

LAW REFORM AFTER **THE NEW ORDER OF PRESIDENT SUHARTO**

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I. Introduction

On July 23, 2001, the *Majelis Permusyawaratan Rakyat* (MPR – People’s Consultative Assembly – the body charged under the 1945 Constitution to determine the Constitution and the guidelines of the policy of state commonly referred to as the Indonesian Parliament) voted Megawati Sukarnoputri to be the fifth President of Indonesia. The exercise of legislative muscle came after a protracted stand off with the previous chief executive, Abdurrahman Wahid. This confrontation within the government had practically paralyzed the nation. The political impasse had set back hopes of any meaningful recovery from the economic crisis that hit Asia in 1997, the event that ended the thirty-two year authoritarian New Order under President Suharto and his successor President Habibie.

This new government of Indonesia under the daughter of Sukarno, the nation’s charismatic revolutionary leader and first president inherited a large backlog of overdue tasks. Among the most urgent of priorities is the revival of Indonesia's standing before the international financial community. The collapse of Indonesian Rupiah had brought the economy to a standstill, a predicament that persists to this day. Borrowers are unable to repay their debts. Indonesian banks cannot secure foreign loans. As a result, banks are pushed into insolvency and are unable to provide the credit that could reignite economic activity and restart growth. Without access to export financing, exporters are unable to earn hard currency by selling their products abroad. Manufacturers and producers no longer can afford the supplies and raw materials required to continue operations. Since manufacturers cannot ship products out the factory door, they could not generate income to service their debts to banks and other creditors. And the cycle repeats in a stationary but downward spiral.

Another priority is to prevent the archipelago nation from fragmenting into a number of separate political entities. Yet another is to afford economic opportunity beyond the elite to the general population. In a rapidly changing and urbanizing society that is connected with the rest of the world, fewer Indonesians will put up with authoritarian rule, nepotism, corruption in government and the violation of human rights.¹ Then there are those on fringe who would much too readily eschew civil society and resort to the use of violence for political ends. The government is facing a tall order to keep all the intrinsic pluralism of Indonesia in line. Without fundamental reform, very little advance can be made on the many fronts.

¹ Indonesians call these the “KKN” - *korupsi, kolusi, nepotisme* – corruption, collusion, and nepotism.

A major expectation for reform lies in the critical area of the legal and judicial system. Indonesia's judicial system is plagued with problems such as endemic corruption and impotence as a branch of government. The reform of the judiciary is crucial both as a means of enhancing equity and enhancing democracy within Indonesia and of improving the environment for foreign and domestic business activity.

But Megawati's appointment of an Attorney General who is a regular career functionary from the Attorney General's Office has been widely criticized as proof of faintheartedness towards legal reform and as a concession to Tentara Nasional Indonesia (TNI)², the reformed national armed forces of Indonesia. The new Attorney General Muhammad Abdur Rachman was associated with the ineffectual investigation of the military's human rights abuses in East Timor. He is viewed as part of the old guard in the judicial system whose entrenched interests are standing in the way of change. Megawati has been criticized as emulating Suharto, who left the economy in the hands of able technocrats, but kept a firm personal rein on the security services and on the legal system. Rachman and new Supreme Court Chief Justice Bagir Manan have spent their entire careers in one of the world's most byzantine judiciaries. Perhaps this was the way for Megawati to show her appreciation of the support of TNI/ABRI who abandoned Wahid for her cause.

The new Justice Minister, Yusril Izha Mahendra, a former Suharto speechwriter, had the same portfolio under Wahid before he was removed by Wahid. It is not apparent why Megawati refused reform-minded candidates as human rights lawyer Todung Mulya Lubis and Achmad Ali, an adviser to Attorney-General Baharuddin Lopa, a no nonsense reformer whose sudden death during Wahid's last days in office newly found hopes of Indonesia waging an effective war on corruption. The new Justice Minister has manifested little inclination or ability to tackle corruption and incompetence within the judicial system over which he had control. His main credential appears to be his membership of a Central Axis party to which Megawati had owed a debt. An observer has also noted recently that “[r]igid protocol and tight security have been restored, along with the authority of the State Secretariat--which administrates presidential affairs, and is now, along with the office of Vice-President Hamzah Haz, under the control of Cabinet Secretary Bambang Kesowo, a Harvard-educated super-bureaucrat and long-time Suharto retainer.”³

Besides the struggle over personalities, effective financial sector reform will depend, to a lesser extent, on substantive reform of the legal system. For example, even though Indonesia has a bankruptcy law, it remains most difficult to secure judicial enforcement against in effort to collect. Indonesian businesses debtors who have political connections could scarcely be touched. This situation has at least two adverse effects on the Indonesian economy: (1) it reduces the incentive for foreign capital to continue to invest, (2) it encourages incompetent management to continue with non-viable projects.

² Formerly known as the *Angkatan Bersenjata Republic Indonesia* (ABRI), the military is well on its way to a comeback after having lost prestige with the fall of Suharto.

³ John McBeth, *Indonesia: Nothing Changes*, *Far East Economic Review*, Issue cover-dated November 01, 2001. See, http://www.feer.com/2001/0111_01/p016region.html

Average Indonesians, as well as foreign corporations and banks, must be reassured that the sanctity of contract and the commercial law applies to all. Over the course of the New Order, nepotism and cronyism had set in and the business projects and managerial style and competence of the elite may not be the most economically efficient. The end result is that misallocation of capital may creep in. Functionality may be maintained in the short run, but in the long run the economy is apt to collapse as inefficiency and losses accumulate to a critical level. This problem is not limited to Jakarta and the national scene: even at the provincial level, the economic and political influence has stifled business efficiency and crippled job creation.⁴

Under President Habibie who replaced Suharto for a short time, meaningful reform of business law was not accomplished. Opposition leader Amien Rais noted in the beginning of July of 1998 that the "law applies only to those who are weak."⁵ As part of the Ministry of Justice, Indonesia's judges lack independence from the bureaucracy and ultimately from the President. Judges and their staff also are underpaid, which invites a lack of attention to official business, distraction with personal affairs, and finally, corruption.⁶ An independent judiciary would go far to realize the notion of *negara hukum* and reestablish greater confidence and interest in Indonesia's economy, especially from the international sector.

II. Reform of Commercial & Bankruptcy Law

The 1997 Asian economic crisis had prompted Indonesia to revisit operate with an eye towards serious *reformasi* its economic laws and the institutional framework within which they. More important, the subsequent fall of Suharto on May 21, 1998 actually resulted in the passage of a shelf-full of new legislation in 1999, the more crucial of which are⁷:

⁴ See, Margot Cohen, Reforming the little Suhartos, *Far Eastern Economic Review*, July 8, 1998, p. A13.

⁵ See, Amien Sets Out His Agenda for Total Reform *Jakarta Post*, July 1, 1998.

⁶ See, Better Salary Key to Boosting Judges' Integrity and Quality, *Jakarta Post*, May 4, 1998.

⁷ During the 1999, the government of Indonesia processed many laws drafts and regulations. 69 of them succeed legalized to be law, beside several of them were Government Regulations, Presidential Decrees, and others, a more complete list is as follows:

FINANCIAL SECTOR

- Law No. 23 Year 1999 on Indonesian Bank
- Law No. 24 Year 1999 on Revenue and Change Value System
- Law No. 42 Year 1999 on Fiduciary Guarantee
- Govt. Regulation No. 17 Year 1999 on BPPN (National Banking Restructurization Board)
- Govt. Regulation No. 4 Year 1999 on Additional Capital Republic Indonesia to Several Banks Govt. Regulation No. 28 Year 1999 on Merger, Consolidation and Acquisition of Bank)
- Govt. Regulation No. 29 Year 1999 on Purchasing Share of General Bank)

TRADE SECTOR

- Law No. 5 Year 1999 on Prohibition of Monopoly and Unfair Efforts

- a new bankruptcy law has been enacted
- a new commercial court established – with its first order of business being application of the bankruptcy law
- a pro-competition law has been passed and an institutional framework for administering the law is being assembled

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- Law No. 8 Year 1999 on Consumer Protection
 - Govt. Regulation No. 9 Year 1999 on Arrangement of Commodity Measured Trade
 - Govt. Regulation No. 10 Year 1999 on Method to Inspection Commodity Measured Trade
 - President Decree No. 3 Year 1999 on Statement to Agreed for Indonesian Quota Increasing International Monetary Fund
 - President Decree No. 5 Year 1999 on Legalization Agreement between the Government of the Republic of Indonesia and the Government of the Hashemite Kingdom of Jordan Concerning the Promotion and protection of Investment
 - President Decree No. 7 Year 1999 on Estimation Criteria to Giving Taxes Facility on Fixed Industry Sector.
 - President Decree No. 12 Year 1999 on Commodity to be Subject Measured Contract
 - President Decree No. 13 Year 1999 on Legalization of Fifth Protocol to General Agreement on Trade Services
 - President Decree No. 28 Year 1999 on Legalization of Framework Agreement on the Asean Investment Area.
 - President Decree No. 28 Year 1999 on Indonesian Manpower Placement Coordination Board
 - President Decree No. 37 Year 1999 on Change of President Decree No 183 Year 1998 on Capital Investment Coordination Board.

POLITICAL SECTOR

- Law No. 2 Year 1999 on Political Party
- Law No. 3 Year 1999 on General Election
- Law No. 6 Year 1999 on Revoked of Law No. 5 Year 1985 on Referendum
- Law No. 26 Year 1999 on Destruction of Subversion Practice.
- Law No. 27 Year 1999 on Change of Criminal Code of Law Related to Criminality for State's Security
- Law No 28 Year 1999 on Clean Government and Anti Corruption, Collusion and Nepotism
- Law No. 35 Year 1999 on Change of Law No. 14 Year 1970 on Justice
- Law No. 37 Year 1999 on Overseas Relationship
- Govt. Regulation No. 33 Year 1999 on Arrangement of Law No. 3 Year 1999 on General Election

MANPOWER SECTOR

- Law No. 19 Year 1999 on Legalization of ILO Convention No. 105 Concerning The Abolition of Forced Labor
- Law No. 20 Year 1999 on Legalization of ILO Convention No. 138 Concerning Minimum Age for Admission to Employment
- Law No. 21 Year 1999 on Legalization of ILO Convention No. 111 Concerning Discrimination in Respect on Employment and Occupation
- [Law No. 29 Year 1999 on Indonesian Manpower Placement Coordination Board](#)

HUMAN RIGHT SECTOR

- Law No. 39 Year 1999 on Human Rights
- Law No. 29 Year 1999 on Legalization of International Convention on the Elimination of All Forms of Racial Discrimination 1965

TELECOMMUNICATION SECTOR

- Law No. 36 Year 1999 on Telecommunication
- Law No. 40 Year 1999 on Press
- Govt. Regulation No.56 Year 1999 on Selling Share of Republic Indonesia to PT. Telekomunikasi Indonesia Tbk

- a new banking law has been issued and the central bank has been made legally independent of the government
- a secured transactions law is being prepared and the company law is being formally reviewed.

But, as all can see, economic recovery is slow in reappearing in Indonesia. Did the reforms have any impact or they remain ink on the pages of a code book? The answer is that it is difficult to discern the improvements that are directly due to such legal reforms. Perhaps, the time has been too short for the cure to take effect for such a massive problem as faced by Indonesia. The other reason is that while the laws are change on the books, the old way of doing business is untouched.

A certain obstacle to recovery that can be discerned is that economic revival is dependent on the adequacy of institutions to administer policy and laws in addition to the conceptual quality of new legislation. Perhaps a most apparent example is the inability of the commercial courts to win public confidence in implementation of the bankruptcy code. The government (the courts are part of the Ministry of Justice) seems reluctant to impose the law against uncooperative debtors. This prevents corporate restructuring does not occur and the old-line companies are allowed to continue with business despite their demonstrated poor financial condition. Bankruptcy serves the critical social goal of weeding out incompetent management and inappropriate business projects to enable a better selection of new enterprises to germinate and grow.

Investor confidence has also been shaken by the visible deterioration of *tertib dan damai* in many parts of the archipelago and this incivility impedes the free flow of commerce and capital as investors become fearful and refuse to commit their assets. Provincial and local authorities also display an inconsistent enforcement of contractual rights and obligations. Unfortunately, it appears that corruption in the far reaching Indonesian bureaucracy is not effectively sanctioned by the rule of law. The momentum for reform appears to be braked – not much has changed as a matter of practice. President Megawati may very well be referring to all of these problems in her recent grim speeches. She remains under pressure to deliver concrete reforms and only time will reveal whether she will be effective.

In defense of the latest President, the challenges facing contemporary Indonesia are intricately complex and there are many powerful forces that contribute to the inertia against change. To the previous two presidents, Habibie and Wahid (especially Wahid as he had campaigned on a platform of reform while Habibie was perceived as Suharto's man), it seems may have seen easier leave the *perjuangan* and to seek rest in the familiar and comforting ways of the *status quo*.

Nevertheless, just a stubborn MPR finally ousted the lethargic Wahid, *the Dewan Perwakilan Rakyat* (DPR - Indonesian House of Representatives – the body charged under the 1945 Constitution for approving legislation) remains committed to a reformative legislative agenda for 2001. The first session of the DPR opened on January

15, 2001.⁸ 22 bills ranging from the controversial to the routine were expected to be taken up by the legislature. On the top of the list are highly contentious amendments to the Bank Indonesia Law, the long-delayed Oil and Gas Law, two new manpower laws, and amendments to intellectual property laws.

Amendments to the 1999 Bank Indonesia Law

The Bank Indonesia Law Amendments bill, a carry-over from the late-2000 DPR session, is high on the agenda. This bill was intended to repair deficiencies in Law No. 23 of 1999 establishing the independence of Bank Indonesia. The bill could introduce policy changes such as lifting the prohibition on BI's providing credit to the government and make it easier to remove a sitting board member. Opponents, including some among BI's Board of Governors, charge that the government's real intention is to weaken the central bank's independence so as to be able to replace sitting governors with its own nominees.

Syahril Sabirin, the Governor of Bank Indonesia was jailed for two months in 2000 and is now on trial at the Central Jakarta Court on charges related to the 1999 Bank Bali campaign finance scandal. Indonesian Prosecutor Yan Mere on October 31, 2001 called for a four-year jail term for the central bank governor charged with alleged corruption linked to the 1999 Bank Bali scandal.⁹ The scandal revolves around the payment by Bank Bali in 1999 of a US\$80million commission to PT Era Giat Prima, a company linked to the formerly dominant GOLKAR Party, to help the recovery of interbank loans. The prosecution stated that the loans were guaranteed by the central bank and therefore no commission was necessary, giving rise to allegations that associate of former president Habibie,¹⁰ who appointed Sabirin, were involved. The majority of the board of Bank Indonesia had resigned in November 2000, but are attending to duties until their successors are selected.

Laws on Public Finance

The Ministry of Finance recommended three laws concerning the management of government finances and asset with an eye towards improving the transparency of spending and to strengthening the ability of public treasurers and Inspectors General to control corruption among public officials. The chief agencies are the Supreme Audit Board (BPK, a separate branch of government rooted in the Constitution), the Finance and Development Control Agency (BPKP) within the executive branch, and Inspectorates General within government departments.

⁸ Under Chapter VII, Article 19(2) of the 1945 Constitution, the DPR shall sit at least once a year.

⁹ Prosecutor told the trial that the case against Sabirin had been proved and the government had lost 904 billion rupiah (86.9 million dollars). Mere also demanded the court fine him 30 million rupiah (2,885 dollars). The court will adjourn for two weeks to allow Sabirin, who is on bail and remains in office, to prepare his defense. See, <http://sg.news.yahoo.com/011031/1/1mo3b.html>.

¹⁰ Not only is the focus on Habibie: a Special Committee is former president Wahid's involvement in the Buloggate and Bruneigate financial scandals.

The Bill on the State Treasury would tighten the rules governing treasurers in state ministries and non-departmental agencies. This legislation would replace a Dutch vintage public administration law. The law requires state treasurers or other government officials who cause losses to the state to face fines, prison terms and seizure of personal assets. The Bill on State Finance would change the way the government drafts and implements the annual budget bill. It will also take into account the fiscal decentralization program introduced on January 1, 2001. The Bill on Investigation of State Financial Responsibility strengthens the ability of the Supreme Audit Board, the constitutionally established national oversight agency, to conduct oversight of the government budget.

For the 2001 session, the DPR is slated to consider two additional bills on public finance drafted by the Ministry of Cooperative and Small and Medium Sized Enterprises: (1) legislation on the Taxation Court: The law would establish a new court circuit to handle tax-related disputes, and (2) legislation on Bank Credit. The legislation is intended to expand credit programs smaller businesses.

III. Reform on Criminal Law and Criminal Procedure

There is great public pressure for the government to reform the laws pertaining to the public prosecutor and national police. The police had been a component of the ABRI for over 30 years until 2000; now that they are separated from the military command, there is an expectation of greater accountability of the police to the civilian oversight. Observers hope for redrafts of laws to strengthen integrity within both the police and prosecutor's office. A governmental combination known as *Makehjapol* has been identified as an obstacle to meaningful reform. *Makehjapol* (sometimes spelled *Mahkejapol*) is the Indonesian style acronym for the Supreme Court (*Mahkamah Agung*), the Justice Department (*Kehakiman*), Attorney General's Department (*Kejaksaan Agung*), and the Police (*Kepolisian*).¹¹ It may have originated in 1981 as an *ad hoc* conference of highest officials from the four departments, to develop a working understanding of the just enacted KUHAP¹², the Code of Criminal Procedure (*Kitab Undang-Undang Hakinan Acara Pidana*). Since then, such interagency arrangements have spread to national, provincial (*Diljapo*) and regency levels. It is well known that Judges routinely meet police and military officials at *Muspida* meetings (*Majelis Unsur Pimpinan Daerah*). While the fate of the accused may be discussed and favors traded between those present, notably absent from such conferences are defense attorneys or other representatives of those accused.

KUHAP separates investigation from prosecution: crime investigation is normally under the authority of police and action in court is under the authority of prosecution. Only in

¹¹ See also, *Ali's Court Investigated in Detail*, *Tempo*, 18 July 1992, p 2. In this article reference is made to the "triumvirate" called *Mahkeja* (*Mahkamah Agung, Kehakiman, Jaksa Agung*).

¹² KUHAP replaced the *Herziene Indonesish Reglement* (HIR), the Dutch colonial code of 1848.

regards to as "special/specific crime" such as corruption, is a prosecutor authorized to conduct investigation. The law against corruption has been amended - the Attorney General has the authority to coordinate law enforcement on corruption cases the proof of which is complicated¹³ and to coordinate preliminary investigation and inquiry on corruption cases which are committed jointly by civil and military personnel.¹⁴ If the government fails to criminally prosecute a case, a civil action can be filed against anyone causing any loss by the Attorney General's Office or by the government agency or company, which suffers from financial loss in that case.¹⁵

As with all of the other areas of law reform, the challenge may be less on the proliferating rework of statutes, but more on the nut-and-bolts aspects of functional implementation of basic concepts of governmental reform on a day to day basis. For tangible improvement to occur, collusion and *ex parte* communications between the judiciary, the prosecutor, and the police must be eliminated. The judge may participate in a conference only if both the prosecutor and the defense attorney are present. The role of the police must be strictly limited to the investigation of a case and to appear only as witnesses in court as called by the prosecutor. Only the defense counsel is to be permitted to earn a fee from the accused and that fee is based on the service of defending the accused against the prosecution. These rules are simple to state but the acid test is in their daily application.

IV. Reform Against the Violation of Human Rights by the State

The separatist and oftentimes sectarian violence in West Timor, the Moluccas, Sulawesi, Aceh, and Papua (Irian Jaya) has generated a correspondingly violent response by the Indonesian government. Violence induces more violence and the cycle seems to be interminable. An inevitable casualty of community violence is the making of residents into refugees. The prevalence of refugees remain a particularly critical predicament in West Timor, as the registration process in June 2001 did nothing to contribute to the safe repatriation or re-settlement of displaced persons.

The 275,000 strong TNI are now under the supervision of a civilian Minister of Defense but still holds on to broad non-military powers and plays an indispensable internal security role. TNI remains not completely accountable to civilian authority. In July 1999, President Wahid signed a decree removing the national police force of 175,000 members from the armed forces and from the supervision of the Minister of Defense and providing for civilian oversight. The military and police, now formally separate, jointly occupy 38 appointed seats in the DPR reserved for the security forces, as well as 10 percent of the seats in provincial and district parliaments. During the first half of the 1999, the phasing out of reserved seats for the security forces in the DPR and MPR was considered.

¹³ See Article 27 of Law No 28 Year 1999 on Clean Government and Anti Corruption, Collusion and Nepotism.

¹⁴ See Article 39, *Id.*

¹⁵ See Articles 31,32 and 33, *Id.*

Consequently, the security forces agreed to relinquish their appointed seats in the national and regional legislatures in 2004, but the MPR adopted a decree during its August session that extended the security forces' presence in the MPR until the year 2009.

In March, 1999, President Wahid had signed a decree abolishing the *Badan Koordinasi Bantuan Pemantapan Stabilitas Nasional* (BAKORSTANAS - Organization for the Coordination of Assistance for the Consolidation of National Stability). This may prove to be a major change for the better, unless the nation becomes engulfed in anarchy – so the jury is still out on this issue.

Despite the above changes, including the enactment of landmark legislation establishing a human rights court by the DPR, the military presently has an internal security role in areas of conflict and rebellion. Accusations of serious human rights abuses continue to be made against both the TNI and the police. The government has sporadically made an effort to prosecute members of the military for violations of human rights. For example, 24 army personnel were sentenced to 8 - 10 years imprisonment for the massacre of 58 civilians in Beutong Ateuh, West Aceh, in July 1999. However, the most senior military officer involved in the incident inexplicably vanished after the hearings. Generally, the Government's record of human rights and enforcement against abuses is considered to be poor. There currently exists the strong possibility that more violations will occur, especially if the “Balkanization” alluded to by President Megawati become reality.

V. Conclusion

With a population of 230 million, Indonesia is the fourth largest country in the world.¹⁶ Just by reason of its population size and the vast dispersion of its land across the archipelago, change inevitably will take time. Any outside observer must necessarily be patient. At the turn of the twenty first century, Indonesia is an experiment in progress, somewhat like the United States of America at the turn of the nineteenth.¹⁷

On November 7, 2001, international lenders gave Indonesia to six months to prove its commitment to economic reform in exchange for up to US\$4billion in loans to cover next year's budget. The Consultative Group on Indonesia (CGI)¹⁸ chaired by the World Bank, and meeting in Jakarta¹⁹ is expected to demand faster economic restructuring, privatizations and a war on corruption. Given Indonesia's weak rupiah and indebtedness, she will be under much pressure to continue with reforms.

¹⁶ Indonesia is the largest country in the world in terms of Muslim population.

¹⁷ Please see first paper. Charleston C. K. Wang, Legal Pluralism in Indonesia: Anachronism or An Idea whose Time Has Come?

¹⁸ . The CGI is made up of 20 countries and 13 institutions, which have lent Indonesia \$14bn since 1998, are meeting in Indonesia for only the second time. The IMF is not part of the CGI.

¹⁹ Hundreds of protestors, including Muslim students, anti-globalization groups and unionists, was reported to be demonstrating outside the meeting with posters proclaiming "IMF, World Bank go to hell with your aid" and "Cancel all debts and eliminate bank debts."

As has been noted above, the key is to be found in forthright implementation of basic legal procedures and less in the promulgation of substantive codes that gather dust on the shelves. The post Suharto DPR has been active in legislating, but the weak link as it always has been in Indonesia is in the lack of separation of powers within the government. There is a lack of checks and balances in the daily affairs of government, a deeply embedded practice of nepotism/elitism, and a byzantine approach to governing. Great vigilance must be placed on developing strong institutions – especially regulatory bodies and the judiciary.²⁰ To protect the judiciary from compromise, judges should enjoy life-tenure or tenure until a prescribed retirement age.

Practical reforms should focus on ensuring transparency, competition, enforcement and honesty in governance. The weak link remains the daily implementation of good practices within the government and must be addressed with persistent vigor. Finally, given the diversity in culture, pluralism in traditions, and chronic political cynicism that grip Indonesia, she will need time to change from the inside and outsiders will necessarily have to be patient as the youngest democracy in Asia goes about with *reformasi* from within.

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²⁰ A recent setback for the public perception of judicial independence is the acquittal of Tommy Suharto on October 4, 2001. See, <http://straitstimes.asia1.com.sg/asia/story/0,1870,74477-1002232740,00.html> .