

VAN ZORGE REPORT

ON INDONESIA

Behind the Headlines

VOL.XI No.12—Nov 25, 2009

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FROM THE EDITOR

Could amnesty save the KPK?

Two questions confront President Yudhoyono. The first is how to bring resolution to the current conflict between the Anti-Corruption Commission (KPK), and the National Police and the Attorney General's Office.

For Yudhoyono, this is not a question of how to achieve justice as much as it is a question of how to achieve calm. According to one member of Team 8, the fact-finding team appointed by the president to investigate the case against KPK deputies Bibit Samad Rianto and Chandra M Hamza, the present crisis is proving evocative of 1998 and the fall of Suharto. And it was Yudhoyono's fear of the possible reoccurrence of such events that lead to the establishment of Team 8.

Thus, the real purpose of Team 8 was not to evaluate the case of Bibit and Chandra, which was weak at best. Instead, Team 8 was the first step in series of moves that could allow President Yudhoyono to save face: his own, the National Police, and the Attorney General's Office (AGO), and to reach at least a tenuous resolution in the case against Bibit and Chandra.

As explained by one lawyer close to the case, this resolution is likely to see the police investigators bringing the case to the AGO, who would accept it. By accepting the case, the AGO would vouch for the strength of the case. This is particularly important because if the AGO does not accept the case, the police investigators could be prosecuted for pursuing a case without sufficient evidence. The AGO may then take advantage of a particular clause in the constitution that allows them not to prosecute a case — even if there is sufficient evidence — because to do so is not in the public interest. This is known by the Dutch legal term 'deponering.' There may still be pressure for Bibit and Chandra to resign, and though their reaction to such a request could prolong and complicate the resolution, it most likely will not prevent a resolution.

This resolution would allow the president, who does not want to be seen as overstepping his authority or angering the police or AGO, to find a quasi-legal solution to his political problem. It is a solution that would essentially allow Yudhoyono to intervene without intervening, and if successful, would turn the public's interest to something else, like Jakarta's rampant blackouts.

The second question confronting President Yudhoyono is, how can the KPK and its anti-corruption campaign survive in a meaningful form?

Back in August, when rumours of the impending arrest of two KPK deputies were first circulating, the *Report* met with a former deputy of the KPK — one who has not since been arrested — and asked him what the KPK hoped to do for Indonesia. He replied that the KPK was working to achieve in Indonesia what the Independent Commission Against Corruption (ICAC) had achieved in Hong Kong. Over 30 years ago, he explained, the ICAC began to transform Hong Kong from a city awash in corruption to the clean(er) city it is today. Hong Kong was ranked 12th in Transparency International's *2009 Corruptions Perception Index*, ahead of Germany, Japan, and the United Kingdom, among many others.

As we find ourselves several months into the KPK- National Police- AGO fiasco, the case of the ICAC is not only a model for what the KPK could achieve, it also provides a model for how the KPK could survive.

First, the ICAC is independent, but its powers are not unchecked. It is independent of the police and the civil service but it reports to the chief executive of Hong Kong. It is not, then, a 'superbody' accountable only to God, as has been claimed of the KPK. Nor is it, as had first been tried in Hong Kong, situated within the existing law enforcement bodies where it is sure to be stymied by vested interests.

Achieving institutional independence, especially when it comes to human resources within the KPK, is paramount and widely-stated. Equally important is imposing systematic legal checks against the KPK's power, so that critiques by the police or politicians about the KPK overstepping its authority would be less likely to gain traction.

Striking the right balance between independence and accountability will require that all stakeholders have the best interests of the KPK at heart, which is unlikely when you consider that over 100 members of the House are currently under investigation. It is not plausible that there will be political will to save the KPK if politicians

are fearful of being prosecuted by the institution they empower.

For its part, the Hong Kong police department was so unhappy with the newly founded the ICAC that they staged a general strike. Bowing to the pressure, the chief executive in Hong Kong decided that it would be best if the ICAC granted a general amnesty and would only prosecute offences committed after the amnesty. What this amounted to was a bargain between the police and the ICAC: The ICAC would not go after sitting politicians or officers for past offences and, in return, these politicians and officers would not challenge the authority of the Commission.

This was a highly controversial decision and was widely seen as a victory of the police over the ICAC. Yet in the long term, granting amnesty allowed the ICAC to survive and to flourish. Police and other members of the civil society in Hong Kong were willing to support the ICAC when they no longer harboured fear that they would be prosecuted for past crimes. This gave the ICAC breathing room and allowed it to prosecute new crimes under stricter anti-corruption laws and to implement a campaign to change the endemic 'culture of corruption.' In short, amnesty gave the ICAC room to do its job. So effective was it in investigating and prosecuting crimes in the public sector, that it began receiving fewer and fewer complaints about the police and civil service, and was able to turn most of its attention to monitoring the private sector.

In the shadow of the Bank Century case and amid the continuous chatter of 'cicak-buaya,' President Yudhoyono cannot be the one to suggest granting amnesty to corrupt politicians and civil servants. Likewise, the KPK leadership is also unlikely to extend a generous offer to those who would prefer to see the KPK sidelined forever. But once this immediate conflict is resolved, it may actually be in the best interest of the KPK to extend an olive branch of amnesty, if only to generate enough political will to see to its survival.

VZ UPFRONT

INTELLIGENCE

Sjamsoeddin is still on the waiting list

- Three-star Army Lt. Gen. Sjafrie Sjamsoeddin, current Secretary General of the Ministry of Defence, had been named as the candidate for Cabinet Secretary, but following a United States decision not to issue him a visa, it is unlikely he will take office.

Three Military Chiefs of Staff are replaced; TNI Chief to follow

- Following the removal of the Chiefs of Staff of the Army, Navy, and Air Force, President Yudhoyono may also replace incumbent Indonesian National Armed Forces (TNI) Commander Gen. Djoko Santoso in the coming months.

SPECIAL FEATURE

The ‘judicial mafia’ and judicial reform in Indonesia

- Local, national, and international organizations and civil society have long labelled the Indonesian judiciary as one the weakest and most corrupt elements in Indonesia. The Reformasi era has so far seen the establishment of promising institutions including the Judicial Commission, the Corruption Eradication Commission (KPK), the Corruption Crimes Court, and the Constitutional Court. However, vested interests plague the operations of these institutions and the Indonesian judiciary remains unreformed and highly susceptible to economic and political pressures.

INTERVIEW

Sebastian Pompe

- The Indonesian judiciary has become increasingly independent through institutional reform such as the ‘one- roof system’ which is designed to allow the judiciary to work without government interference. A number of obstacles remain including the broad area of internal operations, improving service delivery, and unabated corruption in the courts. The political will to reform the judiciary is not sufficient. Now more than ever, international donors and Indonesian civil society are critical to providing guidance to reform, and the pressure to see it through.

PRESENTATION

Kevin Evans on the new House of Representatives

- The large turnover in the House (70 percent) will make it difficult to hold experienced players in the government to account. The Constitutional Court’s decision last year to move to an open list system did not mean fewer women were elected in the legislative elections (as many feared), but the decision did benefit local candidates. It also represents a move toward greater accountability as representatives will need to make sure their electorate approves of the job they are doing. There remains, however, a ‘democratic deficit’ as the Regional Representative Council (DPD) is an elected body without authority. Finally, the current dispute between the KPK and the National Police highlights the need to move from anti-corruption as only law enforcement to creating a system wherein it is possible to work and be successful without engaging in corruption.

INTELLIGENCE

Sjamssoeddin is still on the waiting list

One month into his second term, President Yudhoyono has accepted the oath of all 34 ministers, and installed five deputy ministers and other high-ranking officials. Yet one name remains unannounced: three-star Army Lt. Gen. Sjafrie Sjamssoeddin, whose poor record on human rights may have sparked opposition from the United States.

Sjamssoeddin is current Secretary General of the Ministry of Defense and was on track to be the new Cabinet Secretary. Sources from inside the Palace said that while President Yudhoyono has signed the decree naming Sjamssoeddin, “it is quite uncertain as to when the President will officially announce it.” A source said that Sjamssoeddin may instead serve as expert staff dealing with the Cabinet’s day-to-day activities, which a high level post “but not equal to the ministerial post.” Such a shift, from Cabinet Secretary to expert staff, would be quite a demotion.

Indonesian cabinet structure usually includes two high-ranking state officials to deal with state administration and/or cabinet activities. They are Minister of State Secretary and Minister of Cabinet Secretary. Previously, the position of Minister of State Secretary was held by Hatta Radjasa, while the position of Minister of Cabinet Secretary was held by Silalahi. For the current Cabinet line up, Yudhoyono has appointed Radjasa as Coordinating Minister of Economy, and pending Sjamssoeddin’s appointment, Silalahi continues handling tasks from his old desk.

The stalled installment of Sjamssoeddin has sparked speculation that Yudhoyono has been reticent to officially inaugurate him following pressure from the United States. The US did not issue Sjamssoeddin a visa, effectively blocking him from accompanying Yudhoyono to the G-20 meeting in Pittsburgh held in September.

Sjamssoeddin is a member of Indonesian red berret corps *Kopassus* – the Army’s special forces which has been linked to a series of past human rights violations. Several *Kopassus* members are believed to have been involved in kidnapping cases of pro-democracy activists between 1997 and 1998. *Kopassus* is also accused of being partly responsible for the gross human rights violations before, during, and after the UN-sponsored ballot for independent in East Timor in 1999.

Another *Kopassus* military official was apparently blocked from entering the US as well; Maj. Gen. Pramono Edhie Wibowo, the current *Kopassus* Commander and a younger brother of Yudhoyono’s wife, Kristiani Herawati, was registered on the list of Yudhoyono’s entourage. Like Sjamssoeddin, Wibowo was prevented from visiting the US.

One source told the *Report* that, after a month of waiting, Sjamssoeddin no longer expects he will serve as Cabinet Secretary.

Three Military Chiefs of Staff are replaced; TNI Chief to follow

Coming on the heels of the replacement of three military Chiefs of Staff, President Yudhoyono is preparing to shake things up again with plans – possibly taking place in the next three months – to replace incumbent Indonesian National Armed Forces (TNI) Commander Gen. Djoko Santoso, sources told the *Report*. The sources added that in line with TNI's principle of rotation, the next TNI commander would come from the Navy.

“In the next three months, the newly installed Navy Chief, Vice Admiral Agus Suhartono, is likely to replace Santoso as TNI commander. Meanwhile, Suhartono's current post as the Navy Chief will be filled by Rear Admiral Yulianto, who is now serving as general planning assistant to the Navy Chief,” said to the source.

On November 7, the TNI headquarters announced a dramatic reshuffle removing three chiefs of staff from each branch of the armed forces: Army Chief of Staff Gen. Agustadi Sasongko Purnomo, who was replaced by Lt. Gen. George Toisutta; Navy Chief of Staff Admiral Tedjo Edhie Pudjiatno, who was replaced by Suhartono; and Air Force Chief of Staff Marshall Subandrio, who was replaced by Rear Marshall Imam Sufaat.

Two days after the announcement, President Yudhoyono officially installed Toisutta, Suhartono, and Sufaat at the Presidential Palace.

“The reshuffle inside the military is needed because the incumbent chiefs of staff have met their mandatory retirement age,” said the TNI spokesman Rear Marshall Sagom Tambun.

Despite Tambun's claim that the reshuffle was not sudden or unusual, the timing of the reshuffle – amidst political tension triggered by disputes between the National Police and the Corruption Eradication Commission KPK- has caused much speculation regarding the true motives.

The timing also seemed odd since, as one Air Force officer cautiously said, “Sufaat was still in France when he was told that he should immediately back to Jakarta to handover the command batton to his successor.” An officer from the Navy also shared news of his colleague: “The new Navy Chief is quite young, he is a 1977 graduation of the Armed Forces Academy (Akabri).” The two other new Chief of Staffs are young as well, having graduated from the Akabri in 1976. Well, perhaps not “young” in absolute terms, but the three are relatively younger than many of their associates who were passed over for the promotion.

One rumor has it that, a week before the recent reshuffle, some military top brass had an informal meeting during which they discussed the leadership of President Yudhoyono in the dispute between the National Police and the KPK. The TNI authorities, however, have denied that any such meeting took place.

Many members of the military are also dissatisfied with Yudhoyono's policies on

defense, including the President's latest decision to appoint Sutanto, a retired police general, to head the National Intelligence Agency (BIN) – an institution that has long been dominated by the military. Sutanto replaced Samsir Siregar from the Army.

SPECIAL FEATURE

The ‘judicial mafia’ and judicial reform in Indonesia*

At the peak of the conflict between the Corruption Eradication Commission (KPK) and the National Police, President Yudhoyono shelved the goal of increasing quality growth, including reducing poverty, improving infrastructure, and creating jobs, and announced that his primary objective in the first 100 days of his second administration would be to dismantle the ‘judicial mafia.’ This ‘mafia’ was said to include those both within and outside formal judicial and law enforcement agencies who are involved in bribery, blackmail, and witness intimidation. In this issue’s special feature, we focus on the reform of the Indonesian judiciary and the myriad challenges that remain.

In the morning of Tuesday, 21 April 2009 Nasib Karnan was beaten to death by an angry crowd in Karawang regency on the outskirts of Jakarta. The 51 year old man from the village of Medangasem had stolen three ducks and 20 eggs from his 60 year old neighbour Alim. Citizens had taken the law into their own hands (*main hakim sendiri*) to punish the thief, according to a newspaper report.¹

While forms and patterns of mob justice are subject to change in Indonesia—in the turbulent years after the collapse of Suharto’s dictatorship in 1998 setting thieves on fire and burning them to death was *de rigueur*² —‘street courts’ (*pengadilan jalanan*) have existed in the country since at least the authoritarian New Order regime was established in 1965.³

Incidents of *main hakim sendiri* are indicative of the dismal standing of the official legal apparatus in the eyes of ordinary Indonesians. The lack of credibility of the judiciary, hence the need to resort to self-justice, is primarily a result of the widespread corruption in the legal apparatus. In a comprehensive national survey rating state entities according to the degree of corruption conducted by the government’s Corruption Eradication Commission (KPK) in February 2009, the judiciary rated among the lowest, highlighting the woeful image of the court system.⁴ Likewise, an international survey ranked Indonesia’s judiciary last among 12 other Asian countries, noting that the judiciary is “one of Indonesia’s weakest and most controversial institutions and many consider the poor enforcement of laws to be the country’s number one problem.”⁵

Present day’s systemic graft and abuse of legal powers in Indonesia are the result of a gradual decline of judicial integrity that had started in the late 1950s. While Indonesia had a reasonable legal system in the immediate post-independence years, the politicisation of state institutions during Guided Democracy from 1959-1966 and the subsequent collapse of oversight mechanisms resulted in

* This special feature was provided by Michael Buehler, Postdoctoral Fellow in Modern Southeast Asian Studies at Columbia University in New York. He can be reached at mb3120@columbia.edu

¹ ‘Mencuri Bebek, Karnan Tewas Dikeroyok Massa’, *Kompas*, 22 April 2009, 27.

² ‘Trial by Fire: Taking the law into your own hands is now commonplace in urban areas in Indonesia’, *Inside Indonesia*, Jul-Sept 2004, online. Available at <http://www.insideindonesia.org>

³ ‘Dilarang Main Hakim Sendiri’, *Kompas*, 4 January 1966, 3.

⁴ ‘Judiciary the worst in graft: KPK survey’, *The Jakarta Post*, 5 February 2009.

⁵ ‘Judicial Independence a Myth: Lawyer’, *The Jakarta Globe*, 26 February 2009.

widespread corruption, collusion and nepotism. These unfortunate dynamics were only reinforced by the kleptocratic New Order regime under President Suharto. While structural limits to the independence of Indonesian judges were added. By the end of Suharto's reign in 1998, Indonesia's judiciary had lost all integrity. Reasonably functioning legal mechanisms had been replaced by the rule of a 'judicial mafia' consisting of judges colluding with prosecutors and private advocates.

Promises of reform

Since 1998, the Government of Indonesia has embarked on a path of law reforms triggered by both domestic and foreign pressure. While law reforms under Suharto's predecessor Habibie were primarily aimed at bringing the country's economic regulatory framework in line with demands from the International Monetary Fund (IMF), they also included reform initiatives aimed at the demilitarization of the police forces, a true separation of judicial and executive powers, constitutional reform and the implementation of various initiatives that led to greater democratisation and, at least on paper, the revaluation of human rights. Habibie's follower, Abdurahman Wahid adopted various reforms directly aimed at the judiciary, including salary rises for judges, higher budget allocations for courts and the appointment of *ad hoc* judges from outside the judiciary to Supreme Court positions. Various strategy papers for long term legal reforms were also issued during the Wahid presidency. However, due to the erratic nature of Wahid's leadership, the momentum for legal reform had abated by the time Megawati Sukarnoputri became president in 2001. Nevertheless, it was during Megawati's tenure that an independent Judicial Commission, a Corruption Eradication Commission (KPK) and a Corruption Crimes Court were established.⁶

The election of President Yudhoyono in 2004 reinvigorated judicial reform as he came to power with the pledge to implement an ambitious reform agenda. Rigorous anti-corruption initiatives as well as the improvement of Indonesia's dire human rights record were the main promises he made. Indeed, soon after taking power the Yudhoyono administration introduced measures to reform the legal system, raise judicial standards and tighten law enforcement. Consequently, parts of the judiciary have become more assertive in recent years. Especially the Constitutional Court has become increasingly vocal since its establishment in 2003.

Vested interests prevent the implementation of laudable reform initiatives

However, vested interests within the judiciary have managed to resist the implementation of many reform efforts. The aforementioned Judicial Commission, for example, which was established in August 2001 with a mandate to supervise judges and prevent corruption in the judiciary, was stripped of its oversight powers in a Constitutional Court decision in 2006. The court argued that the investigatory power would affect the independence of judges when deciding cases.

⁶ Timothy Lindsey and Mas Achmad Santosa. 2008. 'The trajectory of law reform in Indonesia: A short overview of legal systems and change in Indonesia' In Timothy Lindsey. Ed. *Indonesia: Law and Society*, 2nd edition, Sidney: The Federation Press, 2-22.

This significantly lowered the potential to promote a fair, clean and transparent judiciary.⁷ It is now the House of Representatives (DPR) that is responsible for the appointment of Supreme Court judges, while the aforementioned Judicial Commission is merely responsible for preselecting justice candidates. This provides political parties with the leverage to transmit their vested interests to the Supreme Court by selecting candidates they deem to be sympathetic to their cause.

Reforms aimed at the Office of the Attorney General have not been very successful either. The implementation of state authority over prosecutions is conducted by the Attorney General based in Jakarta, high prosecutor in each provincial capital and prosecutors in each regency and municipality, according to Articles 3-4 in Law No 16/2004. However, a weak regulatory framework, non-compliance of parties and law-enforcement officers as well as low capacity of the prosecutor's office all pose challenges to prosecutorial independence.

The current Attorney General's Office suffers not only from chronic mismanagement but also leadership failure. In September 2009, Indonesia Corruption Watch (ICW), a Jakarta based watchdog organization, requested President Yudhoyono to replace the current Attorney General Hendarman Supandji as he had "misled the direction of the country's antigraft campaign."⁸ In 2008, an ICW report showed that the Office of the Attorney General handed down unusually light sentences in many anti-corruption trials under its responsibility.⁹ It was also under Hendarman's tenure that the Attorney General's Office adopted a controversial policy of not detaining graft suspects if they agreed to return the stolen money. Hendarman Supandji's integrity suffered another blow when, in early 2009, he provided strategic posts to two senior prosecutors who were both implicated in a bribery scandal in 2008.

Another ICW survey conducted in nine provinces had shown that only 3.5 percent of the graft suspects charged by district prosecutors were from higher echelons in the Indonesian bureaucracy or the upper management in the private sector.¹⁰ Overall, well-connected suspects have a good chance to walk free. In February 2009, for example, Hutomo Suharto, second son of former President Suharto, won a district court case in a case brought by the Ministry of Finance. This verdict was just the latest in a series of legal battles that were won by members of the former New Order oligarchy. In February 2008, Attorney General Hendarman Supandji announced that he ceased the investigation of wrongdoing in the asset evaluation process for two major borrowers of Bank Indonesia Liquidity Assistance (BLBI) in 2000, the Salim and Gadjah Tunggal Group. A few months earlier, the Attorney General's Office had announced that it would close the investigation in alleged

⁷ Simon Butt. 2009. 'The Constitutional Court's Decision in the Dispute between the Supreme Court and the Judicial Commission: Banishing Judicial Accountability?' In: Ross, McLeod and Andrew MacIntyre, *Indonesia: Democracy and the Promise of Good Governance*. ISEAS: Singapore, 188-190.

⁸ 'Antigraft Body Demands New Attorney General', *The Jakarta Globe*, 7 September 2009.

⁹ Indonesia Corruption Watch. 2008. 'Pengadilan Umum: "Kuburan" Pemberantasan Korupsi', online. Available at <http://www.antikorupsi.org>

¹⁰ 'Antigraft Body Demands New Attorney General', *The Jakarta Globe*, 7 September 2009.

illegal logging activities of the Sinar Mas and Raja Garuda Mas groups in Riau province. These were by no means isolated incidents. Between 2007 and 2009 alone, the Office of the Attorney General had cleared business tycoons such as Tan Kian, former Pertamina executives Ariffi Nawawi and Alfred Rohimone, and former minister Laksamana Sukardi of corruption charges. This demonstrated that the ancient Greek poet Solon's saying that laws are like spider webs, they catch the fly but let the hawk go free, is very true in Indonesia.

Judicial reform has also somewhat stalled with regard to the Supreme Court. For example, personnel changes of the past few years, such as the appointment of Harifin Tumpa as Chief Justice of the Supreme Court in early 2009, do not bode well for reform prospects of this branch of the judiciary. Tumpa was investigated for wrong-doings while in office in 2006.¹¹ In a further setback, the House of Representatives approved a legal amendment in December 2008 that rose the retirement age for Supreme Court judges from 65 to 70 years. Given the extent of corruption allegations and the slow pace of reform within the Supreme Court, the regeneration of court personnel should have been an urgent priority.¹²

Corruption eradication

President Yudhoyono came to power in 2004 on the promise to weed out corrupt practices in Indonesia's bureaucracy and to improve the country's human rights record. Looking at the KPK's work alone, it looks like the Yudhoyono government delivered. In several hundred cases the KPK, the Corruption Crimes Court and the Supreme Audit Agency (BPK) have achieved a number of high-profile successes, including governors and general election commissioners. They have also prosecuted public officials and ruling party members for the abuse of power. In August 2008, for example, the KPK commenced the corruption trial of a Foreign Ministry official, Slamet Hidayat who was ambassador in Singapore in 2003-2004.¹³ Courts have upheld jail sentences in several appeals from jailed corruptors.¹⁴ However, the KPK, the most effective investigative body regarding corruption in Indonesia, is handling between 12 and 30 percent of all corruption cases in the country and therefore makes a relatively modest contribution to the law enforcement statistics.¹⁵

¹¹ In February 2006, the independent Judicial Commission recommended investigations on 13 Supreme Court justices, including Tumpa, due to signs of wrongdoing. See, 'No change expected at Supreme Court', *The Jakarta Post*, 17 January 2009.

¹² There are 10 Supreme Court judges that would have retired in 2009 but will now serve until 2012. See, 'Supreme Court Draft Law', *Tempo Magazine*, No. 12/IX, 23-29 December 2008.

¹³ 'Suspect Ambassador accuses Ambassador to the U.S. of Graft', *The Jakarta Post*, 26 November 2008.

¹⁴ In May 2008, the Jakarta High Court upheld a ten-year sentence for the Megawati-era head of the State Logistics Agency (Bulog) Widjanarko Puspoyo. In November 2008, the former Gadjah Tunggal Group executive Artalyata Suryani appealed to the Jakarta High Court trying to reduce his five-year jail sentence he received for bribing a state prosecutor. The appeal was dismissed.

¹⁵ Stewart Fenwick, "Measuring up? Indonesia's Anti-Corruption Commission and the new corruption agenda", In Tim Lindsey (ed.), *Indonesia: Law and Society*, 2nd Edition, ISEAS: Singapore (2008), 414. The bulk of corruption cases are handled by prosecutorial offices across Indonesia. In fact, even the much lauded Corruption Eradication Court has handed down light charges in some cases against public officials and ruling party actors. The former Gadjah Tunggal Group executive Artalyata Suryani was sentenced to five years in prison in July 2008, a charge denounced by many Anti-Corruption groups as too light.

Other investigative bodies are less efficient. The Ombudsman Commission, created in 2000 by a presidential regulation to receive and process reports on disappointing public services, has not been as effective in addressing corruption and promoting good governance as hoped. Over its eight years of operation, “it has...been hampered by a loss of national support, initially evidenced by a lack of government funding and, later by a continual shift in the legislative focus from one new anti-corruption institution to another”.¹⁶

Likewise, the Supreme Audit Agency, an independent constitutional agency, which supervises the state budget, has underperformed. Under the new rules established after the collapse of the New Order in 1998, the head of the Supreme Audit Agency is elected by its members to prevent the appointment of government cronies. To prevent domination by Jakarta based elites, the Supreme Audit Agency is to have offices in every province.¹⁷ While the Supreme Audit Agency has addressed various cases of misconduct in the past few years, it has not been without its own corruption scandals, showing the endemic nature of corruption, collusion and nepotism in Indonesian society.¹⁸ Unfortunately, some of the new members of the Supreme Audit Agency who were took office in October 2009 are controversial. Hari Purnomo, the new Supreme Audit Agency Chair, for example, served a six-year stint as director-general for taxation before he was removed by reform-minded Finance Minister Sri Mulyani Indrawati in December 2005 on allegations of corruption and abuse of power in the office under this control.

In short, the large bulk of power-abuse by public officials and party cadres in Indonesia continues to go unpunished, especially if they are high-up in the political pecking order. This is part of a larger political culture as was aptly shown by the fact that legislative and executive governments have refrained from casting blame on members of the political establishment for abuse of power in recent years.¹⁹

Human Rights

Some progress has been made with regard to improving the human rights situation in Indonesia in recent years. An important law on human trafficking was adopted in 2007, followed by efforts to raise public awareness of the issue.

However, the broader picture looks less encouraging. Torture and human rights abuses are a daily reality in the archipelago state. While victims of torture can submit complaints to the police this occurs only rarely due to the low reputation

¹⁶ Melissa Crouch, ‘Indonesia’s national and local Ombudsman reforms: Salvaging a failed experiment?’, In: Timothy Lindsey. Ed. 2008, *Indonesia: Law and Society*, 2nd Edition, ISEAS: Singapore, 386.

¹⁷ Tim Lindsey and Mas Achmad Santosa, ‘The trajectory of law reform in Indonesia: A short overview of legal systems and change in Indonesia’, In: Timothy Lindsey. Ed. 2008, *Indonesia: Law and Society*, 2nd Edition, ISEAS: Singapore, 36.

¹⁸ ‘State auditor named as corruption suspect’, *The Jakarta Post*, 14 February 2009.

¹⁹ In February 2008, for example, the national parliament refrained from casting blame on the Bakrie Group for the Sidoarjo Mud Extrusion, one of Indonesia’s biggest environmental disasters. The Bakrie Group is under the control of Aburizal Bakrie, the current Golkar chairman.

of the organisation. In fact, the police and the military are frequently involved in human rights abuses. The police often fail to bring prisoners before a judge, and prisoners can be held in custody for up to two months without charges. Some detainees are not registered at all.

Internal oversight mechanisms the Yudhoyono administration set up in recent years are toothless. In 2005, for example, a National Police Commission (Kompolnas) was formed with the task to investigate cases in which police personnel had carried out abuse. However, in June 2008, the commission publicly admitted that it had failed to boost the performance of the police force due to a lack of formal powers.²⁰ The National Police Commission essentially remains a paper tiger with no authority to investigate or detain people. Impunity for police and military officers involved in torture is the norm.²¹

At the same time, the authority, independence and capacity of the National Human Rights Commission (Komnas HAM) remain severely limited. The commission is currently not capable of conducting preliminary inquiries into all allegations of torture and ill-treatment because of its limited resources and weak mandate. The inability to bring the culprits behind the slaying of human rights activists Munir Said Thalib to justice until present provides example and evidence of the weak role the National Human Rights Commission plays in Indonesian politics. The handling of the Munir case is one of the major failures of the Yudhoyono administration and emblematic of the fact that the current Government of Indonesia has not resolved a number of substantive issues with regard to human rights.²²

Overall, the situation has not turned for the better regarding human rights abuses in Indonesia. In fact, only in October 2009, the National Human Rights Commission reported that human rights defenders in Indonesia were increasingly being reported to the police, accused of lies, defamation, and criminal acts.²³

Taking stock

To summarise, after five years of Yudhoyono leadership, the Indonesian judiciary remains unreformed and highly susceptible to economic and political pressures. Misconduct and unprofessional behavior by judges are rarely followed up. In March 2008 the Judicial Commission reported it had received 1556 reports of misconduct by judges in 2008 alone. The Judicial Commission examined 212 cases and recommended 27 cases to be followed up by the Supreme Court. The Supreme Court did not scrutinise a single case.

²⁰ "Police Commission says it is a toothless tiger", *The Jakarta Post*, (4 June 2008).

²¹ "Indonesia: Briefing to the UN Committee against torture", *Amnesty International*, (April 2008), online. Available at <http://www.amnestyusa.org/document.php?lang=e&id=ENGASA210032008>, 38.

²² Human Rights Watch, "Indonesia: Refocus Efforts to Solve Activist's Murder—Alleged Criminal Defamation the Wrong Approach to Munir Killing", (11 September 2009), online. Available at <http://www.hrw.org>

²³ Indria Fernida, "Protecting Human Rights Defenders in Indonesia", (23 October 2009), online. Available at <http://www.upiasia.com>

One of the main reasons for the low integrity and quality among Indonesia's judges is the country's weak career development system. The low pay and lack of adequate retirement contingency of many judges is a key factor in maintaining a system of endemic corruption. Only minor reforms have occurred in this respect over the past years. In April 2008, President Yudhoyono issued Presidential Regulation (Perpres) No 19/2008 on special merit-based stipends for the judiciary. The regulation created a new stipend that ensured adequate take-home salary for judicial system employees if their performance meets certain criteria. This step towards judicial reform will only be successful, however, with an overall improvement of accountability and transparency of the judiciary. At present, there is still a lack of adequate instruments for assessing judicial performance and quality. Overall, incentive structures in the judiciary remain largely unchanged from the New Order era.

At the same time, transparency and accountability continue to lose out to corruption, collusion and nepotism. Indonesia's anti-corruption initiative is currently under severe attack. Perhaps in a reaction to the Corruption Eradication Commission strategy of increasingly targeting high level politicians and bureaucrats, the House passed an Anti-Corruption Court Law in September 2009 which significantly weakened the KPK. The new law authorizes the heads of courts to alter the composition of judicial panels on the Corruption Crimes Court. Career judges, rather than ad hoc judges, may comprise the majority of such panels in the future. The previous law on the KPK ensured that panels consisted predominantly of ad hoc judges, recruited from outside the graft-ridden Indonesian judiciary. Furthermore, the legal training judges get prior to their professional careers is of low quality. Math Noortmann, a legal expert at the Erasmus University in Rotterdam described the quality of legal education in Indonesia as 'disastrous' in a recent interview. Teaching methods are dull, mostly limited to lecturing, while large class sizes render discussion impossible. The emphasis is on memorizing facts rather than developing professional skills. At the same time, professors at many Indonesian law faculties are absent and due to their low salaries engaged in advising governmental and non-governmental agencies. Currently, there is no momentum for a reform of the legal education system. Finally, access to justice is fraught with problems, especially for poor Indonesians. Only between 10 and 17 percent of poor Indonesians have the ability to bring their cases to the courts, according to recent estimates.²⁴

In November 2009, President Yudhoyono promised to make the fight against 'judicial mafias' his top priority for action in the first 100 days of his second-term as President of Indonesia. Given the dismal state of the judiciary in Indonesia after five years of SBY leadership, it is high time to deliver on such promises and to ensure the creation of a legal environment in which duck-thieves get fined instead of being flogged to death by angry mobs.

²⁴ 'Most poor Indonesians cannot afford cost of civil justice', *The Jakarta Post*, 31 July 2009; Adnan Buyung. 2007. Nasution, *Arus pemikiran konstitusionalisme*, Jakarta: Kata.

INTERVIEW

Sebastian Pompe



*Sebastian Pompe is program manager of the National Legal Reform Program (NLRP), which is funded by the Government of the Netherlands and administered by the International Monetary Fund. He is also the author of The Indonesian Supreme Court: A Study of Institutional Collapse. The Report sat down with Sebastian Pompe to hear his thoughts on politics and the judiciary, and the long road to reform.**

Van Zorge Report: What is your overall assessment of judicial reform in the last 5 years?

Sebastian Pompe: In 1998, the judiciary received everything they had been asking for over the previous 50 years, which was power, independence and status. On the issue of power, they got a constitutional court with powers of judicial review. On the issue of independence, judicial independence was constitutional

enshrined (which it was not previously). In addition, the judiciary was given administrative self-management under what is called the 'one-roof system,' which was enshrined in law in 2001 and effected in 2005. Finally, as regards status, the judiciary received a dollop of money with a structural budget increase.

Even though there is general agreement that this is a very good thing, one may question the wisdom of some of these measures, notably the one-roof system which is self-

management in financial, administrative and personnel terms. Some argued that giving an unreformed judiciary such wide budgetary and other controls actually gave up

all outside reform leverage, and thus basically killed the reform dynamic. Also, judiciaries tend to be endemically weak on management, and implementation has become a very major issue. It is important to recognise that the one-roof system is a response in Indonesia against dictatorship, under which it was through personnel, budget and administration that the executive interfered in the course of justice. This means the judiciary in Indonesia today is very independent, in formal terms much more independent than in many other countries.

There has also been an increase in facilities. The Indonesian judiciary has always craved an increase in budgets and salaries and it received a very significant budget and salary increase in the past two years. Overall, the judiciary is much better equipped than it was 5 to 7 years ago.

This is also a result of the introduction of the one-roof system. Under the two-roof system, in which the Department of Justice was handling the administration of courts, the amount of money that was left for the judiciary after the budget was creamed-off by the Department of Justice was pretty meager. The one-roof system has taken out this extra-bureaucratic layer as the

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budget is allocated directly by the government to the judiciary. All in all, if you look at the systemic changes that have been implemented since 1998, there has been a net improvement in constitutional terms, in terms of independence, in terms of power, and in terms of status.

VZR: What are the main obstacles for judicial reform?

SP: There are a number of major challenges. One is the broad area of internal operations. The Americans, the

* The interview was conducted by Michael Buehler and transcribed by Endah Asnari, a language instructor and translator based in Jakarta. She can be reached at endahasnari82@gmail.com.

European Union and the Australians have heavily invested in internal operations in Indonesia, but it continues to be an area of major concern. There is no good record keeping of cases and staff, there are no good methods for budgeting, there is a major gap in relating budgeting to staff and workload, and there is a very major issue in the area of responsiveness

There is a policy plan [9 Blueprints for judicial reform] that addresses these issues which was developed by the institution in close cooperation with civil society. It is not a self-serving plan but a plan that reflects societal aspirations and input. These plans cover a whole range of issues. There is heavy civil society involvement, which is great and does not happen in many other countries. Implementation assessments have been conducted of these plans and the implementation is around 30 to 40 percent, which is not bad as they were very ambitious plans. Currently, there are efforts underway to update those plans and renew their focus, again with heavy civil society involvement.

The other area of major concern is that for all the changes, for all the problem recognition and society involvement, for all the massive funds that have gone into this enterprise, service delivery continues to be very poor.

It is important to recognize that these institutional reform processes never are very easy. Typically, judicial reform of any significance in OECD countries takes at least 10 years. These challenges are also very complicated, in part because they often are not solely within the power of the judiciary to resolve. I just mentioned budgeting. A court, for example, in Indonesia is not a legal entity. Indonesian financial regulations prohibit non-legal entities from having a bank account. Now, how does each court then handle its household funds? Or if there is an order against a defendant to pay damages but the plaintiff is of unknown abode, how does the court hold such payments if it cannot have a bank account? Because of this, courts have to use 'curious' instruments to handle

financial issues because the law does not allow otherwise. So, even before talking about corruption, there are many technical issues that are not easy to resolve and that the court cannot resolve itself because they depend on other government entities such as the Department of Finance, or on the legislative process.

I am somewhat reluctant to say that the court does not reform at all. After all, it is addressing a whole range of issues that have developed over a period of 30 to 40 years. Nevertheless, at the very end, service delivery is really poor. It is also poor in terms of access. Indonesia has very little litigation. They had a lot of litigation in the 1950s, but now, figures are significantly lower: There is no societal trust in service delivery and court decisions command little respect even with government agencies. It is not just a court issue. Even if you have a court document and you are going to the authorities to have it enforced, the authorities do not seem to be very impressed with court orders.

Again, poor service delivery might not all have to do with the courts. It might have to do with the way legal court documents are viewed in the Indonesian state system, and a military heritage which never really valued legal documents. But even with that, the unpredictability of the courts, the inward looking nature of the institution, the way courts apply legal norms that local society has little sympathy for...are all responsible for the fact that the courts are still used very rarely overall. Indonesian courts have about the same case load of New Zealand, which has around 4 or 5 million inhabitants. Indonesian litigation used to be twice as high in the 1950s from what it is currently. So, it is not because Indonesians do not like to litigate but because the circumstances have deteriorated. All in all, the judiciary is still struggling to make itself a credible, dependable party. We are talking about the mainstream judiciary here; the general courts. The constitutional court is a different story and has been exemplary in itself.

VZR: In what ways is the constitutional court exemplary?

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SP: The constitutional court in so many ways has been exemplary. Not only in some of the decisions it has issued in the areas of civil rights, one example is the right for former members of the communist party to participate in elections, but it is also the fact that decisions are getting published the moment they are issued and the decisions are accessible in English; it is a very accessible institution. They try to have a visit from school children every day. In so many ways, it is a visionary court. There has not been even a whiff of corruption. The importance of the Constitutional Court is in the way it shows that things can change. It proves the skeptics wrong.

VZR: *What are the other major obstacles?*

SP: After internal operations and poor service delivery, the final point of concern is that corruption in the judiciary continues pretty much unabated. The information I am getting is that corruption prevails in the judiciary as it did before the reforms were started. It is pervasive. In certain transactions it is quite sizeable. It is pervasive also in terms of participants: The number of parties that are involved in corruption continues to be high. Integrity continues to be a very major concern. The increase in salaries for judges has lifted the incentives to some extent. There is less need for corruption and also the moral justification for corruption can no longer be used. Things are shifting but as you know you cannot out-compete corruption.

It is not necessarily driven by the judiciary alone but also by larger outside interests. There is an understanding developing that corruption is not necessarily driven by these institutions but by broader interests such as powerful politicians and entrepreneurs and lawyers that are acting on their behalf. The judiciary to some extent is on the receiving end. Yet even if it is not necessarily a prompter, it is a willing party.

This said, even in the old days there used to be parts of the judiciary that were honest. Usually women, by the

way, because they used to have high earning husbands so they did not depend on their income...and they also saw it as an intellectual exercise to remain non-corrupt. That group I think has currently expanded somewhat, perhaps in part because of the impact in the incentive structures due to the salary increases. But the power politics remain and more important than such individual transactions is the way these networks work.

The key to working in the current political environment in Indonesia is to not be exposed [to the power politics]. There are very powerful networks of lawyers and entrepreneurs built up within legal institutions and those networks are beholden to these larger companies and corporate interests. These are networks that have been built up over many years and they continue to flourish.

VZR: *Are these networks rooted in the New Order?*

SP: No, I think they are rooted in current politics and economics. I know of junior judges now being recruited who worked for corporations before they joined the judiciary. In fact, they were deliberately dumped by corporations in the judiciary

to work as their agents. Those networks have been built up over a period of 15 to 20 years and they continue to build them up. It is the way the system works. It is not a simple direct transaction between a lawyer or a company and the judiciary. Outsiders make the judiciary service their needs by parachuting in their agents. These agents basically work as middlemen between the outsiders and the judiciary, or the AGO [Attorney General's Office] for that matter as recent events made amply clear. Many of these agents are prosecutors or judges and receive a monthly salary from these outsiders.

VZR: *Against this backdrop, how would you assess the impartiality of the Indonesian judiciary, especially interference by the executive government? How does the situation look at the local level?*

SP: Formally, they are very impartial and certainly meet

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international standards. In reality, there are a number of elements that conspire against such impartiality. One factor is excessive hierarchy and discretion in the way powers are used. The fact that the chief justice can summarily order a judge from one place to another is an enormous power that can be abused easily. For example, you are in a comfortable position in the big city and then you are getting transferred to a little place in the middle of the jungle. So excessive hierarchy and discretionary powers coupled with relatively insecure positions of judges is undermining impartiality. Internal independence, in other words, is an issue.

Another issue is budgeting. Despite the significant budget increases, local courts often still suffer from budget shortage, particularly on infrastructure. So you have a local court building, but electricity is an issue. And local governments often contribute to the funding of court buildings. But since local governments are often parties in local disputes, the cosponsoring of local court buildings does raise fundamental issues about the impartiality of local courts. There is an implicit *quid pro quo*. There are structural factors, in other words, that make this independence complicated.

VZR: Has the situation worsened with decentralisation?

SP: According to Indonesian law, there should be an appeal court in each province and a district court in each district. As new provinces and new districts are being established, they wish for courts. It happens that, as a result of this decentralization drive, existing jurisdictions with a small case load are split up amongst 3-4 new jurisdictions, each having an even smaller workload. It is a ridiculous situation. It is one of these operational problems that need to be changed. Local governments do not see themselves as mature until they have a court. They want the whole apparatus of local government and in their view this includes a court, even though in fact local courts are not part of the local government but continue to be part of

the central government. The situation can become quite silly. In West Java, for example, the province has been divided up into three new entities. So you often find the situation where one inefficient court (i.e, with few cases) is divided into five or six even less efficient courts which must be furnished with judges and budgets from the central judiciary.

There is a tension between the judiciary and decentralisation in budgetary and personnel terms. This is a management issue rooted in inadequate laws and poor thinking. The judiciary also still has this military mind-set that in order

to be important you need to be big. The whole logic within the judiciary is still towards largeness. Therefore, they also continue to recruit judges indiscriminately. Currently, the judiciary recruits around 500 judges each year even though they actually have hardly any work for them. There has been an attempt to cut back on recruitment but recruitment in Indonesia furnishes an industry. The former chief justice tried to curb recruitment but he has not been able to hold his ground. Everything is defined in terms

of sizes and numbers.

They just built a new training facility in the hills of Ciawi, which is beautiful. It is one of the most beautiful training facilities in the world. It is a training facility for 1200 candidate judges. Does Indonesia actually need 1200 candidate judges? Nobody seems to have asked this question. The whole facility that sustains this recruitment logic is inefficient in its own right. There was once a plan to do workload assessment for judges that drives the performance budgeting logic which was aligning staff with workload. The report has been kept confidential because it showed a massive disconnect between the staff and the workload. The report has not had any impact on recruitment practices. In fact, the Indonesian judiciary continues to recruit as before even now they know that there is this disconnect between staff numbers and workload. It is outrageous.

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VZR: But isn't that also a problem of the donor industry. Many do not have that much of an interest in what the actual impact of their work is. I think the incentive structures in many donor agencies are actually not so much different from the Indonesian bureaucracy.

Obviously, donors are to some extent dictated by the situation. There are elements in the donor industry that have been quite critical such as the Asia Foundation, but of course there are less critical elements. But make no mistake, all these institutions that are now so admired, or in which so much hope is now vested, such as the Anti Corruption Commission [KPK], the Judicial Commission, the Anti Corruption Court, came about with donor assistance, and sometimes against the wishes of the existing government.

Those Blueprints for judicial reform, which is the only credible roadmap to judicial reform, was solely donor supported – much as the Blueprints for Attorney General's Office reform. It is the donors that make it possible for Indonesian civil society to sit within the Supreme Court or the AGO, and relentlessly chip away at the block from within the institution. That support and intervention may not be much apparent to outsiders. It is delicate in that processes often are intrinsically constitutional, but it has been instrumental absolutely. There are major battles being fought, not just on the streets, but within institutions. To rubricate donors to supporters of the status quo categorically misreads the situation. There are nuances between programs, obviously, and I for one have been a strong supporter of an engagement that is more ambitious and drives at structural adjustments. But particularly the programs that engage Indonesian

civil society organizations, which are clever, articulate, astute and with a sustained commitment, can achieve considerable traction, as history shows.

VZR: Do you see this politicisation of the judiciary also happening with regard to the Corruption Crimes Court?

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SP: I do not believe in state capture in Indonesia. The reason is not that there is no state capturing going on, but that there is actually a herd of elephants. In Russia you might have one or two elephant, here in Indonesia there's a herd. There are a number of large conglomerates and power blocks in Indonesia and I do not think any one can exert the amount of control that you have

in places like Russia. There is enormous influence of big entrepreneurs and others but it is a fragmenting process which creates constant competition. The current conflict between the KPK and the Police assuredly suggests that there is mischief going on, but it also shows that no-one is fully controls the script. Because of this competition you create room to maneuver. The KPK and the Corruption Crimes Court have a fair room to maneuver. The state has a fair room to maneuver which is enhanced by the democratic process. You have 70 percent of parliamentarians being newly elected politicians and this creates a different power dynamic than you would not have through indirect elections. So, there is actually an active creation of this space for maneuvering.

A POINT OF CONCERN WITH THE KPK IS THE DEGREE TO WHICH SECONDED OFFICERS FROM THE POLICE AND AGO CONTROL THE INVESTIGATION AND PROSECUTION PROCESS OF THE COMMISSION.

The current Corruption Crimes Court in many ways has been an exemplary court. Its format (with ad hoc judges), its track record in highly contentious cases involving high profile suspects, has been outstanding. It is another court free from corruption, and to have achieved this is high

octane corruption cases is a feat. The new law on the anti-corruption court, which establishes 33 new Corruption Crimes Courts and reduces the role of the ad hoc judges, basically ends up destroying the effective law enforcement in corruption cases. The law is an enormous set-back and is a vicious parting shot of the tainted old Parliament; and they knew it because the bill involved heavy wrangling with civil society right up to the final minutes.

Sure, the Corruption Crimes Court is not perfect. I am unhappy with the 100 percent conviction rate of the Corruption Crimes Court. Everyone here in Indonesia is quite happy with it, but it comes across much like the Stalinist courts. I know some of the defendants quite well. Or, let's say, I know some of the witnesses quite well, which is really the pre-defendant stage, and I can tell you that the measures used by the KPK are draconic. Many of their measures would not pass the rule of law test. That is for sure. Such as withholding a passport of a witness for one year: When a witness has a job abroad, this assuredly is a violation of human rights.

A point of concern with the KPK is the degree to which seconded officers from the Police and AGO control the investigation and prosecution process of the Commission. It exposes the Commission to interference from within. I was heavily involved in the drafting process of the KPK Bill before it was sent to Parliament. One of the very specific points in that process was that the KPK should recruit its own investigative and prosecution personnel, and that secondment [i.e. placement of officers] from the other law enforcement agencies would not be permitted. It drew on the experience of the predecessor agency to the KPK, called the Joint Investigating Team (JIT). The Team was housed at the Attorney General's Office and there were strong rumours that the AGO support staff to the JIT tailored the files before sending them up, resulting in a zero conviction rate. So when the KPK Bill was discussed, efforts were focused on cutting the institutional ties with the Police and AGO.

As developments show, the AGO and Police managed to pull themselves back in, referring to their own laws that gave them authority in investigations and prosecutions, but even more so because key Commissioners within the KPK were quite willing to open the door. Currently, investigations and prosecutions by the KPK are virtually monopolized by those old agencies. From that angle, it is actually curious the current conflict could arise at all.

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VZR: Do you see a real chance to address these issues or is it pretty futile as long as the broader patterns of politics in Indonesia do not change?

JP: I strongly doubt whether there is sufficient political will to change things in the judiciary.

The large political and private sector players find the judiciary quite appealing in its current format. There is a lot of talk about anti corruption, which is important in that it creates a moral and political compass. It shapes generally shared ideas on what is right and what is wrong, and what we should aim for. And much the same can be said about such cornerstones of a democratic state, such as the rule of law or the independence of the judiciary. That public discourse matters. Diverging from that line, challenging those concepts, really puts you off the map of political discourse. That is important.

But there is a massive gap with reality. The fact is major players find the current situation quite convenient because it serves them. I do not think there is a serious commitment to strengthen the rule of law. Many people say there is but I do not see it. Of course, this is not a simple horizontal divide: The cracks run right up to the top, and within the highest echelons of government there are persons highly committed to strengthening the rule of law. Minister Sri Mulyani's track record is phenomenal, particularly if you know what she has been up against in previous years. The new Vice President is impressive on this score as well. Key players, such as Marsillam Simandjuntak, Denny Indrayana or Buyung Nasution, who recently has sharpened his tone markedly, have a sterling track record. And the President has stated his commitment. But for

many others, law and rights is a political commodity, it is tradable goods, stuff you can sell. There is no real recognition that it fundamentally matters.

Of course, the situation is not easy. It is fine and good for Buyung to call for legal reform as he just did, I would do so in his place, but it is not at all easy to give that meaning? And impact? As the Blueprints reveal, the scope is massive and intricate at the same time, and reform really is a long grinding slog through difficult issues, with a lot of resistance along the way. One thing we learned in 1998 is that the rule of law is not like an engine that can stand dormant for 30 to 40 years and then you can start it up by turning the key of democracy. The 30 to 40 years of miserable condition of the judiciary turned the judiciary into something different from what it was. The fix is not at all easy. So if we say, “Let’s empower courts. Let’s respect courts,” what if the courts are actually fairly disrespected? Lawyers much like politicians are adept at using such grand phrases, but it is a long way from those high flown words to a wild and pretty unwieldy reality. Breaking down principles into manageable blocks and build those up actually is a pretty complicated process. It is very incremental by its very nature.

This being said, the government does have a major responsibility on which I feel it defaults. The government must impress on the community that it views courts as critically important, the government must demand unquestioned respect to its officers, the government must say that it will uphold their dignity, as well as the decisions and orders the courts issue, that it will implement those, and that it considers itself bound by them. All those things are missing, as recent events illustrate. The *Reformasi* state continues to be in so many ways a state run by bureaucratic rules, not by rights and process.

For their part, the courts should step up also. Of course, and as I have said, there are so many issues left, right, and centre. But what is missing most is a kind of public commitment, an animating purpose that is clearly stated. That involves the judiciary to publicly assert itself when the interests of it as the constitutional guardian are at issue. Instead, and after being under the heel for so long, the judiciary is drenched in non-assertiveness, and its corollary of prickly over-defensiveness. It must learn to assert itself

by projecting its authority and specifically by applying its powers at times and on issues that really matter, as the courageous first Chief Justice Kusumah Atmadja did in facing down the military, or Constitutional Court Chief Justice Mahfud did in playing that tape and then saying he would do so again when the government tried to block future recurrences. That is something no-one can give; the judiciary must generate that courage and vision itself.

PRESENTATION



THE EXECUTIVE NETWORK
Business Solutions for Business Network

The New DPR



The Executive Network (TEN) hosted a panel on the new DPR (House of Representatives) on 11 November. The following is an edited transcript of the remarks of Kevin Evans, Senior Governance and Integrity Adviser to the head BRR (Badan Rehabilitasi dan Rekonstruksi).

Kevin Evans: So what can we expect from this parliament? This is a question of comparing it to the previous parliament. The first dynamic we should consider is that we have an extraordinarily high turnover. In most countries, you do not see a 70 percent turnover in politicians, and this is higher than in the previous two elections. We have an outrageously high turnover. Some might say that it's a good thing, but I also think there's a downside. In parliament, you have people who are supposed to be holding the government to account. [With a high turnover,] what you have is a bunch of greenhorns who are sitting there trying to hold 30-year 'Sir Humphrey Applebees' to account, which is not an easy thing to achieve.

Essentially, this new generation has to come in and learn the ropes. They must learn the types of questions they're supposed to ask in order to get actual answers. This takes time. With such a huge turnover of politicians, we have a huge learning curve collectively. We're fortunate today to have with us two politicians who are actually going into their second term. They will bring with them their experience from the last five years and familiarity with the process.

We heard their approaches and they are on the path towards operating in the way they will need to, in order to survive in this new environment. The first speaker

outlined how you work your electorate: the way you serve the interests of your constituents. That is the way of the future. Our second speaker indicated that it is necessary to maintain some autonomy from the leadership of your political party in order to maneuver more effectively to promote the agenda that you are working towards. In my view, these are the kinds of things that we are likely to hear more of from politicians who survive.

One of the reasons for this is what happened after the Constitutional Court's decision [to move to an open list system] after Christmas last year had a bigger impact on elections and the way that electoral politics works here than anything in the previous sixty years. What it essentially did for the first time ever was to say to budding politicians, "You actually need the voters as much as you need your party support. It is no longer enough to be number one on your party list to get elected." Numerous candidates who were number one were defeated by candidates who were number two.

There were a couple of interesting outcomes of this decision. A lot of my feminist friends were horrified by the decision because they thought it would mean the end of female representatives. My argument was that the voters didn't really care. They minded at the level of the president, but at the level of the representative, they don't

WHAT YOU HAVE IS A BUNCH OF GREENHORNS WHO ARE SITTING THERE TRYING TO HOLD 30-YEAR 'SIR HUMPHREY APPLEBEES' TO ACCOUNT.

really discriminate. What we saw was, between those who were elected and those who would have been elected if the party list was still in place, there was one more woman than we would have got had we had the old system in place. What is ostensibly the case is that party structures are actually more reticent to have

women elected than the broader electorate. That's not to say that families are particularly happy when wives, mothers, daughter go off to parliament.

Interestingly, in some of the regions where there is quite poor equality between men and women, you did in fact see men leapfrogging over women, and in other regions where clearly the situation is more advanced, you saw women jumping over men. In Aceh, Bali, Nusa Tenggara

Barat, you saw women being defeated, but then across Java and parts of northern Sulawesi, you actually saw quite the reverse.

A more important phenomenon to note was that local candidates were the major beneficiaries [of the change to open list system]. Many times the favoured son or daughter of the party placed at number one from Jakarta was defeated by some unknown local candidate who was at number 10, or who was well down the list, and who presumably won the seat because they had a network and a profile locally: they actually managed to gain sufficient support to get themselves elected. This is the kind of incentive we are going to see moving forward.

A lot of the donor community would say, “We need to teach politicians how to represent their constituents.” My view always was that that was nonsense; they were not paid to represent their constituents, there was no incentive for them to do so. They were not elected because they did nice things for their electorate. They got elected because they did nice things for the people who ran their parties because that was where their fate was determined. Now that’s changed. Now there’s a sincere and genuine need, for politicians who want to survive, that the electorate have some familiarity with them and think that they are actually doing a decent job. That may represent a significant shift in the way we can expect politicians to act or, at least, to represent themselves.

I’m extremely heartened by some of the changes in the operations in the parliament that are being made, like the public accounts committee and other mechanisms. I welcome those developments from the parliament and hope those initiatives are properly resourced and able to undertake their task. For example, open sessions becoming the norm, rather than a gift to the public, is

another important element necessary to see exactly where politicians stand.

The issue that I know everyone is talking about is the impact of the KPK [Corruption Eradication Commission] and the rather less than full-on support that is coming from

the parliament. Some say that these developments mean that Indonesia is going backwards. I would call this the ‘jihad akbar’ or the ‘battle royale’ depending on your theological background. This is the battle that in some respects has been waiting for ten years. For the last ten years, we’ve seen steady progress. The people, the groups, and the institutions that had a more comfortable way of operating under the old system have essentially not

dared to confront this current ideology. What has now emerged, and I think because the KPK is really starting to hit home at some profoundly important vested interests, is that important people are now mobilizing to challenge it. So in some respects, what is going on at this stage actually represents a healthy development because what it is showing is that actually the agenda is vital, actually the KPK is being effective, and people are really started to get worried about how they are to go about business.

What I would like to see happening next is to see people starting to ask the question, “Well, how do we fix the system?”

The parliament could do one of two things. It could either head down the easy path, and continue to not fully support the KPK, and that would be the easy option and probably something they could get away with because there are three years left before they start campaigning for the next election. The other option, and the one that is better for the country, is to ask, “How can we go about our business? Obviously dishing out brown paper envelopes or brown suitcases is not the best way of doing things. We should be able to do things better. Yes, the parties need money, and that is a legitimate concern, but the question is how do we

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go about raising the resources necessary to maintain our organization without having to do silly deals, which we know aren't right and which we wish we didn't have to do." The process must move on from catching everybody to actually fixing the system.

This means working more on the preventative side and one obvious way to do it is to reinstall the public financing system. After the 1999 elections, there was relatively generous public financing support, and the mistake came in 2005 when the then-Home Minister changed the way that support was calculated for parties and essentially chopped off 95 percent of the funding. That was a terrible thing to do because it left the parties in considerable difficulty, and people and organizations had to survive some how.

What has been extremely heartening is just how profound and strong the support for the institution [the KPK] and the agenda of anti-corruption has been in this country ten years on. I assume a lot of people thought it would peter out rather quickly. It would be a dangerous move by institutions to go against that level of public support, particularly elected institutions.

There are a couple of things I still think require a bit more attention. One of which is to close what I call the 'democratic deficit' which essentially exists because we have a fully elected house of parliament [DPD] that has no authorities. That seems a bit strange. It would be as bad as the House of Lords in England having serious legislative powers. I mean, if the chamber's elected, give it authorities. The deal that obviously has to be done here is to ensure that the parties are able to operate freely in the upper house (DPD). Senior politicians should want to be in that chamber, and that is going to require a shift in mindset. If I was a politician from West Java, why would I want to be one of 100 representatives in the DPR when

I could be one of four in the DPD? It will require a series of discussions and will require adjusting the constitution with the electoral laws and perhaps even the party law, but I think that would open the path to having effective regional representation and effective representation by population. That's some medium-term homework.

Another one of the challenges that Indonesia continues to struggle with is this view that it's always been a presidential system, and now it is officially what it always was because the constitution says so. Actually Indonesia's traditions are profoundly parliamentary, including the 1945 Constitution which was actually an extreme form of a parliamentary system which doesn't actually exist anywhere else. You see this challenge between what people would take to be a presidential

system, but with parliamentary traditions being reflected in strange things. For example, the president or the government feels like they need to have control over a majority of the members of parliament, and think that they are critical for their survival. This is nonsense. You need that in a parliamentary system because you get votes of no-confidence. What happens in this [presidential] system is that the parliament becomes in itself a form of opposition to the government. One could ask President Obama this right now. He has a clear majority in both houses, but the poor man can barely pass a piece of toilet paper through. The source of opposition becomes the parliament itself rather than necessarily the parties.

In Indonesia, you see that often times the biggest opposition isn't those who claim to be in the opposition because they are the minority, but it's from inside the government's coalition. The President's main concern is not PDI-P, Gerindra, or Hanura, but, particularly for the next election, the concern will be about the non-

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Democrat elements within his coalition. The question he should ask is whether he actually needs those parties in coalition, and to what extent is he compromising his ability to make policy through this kind of activity? This reflects the parliamentary tradition that is not being effectively applied.

The final point I will make is on the notion of consensus. The parliament seeks to operate in a way where everyone agrees. On one level, a strength of this society is the attempt to be inclusive. The downside is that it does become a mechanism for obfuscating accountability. If everyone evades accountability, the entire parliament will fall into disrepute. I think an appropriate interpretation of consensus should be one where everyone agrees to the rules of the game. Like for an election, not everyone can be president who runs for president, but you agree to the rules of the game, and you accept the outcome. Similarly in a parliament, you don't have to agree with every law that goes through, but you have to agree to the process, and you accept the outcome of that process, regardless of whether you are on the winning or losing side of the debate.

In terms of accountability of parties and politicians, there is great merit to be able to stand up and say, "I don't agree." I think the law on pornography was an interesting case. In the end, those opposing the bill had to leave the debate, which is a way of rejecting the process and which is an extreme case of what happens when the process to build consensus breaks down. With the beginning of committee work, and with open sessions, hopefully that will allow accountability to take place, and voters will have more information upon which to base their decision in the next election.

VZ DATEBOOK

Politics

- * JFCC: Lunch with Vice President Boediono
Jakarta, 25 November (to be confirmed)
- * House of Representatives: Golkar and PDI-P will submit their petition calling for a special committee to investigate the Bank Century case
Jakarta, 1 December
- * ASEAN: Ministerial Meeting for Social Welfare and Development (SOMSWD)
Brunei Darussalam, 6 December
- * United Nations Climate Change Conference
Copenhagen, 6-7 December

Economy & Business

- * UN ESCAP: Committee on Macroeconomic Policy, Poverty Reduction and Inclusive Development
Bangkok, 24-26 November
- * World Bank Seminar: Indonesia Economic Outlook 2010: Facing the Global Economic Unrest
Speakers will include: Sri Mulyani Indrawati, (Minister of Finance), Shubham Chaudury (World Bank Senior Economist), Milan Zavadjil (IMF)
Usmar Ismail Hall, Kuningan, Jakarta, 24 November
- * OECD: 5th Annual Conference OECD-CEPII: Developing Countries and the Global Crisis Programme
Paris, 26-27 November
- * WTO: 7th Ministerial Conference: “The WTO, the Multilateral Trading System, and the Current Global Economic Environment”
Geneva, 30 November- 2 December
- * JFCC: Lunch with Trade Minister Mari Pangestu (to be confirmed)
Jakarta, 16 December
- * A new president director of Perum Bulog (Badan Urusan Logistik), the state-owned logistics agency, will be named, likely in the next week, as the current president director, Mustafa Abubakar, was named Minister of State-Owned Enterprises.
- * The president director of PT Perusahaan Listrik Negara (PLN), the state utility firm, will also be replaced, likely in the next two weeks.

Notes

Notes

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