

IDE Asian Law Series No. 12
Law and Political Development in Asia (Indonesia)

**Political Change and Legal Reform
towards
Democracy and Supremacy of Law
in Indonesia**

Prof. Dr. C.F.G. Sunaryati Hartono, SH
Professor of Law
Vice Chairperson,
National Ombudsman Commission

Prof. Dr. phil. Astrid S. Susanto
Professor of Political Sociology and Political Communication
Member of Parliament (DPR/MPR)

RM Surachman, SH
APU Research Professor eqv.
Deputy Ombudsman
National Ombudsman Commission

INSTITUTE OF DEVELOPING ECONOMIES (IDE-JETRO)

March 2002

JAPAN

PREFACE

The evolution of the market-oriented economy and the increase in cross-border transactions have brought an urgent need for research and comparisons of judicial systems and the role of law in the development of Asian countries. Last year, in FY 2000, the Institute of Developing Economies, Japan External Trade Organization (IDE-JETRO) conducted legal researches in Asian countries with two main themes. The first theme was to figure out the role of law in social and economic development and the second was to survey the judicial systems and the ongoing reform process thereof. We organized joint research projects with research institutions in Asia and had a roundtable meeting entitled “Law, Development and Socio-Economic Change in Asia” in Manila. The outcomes of the joint researches and the meeting were published in March 2001 as *IDE Asian Law Series No. 1-10*.

This year, in FY 2001, based on the last year’s achievement, we established two research committees: the Committee on “Law and Political Development in Asia” and the Committee on “Dispute Resolution Process in Asia”. The former committee focused on legal and institutional reforms following democratic movements in several Asian countries. Since late 1980s many Asian countries have experienced drastic political changes by the democratic movements with mass action, which have resulted in the reforms of political and administrative system for ensuring the transparency and accountability of the political and administrative process, human rights protection, and the participation of the people to those process. Such reforms are essential to create the stability of the democratic polity while law and legal institutions need to function effectively as designed for democracy. The latter committee conducted a comparative study on availability of the court system and out-of-court systems (namely Alternative Dispute Resolutions), with the purpose of determining underlying problems in the courts. As social and economic conditions drastically change, Asian countries face challenges to establish systems for fairly and effectively resolving the variety of disputes that arise increasingly in our societies. For dispute resolution, litigation in the court is not the only option. Mediation and arbitration proceedings outside the courts are important facilities as well. In order to capture the entire picture of dispute resolution systems, a comprehensive analysis of both the in- and out-of-court dispute resolution processes is essential.

In order to facilitate the committees' activities, IDE organized joint research projects with research institutions in seven Asian countries. This publication, titled *IDE Asian Law Series*, is the outcome of research conducted by the respective counterparts. This series is composed of papers corresponding to the research themes of the abovementioned committees, i.e. studies on law and political development in Indonesia, the Philippines and Thailand, and studies on the dispute resolution process in China, India, Malaysia, the Philippines, Thailand and Vietnam. The former papers include constitutional issues that relate to the recent democratization process in Asia. Studies conducted by member researchers investigated the role of law under those conditions while taking up such subjects as rule of law, impeachment, Ombudsman activities, human rights commissions, and so on. The latter papers include an overview of dispute resolution mechanisms for comparative study, such as court systems and various ADRs, as well as case studies on the dispute resolution process in consumer, labor and environmental disputes.

We believe that this work is unprecedented in its scope, and we hope that this publication will make a contribution as research material and for the further understanding of the legal issues we share.

March 2002

Institute of Developing Economies

ACKNOWLEDGEMENT

This book entitled “Political Change and Legal Reformation towards Democracy and Supremacy of Law in Indonesia” is a report of a study on the political and legal change which occurred in Indonesia in the context of the multi-dimensional Reformation Movement, which caused and followed the downfall of President Soeharto, who governed and lead the Republic of Indonesia for 32 years (from 1966-1988)

Despite the fact that he called his long-term of tenure “The New Order”, which is supported to counter Soekarno’s (our first President) “Old Order”, which he and his followers found very autocratic, Soeharto’s leadership became even more autocratic and tyrannical than the “Old Order”.

It was therefore very difficult to find out the exact date of the start of the Reformation Movement, which must have been some time during the first decade of Soeharto’s rule, but became clearer until it exploded during the student’s rally in the Parliament’s (MPR and DPR) Building in Jakarta, in May 1998.

In conducting this study I wish to express my gratitude first and foremost to Dr. Naoyaki Sakumoto, who asked me to conduct this study and assured that Institute of Developing Economics of JETRO that in spite of my many activities, I would still be able to complete this study.

To be sure, this would not have been possible but for the cooperation of Pr. Dr. phil. Astrid S. Susanto (Professor of Political Sociology and Political Communication at the Faculty of Social Sciences and Politics at the Postgraduate Programme of the Sahid University, University of Indonesia and member of the Parliament (DPR/MPR) also serving as Vice Chairperson of the First Commission (Foreign Relations, Human Rights and Security) and APU Research Professor eqv. RM Surachman, S.H., (Deputy Ombudsman of the National Ombudsman Commission).

Prof. Dr. phil. Astrid S. Susanto wrote Chapter III on the 1945 Constitution and its Amendments, and Chapter VI on Decentralization.

Whilst Research Professor eqv. RM Surachman responsible for part of Chapter IV and Chapter V (on the Ombudsmanship in Indonesia).

Ms. Wuryastuti Sunario furthermore translated the most important laws, to be found in the Annex in the English language, without which it would have been very difficult for a foreigner, not speaking the Indonesian language, to understand the analysis of the laws discusses in this book.

Therefore, I am most grateful to Prof. Dr. Astrid S. Susanto, Research Professor eqv. RM Surachman, and Ms. Wuryastuti Sunario for their most valuable contributions to this study and for their time spent in order to have this report finished in time.

I will not forget to thank Mrs. Koeswanto Tami Haryono, S.H. and her team for the most valuable help for assisting me in the administrative and secretarial activities needed in completing this book.

After having finished writing this book, the authors feel that much more exact picture of the political and legal changes which occurred in the last four years (1998-2001) of Reformation in Indonesia. It is hoped that this study may start the beginning of longer and deeper studies upon the matter.

May God bless all of you, who helped me finish this study as planned, and may this study be beneficial, not only for Japan, but also for Indonesia.

Sunaryati Hartono

TABLE OF CONTENTS

Preface

Table of Contents

Acknowledgement

Chapter I Introduction

Chapter II Post Soeharto Legal Developments and Reforms of Political Law in Indonesia

Chapter III The 1945 Constitution and its Amendments

- I. Introduction
- II. The First Amendment
- III. The Second Amendment (known as the “First Amendment”)
- IV. The Third Amendment (known as the “Second Amendment”)
- V. Conclusions

Chapter IV Democratization Process in Indonesia through Law

- I. Many More New Laws are Needed
- II. Capacity Building and Institutional Reform
- III. Independence of the Judiciary
- IV. Steps of Judicial Reform
- V. Judicial Review
- VI. The Administrative and Procedural Supervision of Courts by the Ombudsman

Chapter V Legal Measures for Better Protection of Human Rights and Improvement of Good Governance

- I. Introduction
- II. Laws in Support of Better Protection of Human Rights
- III. Ombudsmanship in Indonesia
- IV. The National Ombudsman Commission of Indonesia
- V. The Objective and the Mandates
- VI. The Principle of Independence

- VII. The Principles of Impartiality and Immunity
- VIII. The Future of the National Ombudsman of Indonesia
- IX. Conclusions

Chapter VI Decentralization of Powers and Local Autonomy

- I. Introduction and Short History of Decentralization
- II. Law No. 22/1999 and its Basic Thoughts
- III. Conclusions

Chapter VII Conclusions

Bibliography

- Annex 1** The 1945 Constitution of the Republic of Indonesia
- Annex 2** The First Amendment to the 1945 Constitution of the Republic of Indonesia
- Annex 3** Resolution of the People’s Consultative Assembly No. VII/MPR/2001 Regarding Indonesia’s Vision of the Future
- Annex 4** Law of the Republic of Indonesia No. 2 of 1999 on Political Parties
- Annex 5** Law of the Republic of Indonesia No. 3 of 1999 on General Elections
- Annex 6** Law of the Republic of Indonesia No. 4 of 1999 on the Structure and Position of the People’s Consultative Congress Parliament and the Regional Parliament
- Annex 7** Law of the Republic of Indonesia No. 22 of 1999 on Regional Government
- Annex 8** Law of the Republic of Indonesia No. 25 of 1999 on the Sharing of Finances between the General Government and the Region

Chapter I

Introduction

This treatise on Political Change and Legal Reform towards Democracy and Supremacy of Law in Indonesia was written upon the request of the Institute of Developing Economics (IDE-JETRO) as part of their studies on Law and Political Development in Asian Countries.

The purpose of this study is to find out and analyze the legal and institutional reforms which were necessary for the political changes which occurred in Indonesia, some time preceding and after the downfall of ex-President Soeharto 1998, indicating the Era of multi faceted Reformation in Indonesia. To be true, on hind sight it appeared that this Era of Reformation was prepared many decades before, but it was the Economic Crisis of 1997 which really triggered the downfall of the then existing Government, ending the Era of the New Order.

All three writers, Prof. Dr. Sunaryati Hartono, S.H., Prof. Dr.Phil. Astrid S. Susanto and Mr. RM Surachman, S.H., APU Research Professor eqv., are especially grateful for having had this opportunity, because while writing and discussing the results of it, we came to realize how much in fact we Indonesians have achieved in the three years or so of the Reformation Movement, so that it seemed more appropriate to talk about a Revolutionary Movement instead of a reformation, although Indonesian activists and politicians, as well as the public at large feels as if “nothing” has been done, after President Soeharto’s downfall. Nevertheless, much and much more is yet to happen, before peace, stability, democracy and the rule of law will be established in Indonesia.

The political and legal changes discussed in this book do not focus on the entire developments since 1945, when the Indonesian people became independent, but only concentrate on the latest events, some time before and after ex-President Soeharto’s downfall on the 21st of May, 1998.

Those events therefore cover only less than five years of development; i.e. from 1997, when the monetary crisis started in Thailand and Indonesia, up till the end of February 2002.

The Reformation Movement as part of the Long Modernization Process of Development

Indeed no political or legal change comes out of the blue. Therefore each political event must have had a time and efforts which preceded the event. The same can be said about the Reformation Movement, preceded by the political upheavals starting with the parliamentary decision to oust President Soeharto from his presidency. Although this wish was for years voiced by activists, politicians, and the public at large, it was finally the parliamentary (DPR and MPR) Speaker's statement made by Mr. Harmoko (who was known as a very strong Soeharto supporter, and even for decades was Soeharto's and the ruling party's (Golkar) outspoken spokesman), that it was time for Soeharto to step down and make place for a more democratic president and government.

Therefore we could safely say that the monetary crisis helped our democratic aspirations and movements towards supremacy of law, which started in the 1960's, right after the 1959 presidential Decree, to succeed, although it was certainly not so intended at all.

Hence Soeharto's ousting could be seen as the culmination of several movements for democracy and supremacy of law, which went on for some thirty years (i.e. since the 1960s) and at the same time this event heralded the beginning of a new era for a multi-dimensional Reformation and Transformation, not only in the political and legal field, but also in the social, economic field and even religious field.

However, this treatise will not touch upon the social-economic, religious or moral aspects of the Reformation, except when this is appropriate for the discussions of political and legal developments.

For the purpose of discussion, we will use the definition mentioned in Black's Law Dictionary (sixth edition 1891-1991) of "democracy" and "supremacy of law", which says that:

“Democracy (is) that form of government in which the sovereign power resides in and is exercised by the whole body of free citizens, directly or indirectly through a system of representation as distinguished from a monarchy, aristocracy, or oligarchy” (p. 432)

On page 1440 Black's Law Dictionary states that:

“**Supremacy**” means “the state of being supreme or in the highest station of power, paramount authority, sovereignty, sovereign power”.

Hence, Supremacy of Law means that the Law is supreme as the paramount authority, or is the highest station of power, which means that even the government and parliament should abide by the law it has so promulgated.

Furthermore, when we use the word “law”, it may be that we use it in its generic sense as “the body of rules of action or conduct prescribed by controlling authority and having binding legal force” (p. 884), or as “the solemn expression of the will of the supreme power of the State. The law of a state is to be found in its statutory and constitutional enactments, as interpreted by its courts, and in absence of statute law in rulings of its Courts (Dauer’s Estate v. Zadel, 9 Mich. App. 176, 56, N.W. 2 d 34, 37).

In other words “law generally contemplates both statutory and case law” (Black’s Law Dictionary p. 884), and in this book may either mean law in its generic sense, or either statute(s) or case law, or traditional (customary/*Adat*) as well as modern law, as will be obvious from the context in which the word “law” is being used.

No doubt, from the beginning of Independence Indonesia planned for a democratic state under the law or which in the Dutch language is usually known as “*een democratische rechtsstaat*”.

This is evidenced by article 1 paragraph 1 of the 1945 Constitution saying that: “Sovereignty is in the hands of the people, which is fully implemented by the People’s Consultative assembly (*Majelis Permusyawaratan Rakyat*).”

Moreover, the Elucidation of the Constitution specifically mentions that the Indonesian people aspires to become a *Rechtsstaat* or *Negara Hukum* (i.e. a state which recognizes that the Law is supreme) and not a *Machtsstaat* or *Negara Kekuasaan* (or a state based on mere power in the hands of the Executive).

Through the 50 years of independence, however, willingly or unwillingly, under pressure of the day to day political events, within the country or from international political power play, our state lapsed into an autocratic society, which is why already from the 1960s strong voices were raised, even by our first Vice

President, Dr. Mohammad Hatta, to return to our original aspirations of building a democratic state under the Supremacy of Law.

Hence, through the last forty years or so of independence, many people were caught, punished without due process of law, killed or simply disappeared, because they were fighting the government in the struggle for democracy, eradication of corruption (*KKN*), recognition of more autonomy of the regions outside Java, and better protection of human rights.¹ This is why the struggle for democracy went hand in hand with the struggle for recognition and better protection of human rights on the one hand and the struggle towards Supremacy of (just) Law or *Rechtsstaat* (German) on the other.

Therefore the writers of this book regard the Reformation Movement as part of a long and multi-dimensional process of Development in the process of the Indonesian nation - and state building.

The book is divided in seven chapters, as follows:

Preface

Contents

Acknowledgement

Chapter I: Introduction

Chapter II: Post Soeharto Legal Developments and Reforms of Political Law in Indonesia

Chapter III: The 1945 Constitution and its Amendments

Chapter IV: Democratization Process in Indonesia Through Law

Chapter V: Legal Measures for Better Protection of Human Rights and Improvement of Good Governance

Chapter VI: Decentralization of Powers and Local Autonomy

Chapter VII: Conclusions

Bibliography

Annexes

NOTES

¹ See Todung Mulya Lubis: “*In Search of Human Rights*”, PT Gramedia Pustaka Utama, Jakarta, 1993.

Chapter II

POST SOEHARTO LEGAL DEVELOPMENTS

and REFORMS of POLITICAL LAW

in INDONESIA

The reasons why the people and especially the students in Indonesia were determined to end ex-President's Soeharto's tenure, despite the fact that he was "re-elected" only 2 (two) months ago, were manifold.

The biggest complaint against him, was economic, since Soeharto was found to favour the conglomerates, which consisted of Chinese entrepreneurs as well as his own family and cronies. All kinds of undue practices were tolerated, such as prolonging and even providing even bigger loans to the conglomerates, which were already in the red because of their debts they could never pay, but which time and again exceeded the legal lending limits.¹

Again, hundreds and even thousands of acres of land were illegally taken or "bought" from the owners with an unheard of low price, so that it was felt more like an illegal taking than a fair sale. The lands were used either for the President's own family's purposes (like for building houses, or factories or even for a cemetery) or for the sake of economic and social development, such as roads, schools, mosques, plantations or factories, etc.

A third grudge is the complaints of the regions, that more and more revenues which originated from natural resources in the regions were taken and used by the central government, for projects in Java, thereby neglecting the needs of the people living outside the island of Java.

Furthermore, although the law sufficiently prescribed the procedure or norms to be observed, but more often than not the law was not applied, and interpreted by the courts or the officials in favour of the executive. In 32 years of time such an

attitude certainly caused a situation, where nobody respected the law and courts anymore, because law enforcement was in such a bad shape, especially since corruption, collusion and nepotism flourished and became practiced not only by government officials who were poorly paid, but also by the highest paid officials, judges or businessmen.² No wonder our former Vice President Dr. Mohammad Hatta already in the 1970's complained that corruption has become part of our culture.

Through the years, the practice of unfair political elections which were arranged in such a way that the ruling party (*Golkar*) which officially was not recognized as a political party, like the *Partai Demokrasi Indonesia (PDI)* and the *Partai Persatuan Pembangunan (PPP)*, always won the election with an overwhelming majority, which kept Mr. Soeharto in power.

The Monetary Crisis of 1997 finally was the drop which caused the glass to overflow, which resulted in the downfall of Soeharto, who left his country in complete economic and political turmoil, aggravated by the non-existence of sufficiently effective legal means and institutions to uphold justice and security.

No wonder the first thing to do for president Habibie, who was in fact illegally appointed by Mr. Soeharto to become his successor, was to restore order and start with three important political laws, which were meant to open the door for a democratic parliamentary election, and restore the free establishment of political parties.

Soon after that, a law on the Structure, Organization, and Status of the *MPR* (People's Consultative Assembly) and the *DPR* (Parliament) were issued, followed by the First Amendment of the 1945 Constitution on October 1999. which changed the position of the *DPR* vis a vis the President, especially with respect to the legislative powers of the President, respectively the *DPR*.

The People's Consultative Assembly (*MPR*) itself did not keep silent, because it issued the following Decisions in 1999, 2000 and 2001.

In 1999 the *MPR* issued nine resolutions, i.e.³:

1. *MPR* Resolution No. I/*MPR*/1999: revising the Fifth Revision of *MPR* Resolution No. I/*MPR*/1988 on the Rules of Order of the *MPR* RI.

2. MPR Resolution No. II/MPR/1999 on the Rules of Order of the MPR-RI.
3. MPR Resolution No. III/MPR/1999 on the Accountability of President Prof. Dr. Ing. Bacharuddin Jusuf Habibie.
4. MPR Resolution No. IV/MPR/1999 on the Guidelines of the State's Policies during the Years 1999 - 2004.
5. MPR Resolution No. V/MPR/1999 on the Referendum in East Timor.
6. MPR Resolution No. VI/MPR/1999 on the Procedure for the Candidacy and Election of the President and Vice President of the Republic of Indonesia.
7. MPR Resolution No. VII/MPR/1999 on the Appointment of the President
8. MPR Resolution No. VIII/MPR/1999 on the Appointment of the Vice President.
9. MPR Resolution No. IX/MPR/1999 on the Assignment to the Working Committee of the MPR to Continue the Amendments of the 1945 Constitution. In the year 2000 MPR also issued nine decisions:⁴

1. MPR Resolution No. I/MPR/2000 on the First Revision of the MPR Resolution No. II/MPR/1999 of the Rules of Order of the MPR RI.
2. MPR Resolution No. II/MPR/2000 on the Second Revision of MPR Resolution No. II/MPR/1999 on the Rules of Order of the MPR RI.
3. MPR Resolution No. III/MPR/2000 on the Legal Sources and Hierarchy of Legislative Acts, which determines that the highest law of the land is:
 - The 1945 Constitution, followed by
 - MPR Resolutions;
 - Parliamentary Acts;
 - Governmental Regulations in lieu of Parliamentary Acts (Perpu);
 - Governmental Regulations;
 - Presidential Decrees;
 - Regional Regulations.
4. MPR Resolution No. IV/MPR/2000 on the Recommendation of Policies in the enforcement of Regional Autonomy;
5. MPR Resolution No. V/MPR/2000 on the Upholding of National Unity and Solidarity.
6. MPR Resolution No. VII/MPR/2000 on the Separation of the National Indonesian Army and the Police of the Republic of Indonesia.
7. MPR Resolution No. VII/MPR/2000 on the Role of the National Indonesian Army and the Role of the Police of the Republic of Indonesia.
8. MPR Resolution No. VIII on the Annual Reports of the Highest National Institutions (to the MPR) during the Annual Meetings of the MPR in the year 2000.
9. MPR Resolution No. IX/MPR/2000 on the Assignment to the Working Committee of the MPR to Prepare the Draft for the Amendments to the 1945 Constitution.

In the year 2001 eleven resolutions and four Decisions have been issued by the MPR as follows⁵:

1. MPR Resolution No. I/MPR/2001 on the MPR's Stand towards the President's Maklumat of the 23rd of July 2001.
2. MPR Resolution No. II/MPR/2001 on the accountability of President K.H. Abdurrachman Wahid.
3. MPR Resolution No. III/MPR/2001 on the Endorsement of Vice President Megawati Soekarnoputri as President of the Republic of Indonesia.
4. MPR Resolution No. IV/MPR/2001 on the Appointment of the Vice President of the Republic of Indonesia.
5. MPR Resolution No. V/MPR/2001 on the Third Revision of the MPR Resolution No. II/MPR/1999 on the Rules of Order of the MPR of the Republic of Indonesia.
6. MPR Resolution No. VI/MPR/2001 on the Ethics [to be observed] Life within the Nation (*Etika Kehidupan Berbangsa*).
7. MPR Resolution No. VII/MPR/2001 on the Vision for the Future of Indonesia.
8. MPR Resolution No. VIII/MPR/2001 on the Recommendation for the Guidelines on the Eradication and Prevention of Corruption, Collusion and Nepotism.
9. MPR Resolution No. IX/MPR/2001 on the Change [in Policies on the Agrarian System] and Management of Natural Resources.
10. MPR Resolution No. X/MPR/2001 on the Report of the Execution of MPR Resolutions by the Highest Institutions of the State during the Annual Meeting of the MPR in 2001.
11. MPR Resolution No. XI/MPR/2001 on the Revision of MPR Resolution No. IX/MPR/2000 on the Assignment to the Working Committee of the MPR to prepare the Draft for the Amendments of the 1945 Constitution.
12. MPR Decision No. 1/MPR/2001 on the Time of the Extraordinary Meeting of the People's Consultative Assembly of the Republic of Indonesia.
13. MPR Decision No. 2/MPR/2001 on the Schedule of the Extraordinary 2001 Meeting of the MPR.
14. MPR Decision No. 3/MPR/2001 on the Revision of the Schedule of the Extraordinary 2001 meeting of the MPR.
15. MPR Decision No. 4/MPR/2001 on the Establishment of the ad-hoc Committee of the MPR.

Whilst each of the MPR Resolutions indicates important changes in the political and legal views upon the substances regulated in the Resolutions, one of the most important constitutional reform concern the fact that politically and historically it became possible at last to amend some important articles in the 1945 Constitution. Hence MPR Resolutions No. IX/MPR/1999, Resolution No. IX MPR/2000 and Resoluion No. XI/MPR/2001 are by far the most important laws which have changed the constitutional - and political - law since the end of the New Order. These were followed by MPR Resolution No III/MPR/2000 on the Sources of Law and Hierarchy of Legislative Regulations, MPR Resolution No. VI and VII of 2001 and especially MPR Resolution No. VIII/MPR/2001 on the Eradication and Prevention of Corruption, Collusion and Nepotism.

Also, MPR Resolution No. V/MPR/1999 had politically and legally a very great impact upon the Indonesian Constitution, and politically life, as it changed our territory, apart from the changes of presidents in a number of other MPR Resolutions.

Whether this change of territory had been for the good or for the bad of the East Timorese people themselves, as well as for Indonesians is yet to be seen. Because it seems that the international world and the United Nations already have difficulties in providing the long expected security, economic welfare and social education for a longer period to Timor Lorosae, so that UNTAET itself has started negotiations with Indonesia in order that Indonesians provide the special facilities of posts, telecommunication, transportations, education, and many more other favours to the Timor Lorosae Government⁶, which of course Indonesia is enable to do, as the country itself still faces a multidimensional crisis, apart from the critical position the President and her Government find herself in, as the Indonesian people demand instant radical changes in all aspects of life, including the social - and- economic rehabilitations of people all over the country, who have become victims of political conflicts, natural disasters such as earthquakes, lands slides and floods.

The most important MPR Resolution for Indonesia's future, however, is MPR Resolution No. VII/MPR/2001 on The Vision for the Future of Indonesia.

In this Resoltuion the Future of Indonesia is divided into 3 (three) stages (see article 1), i.e.:

1. the 5 (five) year's vision, as contained in the General Guidelines of the State (*Garis-garis Besar Haluan Negara*);
2. the intermediate vision up till 2020;
3. the ideal vision which are the nation's highest ideals, as contained in the Preamble of the 1945 Constitution.

Hence towards the year 2020, Resolution No. VII/MPR/2001 pinpointed seven challenges, which the Indonesian nation has to face, i.e.:⁷

First, the affirmation of the unity of the Indonesian nation and the unitary state;

Second, the ensurance of the supremacy of just law, whereby all citizens are equal under the law, and enforcement of law is ensured for the sake of certainty of law, justice and protection of human rights;

Third, the formation of a democratic political system, which is based on a healthy political culture and political institutions, respecting differences, maintaining peace and good behaviour, non-violence under an honest, democratic, effective and strong leadership.

Fourth, the establishment of a fair and productive economic system, focusing on the common people's needs, interests and agricultural activities, forestry and activities in the seas, apart from manufacturing and other industrial activities, including the service industry;

Fifth, the creation of a modern civilized society, which respects and actualizes universal values taught by any religion and expressed by our own culture, which is based on mutual respect, and natural love for each and every human being;

Sixth, the improvement of the quality of our human resources, especially through an excellent educational system, which is able to produce professionally and morally qualified people, who are able to cooperate and work together in the spirit of love for their country, despite the ever growing demands for competition in a global market place.

Seventh, globalization, which demands the securing of existence and integrity of the Indonesian nation state, while at the same time making good use of the opportunities provided by the globalization trend, for the benefit of the Indonesian state and people.

Hence, for the analysis and evaluation as to whether the political and legal steps taken, or yet to be taken, are in accordance with Indonesia's vision for the future, one of the most important legal documents to consult are the two MPR Resolutions on the Indonesian Ethics and the Indonesian Vision (MPR Resolution No. VI and VII/MPR/2001), which clearly indicates the official vision towards a civilized, modern, democratic state and nation, living under the Rule of (just) Law.

New Laws for a More democratic and Law Abiding Society

The first laws issued towards a more democratic society were the package of Three Political Laws covering: ⁸

- Act No. 2 of 1999 on Political Parties;
- Act No. 3 of 1999 on the General Elections, and
- Act No. 4 of 1999 on the status and Structure of Parliament (DPR) RI in lieu of Law No. 16 of 1969.

To combat corruption, collusion and nepotism or KKN (*Korupsi, Kolusi dan Nepotisme*) for short, for the implementation of MPR Resolution No. IX/MPR/1998 on Good Governance, and Free from KKN, a special Act on the Eradication and Prevention of KKN was promulgated as Act No. 27 of 1999 on Clean Government, free from Corruption, Collusion and Nepotism.

A specific body named the Commission for the Investigation of the Wealth of State Officials (*Komisi Pemeriksa Kekayaan Penyelenggara Negara* or *KPKPN* for short) was created by Presidential Decrees No. 127/1999, which was revised by Presidential Decrees No. 242/M/2000. To improve the protection of human rights, Act No. 39 of 1999 came to regulate the human rights respected and protected in Indonesia along with the regulation by Parliamentary Act of the National Commission of Human Rights, which was already established by Presidential Decree No. 50 of 1993 under the Soeharto regime.

Also in 1999 ex President Abdurrachman Wahid established the National Law Commission by Presidential Decree No. 15/2000, and the National Ombudsman Commission by Presidential Decree No. 44 of 2000.

Apart from spelling out the functions, tasks and jurisdiction of the National Ombudsman Commission, Presidential Decree No. 44/2000 also mandated the task to the National Ombudsman Commission to within six month of its establishments draft a bill for the Ombudsman Commission, in order that it be based on a Parliamentary Act, rather than a Presidential Decree. The first draft of this bill was drafted by Prof. Dr. Sunaryati Hartono, S.H. together with the chairman and other members of the National Ombudsman Commission, a.o. Mr. Antonius Sujata, S.H.⁹, Prof, Dr. Bagir Manan (the present Chief Justice of the Supreme Court), Mr. R. Surachman SH, APU, Drs. Teten Masduki (also active as the Coordinator of Corruption Watch) and Drs. H. Masdar Mas'ud.¹⁰

After 8 (eight) seminars and workshops in Jakarta, Surabaya, Makassar, Medan, Pontianak, Surakarta and Den Pasar discussing the draft of the bill, we have ended with the 9th revision of the draft, which in March 2002 will be presented to Parliament to be submitted as a Parliamentary initiative for debates with the Government.

The form for the Indonesian Ombudsman chosen by the drafters of the Bill happened to be a combination of the Swedish, Dutch, New Zealand's and Australian Parliamentary Ombudsman, although we decided that the main standards and principles recognized universally for the office of any Ombudsman should also be adhered to by the Indonesian Parliamentary Ombudsman (to be).¹¹

In conclusion, we may notice, that apart from new MPR Resolutions, Parliamentary Acts and Presidential Decrees, Indonesia has also embarked on the establishment of new political - and legal - democratic institutions as part of our democratic and legal capacity building.

To be true, much and much more still ought to be done, especially in the field of retraining and reeducation of personnel, as well as recruitment of leaders and members of the bureaucracy and judiciary. This may, however, take time, perhaps decades, after we may see the results of our efforts in restoring good governance and supremacy of law in Indonesia. However, although this is much too slow for the minds and needs of our younger generations and foreigners alike, apparently we find ourselves going in the right direction towards a democratic state and society under the Rule of (just) Law.¹²

NOTES

¹ Baharuddin Lopa: "*Kejahatan Korupsi dan Penegakan Hukum*", Penerbit Kompas, Jakarta, 2001, p. 115 etc.

² op. cit.

³ see Sukarno DM, etc. (ed.), "*Ketetapan-ketetapan MPR-RI dan Garis-garis Besar Haluan Negara Hasil Sidang Umum MPR RI 1999*", C.V. Mini Jaya Abadi Jakarta, first printing, 1999.

⁴ See Hadi Setia Tunggal, S.,H. (ed.): “*Ketetapan MPR 2001, 2000 dan Perubahan I & II UUD 1945*”, Harvarindo, Jakarta, 2001”.

⁵ See Sukarno, DM, etc. (ed.) “*Majelis Permusyawaratan Rakyat: “Putusan Sidang Tahunan MPR RI Tahun 2001, Perubahan Ketiga Undang-undang Dasar Negara Republik Indonesia Tahun 1945, Hasil Sidang MPR RI Tanggal 9 Nopember 2001*”, C.V. Mini Jaya Abadi, first printing, 2001.

⁶ See “Kompas” newspaper, 26 February 2002.

⁷ See Chapter III MPR Resolution No. VII/MPR/2001

⁸ See Annex

⁹ who is also author of a number of books on corruption and the role of the Ombudsman.

¹⁰ H. Masdar Mas’ud is a Moslem clergyman and member of the National Ombudsman Commission, who wrote and made a study of “Corruption viewed under the perspective of Islamic Law and Culture”.

¹¹ See further about the Indonesian Ombudsman (Chapter V),

¹² See Todung Mulya Lubis: “*In Search of Human Rights*”, PT Gramedia Pustaka Utama, 2nd. printing, 1994 p. 86 in Chapter 3, p. 86 and further that the Rule of Law does not guaranteed justice, as time and again since Hitler, autocratic leaders have relied on their (oppressive) law to control their people unfairly and even cruelly.

Chapter III

The 1945 Constitution and its Amendments

I. Introduction

The amendments to the 1945 Constitution have to be looked upon as a constitutional revolution, as since the 5th of July 1959 Soekarno's Presidential Decree was whole heartedly continued by the next president - namely President Soeharto – who upheld the Congressional Resolution no. IX/MPRS/1966¹ until his resignation on the 21st of May 1998.

Although the Transitional Period under the administration of President B.J. Habibie² was looked upon as a very liberal period, it was not president Habibie's honour to be the president that would have brought the amendments to the Constitution, but the honour historically and ironically goes to the two presidents of Indonesia, namely President Abdurrachman Wahid and President Megawati Soekarnoputri. In fact, Habibie's work was more the handling of the reigns of the state, in order not to totally lose control of the state and nation. One of his efforts was to keep 'peace' amongst others through his (wrong) decision to give to East Timor population the referendum that led to his downfall in 1999 and his succession by President Abdurrachman Wahid. Habibie's impulsive decision totally annihilated - the still often praised diplomatic lobbying and negotiations signed previously on the same day by his very experienced and honoured foreign minister Alatas - known as the 'Memorandum of the 15th of May 1998'. As later developments have proven, his decision on East Timor was not 'the end of all trouble' but 'the beginning of more and worst troubles' which still last until today.

The amendments to the Constitution did not come automatically; since the military (especially the army) were still very much involved in day-to-day politics, the struggle was: how to change the opinion (mostly) of the army, convincing them that the pressure - of at least nearly the whole Indonesian intellectual world at universities and mass media - were for amendments to the Constitution, which demand should be looked upon as a 'natural' change. Fortunately, many Founding Fathers have left a

number of documents (although in private hands), in which it was repeatedly stated (in 1945 and in the 50-ies), that ‘the 1945 Constitution is an **emergency constitution**, formulated towards the end of the Second World War; time was pressing³ to build *Indonesia Merdeka*⁴ (Free Indonesia) but without a Constitution as its legal bondage, the Indonesian nation⁵ would never have become a state.⁶

So, the student rebellions of 1998-1999 did not stop but continued, pressing for Constitutional Amendments.

Then an agreement was reached, namely that amendments to the paragraphs of the Constitution could be carried out, but not to its Preamble, containing the philosophy as well as the soul and history of the creation of the Indonesian state and nation. The Congress was of the opinion that a change of the Preamble would (politically) mean a change of the essentials of the Republic of Indonesia, namely Pancasila itself that is stipulated in the 4th alinea of the Preamble. This agreement opened the way for the amendments to the Constitution.

Yet, since the beginning the intellectual world of Indonesia was aware at the same time, of the fact that it was not only the Constitution, but that a number of very important political laws – especially those leading the state institutions itself, such as Parliament (DPR-RI) and Congress (MPR-RI) which are the fruit of elections, also needed a change of laws, such as the Law on Freedom of Speech, the Party Law, Law on Freedom of the Press. Those laws were exactly:

- Law no 9/1998 on Freedom of Speech in Public;
- Law no.2/1999 on Political Parties, replacing Law no. 3/1975 on the Parties and Golkar;
- Law no. 3/1999 on General Elections, replacing Law no. 15/1969 (reviewed by Law no. 5/1975 and Law no. 1/1985);
- Law no. 4/1999 on Status and Structure of Parliament (DPR-RI) replacing Law no. 16/1969 (reviewed by Law no. 5/1975 and Law no. 2/1985 as well as Law no. 5/1995 on the Status and Structure of Parliament);
- Law no. 6/1999 recalling Law no. 5/1985 on Referendum;
- Law no. 22/1999 on Local Government, replacing Law no. 5/1974 on Principles of Local Government and Law no. 5/1979 on Village Administration;
- Law no. 26/1999 on Recalling Law no. 11/1963 on Civil Government Officials in connection with Prevention to Subversion;
- Law no. 27/1999 on Clean Government, free from Corruption, Collusion and Nepotism;
- Law no. 39/1999 on Human Rights;

- Law no. 40/1999 on Freedom of the Press

Three laws specializing on political activities and aiming at a democratic life and democratic political representation are:

- Law no. 2/1999 on Political Parties;
- Law no. 3/1999 on General Elections;
- Law no. 4/ 1999 on the Status and Structure of Parliament (DPR-RI)⁷;

So, it can be concluded that Resolution No. IX/MPR/1999 on the Assignment to the Working Body of the People's Consultative Assembly to Continue the Amendments of the 1945 Constitution heralded a *Revolution of Legal Strategy* (if the scope and speed of change are taken into consideration), or at its least a 'devolution' – if the softer word is preferred above the taboo word.

II. The First Amendment

The previous list of the new laws already gave a picture of how extensive and intensive (taking substance and time with due respect) changes had to be made in nearly all fields of legal policy, in order to meet the new requirements. It stretches from political-geographic relations between the regions and the central government, to individual human rights. As a consequence, a number of not less important laws had to be postponed to 2001, such as the Law on State Defence and the Law on the Police, although on the 18th of August 2000, Congress already made two Resolutions e.g. Resolution no. VI/MPR/2000 on the Separation of the Indonesian Armed Forces and the Police of the Republic of Indonesia; and Resolution no. VII/MPR/2000 on the Functions of the Indonesian Armed Forces and the Functions of the Police of the Republic of Indonesia.⁸

Thus the amendments to the Constitution did not stand alone, but new legislations based on a New Legal Strategy and Policy had to take place, parallel to the formulation of the amendments.

The first amendment to the Constitution only took place on the 19th of October 1999 (during the 12th session of Congress, 1999); it did not yet use the word 'amendment' but limited itself to the term 'improved' (*yang disempurnakan*). The Resolution 'to improve' the Constitution naturally took heed of the required 2/3 majority votes for the opportunity to introduce the amendment such as stipulated by

paragraph 37(1), but also took note of the 2/3 majority votes requirement for the voting of the Resolution.

Going through the ‘improvements’ to the 1945 Constitution, the reader will soon feel or even discover the struggle and sharp conflict between ‘the New Order’ (1967 – 1998) and the Reformation (1998 still continuing until now).

The 1945 - Constitution⁹

Original Version	‘Improved’ version/amendment 19 th of October 1999
Paragraph 5	Paragraph 5
<p>(1) The President holds the power to make laws with the consent of Parliament;</p> <p>(2) The President issues the governmental regulation for the sake of its implementation;</p>	<p>(1) The President has the right to submit draft laws to Parliament;</p> <p>(2) The President issues the governmental regulations for the sake of its implementation;</p>
Paragraph 7	Paragraph 7
<p>The President and Vice President are in office for a period of five years, and after that still eligible for further appointments [to the same office]</p>	<p>The President and Vice President hold office for a period of five years, and after that only once are eligible for the same office;</p>
Paragraph 9	Paragraph 9
<p>Before taking office, the President and Vice President deliver their oaths based on their religion or sincerely promise in front of Parliament and Congress as follows:</p> <p>(Oath of both the President and Vice President):</p> <p>‘In the name of Allah, I swear to fulfill the obligations of the President of the Republic of Indonesia (of the Vice President of the Republic of Indonesia) justly and at its best, uphold the Constitution and execute all laws and regulations as honest as possible and serve the Land and Nation’.</p> <p style="text-align: center;">Promise by the President (Vice President);</p>	<p>(1) Before taking office, the President and Vice President deliver their oaths based on their religion, or sincerely promise in front of Congress and Parliament as follows:</p> <p>(Oath of the President (and Vice President):</p> <p>‘In the name of Allah, I swear to fulfill the obligations of the President of the Republic of Indonesia (the Vice President of the Republic of Indonesia) justly and at its best, uphold the Constitution and execute all laws and regulations as honest as possible and serve the Land and Nation’</p> <p style="text-align: center;">Promise¹⁰ by the President (Vice President):</p>

<p>‘I sincerely promise to fulfill the obligations of the President of the Republic of Indonesia (Vice President of the Republic of Indonesia) at its best and as just as possible, uphold the Constitution and execute all laws and regulations as honest as possible and serve the Land and Nation’</p>	<p>‘I sincerely promise to fulfill the obligations of the President of the Republic of Indonesia (the Vice President of the Republic of Indonesia) at its best and as just as possible, uphold the Constitution and execute the laws and regulations as honest as possible and serve the Land and Nation’</p> <p>(2) If Congress or Parliament cannot be in session, the President and Vice President deliver their oaths, based on their religion or sincerely promise in front of the Speaker of Congress and witnessed by the Chief of Justice’¹¹</p>
<p style="text-align: center;">Paragraph 13</p> <p>(1) The President appoints ambassadors and consuls;</p> <p>(2) The President receives the credentials of foreign ambassadors;</p>	<p style="text-align: center;">Paragraph 13</p> <p>(1) The President appoints ambassadors and consuls;</p> <p>(2) In case of appointing the ambassadors, the President has to take note of the considerations by Parliament;</p> <p>(3) The President receives the appointments of foreign ambassadors after having taking note of the considerations by Parliament¹²;</p>
<p style="text-align: center;">Paragraph 14</p> <p>The President grants clemency, amnesty, abolition and rehabilitation;</p>	<p style="text-align: center;">Paragraph 14</p> <p>(1) The President grants clemency and rehabilitation after considering the considerations of the Supreme Court of Justice¹³;</p> <p>(2) The President grants amnesty and abolition after taking note of Parliament considerations;</p>
<p style="text-align: center;">Paragraph 15</p> <p>The President confers honorary titles, service awards and other honorary awards;</p>	<p style="text-align: center;">Paragraph 15</p> <p>The President confers honorary titles, service awards and other honorary awards, based on laws¹⁴;</p>
<p style="text-align: center;">Paragraph 17</p> <p>(1) The President is assisted by State Ministers;</p> <p>(2) Ministers are appointed and dismissed by the President;</p> <p>(3) Each Minister is head of a Department;</p>	<p style="text-align: center;">Paragraph 17</p> <p>(1) The President is assisted by State Ministers;</p> <p>(2) The Ministers are appointed and dismissed by the President;</p> <p>(3) Each Minister is assigned to fixed administrative assignments¹⁵;</p>
<p style="text-align: center;">Paragraph 20</p> <p>(1) Every Law must be passed by Parliament;</p> <p>(2) When a draft Law has been passed</p>	<p style="text-align: center;">Paragraph 20</p> <p>(1) Parliament holds the power to make laws;</p> <p>(2) Each draft Law is discussed between</p>

<p>by Parliament, but is not ratified by the President, then the draft may not be re-submitted for discussion during the same session of Parliament.</p>	<p>Parliament and the President for mutual consensus; (3) If the draft Law does not reach a common consensus, the same draft Law cannot be submitted again in the same period of session; (4) The President ratifies the draft Laws mutually agreed upon before becoming Law;</p>
<p style="text-align: center;">Paragraph 21</p> <p>(1) A member of Parliament has the right to propose a draft Law; (2) When a Draft has been passed by Parliament, but is not ratified by the President, then the Draft may not be approved, and the said Draft has to be annulled;</p>	<p style="text-align: center;">Paragraph 21</p> <p>Members of Parliament have the right to initiate draft Laws;</p> <p>(In the Second Amendment of the 18th of August 2000, paragraph 20 was additionally amended as paragraph 20 and 20 A saying: ‘(5) In case a Draft Law had been commonly agreed upon and has not been ratified by the President within 30 days after the day of common agreement, that Draft Law legally becomes Law and has therefore be treated as Law’;</p> <p>On the 18th of August 2000, Congress again passed a Resolution no. III/MPR/2000 on the Resources of Law and the Hierarchies of the seven (7) kinds of Laws and regulations also in connection to Presidential Decree and Congressional Resolution, placing the Congressional Resolution under the Constitution but above the laws and governmental regulations as well as Temporary Laws (in case of Emergency), and Bye Laws having the lowest rank);</p>

From the Amendment to the Constitution as a Resolution of Congress on the 19th of October 1999 it is clearly to be seen, that the purpose of the Amendment was to increase the power of Parliament on the one hand, and to make the President dependent on Parliament on the other hand. The fact that the Congressional Resolution of the 18th of August 2000 confirmed and made ‘automatic ratification’ and legally coming into force of a Draft Law that had been agreed upon by Government and Parliament for more than 30 days, makes the State even less dependent from the possible whims of a president – who for whatever reason or all of

a sudden prefers not to ratify a commonly agreed Draft Law – and at the same time stresses the democratic principle to be adhered to and indirectly shows the upperhand of Congress .

In Home Affairs and especially in Defense and Security Matters, Parliament indeed has an upper hand, but which is still sanctioned by the needed signature (as token of agreement by the Government) of the relevant ministers for Draft Laws in question, being under their jurisdiction of the said ministers. But once agreement has been reached and signed by Parliament and Government on a Draft Law, even if the President all of a sudden objects, based on Amendment to the 1945 Constitution on paragraph 20 and 20A the Draft Law automatically comes into force after 30 days of the joint agreement, with or without the ratification of the President.

III. The Second Amendment (known as the ‘First Amendment’)

On the 18th of August 2000 a second amendment took place. This time, stress was given to:

- (1) The political competencies of the regions towards the central government and visa-versa (Paragraph 18);
- (2) the election and place of members of Parliament as well as its sanctions (paragraph 19);
- (3) the rights of the citizens such as democratic and individual rights (human rights, cultural rights, social rights, political rights, economic rights and the rights for protection by the State for the execution of those rights (Paragraph 26, 27, 28, 28 A, 28B, 28 C, 28 D, 28E, 28F, 28 G, 28 H, 28 I, 28 J);
- (4) Territory of the State (25 E), State Defense (paragraph 30), flag and symbols of the state (paragraph 36 A), National Anthem (36B, 36C);
- (5) Separation of the Military Armed Forces from the Police (Congressional Resolution no. IV/MPR/2000);

The paragraphs of Amendment II (18th of August 2000) really show the efforts made by both Government and Congress to go more into details on the legal formulations and possible consequences, which is proof of the seriousness of both the Government and the Congress of those days, to meet the modern and global demands and challenges, modernize the Indonesian State, society and nation with one very important decision is to separate the Police from the Armed Forces, thus also separating more clearly the assignments and responsibilities of the Police as the state

arm for social order, security and law enforcement. On the other hand the Armed Forces are more stressed in their territorial defense and possible combatant approach. Its full-fledged translation a.o. is found in 'Part 5 : 'Rights and Human Fundamental Freedoms' (= '*Hak-hak dan kebebasan-kebebasan dasar manusia*') of the UUDS-1950. This part was extended by 'Part 6: 'The Fundamentals of the Principles' (= '*Asas-asas Dasar*') as point 35 (the first point of Part 6) starting with the sentence **'The will of the people is the foundation of the power holder; this will is pronounced through periodic, secret, honest and public elections, carried out by the population who are holders of the ballotetc.'** Looking at this sentence, one is apt to say that the drafting of the Amendments to the 1945 Constitutions in many ways were similar or even also inspired and reinforced by the legal spirit of the 1950 Constitution, having been drafted by the same Founding Fathers of the 1945 Constitution. It is regrettable that soon after the 5th of July 1959, the 1950 Constitution was quickly forgotten and with it slowly the nationalistic spirit and optimism for the nation and state of Indonesia became vague and thus more open for foreign and sometimes strange political models and ideas, which negative effects and impacts are still to be felt and to be overcome until today (and hopefully not for too long). Internal political strives than soon made the UUDS-1950 irrelevant for nearly another 50 years, although so much wisdom of Political Philosophy and Philosophy of Law was imbedded in that Constitution.

It was only the Total Crisis of 1997/1998 – that forced many academicians to restudy and compare the already forgotten Constitutions of our nation. It was a consolation to find out that in many ways the idealism for Reformation on Constitutional and Legal questions, did not differ too much from the ideals found in the old Constitutions; the fact was that the rediscovered dreams, ideals and thoughts of the Founding Fathers were enlightening and became a new source of strength and confidence for many intellectuals, knowing that the Reformation was on the right track. This knowledge and confidence were again a source of additional courage to continue Legal and Constitutional Reformation, and slowly a hope for a better tomorrow returned. It is then with this background and within this light, that this study and report on the present three Amendments to the 1945 - Constitution should be understood.

In this context the writer of this report had been very lucky to be one of the participants of the so important Congresses of 1999, 2000, 2001 and so, part of the

report is also based on personal observations and experience during those so important sessions and meetings¹⁶.

The 1945 Constitution

The Original Text	The Second Amendment 18 th August 2000
<p>Chapter VI Regional Governments Paragraph 18</p> <p>The subdivision of Indonesia into larger and smaller units with their administrative compositions will be determined by Law, giving due thought and consideration to the principles of consultation in government's state administration, and providing rights of origins in regions that are extraordinary in their nature;</p>	<p style="text-align: center;">Chapter VI Regional Governments Paragraph 18</p> <p>(1) The Indonesian Unitary State is subdivided into provinces and the provinces into regions/<i>kabupatens</i> and towns with each province, region-and town having their own Local Government, which is determined by law;</p> <p>(2) The Local Government of the Provinces, regencies /<i>kabupaten</i>, towns administrate their own administrative affairs based on the principles of autonomy and responsibility of assistance;</p> <p>(3) The Local Government of the province, region/<i>kabupaten</i>, and town each have their Local Parliament, whose members are chosen by elections;</p> <p>(4) The Governor, the regent/<i>bupati</i> and mayor, in concurrently being head of the province, regency/<i>kabupaten</i> and town are elected on the principles of democracy;</p> <p>(5) The Local Government exerts autonomy in its widest sense, except for those competencies which by law are the competencies of the Central Government;</p> <p>(6) The Local Government has the rights to set its own Bye Laws and other laws needed for the execution of the autonomy and responsibility of assistance;</p> <p>(7) The structure and ways of the execution of Local Governments is stipulated by law;</p>
	<p>Paragraph 18 A</p> <p>(1) The relation of the competencies between the Central Government and</p>

	<p>the governments of the provinces, regencies/<i>kabupatens</i> and towns, or the relation of competencies between the provinces and their regencies/<i>kabupatens</i> and towns, is to be regulated by laws which take into consideration the special traits of each area and their multiplicity;</p> <p>(2) The financial relations, public services, exploitation of the natural and other resources is set in laws regulating the relations between the Central Government and the Regional Governments, and is executed justly in accordance to the laws;</p>
	<p style="text-align: center;">Paragraph 18 B</p> <p>(1) The State acknowledges and respects by law the special units or extraordinary traits of local administration;</p> <p>(2) The State acknowledges and respects units of Common Law Communities and their respective still existing traditional rights, and parallel to the development of society and based on the principle of the Indonesian Republican Unitary State, which has to be regulated by law;</p>
<p style="text-align: center;">Chapter VII Parliament Paragraph 19</p> <p>(1) The structure of Parliament will be determined by law;</p> <p>(2) Parliament comes to session at least once a year;</p>	<p style="text-align: center;">Chapter VII Parliament Paragraph 19</p> <p>(1) Members of Parliament are elected through elections;</p> <p>(2) The structure of Parliament will be regulated by law;</p> <p>(3) Parliament comes to session at least once a year;</p>

<p style="text-align: center;">Paragraph 20</p> <p>(1) Every Law must be passed by Parliament;</p> <p>(2) When a Draft Law does not receive the endorsement of Parliament, the said Draft may not be re-submitted to Parliament for discussion again during the same session;</p>	<p style="text-align: center;">Paragraph 20</p> <p>(1) The legislative power is in the hands of Parliament;</p> <p>(2) Every Draft Law has to be discussed by Parliament and the Government, in order to reach common agreement;</p> <p>(3) If the Draft Law cannot be agreed upon [between Parliament and the President], it cannot be re-submitted for re-discussion during the same Parliamentary session;</p> <p>(4) The President ratifies the Draft Law already commonly agreed upon, to become Law ¹⁷;</p> <p>(5) In case of an already reached common agreement on a Draft Law and the President had not ratified the said Draft Law after 30 days since such agreement, that Draft Law legally come into force, and has to be treated accordingly¹⁸;</p>
	<p style="text-align: center;">Paragraph 20 A</p> <p>(1) Parliament is empowered with the functions of legislation, budgeting, and control;</p> <p>(2) In the execution of her functions, apart from the rights already determined in this Constitution, Parliament also has the right of interpellation, enquete, and freedom to question;</p> <p>(3) Apart from the rights already stipulated in other paragraphs of this Constitution, each Member of Parliament has the right to request an answer, submit suggestions and opinions and enjoy the right of immunity;</p> <p>(4) Further regulations on the rights of Parliament and the rights of the Members of Parliament will be regulated by Law;</p>
	<p style="text-align: center;">Paragraph 22 A</p> <p>Further ways and means of legislation will be stipulated by Law;</p>
	<p style="text-align: center;">Paragraph 22 B</p> <p>Members of Parliament can be dismissed from their position, for which conditions and requirements are stipulated by Law;</p>
	<p style="text-align: center;">Chapter IX A</p>

	<p style="text-align: center;">The State's Territory Paragraph 25 A</p> <p>The Unitary State of the Republic of Indonesia is an Archipelago State with the characteristics of island groups and seaways (= Nusantara), which borders has been determined by Law</p>
<p style="text-align: center;">Chapter X Nationals Paragraph 26</p> <p>(1) Nationals are native Indonesians and other nationals who have been conferred with the legal status of a national by Law; (2) Requirements for Nationality will be determined by Law;</p>	<p style="text-align: center;">Chapter X Population and Nationality Paragraph 26</p> <p>(1) Nationals are native Indonesians and other nationals who have been conferred with the legal status of a national by Law; (2) The population consists of Indonesian citizens and foreigners having their domicile in Indonesia; (3) Matters concerning nationality and citizenship are stipulated by Law;</p>
<p style="text-align: center;">Paragraph 27</p> <p>(1) All citizens are equal in status before the law and government, and have the duty to uphold the law and the government without exception; (2) Each citizen has the right to work and earn an adequate human livelihood;</p>	<p style="text-align: center;">Paragraph 27</p> <p>(1) All citizens are equal in status before the law and government, and have the duty to uphold the law and the government without exception; (2) Each citizen has the right to work and earn an adequate human livelihood; (3) Each citizen has the right and duty to participate in the defense of the State;</p>
<p style="text-align: center;">Paragraph 28</p> <p>The freedom to gather and associate, express freely ones thoughts in writing or in speech or other forms, are stipulated by the Law;</p>	<p style="text-align: center;">Paragraph 28</p> <p>The freedom to gather and associate , express freely ones thoughts in writing or speech and other forms are stipulated by the Law;</p>
	<p style="text-align: center;">Chapter XA Human Rights Paragraph 28 A</p> <p>Every person has the right to live and the right to maintain his/her life and way of life;</p>
	<p style="text-align: center;">Paragraph 28 B</p> <p>(1) Every person has the right to build a family and his/her descendants through a legal marriage; (2) Each child has the right for its life sustainability, to grow up and to develop and has the right on protection against violence and discrimination;</p>
	<p style="text-align: center;">Paragraph 28 C</p> <p>(1) Every person has the right to develop</p>

	<p>himself/herself through the fulfillment of his/her basic needs, have the right to enjoy education and benefit from science and technology, art and culture, for the improvement of his/her quality of life for the sake of the welfare of human being;</p> <p>(2) Each person has the right to improve himself in order to enable him/her to struggle for his/her collective rights in building society, the nation and the state;</p>
	<p style="text-align: center;">Paragraph 28 D</p> <p>(1) Each person has the right on acknowledgement, guarantee, protection, and just legal security and equal treatment before the law;</p> <p>(2) Each person has the right to work and receive just compensation and treatment in return such as is usual in working relations;</p> <p>(3) Each citizen has the right to receive the same opportunities in government jobs;</p> <p>(4) Each citizen has the right to obtain the legal status of citizenship;</p>
	<p style="text-align: center;">Paragraph 28 E</p> <p>(1) Each person is free to profess the religion, choose the [kind] of education and teaching, choose his/her job, choose his/her citizenship, to choose his/her domicile in the territory of the State, to leave and return to it again;</p> <p>(2) Each person has the right to enjoy the freedom to profess his/her religion, express his/her thoughts and attitude according to his/her conscience;</p> <p>(3) Each person has the right of freedom to gather and associate, as well as to express his/her opinion;</p>
	<p style="text-align: center;">Paragraph 28 F</p> <p>Each person has the right to communicate and to obtain information needed to develop him/herself and his/her social environment, and has the right to seek, obtain, own, store, process and disseminate information by using all kinds of available channels;</p>
	<p style="text-align: center;">Paragraph 28 G</p>

	<p>(1) Each person has the right on protection for him/herself, family, honor and dignity, as well as material wealth which he/she owns, and has the right to feel secure and protected against threats and fear when choosing to do or not to do something which is his/her human right;</p> <p>(2) Each person has the right to be free from torture or treatment which is below the dignity of man and has the right to seek asylum from other countries;</p>
	<p style="text-align: center;">Paragraph 28 H</p> <p>(1) Each person has the right to lead a prosperous life materially and mentally, to live, and enjoy good and healthy surroundings, and has the right to enjoy health services;</p> <p>(2) Each person has the right to enjoy opportunities and special treatments in order to obtain and enjoy the same enjoyments of justice;</p> <p>(3) Each person has the right on social insurance which can enable him/her to develop him/herself to become a person of equal worth to others;</p> <p>(4) Each person has the right to own properties individually, which property cannot willy-nilly be taken away from him/her;</p>
	<p style="text-align: center;">Paragraph 28 I</p> <p>(1) the right to live, the right no to be tortured, the right for freedom of thought and conscience, the right to profess one's religion, the right no to be kept in slavery, the right to be recognized as a complete person before the law, and the right not to be brought to court on actions of the past, are the human rights of man, which cannot be diminished in whatever condition;</p> <p>(2) Each person has the right to be free from discriminative treatment based on whatever assumption and has the right for protection against such discriminative actions;</p> <p>(3) Cultural identity and the traditional</p>

	<p>rights of the community are respected in accordance to the development of time and civilization;</p> <p>(4) Protection, promotion, the enforcement and the fulfillment of human rights is the responsibility of the State, especially the government;</p> <p>(5) In order to enforce and to protect human rights based on the principles of the democratic State upholding Supremacy of Law, the execution of the human rights are guaranteed , regulated, and reflected in the regulations and laws;</p>
	<p style="text-align: center;">Paragraph 28 J</p> <p>(1) Each person is obliged to respect the human rights of other people for the sake of an orderly societal life in nationhood and statehood;</p> <p>(2) In exercising and executing ones right and freedoms, each person has the responsibility to abide to the beaconing of those rights by the law, in order to secure adherence to those rights and freedoms also to others, in order to meet the demand for justice based on moral considerations, religious values, social order and security within a democratic society;</p>
<p style="text-align: center;">Chapter XII State Defense Paragraph 30</p> <p>(1) Each citizen has the right and responsibility to join in the efforts of state defense;</p> <p>(2) Requirements for this defense will be stipulated by law;</p>	<p style="text-align: center;">Chapter XII Defense and State Security Paragraph 30</p> <p>(1) Each citizen has the right and responsibility to join in the efforts to secure and defend the State;</p> <p>(2) The efforts for security and defense executed through the Total People’s Security and Defense System by the Indonesian National Armed Forces/TNI and the Police of the Republic of Indonesia as the main forces and the people as the supporting ones;</p> <p>(3) The Indonesian National Armed Forces consists of the Army, the Marine and the Air Force as the forces of the State assigned with the responsibility to defend, protect and maintain the unity and the sovereignty of the State;</p>

	<p>(4) The Police of the Republic of Indonesia is the state force which has to maintain social order and security, for which it has been assigned to protect, to cover, to service society and enforce the law;</p> <p>(5) The structure and the status of the Indonesian Armed Forces, the Police of the Republic of Indonesia, the relation of competencies between the Armed Forces and the Police of the Republic of Indonesia within the execution of those competencies , the prerequisites for the involvement of the citizens in the efforts to enforce security and defense, and other matters connected with security and defense , will be determined by law ¹⁹</p>
<p>Chapter XV Flag and Language Paragraph 35 The flag of the Indonesian State is the Sacred Red-and White;</p>	<p>Chapter XV Flag, Language and State Symbols and the National Anthem</p>
<p>Paragraph 36 The State Language is Bahasa Indonesia</p>	<p>Paragraph 36 A The State Symbol is <i>Garuda Pancasila</i> and the spirit of <i>Bhineka Tunggal Ika</i>;</p>
	<p>Paragraph 36 B The National Anthem is <i>Indonesia Raya</i>/Great Indonesia;</p>
	<p>Paragraph 36 C Further regulations on the flag, language, State Symbol, and the National Anthem will be stipulated by laws;</p>
<p>Jakarta, On the 10th of October 1945 President of the Republic Of Indonesia</p> <p>Soekarno Published on the 10th of October, 1945, The State Secretary</p> <p>A.G. Pringgodigdo</p>	<p>Decided in Jakarta, On the 18th of August 2000</p> <p>Majelis Permusyawaratan Rakyat Republik Indonesia/<i>the Congress of the Republic of Indonesia</i></p>

Before continuing to the next stage of the amendments, mention should be made here about the enormous changes and perhaps the most important breach made

by the Reformation with the New Order, namely the separation of the Armed Forces from the Police. That this breach was not only technically but also politically and perhaps also psychologically very difficult to be carried out, but on the other hand a *sine qua non* to secure democracy and a guarantee that the despotic days of the past would not return, forced the Congress of the year 2000 to make two Resolutions, namely Resolution no. VI/MPR/2000 and Resolution no. VII/MPR/2000. This separation of the Indonesian National Armed Forces from the Police of the Republic of Indonesia is known as the 'Repositioning and the Restructuring of the Indonesian National Armed Forces'. This repositioning and restructuring – according to the Resolution no. VI/MPR/2000 is to avoid the overlap of the roles and functions of the Armed Forces as a state's forces of defence on the one hand and the Police as the state arm for social order and security²⁰ on the other hand. Congress was very well aware of the fact that the second function e.g. the social political function was the cause of the socio-political excesses carried out in the past, that it hampered the democratic development of society, nation and state (TAP/no. VI/MPR/2000-Menimbang d.). Therefore Congress made the explicit stipulation as follows:

Article 1

The Indonesian National Armed Forces and the Police of the Republic of Indonesia are institutionally separated, according to its each individual institutional roles and functions;

Article 2

- (1) The Indonesian National Armed Forces are the state arms who function during the defense of the State;
- (2) The Police of the Republic of Indonesia is the state arm which functions when maintaining security;
- (3) In case of interlink age between defense and security activities, the Indonesian National Armed Forces and the Police of the Republic of Indonesia have to work together and support one another;

Article 3

- (1) The role of the Indonesian National Armed Forces and of the Police of the Republic of Indonesia, will be determined by Resolution of the Congress;
- (2) Activities by the Indonesian National Armed Forces and the Police of the Republic of Indonesia, will be further expressed in detail by law

Determined in Jakarta, the 18th of August 2000

Congress Resolution no. VII/MPR/2000 further stipulates the ‘The role of the Indonesian National Armed Forces and the role of the Police of the Republic of Indonesia’ as follows:

- the wish to protect the whole nation and the whole land of Indonesia; the wish to improve the general welfare, to uplift the educational knowledge and reach a knowledgeable nationhood, at the same time participating in creating world order which in turn helps to fulfill the national ideals, make imperative to have a System of Defense and Security for the Unitary State of the Republic of Indonesia which its nation-wide-interests-approach/*ber-Wawasan Nusantara*;
- whereas in the execution of defense and security of the Unitary State of the Republic of Indonesia , each citizen has the right and the obligation to participate in the defense of the state and the maintenance of security of social order;
- that it is a fact of need that there is are state apparatus as the Indonesian National Armed Forces/TNI which are assigned with the responsibility of the defense of the state;
- but that it is also a fact of need for society to have an apparatus to maintain security and order as well as provide protection and law enforcement such as the Police of the Republic of Indonesia;
- congruent to the process of democratization and globalization as well as meeting the future demands , there is an urgent need for increase of output and professionalism by both the apparatus for defense and security, there is also a pressing need to have a restructuring of both the Indonesian National Armed Forces and the Police of the Republic of Indonesia;
- and since separation of the Indonesian National Armed Forces from the Police of the Republic of Indonesia already has taken place

Congress – during its session on the 18th of August 2000 decided as follows:

Chapter 1

The Indonesian National Armed Forces

Article 1

Identity of the Indonesian National Forces

- (1) The Indonesian National Armed Forces as part of the people, was born together and fought together with the people, in defending the interest of the state;
- (2) The Indonesian National Armed Forces function as a main component in the system of state defense;
- (3) The Indonesian National Armed Forces are obliged to master professional capabilities and skills, congruent to each individual roles and functions;

Article 2

Role of the Indonesian National Armed Forces

- (1) The Indonesian National Armed Forces are arms of the State and function as Defense Forces for the Unitary State of the Republic of Indonesia;
- (2) The Indonesian National Armed Forces as Defense State Forces, have the main responsibility to uphold the sovereignty of the State, keep the integrity of the territory of the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 – Constitution , as well as protect the whole nation and the whole land of Indonesia from threats and disorders to the integrity of the State;
- (3) The Indonesian National Armed Forces execute state functions whenever executing conscription which will be regulated by law;

Article 3

Structure and Status of the Indonesian National Armed Forces

- (1) The Indonesian National Armed Forces comprises of the Army, the Marine and the Air Force, which organization is structured based on needs which further will be determined by law;
- (2) The Indonesian National Armed Forces are directly under the discretion of the President;
- (3) The Indonesian National Armed Forces are led by a Coordinative Chief of Staffs, who is appointed and dismissed by the President, after having received the agreement of Parliament;
- (4) (a) Members of the Indonesian National Armed Forces are under the jurisdiction of the Military Courts in case of military offence and come under the jurisdiction of the general courts, when general public is offended;
(b) In case of public offence as stated in sub (4)(a) is not relevant, members of the Indonesian National Armed Forces come under the jurisdiction of the Military Courts;

Article 4

Supportive Assignments for the Indonesian National Armed Forces

- (1) The Indonesian National Armed Forces takes part in humanitarian civic missions;
- (2) The Indonesian National Armed Forces supports the Police of the Republic of Indonesia in matters of public security, based as request, which will be determined by law;
- (3) The Indonesian National Armed Forces actively supports the peacekeeping operation activities carried out under the banner of the United Nations;

Article 5

Participation of the Indonesian National Armed Forces in the activities of the State

- (1) The State Policies are the foundation for the execution of the assignments by the Indonesian National Armed Forces;
- (2) The Indonesian National Armed Forces keep a neutral distance towards political life in general and refrain from getting involved in practical politics;

- (3) The Indonesian National Armed Forces stands for democracy, upholds the Supremacy of Law and the Human Rights;
- (4) Members of the Indonesian National Armed Forces do not participate as active voters to elect or to be elected; The involvement of the Indonesian National Armed Forces in determining the direction of the national aspirations, is channeled through Congress until the year 2009;
- (5) Members of the Indonesian National Armed Forces are only eligible for civilian posts after retiring from the military services, or after having reached retirement;

Chapter II

The Police of the Republic of Indonesia

Article 6

- (1) The Police of the Republic of Indonesia are a state apparatus assigned with the maintenances of security and social order, enforcement of law, provides protection and services to society.
- (2) In the execution of its responsibilities, the Police of the Republic of Indonesia are obliged to profess professionalism and skills.

Article 7

Structure and Status of the Police of the Republic of Indonesia

- (1) The Police of the Republic of Indonesia are the National Police which organization is hierarchical from the Center to the Regions;
- (2) The Police of the Republic of Indonesia are directed by the President;
- (3) The Police of the Republic of Indonesia is headed by the Head Chief of Police of the Republic of Indonesia, who is appointed and dismissed by the President with the approval of Parliament;
- (4) Members of the Police of the Republic of Indonesia come under the jurisdiction of the Public Courts.

Article 8

The National Police Institution

- (1) The President, in determining the policies for the Police of the Republic of Indonesia, is assisted by a National Police Institution;
- (2) The National Police Institution is built by the President and regulated by law;
- (3) The National Police Institution gives considerations to the President in activities of appointing and dismissing the Head of Chief Police;

Article 9

Assisting assignments of the Police of the Republic of Indonesia

- (1) In State of Emergency, the Police of the Republic of Indonesia render assistance to the Indonesian National Armed Forces, which is stipulated in the laws;

- (2) The Police of the Republic of Indonesia actively assist the [international] peacekeeping operations under the banner of the United Nations;

Article 10
Participation of the Police of the Republic of Indonesia
in the Execution of the State Activities

- (1) The Police of the Republic of Indonesia keep a neutral distance to day-to-day political life and does not involve itself in those activities;
- (2) Members of the Police of the Republic of Indonesia do not actively or passively participation in the elections. The participation of the Police of the Republic of Indonesia in participating in the determination of the national policies, are channeled through Congress until the year 2009;
- (3) Members of the Police of the Republic of Indonesia can be eligible for public posts outside the Police, after having withdrawn from the police activities or when retired from the Police Services;

Chapter III
Closure

Article 11

Detailed stipulations on matters mentioned in this Resolution will be determined by law;

Article 12

These Resolutions come into force on the day of its decision.

Decided in Jakarta,
The 18th of August 2000
The Congress

From the above articles stipulated by Congress (2000) on the Indonesian National Armed Forces and the Police of the Republic of Indonesia, one can draw the conclusion that both have been ordained to refrain from direct political activities, by keeping a neutral distance. At least until the year 2009 both are forbidden to join the elections neither as passive nor as active holders of ballots; their political aspirations are channeled and have to be channeled through their respective members in Parliament and Congress who have either requested for earlier retirement or reached the age of retirement, or who have to withdraw from their active military or police services.

Very obvious is now that the Indonesian National Armed Forces had gone through a process of democratization, after repositioning and restructuring themselves, and in the execution of their responsibilities on the other hand have to uphold Supremacy of Law and the Human Rights. This change surely is a very heavy psychological burden for their members and will need a longer time for adjustment. But at least the fact that these cornerstones for a democratic and just society has been accepted, and that the demand for restriction and repositioning by the public from the Armed Forces had been carried out without rebellion by the armed forces or the police, really deserves the praises for their leaders who could bring their manpower in this present situation.

Although the Armed Forces are directly ordained by the President, the placement of the Coordinative Chief of Staffs can only be appointed by the President, after approval of Parliament [article 3 (2), (3)] which again shows that even the armed forces – for certain technical jobs which could be connected to political interests and assignments (as happened in the past), Parliament has a controlling role to play apart from its special role by approving or not approving an appointment. The same thing accounts for the Head Chief of Police for the Republic of Indonesia, who also needs the approval of Parliament for his appointment or dismissal [article 7 (3)].

At the same time care is taken that the Armed Forces cannot easily or too quickly be involved in day-to-day politics.

The real change for the Indonesian National Armed Forces can be found in article 5 (2), (3) where is stated that the Indonesian National Armed Forces is for democracy, upholding the Supremacy of Law and adheres to the realization of Human Rights.

A real difference can be seen between the place in society of the members of the Indonesian National Armed Forces and the members of the Police Force. If the Indonesian National Armed Forces mostly for military offences come under the jurisdiction of the Military Courts, the members of the Police Force on the other hand right from the beginning come under the jurisdiction of the Public Courts. Exception for members of the Armed Forces to be prosecuted at Public Courts, can only take place when the offence made had not been a military but a public offence.

The reader would have received a wrong picture of the process of democratization in Indonesia, through a.o. the amendment activities towards the Constitution if the part on the military forces and police was omitted . It is an

unavoidable fact, that if the Amendments to the 1945 – Constitution were really aimed at the development and improvement of democracy (as one side of a coin), and the realization of Human Rights within the Supremacy of Law (as the other side of the same coin) – the repositioning and restructuring of the two forces cannot be neglected; the New Legal Strategy without repositioning and restructuring of the Indonesian National Armed Force and the Police of the Republic of Indonesia, would then be incomplete. Therefore, the Resolution no. VI/MPR/2000 and Resoltuion no. VII/MPR/2000 are even more important in value, becoming the precondition for the possibility of democratization and very much yearned for just legal actions. The so many demands for legal prosecution still very much heard of today, is a.o. a proof of how indispensable the repositioning and the restructuring as key issue was for the Reformation. Without this, Reformation would still have had a much longer way and time to go. Fortunately, presently we can say that the history of democracy and rule of law for Indonesia have taken a U-turn for the better.

IV. The Third Amendment (known as the ‘Second Amendment’)

Although the Third Amendment was ready for presentation and decision making during the yearly Session of Congress in October 2001, the sessions in all the Commissions (A, B, C, D)²¹ took too much time, that decision on the ‘Second Amendment’ had to be postponed to Congress Session, 2002. The reason probably was also that the ‘second amendment’ brought three less known new institutions, being:

- (1) the Constitutional Court/*Mahkamah Konstitusi*
- (2) the Regional Representation Institution/*Dewan Perwakilan Daerah*
- (3) the *Ombudsman* as an institution to oversee and improve the execution of Public Services by governmental and judicial institutions

Therefore the detailed discussions on the ‘Second Amendment’ was agreed to be determined in 2002. The ‘Amendment in the drawer’ comprises of a number of alternatives to be decided upon:

- (1) (a) Principles of the State as it stands in the Preamble; or (b) Principles of the State to be taken from alinea 4 of the Preamble
- (2) Sovereignty in the hands of the people and executed by Congress;
- (3) Indonesia being a state with Rule of Law;

- (4) Members of Congress to comprise of elected representatives with (appointed) representatives, whose (public function) prevent them from active /and or passive elections;

Very crucial discussions and decisions have to be taken during the sessions of Congress – 2002 on the system of election for the president and vice president: be it direct or indirect elections (through Congress as is the case now). Changes in attitudes are already showing themselves now: some parties who were in favor of direct elections, by and by are changing their moods for indirect elections, or the other way around. If for the 1st round generally there seems no problem, it is more the 2nd round which bring the question: what if non of the remaining two candidates cannot reach the (50% + 1) ? (amendment to article 2)

Another crucial point will again be the additional sub-paragraph on the rights and duties of the president to seek approval from Parliament before Financial Aids Agreement or not. Actually this responsibility had already been stipulated by the Law on Foreign Agreements (2001), but again the financial economists might stand for a rejection again.

These then are some of the crucial points to be expected during Congress 2002 next to the more hopeful and future oriented institutions like the Constitutional Court and the Regional Representation Parliament that should balance the (traditional) National Parliament where parties strife for political upper hand. Since the purpose of the paper is not to do political and legal estimations the ‘Second Amendment’ stage cannot be discusses any further.

V. Conclusions

The writer of this Report had not the pretension to write ‘a nice story’ of the amendments to the Constitution. Yet, looking upon those two-and-a-half years and pondering upon the results documented before, I could only wonder what a revolutionary Constitutional and Legal Change Indonesia has (and is still going) through, with such a wide scope to be tackled by both the Government and Congress of the Republic of Indonesia; they had to meet the challenges called into life by the Total Crisis. The intellectuals obviously and in real terms seem to have managed to meet the pressing political demands, which in their turn was cast into a New Legal Strategy, which hopefully could overcome the many problems. While being in the

midst of those preparations and discussions, people mostly cannot do anything but let our own conscience and responsibility be the guide to find ways and means to bring the nation out of this Crisis.

And now, going through what had been written above, the intellectuals and politicians themselves are surprised at the results of how little by little, step by step Indonesia managed to bring forward such a progress within the legal revolution for the sake of a quick stable society. Although many groups are still dissatisfied, but academically speaking, the results of those two-and-a-half years had been tremendous! If during the sessions of Congress in August 2002 the third Amendment will become a fact, then indeed the Amendment should be ready by 2002, that from then onward for some one-or-two decades the Amended Constitution will serve its purpose. The matching of the demands to keep the Original Preamble of the 1945 Constitution and yet to combine it with modern constitutional tasks and institutions to meet the future demands, was nearly an impossibility. But now, with the draft of the Third Amendment to the Constitution in the drawer, and seeing that slowly order is returning by using these new amendments and laws, one can only thank God that Indonesia at least has passed its deepest and darkest valley of disorder and unrest and turmoil. Thus credit goes to the Spirit of Reformation, which has forced the whole nation and above all the politicians and intellectuals to work as fast as possible while climbing in the dark out of the dungeon, looking for the sunshine! At least, now we are not groping in the dark anymore, since the right constitutional and judicial decisions had been taken before, and each previous decision is able to become the stepping-stone for further decisions forwards and upwards.

From the academic point of view, it is surprising and really stunning that in the noise of confusion (often caused by thousands of demonstrators), the Indonesian intellectuals and politicians still managed to bring to life constitutional and legal products such as the First, Second and Third Amendment to the Constitution, which if studied properly is surprisingly very systematic and very academic having three stages of Amendments:

- the First Amendment – 1999 :
reflecting the struggle between the too dominant executive power against Parliament, with democracy on the winning side;
- the Second Amendment – 2000 :

reflecting the interests of the citizens stressing Human Rights and at the same time the separation between the Armed Forces and the Police also upholding Supremacy of Law, Democracy and Human Rights;

- the Third Amendment – 2001/02 :
the modernization of the Constitution by three important judicial institutions : the Constitutional Court (for political matters), the Regional Parliamentary Representation (for synchronization the conflicting information often received from the local governments versus the Local Parliaments, with the Central Government as the third Party) and the *Ombudsman* as overseer and improver of Public Services in the interests of the public at large.

At the end of the conclusion, it should be added that all those intellectual and political efforts would be less successful if there was not the strong commitment of the so often criticized Armed Forces and Police, having done their utmost – sometimes beyond the possibilities given by logic – to keep as much as possible order (even if at least only at a limited radius from the Congressional-Parliamentary Grounds), to enable those responsible Members of Congress and Parliament to do their work. Their blind trusts in the Members' efforts and good intention is a precious capital and contribution into the whole process of the three Amendments to the Constitution. Without such dedication and trust the results would never be so surprising as it is now. Thus, in *summa summarum* it can be said that the three Amendments are the contribution of every citizen of Indonesia, and therefore all Indonesians can be proud of the achievement and contribution for a better future for our children, grand-grand children and other future generations at the beginning of the 21-century. This was even achieved without replacing the Original 1945 Constitution, such as given by our Founding Fathers since the beginning of the 20th century through their thoughts and feelings as expressed in the Constitution. The Constitution has remained the same, thus has the state and nation. But the Constitution has now been refurnished with fresh and modern thoughts and ways, so it shines brighter again and makes it possible for the future generations of the 21st century to go on using the 1945 Constitutions (although amended three times) as their leading star towards Modern Indonesia, which indeed had been the dream of the Founding Fathers for this nation living in this Archipelagoes – State.

NOTES

-
- ¹ At that time the Speaker of the Congress (1966) was the very well known General Nasution;
- ² from the 21st of May 1998 - November 1998 when President Habibie was replaced by the newly chosen President Abdurrahman Wahid);
- ³ Japan already started to show signs of losing World War - II, although had not yet surrendered before the disastrous bombing on Nagasaki and Hiroshima on the 15th of August 1945;
- ⁴ This name (meaning 'Free Indonesia') had been the name given by the Indonesian students in the Netherlands since the 20ies when referring to the independent state they dreamt of;
- ⁵ Officially proclaimed on the 28th of October 1928;
- ⁶ this statement actually gives some additional information about the influence of 1) the Dutch ethnologist **Eerde** (1923, *Ethnologie van Nederlandsch Indie*) who taught that the Common Laws - and especially the **common laws on the lands - for a territory stretching from Madagaskar to the Netherlands Indies including West New Guinea were the same**, thus pointing at the legal similarity over a very large territory, which is the very constitutional foundation of the Indonesian state (leaving out Madagaskar) ; note that the territorial-political-constitutional and legal approach totally opposes the racial - anthropological state approach; these two theories are still opposing one another and had given cause to different thinking on some population groups in Indonesia nowadays; 2) the second scientist who influenced the Indonesian Freedom Movement amongst the students in the Netherlands during the 20ies of the 20th century, was **Professor Haberlandt (1917, *Allgemene Anthropologie - I*)** who stated that same race and culture; same language; same occupation of same territory does not automatically make a group of population to be members of the same community until stated and thus has become a legal-political statement, binding territory and population together, thus the *Sumpah Pemuda* (= Youth's Pledge) was born on the 28th of October 1928. Thus **Youth's Pledge combined the theory of Professor Eerde (1922) and Professor Haberlandt (1917), uniting the same common laws, and the uttered pledge by students of different race/sub-race and culture on the common territory stretching from Aceh to West New Guinea (the previous Netherlands Indies); this was the beginning of the Indonesian Nation**; Professor Ernest Renan's theory entitles: "*Qu'est est ce qu'une Nation*" had the greatest impact on the Youth Pledge of 1928.
- ⁷ Didit Hariadi Estiko and Novianto M. Hantoro, (2000 : 29-30), *Reformasi Hukum Nasional : Suatu Kajian terhadap Undang-Undang Produk Pemerintahan Transisi (1998 - 1999)*;
- ⁸ Ketetapan-Ketetapan Sidang Tahunan MPR-RI tahun 2000, Jakarta, Penerbit Restu Agung;
- ⁹ See Prof. Drs. C.S.T. Kansil SH, Christine S.T. Kansil SH, MA, and Engeline R. Palandeng, SH, January 2001, *Konstitusi-Konstitusi Indonesia : 1945 - 2000*, Jakarta, Sinar Harapan;
- ¹⁰ The promise is for followers of the ancient religions/*kepercayaan* not professing one of the five big religions acknowledged in Indonesia, being the Moslem, Christian, Hindu, Buddha religion and Kong Fu Chu;
- ¹¹ This sub-article (2) has been inserted after the *fait a compli* but historical fact for the Indonesians on the 21st of May 1998, when President Soeharto straight-handedly in his farewell speech said that he appointed straight away his Vice President Habibie to take over the Presidency, after which Habibie also said his Presidential oath; all this happened so suddenly and quickly, while in the adjoining room a number of dignitaries were 'waiting for an important announcement' (as the instruction was); present were amongst others the (Minister) Public Prosecutor and the (Minister) Chief of Justice; thus that incident has now become a documented history, not to be repeated in the future; also take note of the words 'Congress or Parliament' which means that in case of emergency - if need be and if only one of these institutions is in session - even although Parliament only consists of 462 elected members and 38 appointed military representatives - it can already suffice if the 2/3 of Congress majority votes is reached - it can 'replace' the role of Congress. This again shows the possibilities to increase the power

of Parliament in **emergency times**, which indeed often happened during the administration of President Abdurrachman Wahid.

¹² If the two previous sub-paragraphs can be taken as 'usual', the 3rd sub-paragraph had indeed caused some embarrassments for some newly appointed ambassadors accredited to Indonesia, the more since some letters 'got lost' during the transitional period from President Abdurrachman Wahid to President Megawati Soekarnoputri; another confusion also befell a number of Indonesian ambassadors accredited abroad, who left Indonesia with credentials signed by President Abdurrachman Wahid, but when the moment came to present their credentials to the heads of states of the accredited countries, an additional process was faced, e.g. sudden need for new credentials from home, which again took some months; in general, this assignment on foreign ambassadors is an additional burden to Commission I of Parliament and until now with just one exception beyond the mishap mentioned above during the change of administration to President Megawati - the process of scrutinizing the ambassador's CV's had been cut short by parliament herself, omitting two internal steps of agreement 1) inter-party agreement; 2) agreement by Plenary Session which assignment was transferred to Commission I with straight agreement suggested to the Speaker of Parliament who then conveys his recommendations to the President;

¹³ The additions to this paragraph by two amendment sub-paragraphs want to stress: 1) the Supremacy of Law to be above political and personal likes and dislikes which at its best can be measured by sub-paragraph 14 (1); 2) since abolition and rehabilitation might include political detainees (from the Soeharto administration period who - when still alive - had all been released by the year 2000) as well as detainees dangerous for public order and security;

¹⁴ again another proof for more justice - also in conferring awards and titles - to secure that decision had been based on existing laws/rule of law; President Habibie had much shown his preference for family and friends in carrying out this subject;

¹⁵ This additional requirement was meant to diminish the number of minister and to avoid the appointment of too many ministers of state without portfolio; but practice in the years 1999-2001 has proven that somehow - for ministerial assignments in **new fields** still to be developed such as the fields of Information and Communication, also Marine Affairs (which also covers fishery and other sea-environmental products and non-products), such as boundaries as set for departments are difficult to develop, since it is the (often expert) appointed minister who has to find and develop his own area of competences;

¹⁶ see Sekretariat Jenderal MPR-RI, 2000, *Putusan Majelis Permusyawaratan Rakyat Republik Indonesia; Sidang Tahunan MPR, 7-18 Agustus 2000*, Jakarta;

¹⁷ This paragraph is an Amendment of the Constitution as Congressional Resolution on the 19th of October 1999, during its 12th session;

¹⁸ this paragraph is part of a Congressional Resolution of the 18th August 2000;

¹⁹ It can also be reported here, that since November 2001 two laws had been passed, namely 'The Defence Law' and 'The Law on the Police of the Republic of Indonesia' but unluckily - probably due to busy schedules, President Megawati Soekarnoputri has not ratified the two agreed upon Draft Law, yet in practice these two laws are effective already and regularly applied, since more than 30 days have elapsed since their agreement;

²⁰ Ketetapan-Ketetapan Sidang Tahunan MPR-RI Tahun 2000/TAP/MPR/No. VI/MPR/2000/-Menimbang-c;

²¹ Commission A discussed Amendment III, which contained a number of very new ideas like the introduction of a second parallel to parliament, which has to house both elected representative from the local governments (50%) and from the local parliaments (50%), hoping for a real just and balanced

policy between the interests of the Central and Regional Governments (like the Senate in the USA); Commission B evaluated the Reports of the Departments and the Higher State Institutions; Commission C evaluated the Presidential Report in congruence to the Departmental and Higher State Institutional Reports, and Commission E prepared the new guidelines to be taken by the impacts of the Total Crisis - without previous consultations inter-commission - came to the conclusion that the year 2001 - 2002 should be a **rescue program**, occupying more time for the discussions on the Crisis than the prepared Amendment III;

Chapter IV

Democratization Process in Indonesia Through Law

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

Although outsiders and even most students and activists would say, as if “nothing” has happened in the field of law, compared to the legal systems and legal institutions of European states and the United States established throughout the ages, whilst Indonesians are also dissatisfied and almost disillusioned with their contemporary legal situation and especially with the courts, police, public prosecutors and lawyers and civil servants in Indonesia¹, the discovery that only in 3 (three) years time so many fundamental legal changes have been made, both with respect to the political parties, the general elections, the relationship between the highest political state-and-legal institutions, the change of the role and relationship of the Armed Forces and the Police, the radical change of the decentralization process and institutions, the protection of human rights and establishment of Human Rights Courts (apart from previously non-existing Commercial Courts) and so many new economic laws, which are not the subject of discussion in this book, cannot but surprise us of the speed in which all this could have happened, if no previous preparations were made, long before ex President Soeharto stepped down in 1998.

I. Many more new laws are needed

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

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

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

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

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

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

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

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

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

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

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

II. Capacity Building and Institutional Reform

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

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

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

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

III. Independence of the Judiciary

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

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

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

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

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

- d. the introduction of the possibility of a dissenting opinion of a judge, when he/she is part of a group of three judges sitting on the case;
- e. the appointment of non-career judges, i.e. usually law professors or well-known practicing lawyers as judges;
- f. the renovation of the process of selecting and appointing judges through a “fit and proper test” procedure by parliament, instead of the ordinary administrative procedure of lengths of tenure of the judges, and appointment by the President;
- g. and other procedural changes and measures which have been introduced internally within the court offices, but also within the police-and-prosecutor’s quarters.

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

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

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

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

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

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

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

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

- (1) Judicial Power shall be vested in the Supreme Court and subordinate courts as may be established by law;
- (2) The organization and competence of these courts shall be provided by law³.

The elucidation of that article says more explicitly:

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

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

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

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

factors and lucrative facilities, others were like that because they did not have the courage to go against the pressure of the authoritative Executive or the undemocratic Ruling Class. In the present situations, unfortunately many Indonesian courts eventually have lost their accountability⁴.

Therefore, the recent reformation movement in Indonesia reaffirmed that the judicial system must also be reformed and cleansed from corruptive judges, registrars as well as corruptive prosecutors and police officers. It is now a must that the so-called “Mafia of Justice” must be eradicated as soon as possible. At the same time, the courts must be strengthened and restructured now and impartial judges and professional justices committed impartiality and fairness must be appointed as well as professional registrars and other judicial staff. Those efforts are *sine qua non*, not only to the recovery of the judicial and legal system as such, but also in support of the revival of the Indonesian economy as well as to the realization of good governance in the process of civil democratization⁵.

IV. Steps of Judicial Reform

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

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

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

V. Judicial Review⁶

One cannot deny that the independence of the judiciary will be more significant when the courts have the power of judicial review. By using this power the courts may review acts and regulations whenever those laws are in contradiction with the Constitution. At the same time, this power will become hollow when the judges are not independent and in favor of the ruling class or those in power. Again, experience taught us that the power of judicial review becomes ineffective during an emergency situation and political instability whereby martial law is declared in Indonesia under the former regimes. Under such situations the independent judiciary is at peril, because the chief administrator or the martial law is vested with broader emergency powers. Under such situation, those in power suspend the basic human rights by claiming that the actions have been in the state's interest and for the people's welfare⁷.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTES

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

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

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

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

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

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

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

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

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

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

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

Chapter V

Legal Measures for Better Protection of Human Rights and Important of Good Governance

I. Introduction

Long before the start of the Reformation Movement, in fact starting from the 1960s, human rights form the basis and background of the Indonesian Reformation Movement. Indonesian academe and non-governmental organizations demanded for better protection of human rights, amongst others through their law and political courses in the universities, their writings and books about Human Rights and the Rule of Law, and through the establishment of the Legal Aid Institution (*Lembaga Bantuan Hukum*) established as a non-governmental organization as well as legal aid bureaus set up by the faculties of law of numerous universities throughout Indonesia.

In 1990 the United Nations Convention on the Rights of the Child was ratified by Presidential Decree No. 36/1999¹. Before that, the UN Convention on the Elimination of All Kinds of Discrimination Against Women was ratified by Act No. 7 of 1984².

To be true, the Indonesian Struggle for Independence was none other but based on the conviction that human rights and freedom of a nation to develop through education are human and natural rights of the Indonesian people. Therefore, the 1945 Constitution's Preamble starts with the statement, that: "Freedom is the right of all people."

And although the 1945 Constitution did not use the word or notion of "human rights", but we can certainly find the principles and norms in it³, such as in the Preamble, article 1 paragraph 1, art. 27, art. 28, art. 31, art. 33 and art. 34.

Politically, though, as a new state and a new nation, born in 1928 on the basis of the Youth Pledge of 1928 which were pledged by a number of local Youth Organizations, such as the Young Java, Young Sumatera, Young Celebes, etc. as a political statement at the closing of the Second Youth Conference, held in Jakarta (Batavia). The Youth Pledge of 1928 indeed is often regarded as the Indonesian

“social contract” (according to the English John Locke’s political theory) reflecting the political will of the people (in accordance to the Professor Ernest Renan’s theory about the way a new nation is born) which created the Indonesian nation (**bangsa Indonesia**).

According to Prof. Ernest Renan in his Dies Speech of 1898 in Sorbonne University⁴, entitled “Qu’est ce qu’une nation?” (What is a Nation?), a number of different ethnic groups, even though they differ in race, culture or religion may create a new nation, on the basis of (1) **historical** similarity (in the Indonesian context: colonialism), which creates (2) the **coherence** between the people, which in turn builds up (3) the **political will** of the people to form (4) a new entity in which all groups will live together (*le desire de vivre ensemble*), now and for all times in the future.

The Young nationalists of the late 1920s applied Renan’s (at that time modern) theory to the groups and people living in the Indonesian archipelago living under the pressure of colonialism, and thus sharing the same miserable lot with the same vision and ideals, i.e. to be free and become an independent nation, which from 1928 onwards became known as the Indonesian nation (**bangsa Indonesia**).

Therefore the Proclamation of Independence declared by Mr. Soekarno and Dr. Mohammad Hatta on the 17th of August, 1945 was politically not only necessary to free our people from the Dutch Government, which attempted to re-colonize the Indonesian Archipelago, after Japan lost World War II, but also to start the political legal process of forming the new Indonesian state, which was given its constitution one day later, on the 18th of August 1945.

Accusations, therefore, as if the 1945 Constitution does not protect human rights, are unfounded, as the very act of creating a new state by freeing the new Indonesian nation of the strings of colonialism itself cannot be but a struggle based on the conviction that liberty is a human right, and that all people have natural human rights, which are to be respected and protected.

Even though the human rights of women or what is now known as the gender issues have been fought for by many women in Java (R.A. Kartini, Dewi Sartika, Ibu Walanda) in Manado, and other regions of Indonesia since the 1800s.

Unfortunately, in the 50 years of Independence, both because of internal - as well as external (or international) political and economic pressure, exercised against a new state and a new government, the Indonesian leaders, and especially our presidents,

rightly or wrongly, became more and more autocratic, taking all the power in their own hands.

It is therefore that after ex-President Soekarno's Decree of 1959, leading to the so-called Guided Democracy, that many of his followers together with the younger generation started their movements towards better respect and protection of human rights against the first President and his followers.

When ex-President Soeharto took office in 1965, they hoped for a better protection of human rights and the supremacy of law, but were soon disillusioned because of the autocratic acts and brutal accusations without due process of law, detentions and killings which happened since the first years of his government, leading to the corrupt bureaucracy and moral degradation of society he created, which has its practices and consequences up till the present (almost four years after his downfall)⁵.

II. Laws in Support of Better Protection of Human Rights

When looking for laws protecting human rights, we can find them scattered in the Constitution and in other laws, such as the Criminal Code protecting the right for life and liberty, or in the National Educational System Act (Law No. 2 of 1989), the right to land as regulated in the Basic Agrarian law, Act No. 5 of 1960, the right to property, regulated in the Civil Code, as well as numerous articles in our Criminal Code and our Criminal Procedure Code⁶.

Nevertheless, human rights activists demanded some sort of Indonesian Declaration of Human Rights and the express mentioning and regulation of the protection of human rights in the Constitution⁷.

But in 1997 and 1998 it was still very difficult to amend the 1945 Constitution, which was still regarded as a sacred document. Therefore the present writer suggested to the then Minister of Law, who at the same time was also the Secretary of State, Prof. Muladi, that a special law on Human Rights be drafted, which was approved on the same day, after the President's approval was obtained. Immediately a Committee was established, chaired by Prof. Dr. Sunaryati Hartono, SH and co-chaired by the then Director General of Law and Legislation, Prof. Dr. Romli Andasasminta, SH. Other members of the Committee consisted of the Chairman of the National

Commission of Human Rights, Mr. Djoko Soegiarto, S.H., Prof. Sri Sumantri, Dr. Adnan Buyung Nasution, activist Mr. Munir from KONTRAS, and many other prominent figures.

In the course of a few months, the first draft of the Bill on Human Rights was drafted, and consisted not only of the rights mentioned in the Declaration of Human Rights, but also included important articles from the Rights of the Child UN Convention and the Convention on the Elimination of All Kinds of Discrimination Against Women. Moreover the National Commission of Human Rights insisted that their organization should also become part of the Law on Human Rights, so that in Act No. 39 of 1999 one can find not only the regulations on the recognition and protection of human rights properly so called, but also the regulation on the organization specially in charge of the protection of human rights, i.e. the National Commission of Human Rights.

Later, a great part of the human rights mentioned in Act No. 39 of 1999 were transferred as the Second Amendment to the 1945 Constitution in Chapter X A as article 28 a to 28 j.

This completes the hierarchy of laws regulating human rights in Indonesia, starting with Chapter X A of the Constitution concerning Human Rights:

- MPR Resolution No. XVII/MPR/1998 on Human Rights
- Act No. 39/1999 on Human Rights, and
- Act No. 26/1999 on the Human Rights Court.

III. Ombudsmanship in Indonesia

In the history towards good governance and Supremacy of Law in Indonesia, 20 March 2000 is one more important date. That day many newspapers as well as electronic media in Jakarta covered and broadcasted the inauguration of the eight ombudsmen of Indonesia in the Palace of the President of the Republic. Undoubtedly, for most Indonesian people's ears until then, even up to now, the word "ombudsman" which was first established in Sweden some 200 years ago, is still an undeciphered word, despite the fact that the ombudsman is one of the symbols of democracy respecting and promoting the rule of law.

Nevertheless, unlike the Finland Ombudsman which received its first complaint only one year after its establishment, the first grievance to the Indonesian National Ombudsman Commission (hereinafter referred to as “Indonesian Ombudsman Office”) was lodged on the very first day of its operation by retired Colonel (Ret.) dr Rudy Hendrawijaya, MPH. It was about a case involving the judiciary. He reported that there were two judgments of the Supreme Court of Indonesia for his case. In the first one, the Court rejected the *cassation* lodged by the opponent party, indicating that the complainant dr. Rudy won the case. In the second one, however, the Court agreed to review the case and gave its own judgment by which the complainant lost the case. The complainant was of the opinion that the second judgment (No.1082 K/Pid/1988 of 16 November 1999) was a forgery⁸.

IV. The National Ombudsman Commission of Indonesia

Most National Ombudsmen Offices in the world were established by an Act. On the other hand, the Indonesian “Komisi Ombudsman Nasional”, or the “National Ombudsman Commission” (hereinafter referred to as “Ombudsman Commission”) was established by Presidential Decree Number 44 of the Year 2000, which however mandated the Commission to draft a Bill on the Ombudsman within six months, indicating that the Presidential Decree was a temporary measure.

V. The Objective and the Mandates

The establishment of the Ombudsman Commission was one of the commitments of the President Abdurrahman Wahid Administration (and continued by the present Administration under the leadership of President Megawati Soekarnoputri) to reform the laws and institutions in pursuing a better and clean administration and to enhance the realization of good governance. In other words, the establishment of the Commission is to prevent authorities in public sector from abusing their authority and discretion; to assist them in performing their jobs effectively and efficiently; and to compel them for the accountability and fairness.

For those purposes the Ombudsman Commission was given the mandate: ⁹

- (1) to accommodate the social participation in conditioning the realization of clean and effective officials, good public service, professional and efficient justice, eradication of mal- administration as well as to ensure impartial and fair trial by an independent judiciary;
- (2) to promote the protection of individuals in getting public service, justice and welfare and in defending their rights against illegal actions and irregular practices resulting from abuse of power, corruption, collusion, discrimination, undue delay, deviation and improper discretion.
- (3) to enhance the supervision of government institutions and agencies, including the judiciary by sending clarifications, queries, and recommendations to those reported institutions and agencies, followed by uninterrupted monitoring of their compliance with the recommendations.
- (4) to prepare the transform of the Ombudsman Commission into a more effective, autonomous, and completely independent Parliamentary Ombudsman of Indonesia by drafting the Bill on the national Ombudsman to be submitted to the Legislature within six months.

In short, the immediate objective of the Indonesian Ombudsman Commission is *inter alia* to pursue the realization of a clean and effective bureaucracy in providing good services to the public, based on the supremacy of (just) law as well as the realization of professional and credible law enforcement agencies, including the accountability of independent judiciary that respects human rights and fundamental freedoms and maintain equal opportunity and justice for all¹⁰.

After two years, the public institutions and agencies have proved to be willing to accept and recognize the existence of the Ombudsman Commission. Further, those institutions and agencies will soon realize that a new legal institution of accountability and integrity i.e. the Ombudsman Commission now controls their works.

The long range objective of the Ombudsman Commission is *inter alia* to pursue the realization of good governance in the context of civil democracy based on the rule of law and supported by a strong judiciary that respect the principle of equality before the law, the presumption of innocence, and the right to a fair public hearing by an independent and impartial tribunal¹¹.

The influx of complainants to see the Chief Ombudsman for reporting their grievances coming from afar and from all corners of Indonesia reflect the great expectations of the people, that the Ombudsman Commission is completely independent and vested with broad authorities. They believe they have found the real protector for their rights and interests. They also trust that the Ombudsman Commission may provide them the last opportunity to get redress and remedies for

their rights which have been damaged, dishonored, abrogated, or even abolished by the unfair authorities and impartial judges¹².

VI. The Principle of Independence

Pursuant to article 17 of the Presidential Decree all expenditures for carrying out the duties of the Ombudsman Commission will be borne by the budget of the State Secretariat.

Many are of the opinion, that this article may distort the independent status of the Ombudsman Commission. However, the Ombudsman Commission has so far been successful in maintaining its independence from the Executive. It is recorded that the Commission occasionally send a critical recommendation to the President. For example, President Abdurrahman Wahid apparently was not ready to appoint one of the two candidates for the Chief Justice selected by the Parliament. The Ombudsman Commission sent the recommendation to the President reminding him that according to the law the President was obliged to appoint one of the candidates. Eventually the President appointed Prof. Dr. Bagir Manan, S.H. the second candidate as the Chief Justice, as the President refused to appoint Prof. Dr. Muladi, S.H. who was an active Golkar party member and a former Minister of Justice under the New Order Government.

As noted earlier, it is one of the universal principles of ombudsmanship that no one or no other institution may intervene, instruct, and dictate the ombudsman¹³. Dean M Gottehrer points out that the Ombudsman Office is established as an independent and impartial institution. In many Constitutions the principle of independence of the Ombudsmen is guaranteed. This means that “[t]he Ombudsman in the exercise of the office’s functions, duties and responsibilities under the Constitution shall not be subject to the direction or control of any other person or authority”¹⁴. Any individual thus must have easy access to the office. There is even no charge whatsoever, even not for administrative or investigative costs for any grievance lodged to the Ombudsman. In addition, he comments that “[i]ndependence and impartiality of the Ombudsman are critical to the office’s success because otherwise people will tend not to use it if it appears to be another bureaucratic government office”¹⁵.

Prof. Gottehrer is an American expert on ombudsmanship and at present is an International Ombudsman Consultant for twenty-five countries. He is also one of the Indonesian Ombudsman Commission's Consultants without formal appointment. In his research report he concludes that Constitutions of 54 countries accommodate the basic provisions on the Ombudsman. Moreover, he has read not less than 100 Ombudsman Acts of many countries. His findings show us that there are 59 universal principles of ombudsmanship. Practically, the Commission has dubbed them as "Gottehrer principles", or "G-principles".

G-principle 1 (G-1), or the principal of independence is the most essential. This principle links with the purpose of its establishment, its sustainability, appointment of Ombudsman, the tenure of office, functions, and procedure of removal.

The purpose of the establishment of Ombudsman Office is to oversee the public administration; to promote the standard of competence and efficiency, to protect the individual from being the victim of injustice, maladministration, and abuse of discretion committed by the public authority as well as to promote and protect human rights. The establishment of the Ombudsman Office should be based on an Act. To repeal and to amend an act needs a larger (2/3) majority vote in Parliament. Hence, the act is not easily changed. The Ombudsman must have high qualification of personal and moral integrity; and must be capable to analyze problems of law, administration, public policy, and human rights (G-2 to G-6) as well as consider the case from the standpoint of fairness, good behavior, as well as other aspects expected from "a wise man". The normal term of office may be between four and six years with or without the possibility of reappointment for the second term (G-8).¹⁶ The Ombudsman must be vested with the power to investigate (G-21) and to give recommendations (G-44). The causes for the removal of the Ombudsman must be specified in the Act *inter alia* because of permanent mental or physical inability to carry out his functions or because of misbehavior, which can consist of actions and omissions (G-12).

As Mr. Marten Oosting, the past President of the International Ombudsman Institute (IOI) and former Dutch Ombudsman points out, the independence of ombudsman encompasses three elements namely institutional, functional, and personal independence¹⁷.

First, *institutional independence* means that the Ombudsman is not part of any public agency. Besides, he holds a high level position in the government system. He may not therefore be controlled by any power of authority (G-1).

Next, *functional independence* means the Ombudsman may not be dictated or pressured by any authority or influence. To prevent any intimidation or instruction restricting his performance, he must be empowered with wide powers and flexible procedure by an Act (G-21 and G-26). In addition, he must be sustained by adequate budget to promote professionalism and quality standard in executing his/her duties and authorities (G-59).

Thirdly, *personal independence* means he must be a person of high integrity. The selection for his position in the office must be based on the best qualification. His/her tenure of office must be limited and explicitly prescribed in the Act (G-2 to G-6). Likewise, salaries and facilities must be guaranteed and equal with those of government officials of very high echelon (G-9 and G-10).

VII. The Principles of Impartiality and Immunity

Other pillars of ombudsmanship are the principles of impartiality and immunity. In conducting the investigations and in giving the recommendations, the Ombudsman must be impartial. Therefore, there are some positions that are incompatible for him. For example, he is not eligible to be a member of a political party, a Member of Parliament, and a judge (G-7). Whenever there is the possibility of conflict of interest, he must refrain from any case if he has any interest on it (G-14). Therefore the Ombudsman may appoint one or two other Deputy Ombudsmen who will handle such matters.

Equally important, G-48 states, “The Ombudsman and persons acting under the Ombudsman’s direction or authority are immune from civil and criminal proceedings for any act performed in good faith under this Act. Ombudsman reports and proceedings are privileged. To this Gottehrer gives his comment as follows: “These immunities protect the Ombudsman, staff and anyone else acting under the Ombudsman’s direction or authority from harassment when dealing with controversial issues or making a finding seen as favorable to an unpopular position and from any consequences in a libel or slander suit.”

Not less important as one of the shields for an Ombudsman, his deputy and staff is G-47 stating that the conclusions, findings, recommendations and reports of the Ombudsman, his deputy and staff may not be reviewed by any court.

VIII. The Future of the National Ombudsman of Indonesia

Measured by those international standards, or universal principles of ombudsmanship, the present Indonesian Ombudsman Commission is still embryonic or prototypic in nature. Even though the Commission has proved to be an independent and impartial institution so far, it still lacks the essential power for exercising full investigation, such as power of subpoena, power of ingress, and other protections or shields for his actions. This weakness was surely seen and felt by the Team drafting the Bill on the Ombudsman. As a result, most of the Gottehrer-principles or International standards and practices of ombudsmanship were incorporated into the Draft of the Bill, namely:

- The reasons of the establishment and the purpose of the National Ombudsman of Indonesia. This is *G-principle 1*. (See Chapter Two of the Draft of the Bill, Art. 2.)
- The qualifications for an Ombudsman, or *G-principle 6*. (See Chapter Seven, Arts. 31 and 34.)
- To be independent and impartial, the Ombudsman may not hold any incompatible positions, such as a member of political party, a Member of Parliament, a judicial officer or a particular public official. This is *G-principle 7*. (See Chapters Five, Seven and Eight, Art. 35 jo. Art 1 point 1; Art. 37 jo. Art. 3 and Art. 13 section (4); and Art 38. jo. Art. 2.)
- Term of office and the eligibility to be re-elected as seen under *G-principle 8*. (See Chapters Seven, Art. 31.)
- The removal of the Ombudsman based on the incapability, such as permanent physic as well as permanent mental illness and misconduct, or *G-principle 12*. (See Chapter Seven, Art. 36 jo. Art. 45.)
- The Ombudsman shall refrain from investigation or examination of cases in which he has an interest in it. The purpose of this *G-principle 14* is to avoid the conflict of interest. (See Chapter Eight, Art. 38.)
- The authorities of the Ombudsman, or *G-principle 20* must be detailed in the Acts. (See Chapter Three, Arts 5 to 8.)
- *Ex-officio*, or *sua sponte* investigation, or the authority to initiate the investigation without complaints. This is *G-principle 20*. (See Chapters Three and Five, Arts. 6f, 6b, 6g, 8 and 13 section (2).)
- Who may lodge grievances or reports is *G-principle 22*. (See Chapter Four, Art. 4.)

- The jurisdictions of the Ombudsman and the categories of public agencies and institutions should be described, or *G-principle 23*. (See Chapter Three, Art. 8.)
- The categories of grievance and reports. This is *G-principle 24*. (See Chapter Three, Arts. 6 point a, 7 point a, and 11.) Note also the statute of limitation, or *kadaluwarsa* in Indonesian legal term. (See Chapter Four, Art. 39 section (3) point e.)
- *The G-principle 25* dealing with the obligation of the Ombudsman to keep the grievance and report confidential. (See Chapter Five, Art. 14 section (3).)
- The procedure rules starting from the grievances or reports received through the investigation processed up to the cases disposed in the form of discoveries, conclusions, and recommendations. This is *G-principle 26*. (See Chapter Five, Art. 13 to Art. 26.)
- The access to any public or confidential records is *G-principle 34*. (See Chapters Five, Art. 19 (1).)
- The power to enter public premises, or *G-principle 37*. (See Chapter Five, Art. 24.)
- The power “to summon, to subpoena, to compel someone to produce any records and the presence of any person to give testimony under oath” in the process of investigation. This is *G-principle 38*. (See Chapter Five, Art. 20.)
- The authority to give recommendation on the amendment of law to any government institutions or legislature, described under *G-principle 45*. (See Chapter Three, Arts. 9 and 10.)
- *The G-principle 48* dealing with the immunity. Since the Commission currently won the case when it was sued in the District Court of South Jakarta, it is worth being quoted completely here: “The Ombudsman and persons acting under the Ombudsman’s direction or authority are immune from civil and criminal proceedings for any act performed in good faith under this act. Ombudsman reports and proceeding are privileged.” (See Chapter Eight, Art. 38 section (3).)

IX. Conclusions

Meanwhile, the Draft of the Bill on the National Ombudsman of Indonesia, which has been prepared by a small Team consisting of Prof. Dr. Sunaryati Hartono (Deputy Chief Ombudsman), Mr. RM Surachman, *APU Research Professor eqv* (Deputy Ombudsman), Mr. Benemay (Assistant Ombudsman), and Mr. Winarso (Assistant Ombudsman), after having been being discussed in numerous seminars in Jakarta and several provinces, was submitted to the Department of Justice and Human Rights on the 8th of May 2001 while some copies were submitted to the Indonesian *DPR* (Parliament) and to the President of the Republic.

The Parliamentary Commission, later, invited the Ombudsman Commission for a hearing about the Draft on 13 July 2001. On that day the Ombudsman Commission gave the clarifications on the background, general principles, objective, structure, functions and jurisdictions of the future National Ombudsman based on the

Draft. In that hearing the Chairman of the Parliamentary Legislative Commission informed the Ombudsman Commission that the Parliamentary Legislative Commission is considering to transform the Draft into a Bill and then to submit it to the Plenary Meeting of the Parliament as a bill on the initiative of the DPR (not proposed by the Government/Department of Justice). However, before reaching that stage, the Draft will be reviewed for some more corrections especially also to include some regulations on the establishment of Regional Ombudsman and their relationship with the National Ombudsman.

One should notice, that the existence of the Ombudsman Commission is to create an independent institution, to which nobody may intervene or influence. Nevertheless, the Ombudsman Commission must submit its incidental reports as well as annual reports to the President of the Republic, since it was established by a Presidential Decree and its Ombudsmen (Commissioners) were appointed and inaugurated by the President too. This does not mean, however, that the Ombudsman Commission may be intervened or instructed by the Executive, since its main function is exactly to oversee the Government Bureaucracies, Public Institutions, and Public Administration.

As soon as the Bill is enacted, the National Ombudsman will not be a Commission anymore. Moreover, the Chief Ombudsman will be elected by the Parliament and inaugurated by the Head of State. From that time, Annual Reports will be submitted to the Parliament, not to the President. Hence, the Ombudsman Commission will become a Parliamentary Ombudsman. Still, it will hold an independent and impartial status, with nobody (not even the Parliament) intervening or influencing it. In addition, the National Ombudsman will have wider jurisdictions and authorities.

Realizing the significant meaning of the Role of the Ombudsman Commission in the present situation of Indonesia, all Commissioners (Ombudsmen) will continue to execute their mandate with sincerity and to the best of their efforts. They are even ready to work *pro bono publico* for the interest of those who feel that they have been the victims of *maladministration* and the victim of injustice as well.

In the meantime, several new names will be submitted soon to the President of the Republic, Ms. Megawati Soekarnoputri, to be appointed Commissioners (Ombudsmen). Pursuant to the Presidential Decree Number 44 Year 2000 the

Ombudsman Commission should consist of nine persons. To date, there are only five Commissioners after the resignation of three Commissioners as mentioned earlier.

With its wider authorities and jurisdiction, the Ombudsman Commission may improve executing its functions by preserving its independence and impartiality in motivating the target groups to comply with the recommendations for the interest of pursuing good governance and guarantee a fair and just judiciary in Indonesia.

NOTES

¹See Team of Tata Nusa editors: *Penunjuk Peraturan Perundang-undangan Republik Indonesia 1945 - 2000*, PT Tata Nusa, Jakarta, 2001, p. 19 and 434.

²*Op. cit.* p. 434

³See Poliyama Widyapustaka (publisher): *Perubahan-perubahan Undang Undang Dasar Negara Republik Indonesia Tahun 1945*, 2nd edition printing, 2001.

⁴ See the Indonesian translation of Ernest Renan's speech by Prof. Mr. Sunario entitled : *Ernest Renan: "Apakah bangsa itu?"*. According to the late Prof. Sunario, who obtained his lawyer's degree in Leiden, the Netherlands in 1925 and who was a freedom fighter and one of the founding fathers of Indonesia, apart from serving as the Secretary of the Second Youth Congress in 1928, Ernest Renan's theory about the birth of a nation very much inspired the Indonesian youth studying in Europe at the time, who brought their ideas to the freedom fighters in Indonesia and spread it through their youth journal and political meetings. This was why the Second Youth Congress was held, in order that the young people of all ethnic groups (Java, Sumatera, Celebes, Ambon, etc.) be united into one nation: the Indonesian nation. Hence the 28th of October 1928 is from then regarded as the date of the birth of the Indonesian nation, whereas the 17th of August 1945 was the date of birth of the Indonesian state.

⁵ See Baharuddin Lopa in Chapter IV of his book entitled: *"Kejahatan Korupsi dan Penegakan Hukum"*, Penerbit Buku Kompas, Jakarta, 2001, p. 111 - 22.

⁶ See Prof. R. Subekti: *Perlindungan Hak Asasi Manusia dalam KUHAP*", PT Pradnya Paramita, 1994, 2nd edition.

⁷ See also Todung Mulya Lubis, *op.cit.*

⁸ Komisi Ombudsman Nasional, *Laporan Tahunan 2000/2000 Annual Report*, p. 10 and p.11.

⁹ Cf. Surachman, *"Institusi Ombudsman: Perkembangannya"*, paper submitted to an Interactive Discussion on "The prospect of Establishing a Local Ombudsman in East Kalimantan, 22nd September, 2001.

¹⁰ *Op. cit*

¹¹ See *Laporan Tahunan 2000/2000 Annual Report* (N.p. : Komisi Ombudsman Nasional. 2001), p. 6 and p. 7 and see also Arts 3-4 of Presidential Decree Number 44 of the Year 2000.

¹² *Laporan Tahunan 2000/2000 Annual Report*, p.6 and p.7

¹³ *Ibid.*, p.8 and p.9.

¹⁴ Ibid.

¹⁵ See Daniel Jacoby: *The Future of the Ombudsman*”, paper submitted at the International Ombudsman Conference, Taipeh, Taiwan, 19 - 24 September 1994.

¹⁶ Dean M. Gottehrer, “Ombudsman Legislative Resource Document”, Occasional Paper # 65, (Edmonton, Alberta: International Ombudsman Institute, 1998)

¹⁷ Marten Oosting, *Protecting the Integrity and Independence of the Ombudsman Institution: The Global Perspective*,” in Conference Papers, 7th International Ombudsman Institute Conference, Durban, South Africa, 30 October 2000-2 November 2000, p 21-22.

17 Cf. Antonius Sujata and R. Surachman, “*Preparing the Establishment of a Parliamentary Ombudsman: The Indonesian Experience*”, paper submitted to the 6th Asian Ombudsman Association Conference, Tokyo, Japan, 18-21 June 2001.

Chapter VI

Decentralization of Powers and Local Autonomy

I. Introduction and Short History of Decentralization

Decentralization is not foreign or even strange to the people of Indonesia. Decentralization itself grew hand in hand with the history and process of occupation and colonialization of the Indonesian territories. The arrival in the 16th century of the Dutch trading company *Vereenigde Oost-Indische Compagnie/VOC* and its bankruptcy in the 18th century, forced the Dutch Administration to make some legal clarifications in those territories with which they traded; these ‘clarifications’ were known as ‘*the Long Contracts*’ and ‘*the short contracts*’ which were a number of agreements between the Dutch Administration and the responsible headmen or even kings of those days, ruling over the territories in Indonesia.

The *long contracts* were usually signed with the already settled political administration units reaching to the level of kingship; in this cooperation the Dutch Administration stipulated the rights and responsibilities of the *swapraja/zelfsbestuursgebieden* being self-ruling territories like the kingdoms in Sumatra (Kampar - Indragiri and Deli-Serdang), the kingdoms of Yogyakarta and Surakarta in Java, and the kingdom of Goa in South Sulawesi and other kingdoms scattered all over the archipelago.

The *Short Contracts* in fact were usually agreements with local headmen of a number of small republics who were used to take care of their own village affairs.¹ The contracts was called ‘short’ since they only mentioned the acknowledgement and recognition of the said territories of the Dutch Administration upper hand, although these territories were also called *swapraja/zelfbesturende gebieden*; in fact, all rights of contacts with the outside world were forbidden by the Administration. Yet, it is mostly in territories of this kind that the common laws/*Hukum Adat* for the socio-cultural (and limited) economic life had been fostered, including the Village Courts / *Pengadilan Adat*², being too far away for the legal arm of the Colonial Administration in Batavia/Jakarta. Thus before the Reformation (1998) the local

administration in Indonesia already knew a number of decentralization regulations, such as:

- Law on Decentralization/*Decentralisatiewet* , 1903
- Law on the Reformation of Administration/ *Bestuurs-hervormingswet*, 1922 (Law of the 6th of February 1922; *Indisch Staatsblad/Ind.Stb.* 1922 no. 216) and its further sub-regulations on decentralization; the *Bestuurshervormingswet* also mentioned the existence of the **de**concentration system;
- The **territorial decentralization** took place as follows :

Further on, the *Bestuurshervormings wet /1922* also stipulated

- (a) that the area of the “provinces” were as large as the areas of administration/*administratief gewest* was regulated by the *Provincieordonnantie* (Ind.Stb. 1924 no. 78; last revision in Ind.Stb. 1940 no. 226, 251;
- (b) apart from the “provinces”, the Colonial Administration also knew autonomous territories called ***Regents-schappen*** (administered by a regent/*bupati*) which nowadays cover the areas of the present regencies called ***kabupatens***, further regulated by regulations called *Regentsschaps - rdonnanties* (Ind.Stb. 1924 no. 79; last revision Ind. Stb. 1940 no. 226)³;
- (c) territories known as ***Stadsgemeenten*** (now known as ‘*kotapraja*’) covering the territory of a town which was regulated by a *Stadsgemeenten-ordonnantie* Ind. Stb. 1926 no. 365; last revision Ind.Stb. 1940 no. 226 and Ind. Stb. 1948 no. 195) (Soehino, 1995: 9-10)⁴

For territories outside/***Buitengewesten*** Java, Madura and Bali where autonomy and decentralization had been introduced, the Decentralization Law 1903 was still the main source, although some further legal developments took place:

- (a) territories were known as inter-communities/ *groeps-gemeenschappen* covering areas which extended across an area equal to the usual administrative units called *gewest*, regulated by the *Groups-gemeenschappen-ordordonnanties*/regulation on inter-communities (Ind.Stb. 1937 no. 464 jo. Ind. Stb. 1938 no., 130 and 264); these territories were headed by a ***resident***;
- (b) territories of town-communities/*stadsgemeenten/ kotapraja* for territories outside Java, Madura and Bali were regulated by the *Stadsgemeenten-ordonnantie Buitegewesten*/Regulation on towns in areas outside of Java, Madura and Bali whose head was the ***burgemeester***/mayor⁵ (Ind. Stb. 1938 no. 131 and 271)(Soehino, 1995 : 11);
- (c) if the previous territories were indirectly under the supervision of the Administration, the *Stadsgemeenten* were directly supervised by the

Administration, and the *burgemeester* was never ‘a local boy’ as was the case with the above mentioned territories (Soehirno, 1995 : 11);

- The **functional decentralization** (or usually called **deconcentration** was regulated through the creation of special legal entities;
 - (a) for the sake of irrigation and road building
 - (b) for cooperation with existing kingdoms, such as the regulation for the self-ruling territories/*zelfbesturende - gewesten/swapraja* of the kingdoms of Yogyakarta and Surakarta, for special activities, such as the *Vorstenlandse Waterschaps-ordonnantie/Regulation on the waterways in the kingdom of Yogyakarta and Surakarta* (Ind. Stb. 1920 no. 722 which was revised several times and the last revision being Ind. Stb. 1935 no. 451);

These in short were the systems and items of decentralization known from the colonial days, which in fact did not include political autonomy (Soehino, 1995 : 10). This decentralization also gave a special connotation to the word ‘*public interests*’ which at that time should be understood as ‘the interests of the colonial power’ which started with building and expanding the 1) irrigation works and 2) roads as infrastructure for economic and political interest of the Administration. Contrary to these ‘public’ interests, the interests of the people were taken care of by the traditional common laws in the villages, thus village affairs became ‘the *village home rule*’.⁶ This was also another kind of decentralization which was not given by the authorities, but which grew and developed on its own, the village areas being too remote and too far away for the legal arm of the Administration. The administration of the hinterlands occurred via the regents.

As was mentioned in Chapter III on ‘The Amendments to the 1945 Constitution’ the Indonesian State has its roots in the Youth’s Pledge/*Sumpah Pemuda* of the 28th of October 1928. Since then the outcry was officially **Indonesia Merdeka**. Note should also be given to the fact that even in 1906 a culturally oriented organization called ‘*Retno Dumilak*’ came to life and was soon followed by another cultural-political-educational movement named **Boedi Oetomo** at the medical school STOVIA/*School tot Opleiding van Inlandse Artsen* (1908), **Sarekat Islam** (1912) and **Muhammadiyah** in the same year. More politically oriented organization then followed, such as the **Persatuan Bangsa Indonesia/PBI** (Van Leur, 1955 : 348).⁷ Going into the second decade of the 20th centuries a number of youth organizations came into existence, like *the Jong Soematra Bond, Jong Java, Jong Celebes Bond* and

others, which were the organizations that played an important role during the 1928 Youth' Pledge/*Sumpah Pemuda* . In May 1927 the first Indonesian political organization – the *Partai Nasional Indonesia* – was founded by a number of young Indonesian intellectuals just returning from their studies in the Netherlands under the leadership of **Soekarno** (the only one in the group that was not a graduate of a university in Holland, but graduate of the Technical Institution in Bandung) and later became the first president of the Republic of Indonesia.

Dutch writers who had a deep influence on the Indonesian movement were amongst others: Eerde (1922), Haberlandt (1917) and the political anthropologist **B.J. Haga**⁸ who very clearly stressed (made a distinction between) the Indonesian (indigenous) democracy and the so called modern western democracy as introduced by the Dutch. Haga – in his dissertation – apart from describing how the Dutch Administration came into being after taking over the territory previously occupied by the *Vereenigde Oost Indische Compagnie/VOC*⁹ - very sharply distinguished between territories which previously were under the reign of kings, and territories (which were in fact a series of small republics) with periodically chosen 'Main Representatives' under different names in different regions. These small republics usually made concessions to the incoming Dutch companies, but under 'unsatisfactory cooperation' on the Indonesian part, resulted in being either directly confiscated by the VOC since the 17th century, or later on in the 19th – 20th century were confiscated by the Dutch Government under the 'agreements' known as *Short Contract* (actually meaning that the area directly came under jurisdiction of the Colonial Administration*. Usually – if such area could be incorporated into already existing kingdoms – they were added to those territories, becoming a kind of suzerainty under a kingdom, or indirectly under the jurisdiction of the Administration. The kingdoms – although quite often also waged long and tedious wars – in the end signed the '*Long Contract*' thus keeping their internal sovereignty (under conditions of set by the Administration), but being totally deprived of their external (trade and war) relations. One of the last kingdoms to experience this was the Kingdom of Goa/South Sulawesi, under the condition that the territory would totally be incorporated in the territory of the Netherlands Indies, if the family could not bring a male heir to the throne (this happened only in the 80ies of the 20th century)¹⁰. It is generally acknowledged by many historians, that the political rise of the Netherlands since the 17th century was

very closely linked with the territorial occupation of many Indonesian territories, thus making the Netherlands one of the important world powers in the 19th century, even competing with England. Vlekke even goes further by saying that the development of the 'Age of Capitalism' at the end of the 19th century and the first decade of the 20th century was reached through exploration and expansion in other continents including in Africa and the Eastern Islands, which was a trend also carried out by the French and the English (Vlekke, 1959: 316). These expansions were inevitably obtained through the use of political and military powers together with excessive competence in production which naturally resulted into prosperity (Vlekke, 1959: 315-316). The Dutch historian Vlekke even mentioned, how '**the unification of Indonesia**' was closely related with the introduction of capitalism in Indonesia. Trading companies and banks invested in Indonesia since the 1860 (with very intensive investments between 1860 and 1880), which continued until the first decade of the 20th century (in the 1920ies).¹¹

A noted dissertation on the coming into being of the Netherlands' Indies' territories, was the dissertation of **Jean Jaques Sturler** who in 1884 wrote on '*Tractaten met Engeland, Spanje en Portugal over Nederlandsch Indie*'. It explained how the territory of the then Netherland's Indies was obtained through piece by piece contracts, first between the Dutch in the Archipelago and later on through agreements amongst the (European) world powers of that time. As is generally known, the **Muenster-Paderborn/Westphalia** was the first International Law Agreement amongst world powers discussing their territories . Two centuries later – this time as an effect of the **Napoleonic War** at the **Congress of Vienna** (1815, 1824 and 1870) again a number of territories were discussed including the territories in the Archipelago which at that time became a stumbling block between the sea-powers England and the Netherlands (after Spain and Portugal left the arch pelagic scenes since the 19th century).

Since the beginning of the 20th century a number of Dutch Parliamentarians in the *Tweede Kamer* /the Hague – at the peak of the '*Ethical Politics*' – demanded for increased democratization and welfare for the Indonesians. They gave an assignment to **Mr. van Kol** to travel throughout 'the Netherlands Indies' for a period of 12 months and submit his report . In 1903 his famous report was published , in which the appalling situation of the local population in Indonesia was mentioned.

Since no changes took place (on behalf of the economic policies calling Indonesia '*wingewest*' /territory of gain/benefit, all good intentions and efforts of the *Ethical Politics* came to be looked upon only as 'pure cosmetics' for the appalling situation, since in reality, it was only the result of the political strategy to favor capitalism and colonialism. The appalling social and economic situation of the Indonesian of those days were worsened by the introduction of a policy on agriculture known as the '*cultuur stelsel*' which was connected with both forced cultivation of certain crops such as coffee, pepper, palm oil and indigo which favored investments by the estates for their export products. Gradually forced labor was introduced, which in the 20th century was even connected with political rights, such as the right to elect (village heads and their assistants) as well as the right to be elected to fill those positions (Haga, 1924) ¹². Some mining products were also of importance to the Administration, such as the copper minings in Gorontalo/North Sulawesi.

It is through Van Kol's book '*Over onze Kolonien*' (1903) that we can draw the conclusion that the well intended *Ethische Politiek* could not achieve its ideals to improve the socio-economic situation of the Indonesian population, since – especially since the two decades of the 19th century which continued into the 20th century, the Colonial Administration mainly served the economic interests of the Dutch capitalistic world. Thus the end of the 19th century and the break of the 20th century was already categorized as 'the beginning of the industrialization of Indonesia'. The continued opening of new estates brought the Administration in close contact and in conflict with the local population, giving rise to the growth of Indonesian Nationalism.

Siding with the enterprises, the Colonial Administration could not but build the needed economic infrastructure, which was the real beginning of distinguished between public functions/interests and the indigenous interests, which at village level was known as 'village affairs' and was fostered by common laws. Taking the economic interests – which were identical to the interests of the Colonial Administration - it stands to reason that the kingdoms which were close to the shores and seas were the first territories where the kings were clipped in their powers, while at the same time became more involved in the economic trading – which made them the administrative colonial arm in their own territories. In the 20ies gave this situation gave rise and reason to an anti-feudalism attitude on behalf of the national movement.

This stage of conflict of interests between the Administration and the local population then became the seeds for the concepts on decentralization. It was the expansion of irrigation works (to be benefited by the (e)states and road building (for the transportation of the agricultural goods to the harbors), that again gave conflicting connotations to the words ‘village interests’ and ‘public interests’. Contrary to the expansion of the irrigation works and road building which mainly served the interests of the investors and Colonial Administration, ‘village interests’ (such as the determination of days of village feasts, village cleaning, harvests and market days etc) were left at the discretion of the village population themselves ‘since they only served the socio-economic of the village population’. The Administrative interests were called public interests¹³, **which** stands in clear opposition to the **village** interests¹⁴. More autonomy was granted, when the public/state interests were less; on the otherhand, less autonomy was given when more and bigger public/colonial interests were at hand. No wonder that the autonomy became biggest at the most remote areas. On the other hand the kingdoms which – because of their already available (although limited) economic infrastructure – became more and more elements within the trading and banking system, and as its consequence experienced less and less freedom and less political independence, in turn also aroused the nationalism on the part of the nobility.

One important difference was the regulation covering the territories in Java and Bali and territories outside them, known as *Buitengewesten*; this was stipulated in the *Inlandse Staatsregeling/IS* where the Administration had most the economic and political decisions; whereas for areas outside Java and Bali there was the *Inlandse Gemeente Ordonnantie Buitengewesten/IGOB* (1938). Compared to the areas in Java and Bali (where only the kingdoms were recognized as self-governing territories)¹⁵, the *Buitengewesten* (especially in the east of Indonesia) had more independence and freedom to regulate themselves based on their local laws/Hukum Adat¹⁶ and local bonds (known as *autonomie* or even *zelfbestuur*), compared to the areas of Java and Bali where the Colonial Administration had a thorough control of the day-to-day administration, with the appointed village head who since the beginning of the 20th century became the lowest colonial administrator. In Sumatra the villages enjoyed their autonomy too (like the *nagari* in West Sumatra and the *marga* in South Sumatra/Palembang), which means that during the colonial days, indeed autonomy

was known but with different limitations for most areas that have their own local common laws, autonomy was granted to the villages.

In the eastern part of Indonesia like in the Mollucas, the indigenous previous local communities could keep their independence – like the *latus* and the *patis* within their concurring areas – which were then connected through the church organization to the Colonial Administration.¹⁷ Thus in short it can be said that the Colonial Administration even acknowledged autonomy but which was based on the degree of public-colonial interests to the villages in general, and from there on created criteria for direct control, based on local conditions. Thus note should be given, that the expression ‘public interest’ during the colonial days infact contradicts the present connotation of ‘the citizens’/ population’s interests’ when the word ‘public’ only represented the ‘colonial’ interests.

It was lawyer **Prof.Dr. Logemann**¹⁸ who in his speech during the 3rd anniversary of the *Batavia Rechtschool* on the 27th of October 1927 developed his system a.o. on the decentralization for the Colony. In his idealism to prepare ‘**home rule**’ for the Indonesian people which was also the ideal of a number of English outstanding scholars and notable public servants), he gave a place to the Indonesian Common Law/*Hukum Adat*. He made a distinction between functional decentralization (only later known as *deconcentration* and territorial decentralization. As already mentioned before, territorial decentralization was practically (although officially never) given to villages being ‘remote, beyond reach and influence’ or to areas which were obtained by *Short Contracts*, and thus their importance was more of geo-strategic value such as the Moluccas¹⁹; whereas functional decentralization was given to regions such as the kingdoms and other territories obtained by *Long Contract*²⁰. Logemann – who as known later, very much influenced two very respected Indonesian professors of the Faculty of Law of the University of Indonesia, namely **Prof. Mr. Soepomo** and **Prof. Mr. Djoko Soetono**. Logemann stressed the fact, that the communities having their local common laws actually must be looked upon as small republics that took care of the local communities’ limited needs and demands, capable of protecting their community’s interests, keeping law and order and mostly even having **local courts**, although by then they had not yet reached the fullfledged stage; these local republics became **in fact the core of democratic institutions of the Indonesian political mind**. Logemann therefore urged in 1927 for

a Colonial Regulation on Indonesia, which would encompass all the common laws (now known as autonomy) within the colonial legal system. Note should be given that practically the Dutch concept on autonomy was **village autonomy/village home rule**. Again, for the historical development and size of the Javanese and Balinese villages this is practically impossible since the villages were much smaller. On the otherhand, this village autonomy was reasonable for many islands outside Java and Bali , where the villages covered large areas²¹.

Another additional book which had influenced the thinking of the Indonesian Founding Fathers was a.o. the book by the ethnologist **Eerde** (1922).²² He discovered that the area extending from Madagaskar (via the Nicobar Islands in the Gulf of Bengal until West New Guinea) had the same **land laws** and common laws on the use of forests products. But it was mostly the laws on the lands (limited to the Netherlands Indies) that Eerde said : “the Netherlands Indies is a **legal entity and unity**’ (= ‘*Nederlands Indie is een rechtseenheid*’)²³. It stands to reason how this statement could the Indonesian lawyers (who studied in Leiden/the Hague) to decide that Indonesia had an ethnological cause to become a unitary state.

With these short historical backgrounds, it is evident that the Youths’ Pledge (1928) had some very clear concepts about the future of *Indonesia Merdeka* with the prerequisites that it must be :

- (1) a unitary state of Indonesia
- (2) a national legal system incorporating the common laws, automatically giving those communities the autonomy (article 18 of the 1945 Constitution)
- (3) be anti-feudalistic

But at the same time - since economic forces that entered Indonesia in the 1880-ies via foreign and colonial private investments influenced the local people in the hinterlands – these created opposite forces against centralization, requesting for strong economic independence which at times was often interpreted as federalism. This last concept was mostly nourished by the Dutch business world, which was trying to escape as much as possible the interference of the Colonial Administration. After 1945 this difference of concepts became stronger amongst Indonesians themselves: those intellectuals who were more scientifically and economically interested, had less interest for the masses and therefore had a stronger inclination for federalism, whereas the legally trained intellectuals with a legal-territorial approach –

were more mass-oriented (and thus closer to the religious nationalists movement). This last group was very much influenced by Eerde's legal ethnological theory, and was in favour of the unitary state. In 1945 it was the last mentioned approach, which had the majority support, possibly also because of Soekarno's charisma.

More objective analysis will explain that the Dutch Crown very probably would not have given in to Indonesia's recognition in 1949, if it were not for **Mohammad Hatta** who led the Indonesian Delegation; the compromise reached on the 27th of December 1949 was the Constitution of the Federal Republic of Indonesia/Republik Indonesia Serikat/RIS. For those favoring the unitary state, this agreement was looked upon as a political 'interphase' or stepping stone for the next step. Article 43 and article 44 of the 1949-RIS Constitution did mention the possibility – based on the principle of the sovereignty of the people in the regional states – that the population could decide for an integrations with other regional states to end the federal state, yet these integration should take place via a (to be formulated) Federal state, which would take too long a time.

The political steps taken in order to be able to return the unitary state of the Republic Indonesia, took place in two stages: Stage one consisted of by a side-consensus known as the **Inter-Indonesia Conferences** held in 1) Yogyakarta, from July to August 1949 and 2) in Scheveningen/the Netherlands on the 29th of October 1949 during the *Bijeenkomst Federaal Overleg/Meeting for Federal Resolution*. This last mentioned meeting was attended by:

- (1) the delegates of the Republic of Indonesia to the The Hague Round Table Conference;
- (2) delegates from the united in the BFO;
- (3) delegates from West Kalimantan;
- (4) Eastern Indonesia;
- (5) the NIT;
- (6) Madura;
- (7) Banjar;
- (8) Bangka;
- (9) Belitung;
- (10) the Larger Dayak Area;
- (11) Central Java;
- (12) East Java;
- (13) Southeast Kalimantan;
- (14) Pasundan/West Java;
- (15) Riau;
- (16) South Sumatra ;
- (17) Eastern Sumatera²⁴

These meetings agreed in Scheveningen into on the 29th of October, 1949 namely that through paragraph 43 and 44 of the Federal Republic, the federate states could determine for a unification to the Republic of Indonesia, which indeed took place based on the RIS-Constitution-1949, in such a way that on the 17th of August 1950 a new Constitution on the unitary state of the Republic of Indonesia was announced. Indeed, this Constitution can be looked upon as the most ideal constitution and the unitary state : it was indeed a parliamentary state, but it did away with the federative element. It is to be regretted that by 1959 Soekarno became impatient – and influenced by the world situation and pressure of the Cold War – the 1945 Constitution was recalled into life, although this decree must be categorized as unconstitutional.

Since this chapter does not mean to discuss the struggle between federalism and centralism during the years 1956 – 1966, which later on was also strongly mixed with an anti-communist approach, the downfall of Soekarno should not come as a surprise. Taking aside the fact whether or not the CIA was involved, one thing can be said for certain: no political discourse between the civilians and their parties could come to an open conflict, as long as the groups involved are not military involved. Another experience made by the modern history of Indonesia is, that no president can continue to reign if he or she does not enjoy the support of the military, especially the support of the army. Thus, the take over in 1966 very clearly showed that as soon as the armies in the conflict surrendered to the Soeharto regime – based on the trust of his anti-communist convictions²⁵ --as soon as that the demands for federalism also diminished. Another interpretation is also, that federalism was demanded by a number of regions (where the Moslem or Christian religions were still prevailant in daily life) - when they discovered that Soekarno was too close to the communists – and demanded for a separation from the republic as a solution. Indeed – for better or worse – the steel arm under the general’s smile – managed to keep the unity for the state between 1996 – 1997. Alas, for whatever reason, paragraph 18 of the Constitution 1945 was totally neglected or purposefully ‘forgotten’ through the creation of Law no. 5/1975 on Local Government and Law no. 5/1979 on Village Administration. Soeharto’s predecessor Habibie, did not have the dominating influence which Soeharto had, and thus – especially because of the Total Crisis – the unitary state was challenged again. This time the *raison d’etre* often used was the

unequal distribution of wealth and the incapacity of the administration of Habibie and later of Abdurrachman Wahid to come to grips with the problems of the Crisis and the Reformation. Therefore a very quick annulments of Law no. 5/1975 and Law no. 5/1979 has demanded and the creation of a Law on Autonomy, taking paragraph 18 of the Constitution-1945 as its basis. Old wounds were re-opened, as happened the case of Aceh – which, as a sign of reconciliation received its Law no. 44/1999²⁶ - and many other regencies requesting for a provincial status for the sake of the ‘a better share of the cake of welfare’²⁷. In very rough lines the description above has tried to inform about some core problems of the past that should be taken into consideration when analyzing Law no. 22/1999 and its application since 2001 (by Congress Resolution, 2000).

II. Law no. 22/1999 and its Basic Thoughts

Discussions on the Indonesian decentralization (1998) cannot be complete without seeking its roots in article 18 of the 1945 Constitution. Then again it was the Resolution of Congress no. XV/MPR/1998 that – within the spirit of Reformation restructured the total political and administrative foundations of the Indonesian state in all fields of life, triggered by the Total Crisis and the end of the Soeharto era. In this context the word ‘decentralization’ was part and parcel of democratic life in the regions. Therefore, Resolution no. XV/MPR 1999 called into life *‘The Realization of Decentralization in the Regions: Its regulations on the sharing of national natural resources in a just way and a Balanced Finance are arranged between the Central- and Regional Governments.*²⁸ The main contents of that Resolution was the realization of a regional autonomy with a factual (in the widest sense of the word) largest sense of autonomy combined with accountability to be carried out in the regions, in proportionality of its regulations, just sharing of the benefits of the national natural resources, and a balance of finances between the Central Government and the Regions. At the same time, the application of regional autonomy is carried out based on the democratic principles and the participation of all members of society. This would enable the realization of the principles of just distribution [when sharing] the [opportunities] to benefit from the local potentials inspire of the pluralities in the regions (Bratakusumah and Solihin, 2001 : 2). Law no. 22/1999 then should be seen

as the interpretation of the principles as laid down in the Resolution no. XV/MPR/1998.²⁹ At the same time Resolution no. XV/MPR/1998 discussed the balanced sharing of finances between the Central-and Local Governments³⁰. The principles laid down by Regulation no. XV/MPR/1998 were:

- the enactments of local autonomy by giving large, real competencies and proportional responsibilities to the regions;
- the enactments of local autonomy that has to be based on the principles of democracy, taking into consideration the plurality of the regions;
- regulations on the sharing and benefiting from national resources between the central government and the regions must to be justly carried out for the sake of the welfare of societies in the regions and the nation as a whole;
- balancing the incomes and expenditures between the regions must be carried out by taking notice of the local [resources] potentialities, the extension of the regions, its geography, number of population and the level of [average] income of the local people;
- the Local Government has the competency to manage the local national resources and to manage the sustainability of the environment³¹;

At the same time the same Congress (1998) demanded for:

- the abolishment of the *Dwi-fungsi*/Double function of the Military;
- an investigation on the wealth of the fallen president Soeharto, his family and friends;
- priorities for setting the foundations for democracy and other foundations like the political parties³², the Press Law no. 40/1999 which revoked Press Law no. 21/1982,³³
- release of the political prisoners (Estiko and Hantoro, 2000 : 75 – 78);

So, the decentralization process during the transitional period was looked upon as being part and parcel of the democratization process.

One important step towards the **supremacy of law/judicial power** was the coming into existence of Law no. 35/1999 which revoked Law no. 14/1970 on the Principles on Competency of the Judges; under this Law no. 14/1970 the judges were responsible to two institutions at the same time, being the Supreme Court/*Mahkamah Agung* and the Ministry of Justice; whereas under Law no. 35/1999 judges are only and directly under the supervision of the Supreme Court (Estiko-Hantoro, 2000: 78).

Thus Law no. 22/1999 was a reflection of the deep concern of Congress (1998, 1999) about the realization of decentralization through Regional Autonomy as a legal tool for the empowerment of the local population by developing the capability of taking initiatives and growing creativity, which would then lead to an increased active

participation of the local citizens in the works of the Local Parliament/Representation Body and thus increasing its level and quality of outputs. Within these thoughts and hopes the full autonomy was given to the regencies and towns. This decision was taken in order to undo the negative effects of the past Law no. 5/1974 which made the regencies and towns, the administrative units of the Central Government, thus losing their competency to develop policies which would be more in congruence with local needs and aspirations.

Using the political and legal situation for the regencies (Law no. 5/1974), Law no. 22/1999 took away the 'dual function' of the regencies and replaced at the provincial level; thus the provinces – although being autonomies (without really having 'territories of their own' are at the same time the administrative deconcentrated units of the Central Government, was carry out the delegated Central Government authorities. Now, based on Law no. 22/1999 the province and the regencies have no more hierarchial power relations.

The powers of the province as an administrative unit of the Central Government and an 'autonomous' power in the province, are:

- to foster good relations between the Central Government and the regencies within the frame of the Unitary State of the Republic of Indonesia;
- to ensure real autonomy amongst the regencies and towns, and in case of inability [temporary] to act on behalf of the regencies;
- to carry out the responsibilities and powers delegated to the provinces – within the frame of deconcentration (Bratakusumah and Solihin, 2001 : 2-3);

Inspite of point 3) above, it should always be kept in mind that by 'the widest autonomy' is understood the wide competency of the autonomous regions to carry out governmental policies (and their concurrent local laws/bylaws) in all fields, except in the excluded competencies in the fields of foreign policy, defence, judiciary, monetary and financial matters and religious affairs. Other competencies, which are included in the word 'full autonomy', are the usual governmental competencies, being planning, operations, supervision and control, management and evaluation. All these competencies are needed in order to enliven and develop life in the regions. At the same time, the Local Governments' accountabilities are the other side of the competencies obtained by the Local Governments under the principles of democratic autonomous governing which aims at a better life for the regions , a.o. by increasing public and social services on their own for the sake of the welfare of the region. Thus

the rule of law and justice, distribution of resources and incomes, a harmonious inter-regency relations and relations between the Central Government and the regions within the unitary state.

Compared to the regencies and towns, **the autonomy of the provinces are more limited** since the interference of the provinces in the affairs of the regencies and towns is limited to those competencies which cannot yet be carried out yet by the regencies and towns (Bratakusumah and Solihin, 2001: 3-4).

Competencies and activities within the autonomy described by Law no. 22/199 are:

- (1) autonomy is carried out and based on the principles of democracy, rule of law and justice, distribution of potential resources and incomes, taking notice of the plurality of and within the regions;
- (2) autonomy is carried out as factual activities, based on the principles of 'full fledged autonomy' and accountability;
- (3) the execution of the full fledged autonomy takes place at the regencies and towns level, whereas the provinces only enjoy limited autonomy ;
- (4) the application of the autonomy has to be within the frame of the 1945-Constitution , in order to secure harmonious inter-regencies/towns relations and relations between the Central Government and the regions;
- (5) the implementation of autonomy has to increase the autonomous capability of the local regions , for which reason the (delegated-hierarchical) administrative function of the regencies and towns towards the Central Government was deleted by Law no. 22/1999;
- (6) those areas which have not reached the legal-political level of autonomous areas ³⁴ such as authority bodies/*Badan Otorita*, harbour compounds, new settlement areas, industrial estates, agricultural estates, mining estates, forests estates, new towns, tourism estates, and new estates of other activities are under the special governmental regulations under the autonomy of the province;
- (7) regional autonomy is hoped to increase the local capability to carry out the functions of local parliaments, in their functions of legislation, control and budgeting, in support of the local autonomy;
- (8) the deconcentration-administrative function of the province is placed at the provincial level to carry out a number of Central Government authorities, delegated to the Governor;
- (9) the supporting obligations/tugas pembantuan is looked upon as a reciprocal activity between the Central Government and the Regions, but also support by the Central Government and Province to the villages, which can include supportive finances, infrastructure and the development of the local human resources, which are accountable (Bratakusumah and Solihin, 2001 : 4-5);

Laws which directly influence the competencies of the regions are:

- Law no. 4/1999 on the Structure and Status of Congress/MPR and Parliament/DPR;
- Law no 22/1999 on Local Government;

- Law no. 25/1999 on the Financial Balance between the Central Government and Regions;
- Law no. 44/1999 on the Execution of the Special [Competencies] of the Province of Aceh Nangroe Darrusalam;
- Law no. 34/1999 on the Provincial Government of the Special Region of Jakarta – the Capital of the Republic of Indonesia
- A number of laws on eleven regions/*kabupatens* and after the existence of Law no. 22/1999 enabling the existence of three new provinces being Central Irian Jaya, (Estiko-Hantoro, 2000: 78 – 79);

Most of these changes had been carried out by the Transitional Government, which only lasted 512 days (Estiko-Hantoro, 2000: 79)

The Indonesian Constitution-1945 in its paragraph o. 18 (Chapter VI) on Local Government says:

‘The territory of Indonesia is sub-divided into large and small regions, where governmental structure will be determined by law, taking into consideration the principles of consensus/ *musyawarah* within the system of state government, and the indigenous rights of the areas with special characteristics’
35

The explanation to paragraph 18 says:

‘I. Because the Indonesian State is a unitary state, Indonesia will not have regions within its territory which also have the status of states;
The territory of Indonesia is sub-divided into provinces, and the provinces [again] subdivided into smaller regions;
In autonomous territories (territory/*streek* and local common-law-community-units/*locale rechtsgemeenschappen*) or simply into plain administrative units; all will be determined by law;
In autonomous areas, local representative bodies will be called into life, because also in the regions the government system will be based upon consensus;

II. Within the territory of the Republic of Indonesia there are circa 250 regions with self-administrative units of area/*zelf besturendelandschappen* and racial community group groups areas/ *Volksgemeenschappen* such the *desa* in Java and Bali ³⁶, *nagari* in the Minangkabau, *dusun* and *marga* in Palembang and so on. These units or area have their indigenous structures and therefore can be looked upon as special areas;
The state of the Republic of Indonesia respects such special units or area and all regulations by the state on such special units or area will have to consider the indigenous character of them’ ³⁷

Based on this article of the Constitution, Congress(1998) made its Resolution no. XV/MPR/1998 on Local Autonomy for the Regions, giving wide and real

competencies together with its accompanying accountability to the Regions; this Resolution also authorized for a just regulation on the sharing of profits on the natural resources within the framework of the unitary state. It was the responsibility of Law no. 25/1999 to regulate the just sharing of profits on national natural resources. Taking the socio-cultural plurality of the regions, care was taken that the local government (based on the local autonomy) take heed of the democratic principles of the state in general but also its responsibility for a just distribution of welfare in the regions. It was hoped that because of the large competencies and reduced competition with the central government, the autonomy would automatically increase the capabilities and competencies of local human resources, which would be achieved through development of the creativity and role of Local Parliament. The creativity to be developed has to be inspired by the local people's aspirations and initiatives.

Reading article 1 no. o of Law no. 22/1999 gives a picture of the dominant political climate at the beginning of the Reformation, which formulates as follows:

‘o. The Village/*Desa* or a similar unit known under different names but for short to be called *Desa* [here], is a legal-communal bond of a community³⁸ which has competencies to regulate and administer the interests of its local community based on its origins/*asal-usul* and local customs, which is acknowledged by the National Governmental System and [its territory is] within the regency.

p. The territory of villages which has as its main activity in the cultivation of agriculture, including the management of the [local] natural resources, at the same time functioning as place of settlement, carrying out local administrative activities, social services and economic activities (article 1, o);

Contrary to ‘village’ is the definition of the territory of the town/*kota* being : ‘Territory of the town, is a territory with non-agricultural activities as its main activity, with a conjunctive use of the territory as place of settlement, town activities, centralization and distribution of governmental services, social services and economic activities (article 1.q).

Prof. H.A.W. Widjaja (2001) – taking Southern Sumatra/Palembang as a case study - gives a short comparison of the status of the village/*desa/marga* in his book³⁹ as follows:

- in 1965, Law no. 19/1965 was issued which gave equal rights and responsibilities to all villages within Indonesia (comparing it with the Colonial Regulation distinguishing between villages on Java, Madura and Bali, and the Regions Outside Java [who in fact enjoyed a larger autonomy];

- because of the very unclear stipulations given by Law no 19/1965, the South Sumatran Government in cooperation with the Local Parliament issued Local Regulation/Bye law no. 2/1969 on the Principles of Assignments and Competencies of the Local Government at *Marga* level;
- Law no. 5/1979, which was issued later which – on **indigenous common law-communities** only distributed to the *marga* the competencies to take care of their common-laws (based on Government Regulations); also ordered the name *desa* to be used across the territory of the Republic of Indonesia, which was one of the very first opposition against the Central Government;
- the competencies which flow from Law no. 22/1999 to the villages, are according to Widjaja as follows :
 - (a) the autonomous administration based on local common law/**Hukum Adat**
 - (b) police competencies (alas, Law no. 3/2002 on the Police Force of the Republic of Indonesia did not accommodate this wish or assumption);
 - (c) Further nourishing of the Common Law together with the revival of the **Common Law/Adat Law Courts** (this assumption is still under discussion and under way but has not passed the stage of draft law yet);
 - (d) Rights of the Common Laws/**Hal Ulayat** , meaning that the **common-law-community** has a local competency to keep law and order in their community and environment based on their common laws;the community has the freedom to use the open **community lands**, build hamlets/*dusun* as sub-units under the village/*marga*, may use the woods as material to build their houses and benefit from the forests products;
 - (e) Enjoy the rights to collect the *marga* resources, such as *marga taxes*; land tenure, build houses on the community grounds, use the *marga* sands ⁴⁰, open local markets, put taxes on *marga* forests logs, carry out social services for weddings, have the rights to sell locally bred cattle, etc.
 - (f) If during the colonial days, the village autonomous administration (usually assigned with overseeing the extension of the irrigation works and road building) is prevented from interfering in the local common laws- whose sustainability is the responsibility of the Common Law Institutions/*Lembaga Adat* or the responsibility of the Common Law Chief/*Pemangku Adat* – the *Marga Government* on the other hand, based on Law no. 22/1999 has the competencies to do both traditional assignments as well as carry out modern administrative activities and responsibilities, and thus the common laws can develop according according to the new demands and conditions (Widjaja, 2001 : 7- 8);
 - (g) The competencies and powers of the village government based on indigenous rights is based on:
 - (1) **Indigenous Communal Rights**, article 3 of Law on the Agrarian Principles no. 1/1960;the rights to benefit from the forests products (article 17 of Law no. 5/1967);
 - (2) the rights to collect the forests products (article 6 of Government Regulations/*peraturan pemerintah* no. 21/1971) ;
 - (h) **contrary to the traditional rights above, the village administration has no rights to benefit from the above resources** (Widjaja, 2001 : 8)

Based Law no. 22/1999 Widjaja is of the opinion that there are distinct there are three (3) formulations of that law that can be used for the village/*Marga Administration* :

- (1) article 101 e on the responsibility of the village head to mediate in conflicts among the village population; which in its complete version the article says: The assignments and responsibilities of the village head are :
 - (a) to lead the operation of the Village Administration;
 - (b) to develop the life of the village community
 - (c) to develop the village economy
 - (d) keep security and order amongst the village community
 - (e) mediate and reconcile the conflicts amongst the village population
 - (f) represent his/her village in or outside Courts and is allowed to appoint someone as his representative;
- (2) article 104 on the Village Representation Institution/*Badan Perwakilan Marga* whose function is 'to protect the common laws, to make village regulations, to tap and channel local people's aspirations, and control the activities of the Village administration' (article 104 of Law no. 22/1999);
- (3) article 111 sub-article (1) and (2) of Law no. 22/1999 which legally obligates everybody to adhere to the indigenous origins and common laws of the villages;

These then are the basic items for a democratic life at village level as granted by Law no. 22/1999 whose articles very much took to heart the destruction of village life, especially of the traditional common-law-communities living in the remote areas and inlands of Indonesia, especially those surrounding forests which are so much sought after for their logs to be exported.

The Transitional Period towards Decentralization (2001-2002) was applied to a number of important activities to be transferred to the provinces and regions on matters of:

- (1) Competencies and Institutions
 - (a) all deconcentration units (provincial departmental representatives/KanWil) in the provinces experienced a transfer of status and became working units of the Provincial Government, except for the five Central Governmental fields of competencies, not included in the fields to be decentralized based on Law no. 22/1999;
 - (b) at the regencies levels the same happened to the departmental units at regency/*kabupaten* level KanDep and UPT) excluding the five fields of Central Governmental competencies, not to be decentralized;
 - (c) the UPTs – operational – technical units of Central – Governmental -non-departmental institutions – through case-by-case approach were coordinated for adjustment to local decentralized conditions by Presidential Decree no. 52/2000;

- (d) at the provincial levels, possibilities were not excluded for the deconcentrated units of the Central Government to coordinate with the Provincial Units/*Dinas Propinsi*;
- (e) provincial representatives of the central departments with very large competencies (surpassing the responsibilities and capabilities of the previous Provincial Units could be changed into special or new Provincial Units, or integrated into existing Provincial Units; these new units are granted autonomy for their specialized fields since there were not known previously for the provinces;
- (f) integration of the functions and inter-units of previously deconcentrated and present decentralized units, is now made possible;
- (g) the Provincial Units (having decentralized competencies) could also be equipped with deconcentrated powers for different (but interrelated) activities;
- (h) activities which had not been decided for its assignment to be either at the provincial or regency level (like the testing of motor cars) were given one year of transition for decision;
- (i) the integration of different organizational unit and/or institutions takes place by Local Government Law/Bylaws;
- (j) other additional fields to be settled during the Transitional Period were:
 - (1) problems of transfer of Central Government officials to become officials of the Provincial cq regency Governments;
 - (2) public services by the Local Government
 - (3) regulation of assets from the Central Government to be transferred to the local governments, based on the transferred powers delegated to the decentralized territories;
 - (4) balance of finances between the local and central government;
 - (5) items concerning the power of the villages :
 - (a) adjustment of the laws concerning the villages and village life in general;
 - (b) status and activities of village state-businesses;
 - (c) the change of status from village to become units of the administration at village level/*kelurahan*;
 - (d) status of the village chief to become the village head as the lowest administrative officer (Widjaja, 2002 : 2-7)⁴¹;

Thus Law no. 22/1999 in many ways was a first effort to correct and a reaction to undo what was stipulated in Law no. 1974. The dominance of the Central Government was felt to be too strong on the local regions and even increased centralization, although in fact the interference of the Central Government was too closely related to the autonomy and decentralization, since political and economic interests cannot be detached from local interests.

As a political phenomena, decentralization was needed to meet the new demands faced by the regions (internationalization and local supervision). At the same time, the more the regions could take care of themselves, the less active the Central Government is in local affairs, the more it can concentrate on macro international

issues of political economic relations. At the same time, the local governments – by being and becoming more and more self-reliant – will have better capacities in:

- a) improving the conditions and life in the regions;
- b) identify and develop the local potential resources for the needed increase of local income;
- c) regions will be in a better position to determine their economic expenditures
- d) increase the local manpower capabilities
- e) reach a higher rate of output
- f) increase local governmental transparency and accountability to the public
(Widjaja, 2000 : 7)

Also the sharing of funds between the province and the regencies, favored the provinces more than the regencies, giving economic and political benefits to the province and disfavoring the regencies. The decentralization which was officially given to the regions (based on law no. 5/1974 and Law no. 5/1979) were not accompanied by the handing-over of competencies from the provinces to the regencies, which especially concern economic and financial strategies which were either had been kept at the provincial or even at central level; some competencies which had been officially ‘transferred’ to the regions were in fact refused by ‘treating them as **sectoral** competencies, and returned those competencies to the Central Government through the vertical hierarchy.

In order to speed up the process of decentralization, the Congress of the year 1999 and the year 2000 issued Congress Resolution no. IV/MPR/1999, both of which ordered the Implementation of Law no. 22/1999 on Local Government which called into life a Central Working Team/*Team Kerja* and at the same time the implementation of Law no. 25/1999 on The Balance of Finances between the Central and Local Governments, to be executed based on the Presidential Decree no. 157/2000. It was the assignment to the Central Government Team:

- (1) to formulate and develop concepts for the needed strategic policies for Law no. 22/1999 and Law no. 25/1999 , including the institutional structure for the Local Government;
- (2) determine the following stages and priorities for the application of both said laws;
- (3) to monitor and facilitate the formulation of regulations for the application of those laws by interrelated institutions;
- (4) to provide consultations and socialization of the two said laws and their application;

- (5) to determine and decide on steps needed to speed up and smoothen the execution of local decentralization, including activities of transfer of personnel, equipment and funds, and documents and archives from the Central Government to the Local Government;
- (6) increase the capabilities of the regions to execute the activities previously carried out by the Central Government, thus increasing the Local Government's accountability capability;
- (7) Periodically report the results of the Working Team to the President;
- (8) The Working team is supported by a number of sub-teams specialized in different fields of transfer of competencies from the Central Government to the Local Government (Widjaja, 2000: 7 – 12).
- (9) As a reaction to this situation, the Law no. 22/1999 in its article no 7 had as its starting point the limitation of competencies of the Central Government in the regions by using paragraph 18 of the 1945 Constitution as the original source of competencies, that only such activities which cannot be carried out by the local government (like foreign policy, defence, finance, judicial system and religious-affairs were left as the sole competencies of the Central Government. Chapter IV / Local Competencies/paragraph 7/sub-paragraph (1) mentions:

‘(1) The competencies of the regions cover the competencies [needed] in all fields of governing and in all other fields, except for those competencies in the fields of foreign policies, defence, judiciary, monetary and financial, as well as religious affairs;

(2) ‘All other fields’ such as meant in sub-paragraph (1) covers policies in national planning and the management of macro-national development, the balance of finances, the state administrative system and the state economic institutions, development and the empowering of the human resources, the exploitation of natural resources and [the use and development] of strategic technologies, conservation [of the natural resources and environment] and national standardization’;

Some **dubious articles** are a.o **article 9** which gives ‘autonomy’ to the provinces. Question should be asked: is this the **deconcentrated power** or the territorial decentralization ? Since the autonomous regencies are autonomous territories within the province, **how can a province still have an autonomy in the same territory as the regencies** ? Since territorial autonomy is real for the regencies, **at the utmost the competencies of the province towards the regencies are of supervision :**

- 1) **whether the five competencies of the Central Government are well carried out in the province;**
- 2) **doing intra-regencies coordination for the purpose of a harmonious intra – regencies development within the province;**
- 3) **carry out regulations and activities thought needed when:**

- (a) the regencies are not yet able to carry out their autonomy to the full;
- (b) the Central Government has not given any directives and regulations on a needed activity (**article 9 sub-paragraph (2)**);

Thus the dubious formulation of the Law no. 5/1974 and Law no. 5/1979 on the ‘dual function’ – e.g the past regencies and now the present provinces having a) autonomy in regulating the area; b) being an administrative unit of the vertical line of the Central Government - is now transferred to the provinces which have given cause to a hesitance at the provincial level to act vigorously on the regencies, and hesistance to obey on the side of the regencies.

Another unclear burden is article 13 of the Law no. 22/1999 that places an extra burden on the autonomous areas (regencies provinces ?) on the responsibility to give help in matters of finances, infrastructure and human resources development with the responsibility of accountability to the Central Government (article 13[1]). The additional problem hereto is, that on this so dubious ‘responsibility to help’ (article 13 (2)) are add the wording ‘ On each assignment such as meant in sub-article (1) a government regulation will be given’. As is generally known the ‘government regulations’ can very often not only deviate from the original law, but often contradicts this, which again gives reason for the regions and provinces to doubt the Central Government’s sincerity on the question of decentralization.

If paragraph 3 needs some clarification on ‘the sharing of the ‘sea-territories’, article 9 (sub-paragraph (2) and article 13 {sub paragraph (1) , (2) need improvements.

These hesitations as reflected by a number of paragraphs and/or sub-paragraphs only explain, that - although political idealism went emotional – the realities brought people back to earth again ; politically a number of competencies were gladly handed over to the regencies – again with the provinces in a dubious political position – but realities demanded a more active role of the provinces into the regencies’ affairs. Probably the exploitation of the human resources – which competency is not transferred to the provinces the less to the regencies – still reflects the clash of interests between the Central Government versus the Local Governments.

If article 7 sub-article (1) gives a dubious competency to the provinces (which is the competence of the province within the province), and at the same time linking the five (5) Central-Government prerogative - activities to the activities of the

province/intra-regencies, the confusion – and of course also aversion/distrust towards the province and the Central Government – on the side of the regencies towards the province is naturally to be sought in the past experience, namely :

- that the territory of the Republic of Indonesia was sub-divided into regencies/*kabupatens* and town/*kotamadya* giving to these territories a local autonomy but at the same time burdened them with the administrative function within the vertical-central hierarchy;
- the experience of more than 30 years had shown that the ‘dual function’ of the regencies much more favoured the centralized administrative purposes, than the autonomy and its accountability; the regencies were not able to take decisions, without previously having obtained the needed directives from the central government (Estiko-Hantoro, 2000 : 80).

This experience was taken at heart during the formulation of Law no. 22/1999 and thus since its existence, only the provinces kept the hierarchical states from the central government, whereas the regencies were freed from their administrative accountability to the central government. Between the province and the regencies/towns based on Law no. 22/1999 (paragraph 2) there exists no hierarchical relations (Estiko-Hantoro, 2000: 80-81), in other words , full autonomy is given to the regencies and towns and its administrative functions and ties to the Central Government through the province were given up.

Another extremity of Law no. 22/1999 was that paragraph 3 ‘sub-divides’ the seas being the competency of the province as far as 12 sea miles from the coast (during low tide)⁴², whereas 1/3 of the provincial sea-territory is the resources allocated to the regencies ((Estiko-Hantoro, 2000: 81)⁴³. These stipulations seemed to have been thought necessary since the sea-products are also important natural-economic national resources, but which also are of importance for the local population.⁴⁴

As was said before, when discussing autonomy and increased decentralization – although after the existence of Law no. 22/1999 because one cannot use the expressions of the past anymore, like ‘regional level I’ for the province and ‘region level II’ for the regencies/*kabupatens* , each time at the back of the mind it should also be taken into consideration that :

- (a) decentralization at the provincial level is in the nature of deconcentration, meaning that the functional autonomy in the province e.g. has a delegated authority from the central government, becoming limited in scope of

- competencies owned, since a decision taken by a governor has only limited validity to the relevant province;
- (b) decentralization at regency/kabupaten on the otherhand has derived its competence of self-government from the people who have directly chosen the regent/bupati and its regional parliament/DPRD; thus a bupati in coordination with his or her local parliament can make decisions **not yet decided upon or regulated by the central government.** In case of conflict between the governor and the regent cq local Parliament, the central government has to make a decision/dictum;

A great deal of criticism has been written and said on the application of Law no. 22/1999, which indeed for many regions had been disastrous : the regents refuse to attend the (coordinating and controlling) meeting of the governor (at provincial level); another regent in another province refuses to hold sessions, because it refuses the newly appointed governor (such as chosen from two candidates and appointed by the Central Government). The first example shows near anarchy and misuse and misunderstanding of democracy and autonomy, with the regent feeling himself above the governor , as being directly appointed by the local regency-voters; the second example show that before deciding, the Central Government has to do away with its priority to choose the governor; instead it should better limit its competencies to approve and appoint the governor instead of choosing between two candidates, which still shows the more powerful overhand of the Central Government.

The confusion has been caused by both sides : the Central Government as well as the Local autonomous Governments. Regions that had known the status of autonomy before – like the case of Palembang – have it easier now to determine which way is best for the region, after the negative experience with Law no. 5/1975 and Law no 5/1979. The fortunate example can be found in the case of Palembang/Sumatra : first of all it was part of the colonial *Buitengewesten* (= being outside of Java and Bali) and therefore since colonial days already enjoyed and practiced some degree of autonomy based on article 118 jo. Article 128 of the *Inlandsche Reglementen*. These previous privileges even since the colonial days were amongst others:

- the local population could live under a self-government system by their chosen local chiefs as village heads;
- the *Inlandsche Gemeente Ordonnantie Buitengewesten* /IN 1938 no. 490 which came into life after the first of January 1939 based on IN 1938 no. 681 which ordained that the indigenous name of the local community unit was *marga* or *haminte/gemeente*⁴⁵ by law⁴⁶ (Widjaja, 2001 : 4-5);

- other names known for ‘village’ through Indonesia are amongst others : *kampung* (Sumatera and Kalimantan), *mukim* (Aceh), *nagari, desa* (Java), *temenggungan* (Kalimantan) , *wanua/distrik/pekasaan* (North Sulawesi), *banjar/lomblan* (Bali and Lombok), *manoa/laraingu/kenaiian/kefeteran/kedaton/kedaluhan* (Nusa Tenggara Timur/Easter-Smaller-Sunda-Islands), *soa/hoana/negeri/ negorij* (Moluccas)(Soehirno, 1995 : 13-14), *walelagama* (Irian Jaya/Papua Highlands – survey by Astrid S. Susanto-Sunario, 1999);

Several differences between Law no. 22/1999 and decentralization of the colonial days, is that the *swaprajas/ zelfbesturende gebieden* had been annulled (Soehirno, 1995: 14), which position is entirely the opposite of the village, which received a higher recognition in the Indonesian legal-administrative system. Yet, some accommodations based on local demands had been made amongst others by creating Law no.44/1999 on the Special Province of Aceh Nangroe Darrusalam ⁴⁷ and Law on the Province of Papua.

Professor **Widjaja** even mentioned how – ten years before Law no. 5/1975 and Law n. 5/1979 namely that Law no. 19/1965 brought the first confusion in the village affairs, by equal levelling and treatment of the *marga* and *haminte* as *desapraja* and *common law/adat autnomy units* (2001: 5). In this confusion the Local Parliament of the Province issued a Resolution no. 2/DPRGR/1969 on the ‘Assignments and Basic Competencies of the *Marga* Self-Government’ which lasted until the issue of Law no. 5/1979 on Village Government, which ordained that regulation on the Customary and Common Law would be determined by Government Regulation (2001: 5). The protests made during the Reformation demanded a correction to Law no. 5/1975 and Law no. 5/1979 standardizing all villages in name, structure, and status of the Village Government, which is contrary to paragraph 18, which respected the indigenous special characteristics of villages in a number of regions.

It was Law no. 22/1999 article 9 which rehabilitated those villages known under different names beside *desa*, to choose their own territorial names according to indigenous local common laws, thus acknowledging the variety and multiplicity of the village cultural backgrounds, the community’s customary ways of village participation, the indigenous local autonomy and system of democracy (which even by the colonial Dutch Administration was adhered to) was rehabilitated, and enabled the improvement of capabilities of the local inhabitants and with it taking their

empowerment into consideration. With the Law no. 22/1999 the province of South Sumatra/Palembang sees its chances for improvement of the *Marga Government* itself (2001: 6).

This confidence – based on professor Widaja’s analysis is based on:

- (1) the *marga* as an indigenous local bond consists of a confederation of territorial community/*streekgemeenschap*⁴⁸ comprising number of hamlets or sub-villages/*dusun*. A communal bond at village level is known as a local community/*localegemeenschap* consisting of the mentioned hamlets. The *marga* is the village bond to the village territory. The competencies of such village ‘home rule’ are:
 - (a) autonomy based on Common Laws
 - (b) having a village-police
 - (c) further cultivate the common laws
 - (d) having a village-common- law-court
 - (e) having village territory known as *tanah ulayat* and competencies to administer the lands (uncultivated lands can be used by permission of the village population; also uncultivated lands and forests and communal resources, the use of which are regulated properly based on common law;
 - (f) the right to benefit from local natural resources (in Palembang this is owned by the *marga*) which are communal resources of income through the same communal procedure as land tenure; for the modern *marga* the village market and forests products were communally regulated; the competency to legalize marriages, take care of cattle and its market (2001 : 7); these rights are still the traditional rights of the village, also according to Law no. 22/1999;
- (2) during the colonial days the administration by the village (with the village head as the lowest administrator) the competencies of the public/state interests were separated from the communal competencies; this totally differs from Law no. 22/1999 which combines the two competencies in one institution : the village meeting (= acting like the village ‘parliament’ with the headman/village head being the chosen representative of the village to the outside world); during the colonial days the common law hierarchy went parallel with the colonial administration hierarchy up to the provincial level; Law no. 22/1999 limits the common law activities as far as its real positive existence (sometimes it can be at the district/*kecamatan* level and it is still a question whether such a traditional common law hierarchy is still to be found at levels above village level). According to Law no 22/199 the **Marga Administration** is assigned with the traditional common law assignments as well as executing the decentralized competencies (2001: 7);
- (3) based on the Agrarian Law n.1/1960 paragraph 3, the lands of the common law villages can continue to be regulated according to the existing local common laws;
- (4) the rights to make profit from the forests products (paragraph 17 of Law no. 5/1967)

- (5) the rights to use and benefit from the forest products (paragraph 6 from the Government Regulation no. 21/1971); (2001: 8)
- (6) the *Marga* Administration at the same time takes care and cultivates the local common laws, which includes:
 - (a) paragraph 101 e : the competencies of the village headman is to mediate in conflicts within the village;
 - (b) paragraph 111 (2) : the execution of the competencies by the Village headman and Administration respects the indigenous local common and customary laws;
 - (c) Paragraph 104 : the Village Representation Body (or as differently called such as the *Marga* Representation has to protect and pursue the local communal laws (2001 : 9);

A survey team, which was set up by a number of NGOs and called themselves LAPERA managed to give an overview of, the problems created by Law no. 22/1999 as follows:

- (1) Law no. 22/1999 was a compromise to the changed situation under the Reformation. This compromise replaced Law no. 5/1974 on the Principles of Relations between the Central Government and the Local Government; and Law no. 5/1979 on Village Administration; The political compromise was given too late and is seen as a matter of momentum taking into consideration its controversies, substance, implications and future policies (LAPERA, 2001 : XVII);
- (2) discussions on the formation of the draft Law no. 22/1999 had their influence on the proposed Amendments to the 1945 Constitution, stressing the realization of its article 18);
- (3) Law no. 22/1999 was further elaborated by Law no. 25/1999 on the Financial Balance between the Central-and Local Governments;
- (4) Article 7 of Law no. 22/1999 combined with Law no. 25/1999 withdrew again the competencies previously transferred to the regions, and therefore **contradicted** the spirit of Law no. 22/1999 which had been the cause for many criticisms and requests for a limited revision of a number of articles in Law no. 22/1999 and Law no. 25/1999 itself;
- (5) Law no. 22/1999 was in line with the growing demand for democracy , to enable the real application of **Law no. 2/1999 on Elections** (carried out in June 1999 on **district system**, although it was a matter of fact that the highest political institutions (DPR and the MPR (1999)) were carried out based on a **mixed-system** between the district-and proportional system. It is hoped that the elections and Congress of 2004 will be carried out according to the pure district system); this reality shows that the Transitional Period is still taking place as reflected in the struggle of political approaches on the results of the 1999 elections ⁴⁹;
- (6) Article 7 of Law no. 22/1999 still reflects a number of political efforts to withdraw competencies already transferred to the regions, especially on assignment to the villages through their regions, in order to 'contribute to national development' giving to the villages no instruments to refuse or veto' (LAPERA, 2001 : XX)

- (7) Law no 25/1999 in its further elaborations, still reflect the struggle of forces to retain the centralistic approach in economic policies and development in general (LAPERA, 2001 : XVIII – XIX);
- (8) Several criticisms were even expanded to the substance of the relations between the Central Government and the Regions by stressing that real politics should show a shift or balance in the centers for political and economic decisions, from the government cq. bureaucracy to the civil society (LAPERA, 2001 : XXI);
- (9) The fact that article in Law no. 22/1999 made ‘religious affairs’ the competency for the Central Government and thus not transferring local political decisions based on local religious realities (= the case of Aceh Nangroe Darrussalam and Irian Jaya, Papua) opens new possibilities for horizontal and vertical conflicts (LAPERA, 2001 : XXI).

III. Conclusions

Decentralization had been widely known, even before article 18 of the 1945-Constitution.

It can be said, that decentralization with a *historical* demand for Free Indonesia/*Indonesia Merdeka*, ever since the territory which by the 19th century was known as the *Netherlands Indies*, was actually a colonial – historical conglomeration of indigenous territories in Indonesia since the 16th century; most of these territories were either small-independent republics possessing their own Common Laws and local government systems, or small kingdoms, or even conglomerations of small kingdoms. It was in the interest of the Colonial Administration that these scattered territories were united into larger units; thus the Colonial Administration introduced the system of vertical hierarchical administration, with the village head as the lowest administration officer. The Colonial Administration also made use of the existing kingdoms (small or large) and built their administrative territorial units. Thus the conflict of interests between the Central Government and the Local Governments or Regions, is no new fact in Indonesian Public Law and Public Administration.

The Youth Pledge (1928) reminded the young Indonesian intellectuals of the indigenous democracy known prior to the arrival of the foreign rulers. Backed up and equipped with modern political, legal and ethnological knowledge at the turn of the 19th century into the 20th century, the acknowledgment of the National Law/*Hukum Nasional* to become the agglomerator of existing *Hukum Adat*/common law as its core, was forgotten, although article 18 of the 1945 Constitution accommodated the

decentralization within the unitary state. Further activities and political conflicts – such as the choice between capitalism, supported by individualism against national collectivism, put the case of decentralization in the background. The modernized version of in a cruel fact, the same conflict between capitalism and nationalism continued for another 30 years under the Soeharto regime, this time using the words ‘economic development’ versus ‘socio-political and cultural development’. If for economic development the word ‘infrastructure building’ was a matter of fact, ‘socio-infrastructure building’ (including political infrastructure building) was neglected. With the turn of the 21st century, the word ‘globalization’ put social development more and more in the background, with its effect on the use of all the national resources – even of the remotest area – for the sake of ‘national development’; which in the end practically came to a peak in the conflict between the ‘Central Government versus Local Regions’. Then came the Economic Crisis, which developed, into a Total Crisis (1997-1999) – with all its political impacts – and total breakdown of many private and governmental institutions. It is in this context that the Reformation Movement must be seen. Reformation is sometimes even blamed for having given too little attention to the economic recovery. But a detailed study on what had been achieved in the years 1998 – 2001 indeed shows that the stressing of the Reformation was to build up a new socio-political and legal infrastructure, to become the foundation for further economic development. Again, at this stage of conflict between many economists (especially those who are globally interested) and others who stress the development of the socio-legal-political infrastructure to exists next to, or to be, the poles of principles that must sustain future economic development, on the condition that such economic development must not exploit the regions, but must especially use the non-renewable resources in a very careful way, in order to secure its further use by future generations. Further stressing that economic development must concentrate on renewable resources, education, health, science and technology as its social infrastructure. This naturally means that such development needs the participation of a knowledgeable public and population. This again in turn stresses the empowering of the Indonesian human being in order to become a new potential of ‘human resources’ the economists so much need. Needless to say, that therefore the democratic principles are the foundation of decentralization, also within the frame to uplift the dignity of the regions and the dignity of the Indonesian in general. For this

reason all the actions – from the Amendments to the Constitution to the many Resolutions of Congress (1998 – 2001) followed by their consecutive Laws passed by Parliament - are to be viewed as development activities to build new foundations and infrastructure for future development, which means returning to the Youth Pledge (1928) and the 1945 Constitution as mentioned in its Preamble.

NOTES

¹ Soehino, SH, [1980 ...1995], *Perkembangan Pemerintah Daerah*, Yogyakarta, Penerbit Liberty. When talking about ‘village’ one should always take into consideration that the larger Sunda Islands like Sumatra, Kalimantan, Sulawesi and later on Irian Jaya/Papua, always covered very large areas which if measured against the villages in Java - especially in Kalimantan and Irian Jaya/Papua - can cover the area of a kabupaten in Java; this had also been the reason of tremendous mismanagement during the New Order which indeed had treated those larger areas in the same as the small villages in Java, thus **distribution of development was slow outside Java, also its opportunities for human resources development, although those larger areas had contributes tremendously to the development of Indonesia; this was one of the outcries for decentralization as soon as Reformation came into life in May 1998;**

² R. Soepomo, 1972, *Pertanian Peradilan Desa kepada Peradilan Gubernur*, Jakarta, Bhratara;

³ Since the Dutch Administration put the 1) provinces 2) regencies/*regentsschappen* and 3) the *Stadsgemeenten* **at the same political-administrative level directly under the Dutch Administration, it can be understood why nowadays in many provinces, the bupati refuse to recognize the governor as the upper power holder (as was under the Soeharto regime based on Law no. 5/1974 and Law no. 5/1979 on behalf of the Central Government;**

⁴ Soehino. SH, [1980 ... 1995], *Perkembangan Pemerintahan di Daerah*, Yogyakarta, Penerbit Liberty

⁵ now known as *Walikota*;

⁶ which included the *Peradilan Adat* and *Kehakiman Desa* (Soepomo, 1972 : 7);

⁷ Van Leur, 1955, *Indonesian Trade and Society*, the Hague-Bandung-W. van Hoeven Ltd.); also the Dutch historian Bernard H.M. Vlekke, 1959, *Nusantara: a History of Indonesia*, the Hague-Bandung/W. van Hoeve Ltd.

⁸ B.J. Haga, 1924, *Indonesische en Nederlandsch-Indische Democratie*, Leiden

⁹ to be distinguished from the British *East Indian Company/EIC* especially operating on the Indian Continent;

¹⁰ J. Sturler, 1884, *Tractates met Engeland, Spanje en Portugal over Nederlandsch Indie*

¹¹ these trading companies and banks were: *the Netherlands - Indian Trading Bank, the Handelsvereniging Amsterdam, the Koloniale Bank, and the Bank of Dorrepaal and Co.* followed by the *Vorstenlanden* (Vlekke, 1959 : 310);

¹² It was this connection between the forced planting of certain crops such as needed by the estates for exports in connection with forced labour (by men and/or women) and then on conjunction with

political rights e.g. the right to elect and the rights to be elected limited to the forced labour, was one of the criticism of B.J. Haga against the colonial administration, saying that this system was not even known in Western Democracy and therefore, **Haga accused the colonial administration of destroying the indigenous democracy which knew pure election based on men known as *primus inter pares* in their regions and the ‘head’ of the village being again no one but a *primus inter pares* amongst the chosen men in the village meeting; Haga criticised the introduction of ‘the western democracy’ the more because it was connected with economic interests of men with capital and investments and forced labour which even in Holland was illegal;**

¹³ = colonial/state interests

¹⁴ Note that nowadays the word public interest means the interest of the people at large which should be served and be the main purpose of any government and any modern state;

¹⁵ regulated by the Administration by *Inlandse Gemeente Ordonnantie/IGO Java en Madura* (Ind. Stb. 1906 no. 83; territories outside Java-Madura (and Bali to ascertain extend) are regulated by the *Inlandse Gemeente Ordonnantie Buitenwesten/IGOB*

¹⁶ Roelof H. Haveman, (2000 : 5), *The Legality of Adat Criminal Law in Modern Indonesia*, Jakarta, PT Tatanusa gave the descriptive definition on ‘Adat Law’ as ‘written and unwritten customary law. More specifically: adat law is a type of customary law. Customary law is the oldest form of law rules of law that came into being because a particular community continuously and consciously observed the same rules for the same sort of relationship or conduct of the people, without they ever having been laid down by a legislator. Or, adapt law is folk law’. (Ind. Stb. 1938 no. 490 jo. Ind. Stb. 1938 no. 681 (Soehirno, 1995 : 14)

¹⁷ this historical fact has become one of the problems within the ‘horizontal conflict’ in Maluku;

¹⁸ Dr. J.H.A. Logemann, 1927, *Eenkele vraagstukken eener Indische Statesrechtsbeoefening*, Weltevreden/Jakarta - G. Kolff & Co.

¹⁹ exit to the Indian Ocean, connecting the Indonesian Archipelago to Europe and the Middle East, South America, or via the South China Sea to Japan and China, and via the Pacific to North and South America;

²⁰ This in many ways is congruent to the borders of a number of important kingdoms, thus becoming the present provinces and capital of the provinces: even Law no. 22/1999 still looks upon the province as the ‘extention’ of the Central Government; whereas the autonomy was given to the regencies/*kabupatens* which outside Java and Bali occupy a territory of a number of previously known ‘villages’ but which under the recalled law no. 5/1975 on Local Government and Law no. 5/1979 on Village Administration caused enormous disasters, making the village head the lowest administrator of the central government, some never known before by the Indonesian!

²¹ It was B.J. Haga’s dissertation (1924) which in detail gives the characteristics of several degrees of integration inter-small republics especially on Sumatra and on the process of integration of the small kingdoms in South Sulawesi which were integrated ‘through state regalia’ and the very large autonomy in the Moluccas (to which area he was once appointed as Governor)

²² ...Eerde, 1922, *Ethnologie van Nederlands Indie*, Leiden

²³ It is very clear that Eerde - although an ethnologist was not talking about **racial bases** for the foundation of the Republic of Indonesia, but right from the start as the **legal basis binding the population to the lands by the same laws**; also note that the state of Indonesian was never thought to be a **nation state based on race**, but from the beginning always consisted of a plurality of races

24

²⁵ General Soeharto together with General Nasution handled the political game at the forum of macro politics, whereas General Sarwo Edhie was the man who faced and led the insurrections in this areas

²⁶ Law no. 44/1999, *Penyelenggaraan Keistimewaan Propinsi Daerah Istimewa Aceh*

²⁷ The case of East Timor is a case not to be discussed here because it has nothing to do with decentralization and its development, although probably it was a (not too reasonable) impetus for the speed up of Law no. 22/1999

²⁸ Deddy Supriady Bratakusumah, PhD and Dadang Solihin, MA, 2001, *Otonomi Penyelenggaraan Pemerintahan Daerah*, Jakarta, PT Gramedia

²⁹ now known as Law no. 22/1999

³⁰ now known as Law no. 22/1999

³¹ Didi Hariadi Estiko and Novianto M. Hantoro, 2000, *Reformasi Hukum Nasional*, Jakarta, Sekretariat Jenderal DPR-RI/Pusat Pengkajian dan Pelayanan Informasi

³² as a consequence the 1999 Elections were participated by 48 political parties (pout of the 100 verified parties)

³³ this law revoked Law no. 21/1982 which gave to the government the right to censor and suppress the press; allowed only one Journalists organization/PWI and the withdrawal of the publications' permits to publish; soon after the existence of Law no. 4/1999 the number of publication increased from 326 to 1,397 publications

³⁴ these areas are **different** from the previously known areas of '*groepsgemeenschappen*'

³⁵ (Note should be given to the fact that until he Law for the Province of Nangroe Aceh Darussalaam (Law no. 44/1999) and the Law for the Region of Papua in 2001, Indonesian only knew (since 1945) two special provinces, namely the Special Province of Yogyakarta and the Special province of Aceh

³⁶ This is incorrect since such units are called *banjars* in Bali

³⁷ translated from C.S.T. Kansil, SH - Christine S.T. Kansil SH - M.H. Engeline H. Palandeng, SH. 2001, *Konstitusi-Konstitusi Indonesia, tahun 1945 - 2000*, Jakarta, Pustaka Sinar Harapan

³⁸ = 'kesatuan masyarakat hukum'

³⁹ Prof. H.A.W. Widjaja, 2001, *Pemerintahan Desa/Marga berdasarkan Undang-Undang no. 22/1999 tahun 1999 tentang Pemerintah Daerah: Suatu Telaah Administrasi Negara*, Jakarta, PT Grafindo Persada

⁴⁰ nowadays being an expensive commodity for exports between Indonesia and Singapore

⁴¹ Prof. Drs. H.A.W. Widjaja, 2002, *Otonomi Daerah dan Daerah Otonom*, Jakarta, PT Raja Grafindo Persada

⁴² Law no. 22/1999/Chapter III/*Sharing of the territory* [Pembagian Daerah]: 'The territory of the Province such as meant in paragraph 2 sub-paragraph 91), is comprised of land territories and sea-territories as far as 12 sea-miles measured from the coastal line [note: usually taken during low tide) or measured into the direction of other islands within the Archipelago;

⁴³ Drs H.A.W. Widjaja, May, 2001, *Pemerintahan Desa/Marga Berdasarkan Undang-Undang no. 22 tahun 1999 tentang Pemerintahan Daerah: Suatu Telaah Administrasi Negara*, Jakarta, PT Raja Grafindo Persada;

⁴⁴ Estiko-Hantoro taken from Sekretariat Jenderal DPR-RI (1999 : 6), *Proses Pembahasan Rancangan Undang-Undang tentang Pemerintahan Daerah*, Jakarta, DPR-RI;

⁴⁵ = mispronunciation of the Dutch word *gemeente*;

⁴⁶ H.A.W. Widjaja, 2001, *Pemerintahan Desa/Marga berdasarkan Undang-Undang no. 22/1999 tentang Pemerintahan Daerah*;

⁴⁷ Hadi Setia Tunggal, SH, 2000, *Penyelenggaraan Keistimewaan Propinsi Daerah Istimewa Aceh*, Jakarta, Harvarindo

⁴⁸ this kind of bonds to be very common in traditional societies; the Danis in the Highlands of the Jayawijaya/Papua apart from confederation even know federations (= a confederation of confederations), thus dividing the Highlands in 3-4 Federations which when waging war against one another create a big wars in the valleys, since the parties involved are bi organizations involving hundreds and hundreds of warriors;

⁴⁹ Team LAPERA, (200, 2001), *Ombudsman Pemberian Negara*, Yogyakarta, LAPERA Pustaka Utama.

Chapter VII

Conclusions

Having completed the previous chapters, the author has come to the following conclusions:

1. That the Reformation Movement already started in the 1970s, if not earlier, before it exploded in 1998, witnessed by Human Rights fighters like Yap Thiam Hien, Mochtar Lubis, Princen, Adnan Buyung Nasution, Todung Mulya Lubis and people obsessed with the principles of the *Rechtsstaat* (Rule of Law) like Tasrif, Mochtar Kusumaatmadja, and many others, which is why the *Lembaga Bantuan Hukum* (Legal Aid Institution or LBH) was established, next to legal aid bureaus which were set up within the universities, and legal clinics established in the 70's in order that law students could be better prepared for their future work. One by one new NGOs came into being, first for environmental reasons, for gender issues, for the interest of the labour movement, against racial and religious discrimination, for the rights of the child, and many others.
2. That the sudden political changes, were lead by university students, and triggered by the monetary crisis of 1997 and that it was the monetary crisis of 1997, and the 12-13 May 1998 riots which formed the "last drop, which made the glass to overflow" and unleashed the already dissatisfied and angry students, people and activists for democracy, human rights and supremacy of law alike to go to the streets and demonstrate against the government and its President. Therefore in the May 1998, students demonstrations went hand in hand with their professors, such as happened in Jakarta and in Yogyakarta, where the Rector of Gajah Mada University Professor Kusnadi lead his students in the demonstration against Soeharto. Also in Makasar at the Hasanuddin University students took their professors lessons at heart so that whatever the students did, they were sure of their professors' support.

3. But after President Soeharto legally resigned from office the legal process of reform set in, starting with the 3 (three) political laws in February 1999 i.e. the law on Political Parties, the Laws on General Elections and the Law on Structure and Status of the People's Consultative Assembly (MPR) and of Parliament (DPR).
4. Soon, during the October 1999 MPR Sessions, nine MPR Resolutions started to outline the political consensus reached by the people's representatives in legal format, including the possibility of amending the 1945 Constitution which hence to forth was taboo (see Chapter IV).
5. So it were the MPR Resolutions which set the tone for the legal reform to come, to begin with the Change of the Rules of Order in the MPR, which changed the passive role of the MPR (and DPR) vis a vis the President and the Government, into a very active one, so much so that nowadays (2001) people think that sometimes the MPR or DPR is overacting, making it difficult for the Executive to perform efficiently, as every government policy, decision or act is scrutinized thoroughly by the DPR/MPR.
6. With MPR Resolution No. III/MPR/2000 on the Legal Sources and Hierarchy of Legislative Acts an end has been made to the debate on whether MPR Resolutions are part of the law or not. Since by this Resolution, MPR Resolutions are placed second (after the Constitution) in the hierarchy of written laws, bringing more certainty in the legal system.
7. All the other MPR Resolution's of 2000 indeed made fundamental changes, either in the procedure, structure and status of legal institutions, or relationship between the state institutions, such as between the Police Force and the Army or between the MPR and other highest state bodies, like the President/Vice President, Supreme Advisory Body (DPA), the State's Financial Controller and the Supreme Court, apart from allowing a Second Amendment to the Constitution to be drafted by the Working Committee of the MPR.
8. One exception however was MPR Resolution No. V/MPR/2000, which enforced the form of unity and unitary state of the Republic of Indonesia and its people.
9. Further developments in 2001 indicated that despite a number of very important changes in the policy, the Management of Natural Resources (MPR Resolution No. IX/MPR/2001) and further reorganization of and within the

MPR itself, another important stand was taken by the MPR by MPR Resolution No. VII/MPR/2001 on the Vision of Indonesia's Future, which still based their planning on the 1945 Constitution's Preamble. This is witnessed by the closing of this document (Vision on Indonesia's Future), which says: "On the basis of Indonesia's Vision to the Year 2020 it is hoped that gradually we will realize the long cherished ideals of the Indonesian nation, i.e. achieving a just and prosperous society, blessed by God the Almighty."

10. In conclusion, we have found that:

- (a) What at first sight seems to be radical political changes have often been prepared for a long time in advance, much as if they come "out of the blue". This happened with our independence in 1945, which was triggered by the surrender of Japan when they lost the Second World War. It happened again in 1998 seemingly as a result of the Economic Monetary Crisis, which began in 1997;
- (b) that political radical changes, in order to be sustainable, ought to be made permanent through legal instruments: laws, new legal institutions as well as legal capacity building, in order that the laws be enforced in the same spirit, as the considerations on which the new laws and institutions are based;
- (c) that the paramount prerequisite towards a more permanent democratic society, living under the Rule of (just) Law, is:

c.1. an independent judiciary (supported by auxiliary institutions like an independent Ombudsman, Mediator, an honest State Comptroller and other legal institutions;

But apart from that we need:

- a steady and steady-fast, wise, honest, but strong and hardworking leadership who maintains the principles of good governance;
- a professionally educated, hardworking and morally good bureaucracy, and
- a people, who trust their leader, their legal system and legal institutions, as well as their political procedures in reaching consensus on their national policies.

In short, political changes seem to have been prepared by processes of political education, which in turn will demand the necessary legal reforms. However, once the laws are in place, people will demand more legal changes, which trigger new political changes towards other legal reform, and so on.

What is more, political and legal theory will prescribe a process down the legal hierarchy, i.e. that laws be made on the basis of previously existing higher products, like Parliamentary Acts (in Indonesia), that shall be based on the respective MPR Resolutions, which in turn shall be based on the previously determined articles of the 1945 Constitution.

In reality, it may be that lower legislative products have been made first (like for instance, the Act of 39/1999 on Human Rights), before the higher legal products, like the respective MPR Resolution and the Constitutional Regulations have been spelled out. Nevertheless the contents of the lower legislative acts should still be in line and in accordance with higher legislative acts, in order that the Rule of Law will still prevail.

Bibliography

ABNR & MKK:

Reformasi Hukum di Indonesia, Cyberconsult, Jakarta, 1999

Badan Pembinaan Hukum Nasional, Departemen Kehakiman R.I.:

Pola Pikir dan Kerangka Sistem Hukum Nasional serta Rencana Pembangunan Hukum Jangka Panjang, BPHN, Jakarta, 1996.

Bandung Institute of Governance Studies:

Naskah Akademik dan Rancangan Peraturan Daerah tentang Ombudsman Kota Bandung, Bandung, 2002

Black's Law Dictionary:

West Publishing Co., St. Paul, Minnesota, 1991

Djarat, Hendarmin, etc. (ed.):

Beberapa Pemikiran Hukum Memasuki Abad XXI, Penerbit Angkasa, Bandung, 1998.

Gottelrher, Dean M.:

Ombudsman Legislative Resource Document, International Ombudsman Institute, 1998

Gottelrher, Dean M.:

Local Ombudsman: The Role and Responsibilities of Independent Ombudsman Institutions, paper presented at Den Pasar, Bali, Local Ombudsman Workshop organized by the National Ombudsman Commission, 21 February 2002

Hamzah, Andi:

Delik-delik Tersebar di luar KUHP, dengan Komentar, Pradnya Paramita,
Jakarta, 1995

Hartono, Sunaryati:

Apakah arti the Rule of Law itu?, Alumni, Bandung, 1969

Hartono, Sunaryati:

Pembinaan Hukum Nasional dalam Suasana Globalisasi Masyarakat Dunia,
Universitas Padjadjaran, Bandung, 1991

Hartono, Sunaryati:

Peranan Kesadaran Hukum Masyarakat dalam Pembaharuan Hukum,
Binacipta, Bandung, 1975

Havemann, Roelof H.:

The Legality of Adat Criminal Law in Modern Indonesia, PT Tata Nusa,
Jakarta, 2002

International Institute for Democracy and Electoral Assistance (IDEA):

Penilaian Demokratisasi di Indonesia, Pengembangan Reformasi Demokratis,
Jakarta, 2000.

Jacoby, Daniel:

The Future of the Ombudsman, paper presented at the Taipeh International
Ombudsman Conference, 1994

Kansil, C.S.T & Kansil, Christine S.T.:

Kitab Undang-undang Peradilan Tata Usaha Negara, Pradnya Paramita,
Jakarta, 2001.

Kantor Menteri Negara Urusan Peranan Wanita (Publisher):

Undang-Undang Republik Indonesia No. 7 Tahun 1974 tentang Pengesahan Konvensi mengenai Penghapusan Segala Bentuk Diskriminasi terhadap Wanita serta Penjelasannya, Jakarta, 1993

Komar, Mieke, etc. (ed.):

Mochtar Kusumaatmadja: Pendidik & Negarawan, Alumni, Bandung, 1999.

Komisi Ombudsman Nasional:

Laporan Tahunan 2000/2001, Annual Report, Jakarta, 2001

Komisi Ombudsman Nasional (Publisher):

Konsep Undang-Undang tentang Ombudsman Nasional, 2001

Lopa, Baharuddin:

Kejahatan Korupsi dan Penegakan Hukum, Penerbit Buku Kompas, Jakarta 2001.

Lubis, Todung Mulya:

In Search of Human Rights, Legal - Political Dilemmas of Indonesia's New Order, 1966 - 1990, PT Gramedia Pustaka Utama in cooperation with SPES Foundation, Jakarta, 1993.

Luhulima, Achie Sudiarti (ed.):

Pemahaman Bentuk-bentuk Tindak Kekerasan terhadap Perempuan dan Alternatif Pemecahannya, Pusat Pengkajian Wanita dan Jender, Universitas Indonesia, Jakarta, 2000.

Majelis Permusyawaratan Rakyat RI (Publisher):

Putusan Sidang Tahunan MPR RI Tahun 2001, Jakarta, 2001

Mahfud, Mohammad:

Pergulatan Politik dan Hukum Indonesia, Gema Media, Yogyakarta, 1999.

Mardimin, Johannes (ed.):

Jangan Tangisi Tradisi Transformasi Budaya Menuju Masyarakat Indonesia Modern, Penerbit Kanisius, 1994

Mini Jaya Abadi (Publisher):

Ketetapan-Ketetapan MPR-RI dan Garis-garis Besar Haluan Negara Hasil Sidang Umum MPR RI 1999, Jakarta, 1999

The National Ombudsman of the Netherlands:

Annual Report, 1998 - English Summary

Tim Redaksi Tata Nusa:

Penunjuk Peraturan Perundang-undangan Republik Indonesia 1945 - 2000, PT Tata Nusa, Jakarta, 2001

Oosting, Marten:

Protecting the Integrity and Independence of the Ombudsman Institution: the Global Perspective, paper submitted at the 7th International Ombudsman Institute Conference at Durban, South Africa, 2000

Poliyama Widya Pustaka (Publisher):

Perubahan-perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Jakarta, 2001

Puspokusumo, Talib (ed.):

“Reformasi Hukum di Indonesia: Sebuah Keniscayaan, “ Tim Pakar Hukum, Departemen Kehakiman dan Hak Asasi Manusia R.I., Jakarta, 2000.

Renan, Ernest: (Indonesian translation by Sunario):

Apakah Bangsa itu?”, Bandung, Alumni, 1996.

Restu Agung (Publisher):

Ketetapan-ketetapan Sidang tahunan MPR-RI Tahun 2000

Rodli, Achmad Fathoni & Salim, Fahrudin (e.d.):

Berguru kepada Bapak Bangsa, Gerakan Pemuda Ansor, Jakarta, 1999

Sharma, P.:

Sasaran Pokok Reformasi Indonesia 1999 - 2004, Yayasan Menara Ilmu, Jakarta, 1998

Silk, Paul & Walters, Rhodri:

“How Parliament Works”, London & New York, 1989

Sinar Grafika (Publisher):

Tiga Undang-Undang Politik 1999, Jakarta, 1999

Sjahnan, H.R.:

Menurut UUD Pelaksanaan Tata Pemerintahan dan Otonomi 1945 di Indonesia, Monora

Soehino:

Perkembangan Pemerintahan di Daerah, Liberty, Yogyakarta, 1995

Subekti, R.:

Perlindungan Hak Asasi Manusia dalam KUHAP, Pradnya Paramita, Jakarta, 1994

Sujata, Antonius:

Reformasi dalam Penegakan Hukum, Penerbit Djambatan, Jakarta, 2000

Sujata, Antonius & Surachman, R.:

Ombudsman Indonesia di tengah Ombudsman Internasional, Komisi Ombudsman Nasional, Jakarta, 2002

Sujata, Antonius & Surachman, R.:

Preparing the Establishment of a Parliamentary Ombudsman: The Indonesian Experience, paper submitted at the 6th Asian Ombudsman Association Conference, Tokyo, 2001

Sumantri, Sri:

Bunga Rampai Hukum Tata Negara Indonesia,” Penerbit Alumni, Bandung, 1992.

Sumantri, Sri:

Hak Uji Material di Indonesia, Alumni, Bandung, 1997

The Swedish Parliamentary Ombudsman:

Annual Report (1 July 1997 to 30 June 1998) - the English Summary

Titik Terang (Publisher):

Kitab Undang-Undang Hukum Acara Pidana, Titik Terang, Jakarta, 1995

Tunggul, Hadi Setia:

Ketetapan MPR 2001, 2000 dan Perubahan I & II UUD 1945, Harvarindo, Jakarta, 2001

Annex 1

THE 1945 CONSTITUTION of the REPUBLIC of INDONESIA

THE 1945 CONSTITUTION

of the REPUBLIC OF INDONESIA

PREAMBLE

That, in truth, Liberty is the right of every people, and therefore, all forms of colonialism must be eradicated from the face of the earth since it is against humanity and justice.

That the Indonesia's fight for independence has arrived at that felicitous moment where the people of Indonesia have been brought safely to the threshold of the Independence of the Republic of Indonesia, that is free, united, sovereign, just and prosperous.

By the grace of God Almighty and urged by the lofty desire to live as an independent nation, the people of Indonesia do hereby declare their Independence.

Further, establish the Government of the Indonesian State that protects the entire Indonesian nation and the entire territory of Indonesia, promotes the general welfare and the intellectual life of the nation, and supports a world order, that is founded on liberty, eternal peace and social justice. Henceforth, instate the Independence of the Indonesian Nation into the Constitution of the Republic of Indonesia, that is democratic, based on the Belief in the One True God, a Just and Civilized Humanity, the Unity of Indonesia, a Democracy directed by Policies formed through Consultation and Representation, and the creation of Social Justice for all the people of Indonesia.

Chapter I

Form and Sovereignty

Article 1

- (1) The Indonesian State is a Unitary State in the form of a Republic.
- (2) Sovereignty is in the hands of the people, which is fully implemented by the People's Consultative Assembly (Majelis Pemusyawaratan Rakyat)

Chapter II

The People's Consultative Assembly

Article 2

- (1) The People's Consultative Assembly is composed of members of Parliament (Dewan Perwakilan Rakyat), and additionally, of delegations from regions and groups, in line with regulations stipulated by Law.
- (2) The People's Consultative Assembly (MPR) convenes at least once every five years in the capital city of the State.
- (3) Decisions made by the People's Consultative Assembly will be made by majority vote.

Article 3

The People's Consultative Assembly decides on the Constitution and the broad outlines of the State Guidelines.

Chapter III

The Powers of the Government of the State

Article 4

- (1) The President of the Republic of Indonesia keeps the powers of Government in accordance with the Constitution.
- (2) In the execution of his (her) duties, the President is assisted by one Vice President

Article 5

- (1) The President has the power to establish Laws with the agreement of Parliament
- (2) The President determines Government Regulations in the correct implementation of the Laws.

Article 6

- (1) the President shall be a native Indonesian.
- (2) the President and the Vice President are chosen by the People's Consultative Assembly by majority vote.

Article 7

The President and the Vice President will hold the office during a term of five years, and may be re-elected,

Article 8

When a President dies, ceases to be in office, or is unable to execute his (or her) duties during the tenure of office, he (or she) will be replaced by the Vice President until the end of the said term of office.

Article 9

Before holding office, the President and the Vice President will be sworn in according to his (or her) religion, or earnestly pledges in front of the People's Consultative Assembly or Parliament, as follows:

The Oath of the President (Vice President)

By the Grace of God, I do hereby solemnly swear that I will fulfill the duties of the President of the Republic of Indonesia (Vice President of the Republic of Indonesia) to the best of my abilities and to the fairest of judgments; to obey the Constitution and implement all the Laws and their regulations in their rightfulness, and dedicate myself to the Nation and Country.

The Pledge of the President (Vice President):

I do hereby earnestly pledge that I will fulfill the duties of the President of the Republic of Indonesia (Vice President of the Republic of Indonesia) to the best of my abilities and according to the fairest of judgments; to obey the Constitution, and implement all the Laws and their regulations in their rightfulness, and dedicate myself to the Nation and the Country.

Article 10

The President holds the highest authority over the Army, the Navy and the Air Force.

Article 11

The President, with the agreement of Parliament, declares war, makes peace and signs agreements with other countries.

Article 12

The President announces a State of Emergency. Conditions and consequences of a state of emergency will be determined by Law.

Article 13

- (1) The President appoints Envoys and Consuls
- (2) The President receives foreign Envoys

Article 14

The President delivers clemency, amnesty, abolition and rehabilitation.

Article 15

The President confers honorary titles, service awards and other honorary awards.

Chapter IV

The Supreme Advisory Council

Article 16

- (1) The composition of the Supreme Advisory Council will be determined by Law
- (2) It is the duty of the Council to give answers to questions posed by the President and the Council has the right to offer advice to the head of state.

Chapter V

Ministers of the State

Article 17

- (1) The President is assisted by ministers of the State
- (2) Ministers are appointed and dismissed by the President
- (3) Ministers lead Departments of the Government

Chapter VI

Regional Governments

Article 18

The subdivision of Indonesia into larger and smaller units with their administrative compositions will be determined by Law, giving due thought and consideration to the principles of consultation in government's state administration, and providing rights of origins in regions that are extraordinary in their nature.

Chapter VIII

The Council of People's Representatives (Parliament)

Article 19

- (1) The composition of the Council of People's Representatives (Parliament) is determined by Law
- (2) Parliament convenes at least once a year

Article 20

- (1) Every Law must be passed by Parliament.
- (2) When a draft Law does not receive the endorsement of Parliament, the said draft may not be re-submitted to Parliament for discussion during the same session.

Article 21

- (1) A Member of Parliament has the right to propose a draft Law
- (2) When a Draft has been passed by Parliament, but is not legalized by the President, then the draft may not be re-submitted for discussion during the same session of Parliament.

Article 22

- (1) In times of dire crisis, the President has the right to issue government regulations in lieu of Laws.
- (2) These regulations must be approved by Parliament in its next session.
- (3) When these are not approved, then the said government regulations must be annulled.

Chapter VIII

Financial Matters

Article 23

- (1) The Budget is determined every year by Law. When Parliament does not approve the Budget as submitted by the government, then the government follows the Budget of the previous year.
- (2) Taxes required by the State will be based on Laws.
- (3) Other matters related to the finances of the State will be determined by Law
- (3) To audit state finances a State Audit Board will be established, whose rules and regulations are determined by Law. The results of such audit will be informed to Parliament.

Chapter IX

Powers of the Judiciary

Article 24

- (1) The powers of the judiciary are executed by the Supreme Court and other judiciary institutions, according to the Laws.
- (2) The composition and authorities of the judicial institutions will be regulated by Law.

Article 25

Conditions for appointment and termination of office of a judge will be decided by Law.

Chapter X

Nationals

Article 26

- (1) Nationals are native Indonesians and other nationals who are given legal status as nationals by Law.
- (2) Requirements for citizenship will be determined by Law.

Article 27

- (1) All citizens are equal in status before the law and government, and have the duty to uphold the law and the government without exception.
- (2) Each citizen has the right to work and earn an adequate human livelihood.

Article 28

Freedom to form unions and associations to voice one's thoughts orally and in writing and by other means will be determined by Law.

Chapter XI

Religion

Article 29

- (1) The State is founded on the Belief in the One God
- (2) The State guarantees the freedom of each citizen to embrace his or her own faith and to follow the rites according to his or her religion and beliefs.

Chapter XII

The Defense of the State

Article 30

- (1) Each national has the right and the duty to participate in the defense of the State
- (2) Requirements for such defense will be determined by Law.

Chapter XIII

Education

Article 31

- (1) Every citizen has the right to education
- (2) The Government makes every effort to implement a national education system, which is determined by Law.

Article 32

The government promotes Indonesia's national culture

Chapter XI

Social Welfare

Article 33

- (1) The economy will be built as a common effort based on mutual support (azas kekeluargaan)
- (2) Most important production sectors necessary to the state that affect the livelihood of a large part of the population will be under the control of the State
- (3) The land and sea and natural resources contained in them are controlled by the state and will be used towards the widest possible welfare of the people.

Article 34

The poor and neglected children are taken care of by the state

Chapter XV

The Flag and Language

Article 35

The flag of the Indonesian State is Red and White

Article 36

The language of the State is Bahasa Indonesia

Chapter XVI

Amendments to the Constitution

Article 37

- (1) To amend the Constitution a minimum of $2/3$ of members of the People's Consultative Assembly must be present.
- (2) Decisions taken must have the agreement of a minimum $2/3$ of those members present.

Transitional Regulations

Article I

A Committee for the Preparation of Indonesia's Independence will regulate and implement the transition of government to the Indonesian Government

Article II

All state apparatus and existing rules are in force, until such new regulations are stipulated in accordance with the Constitution

Article III

For the first time the President and Vice President will be elected by the Committee for the Preparation of Indonesia's Independence.

Article IV

Before the People's Consultative Assembly, Parliament and the Supreme Advisory Council are formed according to the Constitution, all powers will be in the hands of the President who is assisted by the National Committee.

Annex 2

**THE FIRST AMENDMENT TO
the 1945 CONSTITUTION
of the REPUBLIC of INDONESIA**

**THE PEOPLE'S CONSULTATIVE ASSEMBLY
of the REPUBLIC OF INDONESIA**

**THE FIRST AMENDMENT TO THE 1945
CONSTITUTION OF THE REPUBLIC OF INDONESIA**

**BY THE GRACE OF GOD ALMIGHTY, THE PEOPLE'S
CONSULTATIVE ASSEMBLY OF THE REPUBLIC OF
INDONESIA,**

Having duly studied, examined and considered in detail and in earnest those aspects that are basic in nature, faced by the people, the nation, and the state, and, using the authority invested in it by Article 37 of the 1945 Constitution of the Republic of Indonesia, the People's Consultative Assembly of the Republic of Indonesia do hereby amend Article 5, item (I), Article 7, Article 9, Article 13 item (2), Article 14, Article 17 item (2) and (3), Article 20, Article 21 of the 1945 Constitution of the Republic of Indonesia, which in their complete form are stipulated below:

Article 5

the President has the right to propose draft laws to Parliament

Article 7

The President and the Vice President will hold office for a term of five years, after which they may be re-elected for the same position for one additional term.

Article 9

(1) Before holding office, the President and the Vice President will be sworn in according to his or her religion, or earnestly pledge before the People's Consultative Assembly or Parliament, as follows:

The oath of the President (Vice President)

By the grace of God, I do hereby solemnly swear to fulfill the duties of the President of the Republic of Indonesia (Vice President of the Republic of Indonesia) to the best of my abilities and in the fairest possible judgment, obey the Constitution and implement all laws and regulations in the most rightful manner and dedicate myself to the Country and the Nation.

The pledge of the President (Vice President)

“ I hereby do solemnly pledge to fulfill the duties of the President of the Republic of Indonesia (Vice President of the Republic of Indonesia) to the best of my abilities and in the fairest possible judgment, obey the Constitution, implement all laws and regulations in their most rightful manner, and dedicate myself to the Country and the Nation”.

(2) When the People's Consultative Assembly and Parliament are unable to sit in session, the President and the Vice President will be sworn in according to his or her religion, or solemnly pledge in front of the leadership of the People's Consultative Assembly witnessed by the leadership of the Supreme Court.

Article 13

- (2) In appointing Envoys, the President duly considers the advice of Parliament.
- (3) The President accepts the posting of envoys of foreign countries with due consideration to the advice of Parliament.

Article 14

- (1) The President delivers clemency and rehabilitation with due consideration to the advice of the Supreme Court
- (2) The President passes amnesty and abolition with due consideration to the advice of Parliament.

Article 15

The President awards honorary titles, service awards and other honorary awards by Law.

Article 17

- (2) Ministers are appointed and terminated in office by the President
- (3) Each minister will be in charge of a specific function within the government

Article 20

- (1) Parliament holds the powers to form legislation.
- (2) Each draft Law shall be discussed by Parliament and the President in order to obtain mutual agreement.
- (3) When a draft Law is not mutually agreed, the said draft Law may not be re-submitted for discussion during the same session of Parliament.
- (4) The President ratifies the draft Law that has been mutually agreed upon for enactment of that Law.

Article 21

Members of Parliament have the right to propose draft laws.

This document of Amendment is an inseparable part of the document of the 1945 Constitution of the Republic of Indonesia. The Amendment was agreed upon and decided in the 12th Plenary Session of the People's Consultative Assembly of the Republic of Indonesia on 19 October 1999 in the General Assembly of the People's Consultative Assembly, and will come into force on the date of its decision.

Decided in Jakarta
On 19 October 1999

THE PEOPLE'S CONSULTATIVE ASSEMBLY OF THE REPUBLIC OF
INDONESIA

Signed: Chairman, Prof. Dr. H.M. Amien Rais, M.A.
Vice Chairman, Prof. Dr. Ir. Ginandjar Karasasmita
Vice chairman, Drs. Kwik Kian Gie
Vice Chairman, H. Matori Abdul Djilil
Vice Chairman, Drs. H.M. Husnie Thamrin
Vice Chairman, Hari Sabarno, SJP, MBA,MM

Vice Chairman, Prof. Dr. Jusuf Amir Feisal, S. Pd
Vice Chairman, Drs. H.A. Nazri Adiani

Annex 3

**RESOLUTION OF
THE PEOPLE'S CONSULTATIVE ASSEMBLY
No. VII/MPR/2001
Regarding
INDONESIA'S VISION OF THE FUTURE**

**RESOLUTION OF
THE PEOPLE'S CONSULTATIVE ASSEMBLY
No. VII/MPR/2001
Regarding
INDONESIA'S VISION OF THE FUTURE**

BY THE GRACE OF THE ALMIGHTY GOD
THE PEOPLE'S CONSULTATIVE ASSEMBLY

Having duly considered:

Mindful of :

Taking due notice of:

DO HEREBY RESOLVE

To establish :

**THE RESOLUTION OF THE PEOPLE'S CONSULTATIVE
ASSEMBLY OF THE REPUBLIC OF INDONESIA ON
INDONESIA'S VISION OF THE FUTURE**

Article 1

Indonesia's Vision of the Future comprises three visions, namely

- (1) the Ideal vision, these are the ideals of the nation as envisaged in the Preamble of the 1945 Constitution of the Republic of Indonesia;
- (2) the Intermediate vision, that is Indonesia Vision 2020 which is the period ending year 2020

(3) the Five-Yearly vision, as envisaged in the State Guidelines.

Article 2

This Resolution identifies Indonesia Vision 2020 as part of Indonesia's Vision of the future, which has been drawn up in the following manner:

Chapter I	: Introduction
Chapter II	: The Ideals of the Indonesian Nation
Chapter III	: Challenges facing year 2020
Chapter IV	: Indonesia Vision 2020
Chapter V	: Rules governing Implementation
Chapter VI	: Closing Chapter

Article 3

The contents and details mentioned in Article 2 as contained in the document on Indonesia Vision 2020, form an inseparable part of this Resolution

Article 4

This Resolution comes in force on the date of its decision.

Chapter I

INTRODUCTION

1. Background

The People's Consultative Assembly of the Republic of Indonesia , in its efforts to realize the ideals of the Reformation movement which aims to resolve the problems of the state and the nation, do hereby establish Resolution of the People's Consultative Assembly of the Republic of Indonesia No. V/MPR/200 on the Consolidation, Unity and Integration of the Republic of Indonesia, and do hereby entrust the Working Board of MPR RI to formulate the Ethics on National Life and Indonesia's Vision of the Future.

With this formulation of Indonesia's Vision of the Future it is hoped that the life of the people as a nation and state, in general, and national reconciliation to consolidate the unity and integrity of the nation. in particular, shall be based on the (common) understanding of Indonesia's Vision of the Future.

The formulation of Indonesia's Vision of the Future is needed to give focus and provide direction in the life of the people as a nation and a state towards a better future. Further, to ensure continuity of direction in this national life an Intermediate Vision is required which clarifies such visions between the ideals of the nation as envisaged in the 1945 Constitution, with the Five-Yearly visions as envisaged in the State Guidelines. This Intermediate Vision is Indonesia Vision 2020.

2. The meaning of Vision

Vision embodies the concept of the future that is aimed to be achieved within a given time frame. This vision is intuitive wisdom that touches the feelings and moves the soul to action. This vision becomes the inspiration, motivation and creativity that directs the process of living national and state life to the ideals of the future. The nations' and state life are oriented towards realizing that vision, since in essence, this is the confirmation of the ideals of the entire nation.

For the people of Indonesia, Indonesia's Vision is based and has its inspiration in those ideals as stipulated in the Preamble of the 1945 Constitution. In order to further clarify how such lofty ideals should be achieved, it is essential that an intermediate vision be formulated, which is called Indonesia Vision 2020. The Indonesia vision 2020 encompasses all aspects of nation and state life, taking into consideration the challenges faced today and in the future, and bearing in mind the tendencies of achieving these in a measurable manner in 2020.

3. Reasons and Aims

Vision Indonesia 2020 is formulated to become a guide towards the realization of Indonesia's lofty ideals as set out in the Preamble of the 1945 Constitution.

Vision Indonesia 2020 is also formulated to become a source of inspiration, motivation, creativity, and policy guide in national and state life until the year 2020.

CHAPTER II

THE LOFTY IDEALS OF THE INDONESIAN NATION

The lofty ideals of the Indonesian nation have been outlined by the founders of the state as mentioned in line two of the Preamble of the 1945 Constitution of the Republic of Indonesia, as follows:

“ And the fight for independence of Indonesia has reached that felicitous moment where the Indonesian people have been brought safety to the threshold of the Independence of the Republic of Indonesia, that is united, sovereign, just and prosperous.”

In line four of the Preamble of the 1945 Constitution, it is further stated:

.....

These are everlasting ideals, whose achievement must continuously be striven. In this framework Indonesia Vision 2020 has been formulated.

Chapter III

CHALLENGES FACING THE YEAR 2020

Shaping Indonesia vision 2020, the nation and the state face challenging conditions and changes today as in the future, either which originate from within the country as from the outside.

Firstly, consolidating the unity and integrity of the nation and state

The diversity of ethnic groups, race, religions and cultures that exist in the country form the nation's wealth that must be accepted and respected. The proper management of such diversity is a challenge to defend the integrity and integration of the nation. The uneven distribution of population and the management of regional autonomy that utilizes the concept of the archipelagic state in line with the Archipelagic Concept becomes a challenge in regional development to remain within the Unitary State of the Republic of Indonesia. Furthermore, the influences of globalization also form challenges to the consolidation of national and state unity and integration.

Second, a just judiciary system

All citizens have equal position before the law and are entitled to be treated justly. The Law is enforced in the implementation of justice and not for the sake of those in authority or for a specific interest group. The challenge facing the enforcement of justice is the formation of legal rules that are fair, as well as legal institutions and apparatus of the law who are honest, professional, and are not influenced by those in power. The supremacy of the law is enforced to guarantee the proper enactment of the law and justice and in order to defend human rights.

Thirdly, a democratic political system

The challenge facing the establishment of a democratic political system whose sovereignty is in the hands of the people, and includes the active participation of the people in political life; political parties that meet aspirations and are effective, and general elections that are of quality. Such a democratic political system is supported by a healthy political culture, that has sportsmanship, respects differences, is polite in manner, and gives priority to peace and non-violence in all its forms. All the above are expected to create a national leadership that is democratic, strong and effective.

Fourthly, an economic system that is fair and productive

The challenge facing a fair and productive economy is the establishment of an economy that is for the people and provides fair and independent economic incentives. Such an economy has its base in the activities of the people, who effectively and optimally utilize natural resources in a sustainable manner, with special regard to the agricultural, forestry and maritime sectors. To establish such an economic system are needed competent human resources, and an economic mechanism that includes a large number of manpower. Furthermore, the state develops the economy by managing natural resources and other industries, including service industries.

Fifthly, a civilized social-cultural system

The challenge facing the establishment of a civilized social system is the maintenance and actualization of universal values that are taught by all religions as well as lofty national cultural values. These aim to realize the freedom of expression within the framework of inspiring, comprehending and the application of religious and of diverse cultural values. A civilized social system gives priority to the formation of a society that has mutual trust and mutual care towards other members of society and between society and public institutions. To improve the quality of life of society are included improvements in the quality of education, health services, job opportunities, increased income of the people, the sense of safety as well as other elements for the people's welfare.

Sixth, qualified human resources

The challenge facing the development of qualified human resources is the establishment of an educational system of quality that is capable to create reliable human resources with high moral standards, and are capable to cooperate or compete in the era of globalization, and continue to love the motherland. Such qualified human resources believe in God and possess religious devotion, are scientific and well-versed in technology, have high work ethics, and are capable of building a work culture that is productive and has personality.

Seventh, globalization

The challenge facing globalization is to defend the existence and integrity of the nation and the state, besides taking advantage of opportunities that are available for the sake of the nation and the state. To face globalization are needed capable human resources and institutions, both in the public as well as in the private sector.

Annex 4

LAW OF THE REPUBLIC OF INDONESIA

NO. 2 OF 1999

ON POLITICAL PARTIES

LAW OF THE REPUBLIC OF INDONESIA

NO. 2 OF 1999

ON

POLITICAL PARTIES

BY THE GRACE OF GOD ALMIGHTY,

THE PRESIDENT OF THE REPUBLIC OF INDONESIA

Having taken into consideration:

- a. that the freedom to meet, associate and express one's opinion as recognized and guaranteed by the 1945 Constitution, is part of human rights
- b. that to develop and strengthen the freedom to meet, associate and express one's opinions form part of efforts to create a strong national life within the Unitary State of the Republic of Indonesia that is free, united, sovereign, democratic and founded on the law;
- c. that political parties are important means in their function and role for the creation of the freedom to meet, associate and express one's opinions aimed at the growth of democratic life that upholds the sovereignty of the people within the Unitary State of the Republic of Indonesia;
- d. That Law no. 3 of 1975 on Political Parties and the Functional Group and its replacement Law no. 3 of 1985 on the Changes to Law no. 3 of 1975 on Political Parties and the Functional Group, are no longer able to contain present political aspirations, with the result that democratic life in Indonesia is no longer able to proceed well;
- e. That, in connection with the above, and to provide stronger legal foundations for the growth of political parties in order to better guarantee the participation of the Indonesian people in national and state life based on Pancasila and the 1945 Constitution, it is deemed necessary to change Law no. 3 of 1985 on Changes to

Law no. 3 of 1975 on Political Parties and the Functional Group, to be replaced by a new Law on Political Parties.

Further considering:

Article 5 subsection (1), Article 20 subsection (1), Article 27 subsection (1) and Article 28 of the 1945 Constitution

With the agreement of

PARLIAMENT OF
THE REPUBLIC OF INDONESIA

Hereby Decides

To establish
THE LAW ON POLITICAL PARTIES

CHAPTER I

GENERAL STIPULATIONS

Article 1

- (1) In this Law, meant by a Political Party is every organization voluntarily formed by citizens of the Republic of Indonesia based on the common purpose to fight for the interests of its members as well as of the nation and the state through the General Elections.
- (2) The sovereignty of the Political Party is in the hands of its members
- (3) Every Political Party has equal position, function, rights and responsibilities, and in equal degree
- (4) Political Parties are independent in organizing their housekeeping matters.

CHAPTER II

CONDITIONS FOR FORMATION

Article 2

- (1) A minimum of 50 (fifty) citizens of the Republic of Indonesia who are over 21 (twenty years) of age may form a Political Party
- (2) The Political Party formed as mentioned in subsection (1) must fulfil the following conditions:
 - a. Include the Pancasila as the foundation of the Unitary State of the Republic of Indonesia as part of the statutes of the party
 - b. The principles or specifications, aspirations and program of the Political Party are not opposed to the Pancasila;
 - c. Membership to the Political Party is open to every citizen of the Republic of Indonesia with voting rights;
 - d. The Political Party may not use the same name or emblem of a foreign country, the Red and White flag of the Unitary State of the Republic of Indonesia, the national flag of a foreign country, the picture or name of a person, or the emblem of an existing party.

Article 3

The formation of a Political Party may not endanger national unity and integrity.

Article 4

- (1) Political Parties must be formed based on a Notary Act and must be registered with the Department of Law of the Republic of Indonesia
- (2) The Department of Law of the Republic of Indonesia may accept the registration of the formation of a Political Party when the Party has fulfilled the conditions as set out in Article 2 and Article 3 of this Law.
- (3) The ratification of the formation of the Political Party as a legal body is announced in the State Bulletin of the Republic of Indonesia issued by the Minister of Law of the Republic of Indonesia.

**EXPLANATIONS TO THE LAW OF THE REPUBLIC OF
INDONESIA
NO. 2 OF 1999 ON POLITICAL PARTIES**

GENERAL STIPULATIONS

The establishment of a Political Party is basically a reflection of the right of a citizen to meet, associate and express his or her opinion in accordance with Article 29 of the 1945 Constitution. Through Political Parties, the people may express their rights to co-determine the direction that national and state life should take. The diversity of opinions that are alive within society will result in the formation of a number of Political Parties in accordance with those opinions. Therefore, in essence, the state does not limit the number of Political Parties that will be established by the people.

In this diversity of Political Parties, each political party has equal position, function, rights and responsibilities, and to equal degree. Sovereignty of the Political Party is held by its members, and for that reason the Political Party is independent in nature to manage and organize its own housekeeping matters. Consequently, others who are outside the party are not in the position to intervene in housekeeping matters of the Political Party.

In order to achieve a healthy national and state life that has been the vision and ideals of the founding fathers of the state as formulated in the Preamble of the 1945 Constitution, every Political Party within the life of the state must be consistent in applying the Pancasila as the foundation of the state. Thus, the dynamics of

democracy in Indonesia will have a strong foundation. Since the principle aim of the Political Party has thus been agreed upon, each Political Party may have its own independent principles or identifications, as well as aspirations and program as long as these are not opposed to the Pancasila. The aspirations and program of the Political Party are the results of those principles or identifications that are made in efforts to find solutions to problems faced by the Indonesian nation. This Program is to be directed to the national ideals of the people of Indonesia which aim to develop a democratic life that is based on the Pancasila as the general direction, and the fight for the ideals of its members as the specific direction of the Political Party.

The national and state life as envisioned in the democracy that is based on Pancasila, can be achieved only when differences in society do not become the very reason to discriminate membership to a Political Party. The principle of non-discrimination to membership of the Political Party is essential, so that democracy that is based on Pancasila may come dynamically into being, where each Political Party is open to membership for every citizen of the Republic of Indonesia. In this way, the diversity of Political Parties will not disseminate the nation, on the contrary, this will become the bonding factor to unite and integrate the nation.

As one of the democratic institutions, the Political Party has the function to develop awareness of the political rights and responsibilities of the people, channel the interests of society in the formulation of state policies, and further foster and prepare members of society to fill political functions following democratic mechanisms. All these functions are realized through the holding of the General Elections that is implemented democratically, honestly, and justly by the giving and collection of direct votes, that are open, free and made in confidence, as determined through the Decision of MPR no.: Tap MPR no. XIV/MPR/1998 on Changes and Additions to Tap. MPR No. III/MPR/1998 on General Elections. Therefore, each Political Party has the right to participate in the General Elections having fulfilled the conditions as stipulated in the Law on the General Elections.

The State must guarantee that each citizen has equal opportunity to influence policies of state through the Political Party, and the establishment of the principle of democracy of one man one vote. Considering that the establishment of a Political

Party is the realization of the sovereignty of the people, and not aimed at the establishment of economic powers, there must, therefore, be set limits to resources of the Political Party in order to avoid the misuse of moneys for political interests (money politics). The financial transparency of the Political Party provides important information to all citizens to evaluate whether or not to support the said Political Party.

Furthermore, to establish the principles of a state that is based on law, the Political Party must obey all existing laws and regulations. Control over violations of the laws will be implemented by the Supreme Court of the Republic of Indonesia based on its authority as the highest judiciary institution and with reference to existing legal mechanisms.

Annex 5

LAW OF THE REPUBLIC OF INDONESIA

NO. 3 OF 1999

ON GENERAL ELECTIONS

LAW OF THE REPUBLIC OF INDONESIA
NO. 3 OF 1999
ON
GENERAL ELECTIONS

BY THE GRACE OF THE ALMIGHTY GOD
THE PRESIDENT OF THE REPUBLIC OF INDONESIA

Having Considered:
Mindful of :

With the Agreement of

PARLIAMENT OF THE
REPUBLIC OF INDONESIA

DECIDES

To establish:
THE LAW ON GENERAL ELECTIONS.

CHAPTER I
GENERAL STIPULATIONS

Article 1

(1) General Elections are a means to implement the sovereignty of the people in the Unitary State of the Republic of Indonesia based on the Pancasila and the 1945 Constitution.

- (2) General Elections are held in a democratic, transparent, honest and just manner with the direct giving and collection of votes, in public, directly and confidentially.
- (3) General Elections are held once every 5 (five) years on a holiday or a day designated as a holiday, simultaneously throughout the entire territory of the Unitary State of the Republic of Indonesia
- (4) General Elections are held to elect members of Parliament, members of the Regional Parliament of Level I area, and the Regional Parliament of Level II area, which henceforth will be called the DPR, the DPRD I, and DPRD II, except for DPR, DPRD I and DPRD II members belonging to the Indonesian Armed Forces (ABRI).
- (5) General Elections as mentioned in subsection (4) are also to elect members of the People's Consultative Congress, henceforth called the MPR.
- (6) Voting in the General Elections is a right of every citizen who has fulfilled the conditions for election.
- (7) General Elections are held utilizing the proportional system that is based on the list method.

CHAPTER VII

CONDITIONS OF PARTICIPATION IN THE GENERAL ELECTIONS

Article 39

- (1) A Political Party may participate in the General Elections when it has fulfilled the following conditions:
 - a. its existence is recognized by the Law on Political Parties;
 - b. has offices in more than ½ (half) of Indonesia's provinces;
 - c. has offices in more than ½ (half) of the total number of kabupatens/townships in the province as mentioned in point b.
 - d. has submitted the name and emblem of the Political Party.
- (2) A Political Party that has been registered, but does not fulfill the conditions mentioned in subsection (1) can not participate in the General Elections, but its existence is still recognized as long as the party fulfils its responsibilities as regulated in the Law on Political Parties.
- (3) In order to be able to participate in the next General Elections, a Political Party must have 2% (two percent) of the total number of seats in Parliament or at least 3% (three percent) of total seats in DPRD I or DPRD II dispersed in at least ½ (half) the number of provinces and in ½ (half) the total number of kabupaten/townships of the whole of Indonesia, based on results from the General Elections.

- (4) A Political Party participating in the General Elections that does not meet stipulations mentioned in subsection (3), may not participate in the next General Elections, unless it joins another Political Party.
- (5) The registration of a Political Party as participant in the General Elections, will be further regulated in the Decision on the Commission for the General Elections (KPU).

Annex 6

LAW OF THE REPUBLIC OF INDONESIA
NO. 4 OF 1999
ON THE STRUCTURE AND POSITION OF
THE PEOPLE'S CONSULTATIVE CONGRESS
PARLIAMENT AND THE
REGIONAL PARLIAMENT

**LAW OF THE REPUBLIC OF INDONESIA
NO. 4 OF THE YEAR 1999
ON
THE STRUCTURE AND POSITION OF
THE PEOPLE'S CONSULTATIVE CONGRESS
PARLIAMENT AND THE
REGIONAL PARLIAMENT**

BY THE GRACE OF ALMIGHTY GOD,

THE PRESIDENT OF THE REPUBLIC OF INDONESIA

Having Considered:

Mindful Of:

With the Agreement of

PARLIAMENT OF
THE REPUBLIC OF INDONESIA

Hereby Decide

To Establish:

THE LAW ON THE STRUCTURE AND POSITION OF THE
PEOPLE'S CONSULTATIVE CONGRESS (MPR), PARLIAMENT
AND THE REGIONAL PARLIAMENT

CHAPTER II

THE PEOPLE’S CONSULTATIVE CONGRESS

Part One

Structure

Article 2

- (1) The People’s Consultative Congress (MPR) consists of Members of Parliament (DPR) and:
 - a. Regional Representatives
 - b. Groups Representatives
- (2) The number of MPR members total 700 persons, comprising the following:
 - a. Members of Parliament – 500 persons
 - b. Regional Representatives 135 persons, i.e. 5 (five) persons from each Province (Level I Region)
 - c. Groups Representatives – 65 persons.
- (3) Regional Representatives are elected by DPRD I
- (4) The method of electing Regional Representatives for MPR Membership as mentioned in subsection (3) will be regulated in the Rules of Proceedings in DPRD I
- (5) Parliament decides on the kinds and the number of Representatives from each Group
- (6) Representatives of Groups as mentioned in subsection (5) are nominated by each Group and appointed by Parliament
- (7) The method of appointing MPR Members Group Representatives as mentioned in subsection (5) and subsection (6) will be regulated in the Rules of Proceedings in DPR.

Part Two

Membership

Article 3

(1) To become eligible as MPR member, a person must meet the following requirements:

- a. he or she is a citizen of the Republic of Indonesia, is at least 21 years of age and believes in the One Almighty God
- b. Speaks bahasa Indonesia and is fluent in its writing and reading in Latin characters, and has completed a minimal education level of the lower secondary school or similar education level and has experience in community work and or state matters.
- c. He or she is faithful to the vision set out in the 17 August 1945 Declaration of Independence, the Pancasila as the State foundation, and the 1945 Constitution.
- d. Is not a member of the prohibited Indonesian Communist Party, or its mass organization nor is directly or indirectly involved in the G-30-S/PKI coup attempt, nor involved in any other banned organization;
- e. Is not undergoing a criminal sentence passed by the court that is legally binding for having committed a crime which carries a sentence of 5 (five) years or more;
- f. Is clearly not mentally disturbed or has lost his/her memory.

CHAPTER III PARLIAMENT

Part One

Article 11

- (1) Membership to Parliament is based on results of the General Elections and by official appointment,
- (2) Parliament consists of:
 - a. members of political parties as result of the General Elections.
 - b. Members of the Armed Forces who are officially appointed.
- (3) The total number of Members of Parliament are 500 persons, comprising of :
 - a. members of political parties as result of the General Elections, numbering 462 persons;
 - b. appointed members of the Armed Forces, numbering 38 persons.

Article 33

- (1) DPR (Parliament) in its position as the State's high institution, is a vehicle to implement democracy based on Pancasila.
- (2) Parliament has the following functions and authorities:

- a. together with the President form legislation;
 - b. together with the President determine the State Budget of Receipts and Expenditures
 - c. further controls :
 - 1) the implementation of legislation;
 - 2) the implementation of the State Budget on Receipts and Expenditures
 - 3) Government policies to remain within the spirit of the 1945 Constitution and the
 - d. d. Decisions of MPR;
 - d. Deliberate on the audit results of state finances as informed by the Audit Board to the Plenary Meeting of Parliament, to be used as controlling material;
 - e. deliberate in order to ratify and/or endorse declarations of war or of peace, and agreements with other countries made by the President;
 - f. receive and follow-through on the aspirations and complaints from society;
 - g. implement those tasks entrusted to Parliament in the Decisions of MPR and/or as mentioned in such Laws as are entrusted to Parliament.
- (3) To implement its duties and authorities as mentioned in subsection (2), Parliament has the right to:
- a. ask for clarifications from the President;
 - b. undertake investigations;
 - c. make changes to Draft Laws
 - d. express opinions;
 - e. propose Draft Laws;
 - f. nominate/propose a person to a certain position when specified in a specific Law;
 - g. decide on the budget of Parliament.
- (4) Further to the rights of Parliament as set forth in subsection (3) that are, in fact, the rights of its members, Parliament further has the following rights:
- a. To pose questions
 - b. in protocol matters
 - c. in financial/administrative matters
- (5) The implementation of subsection (2), subsection (3) and subsection (4) will be regulated in the Rules of Proceedings of Parliament.

Article 34

- (1) DPRD, as the people's representative institute in the region, is a vehicle to implement democracy that is founded on Pancasila
- (2) DPRD has the duty and the authority :
- a. to elect the Governor/Deputy Governor, the Bupati, Deputy Bupati, and Mayor/Deputy Mayor;
 - b. to propose to the President the appointment and the termination of office of the Governor/Deputy Governor, the Bupati/Deputy Bupati and the Mayor/Deputy Mayor;

- c. Together with the Governor, the Bupati, the Mayor decide on the Regional Budget of Receipt and Expenditures;
- d. Together with the Governor, the Bupati and the Mayor formulate regional regulations;
- e. Further controls:
 - 1) implementation of regional regulations and other rules set forth in the legislation
 - 2) the implementation of regulations and decisions issued by the Governor, the Bupati and the Mayor;
 - 3) the implementation of the Regional Budget on Receipts and Expenditures
 - 4) Policies made by the Regional Government to be in line with the basic design of regional development
 - 5) The implementation in the region of international cooperation;
- f. To express opinions and give its considerations to the Government on planned
- g. international agreements that involve the interests of the region; receives and follows-through on the aspirations of society.

Article 35

- (1) In the implementation of their functions, and in accordance to each level, The DPR and DPRD have the right to ask a state official, a government official or a member of society for information and explanations on matters that are of concern for the sake of the state, the nation, the government and development.
- (2) The state official, the government official, or the member of society who refuses to answer to the request as mentioned in subsection (1) is liable to a prison sentence of minimum one year, for contempt of Parliament and DPRD.
- (3) The execution of rights as mentioned in subsection (1) and subsection (2) will be regulated in the Rules of Proceedings of Parliament and DPRD.

Article 36

- (1) International agreements that involve the interests and livelihood of a large number of people, the nation and the state, and in political, security, social, cultural, economic or financial aspects that are made by the Government, must have the endorsement from Parliament in accordance with existing legislation.
- (2) Regarding International agreements that involve the interests of the region, the Government must earnestly heed the voice of the Regional Government and the Regional Parliament.

Part Three
Immunity of MPR, Parliament and Regional Parliament

Article 38

(1) A Member of MPR, Parliament (DPR) or Regional Parliament (DPRD) can not be brought to court on account of a statement and/or opinion expressed in an open or a closed meeting of MPR, DPR or DPRD, that has been made orally or in writing, except when that Member divulges in public that which had been agreed upon in a closed meeting to be confidential, or that which are specified as state secrets in Book II, Chapter I of the Criminal Code.

(2) Members of MPR, DPR, DPRD may not be changed in mid-term because of a statement and/or opinion expressed in a meeting of MPR, DPR and DPRD.

Part Four
Protocol Positions and Finances

Article 39

The positions according to protocol and the finances of the leadership of MPR, DPR and DPRD are regulated by each body together with the Government, in accordance with existing regulations.

Part Five
Rules of Proceedings

Article 40

Rules of Proceedings in MPR, DPR and DPRD are determined by each institution.

CHAPTER VII
PROHIBITIONS AND INVESTIGATIONS ON MEMBERS OF
MPR, DPR, AND DPRD

Part One
Prohibitions

Article 42

- (1) Members of Parliament and DPRD are prohibited from operating/doing business where this involves funds originating from the State Budget and/or from the Regional Budget
- (2) Violations against specifications mentioned in subsection (1) may be issued with sanctions to the extent of termination of membership to DPR and DPRD.
- (3) The application of sanctions for violations against specifications mentioned in subsection (1), is implemented administratively by the leadership of DPR and DPRD based on proposals or considerations made by the fraction concerned, after due consideration and evaluation of the board that is specially formed for the purpose.
- (4) The implementation of the specification as set forth in subsection (1), subsection (2) and subsection (3) will be regulated in the Rules of Proceedings of DPR and DPRD.

Part Two
Investigations

Article 43

Whenever a Member of MPR, DPR and DPRD is duly suspected of having committed a crime, then the subpoena, questioning and investigation of the Member must have prior written approval from the President when it involves a Member of MPR and DPR; a written approval from the Minister of Internal Affairs when involving a Member of DPRD I, and a written approval from the Governor when involving a Member of DPRD II, in accordance with existing legislation.

Annex 7

LAW OF THE REPUBLIC OF INDONESIA

NO. 22 OF 1999

ON REGIONAL GOVERNMENT

LAW of the Republic of Indonesia

No. 22 of 1999 on REGIONAL GOVERNMENT

BY THE GRACE OF GOD ALMIGHTY,

THE PRESIDENT OF THE REPUBLIC OF INDONESIA

Having taken into Consideration:

- a. that according to the 1945 Constitution, the administrative system of the government of the Unitary State of the Republic of Indonesia provides ample scope to enforce Regional Autonomy
- b. that in the implementation of Regional Autonomy it is essential that the principles of democracy, the participation of the people, the equitable distribution of welfare and justice, and the awareness of the potentials and diversity of the Regions be emphasized;
- c. that considering present international and domestic circumstances and the challenges faced in global competition, it is deemed necessary that Regional Autonomy be enforced through the provision of the widest possible, concrete and accountable powers to the regions proportionately, to be realized through regulations, the division and utilization of national resources, and the share of Finances between the National and Regional governments, in accordance with the principles of democracy, the participation of the people, the equitable distribution of income and of justice, the potentials and diversity of Regions, and enforced within the framework of the Unitary State of the Republic of Indonesia;

- d. that Law no. 5 of the year 1974 on the Principles of Regional Government (Government's White paper no. 3037) is no longer consistent with the principles of Regional Autonomy and the present environment, and must, therefore, be replaced;
- e. that Law no. 5 of 1979 on Village Administration (Government's White Paper of year 1979 no. 56, addendum to White Paper no. 3153) which standardizes names, format, composition and position of village governments, is not consistent with the spirit of the 1945 Constitution and the need to respect and honour the rights of origins of the Regions that are special in nature, and must consequently be replaced;
- f. that in connection with the above, it is necessary to establish a Law on Regional Government to replace Law no. 5 of 1974 on the Principles of Regional Government, and Law no. 5 of 1979 on Village Government;

Taking further into consideration:

- 1. Article 1 subsection (2), Article 5 subsection (1), Article 18 and article 20 subsection (1) of the 1945 Constitution
- 2. The Decision of the People's Consultative Assembly of the Republic of Indonesia No. X/MPR/1998 on the Principles of Reform in Development in the context of safeguarding and normalizing National State Finances as State Guidelines;
- 3. Decision of the Consultative Assembly of the Republic of Indonesia No. XI/MPR/1998 on Clean Governance, free from Corruption, Collusion and Nepotism.
- 4. Decision of the People's Consultative Assembly of the Republic of Indonesia no. XV/MPR/1998 on the Implementation of Regional Autonomy, its Regulation, Division and Fair Utilization of National Resources and the Sharing Finances between the National and Regional Governments within the Framework of the Unitary State of the Republic of Indonesia

5. Law no. 4 of the year 1999 on the Formation and Status of the People's Consultative Assembly, Parliament and Regional Parliaments (Government's White paper of 1999 no. 24 and Addendum to White Paper no. 3811)

With the agreement of

**PARLIAMENT
OF THE REPUBLIC OF INDONESIA**

HEREWITH DECIDES:

To establish :

THE LAW ON REGIONAL GOVERNMENT

CHAPTER I

GENERAL QUALIFICATIONS

Article 1

In this Law the following terminology are understood:

- a. The National (Central) Government, or henceforth called the Government, is the apparatus of the Unitary State of the Republic of Indonesia consisting of the President and Ministers
- b. The Regional Government is the Head of the Region and other apparatus of the Autonomous Region as the Executive Body of the Region.
- c. The Regional Representative Body, henceforth called the DPRD (Regional Parliament) is the Legislative Body of the Region.
- d. The Regional Government is governance by the Regional Government of the Autonomous Region and the DPRD based on the principle of decentralization.
- e. By decentralization is meant the transfer of authority by the Government to the Autonomous Regions, within the framework of the Unitary State of the Republic of Indonesia.
- f. By de-concentration is meant the relinquishing of authority from the Government to the Governor as the Representative of the Government and/or its apparatus in the region.
- g. By Supporting Duty is meant the duty given by the Government to the region and the village and by the region to the village, to execute a specified task, (this duty) to be accompanied by a budget for facilities, infrastructure and personnel. (The appointee) has the responsibility to report its implementation, and is accountable to the institution from whom the task has been received.

- h. Regional Autonomy is the authority of the autonomous region to regulate and manage the interests of the local community according to their own initiative based on the people's aspirations and in accord with existing legislation.
- i. The Autonomous Region, henceforth called the Region, is a unit of a legal community with specific territorial boundaries, that has the authority to regulate and manage the interests of the local community through their own initiatives based on the aspirations of the people, and bound in the Unitary State of the Republic of Indonesia.
- j. Administrative Territory is the working territory of the Governor as Representative of the Government
- k. Vertical institutions are offices of departments and/or non-departmental institutions in the regions.
- l. The Official in authority is a Government official at national or provincial level who has the authority to manage and control regional governance.
- m. Kecamatan is the working territory of the Camat as the regional apparatus of the kabupaten or regional town.
- n. Kelurahan is the working territory of the Lurah as the apparatus of the kabupaten and/or regional town under the Kecamatan.
- o. The village, which may be known by other names, and henceforth called the village, is a unit formed by a legal community that has the authority to regulate and manage the interests of the local community based on origins, local customs and traditions that are recognized in the National Administrative system, and is within the Kabupaten.
- p. The territory of the village is the area where main activities are in agriculture and the management of natural resources, and where the area functions as rural settlement, has public and social services and economic activities.
- q. The territory of the town is an area where agriculture is not its main activity, where the area functions as town settlement, is the concentration and distribution point of public and social services and has economic activities.

CHAPTER III

Article 4

- (1) To enforce the principle of decentralization are formed provincial regions, regional kabupaten's and regional towns that have the authority to regulate and manage the interests of the local community through its own initiatives based on the aspirations of its people
- (2) The regions as mentioned in subsection (1) are separate and have no hierarchical link one with the other.

Article 5

- (1) The region is formed based on economic capacities, regional potential, social – cultural and social-political considerations, the number of population, extent of

territory and other considerations that allow for the implementation of regional autonomy.

- (2) The formation, name, boundaries and capital of the region as mentioned in subsection (1) are established by Law.
- (3) Changes/alterations in boundaries that do not result in the elimination of a region, the name of the region, nor the name and move of the capital city of the region, will be determined through Government Regulation.
- (4) Prerequisites for the formation of a region as meant in subsection (1) will be established by Government Regulation.

CHAPTER IV

THE AUTHORITY OF THE REGION

Article 7

(1) The authority of the Region encompasses authority in all areas of governance, except authority concerning foreign politics, security and defense, the judiciary, fiscal matters, religion and authority in other matters

(2) Authority in other matters, as meant in subsection (1) above, encompasses the authority on national planning, the management of macro national development, the sharing of funds, the state administrative system, and state economic institutions, the training and empowerment of human resources, the utilization of natural assets and of strategic sophisticated technology, conservation and national standardization.

Article 10

(1) The Region has the authority to manage national resources that are within its territory and is responsible to ensure a sustainable environment in accordance with existing legislation.

(2) The authority of the Region over the seas, as meant in article 3, encompass:

- a. the exploration, exploitation, conservation and management of marine resources to the extent of its sea territory
- b. regulate relevant administration
- c. regulate the utilization of areas;
- d. enforcement of rules and regulations issued by the Region or empowered to it by the Government; and
- e. assist in the security and sovereignty of the state

(3) The authority of the Regional Kabupaten and Regional Town City over the sea, as meant in subsection (2) extends to a third of the sea boundary of the Province

(4) Further regulation on this stipulation as mentioned in subsection (2) will be established by Government Regulation.

Article 11

(1) The authority of the Regional Kabupaten and the Regional Town encompass all authority of governance excepting those mentioned in Article 7 and regulated through Article 9

(2) The area of governance that must be implemented by the Regional Kabupaten and Regional Town are utilities, health, education, industry and trade, investment, the environment, agriculture, cooperatives and manpower.

Annex 8

LAW OF THE REPUBLIC OF INDONESIA
NO. 25 OF 1999
ON THE SHARING OF FINANCES
BETWEEN THE CENTRAL GOVERNMENT
AND THE REGION

THE LAW OF THE REPUBLIC OF INDONESIA
NO. 25 OF THE YEAR 1999
REGARDING
THE SHARING OF FINANCES BETWEEN
THE CENTRAL GOVERNMENT AND THE REGION

BY THE GRACE OF GOD ALMIGHTY,

THE PRESIDENT OF THE REPUBLIC OF INDONESIA

Having taken into consideration:

- a. that the Unitary State of the Republic of Indonesia is governed and is developed with
the aim to achieve a just, prosperous and equitable society based on Pancasila and the 1945 Constitution;
- b. that the development of the region, as an integral part of national development is implemented through regional autonomy and the management of national resources, in order to allow the growth of democracy and regional performance that are productive and effective for the sake of good governance, public services, and the development of social welfare in order to create a civil society that is free from corruption, collusion and nepotism, for which purpose community participation, transparency and public accountability are required;
- c. that in order to support the implementation of regional autonomy, financial resources must be regulated that take into consideration the principles of decentralization, de-concentration and functional assistance, to be contained within a sharing system of finances between the Central Government and the Regions, and based on the clear sharing of authority, functions and responsibilities among the various levels of government.

- d. That Law no. 32 of 1956 regarding the Sharing of Finances between the State and the Regions Authorized to Manage their own Household, is no longer in line with present circumstances as well as the needs and aspirations of society to support regional autonomy, and that, therefore a new law is required to regulate the sharing of finances between the Central Government and the Region.

Further considering:

1. Article 1 subsection (1), Article 5 subsection (1). Article 18, Article 20 subsection (1), Article 23 subsection (4), and Article 33 of the 1945 Constitution
2. The Decision of the People's Consultative Assembly (MPR) no. XV/MPR/1998 regarding the Implementation of Regional Autonomy, its Regulation, the just Sharing and Utilization of National Resources, and the sharing of Finances between the Central Government and the Region within the framework of the Unitary State of the republic of Indonesia.
3. Law No. 22 of the year 1999 on Regional Government (White Paper of year 1999 No. 60, and addendum to the White Paper no. 3839)

With the Agreement of

PARLIAMENT

OF THE REPUBLIC OF INDONESIA

HEREBY DECIDES:

To establish:

THE LAW ON THE SHARING OF FINANCES BETWEEN THE
CENTRAL GOVERNMENT AND THE REGION

CHAPTER I
GENERAL SPECIFICATIONS

Article 1

In this Law, understood by the following terminology are:

1. The Sharing of Finances between the Central Government and the Region is a system of funding in the government within the framework of the unitary state, that encompass the proportionate, democratic, just and transparent sharing of finances between the Central Government and the Region. Further, taking due consideration of the potentials, conditions and needs of the Region, and in line with the duties and the sharing of responsibilities, as well as methods of implementing that authority, which includes the management and control of finances.
2. By Central Government is meant the National Government as stipulated in Law no. 22 of 1999 on Regional Government.
3. By Regional Government is meant the Regional Government as stipulated in Law no. 22 of 1999 on Regional Government
4. By Regional Autonomy is meant Regional Autonomy as stipulated in Law no 22 of 1999 on Regional government
5. By Autonomous Region, which henceforth is mentioned as Region, is meant the Regional Autonomy as stipulated in Law no. 22 of year 1999 on Regional government
6. By Regional Head, is meant the Governor when concerning the Provincial Region, or the Bupati when concerning the Regional Kabupaten, or the Mayor, when concerning the Regional Town, as stipulated in Law no. 22 of 1999 on Regional Government

7. By the Regional Representative Council (Regional Parliament), which will henceforth be shortened to DPRD, is meant the Regional Representative Council (Regional Parliament) as stipulated in Law no. 22 of 1999 on Regional Government.
8. By Decentralization is meant the Decentralization as stipulated in Law no. 22 of 1999 on Regional government.
9. By De-concentration is meant the De-concentration as stipulated in Law no. 22 of 1999 on Regional Government
10. By Functional Assistance is meant the Functional Assistance as stipulated in Law no. 22 of 1999 on Regional Government
11. The Secretariat on the Sharing of Finances between the Central and Regional Government is one of the Secretariats in the Advisory Council of the Autonomous Region as stipulated in Law no. 22 of 1999 on Regional Government.
12. The Budget on State's Receipts and Expenditures, which henceforth is shortened to APBN, is the annual balance of payments of the State that is determined based on the Law on the Budget on the State's Receipts and Expenditures.
13. The Budget of Regional Receipts, or henceforth shortened to APBD, is an annual financial plan of the Region that is determined based on Regional Regulation concerning the Budget on Receipts and Expenditures.
14. Compensation Funds are funds sourced from receipts in APBN that are allocated to the Region to fund the needs of the Region in the implementation of Decentralization.
15. Regional Loans are all transactions that result in the Region receiving an amount of funds or benefits in monetary value from another party for which the Region is burdened with repayment, not including short term credit facilities that are normal in commercial transactions.
16. De-concentration Funds are appropriated for the implementation of APBN in the Provincial Region, encompassing all receipts and expenditures made in the implementation of De-concentration.
17. The Budget for Functional Assistance is earmarked for the implementation of APBN in the Region and Village, that encompass all receipts and expenditures for the implementation of Functional Assistance.
18. General Allocation funds are Funds that originate from APBN, that are allocated with the intention to equalize capacities among the Regions to fund expenses for the implementation of Decentralization.
19. Special Allocation Funds are funds that originate from APBN, allocated to the Region to assist in expenditures for a specified requirement.
20. Regional Documents are all documents issued by the Regional Government that are public in nature and are included into the White Paper of the Region.

CHAPTER II

PRINCIPLES OF REGIONAL GOVERNMENT FUNDING

Article 2

- (1) The implementation of duties of the Region that are within the framework of Decentralization will be funded from the APBD

- (2) The implementation of duties of the Central Government that are executed by the apparatus of the Provincial Government in the function of De-concentration will be funded from APBN.
- (3) The implementation of those duties of the Central Government that are executed by the apparatus of the Region or Village within Functional Assistance is funded from the APBN
- (4) The transfer or the entrustment of authority from the Government to the Governor or the transfer of authority of duties from the Central Government to the Bupati/Mayor must be accompanied by its related budget.

CHAPTER III

SOURCES OF RECEIPTS FOR THE IMPLEMENTATION OF DECENTRALIZATION

Part One

Source of Receipts of the Region

Article 3

Sources of receipts of the Region to implement Decentralization are:

- a. Original Receipts from the Region
- b. Compensation Funds
- c. Regional Loans;
- d. Other lawful receipts

Part two

Original Receipts of the Village

Article 4

The Original Receipts of the Village as stipulated in article 3 point a, are:

- a. Regional Taxes
- b. Regional Rates (retribusi)
- c. Profits from Regional companies and other lawful wealth from the Region
- d. Other lawful Regional receipts.

Part Three

Compensation Funds

Article 6

- (1) Compensation Funds consist of the following:
 - a. Regional Share of receipts from taxes on Land and Construction, Duty on Lease and Construction rights, and receipts from natural resources
 - b. General Allocation Funds
 - c. Special Allocation Funds
- (2) State Receipts from Taxes on Land and Construction are shared, with 10% (ten percent) for the Central Government and 90% (ninety percent) for the Region
- (3) State Receipts from Duty on Land lease and Construction Rights are divided with 20% (twenty percent) for the Central Government and 80% (eighty percent) for the Region.
- (4) The 10% from Taxes on Land and Construction, and the 20% on Duty on Land lease and Construction rights to which the Central Government is entitled as stipulate in subsection (2) and subsection (3) above, will be divided among all Kabupatens and Towns.
- (5) State Receipts from natural resources originating from forestry, the general mining sector and the fishery sector will be divided with 20% (twenty percent) for the Central Government and 80% (eighty percent) for the Region.
- (6) State Receipts from national resources in the sector of mining of oil and natural gas which are produced from within the territory of the Region will be shared as follows:
 - a. State Receipts from the mining of oil originating from the territory of a Region, with deduction for related taxes, are shared, with 85% (eighty five percent) for the Central government and 15% (fifteen percent) for the Region.
 - b. State Receipts from the mining of natural gas that originate from the territory of the Region, with deduction for related taxes, are shared with 70% (seventy percent) for the Central Government and 30% (thirty percent) for the Region.

Article 7

- (1) General Allocation Funds are determined at a minimum of 25% (twenty five percent) from Domestic Receipts as stipulated in the APBN
- (2) General Allocation Funds for the Provincial Region and for the Region of the Kabupaten/Town are determined at 10% (ten percent) and 90% (ninety percent) respectively of the General Allocation Funds as stipulated in subsection (1)
- (3) In the event that changes are made in the authority between the Province and the Regional Kabupaten/Town, then the General Allocation Funds for that Province and the Regional Kabupaten/town will be adjusted accordingly.

- (4) General Allocation Funds for a specific province is calculated based on the multiplication of the amount set for the General Allocation Fund for all Regional Provinces stipulated in APBN, by that portion of the Regional Province under consideration.
- (5) The portion of the Regional Province as stipulated in subsection (4) is the weighted proportion of that Province in ratio to all Regional Provinces throughout Indonesia.
- (6) General Allocation Fund for a specific Regional Kabupaten/Town is determined on the multiplication of the amount for General Allocation Fund for all Regional Kabupatens/Towns stipulated in APBN by that portion of the Regional Kabupaten/Town under consideration.
- (7) The Portion of the Regional Kabupaten/Town as stipulated in subsection (6) above is the weighted proportion of the Regional Kabupaten/Kota in ratio to the weight of all Regional Kabupatens/Towns throughout Indonesia.
- (8) The weight of the Region is determined based on
 - a. The needs of the territory of the Autonomous Region under consideration
 - b. The economic potentials of that Region
- (9) The General Allocation Fund as based on the formula stipulated in subsection (4), subsection (5), subsection (6), subsection (7), subsection (8) is calculated by the Secretary for the Sharing of Funds between the Central Government and the Region.

Article 8

- (1) Special Allocation Funds may be appropriated from the APBN for a specific Region to assist to defray special requirements, taking due consideration of the availability of funds in APBN.
- (2) Specific Requirements as meant in subsection (1) above are:
 - a. requirements that can not be estimated using the general allocation formula, and/or
 - b. requirements that are national commitments or priorities
- (3) Special allocation Funds as mentioned in subsection (1) include those originating from re-forestry funds
- (4) Re-forestry funds are divided as follows:
 - a. 40% (forty percent) are for the producing Region as Special Allocation Fund
 - b. 60% (sixty percent) are for the Central Government.
- (5) Except for re-forestry, Regions that receive funds for Special Allocation as mentioned in subsection (2), will set aside accompanying funding from APBD, according to capabilities of the Region under consideration.

Article 9

The amount allocated for the Sharing of Funds as mentioned in Article 6, subsection (1) will be determined every budget year in APBN.

Part Four

Regional Loans

Article 11

- (1) The Region may take loans from domestic sources to defray part of its budget.
- (2) In respect of loans from overseas sources, these must be made through the Central Government
- (3) Regions may take long-term loans to defray expenses for infrastructure construction to become assets of the Region, that will contribute to receipts from which loans are repaid, and that are beneficial to public services.
- (4) The Region may take short-term loans to regulate its cash flow in managing the cash of the Region.

Article 12

- (1) Regional Loans as mentioned in Article 11 may be made with the agreement of DPRD
- (2) Regional Loans as mentioned in subsection (1) are made with due consideration to the capacities of the Region to defray its responsibilities.
- (3) In order that this becomes public knowledge, every agreement on loans made by the Region must be announced in the Regional White Paper.

Article 13

- (1) The Region is prohibited from taking Regional loans that are beyond the limits of amounts determined.
- (2) The Region is prohibited from making agreements that are in fact loans in nature, that will burden the finances of the Region.
- (3) Violations of subsection (1) and subsection (2), will be prosecuted in accordance with existing laws.

Article 14

- (1) All repayments that become the responsibility of the Region for Regional Loans made, will become a priority in the expenses of APBD

- (2) In the case that the Region does not fulfil its responsibility of repayment to the Central government for Regional Loans, then the Central Government may compensate the amount from the General Allocation Fund for the Region.

Article 17

- (1) Expenses made in the implementation of De-concentration will be transferred to the Governor through the Department/ Non-Departmental Government Institution in question.
- (2) Accountability on expenses made in the implementation of De-concentration as mentioned in subsection (1) is with the Governor and accountable to the Central Government through the Department/ Non-Departmental Government Institution in question.
- (3) Financial administration for the implementation of De-concentration is separated from accounts for the implementation of Decentralization.
- (4) Receipts and expenditures made in the implementation of De-concentration are registered in the accounts on the Budget for De-concentration.
- (5) Where there are unutilized funds in the budget as a result of receipts against expenses for De-concentration activities, then unutilized funds must be returned to the Office of State Funds.
- (6) Audit on expenses made in the implementation of De-concentration mentioned in subsection (1) is undertaken by the State Audit institution.
- (7) Further regulations regarding expenses for the implementation of De-concentration will be regulated through Government Regulations.

List of IDE Asian Law Series

- No.1 Proceedings of the Roundtable Meeting “Law, Development and Socio-Economic Changes in Asia”
- No.2 China’s Judicial System and its Reform
- No.3 Judicial System and Reforms in Asian Countries: The Case of India
- No.4 The Malaysian Legal System, Legal Practice & Legal Education
- No.5 The Philippine Judicial System
- No.6 The Judicial System in Thailand: An Outlook for a New Century
- No.7 Legal and Judicial Reforms in Vietnam
- No.8 Law and Development in Changing Indonesia
- No.9 Modernization of Laws in the Philippines
- No.10 The Indonesian Law on Contracts
- No.11 Proceedings of the Roundtable Meeting “Law, Development and Socio-Economic Changes in Asia II”
- No.12 Political Change and Legal Reform towards Democracy and Supremacy of Law in Indonesia
- No.13 Law and Newly Restored Democracies: The Philippine Experience in Restoring Political Participation and Accountability
- No.14 New Legal Frameworks towards Political and Institutional Reform under the New Constitution of Thailand
- No.15 Dispute Resolution Process in China
- No.16 Dispute Resolution Process in India
- No.17 Dispute Resolution Process in Malaysia
- No.18 Dispute Resolution Mechanism in the Philippines
- No.19 Alternative Dispute Resolution in Thailand
- No.20 Alternative Dispute Resolution in Vietnam

Published by Institute of Developing Economies (IDE), JETRO
3-2-2 Wakaba, Mihama-ku, Chiba-shi
Chiba 261-8545, JAPAN
FAX +81-(0)43-2999731
Web Site: <http://www.ide.go.jp>
e-mail: laws@ide.go.jp