

Chapter III

JUDICIAL SYSTEM

A. SUPREME COURT

The existence of the Indonesian Supreme Court cannot be separated from the Court's history because its function, its authority, and its position have changed from time to time throughout that history.

The Daendels Governorship saw many changes to the Indonesia system of justice as established by the Dutch throughout their colonization occur. In 1798, *Raad van Justitie* became the *Hooge Raad*. The period of English Colonialism saw the *Raad van Justitie* in Semarang, Batavia and Surabaya converted into Courts of Justice. The Court of Justice of Batavia also became the Supreme Court of Justice and as such had the competency to hear on appeal matters decided by the Courts of Justice in Semarang and Surabaya.

With the return of the Dutch came the promulgation of the St. 1819 No. 20 on Criminal and Civil Procedure which permitted a dual system of Indonesian justice to develop, particularly with respect to the hierarchy of Courts. Essentially, this dualism could be found in the separate courts for the adjudication of matters relating exclusively to indigenous Indonesians and a court for Europeans.

For Europeans, the function and position of the Supreme Court was as follows: the control and operation of the court; acting as '*hov van casatie*'; and, as an appeal court for *Raad van Justitie*.

The Governor General Decree dated 3 December 1847 No. 2 and which came into force on 1 May 1848 (RO) which stated that the hierarchy of the court in Madura and Java was as follows: *Districtgerrecht*, *Regenschaptgerrecht*, *Landraad*, *Rechtbank van Omgang*, and *Hoogerechtschof*. The hierarchy based on the RO was to be divided into two separate jurisdictions; one for the indigenous Indonesians and the other for Europeans. The *Hooggerechtschof* was a Supreme Court which sat in Jakarta. It had absolute authority over all jurisdictions in Indonesia to ensure the control and operation of the courts; control over the conduct of the judges; settle disputes between the courts established on authority of the King and any Adat Courts that had the necessary competency to hear adat matters.

The Japanese colonial period saw the Supreme Court maintained as the Saikoo Hooin based on Osamu Seirei, Law No.2 of 1944 and but many of its functions were to be handed over to the chief of the Kooto Hooin.

After Independence, Government Decree No.9/S.D.of 1946 stated that the Supreme Court was to sit in Jakarta. The Constitution of the Federal Republic of Indonesia stated that the Supreme Court was the highest federal and was also to sit in the capital city of the Federal State.

The Role of the Supreme Court up to now

Any discussion of the Supreme Court would be remiss if it was not to explore the administration of justice by the Supreme Court until now. The highest court in Indonesia is the Supreme Court or the *Mahkamah Agung*. The Law concerning the administration of justice in the sphere of the General Courts and the Supreme Court No. 13 of 1965 (State Gazette 1965 No. 70; *Undang-undang tentang Pengadilan dalam Lingkungan peradilan umum dan Mahkamah Agung*) explicitly revoked the law of 1950. A short summary of the respective courts will provide a clear picture of the administration of justice in Indonesia.

The court of first instance is created by the Minister of Justice on the recommendation of the Supreme Court. The jurisdiction of a first instance court is normally the Autonomous Region Second Level (*Daerah Tingkat II*). The District Court is in principle a council of judges as at least three judges are required to sit on the bench for each hearing held by the court. The requirement for three judge panels is based on Section 29 of Law No. 13 of 1965 and Section 8 of Law No 19 of 1964 of which the first mentioned law is an implementing regulation. However, Law No. 19 of 1964 has since been repealed and replaced with Law No. 14 of 1970. Article 15 of this law specifies that it is a requirement to have a council of judges presides over both civil and criminal cases.

In the capital city of Jakarta where there are five courts of First Instance; namely, the Central Jakarta Court, the North Jakarta Court, the East Jakarta Court, the West Jakarta Court, and the South Jakarta Court. This means that decisions of the court have improved significantly as all decisions are handed down by three member panels in civil and criminal matters. However, the quality of judicial decisions in outer provinces decline proportionally to the lack of skilled and qualified human resources to staff courts. It is not uncommon for less than three judges to hear matters in the outer provinces particularly where there are not three judges available to hear the matter.

The jurisdiction of the Court of Appeal is based on the Level 1 Region (*Daerah Tingkat I*). The Courts of Appeal usually hand down judgment as a council of judges consisting of three judges, especially in criminal cases. Nevertheless, current practice in the court of appeal of in Jakarta sees only one judge participate in civil cases. The courts of appeal may review all decisions of courts of the first instance in private law cases. The term private law is to be understood in its broad sense and in that regard should be defined to include commercial law cases. All disputes concerning competency between the courts of first instance are settled by the respective court of appeal. The courts of appeal lead and have control over the

court of first instance within its jurisdiction. As a controlling body they have the power to order that files and documents of the courts of first instance be sent to them for examination and evaluation of the capacity and the diligence of the judges sitting in the first instance.

The Supreme Court is the highest level of court in the administration of justice in Indonesia. In a technical judicial sense all courts in Indonesia fall under the leadership of the Supreme Court, but administratively and financially the courts fell under the organization of the Department of Justice. By virtue of its position as Indonesia's highest court, the Supreme Court has supervision and control over all lower courts. It is the task of the Supreme Court to see that the law in Indonesia is upheld by the courts. Therefore, the Supreme Court is empowered to provide warnings to lower court judges and to provide advice to lower courts in the performance of their respective functions. Most often this advice is in the form of Supreme Court Circulars (*Surat Edaran Mahkamah Agung* or *SEMA*). The Circulars tend to have significant influence on the performance of the duties of the judges in the lower courts as well assist the lower court judges in their daily practice and decision making functions. The Circular gives an official interpretation by the Supreme Court of how the former Dutch codification, especially the Civil and the Commercial Code, is to be understood, which part of the Codes should be regarded as valid and those parts which should not.

The Supreme Court is the apex of the court system in Indonesia and as such one of its primary functions is the supervision of lower courts within its jurisdiction. Therefore, the Court reserves the right to request case files and all associated documents are forwarded to it for further examination. However, this is a power that is rarely used as the workload of the Court is already considerable and the backlog of cases is mounting at an exponential rate. Additionally, the Supreme Court also determines competency of the relevant courts within its jurisdiction, particularly with regard

to the jurisdiction of those courts themselves. The current division of jurisdiction is as follows: General Courts – private and commercial law matters; Religious Courts – primarily family and inheritance matters for followers of the Moslem faith; Military Courts – primarily to resolve criminal matters of serving military personnel; and, Administrative Courts – normally to resolve civil matters. There are currently a number of special courts that fall under the jurisdiction of the Supreme Court including the Human Rights Court, the Commercial Court, the Tax Court, and the recently established Corruption Court.

The Supreme Court's primary function is to resolve matters on cassation from lower courts. Cassation at the Supreme Court is normally only available if all other means of achieving justice have been exhausted. Therefore, it is possible for the Court to reject an application for cassation if in the Court's opinion all appellate avenues have not been exhausted. The strict provisions relating to cassation have not resulted in any significant reduction of the Court's caseload.

The normal grounds for cassation are that the decision of the lower court does not comply with the formal requirements as set forth in the laws and regulations governing the relevant area of law. An application for cassation may also be submitted if the lower court exceeds its jurisdiction or authority in rendering its decision. The final grounds for cassation are the improper application of the law and due process in deciding the case at the first instance or appellate level.

The Role of the Supreme Court – a strengthening of its role

The Supreme Court is the highest judicial tribunal and the final court of appeal in Indonesia. The Supreme Court is the apex of the court system in Indonesia and exists as an independent entity alongside the legislative and the executive branches. The Supreme Court is independent of the other branches of government however

this has not always been the case. It was not until 1968 that the restructuring of the Supreme Court was completed and compliance with the provisions set out in the Constitution were achieved, particularly to be independent of all government intervention and interference in the exercise and pursuit of justice. Justices to the Supreme Court are appointed by the President on the recommendation of the DPR and once appointed the justices are in theory independent of the other branches of government. It is important to note that although the Supreme Court is technically remains the highest court of appeal in Indonesia there is now a separate Constitutional Court with the power and authority to hear matters directly related to the interpretation of the Constitution and any conflict between the Constitution and laws created by the DPR. The Constitutional Court is separate from the Supreme Court. In March 2004, the Supreme Court assumed all organizational, administrative, and financial responsibility for the lower courts within its jurisdiction from the Department of Justice and Human Rights.

The transfer of organizational, administrative, and financial responsibility from the Department of Justice and Human Rights is contained in Law No. 35 of 1999. This transfer should result in considerable continued reform of the judiciary and greater independence from the other branches of government. The completion of this series of reform will see the Supreme Court assume central responsibility for the administration of justice throughout Indonesia.

The Supreme Court has 51 judges and the structure of the Court comprises a Chief Justice, Deputy Chief Justice, 6 Junior Chief Justices, and the remainder associate justices. The Court is divided into 8 Chambers and the judges are divided among those chambers. The respective chambers are led by a senior judge and will include a maximum of 3 judicial panels. The management of case and workload at the Supreme Court has traditionally been below standard and most commentators agree that greater

transparency and accountability is required to ensure that the Supreme Court fulfills its primary objectives in the administration of justice. To this end the Supreme Court has already implemented a number of electronic management systems in an attempt to overcome case management and administration matters. The initiation of the Akses-121 or *Sistem Informasi Mahkamah Agung Republik Indonesia* (SIMARI - the Information System of the Supreme Court) is an attempt to allow the public to track cases from submission through to decision. Nevertheless, the system is in its infancy and considerably more development is required if the information systems are to fulfill their designated purpose. A major issue already identified is that the system is only available at the Supreme Court therefore if a member of the public wants to track a case they must be physically present in the Court. The second issue identified is a lack of resources committed to the project as the status of most cases is not regularly updated so access to the system does not guarantee the provision of accurate case information.

To ensure that structure reform takes place within the Supreme Court and the lower courts within its jurisdiction the Court has commissioned a number of “blueprints”. The International Monetary Fund (IMF), in collaboration with the Netherlands, financed four blueprints: (i) an academic draft and bill on the judicial commission, (ii) a policy paper on judicial personnel management reform, (iii) a policy paper on the court financial management reform, and (iv) a policy paper on a permanent judicial education system reform. A fifth blueprint was supported by the Partnership for Governance Reform and pertains to general Supreme Court reform initiatives. The blueprints are the first of their kind to be conducted through a collaborative working relationship between the Supreme Court and local civil society, with a special focus on judicial reform. A steering committee will be established by the Supreme Court to implement the blueprints. The donor community, led by IMF, is also collaborating with the Supreme Court to implement the reforms recommended in the

blueprints. The Supreme Court is intending to adopt a number of the recommendations of the blueprint on the reform and the policy paper on permanent judicial education system reform as soon as practical.

B. CONSTITUTIONAL COURT

The mandate for the Constitutional Court came as an amendment to the Constitution. The Constitution was amended 4 times in successive years after the fall of former President Soeharto, the Constitutional Court amendments were part of the third series of amendment that were enacted on 9 November 2001. The basis of the Court is contained in Article 24(2) and 24C of the Constitution. Separate and independent Constitutional Courts emerged as part of law reform discourse in civil law countries throughout the 20th century. Indonesia is the 78th country to establish a Constitutional Court and is the first country to establish such a court in the 21st century.

Prior to the establishment of the Constitutional Court, judicial review of legislation was one of the many functions of the Supreme Court. The Supreme Court still retains some of these functions but on a much more restrictive mandate. After the relevant constitutional amendments the MPR decreed that the Supreme Court would maintain the authority of the Constitutional Court until such time as the Constitutional Court was ready to assume its constitutional functions pursuant to Article III of the Transitional Provisions of the Constitution. Despite the constitutional establishment of the Court the reality was that there was still no law in place stipulating the precise role, functions, duties, and formulations of the Court. The government and the DPR entered into immediate discussions and debate to draft the Constitutional Court Law. This law was drafted and enacted as Law

No. 24 of 2003 on the Constitutional Court. The enactment of the Law was published in the State Gazette No. 98, Supplemental State Gazette No. 4316. Two days later, on 15 August 2003, the President, through Presidential Decree No. 147/M of 2003 appointed 9 (nine) Constitutional Court Justices. The newly appointed justices swore their oath of office on 16 August 2003 at the State Palace.

With the constitutional amendment enacted, the relevant Constitutional Court Law enacted, and the appointment of the justices to the Court made, the Court was ready to receive its first cases. The Supreme Court which had assumed a caretaker role over constitutional matters until such time as the Constitutional Court was ready to assume these responsibilities itself transferred the initial cases to the Court on 15 October 2003.

The Constitutional Court is a court of first and final instance in that justices have the authority to hold trials at both the first instance and appellate stages. The final decisions issued by the Court are deemed to be final and binding and include the following:

- a. decisions on the constitutional validity of laws – it is important to note that this power has traditionally been interpreted to mean any law enacted by the DPR that is alleged to be in conflict with the provisions of the Constitution. However, recent jurisprudence emanating from the Court suggests that the Court will broadly construe this power to ensure that legal certainty is maintained including to issue determinations on laws that conflict with other laws.
- b. deciding disputes between State institutions.
- c. the dissolution of Political Parties.
- d. resolving disputes related to the results of the General Election.

The Constitutional Court, on the petition of the DPR, reserves the power and authority to determine allegations of treason, corruption, bribery, and other serious criminal offences against the

President and Vice-President. The Court also may be required to determine whether the President and Vice-President are fit for office based on a strict interpretation of the relevant provisions contained in the Constitution with respect to the Office of President and Vice-President.

The 9 justices appointed to the Constitutional Court had to fulfill very specific criteria prior to confirmation of their respective appointments, namely:

- a. be an Indonesian citizen;
- b. hold a law degree;
- c. be at least 40 (forty) years old at the time of appointment;
- d. have never been imprisoned based on a final and binding court decision for committing a crime punishable by at least 5 (five) years of imprisonment;
- e. never declared bankrupt by the court; and
- f. have at least 10 years experience in the field of law.

Prior to appointment candidates are required to submit written confirmation of their willingness to be considered for appointment. The appointment of the 9 justices is divided equally between the Supreme Court, the DPR, and the President with each appointing 3 justices to the Court. Nevertheless, actual appointment to the Court is based on a Presidential Decree that is to be issued within 7 days of nominations being received by the President. Once appointed to the bench of the Constitutional Court, Justices are prohibited from holding the concurrent positions of:

- a. state official
- b. a member of any political party;
- c. a businessperson;
- d. an advocate; or

e. a civil servant

The Constitutional Court is headed by a Chief Justice and supported by a Deputy Chief Justice both of whom are elected from the appointed justices by the justices for a period of 3 years. The remaining justices are appointed as associate justices. The Constitutional Court includes a Secretariat as well as a Registrar to provide essential administrative support in the daily functions of the Court.

C. COURT SYSTEM

The Indonesian judicial system is regulated in the Constitution and an assortment of other implementing regulations. The Supreme Court is the highest judicial institution in Indonesia and constitutes the apex of the judicial power, as expressly stated in Article 24(2) of the Constitution. This constitutional power is further defined in Law No. 19 of 1964. Law No. 19 of 1964 was later repealed by the enactment of Law No. 14 of 1970 on Basic Judicial Power and Law No. 14 of 1970 was in turn repealed and replaced with Law No. 35 of 1999. Law No. 35 of 1999 has been amended and these amendments are contained in Law No. 4 of 2004. Law No. 35 of 1999 provides, among others, that the organization, administration and finances of the Courts of General Jurisdiction are to be handled by the Supreme Court within 5 years of the enactment of the Law. Nevertheless, the Religious Court was excluded from this provision and there is no defined time frame for the transfer of organizational, administrative, and financial control of the Religious Court to the Supreme Court.

The Supreme Court stands at the apex of an independent but complex series of courts of various jurisdictions. There are four branches or spheres of the judicature, namely:

1. General Courts;
2. Religious Courts;
3. Military Courts; and
4. Administrative Courts.

These courts have been granted various degrees of special extended jurisdiction with the Children's Court, Human Rights Court, and the Commercial Court falling under the jurisdiction of the General Courts and the recently created Tax Court falling under the jurisdiction of the Administrative Courts.

The last three branches of the judicature are courts that possess limited jurisdictions. Each of the courts stated above are courts of first instance as well as appellate courts. Historically, these courts have had their organizational, administrative, and financial affairs administered by the respective Ministers of the relevant Departments; namely, the Minister of Justice and Human Rights for General Courts; the Minister for Religious Affairs for Religious Courts; and, the Minister for Security and Defense Affairs for Military Courts. The technical legal and judicial aspects of court administration were the responsibility of the Supreme Court. However, recent reforms to the judiciary have seen these organizational, administrative, and financial functions come under the auspices of the Supreme Court.

A. Commercial Court

The Amendment of the Bankruptcy Law, Law No. 4 of 1998, created a special court tasked specifically with resolving commercial cases including bankruptcy, the Commercial Court. It is emphasized more on the new Bankruptcy Law No. 37 of 2004 that replaces the previous Bankruptcy Law. The Commercial Court is within the jurisdiction of the District Court and is a first instance court. The Commercial Court was established through Presidential

Decree No. 97 of 1999 and the first court was established in Jakarta at the Central Jakarta District Court. The Decree allows for the future establishment of additional commercial courts in Bandung, Semarang, Surabaya, and Medan. It is important to note that any appeal against a decision of the Commercial Court is submitted directly to the Supreme Court.

Under Law No. 37 of 2004, bankruptcies appear to vary according to the individual circumstances and what actions the respective debtor and individual creditors decide to undertake. Specifically, the bankruptcy may result in liquidation of the debtor's estate or it may proceed under a suspension of payments. The new law is full of technical deadlines, all of which are aimed at insuring the debtor's case is adjudicated quickly. Furthermore, it provides a more neutral framework because safeguards exist for debtors and creditors alike.

The Commercial Court was set up with at least two goals in mind. The first was to have a court with career-judges knowledgeable on insolvency or other economic law matters. In the context of the Bankruptcy Law, the judges were selected from a list of career-judges from all over Indonesia. They then had to undergo training in bankruptcy law. The second purpose was to provide for the possibility of introducing new concepts to the court system without tampering with the generally accepted mechanisms and procedures governing the majority of cases. These new concepts include the introduction of non-career judges, of dissenting opinions, and a scaled remuneration system.

As noted earlier, with this new court system, the number of cases has increased, especially bankruptcy cases. The business community is particular enthusiastic and holds high hopes and expectations that the new court will help them to balance the leveraging process in the debtor-creditor relationship. Furthermore, The Commercial Court has jurisdiction not only over bankruptcy cases but also all other commercial dispute matters.

In the Indonesian legal system, there are two kinds of jurisdiction; namely, absolute jurisdiction and relative jurisdiction. Under the principle of absolute jurisdiction the Commercial Court will purposely handle certain commercial cases. The latest development in the definition of absolute jurisdiction would see the commercial court handle bankruptcy cases, trademark cases, patent cases, and certain proceedings related to industrial design and Integrated Circuit system cases. The current case load is indicative of this definition of absolute jurisdiction with the majority of cases being either bankruptcy or intellectual property matters. One of main differences between the bankruptcy and intellectual property regimes are the time limitations placed on proceedings. The most obvious consequence of this is the difficulty in integrating the two subject matters efficiently into the administrative framework of the court. The theory underpinning the court is that it will develop into a court of special jurisdiction dealing with particular subject matter. In contrast the concept of relative jurisdiction would see the establishment of a number of regional courts in the following centers: Central Jakarta, Surabaya, Semarang, Medan, and Makasar.

In a pre-emptive move to ensure that the new Commercial Court was not overwhelmed with bankruptcy petitions as a result of the new regulatory framework 45 career-judges were selected and trained to handle the expected increase in bankruptcy petitions. Ultimately, the Supreme Court appointed 16 (sixteen) judges and 7 (seven) of them were appointed as supervisory judges in 1998. Currently, there are 12 (twelve) judges in Commercial Court. The Commercial Court includes a number of *ad-hoc* judges. An *ad-hoc* judge must fulfill a stringent list of criteria prior to appointment to the Court including being recognized as an expert in the commercial law field and have at least 10 years experience in commercial law. *Ad-hoc* judges on the Commercial Court are no longer active because their limited period of time is ended. Surprisingly, the demand for the services of *ad-hoc* judges has been small and in fact

just one case has been heard by an *ad-hoc* judge since the establishment of the Court. The judge, Elijana, heard a bankruptcy matter between the BPPN (the Indonesian Bank Restructuring Agency) as petitioner and Mahajaya Gemilang Co. as the defendant.

Indonesian law requires that a panel of judges sit on all matters and this is no different in the Commercial Court with all matters being adjudicated by a panel of three judges. In Bankruptcy matters once a declaration of bankruptcy is made, then a sole supervisory judge is appointed to oversee the liquidation and distribution of the estate pursuant to the decision. These supervisory judges observe and supervise the activities of the appointed curators or administrators of the estate.

The Commercial Court continues to be the most advanced and prominent experiment in judicial reform in Indonesia. The Court's regulatory framework means it is the most accountable and transparent of all Indonesian courts. In contrast to other Indonesian courts the decisions handed down by the Court are published and accessible to the public. Decisions of the Commercial Court also incorporate dissenting opinions into the full judgment of the panel ensuring that the individual legal reasoning of dissenting judges is available for analysis ensuring active legal debate on points of law and greater public scrutiny of the judicial process.

B. Tax Court

Indonesia has had a Tax Review Tribunal (Institusi Pertimbangan Pajak) since 1915 (*Staatsblaad* No. 707/1915) based in Batavia (Jakarta). The Regulation establishing this tribunal was amended by *Staatsblaad* No. 29/1927 on *Ordonantie Regeling van het Beroep in Belasting zaken* which in turn was amended by Law No. 5 of 1959. The Tax Review Tribunal changed its name to the Tax Review Council (Majelis Pertimbangan Pajak). The primary function of the Tribunal and the Council was to review and assess applications seeking a review of Central and Regional government

taxes. The Council performed this function until 1997 when these functions were taken over by the Tax Dispute Settlement Board (Badan Penyelesaian Sengketa Pajak or *BPSP*) that was established under the provisions of Law No. 17 of 1997.

Despite having tax dispute settlement mechanisms in place the government believed that to ensure that the efficient, effective, and comprehensive way to resolve tax dispute matters was to have a purposely created court. Therefore, Law No. 14 of 2000 on the Tax Court was enacted. The Tax Court is a special court with limited jurisdiction, as it is only able to hear and decide tax matters. Physically, the Court is a special Chamber of the Administrative Court system and as such is ultimately under the control of the Supreme Court (stated in the elucidation of article 15 Law No. 9 of 2004 on Amendment of Law No. 5 of 1985 on Administrative Court). Law No. 14 of 2000 states that for cases that have already been filed at the *BPSP* but as yet remain to be heard and decided, then these cases will be transferred to the Tax Court.

Prior to the submission of an application to the Tax Court the taxpayer may file their petition to the relevant authority or the Directorate General of Taxation. In the event the petitioner is unsatisfied with the outcome of their petition then they may lodge an appeal against the decision at the Tax Court. Normally, decisions in these matters; namely, the first instance and any appeal should be handed down within 6 and 12 months respectively, with 3 months addition for certain cases.

Nevertheless, the appeal requires that a number of conditions be satisfied; namely, that the appeal is lodged within 3 months of the decision being handed down and that the delinquent taxpayer has paid 50% of the assessed tax that is the subject of the appeal. A taxpayer may also file a petition to the Tax Court if they have an objection to the tax collection process and any assessment including any reassessment by the Taxation Office notified in any tax assessment letter. The court requires only the Respondent to the petition and not the Appellant. Therefore, the appellant's presence

in the hearing is only required where subpoenaed by the Court. It is important to note that the Law requires that the Court provide appropriate reasons and show cause for the subpoena of the appellant before the appellant is obligated to appear. Any proceedings irrespective of whether at first instance or appeal do not abolish the taxpayer's obligations to pay the assessed tax. In practice this means that the taxpayer must pay the assessed tax and in the event the assessment is contested and the taxpayer is successful in their claim then the relevant amount of tax that has been paid will be considered excess payment and reimbursed by the Taxation Office to the taxpayer. The complex nature of taxation generally and the taxation law in particular requires that judges of the Tax Court not only hold a law degree but also hold special qualifications in tax as well as relevant experience related to taxation law.

The decision of Tax Court must state the assessable tax amount and the requirement that the outstanding tax assessment be paid in full. The rationale for the inclusion of an express statement of this nature is to ensure that both the Taxation Office and the taxpayer have the requisite legal certainty to enforce the judgment. Any assessment, additional assessment or decision with respect to the contested tax debt should be paid within 1 month even where there is an objection noted. An application in certain circumstances may serve to delay payment and must be lodged at least 15 days prior to the payment due date. The Taxation Office then has a further 10 days to process the application and respond to the objection. In the event that the Taxation does not process the application and respond within the granted time limit then the application is deemed to have been accepted by the Taxation Office. However, if the objection is regarding a reassessment or an appeal then these time limitations do not apply.

The decisions of the Tax Court are meant to be final and binding. However, despite the final and binding nature of the decisions there is still an avenue of appeal; namely, judicial review

at the Supreme Court. A decision of the Tax Court can be appealed to the Supreme Court seeking judicial review within 3 months of the decision in the matter being handed down provided one of the following conditions are met:

- if the decision is considered to be based on an act of perjury or deception on the part of one of the parties or based on evidence that is subsequently found to be invalid by a criminal court judge .
- if there is new very important written evidence that could alter a decision if it had been discovered in an appeal or the original case.
- if a decision clearly does not conform with prevailing tax regulations.

Upon a partially or fully successful appeal or suit, the tax already paid based on the tax assessment (SKPKB) or additional tax assessment (SKPKBT) will be returned to the taxpayer plus compensation of 2% interest per month up to a maximum of 24 months even if one of the disputing parties files for judicial review at the Supreme Court.

C. Labor Court

Law No. 12 of 1964 required that a labor dispute be processed by a “Pegawai Perantara” or compulsory mediator in the first instance. If the dispute was not able to be settled amicably between the relevant parties at this stage then the matter would be transferred to the P4D (*Panitia Penyelesaian Perselisihan Perburuhan Daerah*) or Regional Committee for Labor Dispute Settlement. In the event that the decision issued by the P4D was rejected by one of the parties then that party could appeal to the P4P (*Panitia Penyelesaian Perselisihan Perburuhan Pusat*) or Central Committee for Labor Dispute Settlement. Essentially, the P4D and the P4P are arbiters tasked with resolving a labor dispute. It is

important to note that the P4 D and P4P are both compulsory arbitrations and any decision was considered to be final and binding. Nevertheless, to secure enforcement of the decision a court order would be required.

The law had been considered ineffective because of the following reasons:

1. the Law did not provide for the imposition of any criminal penalties for breach;
2. when the law was enacted there were at least 15 rules, decrees, and others regulations issued by the Department of Labor and its subordinates. Some of these regulations, decrees, and rules were inconsistent with the law. For example: during the process of PHK (Labor Termination) the company could enforce suspension and during the scorching time, the company could cut the paycheck;
3. The law viewed PHK not as a dispute but rather as a process in the termination of employment that required no further action than filing the PHK at the P4D and P4P.

In December 2003 a new labor law was passed by the DPR and was enacted as Law No. 4 of 2004 on Settlement for Industrial Relation Dispute. The law is comprehensive and includes 9 Chapters, 126 Articles, and 204 sub-sections. A fundamental development and change between the previous regulatory regime and the new regulatory regime encompassed in the new law is the establishment of the Industrial Relations Dispute Settlement Court. This court will ultimately be the peak judicial body in the resolution of all labor disputes, including the earlier noted PHK issue which under the new regulatory framework would be considered to be a contract between the employee and the employer and as such could be resolved in a court of law where the parties were unable to reach a mutually acceptable agreement through mediation or arbitration.

D. Children's Court

Children are neither immune from crime nor are they immune from the ability to commit crimes. Child delinquency is not a new phenomena and this is also true for Indonesia. However, the state of the law for children in Indonesia leaves it prone to the abuse of children's rights through the legal process, particularly the criminal legal process. Historically, Indonesia's response to the crimes of children has often left the children permanently stigmatized as a consequence of their crimes often leading to children being disowned by their families, being expelled from school or quitting on their own accord when the stigma becomes too much to bear. The negative impacts to the future development of not only the children involved but the community in general will remain for the long-term.

The National Statistic Agency reported that in 1997 there were at least 4,000 reported suspects are under 16 throughout all of Indonesia. In Lampung alone, during 2000, some 35 cases were reported a week meaning that courts in Lampung had to deal with some 420 cases a year involving children without any specialized children's facilities or judges with specialized training in the hearing and handling of children's legal matters.

In 1997 Indonesia enacted Law No. 3 of 1997 on the Children's Court. This Law was initially drafted to ensure that Indonesia complied with its international obligations under the Convention on Children's Rights. The relevant provisions in this convention expressly state that children have a right to be protected from exploitation, violation, and unfair treatment in the criminal justice system.

A person who is already eight years old but has not reached eighteen years old and has never been married is considered to be a child (*anak*) as defined in Article 1(1) of Law No.3 of 1997. Juvenile delinquent (*anak nakal*) is generally defined as *children*

who commit crimes or children who commit an action which is forbidden by the law.

Basically, the procedures in the Children's Court are the same as the procedures in a conventional criminal court. However, because the accused in the matter at hand is a child some special provisions apply that must be followed to ensure that the rights of the child are protected at all times.

First, if the children who commit the alleged crime are in the age range as stated in the Law – that is 8 to 18 years old – but prior to the alleged crime reaching the criminal trial phase the child has reached an age above 18 but not yet 21 then the matter will still be heard in the Children's Court. Secondly, where a child alleged to have committed a crime has not yet reached the age of 8 years, the child will still be investigated for the crime committed by the State investigator. The State investigator will then determine whether the child should remain with their parents or recognized guardian and be raised by them or recommend that the child become a ward of the State under the auspices of the Department of Social Affairs.

Generally, the procedures to hear matters in the Children's Court are the same as those in the courts of criminal jurisdiction. However, the Children's Courts have several special features to ensure that the interests of the child remain paramount throughout the proceedings.

Children who commit crimes in the company of adults will have their matter heard in the Children's Court and the adult will be brought before the court with the relevant criminal jurisdiction. Children who commit crimes in the company of military personnel will have their matter heard in the Children's Court and the adult military personnel will be brought before the court with the relevant military criminal jurisdiction. All Children's Court matters are to be heard in a closed court thereby ensuring the confidentiality of the identity of the child. A closed court means that only the child's parents, guardian, or appointed social workers may be present

(Article 8). This is in stark contrast to the Law No. 14 of 1970 where it is stated that in order to uphold the human rights of every citizen, then those citizens have a right to a fair public trial. Any failure to adhere to this stipulation may lead to any verdict being declared void at law. Nevertheless, the closed court principle is not absolute and a judge may open the court to public access in the event that the subject matter of the trial warrants it. In any event the judge maintains the discretion to permit attendance during the trial to other individuals however this discretion still only allows the judge to permit attendance of individuals that have some relationship to the subject matter of the trial or may contribute to bringing the matter to a conclusion.

Despite the generally closed nature of the Children's Court, any verdict that is rendered in a Children's Court matter must still be read in an open court. Any failure to do so may result in the verdict being declared void at law. Nevertheless, although the verdict is read in an open court this does not breach the paramount interests of the trial so long as all reasonable efforts are taken to protect the identity of the child.

There are several significant differences between the Children's Court and the courts of general criminal jurisdiction and some of these are noted below:

1. Generally, the maximum penalty that may be applied against a child is half that of the maximum applicable sentence for an adult. For example where the maximum sentence for larceny may be 7 years in courts of general criminal jurisdiction, then the maximum sentence applicable to a child will be 3.5 years.
2. Most of the judgment is penalty to go to prison not actions that the Law specifically mentioned such as the children will not go to prison but the court will say that the children go back to their parents to be educated.

Indonesia has enacted the necessary provisions of the Convention on the Rights of a Child into its domestic legislation

and as such courts are required to consider and apply these principles in all matters that involve the process of children through the criminal justice system. Some of these principles include the following:

- Every child has the right not to be the object of oppression, torture, or inhuman legal punishment. Sentence of death or life imprisonment shall not be handed down child offenders.
- Every child has the right not to have his freedom unlawfully taken from him. Children may be arrested, detained, or jailed only in accordance with prevailing legislation and only as a measure of last resort.
- Every child whose freedom is taken from him has the right to human treatment, as benefits the personal development needs of his age, and shall not be separated from his parents unless this is in his own interest.
- Every child whose freedom is taken from him has the right to access effective legal or other aid at every stage of ongoing legal proceedings.
- Every child whose freedom is taken from him has the right to defend himself and to access to a private hearing before an objective and impartial Child Tribunal.

E. Human Rights Court

The existence of the Human Rights Court is based on Law No.39 of 1999 on Human Rights (Law 39/1999), particularly in Article 104 which states:

1. *To try severe human rights violations the Human Rights Court is incorporated within the area of the general judicature.*

2. *Court as mentioned in paragraph (1) is to be incorporated by law within a maximum period of 4 (four) years.*
3. *Before the incorporation of the Human Rights Courts as mentioned in paragraph (2), alleged human rights violation cases as mentioned in paragraph (1) shall be heard by the authorized court.*

To satisfy the provisions of the Human Rights Law noted above Law No. 26 of 2000 was enacted on 23 November 2000 establishing the Human Rights Court.

Law 39/1999 was preceded by a Peoples Consultative Assembly Decree (TAP MPR RI) No.XVII/MPR/1998 on Human Rights), which mandated that all state superior institutions and the entire state apparatus had to respect, uphold and disseminate the values of human rights and promote an understanding of these rights within civil society.

To increase awareness of human rights issues and to ensure that they are protected from violation the human rights debate was initially framed within the State ideology of Pancasila, the Constitution, and the Universal Declaration of Human Rights. This led to the establishment of the National Commission for Human Rights or Komnas HAM. Komnas HAM was granted broad general powers to elucidate, examine, observe, research, and mediate human rights issues, as set forth in the law.

The existence of Komnas HAM within the framework of observation and reporting human rights violations and subsequent cases has increased the sensitivity of the legal system to the integral role that human rights plays in a democratic society. Since 2003, Komnas HAM has formed 8 human rights investigator teams, which are:

- Investigator Ad-Hoc Team and Human Rights Violation Study on Soeharto's Actions (Head of Komnas HAM Decision No. 07/KOMNAS HAM/2003, Jakarta 14 January 2003)
- Ad-Hoc Team on Peace Monitoring in Aceh (Head of Komnas HAM Decision No. 10.a/KOMNAS HAM/III/2003, Jakarta 6 March 2003)
- Investigator Ad-Hoc Team on Bulukumba
- Investigator Ad-Hoc Team on Reporter's Violence in 1996-2002 (Head of Komnas HAM Decision No. 04/KOMNAS HAM/I/2003, Jakarta 15 January 2003)
- Research Ad-Hoc Team on Ahmadiyah's case (Head of Komnas HAM Decision No. 26/KOMNAS HAM/VIII/2003, Jakarta 4 August 2003).
- Research Ad-Hoc Team on Missing Person Cases (Head of Komnas HAM Decision No. 18/KOMNAS HAM/VI/2003, Jakarta 20 June 2003 and Head of Komnas HAM Decision No. 29/KOMNAS HAM/IX/2003, Jakarta 23 September 2003).
- Research Ad-Hoc Team on Missing Person Cases (Head of Komnas HAM Decision No. 18/KOMNAS HAM/VI/2003, Jakarta 20 June 2003 and Head of Komnas HAM Decision No. 29/KOMNAS HAM/IX/2003, Jakarta 23 September 2003).
- Research Ad-Hoc Team on Human Rights Violation in Papua (Head of Komnas HAM Decision No. 22/KOMNAS HAM/VII/2003, Jakarta 24 July 2003).

The Human Rights Court is located within the General Court system therefore where procedures are not specifically defined within Law 26 of 2000 then Law No. 2 of 1986 on General Courts will prevail pursuant to Article 2 of Law No. 26 of 2000. Furthermore, Article 49 of Law No. 26 states:

Regulation regarding the authorization of a superior that entitled to punish an officer who delivers the case as stated in Article 74 and Article 123 Law No. 31 of 1997 on the Military Court shall no longer prevail in the investigation of severe human rights violations according to this law.

The abovementioned Article is indicative of the shift from military justice to the pursuit of justice through the General Court system and particularly the Human Rights Court. Furthermore, as stipulated in Article 1(4) of Law No. 26 of 2000:

Every person whether an individual, group of people, civilians, military or police shall be responsible as an individual.

It is important to note that the current regulatory framework expressly states that human rights violations are within the jurisdiction of the General Courts and specifically the Human Rights Court. Therefore, it is not possible for human rights matters to be held in any other forum including Connection Courts, a hybrid Civilian/Military Tribunal where the alleged breaches were conducted by a mixed group of civilian and military personnel. Consequently, even though Connection Courts remain recognized Chapter XI of the Indonesian Criminal Code these courts can no longer hear cases that allege severe human rights violations.

The establishment of the Human Rights Court is expected to ensure that the human rights of individuals and groups are respected as a fundamental tenet of the law providing legal certainty, justice, and a sense of security for all those pursuing justice for alleged breaches of their respective human rights. The development of the Human Rights Court is a part of the drive towards national unity as

encapsulated in TAP MPR-RI No.V/MPR/2000 on National Unity and Stability.

Indonesia needs to participate in the maintenance of world peace and ensure the respect and implementation of universal human rights values, as set forth in the Universal Declaration of Human Rights. Furthermore, the establishment of the Human Rights Court can be viewed as a part of this commitment to increasing Indonesia's participation in global affairs.

The *ad hoc* Human Rights Court currently has been established based on Presidential Decree No. 53 of 2001 on the Establishment of an *Ad-Hoc* Human Rights Court at the District Court of Central Jakarta. This Presidential Decree was issued based on DPR Decree No.44/DPR-RI/III/2000-2001 dated 21 March 2001 to try specific alleged human rights violations in East Timor and Tanjung Priok. The DPR Decree was preceded by a letter from the President No.KD.02/1733/DPR-RI/2001 dated 30 March 2001, requesting the establishment of these tribunals.

The Human Rights Court has already completed all trials related to the alleged human rights violations committed in East Timor and Tanjung Priok cases. Both of which have priority based on Presidential Decree (Keppres) No. 53 of 2001 as stipulated in Article 2 and amended by Keppres No.96 of 2001.

However, in Article 48 of Law No. 26 of 2000, the settlement of the past severe human rights violation can be settled through extra-judicial mechanism, that is as follows: (a) where the alleged violation occurred prior to the implementation of the law it may be settled by a commission on truth and reconciliation (b) Commission on truth and reconciliation established by law. In general, the Elucidation of the law in this respect is express in stating that: "commission on truth and reconciliation is an extra-judicial institution stipulated by the law that carries on its duties to uphold justice and reveal the misuse of power and past human rights violations, pursuant to the prevailing laws and regulations

and perform reconciliation on a national scale and in the national perspective”.

F. Military Court

The Indonesian judicial system is based on Law No.14 of 1970 and that law states that there is to be 4 types of courts. The courts are General Courts, Religious Courts, State Administrative Courts, and Military Courts. The Courts are regulated under specific legislation and as such have specialized jurisdictions. This section will analyze the Military Court.

The Military in Indonesia has been an important and integral part of Indonesian affairs for a long period of time. However, it is clear in any country that the military and the rules governing the military are substantially different from those governing the affairs of civilians. Therefore, the military is subject to a specialized set of laws and procedures that are to be processed through military courts. The Military Court was established and is regulated by Law No. 31 of 1997.

Law No. 31 of 1997 distinguishes the various Military Courts commencing with the Military Court (*Pengadilan Militer*), a court of first instance, Military High Court (*Pengadilan Militer Tinggi*) an appellate court, Military Supreme Court (*Pengadilan Militer Utama*) an appellate court for administrative disputes, and the Military War Court (*Pengadilan Militer Pertempuran*).

The Military Court is a court of limited jurisdiction as it may only try individuals that are members of the armed forces. The military prosecutor (*oditur*) is different in every case and it depends on the rank of the defendant. In MPR Decree VII/MPR/2000 it is stated that (for Indonesian soldiers) any violation of military law is subject to military justice while any violation of the general criminal code is subject to the General Courts. However, in the event that a member of the military

commits a crime in the company of a civilian, then the matter may be processed through the general court system or in a specialized Connection Court (*Pengadilan Koneksitas*).

G. Religious Court

The Religious Court (*Pengadilan Agama*) is based on Islamic law and is to resolve marriage and family law problems for Moslems. The *Pengadilan Agama* is a court of first instance and the Religious High Court (*Pengadilan Tinggi Agama*) is an appellate court. Conceptually, the Religious Courts can trace their history to *tahkim* which was an early dispute resolution mechanism for resolving disputes between Moslems by acknowledged religious experts.

On 29 December 1989, Law No. 7 of 1989 on the Religious Court (*Pengadilan Agama*) was passed by the House of Representatives (DPR). This law is indicative of the important role that the Religious Court plays in Indonesian law and the community generally. The Religious Courts can be found at the municipal level and Religious High Courts are located in the capital city of each province. The Religious Courts are within the jurisdiction of the Supreme Court.

The Religious Court has jurisdiction over disputes between Indonesian Moslems in the areas of marriage, inheritance, will, grants based on Islamic law, and *wakaf* (property donated for religious purposes) and *shadaqah* (voluntary donation). The Religious Court Law states that in inheritance matters, the parties involved are given the freedom to choose the applicable law for their dispute before they submit the dispute to the court. Furthermore, the parties are encouraged to resolve the matter amicably and to the mutual satisfaction of the parties concerned prior to commencing the litigation process.

Essentially, the legal proceedings of the Religious Courts are the same as those of General Courts except for the matters specifically regulated in the Law. These specifically regulated matters generally deal with the issues noted above.

H. State Administrative Court

In 1986 Indonesia enacted Law No. 5 of 1986 on the State Administrative Court. This Law constitutes an implementing regulation drafted and enacted specifically to ensure compliance with the provisions of Law No. 14 of 1970. Law No. 5 of 1986 was amended by Law No. 9 of 2004.

The State Administrative Courts is different from the General Court and these differences are reflected in the characteristics of the State Administrative Court:

1. Compensation for the imbalance of power between the applicant (*penggugat*) and the respondent (*tergugat*) where the *tergugat* is a State official. It is assumed that the applicant's position is weak compared to that of the respondent.
2. The object of the dispute is a decision by a relevant State official.
3. Any claim submitted to the court does not suspend the enforcement of the State official's decision.
4. The court's decision is enforced on the principle "*erga omnes*"; namely, that the decision is enforceable against not only the parties to the claim but also against related third parties.

According to Law No. 5 of 1986 there are 2 ways of settling State Administrative Disputes. The settlements are:

1. Administrative Measures (*Upaya Administrasi*)

Administrative Measures is a way of dispute settlement by an individual or legal person (*badan hukum perdata*) in a dispute

with the State within its own administrative authority (*lingkungan administrasi sendiri*).

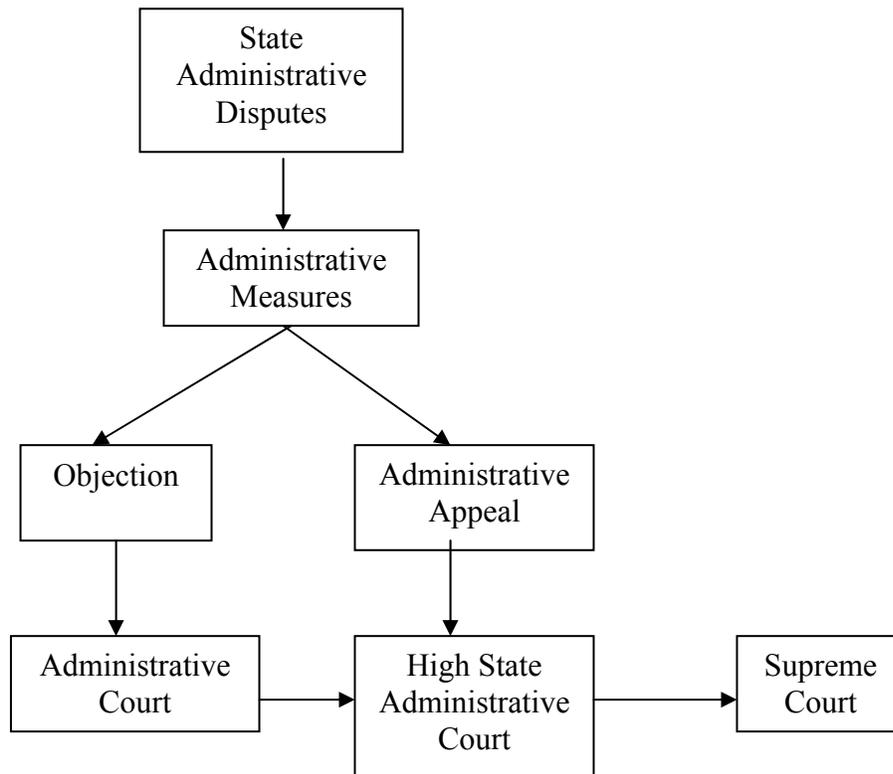
There are 2 kinds of Administrative Measures:

a. Administrative Appeal (*Banding Administrasi*)

An appellate matter resolved by a higher-ranking official.

b. Objection (*Keberatan*)

The settlement of the State Administrative action is conducted by the State apparatus.



2. Accusation (*Gugatan*)

Accusation is any claim against a State administrative official/institution. This effort is used when there is no regulation with respect to the settlement of State administrative disputes through the Administrative Measures (*Upaya Administrasi*).

D. CIVIL PROCEDURE

The Court System

The Indonesian judicial system comprises several types of courts under the supervision of the Supreme Court (*Mahkamah Agung*). Following the civil law tradition of The Netherlands, Indonesian courts do not apply the principle of precedent which is so familiar among common law jurisdictions.

All civil cases will be brought in the first instance before the District/Lower Court (*Pengadilan Negeri*), the daily court of first instance. Its jurisdiction is as a rule that of the Autonomous Region such as City or District (*kota* or *kabupaten*). According to Law No. 14 of 1970, at least three judges are required for each panel for the hearing or session to be declared valid.

The High Court (*Pengadilan Tinggi*) forms the court of second instance or appellate court. They render judgment on appeal of the judgment of the lower court. A Court of Appeal is normally located in the capital city of each province. The Court of Appeal similar to the District Court usually sits as a panel of three judges and have the authority to hear appeals from all lower courts. The Court of Appeal leads and has control over the court of first instance within their respective jurisdictions. As the controlling body they have the power to order that files and documents of the courts of first instance be sent to them for examination and

evaluation with a view to making a determination of the capacity and the diligence of the judges sitting in first instance.

The highest court in Indonesia is the Supreme Court. In a technical sense all courts in Indonesia fall under the leadership of the Supreme Court. However, the previous regulatory framework meant that although general courts were being led by the Supreme Court the administrative and financial matters of the courts were under the auspices of the Department of Justice and Human Rights. This changed significantly with the enactment of Law No. 35 of 1999 which stated that all General Courts were now under the authority and supervision of the Supreme Court.

In 1998, the Indonesian parliament established the Commercial Court (*Pengadilan Niaga*) through the enactment of legislation. Initially, the Commercial Court was tasked to handle bankruptcy and insolvency applications. Its jurisdiction can be extended however to include other commercial matters such as Intellectual Property Rights. Appeals from the Commercial Court proceed direct to the Supreme Court.

In 2001 the Constitution was amended to mandate the creation and establishment of a Constitutional Court (*Mahkamah Konstitusi*). Among other matters, the Constitutional Court has the jurisdiction to hear cases involving the constitutionality of particular legislation, results of a general election, as well as actions to dismiss a President office. The Constitutional Court has been established.

The Procedure

Indonesian Civil Procedure is based on two regulations which were inherited from the Dutch Colonial system, *Herziene Inlandsch Reglement* (HIR) and *Rechtsreglement voor de Buitengewesten* (RBg.) According to the Emergency Law No. 1 of 1951 on the provisional measures to obtain uniformity in the

administration, competency and procedure of the civil courts ensured that those two regulations remained in force until such time a new law was enacted to repeal them.

Court Processes in District Courts

Most disputes appear before the courts of general jurisdiction, with the court of first instance being the District/Lower Court (*Pengadilan Negeri*). A typical civil case begins when the plaintiff registers their claim with the registrar office of a District/Lower court. Subsequently, the head of the District Court will decide whether to appoint a single judge or a panel of judges to hear the case. Most cases are heard by a panel of three judges. The appointed judge or judges will sit for hearings, examinations, and, finally, will issue a decision. The court will schedule dates of hearings and will summon parties to appear before the court. The court will serve a summons directly on the relevant person or, if the address is unknown, place an advertisement in a newspaper including the content of the summons.

There are normally eight hearings or sessions once registration has taken place until the judge or panel of judges renders its verdict. At the first court hearing, if the plaintiff and defendant attend the session, the panel of judges will ask both parties whether or not they have attempted to negotiate an amicable settlement prior to appearing before the court. If the parties have not done so, the panel of judges has the obligation to mediate between the two contesting parties or order that they endeavor to resolve this matter through external mediation. At this point, the hearing will be temporarily adjourned while the parties attempt to reach an amicable settlement.

If the mediation effort is successful, the parties will draw up a Settlement Agreement (*Akta Perdamaian*), which will have the same effect as a court judgment in the sense that it is enforceable. If the mediation fails and an amicable settlement cannot be reached,

then the parties may proceed to litigation and the first court hearing will be scheduled.

In the event a defendant or their attorney does not appear, the panel of judges will schedule another hearing and ask for the defendant to be properly summoned. The panel of judges may also, however, issue a default judgment in the absence of the defendant. In the event a plaintiff or their attorney fails to appear on the scheduled day, the judge or panel of judges will declare the lawsuit null and void.

The first court hearing starts with the plaintiff stating their case and submitting their arguments in support of the case and any demands made regarding how it is hoped the court will decide the matter at hand. The plaintiff does so by reading the written lawsuit. The reading of lawsuits is common in the litigation process in Indonesia as the process is more of a 'paper' process than an oral one. After hearing the plaintiff's lawsuit, the panel of judges will give an opportunity for the defendant to rebut at the second court hearing. It is rare for the defendant to rebut on the same day. The judge or panel of judges will usually adjourn the rebuttal hearing so as to give the defendant time to prepare a written rebuttal.

At the second court hearing, the court will hear the defendant read his written rebuttal (*konpensasi*). At this point, the defendant also has the option to file a counter suit (*rekonpensasi*) against the plaintiff. This is when the process becomes complicated, since the defendant becomes a plaintiff at the same time. The judge or panel of judges in this kind of process will have to issue two verdicts at the same time.

The third court hearing will hear the plaintiff's rebuttal against the argument made by the defendant at the last court hearing.

At the fourth court hearing, the panel of judges will hear the defendant's arguments with respect to the plaintiff's rebuttal.

The fifth and sixth court hearings are dedicated to examining evidence and presenting and hearing any witnesses, including expert witnesses. The plaintiff is given the first opportunity to present evidence, while the subsequent hearing is given to the defendant to present any witnesses or testimony that it may wish to do so in support of its case.

The seventh court hearing is for the court to hear both parties give their conclusions in the case. The eighth and last court hearing is when the panel of judges reads its verdict.

The court's verdict, however, does not immediately take effect and become enforceable. The verdict takes effect only after fourteen days have passed with no appeal submitted. If a party submits an appeal, which is often the case, the verdict does not take effect and is unenforceable.

Appeal to the High Court

Appeals from the District/Lower Court are heard before the High Court (*Pengadilan Tinggi*). The High Court is a District Court of Appeal. Appeals from the High Court and, in some instances from the District/Lower Court, may be made to the Supreme Court located in Jakarta.

The High Court will review the case through materials submitted by the parties at the District Court. In this regard, the High Court procedure is more of a game for lawyers. The parties to the dispute will not be physically involved. The High Court's verdict will take effect and become enforceable in fourteen days if no cassation to the Supreme Court is submitted. There are no restrictions, except for time limits, with respect to challenging a verdict of the High Court to the Supreme Court. In addition, there is no mechanism to examine the admissibility of cassation based on sound legal grounds.

Appeal to the Supreme Court

The Supreme Court can hear a cassation appeal (*kasasi*) which is a final appeal from lower courts. It can also conduct a case review (*Peninjauan kembali*) if, for example, new evidence is found which justifies a re-hearing.

The Supreme Court renders decisions concerning disputes of competency amongst the types of court in the first and last instances.

The Supreme Court can overrule a verdict of a lower court on any of three grounds: the court in question lacked jurisdiction or acted beyond its jurisdiction; the court applied the law incorrectly or violated prevailing law; and, the lower court neglected to satisfy certain requirements imposed by law.

The review of a case at the Supreme Court will be based on the same materials presented at the District Court; the Supreme Court will not admit new evidence. The process at the Supreme Court is the same as at the High Court in that the parties to the dispute are not physically involved.

A case will also not necessarily end once the Supreme Court renders its verdict. The next challenge is to enforce the verdict, and the case can always be re-opened by one of the parties to the dispute if they can furnish new evidence that has a bearing on the decision.

The Supreme Court gives judgment in cassation. Commercial disputes in Indonesia also end with the Supreme Court and also as a cassation. The parties in private law cases may request cassation by the Supreme Court. Cassation is possible only if no other ordinary means of obtaining justice is available. If there is a possibility of bringing the case for appeal to the court of second instance (High Court) then the cassation will not succeed. In other words, it is impossible to request cassation on the decisions of the District Courts of first instance. The case must first be brought before the respective courts of second instance, except in some

instances. For example, in a dispute about trademark registration and bankruptcy the decision of the first instance court may be directly brought before the Supreme Court. This is due to the fact that the decisions for these cases in first instance court are deemed to be final, without opportunity for appeal.

Cassation will be successful if the decisions do not comply with the formal requirements as set forth in the regulation, pertaining to nullification. It is also possible when the lower courts in rendering their decision exceed their jurisdiction. Finally, cassation is possible if the regulations and rules of law have been improperly used or if there is a violation of those rules.

E. CRIMINAL PROCEDURE

Indonesian Criminal Procedure is regulated in Law No. 8 of 1981 on Criminal Procedure. The Law is so called KUHAP or Kitab Undang-undang Hukum Acara Pidana an Indonesian Code of Criminal Procedure. KUHAP replaced the old criminal procedure contained in HIR 1941 or *Het herzine Inlandsch Reglement*, a Dutch regulation concerning the Procedural Law in Hindia Belanda (Indonesia). When the Law was enacted in 1981, it was considered a masterpiece because the Law made some changes and even included some innovations considered to be significant improvements on the old HIR. First, the law ended the dualism in criminal procedure by eliminating the *Landraad* and *Raad van Justitie* Procedures. The Law on enactment was to be nationally implement and applicable throughout Indonesia. Second, the Law utilizes the accusatorial system where the HIR applied the inquisitorial system. The accusatorial system is considered as more humane than the inquisitorial system because the inquisitorial system considers the confession of the defendant as evidence. The inquisitorial system has no limitation concerning the authority of

the investigator and the investigation process itself. Historically, it was the fact that in order to get the defendant's confession, the investigator tortured the defendant if this was the only way to ensure that a confession was made. Third, the Law reflects the national aspirations and the national ideology therefore, at least, on a technical and theoretical level the KUHAP honors and upholds the human rights of Indonesians in its substance.

In the Indonesian Criminal Justice System, there are 4 (four) basic components to the system; namely, the Police (*Kepolisian*), the Attorney General (*Kejaksaan*), the Court (*Pengadilan*), and Correctional Facilities/Prisons. All are considered to be law enforcement institutions. The system may be defined "...generally as a complex of elements or components directly or indirectly related in a causal network, such that each component is related to at least some others in a more or less stable way within any particular period of time..." The Law expects there will be a unity and uniformity in action and policy amongst the four components of the Indonesian Criminal Justice System. The system is referred to as "*SISTEM PERADILAN SATU ATAP*" (Criminal Justice under One Roof System) or it is also known as an "Integrated Criminal Justice System". The mechanism of the criminal justice process begins with arrest, search, detention/remand, prosecution, and trial. At the end of the process, there is an enforcement of the judgment at a correctional facility/prison (*Lembaga Pemasyarakatan*).

There are several stages to the criminal justice process. First, an inquiry conducted by the police. The police in order to conduct an inquiry have the rights and authorities as follows: to receive a report or complaint regarding a crime; to search for information and evidence; to stop a person that is the subject of the complaint or report; and, do any other action based on laws. The Law states that this authority resides in the National Police Force or *Kepolisian Republik Indonesia* and the law does not consider that there is a need to involve lawyers/counselors. This means that there are no legal services or legal aid available to the accused as a requirement

of the law. Related to a discussion of the inquiry and the investigation process, it can be said that the beginning of the criminal justice process is when the following three conditions are met: there is a report of a crime, a complaint of a crime, or there is a “crime caught in action”. Based on one or more of these three conditions, the police will start the investigation. A report of a crime can be defined as any information brought by a person based on his/her rights or obligations given by the law to the authorized officers concerning a crime that has been committed or is being committed or it is suspected that a crime will be committed. A complaint of a crime can be defined as a formal report along with an application from an interested person (especially a victim of the reported crime) asking the authorized officers to take some legal action on the person who committed the crime.

The prosecutorial function rests with the Attorney General, who holds the position of supreme public prosecutor. The Attorney General occupies a cabinet-level post separate from that of the Minister of Justice (or in the most recent Government the Minister of Law and Human Rights), both of whom report directly to the President. In 1992 the Attorney General's Office included 27 provincial-level prosecutors' offices and 296 district prosecutors' offices.

The public prosecutor's principal functions were to examine charges of felonious conduct or misdemeanors brought by individuals or other parties, and then either dismiss a charge or refer it for trial to the relevant Court having jurisdiction over the matter. The prosecutor's office was also responsible for presenting the case against the accused in court and for executing the sentence of the court.

The matter of control over the conduct of the preliminary investigation has been a point of contention between the prosecuting authorities and the police going back to the late 1940s and early 1950s. Practice under the old code of criminal procedure evidently rested on working agreements between the two services,

under which the police, in principle, conducted primary investigations but deferred to the prosecutor whenever the latter asked to undertake the investigation. Under the new code of criminal procedure, a clear division was made between the investigatory function, which was given solely to the police, and the prosecution function, which remained with the prosecutor's office. The only exception was in the case of "special crimes," a category which was not further defined but which was believed to be reserved for unusually sensitive cases such as espionage and subversion, in which the prosecutor could also take a role in the investigation. Continuing tension between the prosecutor and the police was evident during debate over a new prosecution service law in 1991. The law as passed gave the Attorney General the power to conduct limited investigations in cases that were determined to be incomplete. The 1991 law also established the positions of Deputy Attorney General and a sixth Associate Attorney General responsible for civil cases and administrative affairs.

The second stage is the arrest process. This process can be done when there is enough prior evidence or "*bukti permulaaan yang cukup*" and also it is considered to be a paramount part of the inquiry and investigation process. An arrest may be made of any person reasonably suspected of having committed a crime or is reasonably suspected of being about to commit a crime. Generally, the arrest only takes one day. The arresting process should be preceded by an arrest warrant however there is an exception where the person(s) are "caught in the act" of committing the crime.

The third stage of the criminal justice process is detention or remand. At this stage the law states in Article 20 that detention or remand can be effected at any stage of the criminal justice process, Article 21 states that further detention is possible at the demand of the public prosecutor. Article 23 regulates how the type of detention or remand that the accused is subject to may be changed. Articles 24 to 29 regulate the term/ length of the detention period.

KUHAP as well as the Reglement (HIR) stipulates the legal basis for arrest, detention, or remand. There are two basic legal foundations regarding arrest and detention; namely, judicial and opportunity.

The judicial reason arises when there is a reasonable suspicion that the person has committed a crime based on sufficient evidence and the minimum applicable penalty for the alleged crime is 5 or more years. However, there is an exception to the 5-year minimum for certain crimes as stipulated by the law. The opportunity reason applies when there is a sufficient reason to believe that the accused will flee or attempt to destroy evidence or commit further crimes. The opportunity reason applies alternatively, meaning it can be applied even when only one of the conditions arise.

Before exploring the fourth stage of the process, it is important to discuss the pre-trial review process. The pre-trial review is a process or an institution that is not recognized by the Reglement (HIR). This institution was introduced by the Law. The pre-trial review process is the competence of the first instance court (*Pengadilan Negeri*) to examine and decide whether the actions of law enforcement to this point have been legitimate, particularly with regards to the arrest and detention. The Court may cease the investigation or the prosecution process. The pre-trial review may also determine whether there is any compensation due to the investigated person for a breach of their rights or whether the relevant authorities are obligated to rehabilitate the good name of the investigated person. The pre-trial review is conducted by only one judge. This institution is characterized as “accidental” meaning it only occurs when the suspect or his family or his attorney submit an application to the Chief Justice of the first instance court. This is an expedited process as the judge will render a decision within 10 days of the review being commenced. Essentially, the pre-trial review process is a filter to ensure that the actions of the relevant law enforcement agencies comply with the provisions of the

relevant laws. Nevertheless, it is important to note that it does not cover the inquiry process meaning that any unlawful acts of the police in the inquiry process are not subject to pre-trial review.

The fourth stage is the trial. This process commences with a summons to appear based on the prevailing laws and regulations. Once the prosecutor submits the case for trial a panel of judges will be appointed to hear the matter. There are three basic types of trial: regular, expedited, and summary (*summir*).

Law No. 14 of 1970 stipulates a number of principles concerning competency of the court and how a fair trial is to be conducted:

- a. Equality before the law – everyone has the same position in front of law, no discrimination should be allowed.
- b. Due process of law – as all legal enforcement before the trial such as arrest, detention, search, and seizure have to be conducted based on written orders or warrants from an authorized officer, and has to be done in accordance with the law.
- c. Presumption of innocence – no one can be considered guilty before a judgment which is final and binding is rendered.
- d. Everyone who is suspected, arrested, remanded, prosecuted, or tried without legal reason and or in error should be given compensation and rehabilitation. The officers who either deliberately or because of mistake cause this violation have to be charged or given an administration sanction.
- e. The court or justice should conduct matters expediently, simply and cheaply. The trial should be free, fair and impartial.
- f. Everyone charged with a crime has a right to legal representation or legal aid.

- g. The suspect has the right to be informed of what charges are contained in the indictment and the legal basis for the indictment.
- h. The court hearing must be conducted in the presence of the defendant.
- i. The court is open to the public, except where the law provides otherwise.

In order to uphold the human rights of citizens and to implement the principles contained in Law No. 14 of 1970, the KUHAP honors and guarantees some rights for the suspect (accused) and or the defendant. The most significant of these principles is the principle of a *presumption of innocence*. It means that every person who is accused of committing a crime that has led to their arrest, remand, prosecution or trial has the right to be presumed innocent until proven guilty, which in this case would be with the rendering of a final and binding judgment by the relevant court. As an innocent person, the accused has rights: the right to be examined immediately, the right to know the crime alleged to have been committed, the right to know the content of formal charges, and the right to have legal representation, among others.

Furthermore, all statements by the accused are required to be given freely without intimidation or coercion. Any refusal by the accused to sign the statement must be recorded in the police report of the investigative process. Once an indictment has been issued the accused then has a right to a speedy trial by a competent court, the right to be physically present at any court hearing, the right to have the indictment and any other charges in a language in which they can understand, the right to legal aid if the accused is unable to afford legal representation, and a right to receive family visitors, among others. Last, but not least, in order to uphold the principle of the presumption of innocence, the accused does not have the burden to prove their innocence rather the burden of proof is on the prosecutor to prove guilt.

Legal aid can be provided at any stage of the process in order to prepare his/her pleadings. As of the arrest and detention of the accused the right to contact a legal representative becomes available to the accused. The KUHAP recognizes client/lawyer legal privilege and as such any communication between the accused and their appointed legal representative is protected and privileged. The KUHAP recognizes this principle in terms of “within sight but not within hearing”. An exception applies to crimes of subversion, as any contact between the accused and the lawyer may be heard by the relevant officials involved in any investigation or prosecution of the alleged crime.

Free legal aid is provided to the accused where the penalty for the crime is 5 years or more imprisonment. The KUHAP establishes the right to legal assistance of one’s choosing, excluding where the legal assistance is free legal aid. Legal advisors are also given the right to have access to their client at any time.

In criminal court, most of the procedures in reaching a decision which is final and binding are the same as those in a civil court. Specifically, the Criminal Procedure Code or KUHAP also regulates “Judgment in Criminal Court”. At first, a criminal case will be brought to the courts of first instance. It will be heard by a panel of judges. To reach a decision, the judges should have at least two pieces of evidence and sworn testimony that satisfy the panel of judges that the alleged crime has been proved. When the judges reach a decision, it should be declared in open court to ensure that the decision is valid and enforceable. Within 7 days, the defendant or his lawyer may file an appeal. The public prosecutor who conducted the case also has the right to file an appeal. No appeal can be filed a judgment of acquittal (*putusan bebas*) or a judgment of dismissal of all charges (*putusan lepas dari segala tuntutan hukum*).

All judgments in criminal cases other than those judgments of the Supreme Court can be overturned on appeal or cassation. The right to file an appeal rests with the defendant and the public

prosecutor who brought the case. Finally, no cassation can be filed for a judgment of acquittal (*Putusan Bebas*).

All Decisions of the court should be titled with the following: “For Justice based on God” (*Demi Keadilan yang berdasarkan Ketuhanan Yang Maha Esa*).

F. CONSTITUTIONAL PROCEDURE

The History

A Constitutional Court was an oft mooted idea in the Indonesia judiciary and it was not until the Constitution was amended in 2001 that the court began to take on more than just a conceptual form. Articles 24(2) and 24C of the Constitution were amended and inserted, respectively. The Constitutional Court is indicative of the legal reform process in Indonesia and a commitment to the establishment of a legal society and a community that is based on the basic principles associated with the rule of law.

Even though the recognition of a Constitutional Court in the Constitution the reality was that there was not a functioning court in place to perform the tasks that were envisaged for it. The Law expressly allowed for the Supreme Court to continue performing the functions of the proposed Constitutional Court until such time as the court was a physical reality and able to accept transfer of cases from the Supreme Court into its own jurisdiction. The government and the DPR entered into immediate discussions and debate to draft the Constitutional Court Law. This law was drafted and enacted as Law No. 24 of 2003 on the Constitutional Court. The enactment of the Law was published in the State Gazette No. 98, Supplemental State Gazette No. 4316. Two days later, on 15 August 2003, the

President, through Presidential Decree No. 147/M of 2003 appointed 9 (nine) Constitutional Court Justices. The newly appointed justices swore their oath of office on 16 August 2003 at the State Palace.

With the constitutional amendment enacted, the relevant Constitutional Court Law enacted, and the appointment of the justices to the Court made, the Court was ready to receive its first cases. The Supreme Court which had assumed a caretaker role over constitutional matters until such time as the Constitutional Court was ready to assume these responsibilities itself transferred the initial cases to the Court on 15 October 2003.

The Constitutional Court is a court of first instance and of appeal ensuring that decisions are final and binding once handed down by the court. The authorities and powers of the court include: a) judicial review of any Law alleged to be in conflict with the Constitution, b) decide any conflict between state institutions that derive their respective authority and power from provisions contained in the Constitution, c) decide on the dissolution of political parties, and d) decide conflict that arise over the results of general elections. In addition to the above noted authorities and powers the Constitutional Court must decide upon opinions submitted by the DPR with respect to allegations that the President or Vice President are in breach of the prevailing laws and regulations with regard to treason, corruption, bribery, other serious criminal acts, dishonest behavior, or is incapable of fulfilling the requirements for the Office of the President and/or Vice President.

The Constitutional Court comprises 9 members of which one is appointed Chief Justice. Justices to the Constitutional Court are appointed by the Supreme Court, the DPR, and the President, with each appointing 3 justices. The provisions of the Constitution, the relevant laws, and implementing regulations expressly prohibit justices of the Constitutional Court from concurrently holding positions as: a) state officials, b) members of political parties, c)

entrepreneurs, d) advocates, or e) civil servants including as active members of the National Armed Forces or National Police Service.

The Procedure

According to the law, the first stage in the Constitutional Court process is to file a complaint, written in Bahasa Indonesia and signed by the disputing party and must be in the form of 12 original copies of the complaint. The structure of the complaint must cover the identity of the parties and whether they have legal standing to bring the matter to the Court as well as the *posita* and *petitum* of the complaint. The complaint must also be complete with all supporting evidence. For electoral disputes, the complaint has to be submitted within 72 hours (3 x 24 hours) since the result of the National Election is declared by the National Election Commission.

After the court receives the complaint then the session/hearing schedule will be set up with the first hearing to be scheduled within 14 days of the registration of the case. The parties to the dispute then will be notified of the hearing date there will also be a public announcement of the hearing. In the pre-examination phase, the bailiff will examine whether the complaint already fulfills the requirements as well as make a determination on the clarity of the complaint. If the complaint still lacks sufficient clarity or is incomplete in any way the bailiff will return the complaint to the relevant party and demand that the party rectify the noted issues within 14 days and resubmit the case to the court.

For complaints that concern the judicial review of legislation with respect to alleged conflicts with the Constitution then this complaint should also be forwarded in copy to the President and the parliament (MPR). Dispute between governmental institutions requires that a copy of the complaint be forwarded to the opposing party. Any complaint regarding an opinion of the parliament requires that a copy of this complaint be forwarded to the President. In cases where a complaint has been submitted with respect to the

announced election results then a copy of this complaint must be forwarded to the National Election Commission.

All hearings at the Court are open to the public and require the attendance of all parties to the complaint with respect to the presentation of their respective evidence and any other testimony required by the court. However, where one of the parties is a government institution then that evidence or testimony may be in written form and submitted within 7 days of the hearing. The Court has the power to call expert witnesses to submit testimony where the Court believes that it will contribute to the understanding of the matter being heard or assist in resolving the matter to the satisfaction of the Court. All witnesses are entitled to be accompanied by their legal representatives or any other person of their choosing.

The decision of the Court shall be rendered within 60 working days afterof registration of the case for the dissolution of a political party. In cases concerning the dispute of election results the relevant time limits are 14 days where the disputed results concern the President and Vice-President and 30 days where the dispute concerns the parliamentary election results. In cases concerning opinions of Parliament the time limit is 90 working days of registration. Court decisions are to be in written form and each judge's opinion is to be included in the judgment, including any dissenting opinions.

The decision of the Court is deemed to be final and binding once it has been read in open court. A copy of the decision that has been read out in open court will be furnished to the parties within 7 days of the decision being read.

G. ENFORCEMENT & JUDGMENT

Judgment

Indonesia has four judicial branches as outlined in the Basic Principles of Judicial Power as amended by Law No. 4 of 2004; namely, General; Military; Religious; and, Administrative Courts.

General courts include the District Courts of first instance, High Courts (Appellate Courts), and the Supreme Court. General courts are courts that hear civilian (non-military) and criminal cases among and between civilians.

In General Courts, all cases will be brought to the daily courts of first instance or District Court (*Pengadilan Negeri*). Indonesian law requires that all matters are held before a panel of judges. The panel must include at least three judges to constitute a valid hearing, judgment in most civil cases is rendered by three judges. The law further requires that all judgments are read in open court and any failure to do so may result in the decision being rendered void at law. The method of reaching a decision requires that the judges meet in closed chambers to consider the facts presented and the prevailing laws and regulations. All deliberations in closed chambers remain confidential and secret. The amendments contained in Law No.4 of 2004 require that every judge has an obligation to deliver a written opinion to be included in the judgment. The law expressly states that dissenting opinions are also to be included in the written judgment. General Courts normally require the parties to enter into mediation where appropriate. In the event that this mediation process results in a mutually acceptable agreement between the parties, then this agreement will be confirmed by the court in a Deed of Settlement (*akta perdamaian*) which will be deemed to be final and binding on all the relevant parties.

Once the judgment of the General Court in the first instance is rendered an appeal against the content of that judgment may be filed to the High Court. This appeal must be filed within 7 days of the decision being read in open court, and may be filed by any party to the first instance decision. No appeal can be filed against a judgment that has been rendered by the court with the consent of the parties. Any decision handed down that is based on a prior agreement of the parties among themselves or with the court is considered to be final and binding.

The High Courts acting as a Courts of Appeal usually sits as a panel of 3 judges however acceptable practice for civil matters is that only one judge will sit in judgment of the appeal. The courts of appeal may review all decisions of the courts of first instance.

In the event one or both parties are unsatisfied with the decision of the appeal court, then the aggrieved party may file an application for appeal to the Supreme Court within 14 days of the of the appeal court handing down its decision. This appeal is known as cassation.

The grounds for cassation, in private law cases, are: first, when the decision does not comply with the formal requirements as set forth in the regulations, pertaining to nullification, secondly when the lower courts in rendering their decision exceed their jurisdiction. Finally, cassation is possible if the laws and regulations have been incorrectly applied or there is some form of identifiable and provable impropriety. No appeal can be filed to a Deed of Settlement (*akta perdamaian*).

In the criminal jurisdiction the procedures in reaching a decision which is final and binding are the same as other jurisdictions of the General Court. The specific procedures applicable in the criminal jurisdiction of the General Courts are stipulated in the Indonesian Criminal Procedure Code or KUHAP (*Kitab Undang-undang Hukum Pidana*). Criminal matters are first tried in a General Court of first instance and to reach a decision the

judges must be presented with at least two pieces of evidence and faith to satisfy them of guilt or innocence. Once a decision has been reached by the judges that decision is to be read in open court in order to be valid. Within 7 days the aggrieved party may file an appeal to the relevant court of appeal in the jurisdiction. No appeal can be filed against a judgment of acquittal (*putusan bebas*) or judgment of dismissal of all charges (*putusan lepas dari segala tuntutan hukum*).

All decisions that have been decided at the District Court level and appealed to the High Court in the criminal jurisdiction may be appealed to the Supreme Court as a cassation matter.

All judgments are required to be prefaced with the following statement – For The good sake and fairness based on God (“*Demi Keadilan yang berdasarkan Ketuhanan Yang Maha Esa*”). This is critical to ensuring that the decision is afforded the full support of the law as recent jurisprudence suggests that judgments rendered without this statement will be held to be void at law.

Extraordinary Legal Remedies in Indonesian Law

All judgments which have been deemed final and binding at the last appellate level may seek a final extraordinary legal remedy, *Peninjauan Kembali*. *Peninjauan Kembali* is a form of judicial review or cassation that is used for the good sake of law (*Kasasi Demi Kepentingan Hukum*).

Enforcement

In civil matters the Bailiffs of the relevant court execute any enforcement order issued by the Head of the relevant Panel of Judges. The party or parties can request for “Sita Jaminan” or a Confiscation Order or *Consevoir Beslag* and “Sita Eksekusi” or Writ of Execution.

In criminal matters, the judgment that is considered to be final and binding is enforced by the prosecutor (*jaksa*). Any discussion of the enforcement of criminal court judgments requires a more thorough analysis and examination the penal system of Indonesia.

A. The Enforcement of Securities

When a corporate borrower is in financial difficulties and a secured debt has become due, it would be usual or customary for a secured lender and/or the corporate borrower to attempt to negotiate a suitable arrangement for repayment and/or refinancing before the secured lender invokes legal enforcement methods. In this method lenders and borrowers almost always attempt to negotiate an amicable agreement for repayment of debt or refinancing of debt before a lender, secured or not, invokes a recognized legal enforcement method in Indonesia. Both are aware of the uncertainty of enforcement methods. If it is not possible after a suitable period of time for the secured lender to reach an agreement, then enforcement methods may be used by the lender, including foreclosure of security by a secured lender.

There are several mechanisms available to security holders to enforce their securities under the Indonesian legal system including the power to take possession of property, power to appoint a receiver, power to foreclose on a mortgage, power to sell the secured property, and the power to wind up the corporate borrower. A secured creditor must exercise its foreclosure rights against its security through the courts, if the debtor resists foreclosure. The foreclosure procedures vary depending upon the type of security involved. There are no self-help remedies in Indonesia. Accordingly, if the debtor resists repossession by way of security foreclosure, court intervention is required.

B. The Enforcement of Foreign Judgments

In order to enforce a foreign judgment the general principle referred to in Indonesian law is the territorial principle. Consequently, as a general rule, foreign judgments are not enforceable in Indonesia. Judgments of foreign courts cannot be executed by Indonesia courts as a judgment delivered in one country does not have the requisite force of law in some other jurisdiction. However, although foreign judgments are not generally enforceable in Indonesia it is possible for a foreign judgment to be enforced if Indonesia has a bilateral or multilateral treaty with the relevant country issuing the arbitral award. Nevertheless, there are some recent developments that Indonesia in association with Thailand and the Philippines are examining ways of implementing a universal or cross-border principal of award recognition that would in effect allow for the recognition of foreign judgments.

C. The Enforcement of International Arbitration Judgements

Indonesian courts have historically been very reluctant to enforce international arbitration judgments without first confirming that judgment or award through the Indonesian judicial system. An example of this reluctance was highlighted in the Karaha Bodas case where Karaha filed their international arbitration claim in Switzerland. The Swiss arbitration resulted in an award of USD 261 million of the USD560 million claimed. On receipt of the judgment Karaha sort to execute that award in Indonesia.

Indonesia has already ratified Convention on the Recognition and Enforcement of Foreign Arbitral Award (New York Convention 1958) through the provisions of Presidential Decree No. 34 of 1981. However, Article 5 of this convention stipulates that the enforcement of an international arbitration judgment can be refused if it breaches public policy or would be detrimental to public order. In the Karaha Bodas case, the suspension of the project was considered to be in breach of public

policy and as such the Court of First Instance in Indonesia, the District Court, refused to issue the necessary writs of execution to enforce the judgment.

The Indonesian and foreign mass media seized on this refusal to issue the Writ of Execution as evidence that Indonesia was not only reluctant but would not enforce foreign arbitral awards.

D. The Enforcement of Judgments of the Administrative Court

A judgment that is issued and considered final and binding by the Administrative Courts (Peradilan Tata Usaha Negara) have the following consequences:

1. A judgment means that the dispute is settled
2. The judgment is final and binding for everyone not only the parties to the action but all relevant parties as the judgment is said to have the characteristics of “*erga omnes*”.
3. The judgment is an authentic or official document and is considered to be perfect or credible evidence.
4. The judgment has executorial power and can be enforced by any law enforcement agency.

In enforcing the judgment, the name of a government officer who doesn't enforce the judgment will be announced in the printed media this is more affect the officer morally and mentally for Indonesian officer “*nama baik*” or integrity is everything.

E. The Enforcement of Judgments of the Taxation Court (Pengadilan Pajak)

The judgment of the Taxation Court is deemed to be final and binding (Berkuatan Hukum Tetap). The only legal remedy that can be requested is *Peninjauan Kembali* or the judicial review of the

case at the Supreme Court. Judicial review at the Supreme Court is restrictive as the Court is only allowed to consider questions of law and the application of the prevailing laws and regulations to the facts in dispute. The Court will not retry the facts of the case.

Legal Remedy in Constitutional Law

In Constitutional Law, the President has a prerogative right to provide an official pardon [grasi] to the convicted. The effect of a pardon is that it may reduce or even expunge the conviction, sentence, or penalty.

In Article 1 of Law No. 22 of 2002, “Grasi” [Official Pardon] is a pardon such as changing, reducing, or dismissing the execution of the sentence on the convicted and is issued by the President. Generally, the law has interpreted convicted persons as only those persons who have been convicted in a court of law and where the conviction is deemed to be final and binding at law.