they are an insult to our humanity.

C. The Government's Proposals for the Reform of the Judiciary

The Habibie administration has not been unmindful of the problems that exist with respect to the observance of the rule of law in Indonesia. In its first few months the administration has announced major changes to the parliamentary and judicial branches of government. These changes have been designed to democratise Indonesian government. And, within that

framework, measures to reform the judiciary have occupied an important place. In this section, we outline what we understand to be the government's principal initiatives in this regard. We were privileged during our visit to meet with President Habibie, the Minister of Justice, Professor Muladi, the Attorney-General, Mr. Ghalib, and their senior officials. These discussions were invaluable in providing us with information and insight with respect to the programme of legal reform that the administration had set in place.

In his inaugural speech to the People's Assembly, President Habibie, made it clear that his government placed great weight on the rule of law. The observance of the rule of law was a central tenet of his administration's platform for reformation:

Honestly, we must admit that one of the causes of the current crisis is that the rules of law were often disregarded be they in the political, economic or sociocultural domain. The law was often used as an instrument of power which deviated from the goal of enforcing justice and creating welfare for the sake of the people.

Therefore, the reform of the law should directed to making the law authoritative, both as a means of creating order and of realising a just and prosperous Indonesian society based on Pancasila.

We should try our best to realise and enforce the supremacy of the law in our activities as members of society, the nation and the State.

In this regard, we should be aware that a democratic government can only be effected if we establish the law as one of its main pillars.¹⁷

In pursuit of a more democratic, law-based State, the government has instituted widespread reform. From the perspective of the International Commission of Jurists, the most fundamental reforms relate to the creation of the preconditions for free and fair elections, to the judiciary, and for the promotion of human rights. The reforms to the electoral laws and to human rights law are discussed in other chapters of the report. In this chapter we concentrate on reforms relevant to the judiciary.

17 Speech by B.J. Habibie to the Indonesian Parliament, August 15, 1998, reproduced in the *Jakarta Post*, August 16, 1998.

In the two preceding sections, we observed that Law 14/1970 and Law 2/1986 divided the organisation and supervision of the judiciary between the Minister of Justice on the one hand and the Supreme Court on the other. This bifurcation of function permitted the Minister to interfere with judicial independence through his capacity to determine issues with respect to the appointment, dismissal, promotion, transfer and remuneration of judges. The Minister's power in this regard was viewed properly with consternation in both judicial and legal circles. In recognition of the unsatisfactory nature of these legislative arrangements, the President announced in Decree 10/1998 that this division of authority would be altered so as to make it clear that principal responsibility for the supervision of the judiciary rested with the Supreme Court rather than the Minister. The manner in which such a reform will be effected is unclear at the time of the writing of this report but, clearly, its general thrust should be applauded. We were informed by the Minister of Justice that his Ministry may still play a role in Court administration but that this role will be insulated in a manner that will ensure that his office will no longer be able to influence judicial decision-making.

It is, in our view, corrosive of judicial independence for legislative arrangements to provide, in effect, for the judiciary to exist as a branch of the executive. The creation of clear division of responsibility of the kind now being contemplated is a positive first step in strengthening judicial independence. In this regard, we were informed that the Indonesian government has sought expert advice from the United States government with respect to how such a separation of supervisory functions might best be accomplished and is itself conducting a study of 26 different countries to determine an appropriate model.

Secondly, President Habibie has announced widespread reforms designed to eradicate corruption:

It is imperative that a clean government be effected which is free from corrupt, collusive and nepotistic practices; which is accountable to the people; and which is able to render services to the community in a just and equitable manner.

We must eradicate corruption because corruption is a disease which, if not cured, will spread and damage our institutions and even undermine the foundation of the social order and the political system of the State...

We must develop government bureaucracy into an organisation which refers to the execution of efficient governance and to the

provision of services which really satisfy the need of society, free from intervention and political influence.¹⁸

We were deeply concerned to hear that corruption in the Indonesian judiciary appeared to be widespread. No one can have faith that a country is governed under the rule of law when judicial decisions are traded for cash. In response to the cancer of corruption the Habibie administration has announced that laws with respect to corruption will be reformed in order to strengthen the administration's capacity to uncover corrupt activity in whatever branch of government it may occur, prosecute its perpetrators and recover the moneys illegally obtained. Anti-corruption agencies will be reorganised so as to ensure more effective investigation and coordination and priority will be given to speedy hearings of corruption allegations in the courts. While these measures apply across government, they will clearly be of relevance to the discovery and prosecution of criminal activity amongst the judiciary.

In addition, the Minister of Justice informed us that he will be introducing legislation to establish a parliamentary commission on corruption. This parliamentary commission will investigate the phenomenon of corruption wherever it exists and report to parliament on the measures required to combat it. The commission will have a sub-division devoted directly to the investigation of corruption amongst judges and lawyers. The Minister indicated that it would have the power to subpoena witnesses, to conduct audits of judges and investigate corruption by related third parties. It will have a membership going wider than members of parliament to include retired judges, intellectuals and related professional experts. Where there appears to be a *prima facie* case of corrupt activity in the judicial branch, the commission will have the power to refer the case to the Attorney General for prosecution.

That such a commission is to be established is not widely known and legislation to bring it into being has not yet been introduced. Nevertheless, the intention to introduce such a commission and provide it with effective power to clean up corrupt activity, particularly in the judiciary, is to be welcomed. We note only in this regard that institutions designed to eradicate corruption will only be as effective as the commitment of their members allows. Without a clear resolve to eliminate the problem, more coordinated institutional arrangements will be of little value. In this regard, there is clearly a problem where those responsible for the investigation and prosecution

18 B.J. Habibie, *ibid.*

of corruption have themselves formed part of the very regime in which it has developed as a culture. The importance, then, of appointing investigators, prosecutors and judges who have been and are independent of the prior administration cannot be underestimated. That such independence should characterise the Attorney-General's Office is particularly critical in this respect.

D. The Mission's Recommendations with Respect to the Creation of an Independent and Effective Judiciary

In this final section, we outline our principal recommendations for the reform of the judiciary in Indonesia. As befits our charter, we confine ourselves to recommendations which are designed to enhance the rule of law by effecting judicial independence. Judicial independence may be compromised both by government interference with the independent exercise of judicial discretion and by the erosion of judicial ethics and standards through bribery and corruption. Our recommendations deal with each of these vices.

In setting forth these proposals, however, we are mindful of the fact that Indonesia's constitutional doctrines are not necessarily the same as those in other countries and, therefore, that the institutions, structures and practices through which the supremacy of the law is to be established will properly differ in Indonesia according to its national conditions and requirements. In particular, we note that there need not necessarily be a conflict between the principles of the Integralistic State and the creation of a *Rechstaat*. While it is in our view imperative for the creation of a *Rechstaat* that the judiciary be given the standing and jurisdiction independently to assess the legality of executive and legislative action, there appears to be no reason why the values of harmony, order, conciliation and cooperation cannot be built into a *Rechstaat's* operation. The desire should be to take the best from each system and to combine them to create a judiciary that is courageous and autonomous while instituting procedures which will seek first to resolve disputes through an effective process of dialogue, negotiation and mediation between government and its citizens.

Our recommendations are couched deliberately in somewhat general terms in recognition of the fact that room must be made for the new Government of Indonesia to build the rule of law on Indonesian foundations

and in a manner consistent with Indonesian culture and legal tradition. Respect for the distinctiveness of nations demands no less. The reasons underpinning each recommendation have been kept brief since the recommendations themselves follow logically from and incorporate much of the preceding discussion.

Recommendation I

We recommend that a Constitutional Court of Indonesia be established whose purpose will be to review the constitutionality of legislation, regulations, other subordinate legislation and executive action. The Court should also act as the final forum for the resolution of human rights complaints.

The International Commission of Jurists endorses the view, elaborated by President Habibie and his Ministers, that the supremacy of law should underpin the operation of the Indonesian State. In order to entrench the supremacy of law it is imperative that the courts rather than the executive or the legislature be empowered to act as final arbiters of the legality of statute, regulation and administration. In order to ensure the supremacy of the law, therefore, an effective separation between legislature, executive and judiciary must be created. The judicial branch of Indonesian government must be accorded the power of judicial review.

The power of judicial review may be vested either in the Supreme Court of a country, as for example, in the United States, Canada, Australia and New Zealand or may be reposed in a specially constituted Constitutional Court. In countries which have experienced a sharp transition from authoritarian to democratic rule, it is the model of the Constitutional Court that has generally been preferred. Thus, for example, Constitutional Courts have been established in Germany and Austria following the Second World War, in the Czech Republic, Hungary, Slovakia, Poland, Slovenia and many other Central and Eastern European countries following the revolutions of 1989 and more recently in South Africa after the defeat of *Apartheid*.

The adoption of the Constitutional Court model enables a newly democratic nation to invest its confidence in a newly created, genuinely independent court given specific responsibility for guarding the Constitution. Where, as in Indonesia, there is some doubt about the capacity of the existing Supreme Court to rise to the challenge of constitutional review, the formation of a new court staffed by judges whose integrity, courage and independence cannot be questioned, provides an effective and efficient

means of re-establishing trust at the highest level of the judicial branch and encouraging the development of a new, broader and more principled view of national constitutionalism.

For the same reasons, many newly democratic nations have reposed the final power to determine human rights disputes with a Constitutional Court. Where in the past, human rights disputes between citizens and government have been capable of resolution only at the behest of the executive with the assistance of a compliant judiciary, it is unsurprising that society's confidence in and respect for the judiciary is diminished substantially. The creation of new court of high standing before which disputes incapable of resolution before either the lower courts or the Human Rights Commission may be brought, has proven a constructive and successful step in the re-establishment of judicial integrity and societal confidence.

Recommendation 2

We recommend that the Supreme Court of Indonesia and the new Constitutional Court of Indonesia be accorded the constitutional power to execute their own decisions.

At present, the decisions of the highest court in the land cannot be executed except by the Chief Judge of the District in which the original matter was initiated. This somewhat unusual situation creates considerable uncertainty amongst litigants and has provided the mechanism through which the Supreme Court, under an assumed power of recommendation, may undermine the effect of its own decisions and the decisions of the courts below. To provide the Supreme Court and the Constitutional Court, as well as the court of first instance, with the power to execute their own decisions will not only have the effect of creating greater certainty with respect to the outcome of litigation. It will also have the incidental effects of enhancing the authority of courts of final jurisdiction and increasing their accountability by making it clear that responsibility for the execution of decisions is imposed directly upon the courts in which final judgments are rendered.

Recommendation 3

We recommend that in both the Supreme Court and the Constitutional Court a special leave procedure be implemented in which the Courts will have the ability to determine which matters they should hear. Further, in order that special leave

to appeal be granted, we recommend that it should be made a condition that the parties to a dispute have engaged in a process of compulsory conciliation.

This recommendation is a reflection of our view that dialogue, mediation and a willingness to cooperate, so characteristic of Indonesian legal theory, be incorporated into new judicial procedures in the State under law. Clearly, conciliation will not be appropriate in every case that comes before the highest courts for determination. Before the Constitutional Court for example, where there is a request for abstract review of the Constitution there is technically no dispute to be resolved. However, where, as in human rights complaints or administrative litigation, the government is the defendant, special procedures to settle a matter prior to final hearing might constructively be implemented. Not only will court-sponsored mediation provide a final opportunity for government and citizen to resolve their differences but the costs of mediation to the parties and the state may be considerably diminished.

Clearly, this recommendation will require the retraining of judges or, in the alternative, the employment of private mediators. In order to facilitate the transition from rulers' law to the rule of law, however, additional legal education and the injection of new capabilities into the judicial system should be both undertaken and welcome.

Recommendation 4

We recommend that a clear division of responsibility for the judiciary be created between the Ministry of Justice, on the one hand, and the Constitutional and Supreme Courts on the other. This division should be effected on the basis that the executive, of which the Ministry of Justice is a part, shall not assume responsibility for the judiciary in any manner which would enable it to interfere with the independent exercise of judicial discretion.

The principle as stated in this recommendation is designed to eradicate the influence that the Minister of Justice directly and the President indirectly have exercised in the past to the detriment of judicial autonomy. The recommendation also proceeds in accordance with plans for such a separation between executive and judiciary that have now been announced by the present administration. It is stated in terms which are sufficiently general to permit the incoming government to adopt a model that will effect the general principle while taking into consideration and reflecting Indonesian legal doctrine and institutional arrangements.

It follows from this recommendation that Ministers responsible for other divisions of the General Judicial System, for example the Minister for Defence in relation to the Military Courts, should also be deprived of the power to exercise any influence over judicial decision-making. Such responsibility as Ministers have should be confined purely to the administrative operation of the court system.

Perhaps the best way to ensure the desired separation would be through the establishment of a Supreme Judicial Council, consisting of representatives of judges, lawyers and leading academics, whose task would be to oversee the work of the judiciary, and make recommendations to government with respect to its operation, budgets and reform. A Council of this kind operates in Italy and may provide an appropriate model.

Recommendation 5

We recommend that the Law with Respect to the Basic Principles of Judicial Power should be amended to provide that candidates for judicial office should be appointed by the President upon the recommendation of a properly constituted Judicial Commission. The Commission should be comprised of members of the judiciary and of organisations representing the private legal profession whether as solicitors or advocates.

Further, we recommend that the Law be amended to provide that judges should not be capable of removal from judicial office except by a two-thirds vote of all sitting members of the Parliament following a finding of serious judicial misbehaviour.

Under the present statutory scheme, judges are appointed by the President and can only be dismissed by the President. In practice, the President makes appointments and initiates dismissals on the recommendation of the Minister of Justice and in consultation with the Chief Justice of the Supreme Court. This method of appointment and dismissal, in our view, undermines the independence of the judiciary by making judges altogether too dependent on the holder of Presidential office. While it is not uncommon for a judges to appointed by the Head of State, such appointments are usually made following wide process of consultation with relevant legal interest groups. In this case we believe that appointments should be made upon the recommendation of a Judicial Commission comprising judges and lawyers. A similar system is in place in the Philippines and appears to work well in that country.

It is most uncommon to provide that judges should be capable of dismissal at the behest of the Head of State. To do so opens the possibility that judges may be dismissed at the whim of the President whenever they make decisions contrary to the government's interests. It is for that reason that security of judicial tenure is normally buttressed by institutional arrangements that judges can be dismissed only where there is bipartisan agreement that they are no longer worthy of judicial office. Bi-partisanship, in turn, may be achieved by providing that judges can only be dismissed with the consent of a special majority of members of the Parliament. In this instance, we recommend therefore that judges should be dismissed only when two-thirds of the members of the Parliament (DPR) are in agreement with that course.

Recommendation 6

The Law with Respect to the Basic Principles of Judicial Power and the Law with Respect to the General Judicial System should be amended to make it clear that judges are no longer to be regarded as civil servants.

Existing Indonesian legislation provides that judges are to be considered as civil servants and as such are to be monitored and supervised in a manner identical to that established and devised for civil servants. The designation of judges as civil servants, however, serves to reinforce and perpetuate the view that they are responsible ultimately to their Minister rather than to the law. Such an attitude, indeed such a culture, can only detract from the free and fair exercise of judicial discretion. It may also contribute to an unwillingness among capable young lawyers to assume the mantle of judicial office to the detriment of the quality of judicial decision-making as a whole.

Recommendation 7

We recommend that the Law Concerning the Basic Principles of Judicial Power be amended to provide that appointments to the judiciary at every level be open to candidates not only from within the judiciary itself but also to qualified lawyers in the private profession and academics with particular talents and expertise.

At present, appointment to senior judicial office is dependent upon a candidate having been appointed to junior judicial office and is subject to an assessment by the Ministry of Justice as to satisfactory performance in that position. While such a system is not uncommon in countries having a civil

law tradition, its perpetuation in Indonesia is likely to retard the reform of the judiciary and retard the development of a culture of independence among Indonesia's judges.

To restrict judicial appointments only to the existing pool of Indonesian judges is calculated to deprive the judiciary and the country of the opportunity to install highly competent and independently minded legal practitioners in judicial office. The contribution such private and academic practitioners could make to the restoration of respect for judicial office is likely to be very considerable. Their participation in the steady alteration of existing attitudes of careerism and compliance should also prove enormously worthwhile. Further, the appointment of strong, well-qualified and independently minded external candidates makes it less likely that some future attempt by an unprincipled government to influence the tenor of judicial decision making will be successful. Finally it goes without saying that to appoint new judges of the Constitutional Court from the existing ranks of judicial office-holders is likely entirely to defeat the purpose of the reform.

Recommendation 8

We recommend that an Independent Investigatory Commission be established to inquire into the nature and extent of judicial corruption in Indonesia and to make recommendations for the reform of the judiciary to ensure its eradication.

As indicated in our previous discussion, we regard the problem of corruption in the judiciary with grave concern. Because of this we endorse strongly the measures announced recently by the President and the Minister of Justice to combat it. To strengthen the laws against corruption, wherever it occurs, and to establish a parliamentary commission to investigate corruption are welcome reforms. We do not believe, however, that they go far enough to eradicate the problem in the judiciary in the medium to long term. Given the alleged pervasiveness of this collusive behaviour and the culture of criminality it appears to have engendered, we believe that the establishment of an independent commission to explore every aspect and manifestation of judicial misbehaviour is required. Once the commission has completed its inquiries, it should make recommendations for the reform of the judiciary to ensure that the culture of corruption is attacked and then terminated. Further, where there appears to be sufficient evidence to found criminal proceedings against judges that are corrupt, the commission should institute their prosecution.

The establishment of such a commission, comprised of judges, lawyers, and independent citizens, will communicate to judicial office-holders that corruption in judicial ranks cannot be tolerated and will be pursued no matter when it was engaged in. The judicial commission should be armed with complete and effective powers of investigation and should, through an independent prosecutorial arm, be given the authority to launch prosecutions against alleged malfeasors in the ordinary courts of the land. It should also be required to report to the parliament upon its activities and investigations and should be permitted to introduce special reports into the parliament whenever it deems it appropriate to do so.

Recommendation 9

We recommend that an inquiry be launched into the nature and level of judicial remuneration with a view to establishing a regime of remuneration that will provide adequate salaries, pensions and allowances for judges according to their standing, qualifications and professional abilities.

It follows from our preceding discussion that we regard the inadequate remuneration of judges as an important factor contributing to but not excusing judicial corruption. For this reason, and to attract new, highly skilled and properly motivated candidates for judicial office, we believe that an inquiry into the terms and conditions of judicial employment should be established to recommend new and more appropriate levels of pay and allowances.

Recommendation 10

We recommend that new legislation be introduced to regulate the private legal profession the primary purposes of which shall be to ensure that members of the profession are properly qualified, that they are subject to a code of professional ethics, that they are subject to disciplinary proceedings in cases where there have been breaches of professional ethics and that the profession shall operate free from interference by the Executive branch of government.

To be truly independent, the judiciary must be capable of being held to account. One of the most important preconditions for accountability in any nation is the existence of a independent and forthright legal profession. In Indonesia, the development of an active and interested private legal profession has been slow. In part this has been because the opportunities for

individuals to become qualified as and then to practise as private legal practitioners have been limited by economic and social circumstance. In part, however, it has also been because both government and judiciary have seen the growth of an independent and critical profession as a threat to their interests. This, in turn, has led to regrettable attempts to control and divide the profession to the detriment of the healthy evolution of the legal system as a whole.

At the same time, however, as the Minister of Justice among others pointed out, the private legal profession is not free from corruption and malfeasance and for that reason requires regulation in the wider public interest. We agree that legal regulation for this reason is appropriate.

In the same way, therefore, that we have recommended that judges should be subject to an enforceable code of ethics concerning judicial practice, we propose that the private legal profession similarly should be subject to a code of professional practice appropriate to Indonesian conditions. The code should be enforceable and a properly and independently constituted disciplinary body should be established to hear and determine complaints of professional malpractice.

The *quid pro quo* for this, however, should be that the government itself should take no further interest and pursue no further involvement in professional regulation. Apart from the passing legislation embodying the professional code and establishing an independent review body, the government should not be permitted to enter directly into the affairs of the private legal profession beyond, of course, the expression of legitimate criticism. Once the independence of the profession is secured in legislation it can reasonably be expected that the profession itself will become an active and vocal advocate of judicial propriety. This may not make the lives of judges easier, but it is likely to result through perpetual scrutiny in their decisions being more just and independent.

Conclusion

It will be apparent that the thrust of our recommendations is directed at ensuring that in a newly democratic Indonesia, the supremacy of law will be accorded a central respect and that the judiciary shall take its place as the guardian of the law whether embedded constitutionally or in statute.

Plainly, the recommendations will require the new Indonesian government to embrace the concept of the *Rechtsstaat* to a greater extent than previously. As we have argued, however, this need not be to the exclusion of notions of the Integralistic State but this latter conception will, necessarily, assume a less prominent position.

We believe that this alteration in perspective is now justified given the degree to which it is apparent that the principles of the Integralistic State have been manipulated to justify the exercise of untrammelled political power at the cost of respect for the law. Under both the Soekarno and Soeharto regimes, the doctrines accompanying the idea of the Integralistic State were pressed into the service of baser political objectives. Given Indonesia's new commitment to democratisation, therefore, we believe it appropriate to adjust the doctrinal balance. As Todung Mulya Lubis put the matter recently:

Ultimately, the human rights of citizens are defended not by the words of the Constitution but by the institutions of the process of law and the right to association which enables citizens to insist that these institutions function as they are intended...

This has not been the case in Indonesia. While there appears to be no problem concerning the constitutionality of *Rechtsstaat*, its implementation remains doubtful. Soeharto's government held to a narrow interpretation of *Rechtsstaat* and rendered it subordinate to the larger concept of *integralistic staatsidee*, reemergent under the New Order despite its formal defeat in 1945. The notions of checks and balances, separation of powers, independence of the judiciary, due process of law and judicial review - vital foundations of *Rechtsstaat* - have not been highly regarded in the house of *integralistic staatsidee*... Human rights guarantees are, therefore, situated in an unfavourable environment and are virtually incapable of enforcement in practice.¹⁹

It is towards the rectification of this balance and the more effective protection of human rights that the recommendations in this chapter have been directed.

19 T. Mulya Lubis, 'The *Rechtsstaat* and Human Rights' in T. Lindsey (ed.), *supra* note 2.

Chapter IV

Democratic Elections

It is now universally acknowledged by all sectors of Indonesian society, including government, that elections in Indonesia conducted after the coup of 1965 were neither free, fair nor democratic. Electoral structures and procedures were designed to produce one predetermined result: the dominance of the GOLKAR Party which was the vehicle for President Soeharto's authoritarian rule.

To signal a shift towards political democracy, early elections have now been called by President Habibie. These elections take place on 7 June 1999. The objective is for members of Parliament and the President to be elected in free, fair and open political contests. Those who would henceforth govern Indonesia will, therefore, have a real popular mandate.

While scepticism and reservations about the fairness of the elections have been expressed by some leaders of the opposition and non-governmental organisations, the prevailing sentiment appears to be in favour of electoral participation. It appears likely, however, that the provinces of Aceh and East Timor may constitute notable exceptions.

The credibility of the 1999 parliamentary and presidential elections will, therefore, be critical in determining the seriousness with which the new government is committed to reform.

In the view of the mission, the election in all its phases must be conducted without the control and manipulation of the past. The elections must be orderly and credible. The rules about election must be clear, timely and widely publicised. The various participants – voters, candidates, political parties, observer and monitoring groups, the official electoral bodies, the government ministries, the military, and the courts – must understand their rights and obligations under these rules. These rights and obligations must be implemented properly and efficiently on the ground. The results of the elections must be known quickly and the process of determining the winning parties or candidates should be understood widely among the general public. It is in relation to these basic criteria that the adequacy and success of Indonesia's new election law should be assessed.

To govern the elections of 1999, the *General Election Law*¹ was enacted. The essential provisions of this legislation are as follows:

The President is in charge of the General Election.² The General Election is implemented by a free and independent National Election Commission (KPU) composed of representatives of all endorsed political parties and the government itself. The Election Commission reports to the President.³ There are forty-eight (48) representatives of political parties and five (5) from government in the KPU.⁴ The government representatives have the same number of votes as the representatives of all political parties combined.⁵ Operating under the KPU are the Indonesian Election Committee or the PPI⁶, the Provincial Electoral Commission or the PPDI⁷, the Regency Electoral Commission or PPD⁸, the District Electoral Commission or the PPK⁹ and the Votes Collection Committee or the PPS¹⁰ and the Poll Workers Group or the KPSSI0-A. The PPI, PPDI, PPDII and PPK are assisted by a secretarial whose officers are assigned and terminated respectively by the President¹¹, the Minister of Home Affairs, the Governor and the Regent or Mayor¹².

The Voters Collection Committee is responsible for the registration of voters.¹³ It also determines the number and location of polling stations.¹⁴

An Observing Commission is organised at the national, provincial, regency/municipality and district levels.¹⁵ The organisation of the commission at different levels is determined by the Supreme Court, the head of the

1 Law No. 3 of 1999.

2 Art. 8 1).

3 Art. 8 2).

4 Art. 9 1).

5 Art. 9 2).

6 Art. 10 c); Art. 11, Art. 13.

7 Art. 13 a); Art. 14, Art. 15.

8 Art. 15 a); Art. 16, Art. 17.

9 Art. 17 a); Art. 18, Art. 19.

10 Art. 19 a), Art. 21.

11 Art. 9 10).

12 Art. 20.

13 Art. 22 d).

14 Art. 51.

15 Art. 24 (1) and (2).

Appellate Court, and the head of the Court of First Instance, respectively.¹⁶ The Observing Commission observes all phases of the election process and settles disputes arising in the elections.¹⁷

Election monitoring groups, domestic or foreign, are authorised to monitor elections under rules drawn up by the KPU.¹⁸

Voter registration can be made in two ways: a voter goes to register in a specified location¹⁹ or in villages, sub-districts or transmigration resettlement units where registration centres are not geographically accessible to voters or there is public apathy to registration, the PPS shall actively go to the voters to register them.²⁰ There is provision for overseas registration.²¹ It is not clear from the text whether registration centres are the same as polling stations.

Temporary, permanent and additional registers of voters are provided for. Copies of all must be provided to all participating political parties.²²

Participation by political parties in elections is regulated.²³

Qualifications and disqualifications of candidates are prescribed,²⁴ and the procedure for filing of candidacy is laid out.²⁵ The mechanics and schedule of election campaign are regulated by KPU.²⁶

Votes casting and collection are carried out in accordance with regulations issued by KPU.²⁷ Procedure for counting and reporting the results of the vote from the polling stations to the national level are spelled out in detail.²⁸ At all levels, contesting political parties have the right to be present and to sign the statement of the polls and statement of the count.

16 Art. 24 (5).

17 Art. 26.

18 Art. 27.

19 Art. 32 2).

20 Art. 32 3).

21 Art. 35.

22 Art. 38.

23 Art. 39.

24 Art. 43.

25 Art. 44.

26 Art. 46.

27 Art. 53.

28 Art. 57-65.

The Indonesian Armed Forces (ABRI) continues to have thirty-eight (38) automatic seats in parliament. This number is a considerable reduction from the present seventy-five (75). However, it constitutes a continuing deviation from the democratic principle that representatives of the people must hold office consequent to a free and open political contest. ABRI also has 10% automatic membership in the Provincial-Level Peoples' Council and the District Level Peoples' Council. These arrangements are said by the military to be transitional.

Under the terms of the General Election Law, the members of ABRI cannot vote²⁹ and cannot be voted for.³⁰ In our discussions with General Yudhoyono we were assured that the military will be neutral in the 1999 elections; will stay away from the polling centres to avoid suspicion and will simply assist the police in securing the peacefulness and security of the process.

Observations

These electoral arrangements give rise to a number of pertinent observations. These are as follows:

First, the KPU consists of 53 sitting Commissioners. Apart from the broad powers vested on it by Article 10 of the General Election Law, it also possesses significant administrative duties. Forms relating to registration of voters,³¹ absentee voting,³² the schedule for the preparation of temporary, permanent and additional registry of voters,³³ the registration of political parties,³⁴ the mechanics and procedure for candidacies,³⁵ the mechanics and schedule of the election campaign,³⁶ the date for the collection of votes,³⁷

29 Art. 30.

30 Art. 42.

31 Art. 33 (2), Art. 34 (2).

32 Art. 37 (3).

33 Art. 38 (4).

34 Art. 39 (5).

35 Art. 45.

36 Art. 46 (6).

37 Art. 503.

special marks for voters at polling stations,³⁸ the format of legal documents and tabulation of results document,³⁹ the finalisation of the counts throughout Indonesia, the official statement of the results, and the format of statement of counts,⁴⁰ the determination of winning candidates,⁴¹ the procedure to legalise winning candidates,⁴² and the formal announcement of winners⁴³ and their formal notification⁴⁴ and rules for monitoring institutions⁴⁵ are regulated by or are the responsibilities of KPU.

Moreover, the determination of the types and numbers of representatives for group representation in MPR, and the implementing procedures therefor⁴⁶ are made by the KPU. These responsibilities require quick action and round the clock attention.

A 53 member commission carries the peril of being unwieldy or being deadlocked. It would appear, therefore, that the KPU must address the problems of deadlocks, delays and inaction by designing a system that will enable it expediently to address all its responsibilities adequately and effectively. Should this be done, it would minimise confusion and frustration and raise the credibility of the election process.

Second, where implementing regulations are required, the KPU needs to enact them quickly and disseminate them as widely as possible so that the different participants including those who operate in the remote areas will know what they are. Further, the regulations need to be as clear as possible to ensure that ordinary voters will understand them.

Third, the KPU will need to wield effective control and supervision of the bodies operating under it and the flow of information, queries and instructions between them must be quick and efficient.

Fourth, the General Election Law provides that a General Election is to be conducted using a Proportional Representation Election System based on a stelsel list/ranking list. The National Democratic Institute (NDI) notes

38 Art. 55.

39 Art. 64.

40 Art. 65.

41 Art. 66.

42 Art. 69.

43 Art. 70 (2).

44 Art. 71 (2).

45 Art. 27.

46 Art. 81.

in its report of 23 February 1999, that this form of proportional representation has no close precedent or parallel anywhere else in the world. The details of how the system will work have not been adequately explained nor are they widely understood. The mission tried on many occasions to obtain a definitive explanation of how the proportional representation system would work. Somewhat disconcertingly, there were as many interpretations as there were interpreters.

Clearly, it is critical that a definitive official statement about how the voting system works should be devised and then be disseminated by the KPU in terms that are broadly comprehensible to political parties and the voters. The dissatisfaction that arises from either the perception or suspicion of electoral manipulation or fraud would thereby be minimised.

Fifth, good and credible elections start with a good and credible list of voters. In this election, registration of voters began on 5 April 1999. Two systems of registration were authorised.

In the first, the voter went to register at a specific location. As noted above, however, it is not clear whether the specified location in Art. 32(2) is the same as the polling stations in Art. 51. Even the UNFREL, which is a recognised monitoring group, did not know where these locations were for days before registration was due to begin. The lack of information may have stemmed from the fact that it was the Votes Collection Committee or the PPS located in the Sub-district/village/transmigration resettlement unit which was responsible for the establishment of appropriate and sufficient locations. Nevertheless, the KPU should, perhaps, have exercised its authority to ensure that all registration locations were communicated to every interested party.

In the second, the PPS was required to take the initiative with respect to voter registration. In inaccessible areas, it was important to make sure that registration was not conducted on a selective basis so that certain people might be excluded or included inappropriately. We were told by non-governmental election observers that in the provinces registration would be a problem because many qualified voters might not have identity cards and that the chiefs of villages who were largely identified with the ruling party must certify voters' identity before registration. This created substantial opportunities for electoral manipulation.

Sixth, while monitoring groups, domestic and international have been permitted to observe the election, at the time of writing it was unclear what their entitlements and prerogatives would be.

For the purposes of future democratic elections, the following terms of reference for domestic monitoring groups might usefully be considered:

1. The authority to conduct voter education programs. For this purpose, they must have access to the rules of the elections, especially the implementing regulations issued by the KPU.
2. The right to monitor all phases of the election from the registration of voters, and the voting, counting and proclamation process. This means presence in the registration centres, the polling stations and the counting and tabulating centres, and the right to have certified copies of the results of counting and tabulation at different levels.
3. The authority to conduct an unofficial parallel count. The documents referred to in 2) above, especially those at the polling station level, are crucial for this purpose.

Meanwhile, international monitoring groups should be given unhampered access to polling stations and counting and tabulation centres for monitoring and reporting purposes.

Seventh, the question of whether Cabinet Ministers can campaign on behalf of their party has created significant tension between the President and his Cabinet on the one hand and the KPU on the other. A more serious issue, however, is the use and dispensation for election purposes of public funds, property, equipment and the like. In our view, the use of public property for electoral purposes by the governing party of the day should be prohibited.

Further, civil servants should be free to choose candidates and political parties of their preference and should not be pressured by their governmental employers to vote or not to vote in a particular way.

The police have now been separated from the military forces. As a matter of principle, the neutral position taken by the ABRI should, therefore, extend also to members of the police forces particularly as they act as the frontline security force for the elections.

Eighth, the psychological inertia of thirty years of command society may linger. It is most important, in our view, that the KPU should stress the message that the ordinary Indonesian voter is free and that voting is an assertion of the power to determine the character of the Indonesian government and society. This will require that substantial resources be allocated to electoral publicity.

Finally, the principle of free, fair and open competition for all positions in parliament and local councils should be implemented as soon as possible. To this end, a definite timetable for phasing out the automatic membership of the ABRI in the DPR and the Provincial Level People's Council and the District Level People's Council should, in our view, be made.

Recommendations

The observations made here with respect to the election laws represent the mission's position on the electoral process at the time of writing, that is, 31 May 1999. By the time of the publication of this report, the election will have been held and much will be learnt from it in the months and years that will follow. For that reason, it is inappropriate for the ICJ to make concrete recommendations with respect to the election process at this time. Our only recommendation in this regard, therefore, is:

- 1. That the observations made with respect to the Electoral Act and the electoral process in this report be taken into consideration by the Indonesian government when evaluating the effectiveness of procedures set in place for the Indonesian election of 1999.*

Chapter V

The Observance of Human Rights

Introduction

During the Soeharto era, the Indonesian government was frequently the subject of adverse reports with respect to its human rights record. The reports of governmental agencies such as the United States State Department and non-governmental agencies such as Amnesty International and Human Rights Watch have been enormously critical of various aspects of Indonesia's human rights performance. These criticisms have focused first on repressive legislation which has the effect of silencing governmental critics, secondly on the prosecution and gaoling of such critics and thirdly upon more direct human rights abuses perpetrated by the military and police forces in quelling political protest and opposition. In this latter category the suppression of dissent, frequently by torture and death, has been of particular concern in areas such as Aceh, Irian Jaya and, worst of all, in East Timor where it appears that more than two hundred thousand people have died at the hands of occupying military forces.

It is not the purpose of this chapter to cover this ground again. The details of repression and atrocities are contained in many reports published by the agencies listed above, among others. Rather, it is our intention here to describe and assess the statutory and regulatory initiatives proposed by the new government of President Habibie to improve Indonesia's quite appalling human rights record. In the first section, therefore, we shall describe and comment upon the government's new initiatives. Then we examine the current state of legislation that, in the past, has had the effect of suppressing the peaceful expression of political opinion. Finally, we turn our attention to an analysis of the Indonesian *Criminal Procedure Code*.

The Government's New Human Rights Initiatives

The Habibie administration has launched an ambitious program of human rights related reform. Before proceeding to examine the specifics of

this program we should acknowledge three enormously important foundational measures the government has taken to advance the cause of human rights. The first is its decision to hold free and fair democratic elections, a matter discussed in our last chapter. The second is the amendment of the law with respect to political parties which has permitted a wide range of political organisations to take part for the first time in the proposed election. Thirdly, the government has repealed the law relating to the licensing of media organisations. This latter measure had produced a free press in Indonesia for the first time in decades. All three of these measures represent fundamental alterations to the structure of Indonesian political society and deserve the congratulations of the international human rights community.

The government has also announced other, more specific, initiatives that relate to and advance human rights protection. Thus, for example, it has announced that it will adjust the military's participation in the political process in order to enhance the process of democratisation. It has decided to create a more appropriate division of responsibility for courts and judges, one more consonant with the supremacy of the law and the protection of human rights. It has commissioned a review of political laws including laws with respect to demonstrations, the composition of the DPR and MPR and the structure of national regions and the election of regional representatives. Following the commission of crimes against women during the riots of May 1998, the government established a Commission for the Prevention of Violence Against Women charged with the task of producing a national program on the elimination of violence against women by 2003. It has released many political prisoners and is reviewing the cases of those who remain (see Chapter VI). It has announced a high level governmental investigation into the disappearances of political activists in the dying months of the Soeharto regime. Again, every one of these measures must be considered as a positive step towards the incorporation of human rights standards in all aspects of Indonesian political life.

Looking more specifically at the recognition of human rights in Indonesian domestic law, the government has presented a National Action Plan on Human Rights to be implemented progressively between 1998 and 2003. The principal components of the plan are as follows:

- To prepare for the ratification of relevant international human rights instruments in particular the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and other Cruel,

Inhuman or Degrading Treatment or Punishment, the International Covenant on the Elimination of all Forms of Racial Discrimination and the Convention on the Prevention and Punishment of the Crime of Genocide;

- To disseminate widely information and education with respect to human rights protection;
- To define priorities with respect to the observance and enhancement of human rights and to act in relation to those priorities; and,
- To implement the international human rights obligations incurred as the result of the ratification of the relevant international conventions.

In order to facilitate the implementation of the National Plan, the government will establish a National Committee on Human Rights to coordinate human rights planning. This Committee will be comprised of governmental and community representatives and will have overall responsibility for the implementation of the National Plan under the general supervision of the Minister of Justice.

It may not be assumed, however, that the nature of human rights protection in Indonesia will resemble that in other countries, particularly those in Western nations. The National Plan clearly sets down the principles in accordance with which human rights should be observed and upon which legislation should be based. These principles introduce elements of collectivity and responsibility which are emphasised less in the human rights conventions with which the West is familiar. Thus, for example, the preamble to the National Plan states that:

Endeavours to promote and protect human rights in Indonesia are based on principles of indivisibility, equality and recognition of prevailing national conditions. The indivisibility principle implies that civil, political, economic, social and cultural rights as well as the right to development are regarded as integral parts of a whole that cannot be broken up without diminishing each one of the components... The equality principle requires that there should be balance and harmony between individual and collective rights and between the rights of the individual and his responsibility to the community and the nation. ...Equality and harmony between freedom and responsibility are significant factors in the promotion and protection of human rights. It is commonly acknowledged that human rights are universal and the international community has also recognised and concurred that their

implementation is the duty and responsibility of States, taking fully into consideration the various value systems, culture, political systems, level of social and economic development and other relevant factors.¹

More broadly, the particular approach embodied in this statement may be considered to reflect certain cultural assumptions regarding claims of right in the Indonesian context. Following from the values which underpin adat law and the Integralistic State discussed in Chapters 1 and 3 respectively, the particular stance represented in the preamble is one that favours the elimination of conflict that may cause social tension or disruption rather than individual assertion of specific, universal rights and entitlements. Thus, personal rights may be subordinated in relations between equals in the wider interest of social harmony.

However, while one may recognise a legitimate cultural preference for the harmonious resolution of disputes between the citizen and the State, such a resolution is clearly made difficult where the State has an active interest in the achievement of a particular outcome. Hence, the equality delineated in the statement, and its underlying preference for the conciliation of rights related disputes, is likely best to be achieved where government is either uninterested in the subject matter of a dispute or is incapable of acting in relation to it. For this reason, the particular balance struck by future Indonesian human rights legislation between the State and its citizens will need to be carefully monitored in order to determine whether the harmonious resolution of rights-related disputes between the two parties provided for in law may generally be considered fair or whether instead the scales remain tipped too far in favour of those who rule. In the hands of rulers, harmony has too often been mistaken for conformity. With this caveat, however:

We recommend that the Indonesian government proceed as rapidly as possible to ratify the major international human rights conventions, to enact legislation to enable the domestic application of those conventions, and to bring existing legislation into line with the Conventions' provisions.

1 The Indonesian National Plan of Action on Human Rights 1998-2003, Preamble, Paragraph 2.

Legislation with Respect to Human Rights

While the democratic initiatives taken by the government and the particular measures contained in the National Action Plan on Human Rights are to be applauded, it would be premature to assume that Indonesia's human rights record has been rehabilitated as a result. Clearly, substantial problems still remain. In this section, therefore, we consider some examples of existing legislation which would appear to have a detrimental effect upon the free expression of political opinion. The problems identified in this legislation will require consideration and rectification as part of the new government's more general review of legislation in accordance with the obligations it assumes following the ratification of international human rights conventions.

Anti-Subversion Provisions

The Indonesian government has announced that the *Anti Subversion Law* under which many of the Soeharto government's political opponents were arrested and detained will be repealed. It will be replaced by new provisions in the Indonesian *Penal Code* the purpose of which will be to ensure that legitimate government cannot be undermined or overthrown by illegitimate political action or violence. At present, the ICJ has not been provided with the amending provisions of the Code. Here, therefore, the principal defects of the *Anti Subversion Law* will be briefly recounted in order to provide criteria for the comparison of the provisions of that law with the new offences against State security that will be set in its place.

The *Anti Subversion Law* of 1963 defined the offence of subversion in exceptionally broad terms.² Among other things subversion was said to include actions that could distort, undermine, or deviate from the official State ideology of Pancasila. It embraced actions that might otherwise destroy or undermine the power of the State. It covered actions that might disseminate feelings of hostility or arouse disturbances among the general population or broad sections of society or between the Republic of Indonesia and a friendly State.³

2 The Law on Subversion, Presidential Decree No.11/1963 incorporated in statute by Law 5/1969.

3 *Ibid.* Article 1.

The law granted exceptional powers to the military and prosecuting authorities to investigate cases and detain people suspected of subversion for up to one year without charge or trial. The one year period was renewable indefinitely. Further, individuals arrested under the law are denied procedural rights available to other defendants in accordance with the Indonesian Code of Criminal Procedure and more generally, rights accepted as imperative in international law for the purpose of effecting a fair trial. So, for example, prosecutors were given wide powers to search premises and seize material without warrant. Duties of confidentiality normally associated with the conduct of legal practice could be overridden so that lawyers could be compelled to give evidence that professional ethics might otherwise forbid. A refusal to provide such evidence could result in imprisonment.

Further, it was not necessary under the law that any of the acts complained of should actually have endangered the Indonesian Republic. Rather it was sufficient to demonstrate merely that such a consequence were possible. A person could be convicted under the law even though they did not intend the relevant consequence and were not in fact responsible for that consequence.

The penalty for subversion under the Act included the death penalty.

In light of these defects it would appear necessary that any new laws with respect to the undermining of the State should meet at least the following criteria:

- The relevant offences should be defined narrowly and with precision;
- Procedural protection for persons charged with any such offences should not differ from those available to normal criminal defendants and, given the political nature of the charge, should if anything be greater;
- The level of procedural protection should be such as to meet recognised international standards for the conduct of fair trials;
- In relation to any such offence there should be a clear requirement that the person charged should have intended the consequences of his or her actions; and
- The penalties applicable to such offences should bear a clear and close relationship to the seriousness of the offence committed in each individual case.

We note further in this regard that the existing *Penal Code* of Indonesia already includes a very extensive list of crimes against the State. These include, for example, the crimes of:

- Attempting to assassinate the President or Vice-President;
- Attempting to bring the State under foreign domination;
- Attempting to cause a revolution;
- Taking up arms against the government;
- Conspiring with others to commit any of the preceding offences;
- Theft of government documents calculated to damage the State;
- Attempting to undermine the neutrality of the Indonesian State;
- Engaging in spying; and
- Rendering assistance to the enemy in times of war.⁴

Given the breadth of coverage of these offences, and they are but a few of the more important listed in the Code, it is difficult to see what extra work the new provisions designed to replace the *Anti Subversion Law* could usefully do. Such provisions will, therefore, need to be scrutinised with great care to ensure that they are consonant with the relevant international standards concerning crimes of this nature. Therefore:

We recommend that the Anti-Subversion Law be repealed and that any consequential changes to the Indonesian Penal Code accord with the principles and criteria delineated above.

Crimes Against the Dignity of the President and Vice-President

Indonesia's *Penal Code* contains an additional series of offences against the dignity of the President and Vice-President. Like the provisions of the *Anti Subversion Law* these crimes are also cast in the widest of terms. Thus for example, Article 134 of the Code provides simply that:

Deliberate insult against the President or Vice-President which does not fall under a heavier penalty provision shall be punished by a maximum imprisonment of eight years.

It is also an offence under this part of the Code for any person to post any insult in writing or by poster. Further offences are specified with respect to insults directed at the heads of foreign governments. The term

4 Penal Code of Indonesia, Book II.

insult is never defined, no criteria in relation to its necessary gravity are specified and no gradation in the penalties applicable to it are delineated.

Here again, therefore, a statutory provision exists whose effect can be and has been to suppress any expression of disagreement with the President or Vice-President without any clear appreciation of its nature or gravity. Therefore:

We recommend that Article 134 of the Indonesian Penal Code be repealed.

Crimes Against Public Order

The Crimes against the institutions of State are supplemented by others related to the maintenance of public order. In form, these resemble those just described. So, for example, Article 154 of the *Penal Code* states that:

Any person who publicly gives expression to hostility, hatred, or contempt against the Government of Indonesia, shall be punished by a maximum term of imprisonment of seven years...

The expressions hostility, hatred or contempt are nowhere defined and consequently it is difficult to determine how serious such expressions should be in order to incur the penalty specified. The breadth of the terms leaves open the possibility that a person may be arrested and charged for expressing vigorous public disagreement with government policy. Alternatively, it may be possible for a person to be arrested and charged for having expressed vigorous criticism of the operation of governmental institutions. Such may be the case whether or not the criticism is true and whether or not there may have been a public interest in the making of the statement concerned. Further, it is difficult to see how any of the specified offences relate directly to the issue of the public order they are designed to protect. This might suggest that any such offence be qualified by a provision specifying that the statements or actions concerned must be such as to engender a reasonable likelihood of public disorder.

Article 154 is supplemented by other provisions making it an offence punishable by a lengthy term of imprisonment to violate the Indonesian flag, to publish statements of hostility, hatred or contempt or to disseminate such statements. These provisions suffer from the same defects identified above.

Article 160, in conclusion, provides that it shall be an offence to incite a person or persons to take violent action against a public authority or in any other way to disobey the lawful order of a public authority that has been

authorised either by statute or regulation. Such an offence is punishable by a maximum term of imprisonment of six years. While it is understandable that violent actions against public instrumentalities should be prohibited, the general prohibition against disobeying the lawful orders of public authorities on penalty of imprisonment would appear to be excessive and overly general. The problem of disobedience would better be dealt with by specifying penalties associated directly with the particular statute or order itself.

The examples given above constitute but a small fraction of the thirty different provisions concerning the maintenance of public order contained the relevant part of the Penal Code. Therefore:

We recommend that the Public Order Provisions of the Indonesian Penal Code be amended in order to provide a clear and narrow definition of the prohibited acts in question, that the excessive penalties contained in these provisions be moderated and that penalties be tied directly to the offence to which they relate.

The Laws with Respect to Demonstrations

Prior to the advent of the Habibie administration, freedom of assembly had been severely curtailed by the *Law on Political Activity*.⁵ This law provided that no political meeting, gathering or other similar activity could take place without an official permit. In practice, these permits were very difficult to obtain and the criteria upon which they should be provided or withheld were so broad as to confer on the relevant police authorities an unbridled discretion either to permit or refuse a permit as they deemed appropriate.

In recognition of the fact that the law was cast too widely, the new government repealed it and replaced it with a new *Law on Freedom of Expression*.⁶ The new law's stated purpose is to accord to citizens the right to freely express their opinions in public, freely and responsibly within the broader framework of prevailing legal regulation. The exercise of the freedom to express opinions in public is said to be founded upon a balance of rights and responsibilities; consultation and consensus; reasonableness; and the principle of public benefit.

The legislation defines the principal forms of the free public expression of opinion as being demonstrations, marches, public meetings and/or public

5 Law on Political Activity, Presidential Decree No.5 of 1963, incorporated in statute by Law 5/1969.

6 Law on Freedom of Expression, Law 9/1999.

assemblies. Public expressions of opinion of this kind are permitted in all public places with the exception of areas near the Presidential Palace, places of worship, military installations, hospitals, sea and airports, transport terminals and other essential national installations.

The new law retains the requirement that the police should be notified of any and every expression of public opinion as that term is defined. The notification is required 72 hours before the relevant event together with detailed information about the character of the gathering and the persons responsible for it. While the legislation does not appear to permit the police to forbid the relevant meeting or demonstrations, the police are designated as being responsible for securing its place, location and route. They are also said to be responsible for 'pacification' in order to guarantee public safety and order. Should a demonstration or meeting not comply with provisions concerning the designated location or should it not adequately take the rights and entitlements of non-participants into consideration, it may be dispersed.

Having required the identification of the organisers of demonstrations and meetings, the law then provides for criminal and other sanctions should the organisers fail to ensure that the specified event is conducted in accordance with the guidelines set down in the legislation. These include, for example, the requirement that the event be conducted peacefully, having due regard to the rights and freedoms of others and in a manner 'consistent with the protection of the unity of the people'.

Clearly, this law is a significant improvement upon its predecessor. Nevertheless, by holding the organisers of demonstrations criminally responsible for the actions of participants over whom they may, in fraught circumstances, have little control and to do so in relation to criteria that remain quite vague, is calculated to diminish the willingness of many individuals and organisations from engaging in that very public expression of political opinion the statute professes to protect. In our view, these particular provisions merit reconsideration. Therefore:

We recommend that the Law with Respect to Freedom of Expression be amended to reduce the influence of the police force to influence the nature and conduct of political demonstrations and so as not to hold the organisers of such demonstrations personally liable for the actions of demonstrators themselves.

In the next section we finally turn our attention to a consideration of the *Code of Criminal Procedure* (KUHAP).

The Code of Criminal Procedure

The Code of Criminal Procedure⁷ or KUHAP was enacted in 1981. It repealed *Het Herziene Inlandsch Reglement* which had its origins in Dutch colonial rule. Compared to the latter, the KUHAP included significant improvements: the presumption of innocence; the right to legal assistance; the right not to be subjected to pressure and intimidation during investigation; and, the right to compensation for illegal detention, arrest and/or seizure of property.⁸

But the KUHAP was a creation and instrument of the New Order. In terms of protecting human rights, it has proven to be quite inadequate. Its weaknesses have been pointed out in earlier studies.⁹ These weaknesses are either intrinsic to the provisions of the Code or are the result of the political environment in which the law operates.

In an *aide memoire* submitted by the Indonesian Permanent Mission to the United Nations in Geneva in March 1999, it is asserted that at the core of the reform movement in Indonesia "is human rights promotion and protection." In the light of this commitment, the procedures set down in KUHAP will be considered and an assessment of their consistency with international human rights standards will be made.

A detailed review of the provisions of KUHAP reveals the following features which, in our view, are inconsistent with relevant international standards.

1. Prolonged periods of detention for offences carrying a penalty of 5 years imprisonment or longer.
2. Extensive search and seizure powers without judicial warrant.
3. The absence of judicial procedure, beyond pre-trial examination, of the legality of arrest and detention.
4. The lack of a right to counsel where the penalty for an offence is less than five years imprisonment.

7 Law No. 8 of 1981.

8 Fitzpatrick, "Culture, Ideology and Human Rights: The Case of Indonesia's Code of Criminal Procedure" in *Indonesia Law and Society*, (Lindsey, ed. 1999) 339 at 344.

9 International Commission of Jurists, *Indonesia and the Rule of Law: Twenty Years of "New Order" Government* (1991); Lawyer's Committee for Human Rights, *Broken Laws, Broken Bodies: Torture and the Right to Redress in Indonesia* (1993).

5. Certain limitations on, or in some cases the total absence of, protection for the confidentiality of communications between lawyer and client especially in national security cases.
6. The accused has no right to post bail to secure provisional liberty in non-capital offences.
7. There is no rule on admissibility of coerced or illegally obtained evidence.

We now consider each of these deficits in greater detail.

Prolonged Detention

Detention is defined¹⁰ as the placement of a suspect or an accused in a designated place. The placement is initiated either by an investigator, prosecutor or judge in matters and by means regulated by law. Detention can only be ordered where the offence is liable to imprisonment for five years or more¹¹ or for certain specific crimes defined in the Criminal Code, violations of certain provisions of the Ordinance on Customs and Excise, some immigration offences; and some provisions of the Narcotics Laws.

The relevant provisions on detention in the Code are as follows:

Article 24

- (1) A warrant of detention issued by an investigator as intended by Article 20, shall be valid for at most **twenty** days.
- (2) The period of time mentioned in section (1), if necessary for purposes of an examination which is not yet completed, may be extended by a competent public prosecutor for at most forty days.

Article 25

- (1) A warrant of detention issued by a prosecutor as intended by Article 20 shall only be valid for at most twenty days.
- (2) the period of time as stated in section (1) if necessary for purposes of an examination which is not yet completed, may be extended by the head of a competent district court for at most thirty days.

¹⁰ Art. 1 21.

¹¹ Fitzpatrick, *op cit.*, at 345.

Article 26

(1) A judge of a district court who is adjudicating a case as intended by Article 84 shall have the authority, for purposes of examination, to issue a warrant of detention for at most **thirty** days.

(2) The period of time as stated in section (1), if necessary for purposes of an examination which is not yet completed, may be extended by the head of the district court concerned for at most **sixty** days.

Article 28

(1) The Supreme Court Justice who is adjudicating a case as intended by Art. 88 for purposes of an examination in cassation, shall have the authority to issue a warrant of detention for a period of at most **fifty** days.

(2) The period of time as stated in section (1), if necessary for purposes of an examination which is not yet completed, may be extended by the Chief Justice of the Supreme Court for at most sixty days.

Article 29

(1) As an exception to the periods of detention as mentioned in Article 24, Article 25, Article 26, Article 27 and Article 28, for purposes of an examination, the detention of a suspect or an accused may be extended on the basis of proper and unavoidable reasons, because:

- (a) the suspect or the accused is suffering from a serious physical or mental disturbance, as evidenced by a doctor's certificate, or
- (b) the case being examined is liable to imprisonment of nine years or more.

(2) The **extension** mentioned in section (1) shall be granted for at most thirty days and in the event such detention is still required, it may again be extended for at most thirty days.

It is evident from the text of the provisions of Art. 24 that police investigators may of their own authority issue orders of detention for twenty days. This detention may in turn be extended by a prosecutor for forty days. Without judicial intervention, therefore, a person can be detained for sixty days. With judicial concurrence under Article 29 detention may be increased to one hundred and twenty days.

While Art. 52 suggests that the accused must not be intimidated or coerced, the prospect of prolonged detention itself creates an situation of pressure and intimidation. This will be especially true of those who do not know their rights and lack the capacity to claim them. In addition, prolonged detention creates the opportunity for investigators to pressure suspects into making self-incriminating admissions.¹²

Even more importantly, however, the long detention periods constitute a severe restraint on personal liberty.

Article 3 of the Universal Declaration of Human Rights provides that "[E]veryone has the right to life, liberty and security of persons." Article 9 proscribes arbitrary arrests and detention.

Art. 9(1) of the International Covenant on Civil and Political Rights reiterates the above principles. Art. 9(3) stipulates that anyone arrested or detained on a criminal charge shall be **brought promptly before a judge** or other officer authorised by law to exercise judicial power and shall be **entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody**, but release may be subject to guarantees to appear for trial at any other stage of the judicial proceedings, and, should the occasion arise, for execution and judgment.

It is submitted that the prolonged detention of suspects and accused under KUHAP is inconsistent with the above principles of international human rights instruments. For this reason

*We recommend that the period of detention without judicial warrant be shortened at most to **thirty six hours** after which a suspect must be either charged in court or released.*

Extensive Search and Seizure Powers

As a rule, searches may be conducted only on proper warrant by the head of a local district court. However, Article 34 of the Code authorises an investigator

(1) In urgent and compelling circumstances, where an investigator must act immediately and cannot possibly first ask for a

12 Art. 33.

warrant ... the investigator may carry out a search

- a. in the yard of the house where the suspect resides, or is staying or is present and of those things which may lie thereupon;
- b. in every other place where the suspect resides, stays or is present;
- c. at the location where the offense was committed or where traces are found; and
- d. in lodging or other public places.

The only limitation placed upon this power to search is that an investigator is not allowed to examine documents, books and other written materials which are not connected with the offence.¹³

The same rules apply to seizures. Thus a warrant is generally required.¹⁴ But in "urgent and compelling circumstances, where an investigator must act immediately and cannot possibly first obtain a warrant... the investigator may seize movable goods". When this power is exercised, there is a duty to report to the head of the district court for the latter's approval.¹⁵

The goods subject to seizure are as follows:¹⁶

- a. goods or claims of the suspect or the accused of which all or part of presumed to have been obtained from an offense or as a result of an offense;
- b. goods which have been directly used to commit an offense or in preparation therefor;
- c. goods used to obstruct the investigation of an offense;
- d. goods especially made and intended for the commission of an offense; and
- e. other goods which have a direct connection with the offense committed.

13 Art. 34(2).

14 Art. 38(1).

15 Art. 38(2).

16 Art. 39.

The extraordinary search and seizure powers of investigators discussed above are not connected with arrests in *flagrante delicto*, because searches may be conducted without warrant beyond the scene of the crime. Article 40, however, is specific to seizures in cases of apprehensions in *flagrante delicto* and is therefore considerably narrower in scope.

Art. 12 of the Universal Declaration of Human Rights provides that

[N]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence . . .

This principle is reiterated in Art. 17 of the International Covenant on Civil and Political Rights.

The existing provisions of the KUHAP, therefore, authorise broad and roving authority to effect searches and seizures. Consequently, in our view, they contravene the relevant principle in the human rights instruments cited above. Therefore,

We recommend that

1. *Searches and seizures should be conducted generally only on warrants issued by the courts.*
2. *Searches and seizures should only be authorized by warrants on the basis of probable cause determined by the judge upon examination under oath of the complainant and other witnesses.*
3. *The place to be searched and the persons or things to be seized must be described with particularity.*
4. *Warrantless searches and seizures may only be done incident to a valid arrest or when the evidence of an offence is in plain view.*

Action to Declare Illegality of Detention

Pre-trial review is defined as the competence of the District Court to hear and to judge, among other things, whether an arrest and/or detention is legal or not, at the request of the suspect or his family or other party empowered by the suspect.¹⁷

17 Art. 110.

The procedure¹⁸ for pre-trial is as follows:

- a. Within three days after receipt of the request, the assigned judge shall set the day of the trial;
- b. In examining and deciding the legality or illegality of the arrest or detention... the judge shall hear the testimony of both the suspect or the petitioner and the competent official;
- c. In the event that a case has already begun to be examined at district court whereas the examination of the request for pre-trial review has not yet been complete, the request will fail;
- d. A judgment in pre-trial review at the stage of investigation shall not preclude the possibility of another examination in pre-trial review being held at the stage of examination by the public prosecutor, if a new request is submitted therefor.

Where a judge rules that an arrest or detention is illegal, then the investigator or the public prosecutor must immediately release the suspect.¹⁹

No appeal may be lodged with respect to judgment in pre-trial review.²⁰

This procedure to question the legality of detention is extremely limited. Sole jurisdiction to consider the question is lodged in District Courts and no appeal is permitted therefrom. If pre-trial hearings drag and the case against the accused is filed in court, the action is automatically quashed. No matter how erroneous the judgment validating a detention at pre-trial proceedings the detained person is bound by it. It is possible, too, beginning with an illegal detention at the investigative level, a void warrant of arrest may be issued and an invalid charge may be filed. In both these latter instances the detained person will have no legal recourse until the end of his or her trial.

In our view, therefore, it is necessary to establish a more effective cause of action and procedures to protect suspects and accused from illegal violations and curtailment of their liberty. Therefore:

We recommend the establishment of the privilege of the writ of habeas corpus or its equivalent as a cause of action to challenge the legality of arrest and detention and to secure a detainee's immediate release. Original jurisdiction should be

18 Art. 82 (1).

19 Art. 82 (3)(a).

20 Art. 83 (1).

exercisable by courts at all levels. Decisions by lower courts should be subject to review by higher courts. This action should have priority over all other kinds of cases.

Right to Counsel

While legal counsel may be retained from the moment of arrest or detention at all stages of examination,²¹ it is only those who are accused of any offence punishable by imprisonment of at least five years and who do not have their own counsel to whom the investigator, prosecutor or judge is obliged to assign counsel.²²

Furthermore, under Sec. 115(b), when an examination is being conducted in national security cases, legal counsel may be present to watch, but not to listen to, the examination of the suspect.²³

Art. 14(2)(d) of the International Covenant on Civil and Political Rights establishes as a compulsory minimum guarantee the right of the accused:

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

It is our view that the interests of justice require that in all cases that may entail the deprivation of a person's liberty, even if it is less for than five years, a suspect or an accused must be assisted by competent legal counsel. Therefore:

We recommend that Sec. 56 of the Criminal Procedure Code be amended to require investigators, prosecutors and judges to appoint counsel for the accused, should he or she not have one, in all criminal cases that may entail the deprivation of the liberty of the accused.

Further, we recommend that Sec. 115(b) of the Criminal Procedure Code be repealed.

21 Art. 54.

22 Art. 56 (1).

23 Art. 115 (b).

Lawyer-Client Relationship

A suspect or an accused who is subject to detention has the right to contact his or her legal counsel.²⁴ Legal counsel may be retained from the moment of arrest or detention and at all²⁵ stages of examination. Such legal counsel has the right to speak with the suspect at any stage of examination and at any time for purposes of the defence of his or her case.²⁶

The law states, however, that if there is proof that legal counsel is abusing his or her rights or entitlements, a warning shall be given to him by the investigator, public prosecutor, or prison officer. If the warning is not heeded, the contact between lawyer and client shall be supervised. After supervision, if the abuse continues, the contact shall be witnessed. Finally, if the abuse persists, the contact shall be prohibited.²⁷

In ordinary cases, the investigator, prosecutor or prison official cannot listen to the content of the discussion between lawyer and client. In crimes against State security, however, officials may listen to the conversation.²⁸ Full confidentiality is guaranteed from the time the case is filed in court.

Adequate legal representation can only be rendered if a client makes full disclosure of facts to his or her lawyer. The client will only do so if he or she is confident that counsel cannot, either at his or her discretion or by compulsion, disclose what he or she is told in the course of their conference. Confidence is negated when third persons not bound by fiduciary relations "supervise" or "witness" or listen to conversations between lawyer and client. In national security cases, confidentiality between lawyer and client becomes all the more important because the penalties are higher and the full machinery of the State is mobilised to secure conviction.

Article 14(1)(b) of the International Covenant on Civil and Political Rights lists among the minimum guarantees in criminal cases the right "[T]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing."

We recommend, therefore, that full confidentiality be extended to lawyer-client relations from the time of custodial interrogation. Unless confidentiality is

24 Art. 57 (1).

25 Art. 69.

26 Art. 70 (1).

27 Art. 70 (2), (3) and (4).

28 Art. 71 (2).

recognized at this stage, the position of the accused may already have been irremediably compromised or damaged by the time the trial begins.

We recommend further that

1. *ecs. (2), (3) and (4) of Article 70 be repealed;*
2. *Art. 71 (1) be modified to remove supervision; and*
3. *Sec. (2) Art. 71 be repealed.*

The Right to Bail

Bail is mentioned only perfunctorily in one provision of KUHAP.²⁹ In view of the authority vested in different officials to subject a suspect or accused to extended periods of detention, it appears that there is no right to bail to secure the temporary liberty of an accused.

This is inconsistent with Article 9(3) cited above. Therefore:

We recommend the establishment of the right to bail in all criminal cases except in relation to capital offences where the evidence of guilt is strong.

Admissibility of Illegally Obtained Evidence

Article 117 (1) protects a suspect or witness from pressure to provide evidence. In addition, Article 153(2)(b) directs a judge to ensure that the accused does not give involuntary testimony.

There is no rule, however, that addresses instances of testimony, obtained by means of coercion or pressure. In the course of the mission's interviews with released political prisoners, we learnt that evidence had been provided frequently and confessions had been extracted by means of torture. These false confessions had then been used to secure subsequent conviction.

Article 14(3)(g) of the International Covenant on Civil and Political Rights establishes the right of an accused person not to be compelled to testify against himself or to confess guilt. This right would be pointless if

²⁹ Art. 59.

evidence obtained in violation of this rule may, in any case, be used against the accused. Therefore:

We recommend that a rule be adopted that would forbid the admission of any evidence at trial that had been obtained by coercion or any other illegal means.

The Social Factors

Finally, there are a variety of social factors that contribute to weakening the enforcement of protective rules in KUHAP. First, there is the lack of lawyers, especially in rural areas. Second, there is the lack of knowledge by the people of their rights under this law and the frequent disregard of the same by the relevant authorities. Third, there is the weakness of the judiciary in relation to the executive branch of government. Therefore:

We recommend:

- 1. The establishment of programs for human rights education for judges, law enforcers, military personnel, and the general public.*
- 2. The establishment of a direct link between human rights observance and promotions in the police and military services.*
- 3. The examination of the feasibility of a governmental system of legal assistance or government support for private organizations providing legal aid.*
- 4. That the position of the judiciary be strengthened by the adoption of the recommendations contained in Chapter III of this report.*

Chapter VI

Political Prisoners in Indonesia

The Indonesian Constitution appears to give some small measure of recognition for the free exercise of political expression. So, Article 28 of the Constitution provides that:

Article 28: Freedom of association and assembly, of verbal and written expression and the like, shall be prescribed by law.

As with many other provisions of the Indonesian Constitution, however, the fact that free political expression may be prescribed, and therefore, circumscribed by law means that mere constitutional recognition of the right will mean little in the face of a determination by government to suppress political dissent through legislation. It has been a prominent and unfortunate feature of Indonesian law since 1963 that freedom of expression has been very seriously constrained.

As outlined in the previous chapter, many laws have been initiated which make it exceptionally difficult to express political opinions contrary to those of the government without incurring the risk of heavy penalty. Of these, the Anti-Subversion Law (1963) has been the one most commonly used.

During the 1990s, many political activists were charged with offences under the relevant legislation. Because of the breadth of the Act's terms and the waiver of normal protections under Indonesia's Code of Civil Procedure, a defence to the charge of subversion was made difficult. This combined with the partisan approach of the judiciary ensured that many individuals doing no more than expressing legitimate and peaceful opposition to government policies and actions were imprisoned, often for very lengthy periods of time (See further Appendix A).

During this period, the Australian Section of the International Commission of Jurists monitored political trials in East Timor, Jakarta and Surabaya and concluded that almost every trial included breaches of internationally acceptable standards of criminal investigation and trial procedure.¹

1 The ASICJ has published the following reports: *Report on the Santa Cruz Massacre, Defence Denied: The Mis-trial of Xanana Gusmao, Report on the Anti-Subversion Trials March 1998, and But a Shadow of Justice: Political Trials in Indonesia.*

At the time of President Soeharto's resignation in May 1998, there were approximately 230 political prisoners in Indonesian prisons. These consisted of the following groupings.

Prisoners associated with the Communist Party of Indonesia (PKI)	10
Members of the Peoples Democratic Party (PRD) and associated groups	12
Prisoners from Aceh	47
Prisoners from Irian Jaya	12
Prisoners from East Timor	120
Prisoners associated with Islamic groups	25 ²

The Prisoner Release Program

The new administration of President Habibie indicated that it would review the position of all political prisoners with a view to releasing them from detention. Soon after his inauguration, President Habibie promised that "all political prisoners will eventually be released unless they are Marxists or Communists".³

Within a week, the government had moved to release fifteen prisoners from Cipinang prison in Jakarta including two internationally renowned prisoners, trade union leader Mughtar Pakpahan and democratic parliamentarian Sri Bintang Pamungkas.⁴

The program of prisoner release continued slowly and sporadically through 1998. On 17 August, Indonesia's National Day, 28 prisoners from East Timor, Aceh and Irian Jaya were released. Most of these were nearing the end of their sentences or had been serving short terms of imprisonment. Later, on December 31, 43 prisoners from Aceh, East Timor and southern Sumatra were freed.

While these releases were welcome, many other prisoners remained in detention. Particular concern was expressed for the health and welfare of

2 Human Rights Watch and Amnesty International, *Indonesia, Release prisoners of conscience now!* (June 1998).

3 Political prisoner releases stalled: *Tapol*, July 1998, p. 28.

4 Forrester and May, *The Fall of Soeharto*, (1998) 61.

the 10 members of the PKI still in gaol and awaiting the death sentence. Eventually, these prisoners were also released in March 1999. In our meeting with three of these ageing detainees they described their freedom as 'miraculous'. They had served 34 years in prison. As far as we are aware, this was the longest period of imprisonment of any political prisoner then detained anywhere in the world. That they should have been detained for such an extended period, some under the sentence of death, amounts in our view to cruel and unusual punishment within the terms of the relevant international human rights conventions.

Despite this program of release, many legal and human rights groups in Indonesia continued to impress upon the mission that other political prisoners remained in gaol and that their cases ought not to be overlooked or forgotten.⁵ For example, Gustaf Dupe, the representative of the Action Committee for the Release of Political Prisoners, informed the mission that there was continuing apprehension with respect to the treatment of prisoners in outer provinces under military occupation, in particular in Irian Jaya and East Timor. The fact that these persons remain in detention in far flung provinces of the country clearly makes it difficult to obtain accurate information about their treatment and condition. As late as March, a request to have an Irian prisoner, Eliezer Awom, moved from Surabaya to Jakarta in order to facilitate contact with his family was refused by the relevant authority without reason or justification.

When the ICJ mission commenced in Jakarta on Monday 22 March, over 130 political prisoners remained in prisons throughout Indonesia.⁶ Consequently, the mission took the opportunity to raise the position of political prisoners at the highest levels of government.

Discussions with the Government

The President, Dr. Habibie, informed the mission that within 24 hours of his inauguration he had determined to release all political prisoners. However, prisoners who might be deemed 'political' would not be released if they were either criminals, terrorists or members of prohibited organisations. In each of these cases, the reason for the person's detention

5 Prisoner releases: A slow business, *Tapol*, September 1998, pp. 15-6.

6 Based on data provided by Komite Aksi Pembebasan Tapol/Napol (Action Committee for the Release of Political Prisoners).

related not primarily to their political status but rather to their danger either to other people or to the State.

The Attorney General, Mr. Ghalib, said that no clear timetable existed for the release of the remaining political prisoners. Each case would have to be considered individually. Nevertheless, he expressed his confidence that all genuine political prisoners would be released in due course. He informed the mission that Indonesia's Criminal and Penal Codes would be amended to permit the peaceful expression of political opinion. There were twelve provisions of the various codes that were currently being reconsidered. He was unable to inform us, however, of the particular amendments being proposed. More particularly, while he indicated that the *Anti-Subversion Law* would be repealed he also told us that new provisions relating to crimes against the State would be included in the Criminal Code. No details with respect to such provisions could yet be made available.

The Minister of Justice, Professor Muladi, confirmed that following revision of the Criminal Code, the *Anti Subversion Law* would be repealed. He informed us that the chapter in the Criminal Code with respect to crimes against the State would be extended but the revision, he said, would at the very least seek to ensure that the procedural protections applicable to all other offences would apply similarly to such crimes thus reversing the regrettable withdrawal of such protections under the *Anti Subversion Law*.

The Minister indicated that a special team had been created in his department to evaluate the cases of each of the remaining political prisoners. Following the President's remarks, however, he indicated that three categories of prisoners would not be released:

- Prisoners found guilty of violent crime;
- Prisoners who were communists, except those released on humanitarian grounds; and
- Prisoners who had been found guilty of undermining the State ideology of Pancasila.

Looking more specifically at particular cases, Minister Muladi informed the mission that the student leaders from the banned PRD party, gaoled after the riots in Jakarta in 1996, had been offered a pardon and release. They had not yet been discharged from custody, however, because they were unwilling to accept a pardon. The Minister anticipated that the East Timorese resistance leader, now under house arrest in Jakarta, may be released as part of a wider settlement of the East Timor independence questions.

The Situation of Remaining Political Prisoners

While in Jakarta, the mission expressed its concern with respect to the detention of certain political prisoners of whose existence it had become aware. A discussion of their situation under their specific categories follows below.

The PKI Prisoners

The International Commission of Jurists had on many occasions expressed its deep concern for the health, well-being and status of 10 members of the former Communist Party of Indonesia (PKI). These ten men had been in gaol continuously since 1965. The Mission was particularly pleased, therefore, when it learnt that the 10 would be released on humanitarian ground following a Presidential Decree issued immediately before our visit to Jakarta. Their release was conditional on their willingness to swear an oath of allegiance to Pancasila, the 1945 Constitution and all the decrees of the Peoples Consultative Assembly. Minister Muladi indicated that the releases were designed to have a positive effect on national morale and identity. They were symbolic of a new spirit of national reconciliation.⁷

The PKI prisoners were released on 25 March and met briefly with members of the ICJ mission on 29 March. These were now old men who had spent almost half their lives in prison. Some were angry, some were frail. All seemed bewildered by the new world that had greeted them. It is to the credit of the Habibie Administration, and to the shame of the former regime of President Soeharto, that indeterminate sentences of imprisonment, some under the constant threat of execution, should have been permitted to stand for so very long.

Prisoners from Aceh

The grave situation in Aceh is described in Chapter VII. In this section we focus only upon the imprisonment of Acehnese political activists. The province of Aceh had been accorded the status of a military operational area (Daerah Operasi Militer - DOM) from early 1989 until August 1998. During this period, many Acehnese political figures, academics, lawyers, students and other social activists had been arrested under the *Anti*

7 Government releases PKI prisoners, *Jakarta Post*, March 25 1999, p. 2.

Subversion Act, found guilty in biased courts and sentenced to long terms of imprisonment.

As one part of a process of national reconciliation, Presidential Decree 13/1999 provided for the release of 40 Acehese political prisoners who had been sentenced to gaol for alleged participation in the movement for Acehese independence. Further, President Habibie himself visited Aceh on 26 March 1999, at the same time that the ICJ mission was there. During that one day journey, the President addressed the Acehese people at the great Acehese Islamic mosque in central Banda Aceh and apologised for the atrocities committed by military forces in the ten years of military rule. In an indication of the greater degree of freedom permitted under his leadership, the President invited four representatives of oppositional political opinion to address him in public following his speech. Such a concession would have been unimaginable under the former Soeharto regime.

Nevertheless, human rights activists expressed their concern that some political prisoners in outlying areas of the province had not yet been released and the fear that with the reactivation of the Acehese independence movement in the form of a drive to permit a referendum of the province's future may result in further persecution and imprisonment. Regrettably, in the period immediately before the Indonesian election, these predictions were vindicated with many more Acehese either killed or detained by the military forces.

East Timor

During our visit we were permitted to speak with the leader of the East Timor Resistance Movement, Xanana Gusmao. Gusmao had been arrested in Dili in November 1992 and charged with fomenting rebellion and certain firearms offences.

In our view, his trial on these charges did not meet international norms of fair trial procedure. This was because, among other procedural defects, he was not permitted freely to appoint his defence counsel and was prevented from reading his defence statement as the judges considered it irrelevant.⁸ Unsurprisingly, he was found guilty on all charges and sentenced to life imprisonment.

8 Australian Section of the International Commission of Jurists, *Defence Denied: The Mis-Trial of Xanana Gusmao*.

Following his transfer to Cipinang prison in Jakarta, Xanana Gusmao met frequently with representatives of foreign governments, including President Nelson Mandela of South Africa. He continues to act as an inspiration to his people in the same way that President Mandela did to the South African people during and after his 27 years of imprisonment.

As an acknowledgement of Xanana Gusmao's crucial position in securing a solution to the fraught problem of East Timorese independence, in February 1999 the reformation government permitted his transfer from the main building of Cipinang prison to a private house outside the prison wall. At the time of the Mission's visit he remained, however, under prison control and could not leave the house which was enclosed by barbed wire and heavily guarded. This transfer is a positive step and facilitated his contact with organisations in East Timor and with the wider international community. With the assistance of Minister of Justice Muladi, members of the ICJ mission were able to meet with Xanana Gusmao on 30 March 1999. Gusmao suggested that he would not be released until after the referendum in East Timor. He considered that his release may form part of a settlement. With the assistance of Justice Minister Muladi, the mission was able to meet personally with Mr. Gusmao at his residence.

During the ICJ visit, Mr. Gusmao confirmed his commitment to a peaceful solution for East Timor. He indicated that there had been calls for him to advocate violent retaliation in the face of the increasingly brutal behaviour of paramilitary forces in East Timor. He indicated to us his view that ABRI was arming local militias in order to foment disorder and thus to avoid a plebiscite on East Timor's future scheduled for August 1999. He was strongly of the view that the plebiscite required United Nations supervision. He believed that forceful international pressure was required to ensure that the militias were disarmed as soon as possible. He was unable to say if and when he was likely to be released. He believed, however, that his release may come as part of a wider political settlement of the East Timor question, perhaps after the plebiscite had been conducted.

It is tragic to report that soon after our visit to Mr. Gusmao, his fears with respect to the behaviour of paramilitary forces in Indonesia were realised. On April 5 hundreds of militiamen appear to have attacked independence supporters in Liquisa. At least 16 people were killed in a massacre in a church and the priest's house attached to it, and many more were forced to flee from their homes. Shocked by the escalation in violence, Xanana Gusmao invoked a call to arms in a statement to the international community:

...I know that the East Timorese will suffer another bloodbath but I also know that we have no other alternative...

Therefore, I am compelled to authorise [my guerrillas] to undertake all necessary action in defence of the population of East Timor against the unprovoked and murderous attacks of armed civilian groups and ABRI.⁹

Minister of Justice Muladi reacted negatively, suggesting that if Xanana Gusmao continued to make such comments, "it is not impossible that we will return him from house arrest to Cipinang prison."¹⁰

During April, the situation in East Timor continued to deteriorate with increased violence and terror by pro-Indonesian militias, culminating in an organised show of force in Dili, during which 20 more people died.¹¹

On 21 April a peace agreement was signed in Dili between the pro-Indonesian militias and the independence groups. The agreement had been supported by Mr. Gusmao in an attempt to prevent further bloodshed. Minister Muladi was reported to be considering an amnesty for Xanana Gusmao but intended to await the outcome of UN sponsored talks in New York.¹²

The peace agreement, however, did not quell the violence. On 24 April over 100 people were killed in attacks on Suai in East Timor.¹³ Deaths, sporadic but organised attacks, and threats to the local population continued in succeeding months with a view to intimidating the supporters of an independent East Timor. It is not suggested here that this activity occurred at the behest of the current Government of Indonesia. But the government appeared unable to control the violence perpetrated, it seems, by rogue military and paramilitary forces. Despite increased deployment of military and police forces throughout East Timor, violence and intimidation continued unabated until the conduct of the plebiscite with respect to East Timorese independence conducted on 30 August 1999.

It is of grave concern to the Mission and to the ICJ more generally that the period after the ballot, which resulted in an overwhelming vote in

9 "Take up arms, orders Gusmao as 16 die in Timor fight," *Sydney Morning Herald*, April 6, 1999, p. 1.

10 "Riot squad took part in massacre," *Sydney Morning Herald*, April 9, 1999, p. 12.

11 "The Thorn makes its brutal point," *Sydney Morning Herald*, April 19, 1999, p. 9.

12 "Survivors wary of mayhem," *Sydney Morning Herald*, April 23 1999, p. 9.

13 "Massacre shatters brief day of peace," *Sydney Morning Herald*, April 24 1999, p. 1.

favour of independence, was characterised by gross violence against civilians, forced displacement and wanton destruction of property. It appears likely that crimes of genocide were committed on a wide scale in the period between the plebiscite and the deployment of the United Nations peace-keeping force on 20 September 1999.

Xanana Gusmao was granted a pardon on 7 September. With international concern expressed for his safety, he took refuge first in the British Embassy in Jakarta and later flew to Darwin, Australia.

The ICJ considers that Mr. Xanana Gusmao has authority, credibility and respect in the eyes of almost all concerned parties both in Indonesia and in the wider international community. He appeared to us to be a man of great dignity and determination. Any peaceful resolution to the current escalation of violence and for the longer term resolution of the dramatic and tragic events in East Timor would appear to require his active involvement. It was unfortunate that his continued imprisonment did not allow him to be involved more actively in planning the plebiscite that took place.

The PRD prisoners

The People's Democratic Party of Indonesia is a small left-wing political party of university students and trade-union activists based mainly in Javanese urban centres. In July 1996, the group was accused of involvement in the riots which followed the government backed attack on the headquarters of the Indonesian Democratic Party led by Ms. Megawati Soekarnoputri.

During August and September 1996, 11 leaders of the PRD and allied associations were detained and charged under the *Anti Subversion Act* and Article 154 of the Criminal Code.

The Australian Section of the International Commission of Jurists monitored their trials in Jakarta in 1997 and witnessed numerous procedural irregularities and significant breaches of judicial process. These included the failure to give the defendants bail, a refusal to permit them to bring expert evidence, a refusal to permit the defendants to cross examine prosecution witnesses and a refusal to given the defendants themselves a complete right to make statements in their defence. The report recommended that

Given that procedural violations were observed in the PRD trials at both Jakarta and South Jakarta Pengadilan Negeri (District Court) and in the appeal process, all PRD defendants be

permitted to apply to have their convictions reopened and re-examined in the context of procedural irregularities.

Eleven PRD members were convicted and sentenced to terms of imprisonment ranging from 18 months to 13 years. Seven remained in Cipinang prison in March 1999 and met with the ICJ mission on 31 March.

The leader of the student group, Budiman Sudjadmiko, advised the mission that he and his fellow students had been offered a pardon by the government. They had all refused to accept it, however, as they considered that they had neither committed any relevant crime nor had they been properly found guilty of any relevant crime. They could not, therefore, accept a pardon since a pardon necessarily implied that some punishable offence had been committed. They believed that they should be unconditionally released together with their trade-union colleague, Dita Sari, who remains imprisoned in the women's prison in Jakarta.

The continued imprisonment of the PRD students appears difficult to justify in the context of the changed political landscape in Indonesia. The PRD is now recognised as an official political party in Indonesia for the purposes of the democratic election. The principal demands made by the party have been accepted by the reformation government. These include the removal of President Soeharto, the repeal of restrictive electoral laws, the reduction of the influence of the military forces in parliament and the conduct of a referendum for the independence of East Timor. At the time of the students' arrest, every such demand may well have been considered subversive but each one now constitutes government policy.

Other Political Prisoners

Many political prisoners remain in Indonesian prisons having been found guilty of crimes related to their political opinions and activities. We understand that there remain approximately 60 political prisoners in prisons throughout Indonesia. We express considerable concern for prisoners now held in Aceh, East Timor and Irian Jaya. Their fate is unknown. A complete list of the relevant prisoners appears as an Appendix to this report.

Recommendations

1. *We recommend that all laws having the effect of imprisoning individuals for the peaceful expression of their political opinions should be repealed.*

2. *We recommend that all remaining political prisoners be immediately and unconditionally released. In particular we recommend the immediate and unconditional release of the student members of the PRD.*
3. *We recommend that Prisoner assistance groups be given access to Department of Justice records to prepare data on all remaining political prisoners and be accorded financial support to arrange visits to prisoners in outlying regional prisons particularly in Aceh, Irian Jaya and East Timor.*

Chapter VII

The Commission's Visit to Aceh and Palembang

The recent history of Aceh is the story of its victims

"Z" is a man now in middle age. Not long before the mission's visit, he had been released from prison where he had spent the last eight years of his life. Unlike the well known political prisoners in Java and Surabaya, he had spent the time of his imprisonment in relative anonymity and, for that reason, beyond the help and sustenance that the international community can sometimes provide. He spoke about his experience more with resignation than bitterness, although for bitterness he could not have been blamed.

Before his imprisonment he had been a Professor at one of Banda Aceh's leading universities. Like many Acehnese he felt keenly the disparities in provision between Java and the remaining islands and regions in the Indonesian archipelago. And it was from that sense of injustice, experienced directly in the funding of tertiary educational institutions, that he spoke to public meetings at the university and beyond.

He knew little of Aceh Merdeka, the rebel independence movement which had gathered strength during the late 1980s, except that it existed and that its cause was understandable even if its means could not always be endorsed. From time to time he was asked for money from friends less well off. He gave generously from fellow feeling. And he continued to teach with a skill and commitment to his subject that was still apparent when we met him the day before President Habibie was due to visit Aceh to apologise for the crimes committed against its people.

After midnight one morning in 1991, Z heard a banging at the door. He opened it to find several uniformed soldiers gathered there. They dragged him from his house and took him to the local military camp for questioning. During this questioning, which was accompanied by cursing and beating, he realised that he was suspected of conspiring to assist the rebel movement whose operational headquarters lay some 70 kilometres away on the east Sumatran coast. The initial charge was that he had provided money to the

rebels, money that could assist them in the purchase of arms and equipment. Z denied the charge, admitting freely that he had recently given money to a friend but saying that he had no knowledge whatever of its eventual destination. He was thrown into a small, dark cell and left there to reflect upon his testimony and told to rethink his position. He did not know at that time that other university colleagues across several faculties had been arrested and detained in a similar manner.

Not long after, he was charged under Indonesia's notorious *Anti-Subversion Act*. The law gave the military authorities virtual *carte blanche* to detain their perceived enemies and deprived those detained of even the minimal procedural protections afforded under the Indonesian law of criminal procedure. The more specific charge was that Z had acted subversively by conspiring with his university colleagues to establish a cell of the rebel movement and to plan and finance the movement's political operations.

Over the next three months Z was tortured frequently by members of the armed forces. The torturers' purpose was to extract a confession to the charges set down. The most common form of torture was electric shock. These shocks were delivered to almost every part of his body but tended to be concentrated on his hands, feet, head and genitalia. His hearing remains impaired as a result. Not only was he tortured but he observed and heard the torture of others. The atmosphere was pregnant with fear, denigration and the abuse of human dignity.

When these sessions were over, he would be returned to his cell, the conditions of which were putrid and shocking. We were shown these cells from the outside. Each cell consisted of a tiny room in which there was no bed, no bedding, and no washing or toilet facilities except for a slop bucket on the floor. Every evening, Z threw the water containing his excrement out the window onto the fencing that lay opposite. He was given two portions of rice, two portions of water each day and the occasional dried fish. While in military internment, Z and his colleagues were permitted out of their cells for only one hour a day except, that is, when they attended their interrogations.

Steadily, the military authorities wore Z down and eventually he confessed to political crimes that he had never committed. He was forced to agree that he had called a meeting of a rebel cell together in a tailor's shop above a main street in the capital. There, he and his colleagues were said to have organised themselves into an operational unit. Because of his command of foreign languages, Z was designated as responsible for international liaison. A friend from the Economics department was Treasurer. Another,

from Science, was chief technical adviser and so on. The problem was that none of this had ever occurred.

"It was funny," he remarked ruefully,

because since none of it had ever happened, we were unable to get the stories quite right. During interrogation, I would say one thing that contradicted what one of my friends had said. But because the whole thing was a fiction, we could not coordinate our stories. So, whenever I made a mistake in the interrogators' eyes, I would be tortured again. And when my colleagues contradicted me, they would be tortured too. In the end we worked out what we were supposed to have done but it took several months.

Even with their confessions, the military did not regard this as sufficient. They put the teachers together, therefore, and told them to recreate the discussion at the fictional meeting so it could be recorded. This had to be rehearsed several times but finally the macabre piece of theatre was complete. Then, armed with the lie that the meeting had been observed through binoculars from a window opposite, the defendants' confessions, and the fabricated tape recording, the prosecution went to the Court. The result was never in doubt as the compliant judiciary never decided against the military occupiers.

Z and his colleagues received a sentence of eight years in gaol for having done nothing but speak out about educational discrimination against their region. Z was happy to have been released. His family had waited for him. After the military protectorate was ended late in 1998, he found a job in the university again. But you could see he was cautious about speaking publicly of his experiences. Most Acehnese still live with fear in their hearts.

Some Background

Aceh's recent history has been characterised by a fierce sense of difference and the desire for autonomy. Originally an independent Sultanate, Aceh's first major contact with the West occurred with the finalisation of a trade treaty with England in 1585. The province remained independent and its trading status thrived under British protection. Aceh was essentially a Muslim community and attracted many more Muslim immigrants during the centuries that followed, seeking to take advantage of the trading possibilities it offered and the congenial home for religious worship. It resisted the

colonisation of the Portuguese but its autonomous status ended following the withdrawal of British protection in 1871. The Dutch then sought to extend their sphere of influence to Aceh and when they were resisted, they declared war on the province in 1873. The Acehnese fought a prolonged and bloody battle for the next 35 years until they succumbed to Dutch rule in 1908. They had held out against Dutch colonialism for longer than any other province in the Indonesian Archipelago.

Following the defeat of the Dutch in 1945 in the battle for Indonesian independence, the new Indonesian government, after having made promises of greater autonomy, dissolved the province of Aceh in 1951. It was incorporated into the larger province North Sumatra under a governor in the capital city, Medan. This prompted an outcry from the Acehnese who believed they had been the subject of political treachery. In 1953, the Acehnese leader Daud Beureueh declared Aceh an independent Islamic republic which it remained until 1961 until it was contained again by the central authorities. In 1961, however, its provincial status was restored and promises were made that it would be given considerable autonomy with respect to religious, cultural and educational affairs.

In the view of the Acehnese leadership, these promises were honoured neither by the Soekarno regime nor by the New Order government which succeeded it. In the late 1980s, therefore, the desire for independence from Indonesia grew stronger and the more extreme advocates of rupture from Jakarta took to the hills to form a guerilla force. This could not genuinely have been called an army because at its height it seemed to consist only of between one and two thousand men. But following the deaths of Indonesian military personnel, the Indonesian government declared Aceh to be a military protectorate and placed it directly under army rule. This rule continued until the ascension of the Habibie administration in mid 1999.

Military rule in Aceh was brutal and atrocious. The guerrillas were attacked, killed and contained following which a campaign of terror appears to have been launched against the provincial community. Amnesty International estimates that some 2000 people were murdered between 1989 and 1993, the bulk of them civilians. The purpose of these killings it seems was to intimidate the local population so as to ensure that any vestige of the incipient independence movement would be eradicated completely. Several mass graves have been found into which up to thirty or more civilians had been thrown. Many more Acehnese were injured and maimed by the occupying troops. It was not uncommon for local roads to be littered with corpses as a warning to others. Women were raped in

public. The breakdown in law appeared total. As its power increased, military rule became increasingly arbitrary and capricious. This State sponsored violence diminished only when President Habibie announced that Aceh's status as a military protectorate would cease late in 1998. By then Amnesty estimated that more than 5000 civilians had been killed or had disappeared.¹

Late in 1998, the Indonesian Human Rights Commission (KOMNAS HAM) conducted an inquiry into the atrocities in Aceh. In its report on the inquiry, it concluded that during the period of military occupation, gross violations of human rights had occurred.² The violations, it said, included summary killings; torture and other cruel, inhuman and degrading punishment; enforced disappearances; arbitrary arrest and detention; rape and sexual assault; and destruction of property. These violations, it said:

are an attack against the status and esteem of humanity, as the condition of prolonged terror creates severe trauma in the social, political and legal arenas.³

The Human Rights Commission welcomed the end of military rule but cautioned that that withdrawal must be followed by a wider program to create conditions conducive to the protection and advancement of human rights. Further, it stated that:

The foundation for the restoration of the rights of victims and victims' families should be the discovery of the truth about the events of the past. This is required in order to give substance to

1 Precise numbers are difficult to determine. The provincial government provided the following figures:

Civilians Killed:	1,021
Civilians Disappeared:	864
Widows	1,376
Orphans	521

In contrast, the Forum of Human Rights Organisations in Aceh provides these figures:

Killed:	13,321
Disappeared	1,958
Raped	128
Tortured	3,430
Orphans	16,375

2 See summary in Indonesian Human Rights Commission (KOMNAS HAM) Annual Report to Parliament, 1998, p.52-53.

3 *Ibid* at 52.

a reconciliation through which justice and the rule of law may be strengthened...there should be no place or opportunity for revenge.⁴

The mission's first meeting was with the province's new civilian Governor. He was open about the events just described. He concurred in the estimate of the number of deaths. He was concerned, he said, for the many thousands of widows and orphans who had been left in poverty during the protectorate. The new government, however, had promised compensation and he hoped that this would soon become available. He had sought assistance from governmental and non-governmental sources to provide student fellowships for orphaned children and prosthetic equipment for those who had been maimed. Villages that had been destroyed would be rebuilt. All this would take time. We asked whether any of the army officers who had been responsible for the extrajudicial killings had yet been brought to justice. A first group had been prosecuted, he replied. They had been dismissed from military service and some had gone to prison. But it was unlikely that significant numbers of military officials guilty of the atrocities committed would be found. Many had been moved on. And by their nature, those responsible for mass graves are difficult to identify. The Governor had proposed a full investigation to the central government. It was their responsibility, he said. But at least a start had been made.

The Rule of Lawlessness

International observers have been permitted into Aceh only since the discontinuation of its protectorate status. It was easy to see why when the Mission met with three maimed victims of military rule in a small room attached to a legal office in suburban Banda Aceh.

"P" was a young man who was crippled. He walked with crutches but nevertheless with considerable difficulty. He told us that he had left Indonesia to become a machinist on an oil rig and had later worked as crew on a Greek tanker. Periodically he returned home to visit his parents and extended family. In 1995 he came back for Ramadan. Soon after his return, however, he had been arrested by members of the Indonesian internal security forces, KOMPASSUS. They accused P of having been part of an over-

4 Ibid at 53.

seas unit supporting *Aceh Merdeka* and with supplying funds to the local insurgents. In the succeeding days, he was beaten and tortured. After two weeks he emerged with his back broken, legs paralysed and suffering from incontinence. Having been battered in the dark, he was unable to identify his attackers. He was never charged with an offence either before or after these events.

We asked him why he believed that he had been the subject of suspicion. He told us that some people had been jealous of the money he had made overseas. He thought someone might have pointed the finger at him for that reason. Many people who had done something different had been targeted in this way. Accusations of subversive activity acted as a fine cover for revenge or jealousy deriving from disputes of a quite different kind. The military's objective had not been to investigate allegations of subversion, he said. It had been to intimidate the local population through terror.

I can't feel my legs, look, I can't walk properly. I can't control my bladder. I want to sue so that I can have an operation. I have six children under twelve. I have no way of earning an income. My wife does not have a job. We can barely survive. What can we do?

P does not have a passport or any official papers. He says that the military burned them and have refused to allow their reissue. Now he cannot travel. He suffers a dual imprisonment: in his province and in the wreckage of his body.

"Q" was just seventeen and at school when he walked through the gate of the local military barracks in search of a friend who had become a soldier. They had agreed to meet and have a drink together. A few feet past the entrance, a guard had yelled something at him. He didn't hear what was said and had not been aware that the shout was for him. Mistakenly, and perhaps foolishly, he continued to walk towards the military huts. A machine gun deposited a full round of bullets in his leg. He fainted and the next thing he knew was that he was in an ambulance being taken to the local military hospital. He arrived there at 8:00 am and went into an operating theatre at 9:00 am. In the interim no one spoke with him about his condition nor were his parents or any other relatives contacted for consent to the operative procedure. When he awoke, his leg had been amputated above the knee.

He spent the next three and a half months in the hospital. It had become well known for its cavalier surgical procedures - at least where civilians

were concerned. At the time of his discharge, the military superintendent of the hospital had demanded that he sign a form releasing the hospital from liability for the injury attributable to the operation. He and his parents refused to do so. So, the signature was forged anyway. The military government offered him a derisory flat sum payment in compensation. He took it but the money lasted only a few months.

I am twenty four and I've been unemployed for seven years. I will never get a job. I never finished school, I've been too depressed. My leg won't grow back. I need some money to take care of me and my family. I want compensation - now.

"X" looked shattered from the moment we saw him. There was a vacant and occasionally desperate look in his eyes and it took a little time for him to overcome his fear so that his story could unfold. We noticed he was missing an arm.

In 1992, he had had a dispute with his neighbouring farmer over money. He believed that the neighbour had approached the military forces on three different occasions to obtain their assistance in pressing his demands. When they came finally, it was in the belief that he had an active involvement with *Aceh Merdeka*.

X ran and escaped and hid in the country for 20 days until he was captured. The soldiers demanded that he raise his hands in the air, and they emptied the contents of an armalite rifle into his outstretched limb. He turned and ran back to the forest but his freedom was shortlived. Three days later he was apprehended again and taken to the military hospital where his arm was removed. After two months in hospital he was sent home but his wounds were still infected and he had to pay for his own medicines to quell the inflammation.

Despite being debilitated by his injury, he was arrested again by the military two months later for reasons of which he is still unsure. In detention he was beaten around the head, the soldiers cut open his ears and squeezed lime into them. They threatened that his family would be killed unless he confessed to collaboration with the rebels. In fact, his family were not killed but his father and two brothers were beaten and then the entire family were assaulted by their neighbours while soldiers watched with guns at the ready.

X also has six children. He has insufficient money to enable them to complete their schooling. He doesn't mind so much about the compensation. He just wants, he told us, to be sure that his children will have the

opportunities that only education can afford them. He wrote a letter to the President requesting redress but has not yet received a reply.

These victims' stories are but some among many of the hundreds if not thousands that can probably be told. We are not, of course, in a position to ascertain the veracity of any of them. We could only assess their truthfulness from the demeanour of their tellers. All three left us in no doubt either about their sincerity or their suffering.

We were left with three very strong impressions. First, it appeared from these stories and many others we heard, that State terrorism had been in operation in Aceh for almost a decade between 1989 and 1999. The scale of such terrorism appeared not in any way justified by the extent of the threat posed by the guerilla bands that had roamed the hills some tens of kilometres from where these events took place. Secondly, the atrocities committed during that time cry out for independent investigation. It is difficult to imagine how any tranquillity could return to the province while such injustice goes unconfessed and unpunished. Thirdly, the case for the compensation of victims appears overwhelming. That such a case exists has been acknowledged by government. The adequacy of the payments that will emerge is yet to be determined.

Protests and Demonstrations

The Mission visited Aceh on 24 and 25 March 1999. March 25 was also the day on which President Habibie visited the province in order to offer his apologies for the military abuses that had take place during the ten years of occupation and to discuss the call by many provincial and student leaders for a referendum to determine the future place of Aceh in the Indonesian federation. We were impressed by the President's willingness to visit Aceh to consider and respond to Acehnese political demands directly. Only a year ago, the possibility that the Indonesian President would visit a troubled province and discuss prospects for greater autonomy with community leaders would not have been considered. The choice to replace force by persuasion in this instance was a very positive one and was indicative of a movement at the highest levels of government towards greater democratisation.

The President's visit was also an occasion to determine the extent to which police and military forces were willing to tolerate political protest and demonstrations. Unsurprisingly, the student movement in the province

had organised a street demonstration to indicate to President Habibie their support for a referendum on Acehese independence. Here, the results were mixed. We were present at the demonstrations which took place at two different sites. At one site, near the central Mosque where the President was to address provincial leaders, the behaviour of the police and military in regulating the conduct of the demonstrators was good. The movement of the demonstrators to locations a little distance from the mosque was appropriate for reasons of security and effectively achieved. The students were permitted to make political speeches and no unnecessary clashes between them and the police occurred.

At the other demonstration site, however, the law enforcement authorities were neither as skilled nor as disciplined. The reasons for this failure to act appropriately or effectively remain unclear. At a bridge some distance from the Mosque and the Presidential party, there were three clashes between students and riot police. Many students were beaten and approximately 135 were treated in hospital for their injuries. Those who ran to help their friends were also assaulted with batons and shields. Two students were seriously injured. While we did not witness these clashes we did visit injured students in hospital and saw for ourselves the gravity of their wounds. We spoke to other independent, international observers who had witnessed the events in question. In their view, the clashes had been initiated principally by the police rather than the demonstrators. It may well be, therefore, that there was a failure in police and military leadership. Its consequences were both unfortunate and severe.

That much more needs to be done to ensure that both police and military officials are equipped to deal effectively and without violence with political process was tragically demonstrated more recently on 3 May 1999 when 19 people protesting in favour of Acehese independence were killed by military forces in clashes in the Lhokseumawe area of the province. Many more were injured. Since that time we understand that several hundred more Acehese have been killed or injured by the military forces. In our view, such tragic and reprehensible conduct on the part of the military forces deserves the heaviest national and international condemnation. The use of excessive force and violence to disperse political protest runs absolutely counter to the efforts by the national leadership to encourage a movement towards a more democratic and peaceful Indonesian State. Those responsible for the latest atrocities should be immediately brought to justice.

Recommendations

Arising out of the Mission's visit to the province of Aceh, we make the following recommendations.

Recommendation I

We recommend that the Indonesian government establish an independent and comprehensive inquiry into human rights abuses that occurred during the period of military occupation.

We recommend further that given the difficulty attendant upon identifying many perpetrators of human rights abuse, consideration should be given to the establishment of the inquiry in the form of a 'Truth Commission.'

As pointed out by the Indonesian Human Rights Commission, it is unlikely that a reconciliation between the Indonesian government, the Indonesian military forces and the Acehnese people will be achieved without a full and complete investigation of the abuses of military power that occurred in Aceh in the period of military occupation. It is imperative that such an investigation take place. Although the government has promised to bring the perpetrators of human rights violations to justice, as yet very little has been done.

It will not be sufficient for such an investigation to be conducted by the Indonesian military itself. The military command may justifiably be regarded as judges in their own cause. Similarly, it will not be sufficient in our view to conduct prosecutions in the military courts. These courts cannot be expected to deliver impartial justice.

At the same time, it is apparent that the task of identifying the perpetrators of human rights abuse is a difficult one. Many incidents of extrajudicial killing, rape and torture took place up to ten years ago. In some, for example where mass graves have been discovered, no survivors exist and no witnesses were present.

For these reasons we believe that it may be appropriate to establish an inquiry upon the model of a truth commission. Such a commission was established in South Africa and Chile to examine the human rights abuses which took place under the *Apartheid* and Pinochet regimes respectively. In such a commission, military officers and governmental officials responsible for human rights abuse may be accorded immunity from prosecution if they confess publicly to their role in the repression of the civilian population.

Those officers and officials who do not come forward to bear witness to their crimes, however, should be prosecuted and gaoled with the full force of the law. Through such a commission a process of reconciliation may begin. The process provides an opportunity to approve and condemn, purge and purify. It also has the additional advantage of making it more difficult for future governments to falsify the historical record.

Recommendation 2

We recommend that the victims of human rights abuse be granted full and fair compensation for the injury, damage and suffering caused to them during the period of military occupation.

Again, following from the observations of the Indonesian Human Rights Commission we believe that the victims of abuse, including the families of those who were murdered, should be fully compensated. Such compensation should be adequate not only to cover the medical expenses required for recovery but should also be compensated for economic loss. The aim should be to return the victims of abuse and their families to a financial position similar to that which they might have expected had they not been subjected to the abuses in question. Further, those who were tortured while in military custody should also be compensated for the psychological distress they were caused.

We recognise that the implementation of this recommendation will be expensive. Nevertheless, as should be clear from the content of this chapter, the gross harms inflicted upon members of the Acehnese community were such that it can only be just that their pain and suffering should be recognised and redressed through the provision of medical and monetary resources equal to their need and distress.

Recommendation 3

We recommend that the Indonesian government make special provision for the children of the victims of extrajudicial killing, maiming and torture in order to ensure that they may be cared for appropriately during their childhood and may complete such education as their capabilities will allow.

As we indicated previously, many Acehnese children have been orphaned and disadvantaged as the result of human rights abuses inflicted upon their parents and relatives. Simple humanity requires that the damage suffered by these children should be minimised and that adequate

provision should be made for their growth, welfare and educational development.

Recommendation 4

We recommend that in seeking to regulate the conduct of political demonstrations, police and military forces observe internationally recognised rules of engagement.

We have been particularly concerned about recent incidents in which instances of political protest have been brutally suppressed by law enforcement authorities. This suppression has resulted in quite unnecessary loss of life and serious injury. It has also caused very substantial damage to the process of reconciliation embarked upon by the Government of Indonesia.

The international guidelines for the use of force in response to both non-violent and violent demonstrations require that:

- force should only be used when strictly necessary and only to the minimum extent required under the circumstances;
- lethal force should not be used except where strictly unavoidable in order to protect life;
- if there is no alternative but to use force, prompt, independent and full investigations of the events must be held;
- exceptional circumstances, such as those facing Indonesia currently do not justify any deviation from these standards but rather require greater vigilance in order to ensure that human rights are protected.

That such guidelines require immediate implementation and full compliance had been demonstrated not only by the recent violent events in Aceh but also in similar incidents across the country in places which include East Timor, Irian Jaya, Ambon and Jakarta.

Recommendation 5

In accordance with the guidelines specified in the previous section, we recommend that a full inquiry be initiated into the events surrounding the killing and injuring of demonstrators in Aceh during protests in favour of a referendum on 25 March and 3 May 1999 and the deaths and injuries inflicted by the military forces in the succeeding months. Military and police officers found to have acted in

derogation of their duties should be referred to the Attorney-General for immediate prosecution in properly and independently constituted civilian courts.

Palembang

The ICJ mission made its second visit to Palembang, in Southern Sumatra. During the visit, the mission was made aware of a number of issues concerning land disputation. In Palembang there appeared to be a major conflict between local shrimp farmers and the larger shrimp farming companies with respect to the proceeds to be derived from the industry. It is not the place of the mission to make any comments with respect to the merits of this disagreement. But there were a number of issues arising from the dispute which caused it concern.

The mission members visited the local prison where some 40 local farmers had been detained following a public demonstration in support of their claims. The mission members were able to interview a number of the farmers. They denied having used violent means in support of their demands for just compensation and blamed government sponsored infiltrators for the violence that occurred. More importantly, however, they indicated that they had been unable to obtain the lawyer of their choice and that they had had to rely instead upon a lawyer provided by the local authorities.

Further, the farmers had been detained without trial for periods substantially longer than those permitted under Indonesia's Criminal Procedure Code (see further Chapter V). Despite this, neither prosecutors nor judges had taken any action to rectify the situation.

The problem of lack of access to legal representation emerged again in the mission's visit to the local District Court. There, we observed the trial of three defendants in an important criminal case who had no representation whatever. When it became apparent that we were unhappy with this situation, the judges in the case asked the defendants whether they would prefer to be legally represented. They responded affirmatively and the case was adjourned to enable legal representatives to be found. It should not have taken our presence to ensure this result.

The *ad hoc* nature of these arrangements cause the mission considerable concern. On this basis:

- 1. We recommend that all defendants in criminal trials be advised by both prosecutors and judges that they may elect to be legally represented. Where this*

election is made, every endeavour should be made to ensure that such representation is forthcoming.

2. *We recommend that both prosecutors and judges institute procedures to ensure that the pre-trial detention of criminal defendants is effected in accordance with the provisions of the Indonesian Criminal Procedure Code.*

Appendix A

(This Appendix consists of the Report written by Professor Spencer Zifcak on the Trials of Political Activists in Jakarta in April 1998. It is included here to provide a practical illustration of the operation of the Anti-Subversion Law and the partial attitudes of the Indonesian Judiciary prior to the fall of the Soeharto regime)

But a Shadow of Justice: Political Trials in Indonesia

Ratna Sarumpaet is one of Indonesia's best known actresses. In 1997 she wrote a play called 'Marsinah'. Marsinah was a member of Indonesia's officially recognised union, the SPSI. She worked in a factory in Eastern Java. In 1994, fed up with her poor working conditions and angry about the meagre remuneration she and her colleagues received Marsinah, just 23, led an unauthorised strike. A few days afterwards she was raped brutally and murdered. The identity of her killer remains uncertain. Marsinah became a martyr to the trade-union cause.

Ratna Sarumpaet's one-woman play dealt with key aspects of Marsinah's short life. At times, however, she would step out of role, step forward on stage and address her audience on the parallels that could be drawn between the conditions oppressing her subject and those which still prevail in the country at large. About 600 people attended the first performance in Jakarta and were held in thrall. The success was short-lived however. The Indonesian authorities prohibited any further performances in the capital and the play itself drifted into oblivion.

The prohibition marked Sarumpaet. It sharpened her appreciation of political repression and provoked her engagement in oppositional political activity. Around her she gathered a small but dedicated group of activists - artists, lawyers, journalists, students - all of whom were devoted to resisting artistic and political suppression.

In March this year [1998], she convened a 'People's Summit', timed to coincide with the re-election of General Soeharto as President of Indonesia by the People's Consultative Assembly (MPR). It was hardly an imposing affair. Some 50 people turned out to attend the meeting which took place in

a small hotel in central Jakarta. Moments before the meeting was scheduled to begin, Sarumpaet was approached by the hotel management and told that the hotel could no longer house the event as the police has forbidden it. She took to the podium and announced that the summit could no longer continue. She apologised and expressed regret that freedom of speech and expression no longer appeared to exist in Indonesia. The meeting, she said, would have to be abandoned but before it was she asked that all present join her in singing the national anthem and in saying a prayer for Indonesian democracy. The participants complied and then left the premises.

Outside they were met by the constabulary. The police converged upon Sarumpaet who clung to the arm of a foreign diplomat. She was encircled by several supporters including her young daughter who begged that her mother should not be taken. Sarumpaet cried out in English and Indonesian for an arrest warrant. "I am the arrest warrant" the supervising officer replied. Subsequently, she and nine others including her daughter were detained and transported to prison. They have remained there pending trial ever since.

I was present at the legal proceedings in which Sarumpaet challenged the validity of her arrest. A statuesque and striking woman said to have the 'highest cheek bones in all of Java', Sarumpaet made her entrance to the North Jakarta District Court accompanied by a bevy of defence lawyers and security guards. It was the day on which the judge would deliver his decision. There was little optimism among the 250 or so Sarumpaet supporters who crammed the courtroom.

The judge began by summarising the evidence provided by defence witnesses - the prosecution had called none - but that was as far as his commitment to procedural fairness would take him. Having noted the circumstances of the meeting and the arrest as Sarumpaet had described them he proceeded to cite the provisions of the relevant law. Noting that the law required that any person holding a meeting that might undermine the stability of the State must have an official permit, he said simply that the defendant had been caught 'red-handed' without one. Pre-judging the substantive issue, he concluded that Ratna's arrest had proceeded on reasonable grounds as she had self-evidently broken the law and that, therefore, such defects as there were with the arrest procedure and warrant must be considered as a mere administrative triviality. The case, he said, should proceed to trial. There followed a remarkable series of events.

Ratna's defence lawyer jumped to his feet and screamed at the judge at the top of his voice. He demanded that the judge examine his conscience and accused him of political complicity. Procedural protections under

Indonesia's Criminal Code (KUHP) were valueless, he declared. "From now, even to sing the National Anthem and to call for prayer is a criminal offence in this country".

At this point heavily armed security guards entered the courtroom and ushered the judge out the back door. As he left, Sarumpaet herself leapt onto the bar table and delivered a political speech *ex-tempore* to cheering supporters. The security guards returned and ushered her through the throng into a waiting police wagon but not before she had stepped onto its stair, turned and issued a further denunciation of the court and its 'political justice.' She now waits in prison for the next three months until her next appearance on the politico-legal stage.

Political law

The law under which Ratna has been charged is sweeping in scope and of intensely political origin. Together with the *Anti-Subversion law*, the *Law Against Political Activity* was first issued as a Presidential Decree by former President Soekarno when Indonesia appeared on the brink of confrontation with Malaysia in the early 1960s.¹ After the bloody massacres of 1965 and Soekarno's subsequent replacement, the 'New Order' government of President Soeharto promised that all decrees conferring emergency powers would be reviewed. The first provisional Parliament established under the New Order government was given two years during which to determine whether these and other decrees issued by Soekarno were in the interests of the people and whether they were constitutional. It had been widely assumed that the *Law Against Political Activity* and the *Anti-Subversion Law* would be repealed. Instead, in 1969, the decrees were incorporated into Indonesian law by statute with references to threats to Soekarno's 'Guided Democracy' replaced with threats to 'Pancasila' the official philosophy of General Soeharto's New Order regime.²

1 The Law on Political Activity, Presidential Decree No.5/1963 reincorporated by statute into Indonesian law as Law 5/1969.

2 Pancasila consists of five components: 1. A Belief in one, supreme God; 2. A commitment to just and civilised humanity; 3. A commitment to the unity of Indonesia; 4. A commitment to democracy, led by the inner wisdom of consensus arising out of deliberation of the people's representatives; 5. Social Justice for the whole of the Indonesian people. These are set out in the Preamble to the Indonesian Constitution 1945.

In summary the *Law on Political Activity* provides no political meeting, gathering or other similar activity shall take place without an official permit. There are a number of features of this law which merit particular attention. First, it requires that the organisers of any and every political meeting having more than five participants must obtain a permit from the police before it can be held. This gives the police *carte blanche* to determine whether and when people may gather to discuss matters of contemporary political concern. Secondly, the meetings in relation to which a permit must be obtained are those which might have the effect of 'undermining the State'. Such a definition makes it exceptionally difficult for organisers to determine whether a permit is required and, correspondingly, accords the authorities a virtually unlimited discretion to determine whether any particular meeting falls within that definition. Thirdly, the law does not require that a meeting should be reasonably likely to undermine the State. Rather it makes it sufficient that such an effect may possibly occur. Fourth, the law does not set down any criteria in relation to which a judgment about whether a meeting might undermine the State should be made. This renders the judgment subjective and arbitrary.

Ratna Sarumpaet was also been charged under a second law which, as with the first, has been used with increasing frequency in the past few months. This law, which is contained in Indonesia's Criminal Code, forbids a person from expressing "hate or insult to the Government of the Republic of Indonesia"³ The law is taken directly from a Dutch statute designed originally to suppress the pre-war nationalist movement and carries with it a maximum gaol term of seven years. Again there appear to be no clear legal criteria in relation to which a judgment about whether a person has expressed "hate" or "insult" might properly be made.

The companion *Anti-Subversion Law* suffers from all these defects and more.⁴ The law describes a wide range of activities that might be considered subversive. These include, for example, actions which could distort, undermine or deviate from the official State ideology of 'Pancasila', otherwise destroy or undermine the power of the State, or disseminate feelings of hostility or arouse disturbances or anxiety among the population or broad

3 The Criminal Code (KUHP) Articles 154, 155. The Criminal Code also makes it an offence punishable by a maximum of six years gaol to engage in "Deliberate disrespect for the President or Vice-President", Article 134.

4 The Law on Subversion, Presidential Decree No.11/1963 incorporated by statute into Indonesian Law as Law 5/1969.

sections of society or between the Republic of Indonesia and a friendly State.⁵

It is not necessary that any of the acts described should actually have endangered the Republic. It is sufficient to demonstrate merely that such an effect were possible. Further, a person charged may be convicted even though he or she did not intend the consequence concerned and was not responsible for it.⁶ It is sufficient that the person might have been 'expected' to know that the relevant consequence might eventuate. Quite whose expectation this might be is legally unclear although in practice it has become that of the government.

The *Anti-Subversion Law* sweeps aside a host of procedural protections normally guaranteed to detainees by Indonesia's *Code of Criminal Procedure*.⁷ Among other things it accords wide power to the military and to prosecutors to search premises and seize material, to investigate cases and to imprison suspects for up to one year without trial. This latter period of detention is renewable indefinitely. Any person may be called as a witness in the proceedings including any professional person whose duties of confidentiality would normally prevent their evidence from being tendered. A refusal to give evidence is punishable by gaol. The sweeping nature of these procedural exemptions has resulted in the substantial abuse of the rights of political detainees.⁸

Following the arrest and detention of many political activists involved in the peaceful occupation of the premises of the Democratic Party of Indonesia (PDI) in July 1996, the Indonesian Human Rights Commission (KOMNAS HAM) called upon the government to repeal the subversion law. It argued that the law contradicted existing criminal statutes, encouraged the abuse of human rights because of that contradiction and that its general nature permitted the government to apply its provisions arbitrarily. In so doing, the Commission added its voice to those of the United Nations High Commissioner for Human Rights, the United Nations Special Rapporteur on Torture and the International Commission of Jurists among many others.⁹

5 Article 1(1)(a)(b) and (c).

6 So decided by the Supreme Court of Indonesia, *Keputusan Mahkamah Agung No.20/Kr/1969*, July 17, 1971.

7 *Code of Criminal Procedure (KUHAP)*, Law 0/1981.

8 These have recently been documented by Amnesty International in 'Indonesia/East Timor, the Anti-Subversion Law: A Briefing, AI Index: ASA 21/3/97, February 1997.

9 See in particular 'Indonesia and the Rule of Law', International Commission of Jurists, Frances Pinter, London, 1987.

Until July 1996, it seemed that the Indonesian government had responded to the sustained international criticism of these repressive laws by moderating their use. Since then, however, they have been invoked with renewed vigour. In the last eighteen months more than 200 people have been imprisoned under the laws just described in Jakarta alone. A new crackdown on political dissent has commenced.

The Anti-Subversion Law in Action

On my first working afternoon in Jakarta I met Dr. Sri-Bintang. We encountered each other in a small holding room at the back of the South Jakarta District Court where Bintang was awaiting the recommencement of his trial on charges of subversion. Small, animated, bespectacled, expressive and rueful he reminded me a little of Woody Allen as he held court among his family and friends. I asked him how he felt. "Well, you know, one has to be brave - and always optimistic" he responded.

Bintang, 53, had been a Professor of Technology at one of Jakarta's major technical universities. Subsequently, he became a member of parliament representing the Islamic PSI party. In 1994 he travelled to Europe and while there delivered two speeches, one in the Hague the other in Berlin, critical of the undemocratic nature of the Soeharto regime. In the speeches he described Soeharto as a dictator, a term apparently regarded by the authorities as particularly offensive.

It was Bintang's misfortune to precede General Soeharto in Berlin by only two weeks. Upon his arrival, Soeharto was met and publicly embarrassed by a small but vocal band of protesters. In an interview soon after he was visibly angry and upset. Not long after Soeharto's return to Jakarta, Sri-Bintang was arrested and charged with sowing hatred against the President. He was found guilty and imprisoned for a term of two years and eleven months. The University stripped him of his teaching position. No connection between Bintang and the demonstration was ever established. The conviction rested solely on the content of Bintang's addresses abroad.

Soon after his release from prison, Bintang resigned from the PSI and established his own political party, the PUDI. Under a package of political laws enacted in 1985, however, only three parties are officially to be recognised - Golkar, the government party, PSI, the Islamic party, and PDI, the party led before her engineered removal by Megawati Soekarnoputri, the daughter of former President Soekarno. Bintang travelled the country

seeking support for his plans for a more democratic and radically decentralised Indonesian Republic. Then, he had the temerity to declare his candidacy for the Presidency in the elections to be held in March 1998. Everyone knew that only one nomination for President would go forward, that of General Soeharto. With Bintang's declaration, however, official patience ran out. He was arrested and charged once more with subversion.

The indictment makes interesting reading. Five events are recounted as evidence of subversive activity. Bintang, it is said, organised a meeting to announce the formation of his new political party, another to develop its constitution, another to declare the party's formation and adopt its constitution and another to declare his candidacy for President. Finally, it says, he sent out greeting cards to his supporters announcing the imminent dissolution of the 'New Order' government and the introduction of his own.

In Court that afternoon, Bintang delivered his demurrer. He spoke eloquently, energetically and without pause for two and half hours. He agreed that the events set down in the indictment had occurred but argued that they did not and could not constitute subversion. The prosecution, he said, had simply taken it for granted that the meetings he had organised were subversive. But it had never demonstrated how or why this might be the case. All the meetings described had been publicly announced and conducted. Without conspiratorial, secretive or agitational components it was difficult to understand how any subversive intent could be proven. The simple formation of a political party did not in and of itself demonstrate an intention to overthrow the State ideology and neither did a declaration of one's candidacy for President. His party's manifesto, he said, had explicitly embraced 'Pancasila' ideology and recognised the primacy of the three party system.

As he moved from the particulars of the indictment to more general observations upon political freedom and suppression, Bintang's presentation became ever more passionate. The *Anti-Subversion Law*, he argued was cast so widely that any intellectual writing on government could be outlawed at the government's behest. He acknowledged that he had criticised the operation of Indonesian democracy but in doing so he had sought only to expose the strength of executive power, corruption wherever it existed and gross inequalities of wealth and power. Everyone, he said, acknowledged the existence of these social characteristics privately. He had sought simply to draw them into the public domain. Such fair comment, he pleaded, could not be regarded by any reasonable person as either subversive or dangerous to the continuation of the Indonesian State.

He looked directly at his judges and concluded:

the activities in which I have been engaged represent entirely legitimate political action. I have sought only to exercise freedom of speech and freedom of assembly. Every one of my activities has been consistent with the United Nations framework for human rights, with the rule of law, with the Indonesian Constitution and with the fundamental tenets of democracy. Who are you to convict me for this?

A Partial Judiciary

Throughout his presentation, Bintang's eyes darted between the three judges, assessing, accusing, but theirs rarely rested upon him. One of the most disconcerting elements of this trial and the others was the self-evident unwillingness of members of the judiciary to engage with the accused and their representatives except when absolutely necessary.

In delivering his decision in Ratna Sarumpaet's proceeding, the judge never once looked at her. In Bintang's case, the presiding judge with whom I had spoken prior to the afternoon session at least made eye-contact from time to time and recorded the odd note. His two colleagues, however, stared distractedly at the ceiling, out the high windows, into their hands, at movement in the gallery, at the heavily armed security police in the doors of the court, focusing it seemed everywhere except upon the lively and intense defendant claiming their attention. Their expressions betrayed no trace of concern or attentiveness, but rather boredom, listlessness and the occasional flash of irritation as Bintang turned his argument to corruption not only in government but also in the judiciary. A less inspiring reception to legal argument would be hard to imagine.

Without a genuinely independent judiciary, trials like this become an elaborate charade. In the ordinary courts of Indonesia, in the current political cases, no trace of independence can be discerned. There are a number of reasons for this.

The Indonesian judiciary is directly responsible to the Minister of Justice. It is not administered as a separate and distinct judicial hierarchy but forms part of the executive arm of government. Judges' appointment, remuneration, promotion and reward therefore are in the gift of the Minister and the government. In political cases, it can reasonably be expected that a decision favourable to the government will be rewarded, a decision adverse to it, penalised.

While the significance of judicial independence is acknowledged in the higher levels of the administration, its practical application and import is not. So, for example, in a speech in April the recently appointed Minister of Justice, Professor Muladi, urged his judges to be more courageous and less conformist in their decision-making. To encourage them, he cited the example of one judge in Yogyakarta who had made a decision to free an accused after having found that there was insufficient evidence to link him to the murder of a well-known journalist. That judge, he said, had been promoted soon after to head a Jakarta District Court.¹⁰ That it might be inconsistent with judicial independence for a judge to be promoted following an approved decision and that the promotion should have been effected directly by the Executive seemingly went unappreciated.

Appointments to the country's highest court, the Supreme Court are made routinely from the ranks of the military, the government and the civil service. No appointment from the private legal profession has ever been made.

Senior officials, including judges, are required to be members of the ruling Golkar party and to join an association under the chairmanship of the Minister of the Interior, KORPRI.¹¹ The association obliges all members to follow the association's rules and guidelines. Further, in every district a tripartite consultative structure has been established that involves periodic meetings of the chairman of the District Court, the chief prosecutor and the chief of police. Occasionally, these meetings are supplemented by others in which the commander of the local military district and the head of the municipal government are also involved. Meetings of both kinds appear to be held more frequently when political cases stand to be decided.

In political cases, proceedings are routinely prejudiced by statements from senior military and governmental officials implying the guilt of the parties being tried. For instance, in Sri-Bintang's case a senior general was quoted as saying that the accused's mailing of greeting cards deriding General Soeharto's prospects for re-election was clear evidence of subversive activity. During the course of earlier trials of PRD activists in 1997, General Soeharto himself had said that the PRD "had conducted activities which had the characteristics of insurgency."¹²

10 *The Jakarta Post*, March 23, 1998.

11 Presidential Decree 82/197.

12 See further Amnesty International, 'Indonesia: The Trial of Thought', ASA 21/19/97 pp. 12-13.

In subversion trials, the courts' setting can also be intimidating. In all the proceedings I witnessed, heavily armed guards stood at the hearing room doors and patrolled the corridors. Plain clothes intelligence officers were ever present.

Judges are very poorly remunerated leaving them open to monetary and political inducement. To supplement their meagre incomes, many judges engage in commercial activities beyond their profession so producing undesirable conflicts of interest. In the private legal profession, disillusionment with the calibre and partiality of the judiciary has become so great that, in civil cases, every effort is made to reach a settlement before a matter reaches court. In commercial cases, private arbitration has become the preferred method of dispute resolution. Acknowledging some of these problems, Justice Minister Muladi has recently announced a war on judicial corruption. It has been met with reservation amongst the judges and considerable scepticism in the legal profession. Nevertheless, everyone hopes that some inroads will be made.

Procedural Bias

In such an environment, it is unsurprising that partial, political decisions should be made in party political proceedings. But bias extends considerably further into trial procedure.

To take only the most recent example, on February 11 of this year [1998] 122 people were arrested for having taken part in a demonstration. The demonstration, which took place in the main shopping street of Jakarta, had been in favour of lower food prices. The demonstrators, some of whom were loosely associated with Megawati Soekarnoputri's opposition PDI party, were rounded up and incarcerated at the central metropolitan police station. 65 of them were subsequently removed to another police detention centre.

The demonstrators challenged the validity of their arrest and detention, invoking the *Criminal Procedure Code's* pre-trial procedures. On the day of their hearing, their families, friends and supporters gathered at South Jakarta District Court to catch sight of their colleagues and loved ones. They were destined to be disappointed. Six separate court rooms had been set aside to process the demonstrator's appeals but the defendants did not arrive. Their lawyers made inquiries and late in the afternoon it emerged that the police had refused to permit them to leave their cells to attend. The defence took

their complaints about this refusal to the bench and all the cases were stood down until the following day.

That next day exactly the same thing occurred. The defendants were not released. Their lawyers again protested to the judges who asked that the defence proceed without the clients. There followed a heated interchange the result of which was another adjournment with the judges indicating that they would decide overnight whether they could and would proceed in the defendants' absence. On the third day, the defendants failed to emerge yet again. The judges did not order their attendance but indicated that they were willing to proceed to a determination. All the defence lawyers walked out of court, leaving the judges and the prosecutors to themselves. There followed a troubling scene in which the name of each defendant was read out followed by a one sentence statement from the judges in each court that the arrests had been made in accordance with the law.

This is but one of many startling instances of legal irregularity in the conduct of criminal proceedings.¹³ During my visit I observed many other deficits in trial procedure principal among which were:

- the ready acceptance by the Court of the validity of arrests in spite of the fact that the prosecution failed to call either the arresting officers or any other witnesses to demonstrate that reasonable grounds for an arrest existed;
- the refusal by the Court to permit defence lawyers to question prosecution witnesses directly. Instead, the lawyers were required to direct their questions through the bench;
- the refusal by the Court to inquire into claims by defence witnesses that their earlier contradictory evidence had been obtained under duress;
- the refusal by the Court to require the prosecution to specify clearly how certain events could constitute subversion within the meaning of the term in the *Anti-Subversion Law*;
- the refusal by the Court to step in and prevent defence lawyers being called as witnesses against their own clients; and

13 Such irregularities have been extensively documented recently by the Australian Section of the International Commission of Jurists in its 'Report on the Anti-Subversion Trials in Indonesia', March 1998, ASICJ Sydney Australia.

- the intervention by the Court to prevent difficult and pertinent questions being put to prosecution witnesses, such intervention being justified on the grounds that the questions were irrelevant.

One of the most alarming failures of the courts has been their refusal to countenance the release of detainees held on remand when the initial case against them has collapsed. Instead, the judges have connived in continuing their detention after having been given notice by the prosecution that entirely new and different charges would be laid. Defendants thus find themselves confronted by a moving feast of allegations, charges and indictments that cohere only on the first day of their trial. The proceedings against Dr. Muchtar Pakpahan, the leader of Indonesia's only free trade union is the most celebrated case in point.

Dr. Muchtar Pakpahan

I met Dr. Muchtar Pakpahan in his hospital room in central Jakarta. He has been ill for more than a year, having been diagnosed with a large tumour on his lung. His requests to obtain treatment overseas have been denied repeatedly by the Indonesian government although a Canadian medical team was recently permitted to assess him. His transfer from prison to hospital appears to have been beneficial as he told me on the first day we met that he was feeling considerably better than he had done. For a forty-four year old man, however, his movements were measured and slow.

Despite his poor health, his close relationship with his wife and four children and constant harassment by the authorities for almost two decades, Pakpahan's commitment to his cause seems undiminished. He has retained his position as head of the Indonesian Prosperous Worker's Union (SBSI), the union he helped to establish in the late 1970s to organise and agitate for minimum wages and conditions for workers whose labour has too often been abused. He speaks passionately about his social responsibility and the plight of Indonesia's people following the recent collapse of the Indonesian economy. One can see that the poverty and hunger being experienced by increasing numbers of workers hurts him.

In April 1994, Pakpahan and ten of his colleagues were arrested in Medan in Northern Sumatra and charged with inciting workers to demonstrate and to strike. He had been elsewhere at the time of the demonstration but was nevertheless held responsible. To these charges a later one of sowing hatred against the President was added and Pakpahan was convicted

of the latter in November 1994. He was sentenced to three years and upon appeal the sentence was increased to four. Mr. Pakpahan requested judicial review of the conviction and sentence before the Supreme Court of Indonesia. In October 1995, his application for review was successful and he was acquitted.

Then, on 29 July 1996, two days after the government-backed break up of the occupation of the headquarters of Megawati Sukarnoputri's opposition party (the PDI), Pakpahan was re-arrested, interrogated and charged with subversion. Although the foundation for this charge and others was unclear, the implication appeared to be that Pakpahan had masterminded the occupation and had been responsible for the subsequent violence. In fact, at the time of the violence, he had been in another part of Java, three hours away, addressing a regional meeting of his union. He says he had no prior knowledge whatever of the 27 July occurrences.

In the event, these initial charges were dropped, the authorities realising apparently that there was no evidence which could plausibly link Pakpahan with the 27 July events. A raft of new subversion charges, however, were brought in their stead. Among other things these related to the publication of Pakpahan's book 'Portrait of the Indonesian Nation' - a critical analysis of the operation of Indonesian democracy, to speeches and interviews that he had given in Europe and to his composition of a song "Love Letter for Marsinah", a musical tribute to the murdered trade union activist.

To further secure their quarry, the government, through the Chief Prosecutor's office, initiated a review of Pakpahan's earlier acquittal by the Supreme Court. The Court reconvened with surprising speed and overturned its own previous decision. It proceeded to reimpose the four year sentence that had initially been handed down.

Muchtar Pakpahan retains his sense of humour in the face of this adversity. I told him that I was somewhat mystified by the fact that he had been arrested on one set of charges relating to the 27 July 1996, riots but that he was now defending himself in court on a completely different set. He paused for a moment and his face broke into the broadest grin as he observed wryly "it is a complete mystery to me too". Later we spoke about elections in Northern Sumatra in which the local authorities are alleged to have manipulated the electoral rolls to ensure the success of their favoured candidate. "That member of parliament", he said, "represents the computer".

No one, however, one can doubt the sincerity and earnestness of his cause. In response to a question about the content of his book, he gave me a forty-five minute lecture on all the deficits of Indonesian democracy which are its subject.

In the book, Pakpahan argues that in every facet of Indonesian political life power has been centralised in the hands of the President. A portfolio of political laws introduced in 1985 restricted the number and nature of officially recognised political parties. Presidential appointments to the Parliament ensured that the "New Order" government retained legislative control and that General Soeharto would be unchallenged in elections for President. Even where opposition political parties are permitted, parliamentary candidates have been screened for their suitability. In the regions too, the local mayors could be elected only if they met with official approval. Newspapers must be licensed by the government and those, like *Tempo*, which had been too critical of government policy have had their licenses revoked. The police have no genuinely autonomous prosecutorial discretion, acting where required, on governmental orders. The judiciary, while notionally independent, is subject to the overarching control of the Ministry of Justice. The Constitution, the book concludes, is of only symbolic importance. The real law of the country is promulgated in the statutes of a thoroughly compromised parliament and by Presidential decree.

In Jakarta's legal and diplomatic circles it is widely accepted that such a description of Indonesian rule is accurate. I asked Pakpahan, therefore, why he thought he had been targeted by the authorities while many others have not.

It is because the government knows that it is only organised labour that can bring about change. It has learnt the lessons of Eastern Europe and South Africa. It does not want those events to be repeated in Indonesia. That is why I am being kept here... It is why the cabinet has decided that I should serve another five years in gaol.

Counterpoints

In Indonesia, there are of course competing perspectives on the delicate subject of political justice. Government officials, prosecutors and judges with whom I spoke were at pains to emphasise that Indonesia's legal norms and legal system differed from the Western models with which I was

familiar. It is unhelpful, they argued, to apply Western concepts and standards to a country and to a system in which Eastern cultural and legal traditions prevail.

The key to understanding these traditions is the concept of 'adat law'.¹⁴ At one level, adat law can be understood simply as the traditional, uncoded law of the Indonesian people which preceded and now complements the codified law introduced by the Dutch colonial rulers and their successor nationalist governments. At another level, however, adat law can be appreciated as a system of rules and practices devoted to the attainment and maintenance of a community consensus arrived at by mutual consultation. On this view, justice consists not primarily in the application of explicit rules but rather in decisions which uphold and promote the general wellbeing. This is an understanding of the law that is more collective than individual in character.

Among the Javanese in particular, the underlying cultural value attached to consensus is pervasive. Outward expressions of dissatisfaction and hostility are frowned upon. Disagreements are finessed rather than arbitrated. Mutual assistance and compromise are preferred to argument and enforcement. Balance, equilibrium, coexistence and harmony are valued over conflict, contract, dissent and diversity.

It is such values that are called in aid by governmental officials when criticism of Indonesia's human rights record are made. So, for example, the Indonesian government has cautioned western observers with respect to their defence of individual rights. These, it is said, should be balanced by "the rights of the community, in other words, balanced by the obligation equally to respect the rights of others, the rights of the society and the rights of the nation."¹⁵ Such an orientation is said to be more consistent with the cultural traditions and customs prevalent in developing countries where the interests of the community must of necessity prevail over those of the individual if economic growth and prosperity is to be achieved - if hunger, ignorance, backwardness and disease are to be defeated.

An attachment to collective values is also said to underlie Indonesia's 'Pancasila' democracy. Pancasila's principles - the belief in one God, a just and civilised humanity, a unified Indonesia, deliberative democracy and social

14 Adat law and its application is discussed in more depth in *Indonesia and the Rule of Law*, International Commission of Jurists, Frances Pinter Publishers, London, 1987, Chapter 2.

15 Indonesia's position on Human Rights, Position Paper, Embassy of Indonesia in Canada, September 1995.

justice - are understood to imbue the Indonesian Constitution and inform not only its interpretation but also that of the general law.

So much might well be conceded in a State which fostered plural discussion and deliberation regarding national purposes albeit within a wider civic and cultural framework. The problem in Indonesia, however, is that values, principles and traditions having distinctive and significant merit have been dragooned into the service of the State and now serve to mask the deeper reality of authoritarian rule.

Thus, the rights of the nation metamorphose into the rights of the ruler. The principles of Pancasila become personified in the President. Alternative political perspectives are swept aside in the name of consensus. Critics are crushed to preserve a governmentally defined harmony. Those not with the government are designated as its enemies and as the enemies of the Pancasila State. The idea of community is transmogrified through ideology into tyranny.

On the broader political plain, the government is often heard to argue that Indonesian society is inherently unstable. The fragile unity which has been achieved and which has brought to its people a degree of prosperity until recently unknown can only be endangered by permitting too much diversity, difference and dissent. To fracture the Republic would be to invite chaos and confusion.

So much may again be admitted. Indonesia's political history has from time to time been bloody and the memories of the political carnage of 1965 still exert a powerful influence on the Indonesian political psyche. Yet it is hard not to feel that the dangers of disintegration are exaggerated in order cement the government's preeminence. There is no guerilla warfare here as for example there has been in the Philippines. Except in East Timor separatist tendencies appear sporadic and muted. The political opposition is divided. The union movement is still in its fledgling stages. The students while restive are disorganised and their demands are diffuse. Non-governmental organisations promote legal and democratic reform and act for individuals in trouble but their collective strength remains negligible.

To contain these movements, however, the government, in partnership with the military, has amassed a repressive State organisation of truly formidable dimensions. As one senior diplomat remarked to me "the mechanisms of political suppression are as pervasive as they were in the former USSR. The problem is that they are less sophisticated and, therefore, are worse."

Disappearances

In the months which preceded my visit to Jakarta, a new and disturbing facet of political repression had emerged. Oppositional political activists simply began to disappear. While it was difficult to determine the exact number of such disappearances, at least twelve people had been listed as missing in the period from February till April.

The twelve included Andi Arief, leader of the banned Indonesian Student Movement for Democracy, Pius Lustrilang of the People's Democracy Alliance, Desmond Mahesa of the Indonesian Legal Aid and Human Rights Association and Haryanto Taslam, an aide of Megawati Soekarnoputri. These four have subsequently emerged but have been reluctant to speak of their ordeal. All that has been gleaned is that they were taken by armed men said to be security personnel and interrogated at length.

A number of others are still missing at the time of writing. Rahardo Djati, a member of the National Committee of Discipline Upholders disappeared on 12 March. Following a violent episode in which police and students clashed on the campus of Lampung University on 19 March, five students were arrested and seriously mistreated. There remains no trace of four others.

The Indonesian Human Rights Commission has urged the government, the military and the police to initiate urgent inquiries as to the fate of these political activists. Sjamsuoddin, a member of the Commission, has said that:

These detentions are illegal. If it goes on like this we won't be a country based on law. If we are based on law it is clear we don't have kidnappings. So we call on the police to use the legal procedure if they think someone has a case to answer.¹⁶

The ruling Golkar faction in the House of Representatives has also expressed its concern as to the activists' well-being. It may be, as some in government have suggested, that they are simply in hiding. But this is a story that inspires little confidence amongst Jakarta's legal aid and human rights community. Its anxiety mounts every day.

Unlike the Philippines under Marcos, disappearances have not formed part of the Indonesian political culture. It is only to be hoped that the

¹⁶ Reported in The Age newspaper, Melbourne, Australia, 28 April 1998.

government's declared willingness to investigate the new phenomenon will be matched by action and the trial and imprisonment of any person found responsible.

Conclusion

In his holding room at North Jakarta District Court, I asked Muchtar Pakpahan whether he saw any prospects of success in defeating his prosecution for subversion. "My success", he responded, "will not be here."

My success lies in the fact that more people now dare to say the truth. When I began in 1978 I was the only labour leader in Indonesia. Now there are many and many more will follow.

I then asked whether he had a message for the international community.

Tell your people in Australia that I am in gaol because I stand for worker's rights, for the rule of law, for human rights and for democracy.

Tell them that it is better to die in justice than live in fear.

28 April 1998

Recommendations

Following from my observation of the trials in Jakarta I make the following recommendations:

1. *That the Australian Section of the International Commission of Jurists write to the Minister for Foreign Affairs, The Hon. Alexander Downer, requesting that he make urgent representations to the Indonesian government to the following effect:*
 - *That the Anti-Subversion Law, the Law on Political Activity and the Law prohibiting statements sowing hatred against the President be repealed immediately.*
 - *That all persons presently detained under these laws, including Dr. Muchtar Pakpahan, Dr. Sri-Bintang and Ms. Ratna Sarumpaet, be released from custody.*

- *That the Indonesian government be encouraged to investigate the current spate of disappearances among opposition political activists and that any person or persons who might have been responsible for such disappearances be prosecuted and tried.*
- 2. *That this report be communicated to the International Commission of Jurists and to the Centre for the Independence of Judges and Lawyers in Geneva with a view to them making similar representations to the Indonesian government in every appropriate international forum.*
- 3. *That this report be forwarded to Amnesty International, Human Rights Watch and any other relevant human rights body for information and action.*
- 4. *That the Australian Section of the International Commission of Jurists continue to send monitors to observe the current round of political trials in Jakarta and elsewhere in Indonesia.*

Appendix B

Political Prisoners in Indonesia

Based on data provided by POKJA-PLP on 20 May 1999

NO.	PRISON	NAME OF PRISONER	CASE	SENTENCE
1	LP Banda Aceh	Idris Ahmad	GPK Aceh	11 years
2	LP Banda Aceh	Jamaluddin bin Usman	GPK Aceh	16 years
3	LP Banda Aceh	Mulkan Usman, SH	GPK Aceh	11 years
4	LP Kembang Kuning Jawa Tengah	Marsudi	GPK Lampung	Life sentence
5	LP Kalisosok Surabaya	Abdul Kadir Baraja	Islamic Group	15 years
6	LP Cipinang Jakarta	Yose Alexander Gusmao Als Xanana	GPK East Timor	20 years
7	LP Kalisosok Surabaya	Markus Ximenes Belo	GPK East Timor	13 years
8	LP Kalisosok Surabaya	Markus Ximenes	GPK East Timor	9 years
9	LP Kalisosok Surabaya	Mario Filipe	GPK East Timor	9 years
10	LP Kalisosok Surabaya	Joao Bosco Ximenes	GPK East Timor	9 years
11	LP Kalisosok Surabaya	Muh Amin Dagal	GPK East Timor	13 years
12	LP Kalisosok Surabaya	Fortunato Ximenes	GPK East Timor	12 years
13	LP Kalisosok Surabaya Alvino	Freitas	GPK East Timor	12 years
14	LP Kalisosok Surabaya	Justino Grasiano Freitas	GPK East Timor	13 years
15	LP Kalisosok Surabaya	Bintura Belo	GPK East Timor	12 years
16	LP Kalisosok Surabaya	Dominggus Freitas	GPK East Timor	11 years
17	LP Kalisosok Surabaya	Virgilio Martines	GPK East Timor	11 years
18	LP Kalisosok Surabaya	Filomino Freitas	GPK East Timor	11 years
19	LP Kalisosok Surabaya	Dominggus Savio Freitas	GPK East Timor	12 years
20	LP Kalisosok Surabaya	Domingus Sarmento	GPK East Timor	12 years
21	LP Kalisosok Surabaya	Alexander Freitas	GPK East Timor	12 years
22	LP Kalisosok Surabaya	Joao Freitas	GPK East Timor	12 years
23	Lapas Semarang Jawa Tengah	Jacinto Das Noves	GPK East Timor	10 years
24	Lapas Semarang Jawa Tengah	Saturnino da Costa Belo	GPK East Timor	12 years

25	Lapas Semarang Jawa Tengah	Francisco Miranda Branco	GPK East Timor	15 years
26	LP Becora Dili	Abel da Costa	GPK East Timor	8-10 years
27	LP Becora Dili	Alfonso Manuel	GPK East Timor	2 years
28	LP Becora Dili	Agustino Belo	GPK East Timor	Unknown
29	LP Becora Dili	Armindo da Costa	GPK East Timor	8 years
30	LP Becora Dili	Contancio C. Santos	GPK East Timor	20 years
31	LP Becora Dili	Celestino Filipe Gama	GPK East Timor	8 years
32	LP Becora Dili	Francisco da Conceicao	GPK East Timor	10 years
33	LP Becora Dili	Francisco da Silva	GPK East Timor	10 years
34	LP Becora Dili	Francisco Soares	GPK East Timor	Life sentence
35	LP Becora Dili	Igido da Cunba	GPK East Timor	10 years
36	LP Becora Dili	Joao da Cunba	GPK East Timor	3 years
37	LP Becora Dili	Luis Antonio Soares	GPK East Timor	10 years
38	LP Becora Dili	Mariano da Costa Sarmento	GPK East Timor	10 years
39	LP Becora Dili	Reinaldo Marcal	GPK East Timor	10 years
40	LP Becora Dili	Romeo da Conceicao	GPK East Timor	10 years
41	LP Becora Dili	Sesario Belo	GPK East Timor	Unknown
42	LP Becora Dili	Silverio Ximenes	GPK East Timor	Unknown
43	LP Becora Dili	Vincent M. da Cruz	GPK East Timor	Unknown
44	LP Baucau	Carlos Freitas	GPK East Timor	4 years
45	LP Baucau	Francisco da Costa	GPK East Timor	Life sentence
46	LP Baucau	Francisco Freitas	GPK East Timor	4 years
47	LP Baucau	Jeronimo Soares	GPK East Timor	8 years
48	LP Baucau	Luis Marcio da silva Belo	GPK East Timor	Life sentence
49	LP Baucau	Rui Ivo da Sa Freitas	GPK East Timor	2 years
50	LP Kalisosok Surabaya	Eliezer Awom	OPM	Life sentence
51	LP Kalisosok Surabaya	Drs Albert Sefnat Kaliele	OPM	17 years
52	LP Kalisosok Surabaya	Drs Septimus Paiki	OPM	16 years
53	LP Kalisosok Surabaya	Simon Mosao, SH	OPM	16 years
54	LP Kalisosok Surabaya	Ik Yordan	OPM	13 years
55	Lapas Klas II A Abepura, Jayapura	Benekdiktus Kua Wamba	OPM	7 years
56	Lapas Klas II A Abepura, Jayapura	Benekdiktus Beraip	OPM	10 years
57	Lapas Klas II A Abepura, Jayapura	Hendrikus Kowip	OPM	7 years
58	Lapas Klas II A Abepura, Jayapura	Kasiwirus Iwop	OPM	7 years



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