

The Rule of Law and Land Disputes in Indonesia

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ABSTRACT

This article discusses how essential it is for the rule of law to be applied, in order to protect land rights and to avoid land disputes in Indonesia. This is an analysis of the Indonesian laws dealing with the rule of law and how the rule of law is practiced under the Indonesian legal system. The concept of human rights in general, and how Indonesian laws accommodate these rights will be examined. It appears that a lack of the rule of law and the lack of protection toward human rights have led Indonesia into a situation of political uncertainty and into episodes of sporadic violence. Indonesia's failure to implement the rule of law has contributed to ongoing land disputes. Under former President Soeharto, the rule of law only exists in theory, but in practice the government has failed to apply it. As a result there is a lack of confidence in legal institutions including the court system.

ABSTRAK

Artikel ini membicarakan betapa pentingnya pemakaian kedaulatan undang-undang untuk melindungi hak-hak terhadap tanah dan juga menghindarkan dari berlakunya pertelingkahan mengenai tanah di Indonesia. Ia merupakan analisa kritis tentang Undang-Undang Indonesia berhubung dengan pemakaian konsep kedaulatan undang-undang. Konsep hak asasi secara amnya juga turut dibincangkan. Ia menunjukkan seolah-olah kedaulatan undang-undang dan perlindungan hak asasi diabaikan sehingga membawa Indonesia ke arah politik yang tidak menentu, seterusnya menyumbang ke kancah huru-hara. Di bawah pemerintahan Presiden Suharto di dapati bahawa konsep ini hanya terdapat dalam teori sahaja sedangkan pada amalnya ia tidak berlaku. Ini telah menimbulkan rasa kurang yakin terhadap institusi perundangan termasuklah sistem mahkamah.

INTRODUCTION

The rule of law is essential to avoid land disputes and for the protection of human rights. Many legal experts have isolated the importance of the rule of law in the protection of human rights. Todung Mulya Lubis, an Indonesian leading human rights lawyer, believes that the rule of law is crucial to the protection of human rights. Lubis adds that only within a state based on the rule of law including the independence of the judiciary with due process of

law and judicial review, can human rights be guaranteed.¹ In addition, Robin Creyke maintains that the rule of law requires that decision making should have lawful authority and should be rational and predictable.²

Logeman argues that there are three basic elements of the rule of law. First, there must be a guarantee of human rights protection in all fields without distinction of any kind such as sex, race, cultural background, economic condition and political conviction. Second, there must be an independent and impartial judiciary. Third, there must be strict adherence to the principle of legality.³

Friedrich Hayek and Justice Scalia observe that the rule of law means that the government is bound by rules fixed and announced before hand.⁴ They argue that a minimum requirement of the rule of law would be a commitment to some form of equality, at least to the avoidance of arbitrary discrimination between equally situated persons. Another requirement would be the maintenance of fair procedures for resolving disputes. An International Commission of Jurists (ICJ) conference in Bangkok stressed six basic elements of the rule of law which included constitutional protection of human rights, an independent and impartial judiciary, fair and free general elections, recognition of the right to express an opinion, freedom to organise, freedom to dissent and civil education.⁵

This article will discuss how essential it is for the rule of law to be applied, in order to protect the villagers' land rights and to avoid land disputes in South Sumatra. An analysis of the Indonesian laws dealing with the rule of law and how the rule of law is practiced under the Indonesian legal system will be conducted. The concept of human rights in general, and how Indonesian laws accommodate these rights will be examined. It appears that a lack of the rule of law and the protection toward human rights have led Indonesia into a situation of political uncertainty and into episodes of sporadic violence.⁶

¹ The rule of law has some synonyms such as *rechtsstaat* and which is translated literally as *negara hukum* in Indonesian and this term is used in the 1945 Constitution. *Rechtsstaat* derives from a civil law model and rule of law implies a common law. Todung Mulya Lubis, *In Search of Human Rights: Legal Political Dilemma of Indonesia's New Order 1966-1990*, PT Gramedia Pustaka Utama and SPES Foundation, Jakarta, 1993, pg. 171.

² Robin Creyke, et.al, *Aspects of Administrative Review in Australia and Indonesia*, Centre for International and Public Law Australian National University, Canberra, 1996, pg. 11.

³ Id. Logeman as cited in Robin Creyke.

⁴ George P. Fletcher, *Basic Concepts of Legal Thought*, Oxford University Press, New York, 1996, pg. 11.

⁵ Ismail Suny, *Pancasila's Democracy Mechanism*, Aksara Baru, Jakarta, 1978, pg. 20.

⁶ For example, ethnic violence occurred in many parts of Indonesia including Maluku and Kalimantan where thousands of people died. Indonesia is also faced with disintegration problem where many regions including Aceh and Irian Jaya claim independence from Indonesia.

Indonesia's failure to implement the rule of law has contributed to ongoing land disputes.⁷

In a unitary state with strong central government domination, national land policy has crucial implications for the regions. The central government's economic policy to invite and give business permits to as many plantation investors as possible in South Sumatra has influenced land ownership management. Land disputes in Indonesia have been caused by the government's unwillingness to recognize community land rights which are inconsistent with government policy of inviting massive investment.⁸

THE RULE OF LAW IN INDONESIAN LAWS

Indonesia appears to have a commitment to the rule of law (*negara hukum*) as provided in some laws. For example, Article 1 of elucidation of the Indonesian 1945 Constitution states that Indonesia is a state based on law, not on power and the government is based on a constitutional system which is not absolutist (unlimited power).⁹ Article 1 of Elucidation of Act No 14/1970 on the Indonesian Judicial Power Act states that the independence of the judiciary embraces a concept that there is an independent judiciary free from interference from other state institutions, free from pressures, directions or recommendations which originate from extra-judicial authorities.¹⁰

The Indonesian Consultative Assembly (*MPR*) stated that rule of law in Indonesia consists of three principles:¹¹ First, legality, in the sense of law in all its forms. Second, an independent judicial system. Third, the recognition and protection of fundamental rights such as the right to life, liberty, and security.¹²

In order to enforce the rule of law, Indonesia has five arms of government. The five arms of government are the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat or MPR*), the House of Representatives (*Dewan Perwakilan Rakyat or DPR*), the President (*Presiden*), the Financial Auditing Board (*Badan Pemeriksa Keuangan or BPK*), and the Supreme Court (*Mahkamah Agung or MA*).

⁷ Endang Suhendar and Ifdal Kasim, *Tanah Sebagai Komoditas*, ELSAM, Jakarta, 1996, pg. 61.

⁸ Maria R. Ruwiasuti, 'Community Rights in Politic of Agrarian Law', KPA-Bandung, 1997, pg. 56.

⁹ See the elucidation of Indonesian 1945 Constitution.

¹⁰ The elucidation of Act No 14 of 1970 on the Basic Law on Judicial Power.

¹¹ *Majelis Permusyawaratan Rakyat* Indonesia, 'Rencana Pembangunan Lima Tahun', 1970.

¹² Article 3 of Universal Declaration of Human Rights 1948.

RULE OF LAW: CONCEPT VERSUS REALITY

The implementation of the rule of law and human rights protections are two essential elements for a democratic state. The rule of law is an instrument to give security and access to legal processes to all citizens. In addition, the rule of law enables all state organs to perform their roles as required by law. Citizens must be protected from abuse especially from the government officials and the military.

The World Bank argues that the practice of rule of law and legal reform and human rights protection must emerge as a key component in Indonesia's efforts to fight corruption and establish good governance in both the public and private sectors.¹³ The negative implications are easy to see in countries that fail to protect human rights.

The problem for Indonesia is that both the rule of law and human rights protections are far from ideal. Under thirty two years of the New Order Government, Indonesia has seriously neglected the rule of law and has not given sufficient human rights protection to its citizens. As a result, after President Soeharto left office, Indonesians were impatient and they wanted to see that the rule of law and human rights protections were implemented immediately. The difficulty was not only Indonesia's lack of experience in those two fields, but also because the implementation of the rule of law and the protection of human rights require time and an orderly procession of steps.

There are not many countries in the world which could have shifted immediately from a totalitarian state to a country that practiced the rule of law and at the same time guaranteed human rights protections. Under thirty two years of Soeharto's dictatorship the most serious problem left was the accumulation of corruption, collusion, and nepotism in many aspects of Indonesian lives, including within the legal system. Corruption was so systematic and widespread that it made Indonesia the fourth most corrupt country in the world after Nigeria and Cameroon.¹⁴ The Political and Economic Risk Consultancy, Ltd (PERC), a leading Hong Kong based consultant, in its 2001 report on corruption in Asia found that Indonesia is the second most corrupt country in Asia after Vietnam.¹⁵

¹³ World Bank, 'Judicial and Legal Reform', Country Report, 2000 <http://www.worldbank.org>. (15 Nov 2003).

¹⁴ Transparency International Report, 1999 <http://www.transparency.org>. (3 Oct. 2003).

¹⁵ In its 2001 report, PERC put scale of corruption from zero to 10, with zero being the best grade possible and 10 the worst. The result of 2001 trend of survey scores for corruption are as follows: Singapore (0.83), Japan (2.50), Hong Kong (3.77), Malaysia (6.00), Taiwan (6.00), South Korea (7.00), China (7.88), Thailand (8.55), Philippines (9.00), India (9.25), Indonesia (9.67), and Vietnam (9.75). The Political and Economic Risk Consultancy, Ltd, 'Corruption in Asia'. <http://www.asiarisk.com>. (7 March 2001).

Ismail Suny, a prominent Indonesian constitutional lawyer, argues that there is a universal standard applied in the rule of law. He believes that the requirements of an Indonesian rule of law should comply with international standards. He emphasises that the judiciary should also be supported by social control and public opinion.¹⁶

The judiciary alone cannot be effective without social control and public opinion. However, an independent and impartial judiciary is the basic element in the practice of the rule of law. It would be all but impossible for a country to protect human rights without an independent judiciary system.¹⁷

In theory Indonesia is committed to the rule of law but in practice there is evidence to suggest the contrary. While the rule of law requires the independence of the judiciary, this article will show that Indonesia has a dependent judiciary. In addition, human rights can only be protected if the military is made subject to the rule of law. However, ample evidence shows that Indonesian's military often acts with little respect to the law, and evidence of this is found in military activities in Aceh and Papua.¹⁸ Furthermore, there is a lack of checks and balances between the government and the parliament under the Indonesian constitution

DISTRIBUTION OF POWER: LACK OF CHECK AND BALANCE

The French political philosopher Montesquieu developed the doctrine of the separation of powers. This doctrine stipulates that the three major organs of the state, the executive, the legislative and the judiciary shall each perform a single different function. Laws are enacted by the legislature and the executive is responsible for applying those laws. The judiciary will resolve a dispute regarding the meaning or the application of a law.¹⁹

The Indonesian system is based on a further 'modification' where state power is not separated as proposed by Montesquieu, but divided. The state power comes from the People's Consultative Assembly (*MPR*) and it is distributed between the executive, the legislature, and the judiciary. The President, who gains power from the *MPR*, claims an implicit right to influence the other two instruments of the government. During the thirty-two years of the New Order Government, a doctrine of distribution of power was

¹⁶ Ismail Suny cited by Todung Mulya Lubis (n 1), pg.102.

¹⁷ World Bank, 1997 as cited by Gary Goodpaster 'The Rule of Law, Economic Development and Indonesia', in Timothy Lindsey (ed), *Indonesia Law and Society*, The federation Press, Sydney, 1999, pg. 21.

¹⁸ Todung Mulya Lubis presentation, Asian Law Centre, University of Melbourne, 8 November 2000.

¹⁹ John McMillan, "An Overview of the Australian Legal System" in Robin Creyke, et.al (eds) (n 2) pg. 43.

implemented as the President had absolute power compared to other two institutions.

The Elucidation of the 1945 Constitution states: “the President is not responsible to the *DPR* (the House of Representatives), which means the President’s position is not dependent upon the *DPR*”.²⁰

Theoretically, the Indonesian Consultative Assembly (*MPR*) controls the President. In practice, under the New Order Government the President controlled the government and had extensive power to implement the broad outlines of state policy formulated by the *MPR*. Consequently there was limited opportunity to have an independent judiciary and legislature. The President had extensive power and dominated other state institutions. Ismail Suny, a prominent Indonesian constitutional lawyer, has described the situation under the New Order regime as “executive-heavy government”.²¹

Although there were essential improvements under President Abdurrahman Wahid’s government (from 1999) and under President Megawati Soekarno Putri (from 2000), the three decades of government under Soeharto (1966-1998) has made it a difficult task to ‘liberate’ the judicial system in Indonesia. Many judicial processes in Indonesia, which are contrary to the rule of law principles, have become endemic.

A DEPENDENT JUDICIARY

In law, the Indonesian judiciary is independent of the government, however the reality is very different. The Indonesian 1945 Constitution dealing with judicial power does not explicitly deal with judicial independence. Articles 24 and 25 state that: 1) judicial power is to be exercised by the *Mahkamah Agung*, and other judicial bodies in accordance with statute²², 2) the structure and powers of those courts shall be regulated by statute²³, and 3) the conditions for becoming a judge and for being dismissed shall be prescribed by statute.²⁴

Judges in Indonesia have limited independence; they are government officials appointed by the government. Article 11 of Act No 14 of 1970 on the Judicial Power authorizes the Minister of Justice to determine judicial appointments, promotion, salary and dismissal.²⁵ Under the Indonesian 1945

²⁰ The Elucidation of 1945 Constitution on the System of the Government (point 5).

²¹ Todung Mulya Lubis (n 1) pg. 179.

²² Article 24 (1) of the 1945 Constitution.

²³ Article 24 (2) of the 1945 Constitution.

²⁴ Article 25 of the 1945 Constitution.

²⁵ Former Chief Justice Ali Said was highly critical of government attempts to limit the independence of the judiciary. Similar criticisms have been stated by other *Mahkamah Agung* judges such as Adi Andoyo and Bismar Siregar. ‘Mahkamah Ali yang Dipreteli’, *Tempo*, <http://www.tempo.co.id>. (10 July 1992).

Constitution, a Minister is the assistant to the President who is appointed and dismissed by the President.²⁶ The Chief Justice has equal status to a Minister. As assistants to the President, Ministers have an obligation to support the President who has an absolute right to suspend his ministers.²⁷ Judges in Indonesia are answerable to the Minister of Justice and the Chief Justice, and therefore have similar status to any other bureaucratic appointment in Indonesia. In relation to judges as government officials, Lev states:²⁸

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

In addition, under the New Order Government the government effectively controlled the composition of the courts. Article 8 of the *Mahkamah Agung* Act stipulates that the Chief of *Mahkamah Agung* judge is to be promoted from a list of two judges proposed by the Parliament. The problem with this process of appointment is that the President may not agree with the candidates proposed by the *DPR*. It is possible that the *DPR*'s appointment of the candidates is influenced by political factors. That was the reason given by President Wahid when he refused to choose either of the two candidates proposed by the *DPR* because both candidates, Prof. Muladi and Prof. Bagir Manan, were involved in the New Order Government under former President Soeharto regimes. President Wahid did not explain what exactly they had done.²⁹

As the executive director of the Indonesian Association for Legal and Human Rights Aid, Hendardi argues, the public must be involved in the election and appointment of the *Mahkamah Agung* chairman and the *Mahkamah Agung* judges in order to achieve the independence of the judicial

²⁶ Article 17 of the 1945 Constitution: 1) The President shall be assisted by Ministers of the state, 2) These ministers shall be appointed and dismissed by the President, 3) These ministers shall lead the government departments.

²⁷ For example, there were three ministers suspended in the first year that President Abdurrahman Wahid was in office.

²⁸ Daniel S. Lev, 'Judicial Authority and the Struggle for An Indonesian *Rechtstaat*' (1978) 13 *Law and Society Review*, 37.

²⁹ *Kompas*, <http://www.kompas.com>. (9 January 2001).

branch. The *DPR* needs to hold hearings on the election or appointment of the supreme judges. As well as to safeguard the independence of judges against collusion, corruption and nepotism, a control mechanism regarding the assets of judges must be established.³⁰

There is an attitude that judges at the district level are viewed as subordinate to the local government. A prominent Indonesian judge, Benyamin Mangkoedilaga, wrote that, in Sumatra, there was a case where a governor (equal to a Premier in Australia) expelled a judge from his province because he was not pleased with the judge's decision.³¹

The problems exist because the organization, transfer of judges, and financial aspects of the judiciary are under the power of the government. Whilst Article 10(4) of Act No 14 of 1970 on the Indonesian Judicial Power gave the authority to the *Mahkamah Agung* to offer supervision and guidance to the courts, that authority has been limited to technical aspects. Although some judges have high moral integrity, they suffer hindrance in their career development. The real independence of judges much depends on the division of power among the executive, legislature, and the judiciary.

Whatever model of judiciary is adopted for the future of the Indonesian judicial system, it should include five key elements: independence, impartiality, fairness, competence and accountability. In many common law systems, judges have been traditionally selected from the senior practitioners, mainly former Queens' Counsel (senior barristers).³² Judicial accountability is achieved by having court processes generally conducted in public, and judges are required to give reasons for their decisions. In addition, court decisions are published and the public can easily access court decisions. One alternative way to control the Indonesian judges is by publishing their decisions as has been practiced in Australia. Although Indonesia does not follow the doctrine of precedents,³³ it is suggested that the publication of judges' decisions would have some sort of control on Indonesian judges in making their decisions, as it occurs in most European civil law jurisdictions.³⁴

³⁰ 'Executive Branch Decisive for Independence of Judges', *Kompas*, <http://www.kompas.com>. (6 October 1998).

³¹ Benyamin Mangkoedilaga, 'Recruitment System and Problems of Independence of the Indonesian Judges', in M.Deden Ridwan and Asep Gunawan (ed), *Democratization of Power*, Yayasan Obor, Jakarta, 1999, pg. 131.

³² Attorney General Department, *Judicial Appointments: Procedure and Criteria* (Australian Government Publishing Service, Canberra, 1993), p. 4.

³³ A doctrine that a court is bound to follow the previous decisions of courts higher in the same hierarchy on the same or similar issues.

³⁴ French, Italian and German judicial decisions are published.

GOVERNMENT INTERFERENCE IN THE JUDICIARY

As mentioned earlier, the rule of law requires the independence of the judiciary, free from government influence. This is not the case in Indonesia because there is a legal basis for government interference in the judicial processes.

Indonesia has a history of limited independence of its judicial system. Under the Soekarno Old Order Government (1945-1966), the judiciary was regulated by Act No 19 of 1964 and Act No 13 of 1965. These two laws gave the right to the President to interfere in the judicial process for the interest of the state.

Article 19 of Act No 19 of 1964 states:

“In the interests of revolution, the honor of the state and nation, or the urgent interests of society at large, the President can intervene in court proceedings”

Moreover, Article 23(1) of Act No 13 of 1965 states:

“In the case where the President interferes, the court processes have to be terminated and the decision of the President should be announced”

The New Order Government (1966-1998) used similar ways to interfere with judicial proceedings. Article 13 of the Indonesian Constitution 1945 explicitly gives the President a right to interfere with the judicial processes as he has a power to grant clemency, amnesty, and abolish and restore the rights of those convicted by the courts.³⁵ Although these powers may be very common for the Head of government elsewhere, in the case of former President Soeharto, he abused them. As a result of this power, when the *Mahkamah Agung* issued a decision, President Soeharto was able to change the decision because of his power based on Article 14 of the 1945 Constitution. There were many land cases involving government interference in court decisions. Examples include the *Kedung Ombo land case* (Central Java Province), and the *Hanoch Hebe Ohee land Case* in Papua.

Under Soeharto, the government may dictate to the judges what decision should be made. Prominent Indonesian judge Benyamin Mangkoedilaga stated that the problem with the Indonesian legal system was that judges in Indonesia were not free from government intervention. “If Indonesian judges are being asked: “is there any intervention from the government?” Most of them will answer ‘yes’ to this question.³⁶

³⁵ Article 13 of the 1945 Constitution: “The President can grant clemency, amnesty, abolition and rehabilitation to those convicted by the Courts”.

³⁶ Benyamin Mangkoedilaga (n 33), pg. 130.

In the *Kedung Ombo* case a dispute arose when the government decided to take over more than 60,000 hectares of land to build a dam in Kedung Ombo village in central Java. Many villagers refused the low rate of compensation³⁷ offered by the local authorities. More than 1,500 families refused to leave their homes.³⁸ According to the District Court (*Pengadilan Negeri*) and the Higher Court (*Pengadilan Tinggi/Court of Appeal*) the level of compensation offered by the government was sufficient and the government had sufficient deliberations with the people.³⁹

The villagers in Kedung Ombo then appealed to the *Mahkamah Agung* which upheld the appeal and increased a claim for a higher level of compensation than the local government had offered. The rule of law was then jeopardized when the Indonesian *Mahkamah Agung*, the highest court in the country, made the extraordinary decision to review its own final decision on an appeal from a lower court. However, after the President invited the Chief Justice to talk, the *Mahkamah Agung* reviewed its decision. The *Mahkamah Agung* reviewed its own decision on the basis that the judges hearing the case may have been mistaken and the decision may have conflicted with legislation.⁴⁰

RULE OF LAW OR RULE OF THE RULERS?

A crucial question is whether there is any rule of law in Indonesia. Arif Budiman argues that many Indonesians do not believe in the rule of law, because they do not believe that law will protect them. He believes that under the New Order Government law was manipulated to serve politics. During this period, rule of the ruler was practiced instead of rule of law.⁴¹ On the issue of the chaotic judicial system, Prof. BIT. Tamba, a criminal law expert, observes:

The Court system in Indonesia has degenerated. The collapse is continuing. We can not stop this process in one day. It is a mission impossible. Our court system is in a very serious situation, that is true. Judge's decisions can be bought, that is also true⁴²

³⁷ The standard of compensation was based on the Governor's decision on compensation. In practice, each province has its own Governor's decision regarding the standard of compensation.

³⁸ Daniel Fitzpatrick, 'Disputes and Pluralism in Modern Indonesian Land Law' (1997) 22 *Yale Journal of International Law* 171.

³⁹ Semarang District Court Decision No 11/Perdata/G/1990 and Central Java Higher Court Decision No 143/Perdata/1991.

⁴⁰ *Forum keadilan*, 'Kedung Ombo Kembali ke-titik Nol', 8 December 1994 [Internet: <http://www.forum.co.id>].

⁴¹ Timothy Lindsey, (n 19), pg. v.

⁴² *Sriwijaya Post*, 'Wawancara Dengan Prof. BIT Tamba', <http://www.indonesia.com/sriipo/> (6 November 2000).

Research conducted by a legal aid foundation in Yogyakarta concluded that the rule of law in Indonesia is still a myth because the court systems were subordinate to the government. There was a patent lack of integrity on the part of many involved in law enforcement.⁴³ Prof. Harkristuti Harkrisnowo added that rule of law in Indonesia has not been implemented, as required because the courts are not independent, there is inconsistency in law enforcement and a lack of legal protection of the peoples' rights.⁴⁴

The independence of courts in Indonesia is questioned when they have to handle cases which involve the government or the military. Often the judges have to face serious consequences when the government does not accept their decision. As mentioned earlier, it was not surprising when the Head of a District or a Governor of a province was angry with a judge and did not accept the decision. Sometimes judges have had to contend with the military wishes when their decision is counter to the military interest. For example, in the *Tempo Magazine case*⁴⁵ three members of the military "visited" Higher court judges and tried to influence them.⁴⁶

In relation to inconsistency in law enforcement, law in Indonesia is implemented in a discriminatory way. People believe that law only applies to the powerless and poor people whereas rich people and powerful people seemed untouchable. Cases involving former President Soeharto for corruption charges, General Wiranto's case for human rights violations in East Timor⁴⁷, and Tommy Soeharto's case, (former President Suharto's son) for corruption charges⁴⁸ are only examples of how the law in Indonesia had to give way to the economic or political strength of powerfuls.

⁴³ Non Government Organizations Forum, 'Independent Observer is needed to Control Indonesian Court', *Kompas*, <http://www.kompas.com>. (29 August 1997).

⁴⁴ Harkristuti Harkrisnowo, 'Rule of Law' in M Deden Ridwan and Asep Gunawan (n 36) p 107.

⁴⁵ On 21 June 1995 the Minister of Information cancelled the publishing license (*Surat Izin Usaha Penerbitan Pers/ SIUPP*) of popular magazine, *Tempo*. According to the Minister of Information, the government banned this magazine because *Tempo* had repeatedly ignored warning from the government about its content and had violated regulations on its operation and management, 'Muzzling the Press', *Inside Indonesia Melbourne*, September 1994, pg. 2.

⁴⁶ Benyamin Mangkoedilaga (n 33) pg. 129.

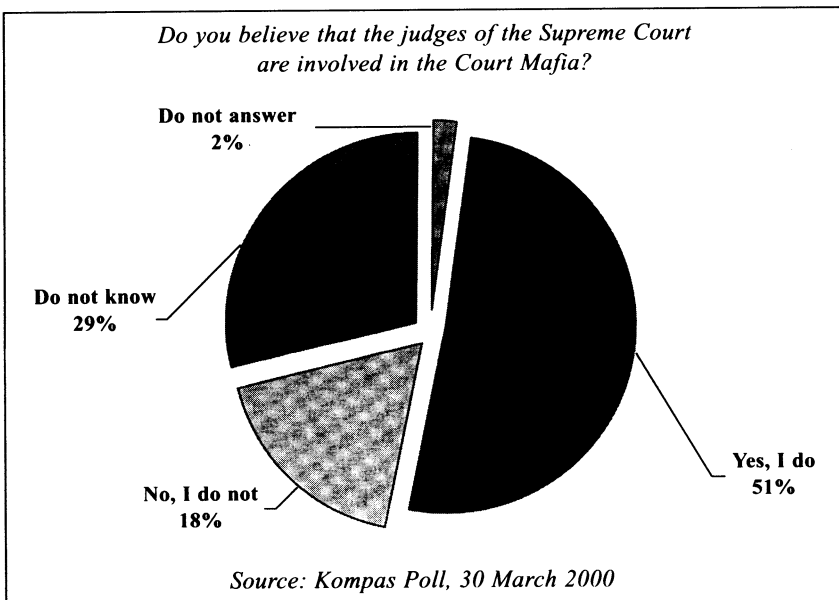
⁴⁷ According to Todung Mulya Lubis, a former Vice Chairman of the Human Rights Violation Investigation Team in East Timor. General Wiranto is recognized by his team as the chief perpetrator of human rights violation in East Timor. However, among forty persons named only eleven were charged excluding General Wiranto. Discussion with Todung Mulya Lubis, Melbourne University Asian Law Centre, 8 November 2000.

⁴⁸ The Courts up to the *Mahkamah Agung* found Tommy guilty for corruption and sentenced to 18 months in prison but Tommy refused to surrender and since then he became a fugitive. *Kompas*, <http://www.kompas.com>. (9 November 2000). He was arrested after one year in hiding. *Kompas*, 'Menyerah dibawah todongan senjata', <http://www.kompas.com>. (30 November 2001).

PUBLIC MISTRUST OF THE JUDICIARY SYSTEM

Government interference with the judiciary, limited independence of judges, corrupt legal officials including judges, policemen, lawyers, and prosecutors are enough reasons for many Indonesians not to trust their own judiciary system. Prof. S. Lev writes “the Indonesian courts are not trusted by the people”.⁴⁹ The respected Indonesian national daily *Kompas* recently carried out a research where that 51% of the respondents were found to have believed that *Mahkamah Agung* judges were involved in the court *mafia*⁵⁰ as presented in the following figure.⁵¹

KOMPAS POLL ON JUDGES AND COURT MAFIA



As mentioned earlier, most people choose not to go to the court if they have legal problems including land disputes.⁵² Instead, they go to other institutions such as the Parliament or Non-governmental organizations. People in

⁴⁹ Daniel S. Lev, 'The *Mahkamah Agung* Must not Nominate a Justice of the *Mahkamah Agung*', *Kompas*, <http://www.kompas.com>. (20 March 2000).

⁵⁰ The word *mafia* is often used in Indonesia as a synonym for a corrupt judiciary system.

⁵¹ *Kompas*, <http://www.kompas.com>. (29 March 2000).

⁵² Research conducted by the Legal Aid Foundation in Lampung found that more than 90% of landowners whose land was taken by the government chose not to bring their disputes to the court.

Indonesia have taken the law into their own hands. There are many examples where people take the law into their own hands. In many cases, people tortured and burnt thieves instead of sending them to the police simply because people have lost their faith on the entire legal and judicial system justice. For example, between the period January to May 1999 at least 45 people suspected of crimes were killed by mobs.⁵⁴ Landowners who have disputes with oil palm plantations have burnt farms or damaged the companies' facilities because they believe there is no chance of winning the case if they were to bring the case to court.⁵⁵ Many villagers reclaimed their land by force from the plantation companies which they believed took their land by force under the New Order Government. Recently, people have tended to use collective self help to achieve their goals or to force the government to perform their promises. The judicial process is mistrusted as it is feared it is not free from corruption, collusion and nepotism (*Korupsi, Kolusi, Nepotisme*). Alan Rose argues that justice and the appearance that justice is being delivered are fundamental to create public confidence.⁵⁶

The United States National Center for State Courts' Trial Court Performance Standards also stressed the importance of public trust and confidence toward the judiciary. Public trust can only be achieved by ensuring that: "the court and the justice which it delivers should be perceived by the public as accessible; the basic court functions are conducted expeditiously and fairly, with integrity; and there is a public perception of independence and accountability".⁵⁷

LAND DISTRIBUTION: PRIORITY FOR THE INVESTORS

Land in Indonesia has great significance not only economically, but also socially, politically, and culturally,⁵⁸ and in some cases it even has religious value.⁵⁹ Therefore, serious problems often occur when land is occupied by investors, by the state, by high-ranking government officials or by a group of

⁵⁴ *Kompas*, 'Telah 45 Orang Meninggal Dieksekusi Massa', <http://www.kompas.com>. (18 June 1999).

⁵⁵ *Kompas*, 'Kelapa Sawit dirampas, Kantor Dibakar', <http://www.kompas.com>. (26 April 2000).

⁵⁶ Alan Rose AO (n 7), pg. 326.

⁵⁷ Id.

⁵⁸ Indigenous peoples' claims can be divided into three types of land rights: land as communal rights, land as using rights, land as utilities rights, J.C.Eerde, 1920 as cited by Astrid Susanto Sunaryo, *Masalah Agraria Dalam Kelembagaan Adat*, Institut Pertanian Bogor, 1999, pg. 7.

⁵⁹ Land for the indigenous people such as the Kubu tribe in the Provinces of South Sumatra and Jambi has a spiritual meaning. My research funded by the Toyota Foundation of Japan in 1991 showed because of their beliefs they have a tradition called "melangun" – meaning they have to move to another area of land if one of the family member died.

the elite, without taking into account the needs of local people on the land. Land ownership is a contentious issue impacting on people's ability to control their quality of life. According to the Indonesian Statistic Bureau in 1993, 43% of households in villages had less than 0.1 hectares of land, or had no land at all. 27% owned land of between 0.1 to 0.49 hectares. 14% owned land with an area of between 0.5 to 0.99 hectares. However, 16% owned land of more than 1 hectare. The majority of farmers in all Indonesian villages had land measuring less than 0.5 hectare, or had no land at all.⁶⁰ However, according to the government policy on the transmigration program, the minimum area that is economically productive for a single landowner is 1 hectares.⁶¹

It is common to find that large companies and some individuals own large areas of land in Indonesia including former President Soeharto. The Agrarian Minister/the Head of National Land Body has so far found that Soeharto's family has more than 820 hectares of land all over Indonesia.⁶² In addition the majority of land is controlled by the investors who have business in forestry and on plantations. The largest concentration of land ownership is in the hands of forestry interests which was made possible by the government through *Hak Penguasaan Hutan* (HPH) or Forest Use Rights.⁶³

Forestry industries mainly produce timber and related products, such as pulp and paper. For example, one private company, *Barito Pacific Group*, owns at least 6,158,670 hectares of "production forest".⁶⁴ In 1994 there were 20 business groups which acquired more than 50% of the total forest under Forest Use Rights. In the same year, the government granted Forest Use Rights amounting to 64,291,436 hectares.⁶⁵

Anne Casson writes that in 1997, eight conglomerates⁶⁶ dominated the Indonesian private estate sector namely the Raja Garuda Mas Group,⁶⁷ the

⁶⁰ See *Biro Pusat Statistik Republik Indonesia*, 1993.

⁶¹ Article 28(b) of Government Regulation No 42 of 1973 on the Transmigration Program.

⁶² *Suara Pembaruan* 'Soeharto dan Keluarga Memiliki 820 Hektar Tanah', 29 December 1998 <http://www.suarapembaruan.com>. (29 December 1998).

⁶³ Forest Use Right is a license for a 20 year period and can be renewed for another 15 years.

⁶⁴ In Indonesia the forest is divided into five categories as follows: production forest, conversion forest, limited production forest, forest land, and mixed forest plantings.

⁶⁵ Dianto Bachriadi, 'Akar Sengketa Agraria dan Penguasaan Tanah serta Sumber-sumber di Indonesia Masa Kini', (Institut Pertanian Bogor, 1999), pg. 26.

⁶⁶ Four of these groups had their plantation holding companies listed on the Jakarta and Surabaya Stock Exchange including PT Astra Agro Lestari Tbk (Astra International Group), PT PP London Sumatra Indonesia Tbk (Napan Group), PT SMART (Sinar Mas Group), and PT Bakrie Sumatra Plantations (Bakrie and Brothers). PT Indofood (Salim Group) has some investments in oil palm plantations and commands a 60% share of the cooking oil industry. Anne Casson, *The Hesitant Boom: Indonesia's Oil Palm Sub-Sector in an Era of Economic Crisis and Political Change*, CIFOR, Bogor, 1999, pg. 14.

⁶⁷ The Raja Garuda Mas Group plantation holding company is called PT Asian Agri.

Astra International Group,⁶⁸ the Sinar Mas Group,⁶⁹ the SIPEF Group,⁷⁰ the Soefin Group,⁷¹ the Napan Group,⁷² the Bakrie Group,⁷³ and the Salim Group.⁷⁴

Land is also concentrated in mining sectors. In 1996, there were 215 private companies, 4 state owned companies, and 11 co-operations (*koperasi*) with activities in mining. Many companies have acquired extensive areas of land, for example, PT Freeport Indonesia in Papua has areas for gold and copper mining operations amounting to an excess of 2.6 million hectares.⁷⁵ Land is also owned by large companies requiring huge areas of land for estate crop commodities such as rubber, coffee and palm oil plantation activities. The plantation sector has been most active in the development of land.

Over a five year period (1989-1993), oil palm had the highest growth. In 1995, the area planted out for oil palm in Indonesia had grown to 2,010,191 hectares,⁷⁶ which again increased significantly to 2.5 million hectares in 1997.⁷⁷ Data in 1997 shows that most of the oil palm plantations were concentrated in six provinces, namely: North Sumatra (584,746 hectares), Riau (522,434 hectares), West Kalimantan (227,712 hectares), South Sumatra (247,109 hectares), Jambi (195,460 hectares) and Aceh (176,546 hectares).⁷⁸

The rapid development of Indonesia's oil palm sector has made Indonesia the world's second largest crude palm oil (CPO) producer after Malaysia. Indonesian CPO production has increased by around 12 percent per annum, from 167,669 tonnes in 1967 to 5.4 million tonnes in 1997.⁷⁹

⁶⁸ The plantation holding company owned by PT Astra International Group is called PT Astra Agro Lestari.

⁶⁹ The Sinar Mas Group Plantation holding company is called PT Golden Agri Resources.

⁷⁰ The plantation holding company owned by the SIPEF group is called PT Tolan Tiga Indonesia.

⁷¹ The plantation holding company owned by the Soefin Group is called PT Soefindo Indonesia.

⁷² The largest plantation holding company owned by the Napan Group is called PT Pan London Sumatra Indonesia. Among the shareholders of this group were Henry Liem, Andry Pribadi, Wilson Pribadi and Ibrahim Risjad.

⁷³ The plantation holding company owned by the Bakrie and Brothers Group is called PT Bakri Sumatra Plantations.

⁷⁴ The plantation holding company owned by the Salim group is called Salim Plantations.

⁷⁵ Dianto Baehriadi (n 73), pg. 6.

⁷⁶ Potter, L., and J.Lee. *Oil Palm in Indonesia: It's Role in Forest Conversion and the Fires of 1997/1998*. (Report for the WWF Indonesia, 1999).

⁷⁷ Indonesia is the world's second largest crude palm oil producer after Malaysia. In 1997 the world CPO producers are as follows: Malaysia 51%, Indonesia 30%, Africa 7%, Latin America 6%, PNG and Solomon Islands 2%, and other Asian countries 3%. Directorate General of Plantation Estates, 1998 and Oil World as quoted in Anne Casson (n 90), pg. 11.

⁷⁸ Directorate General of Plantation Estates Republic Indonesia, Jakarta, 1998, pg. 14.

⁷⁹ Anne Casson, pg. 10.

AN OVERVIEW OF THE CHANGING NATURE OF LAND DISPUTES IN INDONESIA

Land disputes have led to chaos since former President Soeharto resigned from office. Disputes have involved local people versus plantation companies, and landowners versus the government. In many parts of Indonesia, people took back their land from the investors by force, or took over the plantation companies production in commodities such as oil palm. Many people simply occupied land or burned the plantation areas used by the investors. According to the Minister for Forestry and Plantation, Dr Muslimin Nasution, in the middle of December 1998, the total area under plantation production taken by force reached 39.8 thousand hectares in 106 locations. There were 54 locations of state-owned plantations and more than 35,500 hectares of private-owned plantations occupied by force.⁸⁰

Four areas studied by the Legal Aid Foundation in 1995 – South Sumatra, North Sumatra, West Java, and Bali revealed 113 agrarian disputes which involved 64,452 families. In 3 districts of West Sumatra – Asahan, Tapanuli Selatan and Labuhan Batu – by 1994 there were 19 land disputes which involved 5,047 families. In West Java between 1988 and 1991 there were approximately 15,000 farmers who had to leave their farms because their land was claimed by the government as state land and would be used for “development”. In 9 cases over land disputes, there were 480 houses burnt, and 89,500 families were forced to leave their land.⁸¹

Land cases also dominated in other provinces such as South Sumatra, Lampung, North Sumatra and Yogyakarta. According to the Legal Aid Foundation in the province of Lampung, in 1995 alone there were 110,737.50 hectares of land involved in land disputes.⁸² In the province of West Java in 1995-1996 the complaints to the House of Representatives were also dominated by land cases.⁸³ In 1999, in the province of North Sumatra there were 539 land cases reported to the Governor’s office and only three of the cases were resolved in that year.⁸⁴ According to the Legal Aid Foundation in Yogyakarta, in 1997 land cases reported increased more than 200 percent from the previous year.⁸⁵

⁸⁰ *Suara Pembaruan*, ‘35,500 hectares of plantation occupied by force’, <http://www.suarapembaruan.com>. (6 January 1999).

⁸¹ *Id.*

⁸² ‘Land disputes in Lampung reached the areas of 110,737.50 hectares’, *Kompas*, Internet: <http://www.kompas.com>. (5 January 1996).

⁸³ ‘Forty Five Cases were reported to the West Java House of Representatives’, *Kompas*, <http://www.kompas.com>. (2 January 1996).

⁸⁴ ‘Land cases are complicated’, *Suara Pembaruan*, <http://www.suarapembaruan.com>. (8 December 1999).

⁸⁵ ‘Land cases: Increased 200 percent’, *Suara Pembaruan*, <http://www.suarapembaruan.com>. (3 January 1998).

Many complaints made to both government and non-governmental institutions were issues over land disputes. For example, the Functional Group Faction in the *DPR* and the National Commission for Human Rights also received complaints. Between 1994 and 1997, of the 434 complaints reported to the Functional Group Faction of the Indonesian House of Representatives, 233 of the complaints related to land problems. Moreover, cases reported to the National Commission for Human Rights have increased. For example, the three major areas of complaint in 1994 to 1996 to the Commission were land cases, human rights and labour. In 1994, there were 101 cases of complaints relating to land disputes, and the following year this rose significantly to 168 cases. Land disputes reported to the National Commission on Human Rights jumped to 327 cases in 1996.

These complaints came from the outer islands thousands of kilometers from the central government. Though there is a House of Representatives both at provincial and district levels, people often found that local governments and local institutions had no power to solve problems.⁸⁶ The local government is, in practice, powerless to face companies which are supported by the central government. In many land disputes, only the central government can resolve all matters.

Under the 1974 Law on Regional Government (*Undang-undang Pemerintah Daerah*) Indonesia established a centralised hierarchical system of regional government. Local government is dependent on the central government for making decision. The Head of District at the District level (*Bupati*) depends on the Governor (*Gubernur*) at the provincial level. The Governor acts as a functionary of the central government rather than as an independent leader of the district. Since Act No 22 of 1999 on the Regional Government, the district government is no longer subordinate to the provincial government. Article 4 (2) of the Act states: "Each provincial and district government is an independent institution without any hierarchical relationship". This change of power has implications for the strategy to contend with land disputes in South Sumatra.

The data from *Yayasan Pusat Studi HAM* (Centre for Human Rights Study Foundation),⁸⁷ showed that there were 891 land cases which also involved human rights abuses. According to this report, human rights abuses involved land confiscation and expropriation.⁸⁸

Land disputes go unreported as many Indonesians avoid going to the Court, or reporting their land disputes to other authorities. Many landowners

⁸⁶ Interview with Suharyono, Director of Legal Aid Foundation, Palembang, 13 January 2000.

⁸⁷ As published in the Human Rights Violation Index No 10 November 1997.

⁸⁸ See, Press Release by *Konsorsium Pembaruan Agraria* (Consortium for Agrarian Reform), Agrarian National Day, 1997 <http://www.kpa.or.id>. (10 January 1992).

whose land has been taken by the companies or the government chose not to oppose the action because if they did, the government would accuse them of impeding Indonesian development. According to the *LBH Lampung* research, in the province of Lampung only 5.53% of landowners whose land was taken for various projects complained about the matters, and 94.47 % of the victims chose not to report their complaint.⁸⁹ This statistic alone cannot be used to conclude that almost 95% of the people avoid going to court because they do not trust the court. It could be claimed that some of the 95% had no cause for complaint. Nevertheless, the *LBH Lampung* finding indicates that only a tiny minority of landowners whose land was taken by force brought a complaint to the court.

Under the New Order Government, people had various reasons for not doing anything when they had disputes over land against the government or the company. In many cases people understood that opposing the government was useless because the government would stop at nothing to overcome opposition, including using force or obstructing the court process. Landowners would not bring their cases to court because they understood that the court would ask for written proof of land ownership, and most occupiers only had ownership under customary law and could not show their land certificate to the court.

CONCLUSION

Land disputes also a result of the New Order Government policy which viewed land only as a business commodity, and applied the Basic Agrarian Law inconsistently. In addition, the government failed to avoid arbitrary discrimination between equally situated persons and there were no fair procedures for resolving disputes.

As a result there were many land acquisitions by force that led to human rights abuses. Under the Soeharto regime (1966-1998) people did not voice their misgivings, and their disappointment with the government grew. All problems hidden from the government appeared after Soeharto was withdrawn from power by force. As a result the new government under Abdurrahman Wahid (from 1999) inherited many land disputes which were repressed during Soeharto's time in office.

Ultimately the rule of law and human rights protection are defended, not by the words written in legislation, but by an independent judiciary and good governance which builds confidence in government institutions. It is meaningless to have elegant legislation or to regulate the independence if in

⁸⁹ 'Land disputes in Lampung reached the areas of 110,737.50 hectares', *Kompas*, Internet: <http://www.kompas.com>. (5 January 1996).

reality those values are a dream. Lack of the rule of law led to situation in which the landowners took the law on their own hand, resulted huge number of land disputes that Indonesia has to face recently.

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