



Watch
INDONESIA!

The New Indonesian Constitutional Court

A study into its beginnings and first years of work

by

Petra Stockmann

Prefaces by:

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Table of contents

Glossary.....	4
Foreword by Prof. Dr. Jimly Asshiddiqie, SH.....	5
Foreword by Prof. Dr. Siegfried Broß.....	7
Foreword by Christian Hegemer.....	10
I. Introduction.....	11
II. Establishing Indonesia's <i>Mahkamah Konstitusi</i>	
1. Constitutional jurisdiction – an old idea eventually realised.....	14
2. Last minute compromise on the Law on the Constitutional Court.....	15
3. Selecting the judges.....	16
4. The nine guardians of the constitution.....	18
5. A first time for everything.....	19
6. Recruiting staff.....	19
III. What law for the judges to uphold – and how?	
1. <i>Rechtsstaat</i> a constitutional mandate.....	21
2. Constitutional provisions on the Constitutional Court	23
3. Who guards the guardians of the constitution?.....	23
4. The Constitutional Court's law of procedure for judicial review cases – or: Accompanying Ibu Ina in her quest for justice.....	26
IV. The court at work	
1. Activities during the court's first two and a half years.....	29
2. Which laws did the judges decide to accept for review? The ruling on the legal limitation of the court's jurisdiction.....	30
3. Withholding former communists' passive voting right declared unconstitutional.....	34
4. Ruling on the partition of the Province of Papua.....	38
5. The problem with retroactive effect of law.....	44
6. Determining the limits of state control in the economy.....	52
7. Twenty percent of the state budget for education.....	58
V. Conclusion.....	63
VI. References.....	67

Glossary

adat: customary law

bupati: regent, district head

DPD: *Dewan Perwakilan Daerah*, Regional Representative Council

DPR: *Dewan Perwakilan Rakyat*, People's Representative Council

DPRD: *Dewan Perwakilan Rakyat Daerah*, Regional DPR

G-30-S/PKI: *Gerakan 30 September/PKI*, September 30th movement/PKI

GBHN: *Garis-Garis Besar Haluan Negara*, Broad Outlines of State Policy

Gesetz: law, statute

Golkar: *Golongan Karya*, lit. Functional Groups, ruling party under Suharto

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

IMF: International Monetary Fund

KUHAP: *Kitab Undang-Undang Hukum Acara Pidana*, Code of Criminal Procedure

LoI: Letter of Intent

Mahkamah Konstitusi: Constitutional Court

MKRI: *Mahkamah Konstitusi Republik Indonesia*, Indonesian Constitutional Court

MP: Member of Parliament

MPR: *Majelis Permusyawaratan Rakyat*, People's Consultative Assembly

NGO: Non-Governmental Organisation

non-derogable right: right that may not be suspended under any circumstances

PDI-P: *Partai Demokrasi Indonesia - Perjuangan*, Indonesian Democracy Party - Struggle

PKI: *Partai Komunis Indonesia*: Indonesian Communist Party

Perpu: *peraturan pemerintah pengganti undang-undang*, government regulations in lieu of a law

rechtsstaat: constitutional state under the rule of law

UDHR: Universal Declaration of Human Rights

wet: law, statute



**THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA**

**FOREWORD
BY
THE CHIEF JUSTICE OF THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA**

Prior to its amendment, the 1945 Constitution had prevailed as the state constitution of The Republic of Indonesia for three periods, namely in the early years of independence from 1945 to 1949, and was subsequently superseded by the RIS Constitution and 1950 Provisional Constitution. The second period was marked by the reinstatement of the 1945 Constitution by virtue of the decree of the Decree of President Soekarno dated July 5, 1959 and lasted up to the transfer of power from President Soekarno in 1966, which at the same time marked the beginning of the period of the application of the 1945 Constitution up to its first amendment in 1999. During the above mentioned three periods, different models of state administration were applied, although all of these were based on the same, unchanged text of the 1945 Constitution.

In the early years of independence, the country adhered to liberal democracy with the parliamentary governmental system, which differs from the governmental system envisaged in the 1945 Constitution. During the later period, which was known as the old order era, the presidential governmental system was applied according to the 1945 Constitution completed by the establishment of the House of Representatives (DPR) and the People's Consultative Assembly (MPR). The democracy, which developed at the time was known as guided democracy, however, the "guided" aspect became so prominent that it tended to lead towards authoritarianism. Meanwhile, despite the steps for applying the presidential system during the new order era, democracy was unable to develop and power abuse became rampant.

In addition to the institutional condition of state not yet well-established and the weaknesses of the 1945 Constitution itself, the above condition was also caused by the absence of an institution for safeguarding the Constitution. In fact, it can be stated that the Constitution could not be considered as the supreme law, because it was the MPR, which fully executed the people's sovereignty. In actual fact, this means that the MPR received a constitutional mandate. Considering that the state administration system under the 1945 Constitution vested an enormous amount of power in the President, including the power for the establishment of the MPR and legislation, it was the President, rather than the Constitution, who had a stronger position in determining how the state should be administered. The constitution eventually appeared to serve merely as a tool for legitimizing unlimited power.

The above experience was one of the considerations that led to the establishment of the Constitutional Court as one of judicial power executors, in addition to the Supreme Court. The amendments to the 1945 Constitution, aimed at the realization of a democratic constitutional

state based on the principle of constitutional supremacy, may be facing the same fate as the 1945 Constitution, unless there is a constitutional control mechanism, which guarantees the implementation of the constitution in the life of people, the nation, and the state.

Pursuant to Article 24C of the 1945 Constitution, the Constitutional Court has four authorities, namely to conduct judicial review to ensure that laws are in compliance with the Constitution, to make decisions in disputes related to the authority of state agencies the authority of which bestowed by the Constitution, to make decisions on the dissolution of political parties, and to resolve disputes related to the results of general elections. In addition to the above, the Constitutional Court is required to make decisions regarding DPR's opinion concerning alleged violations committed by the President and/or the Vice President in an abdication under the 1945 Constitution. Three years following its establishment by virtue of Law Number 24 Year 2003 regarding the Constitutional Court it has performed its functions based on the mandate granted by the 1945 Constitution in the state administration of the Republic of Indonesia.

The Constitutional Court has also contributed to the development of academic studies and the publishing of various books concerning the Constitutional Court viewed from various aspects, both in terms of its institutional form as well as its powers, both in general and specific terms with regard to the Constitutional Court of the Republic Indonesia. These books have been extremely helpful in introducing the Constitutional Court, in developing ideas about the constitution and constitutional awareness, and in realizing the principle of constitutionalism in Indonesia.

This book titled "The New Indonesian Constitutional Court" written by Petra Stockmann deserves a warm welcome, as it is one book about the Constitutional Court of the Republic of Indonesia written in English, making it accessible to the international community. This is an extremely important factor in positioning Indonesia as a democratic constitutional state on a par with other countries and for the development of science, for which a comparative aspect is an absolute requirement.

On the other hand, this is one of the books, which provide comprehensive information on the Constitutional Court of the Republic of Indonesia, ranging from the historical aspect to the implementation of its powers. This book records the journey leading towards the establishment of the Constitutional Court of the Republic of Indonesia, its procedural and court proceedings, and also analyzes several important decisions issued by it so far.

Being the result of human creation, the book is certainly not free from shortcomings, either due to constraints in experience, insight or time available for writing it. For example, the book still includes a statement saying that constitutional judges are under the supervision of the Judicial Commission (p. 26). This is quite understandable, as this book had been written prior to the issuance of Decision Number 005/PUU-IV/2006 which, based on legal arguments, stipulated that constitutional judges are not under the supervisory authority of the Judicial Commission, and that several Articles in Law Number 22 Year 2004 concerning the Judicial Commission related to constitutional judges are contradictory to the 1945 Constitution.

Finally, I wish to congratulate the writer and I hope this book will be useful for readers all over the world.

Jakarta, September 2006

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Foreword to the study by
Petra Stockmann

If one thinks about how a modern democratic constitution of a state under the rule of law should be drafted with a view to supreme state bodies, it is striking that generally, no difficulties arise when it comes to establishing a consensus about a separation of powers, and with it, a division into supreme state bodies, being indispensable. In this context, it is obvious to think about a parliament and a government. It is not essential to provide for a state president beside the head of government. For various reasons, this is certainly beneficial to a modern democratic state under the rule of law; however, it will possibly not be imperative. One may restrict the structure of the parliament to one chamber; however, a division into two chambers is conceivable as well. In a unitary state, such a structure does not suggest itself because it will then inevitably prove to be difficult to install a second chamber in accordance with democratic principles where, as is the case for instance with the formation of a Senate or concerning the *Bundesrat* in Germany, the participation of the population as a whole, even where it is possibly only an indirect one, and not only that of different groups within the population, is required for democratic legitimisation.

If the supreme level of state control is divided among several supreme state bodies, which by definition is indispensable for a modern democratic state under the rule of law, the question arises whether all requirements concerning the ability to operate, but also the viability of such a body politic, have thus been met.

The structuring of a modern democratic constitution of a state under the rule of law is not much of a problem when it comes to assigning responsibilities and competences to the individual supreme state bodies. The assignment is made according to simple formal rules, that is, either the principle of enumeration is followed, which is advisable, or the competence for specific sectors is provided pursuant to a general clause. The latter approach, however, is not very suitable from the start because in comparison with the principle of enumeration, general clauses are more likely to give rise to disputes.

It is not precluded from the outset to award to a modern democratic state under the rule of law this title also if no constitutional court exists. One could consider establishing an institution, which is independent of the parliament and the government to perform this function, whose members may come from both supreme state bodies. What I, however, consider preferable is a constitutional court that is established as an autonomous supreme state body with complete personal and factual independence vis-à-vis the other supreme state bodies. There is a simple reason for this, which, however, must easily be acknowledged as appropriate.

The establishment of a constitutional court as a body for the settlement of disputes of the other supreme state bodies covers only part of the importance that a constitutional court has in a modern democratic state under the rule of law. Its importance goes far beyond this. A problem, which also exists in a democratic body politic, cannot convincingly be handled along the lines of

the familiar standard according to which in a democracy all state authority can ultimately be derived from the forming of the political will of the state's people, and according to which the people exercises its power of creation, which in this context is due to the people alone, through general, equal, free and secret elections – in specific areas also for instance through direct decision-making, as is the case in Switzerland. The problem I am referring to is that democracy depends on its acceptance by those parts of the population, and those political groups, which have remained a minority in elections and votes, and it depends on an adequate mechanism for solving conflicts being provided for disagreements that arise in spite of a democratically legitimised majority decision in a state under the rule of law to ensure that the political dispute will not be continued, more or less violently, in the streets by means that do not observe the rule of law.

In this respect, the establishment of a constitutional court for the resolution of disputes concerning state organisation means “added value” in terms of democracy and rule of law because the interpretation and application of the constitution and of the regulations concerning the competences and powers of the supreme state bodies that are derived from it are not entrusted to a majority decision alone, a means which is not likely to guarantee the reliability and predictability of a constitution. In a modern democratic state under the rule of law, the supreme state bodies require a legitimisation that goes beyond the legitimisation by the state's people in the corresponding elections. Such legitimisation strengthens not only the supreme state bodies as such, and each of them separately, but over and above this, it strengthens the entire democratic body politic under the rule of law.

Even if the controversies that are to be settled by the constitutional court arise on the highest level of state organisation, this does not alter the fact that, as experience has shown, the population takes a vivid interest in the decision-making processes, and in the coordination processes, of such decisions. Such procedures are followed more attentively than those who are governing may really want sometimes. For this reason, another institution is required on the highest level of state organisation to deal with borderline cases that may not meet with due acceptance by the population. This institution must be suitable to at least partially compensate such deficiencies, and to thus strengthen, and also justify in a lasting manner, the trust of the population in the state and its bodies.

It is not enough that a constitutional court has the competence to rule on disputes between supreme state bodies – in the function of a court for state matters, so to speak. Even if the population takes an interest in such disputes on state organisation, and even if such disputes sometimes raise the awareness about the protection of political minorities, an aspect, which already provides an indication of individual legal positions, one must engage in further-reaching considerations. Where the competence of a constitutional court is organised in such a manner, people are not integrated into decision-making processes as subjects but merely as more or less attentive observers. In a modern democratic state under the rule of law, this is not enough.

It is therefore necessary to take up several strands and to open up another competence for a constitutional court. Here, the aspect of the protection of minorities, just as the aspect of transparency, must be taken into account, but also those of the predictability and reliability of the constitution. In addition, there is the problem of acceptance, which I have already mentioned in a different context. If all these strands are linked, and if they are attached to the individual, who, in a modern democratic state under the rule of law has the quality of a subject, a legal remedy is required, which provides the individual with the possibility of taking recourse to a constitutional court for the clarification of constitutional issues that are doubtful to him or her. In this manner, the constitutional complaint becomes a virtually ideal means of achieving acceptance of state power in the consciousness of the people in a modern democratic state under the rule of law.

Due to this construction, that is, a constitutional court and the possibility for the individual of lodging a constitutional complaint, the individuals find their place as subjects in the body politic. Only those individuals who refuse to go along with this are not reached in this manner. Even in a democratic state under the rule of law, we cannot expect, however, to awaken a positive consciousness in all people. What must be aspired to, however, is to attain an approach to such positive consciousness that is as close as possible. The establishment of a constitutional court, which is not only competent for state matters but also opens to the individual the possibility of lodging a constitutional complaint, is also suitable for achieving this objective because it serves the individual.

Supreme courts cannot perform this function. It would be detrimental to the reliability and predictability of a constitution if different state institutions were competent for its interpretation and application. If the competence of a constitutional court is restricted to state matters, divergences between the rulings of the constitutional court and those of a supreme court that is, among other things, competent to rule on constitutional complaints, are inevitable. In proceedings, which involve the abstract review of the constitutionality of statutes, or, for example, in cases that involve the influence of fundamental rights and of human rights on the status of a member of parliament, overlaps will be inevitable. Such overlaps, however, are detrimental to legal certainty. Ultimately, the interpretation of the constitution must always be concentrated in one state body. Otherwise, one could also not have confidence that the implementation of the constitution by court rulings will meet with the greatest extent of acceptance possible.

The following study by Ms. Petra Stockmann documents in a particularly impressive manner the extraordinary achievement of the Republic of Indonesia's responsible state bodies when establishing a constitutional court with the corresponding competences. The study makes evident as well that the members of the Constitutional Court of the Republic of Indonesia are performing the tasks, which are incumbent on them as regards the enforcement of the constitution and of the state under the rule of law, with utmost dedication and with an admirable sense of responsibility. Thanks are due to the Hanns Seidel Foundation for sponsoring the research project.

Foreword

The establishment of the Indonesian Constitutional Court (MKRI) on August 17, 2003, as one result of reform in the years after 1998 has propelled Indonesia into the First League of Nations with a similar court such as in Germany, Austria, South Korea and Thailand.

A true democracy needs a back-up by the “Rule of Law” (Supremacy of Law), and the MKRI stands for this mechanism, otherwise democracy will fail. Their enemies paralyze or kill democracy by undermining the “Rule of Law” in brutal as well as soft, sophisticated ways, e.g. Weimarer Republic!

Having more than 30 years of experience in the field of socio-political education both at home and abroad, and taking into account the Hanns Seidel Foundation’s work in promoting democracy and rule of law in Indonesia since 1993, it is a great honor for us to facilitate the scientific study on the establishment and conduct of the Constitutional Court.

The study was carried out by an external expert, Dr. Petra Stockmann (Mrs.), a senior researcher of Berlin-based Watch Indonesia, on her own interest looking in the existence of the young court from a foreigner’s perspective. Its fact-findings should help the court in disseminating ‘the wind of change’ at home and abroad, and serve with knowledge to the international community on the successfully undertaken process of democracy in Indonesia. It might activate and trigger a fast expanding recognition of the court in return.

Fixing the “Rule of Law” is stabilizing democracy. The book presents landmark rulings on energy sector, division of Papua province and state budget for education, among others. The fact that in the meantime a growing number of laws has been reviewed by the court indicates that the court has become a “first address”. The outcome sometimes sounds like an alarm signal to the legislator, to put more attention to the proper making of “Law” in order to meet certain standards on the judicial quality of laws. This fact is a milestone in Indonesia’s quest for “law and order”, based on democratic principles.

I do hope the book is of great use as reference - whenever, and an exhibit underlining Indonesia’s best practices as a role model for other countries in transition – wherever. Finally, I would like to congratulate Dr. Stockmann for her efforts to tackle the challenge, and thank all other parties and mentioned office bearers for their contribution to the study, among others from MKRI and *BuVerfG*.

Jakarta, January 2007



Christian Hegemer
Director

I. Introduction

Jakarta, Jalan Merdeka Barat No. 7. The white walls of the building bright under the glaring Indonesian midday sun, its glass front allowing the odd passer-by a faint glimpse into the interior. Located on one of the busy roads encircling Monas, the National Monument, the venue is in walking distance from the Presidential Palace, the Supreme Court, several ministries, and embassies. At the heart of Jakarta's city centre and close to the pulse of its political life. It is here that for more than two years now important decisions have been taken which have shaken up the balance of power and introduced new rules into the political game. It is the home, if only temporarily, of Indonesia's new Constitutional Court.

In recent years, a number of countries in transition to democracy have established constitutional courts or other organs in charge of constitutional jurisdiction. In Asia, the examples of South Korea, Mongolia, Thailand, Cambodia, and the Philippines come to mind. It seems that a wave of constitutionalism and constitutional jurisdiction has accompanied the much talked about waves of democratisation.

Why might constitutional courts be important for countries undergoing a transformation towards a democratic constitutional state under the rule of law? Justice Yong-Joon Kim, the President of the South Korean Constitutional Court, established in 1988, writes on his country's experiences: "From a political standpoint, it can be said that the Constitutional Court has accelerated the process of democratization in Korea by doing away with the authoritarian system of past regimes. The legal system, which had been outside the control of the constitution, is now being reformed one step at a time."¹

Having a written constitution which enshrines a democratic political system, the principle of rule of law, separation of powers including an independent judiciary and a bill of human rights is one thing; turning the dead letter into a living reality quite another. Once more Justice Yong-Joon on the Korean experience: "Since ... [1948], Korea has had a republican form of government and a constitution that protects the basic rights of the citizens based upon the principles of democracy and of the rule of law. Until recently, however, the Korean Constitution had been unable to perform effectively its protective functions. ... Starting in 1987, Korea was engulfed by a strong democracy movement. The people ... genuinely longed for a society in which human rights, freedom, and democracy would be living realities. Hence, it seemed natural that the aspirations of the people began to focus on establishing a new mechanism for constitutional adjudication."

Protecting individuals' basic human rights vis-à-vis the state is a key task of a constitutional court in any democratic *rechtsstaat* or constitutional state under the rule of law. This can be ensured either by a constitutional complaint mechanism, which gives citizens the possibility to turn directly to the court if they consider a right of theirs violated, or via a constitutional court's judicial review function,² granted, however, that individuals are entitled to lodge corresponding petitions.³ Such judicial recourse may be even more important in new democracies or countries in transition where possibly neither the old authoritarian state institutions nor the old laws and regulations have been thoroughly overhauled. The option to turn to a constitutional court can also serve as an outlet for people's frustration over a real or perceived lack of change and at the same time help further societal peace, functions that should not be underestimated, as German

¹ Cf. Yong-Joon 2005.

² I.e. ruling on the constitutionality of a law or also of other pieces of legislation.

³ Other functions that constitutional courts are often accorded and which contribute to the democratisation process are their competences to review election results and to decide upon the banning of political parties.

Constitutional Judge Siegfried Bross stresses.¹ Justice Bross also explains that the fact that parliament and government are prepared to be controlled by an independent body – among others by allowing their legislation to be reviewed – may enhance their democratic credentials and strengthen their standing in the eyes of the people who may not be fully convinced that things have really changed in their country.

But not everyone sees constitutional courts in such bright light. Especially the judicial review function of constitutional courts has been subject to criticism as it conflicts with the concept of parliamentary sovereignty: From a democratic theory point of view it has been considered as problematic that a small group of people with no popular mandate wields the power to abrogate legislation enacted by democratically legitimised legislators. Tom Ginsburg has called it the “countermajoritarian difficulty” noting that it has been the central concern of normative scholarship on judicial review for decades.² Linked with this normative problem are the frequently heard fears that a constitutional court - envisaged by its proponents to limit the power of other constitutional organs - might itself turn into a “superbody” or “superman”.³

In view of the virtues and the problems that the establishment of a constitutional court may bring about, each country has to work out what role, what scope of authority, and what position its constitutional court should have. In each country, a balance needs to be found that is acceptable to all parties involved.

Constitutional courts in transition countries face a number of additional challenges: For one, the courts will in one way or another have to deal with the legacy of the past authoritarian regimes. Questions of transitional justice may also touch upon the realm of constitutional jurisdiction and might collide with the principle of upholding the law. And then there is the question of what law the court has to uphold. Is the constitution a document that enshrines unambiguously the principles of a democratic constitutional state under the rule of law and human rights protection? Or was an authoritarian constitution amended in a patchwork fashion, the process dominated by short term (self-)interests and political compromises of the day? If more of the latter is the case, then the constitution in question might be fraught with inconsistencies and provisions which justice-minded judges might find difficult to uphold. What raises the question of how creative judges may be in their interpretation of the constitution, which is, once more, a question of boundaries.

What boundaries then have the authors of the Indonesian Constitution and the Indonesian legislators set up for the country’s new constitutional court? How do the judges deal with their tasks, their authority, and the challenges their jobs pose? And how broad is the access to the court?⁴ Can – and do - people make use of this new judicial recourse? The following study tries

¹ Interview by the author with Justice Siegfried Bross, Karlsruhe, 2/8/2005. Cf. for some of the mentioned aspects Bross 2005a: 7.

² Cf. Ginsburg, 2003: 2f. Constitutional courts have been described as “protecting democracy from its own excesses” in that they could be “countermajoritarian”, able to protect the substantive values of democracy against possible attempts to subvert them by procedurally legitimate elected bodies; cf. *ibid.*

³ “Superbody” is the term often used in the Indonesian debate, but also the term “superman” can be heard. Among others, Vice President Yusuf Kalla is reported as having used the latter; interview with Christian Hegemer, Director of the Hanns Seidel Foundation in Jakarta, 24/4/2006. - Against fears that the court may become such a “superbody”, it has been argued that a limitation of the constitutional court’s authority can be achieved by way of clear regulations on competence, function, composition, and procedure. One important element is that the court may not act on its own initiative but only upon application. Cf. Bross 2005 and in a much briefer version also 2005a: 3.

⁴ On the issue of access to the Indonesian Constitutional Court in particular and access to justice in Indonesia in general cf. the papers by Chief Justice Jimly Asshiddiqie and Justice Siahaan presented at the workshop “Comparing Access to Justice in Asian and European Transitional Countries” held in Bogor, Indonesia, on 27-28 June 2005, co-

to find answers to these and other questions whereby the guiding one will be: Has the Indonesian Constitutional Court contributed to further democratisation, rule of law and human rights protection?

In Chapter II of the study, the reader will be led back to the beginnings of the Indonesian Constitutional Court, the *Mabkamah Konstitusi*: how in a last minute compromise the Law on the Constitutional Court was enacted, and how the selection process to determine the judges was rushed through so that the court could be established on August 17th, 2003, as the constitution demanded. The judges had to start from scratch, as we shall see. They had no court room, no offices, no staff – only, as one of them recalled, three documents: the constitution; the Law on the Constitutional Court determining the details on their tasks; and the presidential decree documenting that they were Indonesia's first guardians of the constitution.

In Chapter III, the mentioned documents shall concern us in a bit more detail. From the brief overview of the constitution the reader will get an idea about the nature of the document that serves as the basis for the judges' work. Are key democratic *rechtsstaat* principles enshrined therein? As concerns the Law on the Constitutional Court, we shall see what boundaries legislators determined for the judges, the focal question being: Who guards the guardians of the constitution? Last, but not least, the reader can accompany, Ibu Ina, a fictitious person, in her quest for justice, i.e. follow her around as she pursues her judicial review petition, and thus learn about the Constitutional Court's procedures.

In Chapter IV, the reader can familiarise him- or herself with the court's work. The focus will be on selected judicial review cases that the court has ruled on in its first two and a half years. For each case, the socio-political background is sketched and the verdict outlined. The argument in the rulings is often emphatic, and positions are vehemently defended. In their dissenting opinions, the judges are outspoken and do not mince their words. To get an idea about the controversial positions on contested issues, I have juxtaposed the judges' different opinions. From selected reactions by petitioners, government and parliament representatives, and NGOs, one can get an impression of how the rulings have been received.

The verdicts presented in the study cover a wide range of issues. I have chosen rulings, which have in one way or another broader implication and touch upon fundamental questions. They are: May legislators put a time limit on the Constitutional Court's jurisdiction? Is it constitutional that former members of the Indonesian Communist Party are deprived of their passive voting right? How about the special autonomy for the Province of Papua and the partition process? May laws be applied retroactively to try crimes committed in East Timor 1999 and to the Bali bombings? Where has the court drawn the line concerning state control over key sectors of the economy? And finally, is the government obliged to immediately allocate 20 percent of the budget to education as the constitution demands?

After two and a half years in office, it's half-time for the judges. Time to stand back and take stock provisionally. Which is attempted, in a modest way, in the concluding chapter of the study.

II. Establishing Indonesia's *Mahkamah Konstitusi*

1. Constitutional jurisdiction – an old idea eventually realised

The idea to have an institution in charge of constitutional jurisdiction is by no means a new one in Indonesia. In fact, it had already been debated as early as 1945 when the founding fathers of the new republic were drafting the 1945 Constitution. The concept of a Supreme Court vested with powers of judicial review was proposed by Muhammad Yamin, himself a strong advocate of democracy, rule of law and human rights protection. Judicial review authority for the Supreme Court would clearly have strengthened the principle of separation of powers; the very idea, however, did not fit into the integralist concept of state promoted by prominent constitutional law expert Raden Soepomo, who consequently rejected it.¹ The authors of the original 1945 Constitution decided against judicial review authority. But the idea was kept alive. It was brought up ever now and again, in the 1970s, for example, by the Indonesian Judges' Association IKAHI and in the 1980s by the Indonesian Lawyers' Association PERADIN.²

A window of opportunity for constitutional jurisdiction opened in the ensuing *era reformasi*, after the fall of Suharto. NGOs still had it on their agenda for democratisation and judicial reform. Members of the MPR, the People's Consultative Assembly, in charge of constitutional amendment became aware that several states had recently introduced constitutional jurisdiction into their system of government, among others Thailand and South Korea. Study tours abroad seem to have further strengthened their conviction that constitutional jurisdiction was an important element in a system that was based on separation rather than integration of powers.

Additional impetus was provided by the impeachment of President Wahid. It was felt that the decision whether a president had committed acts that justified dismissal in accordance with the constitution should not be solely based on political considerations. According to Jimly Asshiddiqie, it was Wahid's impeachment that really brought home the importance of a constitutional court: "... in my opinion, without this incident, surely the awareness of the importance of the Constitutional Court would not have turned into an awareness to realise the existence of the Constitutional Court."³ Another issue underlining the necessity of constitutional jurisdiction was when at the height of the stand-off between president and parliament Wahid single-handedly sacked the police chief and appointed a loyal general.⁴ Parliamentarians protested: No longer did the president have the authority to appoint and dismiss the police chief, parliament had a say in it as well - a classic case of conflict between two constitutional organs.

Against this background it is not surprising that a role in impeachment proceedings, the task to decide in conflicts between constitutional organs and judicial review were agreed as tasks of the Indonesian Constitutional Court, as were the authority to rule on disputes concerning election results and on the banning of political parties. At a whole, the idea to have a constitutional court seems to have met with little opposition - that is notwithstanding the objection of people who did not want any change of the original 1945 Constitution.⁵ But then the latter position was no longer a tenable one, since process of constitutional amendment had gotten under way already in 1999.

¹ For some quotations of Supomo's position cf. Alrashid 2004.

² Cf. Asshiddiqie, 2004: 6; Siahaan, 2005: 7.

³ Cf. Asshiddiqie, 2004: 11; cf. also Siahaan, 2005: 9 for a similar view.

⁴ Cf. e.g. Widjojanto, 2004: 210f.

⁵ Interviews by the author with Justices Harjono, Natabaya and Siahaan, Jakarta, 8, 15/9/2005; cf. also Asshiddiqie, 2004: 9.

The next question was whether to vest the authority for constitutional jurisdiction in the Supreme Court with correspondingly enlarged authority or in a separate constitutional court.¹ Although many American or Dutch trained legal experts were apparently somewhat inclined towards the Supreme Court model,² it became relatively quickly clear that this was not a viable option for Indonesia. When MPR members invited representatives of the Supreme Court to discuss the matter, they were told that the court did not consider it possible to take on additional functions – not with a backlog of more than 20.000 cases. It needed little to convince MPR members who had additional concerns, above all the tarnished reputation of the Supreme Court.³

With its Third Constitutional Amendment on November 9th, 2001, the MPR eventually provided Indonesia with a constitutional court. One year later, with its Fourth - and so far last – Amendment, MPR members set government and parliament a one-year deadline for the establishment of the new institution.⁴

2. Last minute compromise on the Law on the Constitutional Court

Prior to its establishment, an implementing law with details on the Constitutional Court's structure and function and, possibly, on its law of procedure had to be passed. The parliamentary body in charge of drafting legislation started work as early as 2001.⁵ But it took a long while until the draft found its way into the plenary session of the parliament, the DPR, where it was agreed as a parliamentary law initiative, and even longer until a special committee for further deliberations was set up.⁶ By that time it was already May 2003, which left only three months until the constitutional deadline of August 17th, 2003. It was only then that the government entered into the deliberations. At the end of June, the Ministry of Justice and Human Rights submitted a list of 355 items considered as problematic in the law. Worries were abound that the deadline could not be met, as were suspicions that the delay was intentional: “The government really seems intent on not bringing about the Constitutional Court at this moment, as it considers such an authority of the Constitutional Court as huge”, Special Committee member and Golkar legislator Slamet Effendy Yusuf is quoted as saying.⁷ The proposal by Justice Minister Yusril Mahendra to amend the constitution surely did not help to alleviate such fears. But the Justice Ministry's representative Abdul Gani proposed a schedule how the constitutional deadline could be met: According to his calculation, 30 days were needed with the assumption that 10 items be discussed in each session. “If speeding up is wished, then three meetings need to be held each day. This way, the 355 problematic items can be finished within 10 days.”⁸

A discussion marathon got under way, and recess for parliament was cancelled. Then on August 6th, 2003, almost a week later then scheduled and in the midst of the annual session of the MPR,

¹ Interview with Justice Harjono, Jakarta, 8/9/2005.

² Cf. Asshiddiqie, 2004: 8. The constitutional court concept was first realised in Austria, later amongst others also in Germany, the Supreme Court model was first practiced in the United States and is today amongst others also followed in the Netherlands.

³ Interview by the author with Justices Harjono and Siahaan, Jakarta, 8, 15/9/2005.

⁴ Cf. Art. 24 C and Art. III of the Transitional Regulations, 1945 Constitution. Unless mentioned otherwise I refer to the 1945 Constitution after the Fourth Amendment.

⁵ During the deliberation process, legislators also held consultation meetings with experts. In March 2002, the Hanns Seidel Foundation in cooperation with the National Democratic Institute (NDI) and the research institute LIPI (*Lembaga Ilmu Pengetahuan Indonesia*) facilitated numerous discussion panels for legislators and research teams involved in the law drafting process with Dr. Ulrike Mueller, then Senior Researcher of the German Constitutional Court.

⁶ Most laws are drafted by the government; a law initiative by parliament is, like in many other states, a rather rare case. DPR stands for *Devan Permakilan Rakyat*, People's Representative Council.

⁷ Cf. Sinar Harapan Online, 27/6/2003; cf. also Isra, 2004: 334.

⁸ Cf. Kompas Cyber Media 23/6/2003.

the extraordinary plenary session to pass the law eventually took place. Tough deliberations continued during the session before around midnight agreement was finally reached. The last two contested items were the educational requirements for constitutional judges and a temporal limitation of the court's jurisdiction. Concerning educational requirements, all factions but one agreed with the government to make a law degree mandatory. Representatives of the Reform Faction, however, opted for broader access to the bench.¹ They may have had in mind the example of neighbouring Thailand where three out of the 15 seats are reserved for political scientists.² At long last, however, the Reform Faction's representatives gave in.

The other contested issue was the scope of the court's jurisdiction. Once more, only one faction refused to go along with the government's position, this time PDI-P.³ The majority view was that the judicial review authority of the court be limited to laws passed after the First Constitutional Amendment of October 19th, 1999. Without such a limitation, so the line of the argument, the court might be flooded with applications for judicial review. Justice Minister Mahendra pointed out that this did not mean that earlier laws could not be revoked. In such cases applications for legislative review could be submitted to parliament.⁴ Quite different the view of PDI-P: "We think that the Constitutional Court has the right to review all laws, without limitation," stressed their spokesman Zainal Arifin.⁵ If PDI-P's oppositional stance did not find support among fellow MPs, their criticism was at least shared outside parliament: "To have a limitation on the judicial review of laws by the Constitutional Court will clearly only take away the right of the people to obtain constitutional protection. If so, what is the meaning of the constitution, if it can't be a place of protection for all components of society", the Chairman of the National Law Reform Consortium, Firmansyah Arifin, is quoted as saying.⁶

Eventually, also PDI-P backed down, except for two of their MPs who insisted on having their opposition put on record. One of them later told the press he would work for the contested article to be reviewed. And PDI-P spokesman Zainal Arifin mused about the irony if the first law to be subjected to judicial review by the court was the very Law on the Constitutional Court. And indeed, as we shall see, this time-pressured agreement was by no means the end of the story.

With an – almost – consensus eventually reached, Law 24/2003 on the Constitutional Court could be passed without voting⁷ and was enacted with the signature of President Megawati Soekarnoputri on August 13th, 2005. This left only four more days for the appointment of the nine judges, lest the deadline be missed.

3. Selecting the judges

Now, who would be the nine judges? The authors of the constitution had determined that government, parliament, and the Supreme Court each name three candidates. Parliament set out to work on its selection procedures right after its extraordinary session. Until August 9th, factions were to name three candidates each; proposals from the public would be accepted until August 12th; the following two days, then, a fit and proper test would be conducted.

¹ Cf. Berita hukumonline, 7/8/2003.

² Cf. Bunbongkarn, 2004: 73

³ *Partai Demokrasi Indonesia - Perjuangan*, Indonesian Democracy Party – Struggle.

⁴ Cf. Kompas Cyber Media, 5/8/2003; Harman, 2004: 230f.

⁵ Cf. Kompas Cyber Media, 5/8/2003.

⁶ Cf. Sinar Harapan Online, 7/8/2003.

⁷ The preferred mode of reaching agreement is still a consensus model. Only if no consensus can be reached parliament resorts to voting. Consensus does, however, not mean that virtually all MPs agree. The DPR regulations for consensus still leave room for opposition.

The government's selection procedure differed markedly: A fit and proper test was not to be, rather, a team consisting of the Justice Minister, the Co-ordinating Minister for Political Affairs and Security and the Chief Prosecutor would pre-select the candidates. Strong criticism concerning this procedure was voiced by NGOs, but also former Justice Minister Muladi was all in for transparency. Giving at least some acknowledgement to the law it had just co-authored, or more precisely: to the provision that called for transparency and participation of the public in the selection process, the government let it be known that it accepted submissions of candidate names until midday of August 14th.¹

Lack of transparency was bemoaned in the Supreme Court's selection procedures as well. Chief Justice Bagir Manan also did not feel inclined to conduct any kind of fit and proper test: "Why do I have to conduct a fit and proper test? I know the qualities of each person. If transparent, we are also transparent. We choose from among the judges, not from obscure persons," Manan is quoted as saying.² And other than government and parliament, Manan also rejected any obligation of the court to publicly announce the candidates' names, declaring that the constitution had endowed him with the authority to determine the judges. As required by the law,³ both the DPR and the Ministry of Justice had made their temporary lists public ahead of parliament's fit and proper test. It had turned out that they were overlapping in three cases, with one of the popular candidates being Prof. Dr. Jimly Asshiddiqie, senior lecturer at the University of Indonesia.⁴

On August 13th, the Supreme Court's candidates were the first to be determined. "The names of the three candidates have already been sent to the president. They remain awaiting the appointment by the president", Chief Justice Manan announced.⁵ Chosen were Prof. Dr. Mohammad Laica Marzuki, Supreme Court Judge, Soedarsono, Head of the Administrative High Court of Surabaya, and Maruarar Siahaan, Head of the Administrative High Court of Bengkulu.

The following day at noon, while the DPR's fit and proper test was still under way, Minister Mahendra announced that the selection team had submitted a list of 23 names to the president. Most were in fact names of candidates who had been proposed by the public, among them many academics. Later that day, the parliamentary commission in charge elected DPR's candidates. As two aspirants had previously withdrawn, this left twelve candidates in the race. Most votes went to Jimly Asshiddiqie who according to his own account had declined the government's candidacy offer in favour of the DPR's. Asshiddiqie who had been nominated by Golkar and the Reform Faction recalls how during the fit and proper test he had left no doubt about his criticism concerning the mentioned temporal limitation of the court's jurisdiction as had been written into the Law on the Constitutional Court: "During the fit and proper test, I was asked about many things, including my opinion on Article 50 of the Law on the Constitutional Court. I conveyed my opinion on the Constitutional Court, including on Article 50, which I consider as violating the constitution. But in order not to disturb the process of establishing the Constitutional Court, I said let this article be, as the Constitutional Court can later review this article or set aside the validity of the provision."⁶

¹ Art. 19 of Law 24/2003 requires a transparent and participatory nomination process. In the explanation to the article it is furthermore stated that candidate names shall be published in the mass media so that the public has the opportunity to give an input concerning the candidates.

² Cf. Kompas Cyber Media, 8/8/2003; Berita hukumonline, 8/8/2003.

³ Cf. Explanation Art. 19 Law 24/2003.

⁴ The other two were Prof. Dr. I Dewa Gede Atmadja (Udayana University) and Harun Kamil (MPR member), both of whom were eventually not elected; cf. Kompas Cyber Media, 13/8/2003.

⁵ Cf. Suara Merdeka CyberNews, 14/8/2003.

⁶ Cf. Asshiddiqie, 2004: 13.

As their second candidate, the MPs chose General (ret.) Achmad Roestand, a candidate of his United Development Party (PPP) and long time parliamentarian. Previously, since 1989, Roestand had represented the military and police faction in DPR and MPR. In retrospect he writes on his election: “I flawlessly passed the test. But later I thought that my passing was caused more by the factor of being ‘known’ than by the factor of ability as had been the condition. In fact, I had once been the chairman of the commission that was examining me ...”.¹

Last, but not least, Commission II elected another colleague: I Dewa Gede Palguna, Vice Secretary of PDI-P’s MPR faction and one of his party’s candidates. With his 41 years of age, Palguna was and still is the youngest among the constitutional judges.

Then, at long last, also President Megawati made her choice: She named Prof. Dr. H.A.S. Natabaya, senior lecturer of Sriwijaya University, and Prof. Dr. Abdul Mukthie Fadjar, senior lecturer of Brawijaya University, to be appointed as constitutional judges. Both had been on the government’s initial list of candidates, Natabaya furthermore among the proposals from the public. As the third government candidate, Megawati chose Dr. H. Harjono, MPR member representing East Java. His name had not been among the 23 submitted by the selection team; Harjono had previously been one of PDI-P’s candidates, but was reportedly asked by the party to withdraw as he was to be named as a candidate by the government.²

On August 15th, President Megawati formally appointed the nine constitutional judges who took their oath of office on the following day. The constitutional deadline was met. Indonesia was the 78th country to have a constitutional court.³

4. The nine guardians of the constitution

“Sembilan jubah merah adalah dewa-dewa pembawa cahaya
para pengawal konstitusi yang gagah
sembilan jubah merah bukan drakula-drakula haus darah
bukan penjagal konstitusi yang membuat rakyat marah.”

“Nine red robes are the divine bearers of light
brave guardians of the constitution
nine red robes are not bloodthirsty draculas
not the constitution’s butchers causing people wrath.”⁴

Who are the nine red-robed guardians of the constitution whom Justice Fadjar in his poem envisages as the bearers of light? What qualification and experience do they bring into the new institution? All, of course, hold a degree in law, a mandatory precondition as may be recalled. All but one have, in varying degrees, been teaching at university after graduation. For six of them, of whom four carry the title of professor and one holds a doctorate, university has been a main focus of their career. All nine have in one way or another been involved in further education abroad: two hold a degree from a university in the United States, two have been at universities in the Netherlands for postgraduate studies; most of them took part in various kinds of further education programmes abroad; some were visiting scholars - with the United States, the Netherlands and Australia their main countries of destination. Court members have also taken part in a number of official missions, among others to the Preparatory Session to the International Criminal Court and to the UNESCO. Taken together the judges bring into the

¹ Cf. Roestand, 2004: 46 f. (not strictly literal translation).

² Cf. Berita hukumonline, 17/8/2003; cf. also Kompas Cyber Media, 15/8/2003.

³ Cf. Siahaan, 2005: 7.

⁴ Cf. Fadjar, 2004: 42; translation by P.S.

court work experience in the executive, the legislative – both in an official position or as advisor – and in the judiciary. It may not surprise that there is some correlation between the nominating institution(s) and the judges' work experience in the three branches of government. Only one of them has experience in the business world. All judges have been active in or affiliated with societal organisations, be it professional organisations, NGOs active in law reform, legal aid, fight against corruption, military reform, or think tanks. In different frameworks – academic, non-governmental, governmental, and parliamentary – several of the judges have been involved in promoting constitutional and legal reform as well as in human rights studies and education.¹

5. A first time for everything

“Setting foot into the Constitutional Court for the first time was the first time for everything. A new institution, established for the first time; a group of judges, elected for the first time; and later, of course, also to name the first session, with procedures made for the first time”, recalls Justice Palguna.² The judges commenced with their new job immediately. They virtually had to start from scratch: there was no court room, no office, no staff, nothing. “My mobile phone number turned into the office address”, remembers Jimly Asshiddiqie, “... a number of times I was considered to be the secretary of the chief justice to what I just nodded agreement.”³ Asshiddiqie had in the meantime been elected chief justice and Laica Marzuki his deputy.

During the first month, Hotel Santika served as office space for the court – and for those six judges not home in Jakarta also as temporary accommodation. For the next three and a half months, the court moved to the Plaza Centris in South Jakarta, but the court room remained in one of the DPR/MPR's building where also the first court sessions took place. Since January 8th, 2004, the address of the Constitutional Court has been Jalan Merdeka Barat No. 7. The building is rented from the Ministry of Communication and had been renovated and adjusted to the needs of the court by the State Secretariat. The court room is situated on the ground floor. Usually, the sessions now take place here. Only in exceptional cases, as had been the case after the 2004 elections, additional space is rented. Offices and meeting rooms as well as the library are located on the other three floors. Nevertheless, it is yet again only a temporary housing: Next door, construction work is currently under way to build a permanent home for the court: a 16-floor building in mixed Greek and classic style, its design clearly intended to underline the dignity of the institution. The building is scheduled to be ready in 2006.⁴

6. Recruiting staff

“One afternoon in September 2003 my mobile phone rang”, recalls Refly Harun. “‘Refly, where are you?’, a familiar voice was heard. ‘In the office, Prof, I answered by way of greeting. ‘You’ll work at the Constitutional Court. I want to gather smart people in the court as assistants of the judges.’”⁵ The caller was Chief Justice Asshiddiqie who envisaged that the work culture at the court resemble that of a university and accordingly aimed at former students applying for positions, not only as assistants to the judges.⁶ Several did submit their application, underwent

¹ All information based on *Profil Hakim Konstitusi* 2003.

² Cf. Palguna, 2004: 83f.

³ Cf. Asshiddiqie, 2004: 14, 15.

⁴ Cf. *Laporan Tahunan 2004*: 59f; Gaffar, 2004: 133f.

⁵ Cf. Harun, 2004: 309.

⁶ Cf. Asshiddiqie, 2004: 17.

the recruitment procedure, were interviewed, and had to get through a psychological test as well as English and computer exams.

The establishment of the Secretariat General was led in a caretaker position by Janedjri Gaffar, Bureau Head at the MPR's Secretariat General, and supported by some of his MPR colleagues who had been assigned to the court. Other staff came from the Justice Ministry. Recruitment of non-civil servants was conducted in cooperation with the University of Indonesia's recruitment agency. A good year later, around 200 employees are working at the court. When it came to appointing a permanent Secretary General of the Constitutional Court in December 2003, President Megawati chose A.A. Oka Mahendra from the Justice Ministry over Janedjri Gaffar. At the time of writing, it is, nevertheless, Gaffar who heads the Secretariat and has done so since August 2004. He was appointed Secretary General after Mahendra had resigned for health reasons. Chief Registrar of the Constitutional Court is Drs. H. Ahmad Fadlil Sumadi who briefly also had to head the Secretariat General when Mahendra fell ill.¹

¹ Cf. for the above *Laporan Tahunan 2004*: 52f, Gaffar, 2004: 135ff, Sumadi, 2004: 146.

III. What law for the judges to uphold – and how?

“... we nine started to go about our task equipped only with three pieces of paper, i.e. the 1945 Constitution, the Law 24/2003 on the Constitutional Court and the Presidential Decree 147/M/2003 on the installation of the nine constitutional judges”, Justice Soedarsono recalls.¹

Which are the principles that the guardians of the constitution shall uphold? And what do the mentioned documents determine concerning the judges’ work?

1. *Rechtsstaat* a constitutional mandate

Four amendments of the 1945 Constitution have considerably restructured the Indonesian system of government. The most visible changes have possibly been: free and fair elections conducted by an independent election commission; a president directly elected by the people; no appointed parliamentarians any longer; directly elected governors, *bupatis*, mayors etc. No doubt, democracy has taken root in Indonesia.

Negara hukum or *rechtsstaat*, is another fundamental principle enshrined in the Indonesian Constitution. The concept originating from the continental European legal tradition may best be translated into English as “constitutional state under the rule of law”. In an elaboration on the concept, Jimly Asshiddiqie lists the following principles and elements as pillars for a modern *rechtsstaat*: supremacy of law, equality before the law, due process of law, limitation of power, independent executive organs, an independent and impartial judiciary, existence of an administrative judicature and of a constitutional court, human rights protection, democracy (for the state to be a democratic *rechtsstaat*), welfare state, transparency and social control.²

With the constitutional mandate to establish a constitutional court, elements of separation of powers and of limitation of power have been introduced and the principle of supremacy of law strengthened: The court’s judicial review authority shall ensure that laws are based on the constitution, thus supporting that acts of legislators, that is government and parliament, are bound by law. The Constitutional Court does not have the authority to review either presidential and government regulations or court verdicts. In this respect, exclusive authority lies with the Supreme Court as the highest appeal court and due to its constitutional authority to review lower ranking legislation against laws. Verdicts by the Supreme Court are not subject to judicial review by the Constitutional Court. Equally, no judicial review authority is determined for acts of the MPR: As the People’s Consultative Assembly no longer issues decrees this primarily concerns the existing body of MPR Decrees. These remain a legal source exempt from judicial review.

¹ Cf. Soedarsono, 2004: 125.

² Cf. Asshiddiqie, 2005a: 154ff. From my interviews with Justices Harjono, Natabaya and Siahaan I learned that the court has not yet developed an elaborate concept of *rechtsstaat*. When answering my questions for a brief idea about their understanding of *rechtsstaat* the judges mentioned most of the principles also Asshiddiqie outlined, especially limitation of power, human rights protection and separation of powers. Interviews with the three judges conducted by the author, Jakarta, 8, 15/9/2005. In an elaborate e-mail answer to my question concerning the court’s interpretation of the *rechtsstaat* concept, Justice Siahaan furthermore explained that the parameters used by the judges were the interpretations of the concept developed up to now, whereby he referred among others to the definition of the concept as adopted on the Second National Seminar of Law held in Semarang on December 27th, 1968, entitled “To Enforce the Rule of Law Based on the Democracy of Pancasila”, to the interpretation of the International Commission of Jurists (ICJ), to the understanding of A.V. Dicey and the above quoted interpretation of Jimly Asshiddiqie; e-mail from Justice Siahaan, 2/6/2006. The ICJ concept is an elaborate human rights based rule of law concept which had been developed on several international conferences during the 1950s and ‘60s; cf. ICJ 1966.

Another key component of *rechtsstaat* mentioned by the constitutional judges is judicial independence. Indonesia's constitution today clearly and unambiguously states that the judicial power is an independent one. In support of the same, the authors of the constitution have created a new, explicitly independent, institution, the Judicial Commission, and determined new appointment procedures for Supreme Court judges: Candidates for the latter positions are now proposed by the Judicial Commission to the parliament in order to obtain agreement and are then determined as Supreme Court judges by the president. The Judicial Commission is furthermore accorded "... other authority in the framework of guarding and upholding the honour, the noble status and the conduct of the judges."¹

Last, but not least, protection of human rights was mentioned as a crucial element of *rechtsstaat*. Since 2000, the constitution comprises an entire chapter entitled "Human Rights". It is possibly this part that constitutes the cornerstone for the judges' judicial review work. In essence, the human rights chapter's Articles 28 A-J are a slightly altered version of the Indonesian Human Rights Charter that had been released by the outgoing last Suharto era MPR in 1998. Although the provisions in both constitution and charter somewhat resemble those in the Universal Declaration of Human Rights, they are by no means identical.²

Indonesia's constitution today includes numerous crucial rights and freedoms, some of which are explicitly declared as non-derogable, meaning that they may not be diminished under any circumstances whatsoever. Non-derogable under the constitution are the right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognised as a person before the law and the right not to be prosecuted on a retroactive legal basis. Furthermore, the long constitutional catalogue of rights includes, among others: the prohibition of discrimination, the right to freedom of information, expression, association, and assembly, the right to education and work, the right to social security, to health care, to a place of residence and to a decent livelihood. The latter rights and the constitution mandating social justice and the establishment of a system of social security can be read as elements of a welfare state that Asshiddiqie considered as part of the concept of *rechtsstaat*.³

As compared with the Universal Declaration of Human Rights, the Indonesian Constitution also lacks crucial rights. Notable for its absence are the prohibition of arbitrary arrest, detention, exile and deprivation of citizenship, the notion of equal rights for men and women and the right to freedom of movement.⁴ Moreover, the discrepancy between the two documents regarding the reasons for rights' limitation needs mentioning: The Universal Declaration states: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of *morality, public order and the general welfare in a democratic society* [italics PS]." In the Indonesian Constitution's corresponding clause 'general welfare' has been substituted by 'security'⁵ and 'religious values' has been added as grounds for rights limitation.⁶

Given the new constitutional reality: Can legislators bar former members of the banned Communist Party from standing as candidates in the elections? The constitution prohibits discrimination, but it allows for exceptions in the name security. The court ruled that they may

¹ Cf. Art. 24 (1), 24 A (3), 24 B 1945 Constitution.

² For a detailed analysis of the Constitution's new human rights provisions cf. Stockmann, 2004: 201-317.

³ Cf. Art. 34 and Preamble 1945 Constitution.

⁴ Cf. Art. 28 A-J 1945 Constitution.

⁵ *Keamanan*, can also be translated as safety

⁶ Cf. Art. 29 (2) Universal Declaration of Human Rights; Art. 28 J (2) 1945 Constitution.

not. Can legislators determine that the Antiterrorism Law is applied to the Bali bombings although it was enacted after the attacks? The constitution prohibits retroactive effect of law under any circumstances. The court ruled that they may not. Can legislators provide for the establishment of human rights courts for the trial of gross violations of human rights committed in East Timor 1999, although the Human Rights Courts Law was enacted after the atrocities? Another case of retroactive effect of law - and the court ruled that they may.

Before we turn to these and other question and the judges' answers and arguments let's see what the judges' basic documents determine concerning the court itself.

2. Constitutional provisions on the Constitutional Court

Most of what the constitution says concerning the court – and some of what it doesn't – has already been touched upon above. To summarise:¹

Composition: The court consists of nine constitutional judges who are determined by the president with government, parliament, and Supreme Court nominating three candidates each. Lest there be any doubt as to the role of the president, the Law on the Constitutional Court makes it clear that the determining act is only administrative in nature.² The authors of the constitution ruled out that the judges concurrently hold positions as state officials. They are required to possess integrity and personalities that are not disgraceful, they need to be just and statesmen who master the constitution and matters pertaining to the state. Once in office, the judges elect from among their own ranks the chief justice and his or her deputy.

The five tasks of the court: Firstly, the court has the authority to review laws against the constitution; secondly, the court decides in conflicts concerning the authority of constitutional organs;³ thirdly, it rules on the banning of political parties; and fourthly, it decides disputes over the outcome of general elections. The court rules in first and last instance, its verdicts are final and binding. Fifthly and lastly, the court has a role in impeachment proceedings. It is obliged to investigate and give a ruling on the opinion of the parliament that the president and/or the vice president no longer fulfil the conditions of holding the respective position and/or violated the law in the form of committing treason against the state, corruption, bribery, other gross criminal acts or disgraceful deeds. The court's ruling has to be issued within 90 days. It is not a ruling on the actual dismissal, though. In this, the MPR has the final say; but it only convenes to decide on the matter, once the court has ruled in support of parliament's impeachment proposal.

For further details on the appointment and dismissal of the judges as well as on law of procedure the constitution refers to an implementing law, which is, of course, Law 24/2003 on the Constitutional Court and to which we shall turn now.

3. Who guards the guardians of the constitution?

The constitution vests considerable power in the nine constitutional judges. This raises the question: Who guards the guardians of the constitution? How shall it be ensured that office

¹ Cf. for the following Art. 7 B (1, 4, 5), 24 C 1945 Constitution.

² Cf. Explanation Art. 18 (1) Law 24/2003.

³ It does also not explicitly list the mentioned constitutional organs, or to put it literally: the "institutions the authority of which is provided by the constitution".

holders are - and remain – persons of integrity who fulfil their oath of office to uphold the constitution? The constitution is silent on these issues - and the law? What kind of legal framework, what type of accountability, supervision, and sanction mechanism did legislators determine to ensure the judges' integrity, independence, and proper work? And to which standards and mechanisms did the judges subject themselves?

The court is formally accountable to the public. This accountability shall be implemented by way of publishing a report on the court's work as well as on its administrative and financial matters. If this helps to make the court's work more transparent, so does the requirement that the public shall have access to the verdicts.¹ The latter is a novelty in Indonesia where court rulings are – if at all – rather difficult to obtain.

Among the requirements for the judges that legislators spelled out in the law, there is one that might cause some irritation: Can a person who has been in jail for, say, four years really be considered as a person of integrity, as the constitution requires the judges to be? The legislators seem to think so. They don't seem to find fault with the idea that guardians of the constitution have seen the inside of jails as ordinary convicts - just to be clear, we are not talking specifically about political prisoners of an authoritarian regime here. As a requirement for prospective judges legislators put down in law that they may not have been sentenced to a jail term for a crime punishable with five years or more imprisonment - which, it may be added, is a condition similar to the one applicable to both MPs and president.² Quite obviously, there is no unity in opinion on the meaning of integrity, and no legal regulation on the matter either, as Jimly Asshiddiqie pointedly noted.³

In an aim to support the judges' independence, legislators extended the list of positions that judges are barred from holding while in office: Those among the judges who had been in judicial service had to vacate their old benches, the MPs among them their seats in parliament, as constitutional judges may not hold positions as other state officials. Those among the nine who had been in state service, e.g. at universities, had to give up their civil servant position or have it temporarily suspended. Party membership also had to be relinquished. Judges may also not work as lawyers nor have leading positions in the business world.⁴

And where do legislators draw the line concerning misconduct on the part of the judges? One reason for dismissal is that the requirements for becoming a judge are no longer met, another when a judge holds an office he is legally barred from. Dismissal also looms if judges fail to perform their duties, first and foremost, of course, if they do not comply with their oath of office to uphold the constitution. Concerning their task in impeachment proceedings, deliberate obstruction of the court's timely decision on parliament's corresponding proposal will yield the same consequence. Likewise, skipping five court sessions in a row without good reason may result in job loss.⁵

How about judges committing criminal offences while in office or being charged with the same? The case of DPR-President Akbar Tanjung comes to mind, who had been sentenced to a three

¹ Cf. Art. 13, 14 Law 24/2003. The report is bilingual, Indonesian and English.

² Cf. Art. 16 (1d) Law 24/2003; cf. Art. 6 t Law 23/2003 on the election of the president and the vice president; Art. 60 i Law 12/2003 on the election of the members of the DPR, DPD and DPRD; for parliamentarians the condition is that they may not currently be serving a prison sentence for a crime punishable with five years or more imprisonment.

³ Cf. Asshiddiqie, 2005: 322.

⁴ Cf. Art. 17 Law 24/2003 and corresponding explanation.

⁵ Cf. Art. 23 (2) Law 24/2003.

year prison term in first instance on charges of corruption - and stayed put.¹ Can the guardians of the constitution also continue on the job while being prosecuted or even after a conviction? Two different regulations for dismissal of constitutional judges exist: The first explicitly states that when a judge is sentenced to a prison term of five years or more he will be dismissed dishonourably. In such an event the judge in question will not get the chance to defend himself before the Judges' Honour Council as would otherwise be the procedure.²

Before dismissal, a judge can face suspension, lasting at the most for 90 work days. If by that time the process has not led to dismissal, the judge in question will be rehabilitated by way of presidential decree. Procedures differ, however, when a judge is detained or on trial, charged with having committed a crime punishable with five years or more imprisonment.³ If in such a case there is no verdict after the 90 day suspension, the judge in question will be dismissed - a likely event as it seems rather improbable that a final verdict will be reached within such a short time. If the judge concerned is eventually acquitted he will be rehabilitated, but not reinstated as constitutional judge.⁴ It should be mentioned that for any arrest or detention of constitutional judges the police needs an order issued by the Attorney General who in turn must have obtained prior presidential consent. Only if caught red-handed, or if preliminary evidence suggests a most serious of crimes may the police act without such an order.⁵

A dismissal procedure can be initiated by the chief justice, either upon a request from within or from outside the court. The chief justice then calls a plenary meeting of the judges during which the request is discussed. If considered necessary, a Judges' Honour Council is formed to deliberate and decide the case at hand. The decision of the council is binding for the chief justice. If the council suggests dismissal, the chief justice puts this recommendation before the president who determines the same in a presidential decree.⁶

The law does not state much on the Judges' Honour Council. Details were worked out by the judges themselves in the Constitutional Court Regulation on the Constitutional Court's Code of Ethics. For cases of possible dismissal, the Honour Council consists of two constitutional judges plus three members from outside: a former Supreme Court judge, a senior legal practitioner, and a professor of law.⁷ "With such a composition the mechanism of decision making among the five members of the Honour Council can be carried out independent of the internal influence of the Constitutional Court itself which can be assumed to be inclined to defend its colleagues," explained Asshiddiqie who had previously recommended legislators to have constitutional judges supervised by the new Judicial Commission.⁸

Released in September 2003, the Code of Ethics was one of the first regulations the judges issued. Two years later, they opted for amendment and subscribed to a much more comprehensive code by accepting the "Bangalore Principles of Judicial Conduct". Key principles included in this international standard are: independence, impartiality, integrity, propriety, equality, competence, and diligence.⁹

¹ The corresponding legal provision does not necessitate to give up a position as MP in that case; cf. also footnote 2 above. Tanjung was eventually acquitted by the Supreme Court - a verdict which was much criticised.

² Cf. Art. 23 (2a), 3 Law 24/2003; Asshiddiqie, 2005: 344.

³ Or for a number of other selected criminal offences with lower sentences according to the Code of Criminal Procedure's Art. 21 (4); cf. Art. 25 (2) Law 24/2003.

⁴ Cf. Art. 25 Law 24/2003, esp. Art. 25 (5) and Explanation.

⁵ I.e. crimes punishable with a death sentence or crimes against state security; cf. Art. 6 Law 24/2003.

⁶ Cf. Art. 23 (3, 4) Law 24/2003; Asshiddiqie, 2005: 346.

⁷ Cf. Art. 4 Constitutional Court Regulation 2/2003.

⁸ Asshiddiqie, 2005: 345f (quotation), 353.

⁹ For each principle the Bangalore Principles state a number of provisions concerning application.

The Bangalore Principles were formally accepted as a new Code of Ethics in the process of deliberations between the Constitutional Court and the newly founded Judicial Commission. What role does the Judicial Commission play in this respect? It may be recalled that the commission's tasks of guarding judges' conduct was left rather unspecific in the constitution. In a broad interpretation, legislators then granted the Judicial Commission the authority to supervise the conduct of the constitutional judges as well. With this, legislators added an external supervision mechanism to the internal one that they had provided for in the Law on the Constitutional Court.¹

But the authority of the Judicial Commission does by no means render the Judges' Honour Council obsolete, to the contrary. Legislators authorised the commission to investigate in cases of alleged misconduct and to give a binding recommendation on penalising a judge in the case that the sanction amounts to a written reprimand. In cases of possible suspension or dismissal, however, the commission is to issue a recommendation to the chief justice, which is not explicitly characterised as binding. The accused is then granted the opportunity to defend himself before the Judges' Honour Council. If the council rejects his defence, then the recommendation for dismissal is put before the president. This means that the investigation process is externalised, while the decision on serious sanctions is left in the hands of the Judges' Honour Council – an institution that legislators intended as internal supervision mechanism, but which the judges themselves opened up to external control.

This may not have been the last word on the matter. It might be interesting to note that the Judicial Commission wants to see its authority enhanced and has started lobbying legislators to this end: “We hope that the authority of the Judicial Commission is not just limited to recommendations but [includes] determining and applying sanctions”, Busyro Muqoddas, Chairman of the Judicial Commission, is quoted as saying.² It remains to be seen whether the constitutional judges will in future be solely subject to external supervision.

4. The Constitutional Court's law of procedure for judicial review cases – or: Accompanying Ibu Ina in her quest for justice

What is the law of procedure concerning judicial review cases like? For the purpose of illustration, we shall follow a fictitious person, let's call her Ibu Ina, in the process of filing a petition to the Constitutional Court.³ Ibu Ina felt that a certain law violated a constitutional right of hers and decided to bring it before the Constitutional Court for judicial review. Her hope was that the court would declare the one discriminating article in the law unconstitutional and thus invalid. Now, where to find information on how to proceed? Ibu Ina searched the homepage of the Constitutional Court for information before consulting with her lawyer. She found what she had been looking for: a brief version of how to bring a case before the court as well as the comprehensive court regulation on the law of procedure for judicial review cases.⁴ Her first question: was she entitled to bring her case before the court? Yes she was, she decided. Legislators had determined that any party whose rights or authority are violated by a law, be it an individual Indonesian citizen, a customary law (*adat*) community, a public or private legal entity or

¹ Cf. for the following Art. 21-25 Law 22/2004.

² Cf. Berita hukumonline, 6/10/2005.

³ The following is based on the relevant provisions on procedure in Law 24/2003 and the Constitutional Court Regulation 6/2005 on the procedure in judicial review cases.

⁴ Cf. http://www.mahkamahkonstitusi.go.id/mk_lkht/m/ina/prosedur/#pengajuanpermohonan; Constitutional Court Regulation No. 6/2005.

a state institution, could file a petition. And what about the costs? Ibu Ina was glad to find that she could submit her case free of charge as far as the Constitutional Court was concerned.

Following the instructions, Ibu Ina – or rather her lawyer – prepared the petition. There was a request for material judicial review, a review of certain provisions in the law, not for formal judicial review, i.e. alleging that the process of drafting and enacting the law had been unconstitutional. Eventually, Ibu Ina submitted to the court twelve printed copies as well as an electronic version of her judicial review petition. The court registrar examined whether the petition was formally complete: written in Indonesian, containing details - and proof - concerning Ibu Ina's identity, the court's authority, her legal standing, the constitutional right that she considered to be violated, the provisions in the law that she requested the court to rule on as well as a detailed reasoning for her petition. And, of course, her lists of evidence, of witnesses and experts. The registrar found Ibu Ina's petition incomplete and asked her to resubmit an improved version within seven work days. Which she did - and this time the registrar had no further complaints. Her case was registered, got an official number.

Within the next seven days, copies of her petition were sent to the parliament and the president. Furthermore, the Supreme Court was notified. A necessary step, as a law under judicial review before the Constitutional Court always means that the Supreme Court has to stop any review of legislation that serves as implementing legislation of the concerned law until there is a decision.

The registrar forwarded Ibu Ina's files to the chief justice who named three judges to take charge of the case. The chairman of the panel of judges determined within the following 14 days the date of her first hearing. Ibu Ina was notified – well before the three days prior to the hearing as would have been necessary. And she was surprised to find the date of the hearing of her case also posted on the court's homepage.

Then came the day of the introductory hearing: Three judges were present, the panel in charge of her case. Now it was the judges' turn to examine whether her petition was complete and clear. Once more: disappointment. The judges explained to Ibu Ina and her lawyer what the problem was and how they should improve the petition. To accomplish this they were granted 14 work days. Eventually, the petition was accepted by the judges. With parliament, president and Supreme Court once more duly notified, the hearings on the substance of Ibu Ina's case could start.

When on the day of the first hearing Ibu Ina arrived at Jalan Merdeka Barat No. 7, the entrance hall was buzzing. Court employees motioned everyone to sign in. Journalists came and collected their briefing papers in the press room. On a huge TV screen the still empty court room was visible for those waiting outside. Ibu Ina and her lawyer entered the court room and breathed in the air of dignity, which hung over its dark and heavy wooden furniture. Opposite the entrance on a small podium stood the wood carved tables and the leather-covered chairs with their high backrests, awaiting the judges. Ibu Ina and her lawyer took their seats on the left hand side. Behind them, underneath the photographs of Indonesia's first nine constitutional judges, the clerk of the court was busy setting up his laptop, readying himself to type the minutes of the hearing that would later be posted on the court's homepage. Parliament representatives started coming in and took their seats vis-à-vis Ibu Ina. In later sessions they would be joined by government representatives. At the table to her right, facing the judges, one of the experts she had named was unpacking his files while talking to some of the journalists who had taken their seats behind him on the visitors' chairs. Then, the nine judges came in and the chief justice opened the hearing.

In the course of this and the following hearings, the court worked its way through Ibu Ina's petition; government and parliament representatives gave information; evidence was examined; experts and witnesses were heard – one of the latter who had initially refused to follow the summons was even brought to court by force of police.

Then the long awaited decision: Ibu Ina had learned that the decision had been taken in the Judges' Deliberation Sessions, which are, other than the court hearings, closed and confidential. At least seven of the judges had to be present in the session in which the verdict on her case was determined. And all nine judges had to submit a written opinion, not only the ones in charge of drafting the verdict.

The decision in Ibu Ina's case was read out in an open court session. Otherwise, Ibu Ina was told, it would not be valid. By a narrowest of margins, 5 against 4, the court had ruled in favour of her petition. The judges were clearly split in their legal opinion on the matter at hand. Two sessions of *musyawarah untuk mufakat*, deliberation to reach consensus, the mode of decision making that the legislators had determined as preferable, had not yielded the very result. But consensus or not, Ibu Ina had achieved what she had hoped for: In its verdict, the court declared the article under review as unconstitutional and no longer valid as of the date of announcing the ruling.

Like president, parliament, and Supreme Court, also Ibu Ina as petitioner duly obtained a hard copy of the verdict within the following seven days. But already a day after the verdict she could download it from the homepage of the court and study once more the argument of the judges who had ruled in favour and the dissenting opinions of those who had voted against her petition.

IV. The court at work

1. Activities during the court's first two and a half years

“May peace be upon you and Allah’s mercy and blessing. Ladies and Gentleman, before opening the session let me convey to you that this is the Inaugural Session of the Indonesian Constitutional Court. ... May this Inaugural Session ... be testimony for the whole Indonesian people that the presence of the Constitutional Court in our system of government will, slowly but steadily, raise the spirit, raise the optimism and raise the conviction that the 1945 Constitution of the Republic of Indonesia can be expected to really and truly become a living constitution.”¹ With these words Chief Justice Asshiddiqie opened the first session of Indonesia’s Constitutional Court. This was on November 4th, 2003, after a couple of extremely busy weeks that saw the improvised creation of the court’s basic structures.²

Today, Indonesia’s *Mahkamah Konstitusi* is a relatively well established institution. Over the past two and a half years, the judges have dealt with 120 cases: 45 petitions concerning election results, three applications concerning disputes between constitutional organs and the remaining ones petitions for judicial review of laws, some of which will be the topic of the following chapters.

The 2004 election marathon turned out to be an extremely strenuous time for the judges, as the law determines a tight schedule for the court to give its rulings on election results. The 44 petitions concerning the results of the parliamentary elections, 23 submitted by political parties concerning disputes in as many as 252 cases and 21 submitted by candidates for the new Regional Representative Council (DPD), had to be decided within 30 work days.³ “Almost every day we had to set out with the sun and went home with the moon, sometimes even around early dawn,” recalls Justice Palguna. “When all cases were decided, I remember, physically I felt as tired as if I had walked from the western to the eastern tip of Java.”⁴

The one petition concerning the presidential election was submitted by General Wiranto and his running mate, Salahuddin Wahid, alleging that 5.434.660 votes for them had been missing in the Election Commission’s tabulation of the results. The court rejected the petition for lack of evidence.⁵

Besides fulfilling their constitutional tasks, the judges were active in socialising the court’s work and fostering cooperation: A number of Memoranda of Understanding were signed between the court and different law faculties. Constitutional study and research centres were established. Occasionally, judges held public lectures at universities and the court frequently received student groups from all over the country. Judges have travelled the country to meet with representatives of regional governments and parliaments as well as with Islamic teachers and students of Islamic

¹ Minutes of the Proceedings 001/PUU-I/2003, p. 3.

² Shortly before the first court session, a strategic planning workshop was conducted in cooperation with the National Law Reform Consortium (KRHN), which resulted in the “Blueprint on building the Constitutional Court as a modern and trustworthy institution of constitutional jurisdiction” which includes among others a matrix and time schedule of planned activities for 2005-2009; cf. *Cetak Biru*.

³ Cf. http://www.mahkamahkonstitusi.go.id/putusan_sidang.php, *Laporan Tahunan 2004*, p. 42ff, *Berita Mahkamah Konstitusi* special edition 2004, p. 4ff.

⁴ Cf. Palguna, 2004: 91f. The verdicts changed the distribution of seats in the DPR, with four parties gaining and four others losing one respectively two seats. Concerning the ruling on election results the court has cooperated with the International Foundation for Election Systems (IFES); cf. *Laporan Tahunan 2004*, p. 47, 63ff; cf. also <http://www.ifes.org/indonesiapast-project.html?projectid=indonesiaconstitutional>.

⁵ Cf. *Laporan Tahunan 2004*, p. 48ff, *Berita Mahkamah Konstitusi* special edition 2004, p. 55ff.

boarding schools (*pesantren*). During socialisation meetings on Java, the judges can now distribute copies of the constitution in both informal Javanese (Ngoko) and Javanese in Arabic writing.¹

Discussions on the court's verdicts with parties concerned, academics, NGO representatives, and journalists have been organised in cooperation with the University of Indonesia and the Hanns Seidel Foundation.² Topics related to the court are also regularly debated on the TVRI (state television) programme "Forum Konstitusi".

The court publishes two journals, the *Berita Mahkamah Konstitusi* and the *Jurnal Konstitusi*, as well as, in cooperation with the Konrad Adenauer Foundation, a research series.³ And the judges themselves have been busy writing on a number of themes related to the court and constitutional jurisdiction. The court has a homepage on which verdicts are posted almost as soon as they are announced and a lot of other information is available.⁴

The court has also been active in fostering cooperation and exchange with constitutional courts in other countries, especially in Asia and Europe. An opportunity for exchange with colleagues from Asia is among others provided with the regional seminars of Asian constitutional court judges.⁵ In Europe, the most frequent exchanges seem to have been with the German Constitutional Court, this facilitated by two political foundations: The Hanns Seidel Foundation has among others organised two speaking tours of German Constitutional Court Judge Prof. Siegfried Bross to Indonesia and two visits of Indonesian judges and staff members to Germany.⁶ The Konrad Adenauer Foundation has e.g. organised a seminar in Jakarta with the former President of the German Constitutional Court, Prof. Ernst Benda.

2. Which laws did the judges decide to accept for review? The ruling on the legal limitation of the court's jurisdiction

Challenging the legal limitation of the court's review authority

Among the first laws that were brought before the court was one law dating from 1985. Thus, right away the judges were confronted with the legal limitation that legislators had put on their judicial review authority. It may be recalled that this regulation, included in Article 50 of the Law on the Constitutional Court (Law 24/2003), had been contested among legislators to the last minute. Article 50 reads: "Laws which can be petitioned to be reviewed are laws enacted after the amendment of the 1945 Constitution of the Republic of Indonesia." And the corresponding explanation specifies that what is meant with amendment is the First Constitutional Amendment of October 19th, 1999.

The logical consequence would have been for the court to reject the petition for review of the 1985 law. But this was not what happened. Like among legislators, also among the judges

¹ Cf. among others *Berita Mahkamah Konstitusi* No. 9, p. 17; No. 12, p. 15ff; *Laporan Tahunan 2004* p. 65, 71.

² Cf. e.g. Hanns Seidel Foundation & Mahkamah Konstitusi 2004, Hanns Seidel Foundation, Mahkamah Konstitusi & Universitas Indonesia 2004, 2005, 2005a; cf. also http://www.hsfindo.org/index.php?con=patners_detail&mcxv=17 for details on the cooperation of court with the Hanns Seidel Foundation (HSF).

³ Cf. for the first publication Mahkamah Konstitusi & Konrad Adenauer Foundation 2005. Research cooperation seems to exist also with the Asia Foundation.

⁴ The homepage is <http://www.mahkamahkonstitusi.go.id>. The judges' books are published by Konstitusi Press; enquiries can be sent to the court via the homepage.

⁵ This is facilitated by the Konrad Adenauer Foundation (KAS) Singapore. For details on the seminars cf. Konrad Adenauer Stiftung 2004, 2005.

⁶ Details cf. link in footnote 2.

opinions differed when it came to the question whether parliament and government had the authority to put a time limit on the court's review authority. Whereas one of the judges, Justice Natabaya, had been a driving force behind Article 50, at least one other, Justice Harjono, had told fellow MPs during the parliamentary deliberations that he considered the very provision unconstitutional.¹ But other than in parliament, in the Constitutional Court opponents of Article 50 had the majority.

Part of every verdict is a clarification whether the case is within the court's jurisdiction. In their ruling on the mentioned 1985 law, the majority of the judges decided that this was the case and that they accepted the petition. How did they proceed? As Article 50 was not itself under review and the court may not act *suo moto*, on its own initiative, revoking the contested provision for being unconstitutional was not possible. The majority of the judges opted for an approach which Chief Justice Asshiddiqie had already outlined during his fit and proper test in the DPR, namely to set aside the contested provision. The verdict on the 1985 law includes lengthy legal explanations for their decision. Three judges, Justices Marzuki, Natabaya and Roestandi, disagreed with both procedure and interpretation of Article 50 and gave dissenting opinions.

"This is a good and progressive step", lauded legal reform advocate Firmansyah Arifin who had earlier harshly criticised the inclusion of Article 50 into the Constitutional Court Law. Unsurprisingly, Justice Minister Mahendra did not quite share this enthusiasm. "This Article 50 can not be interpreted differently", he said. "There is only one interpretation, namely what can be reviewed are laws after the 1999 Amendment." But interestingly, he granted the judges the option to rule on the matter, recommending: "The Constitutional Court should first conduct a judicial review of Article 50 of Law 24/2003."²

Concerning this procedure, Mahendra had the support of one of the judges of dissenting opinion: Justice Natabaya stated, supposing Article 50 was considered to be unconstitutional - which in his view was not the case -, the way to determine the same would be via a petition for judicial review. "... the judges may not arbitrarily (*willekeurig*) set aside law of procedure (Law 24/2003) that constitutes the rules of the game (*spell regels*) binding the judges themselves...".³ Justice Roestandi went even further in his criticism: Setting aside Article 50 would become a precedent "... with the result that this setting aside in essence constitutes a euphemism for annulment (*annulsi*) or a quiet declaration that Article 50 of Law 24/2003 has no longer any binding legal force."⁴

Article 50 declared unconstitutional

At least this procedural aspect of the problem was put to rest a good year later when a petition for judicial review was brought before the court in conjunction with a petition for review of another pre-1999 law. With the same majority, six versus three, the judges officially declared Article 50 unconstitutional and no longer valid.

Unsurprisingly, also the ruling evoked both support and criticism: "We see the Constitutional Court Verdict that revokes Article 50 of Law 24/2003 as a step forward and in line with the hopes and the wishes of the people", Law Reform Consortium representative Fultoni said.

¹ Interviews with Justices Natabaya and Harjono, Jakarta, 8/9/2005. Whether other judges have been giving their opinion to legislators is beyond my knowledge.

² Cf. Berita hukumonline, 6/1/2004; Kompas Cyber Media, 3/1/2004; detikcom, 2/1/2004 as posted at <http://cybernews.cbn.net.id>.

³ Cf. Verdict 004/PUU-I/2003, p. 28.

⁴ Cf. *ibid.*, p. 20. Justice Siahaan explains in his book on the Constitutional Court's law of procedure that the consideration part of a verdict which contains the *ratio decidendi* is inseparable from the decision part and of the same standing, namely binding; cf. Siahaan, 2005: 205.

Whereas the former deputy chairman of the Constitutional Commission, Albert Hasibuan, wondered: “How shall the judges be fair and independent if the article they are asked to review is related to their own existence?” Reactions from parliamentarians were also mixed - no wonder, given the fact that the provision had been a highly contested one.¹

Are legislators authorised to put a time limit on the court’s judicial review authority?

No, they are not, was the answer by the majority of the judges. They pointed out that the constitution did not include any kind of limitation on the court’s jurisdiction. The authors of the constitution delegated authority to legislators to determine details concerning appointment and dismissal of the judges, the law of procedure, and other regulations on the court. But this was not intended for any limitation of the court’s authority.² Despite the fact that Article 50 was included in the chapter on the court’s law of procedure, in terms of substance it concerned the authority of the court. And this authority had already been regulated clearly and exhaustively (*secara limitatif*)³ in the constitution; a law might neither extend nor diminish it. Any change to the court’s authority needed to be determined in the constitution, not in a lower ranking piece of legislation. The function of Law 24/2003 was to implement the constitutional article that authorises legislators to determine details on the mentioned issues, not to make new regulations, let alone such that limit the implementation of the constitution. Article 50 was considered to diminish the court’s constitutional authority and to be against the universally accepted doctrine of hierarchy of legal norms.

No, Article 50 was not unconstitutional, objected the judges of dissenting opinion, it did not diminish the court’s authority, but implemented and explained the same. Justice Roestandi argued that Article 50 spelled out details of the “other regulations on the court” which to determine the constitution authorizes legislators and which could take the form of confirmation, repetition, or restriction. Thus, the term “other regulations” provided the possibility for legislators to also determine which laws might be reviewed by the court.⁴

Justices Natabaya and Marzuki explained that the Constitutional Court had two kinds of authority, constitutional and procedural. Whereas the former was determined in the constitution, the latter was regulated in Law 24/2003. This Law on the Constitutional Court was the implementation of the constitutional order for legislators to determine details on the mentioned issues. The regulation on procedural authority contained in Article 50 of the law did therefore not diminish the constitutional authority of the court and was thus not unconstitutional.⁵

Justice Natabaya furthermore underlined the importance of procedural law by which judges were bound, stating that the function of procedural law was to maintain substantive law.⁶ Justice Roestandi put it slightly differently when stressing in his first dissenting opinion: “It needs to be remembered that according to legal regulations the constitutional judges need not just uphold the law, but also justice, and they need not only uphold *justice*, but also *the law*.”⁷

¹ Cf. detikInet, 13/4/2005; Kompas Cyber Media, 14, 15/4/2005.

² Cf. for this and the following Verdict 066/PUU-II/2004, p. 53ff.

³ In my understanding, the translation “exhaustive” that to my knowledge is comprised in the French term *limitatif* comes closer to what is meant in this context than the literal translation “limitative”.

⁴ Cf. Verdict 004/PUU-I/2003, p. 21; in his dissenting opinion in this first verdict, Justice Natabaya among others put forward a similar argument; cf. *ibid.* p. 26f.

⁵ Cf. Verdict 066/PUU-II/2004, p. 56, 64f.

⁶ Cf. *ibid.* p. 68. – Furthermore, for the purpose of comparison, Justice Natabaya referred to time limits that exist concerning constitutional complaints under the German system of constitutional jurisdiction. In this respect, Justice Natabaya quoted a paper that Justice Bross of the German Constitutional Court had presented in Jakarta; cf. *ibid.* p. 69f, the quoted paper is Bross 2005a.

⁷ Cf. Verdict 004/PUU-I/2003, p. 22; italics in the original, P.S.

Fair or problematic double standards?

The majority of the judges argued that with a limitation of the court's review authority double standards would be applied: Laws enacted after October 1999 might be reviewed by the court, while laws enacted before that date might not. This would cause legal uncertainty, which in turn would give rise to injustice.¹

Justice Roestandi disagreed: He considered it as just that a distinction was made between different types of laws. In his view, it would not be appropriate if laws enacted before the amendment of the constitution were reviewed against the amended constitution. And that laws might not be reviewed by the Constitutional Court did not mean that they might not be reviewed at all; there was always the possibility of legislative review.²

Justices Marzuki and Natabaya pointed to the Transitional Regulations of the constitution, which determine that all existing legal regulations continue to be valid as long as no new ones are made in accordance with the constitution. This meant, they argued, that legal change was only possible through the process of lawmaking or legislative review by parliament and government. This view was not shared by the majority of the judges who stated that these transitional regulations might not be interpreted in a way that limited the Constitutional Court's review authority.³

May the judges rule on the court's jurisdiction?

As mentioned above, critics had raised the question whether or not the court was in a position to rule on its own jurisdiction. Justice Roestandi who had been very outspoken in his objection to the earlier approach of setting aside Article 50 also raised this issue from a perspective of court ethics. He pointed to the fact that in civil and criminal law cases judges were obliged to withdraw from a case if they had close family or work ties with one of the parties. "With regard to reviewing Article 50 of the Law on the Constitutional Court, the connection between the article under review and the constitutional judges is very clear, as the article regulates the authority of the court itself."⁴

This position was contested by Justice Siahaan, a supporter of the majority view, who countered it in one of his publications. Reviewing Article 50 was not a matter of personal interest of the judges with the aim to extend their authority, argued Siahaan. Rather, it was in the interest of justice, which was a right of the people, so that the access to the court was not prevented solely on the grounds that a law came into being before the amendment of the constitution.⁵

Other conceivable options?

Is a way to deal with the problem conceivable that would free both legislators and judges from the allegation of overstepping their authority? Might it have been an option for the court to hand the problem back to the MPR with the request to clarify the timeframe of the court's jurisdiction by way of constitutional amendment? We will come back to this issue in the concluding chapter.

¹ Cf. Verdict 066/PUU-II/2004, p. 54.

² Cf. *ibid.*, p. 59f; Verdict 004/PUU-I/2003, p. 22.

³ Cf. Verdict 066/PUU-II/2004, p. 57, 63, 54; Art. 1 Transitional Regulations 1945 Constitution.

⁴ Cf. *ibid.*, p. 61, quotation p. 62.

⁵ Cf. Siahan, 2005: 35f.

3. Withholding former communists' passive voting right declared unconstitutional

“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives,” states the Universal Declaration of Human Rights, and: “Everyone has the right to equal access to public service in his country”.¹ - For almost four decades, until a landmark constitutional court verdict of February 24th, 2004, a key aspect of these rights, the right to stand as candidate for parliament, had been withheld from a large group of Indonesians.

Legal discrimination of former communists

With the discrimination of former real or alleged communists outliving the mass murder of 1965/66, a body of discriminating legislation had been put in place, most of it valid until the present day. One key political right that had been taken was the voting right, both active and passive. The Election Law of 1969, the first under Suharto's New Order regime, determined in its Article 2: “Citizens of the Republic of Indonesia who were former members of the banned Indonesian Communist Party [PKI] including its mass organisations, or were directly or indirectly involved in the ‘Counter-Revolutionary Movement G.30.S/PKI’ or other banned organisations are not given the right to vote nor to be elected.” In the corresponding explanation it was clarified what was meant by directly and indirectly involved in the September 30th Movement/PKI (*Gerakan 30 September*, G.30.S), i.e. in the group that in official Indonesian historiography is made responsible for the alleged 1965 coup: “Intended with ‘directly involved in the G-30-S/PKI’ is: 1) Those planning, joining in planning or knowing about a planning of G-30-S/PKI, but not reporting to the authorities in charge. 2) Those, conscious about their objective, carrying out actions in the implementation of G-30-S/PKI. Intended with ‘indirectly involved in the G-30-S/PKI’ is: 1) Those showing attitudes, in deeds as well as in statements, which are in agreement with G-30-S/PKI. 2) Those consciously showing attitudes, in deeds as well as in statements, opposed to the efforts of crushing the G-30-S/PKI. ...”.² Any violation of this prohibition was threatened with a maximum penalty of five years imprisonment.³

The new legislation for the first post-Suharto era elections in 1999 brought change, albeit only very tentatively: Former communists and other people of the mentioned group were granted active voting right, but with a legal reservation.⁴ And they remained deprived of their right to stand as candidates in the upcoming parliamentary elections. Legislators also held on to the very same explanation that had been attached to the prohibition in the 1969 law as well as to the sanction provision.⁵ This meant that according to the law even people who had shown their opposition to the mass murder of 1965/66 were strictly speaking faced with a maximum five year prison term should they try and stand as candidates for any parliament, be it local, provincial or national.⁶

Legislators who came into office after the relatively free and fair 1999 elections were in charge of determining the rules of the game for the 2004 elections. It was a contested issue whether or not to uphold the ban on former communists and other persons belonging to the discriminated group. The government's proposal included the prohibition. And as no consensus could be

¹ Cf. Art. 21 (1, 2) Universal Declaration of Human Rights (UDHR).

² Cf. Explanation Art. 2 (1) Law 15/1969.

³ Cf. Art. 27 (6) Law 15/1969.

⁴ Explanation Art. 28 Law 3/1999 which grants every citizen of at least 17 years the active voting right expressly states: “The provision in this article also applies to citizens who have been directly or indirectly involved in the G-30-S/PKI (September 30th movement/PKI) and other banned organisations, unless stipulated otherwise by legislation.”

⁵ Cf. Art. 43 (1f) Law 3/1999, Art. 3 (1d) Law 4/1999 and provisions referring to the same, the 1969 explanation is included in Explanation Art. 3 (1d) Law 4/1999, the penalty provision in Art. 73 (6) Law 3/1999.

⁶ For more details cf. Stockmann, 2004: 128f.

reached among parliamentarians on the matter, eventually, it had to be decided by voting: Out of the 327 MPs present, only 103, apparently mostly members of PDI-P, were in favour of its complete abolition. Thus, also the 2003 Election Law continued the tradition and barred former communists and people belonging to the mentioned group from standing as candidates in parliamentary elections. Legislators, however, bade farewell to the quoted 1969 explanatory part and the sanction provision.¹

Two petitions challenging the ban on former communists' passive voting right

A good half year after the enactment of the Election Law, two petitions were handed to the Constitutional Court to review this discriminating provision, i.e. Article 60g. The first group of petitioners included among others such well-known personalities as Prof. Deliar Noer, Dr. Ir. Sri Bintang Pamungkas and the former Governor of Jakarta, Lt. Gen. (ret.) Ali Sadikin. The second consisted of Sumaun Utomo, Chairman of the Organisation for the Struggle for Rehabilitation of the Victims of the New Order (LPRKROB), and of other leading members of the same organisations, all of them former political prisoners. As the first group had initially not comprised any person whose constitutional right was violated by Article 60g, the judges asked the petitioners to include the same in order to fulfil the necessary legal standing condition. This done, the two groups agreed that their review petitions were examined as one case. Albeit using different lines of arguments, both groups referred to a number of constitutional human rights provisions in support of their plea, among others the right to equal opportunities in government and the right to be free from discrimination.²

On February 24th, 2004, the verdict was issued: The court granted the petitions, declared that Article 60g of the Election Law was against the constitution, and ruled that it thus had no longer any binding legal force.

Reactions

“This is a little win in our long fight for justice,” commented 81-year old petitioner Sumaun Utomo. “There is a long way to go – we’ve been discriminated against for so long. Twenty million of us have had our rights as citizens revoked. We cannot work in the military, the police, the public service, state-owned enterprises, or as a teacher, a journalist or a lawyer.”³

“SPECTACULAR! ... this time the goddess of justice (law) has refused to bow down to the god of power (politics),” rejoiced Refly Harun, Assistant to Justice Roestand, the only judge who had issued a dissenting opinion.⁴ Similar positive reactions also came from human rights organisations: “With the verdict the Constitutional Court has opened a ‘new’ page in the history of protecting the rights of citizens in Indonesia”, stressed Ihdhal Kasim, Executive Director of the Institute for Policy Research and Advocacy, ELSAM. “The court has already positioned itself as a *constitutional guard*.”⁵

The verdict was also welcomed by the Chairman of the Islamic mass movement Nahdlatul Ulama, Hasyim Muzadi: “Oh this is very good, because all legitimate citizens have the right to vote and to be elected,” Muzadi remarked. “The Sept. 30, 1965 incident is already a part of

¹ Cf. Art. 60g UU 12/2003; Lubis 2004; Verdict 011-017/PUU-I/2003, p. 9, 16.

² Cf. Verdict 011-017/PUU-I/2003 p. 1ff, 32f.

³ Cf. Australian Financial Review online, 26/2/2004.

⁴ Cf. Harun 2004a; capital letters in the original; not entirely literal translation.

⁵ Cf. Kasim, 2004; italics and English in the original.

history, and it's time for us to forgive one another. The restoration of former PKI members' rights will not be a threat to our country.”¹

In a press briefing after the announcement of the verdict, Chief Justice Asshiddiqie had called on officials to refrain from commenting on the ruling² - a call that was apparently not much heeded: “I feel disappointed about the Constitutional Court Verdict”, Armed Forces Chief Endriatono Sutarto is quoted as saying, “... but it's already done. So let's hope that they will not spread (communism).”³ Sutarto had earlier made much criticised remarks about intelligence data pointing to alleged efforts to sabotage the 2004 elections via a petition for judicial review of the Election Law. And Vice President Hamzah Haz let it be known: “If this matter is already decided by the Constitutional Court, well, what more do we want ... if the legal aspect has already changed, we also hope for a change of the mental attitude in question. Former PKI members must demonstrate that they have already changed.”⁴

Breaking a long cherished taboo

In their legal consideration, the majority of the judges stated that the constitution granted everyone the right to be free from discriminatory treatment on whatever basis and the right to obtain protection against the same.⁵ This was specified in the Human Rights Law, the implementing law of the constitutional human rights provisions, which included in its definition of discrimination expressly discrimination on the basis of political convictions.⁶ Article 60g, the majority of the judges argued, constituted such discrimination based on political conviction and thus violated a basic constitutional right.

Furthermore, the Indonesian Constitution determined that all citizens had the same standing in law and in government, without exception, and that everyone had the right to “recognition, guarantees, protection and just legal certainty as well as equal treatment before the law”.⁷ Apart from invoking constitutional provisions, the judges also quoted Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights (ICCPR) and argued that the right of a citizen to vote and to be a candidate were rights that were guaranteed by constitution, law and international conventions, thus a limitation or abolition of these rights constituted a violation of basic rights of a citizen.

Justice Roestandi did not dispute that Article 60g was not really in accordance with all the mentioned human rights provisions. Nevertheless, he considered Article 60g not as unconstitutional arguing that the constitutional provisions could not be taken partially, but had to be read systematically, in conjunction with other provisions. There was, firstly, Article 22 E of the constitution, which authorised legislators to determine details concerning the elections. These could include conditions, confirmations, repetitions, or restrictions as long as they were not against the constitution. And, secondly, the constitution allowed legislators to impose limitations on all rights except on those declared as non-derogable:⁸ This is determined in Article 28 J (2) of the constitution which reads: “In exercising his or her rights and freedoms, every person is obliged to obey the limitations which are laid down in laws with the sole purpose of guaranteeing recognition and respect of other people's rights and freedoms and to fulfil just requirements in

¹ Cf. Pikiran Rakyat online, 26/2/2004 and The Jakarta Post.com, 26/2/2004.

² Cf. *Berita Mahkamah Konstitusi*, No. 3, March 2004, p. 5.

³ Cf. Pikiran Rakyat online, 26/2/2004 and The Jakarta Post.com, 26/2/2004 for the quotations that are in part identical, brackets in the original; cf. for the other information Kompas Cyber Media.com, 18/11/2003; Lubis 2004.

⁴ Cf. Pikiran Rakyat online, 26/2/2004.

⁵ Cf. Art 28 I (2). For this and the following cf. Verdict 011-017/PUU-I/2003 p. 33-43.

⁶ Cf. Art. 1 (3) Law 39/1999.

⁷ Cf. Art. 27 (1) und 28 D (1) 1945 Constitution.

⁸ Meaning they may not be diminished under any circumstances.

accordance with moral considerations, religious values, *security*¹ and public order within a democratic society.”² As the rights that had been limited with Article 60g were not among the rights, which are non-derogable, i.e. may not be diminished in any situation whatsoever, Article 60g was not unconstitutional. The last word on an evaluation of the security situation would lie with the legislators, argued Justice Roestandi while expressing the hope that in the framework of national reconciliation Article 60g would undergo reconsideration by way of legislative review.

The majority of the judges acknowledged that the constitution allowed for the limitation of rights. But, other than Justice Roestandi, they argued that the mentioned constitutional provision did not cover the limitation included in Article 60g Election Law as the latter was only based on political considerations. They furthermore stated that Article 60g contained “nuances of political sentencing” vis-à-vis the concerned group and underlined that in a constitutional state under the rule of law, *rechtsstaat*, any prohibition that is directly linked to rights and freedoms of a citizen had to be based on a final and binding court verdict. The judges considered it to be against the principles of *rechtsstaat* as well as against the law, the feeling of justice, and the principle of legal certainty that someone who was not directly involved in a criminal act be held criminally responsible.

The judges also dealt with the argument that had been put forward among others by the government in support of Article 60g, namely the reference to the 1966 MPR Decree banning communism, which had been reaffirmed only in 2003. They argued that the decree was on the banning of the PKI and the spreading of ideas and teachings of communism which was by no means linked to the withdrawal or limitation of the active or passive voting right of citizens, not even that of former PKI members.

The majority of the judges closed their legal consideration by stating that former members of the PKI and their organisations had to be treated like others citizens, without any discrimination.

Justice Roestandi's dissenting opinion...

Justice Roestandi has been criticised a lot for his dissenting opinion. In his article “Why I gave a dissenting opinion”³ he defended his decision. Rejecting the allegation that his dissenting opinion was due to his military background, he called on people to study his line of argument. Roestandi emphasized that in his dissenting opinion he did not touch on the issue of armed forces’ revenge vis-à-vis the PKI. What he had done was to provide an academic analysis of the systematic relationship between all human rights provisions included in Article 28 A-J of the constitution. He repeated his interpretation that based on Article 28 J all rights except for the non-derogable ones could be limited. But the seven non-derogable rights were absolute. This might not be in accordance with international provisions, Roestandi said, but “... my task as constitutional judge is to review the constitutionality of a law against the 1945 Constitution, not to review the constitution against international law.” And he continued: “So, not because I am a former military member I became a *dissenter*! If the criteria is former military member, than I would have had to reject the granting of the annulment of Law No. 16/2003 (Law on Terrorism [applied to] Bali bombing). Aren’t at the moment both military and police primarily concerned with the issue of combating terrorism. It is plain as can be, that I was one of those at the forefront of granting the plea of Masykur Abdul Kadir, a person who has been convicted to a life sentence for the Bali bombing crime”⁴

¹ *Keamanan*, can also be translated as safety.

² Cf. Art. 28 J (2) 1945 Constitution; italics by P.S.

³ Cf. Roestandi 2004.

⁴ Cf. id. p. 50 f, quotation p. 51; italics and English in the original.

... *underlines the necessity for constitutional amendment*

Maybe more than anything else, Roestandi's argument underlines the necessity to bring Article 28 J (2) of the constitution into accordance with international standards. As mentioned above, the Universal Declaration of Human Rights does not include any mention of national security as grounds for rights limitation, nor of public safety.¹ – The term in the Indonesian Constitution, *keamanan*, can be translated as both security and safety. – The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) allow, among others, the rights to freedom of expression, assembly, and association to be limited on the grounds of national security. They furthermore allow the latter two rights and the freedom to manifest one's religion or beliefs to be limited on the grounds of public safety.² The rights violated by Article 60g are not among those articles. Thus, had the constitutional provision on rights limitation been in accordance with the standards of ICCPR and ICESCR, which Indonesia has recently ratified, (national) security respectively (public) safety could not have been invoked in support of the constitutionality of withholding former communists passive voting right.

Consequences of the verdict

The joy over the verdict by those affected by Article 60g was somewhat dampened when it became clear that they would not be able to exercise their newly restored right during the upcoming 2004 elections.³ After the announcement of the ruling Chief Justice Asshiddiqie explained that it was effective only prospectively, i.e. as of the date of the announcement, and that it was not possible to remove candidates from candidate lists that had already been made public by the Election Commission.⁴ The background for the Chief Justice's explanation is Article 58 of the Law on the Constitutional Court, which determines that a law reviewed by the court remains valid until there is a verdict declaring the law unconstitutional. – It was not the only time that the strictly prospective application of a constitutional court verdict evoked criticism and protest as we shall see. In one case, the question of a possible retrospective or a strictly prospective effect of a verdict literally became a question of life or death.

4. Ruling on the partition of the Province of Papua

Contradictory policies towards Indonesia's easternmost province

Towards the end of their terms in office, the Habibie administration and the last Suharto era parliament enacted the controversial Law 45/1999. Apart from establishing new regencies and municipalities, the law determined the partition of Indonesia's easternmost province Papua, or Irian Jaya as it was at that time still officially called. Two new provinces were envisaged to be split of the mother province, namely Central Irian Jaya and West Irian Jaya.⁵ A storm of protest arose in Papua⁶ and its provincial parliament recommended to the government in Jakarta that the law be repealed.

After October 1999, a breeze of change could be felt: The new MPR determined in its Broad Outlines of State Policy (GBHN) 1999-2004, at that time still the binding policy guidelines for the president, that special autonomy should be provided for the Province of Irian Jaya and cases

¹ Nor of religious values as we have seen above, but this does not concern us here.

² Cf. Art. 12, 13, 14, 18, 19, 21, 22 ICCPR, Art. 8 ICESCR.

³ Cf. e.g. Tempo, 2-8/3/2004, as posted at: <http://www.indonesia-house.org>.

⁴ Cf. Tempo Interaktif, 24/2/2004.

⁵ Law 45/1999 on the Establishment of the Province of Central Irian Jaya, the Province of West Irian Jaya, the Regency Paniai, the Regency Mimika, the Regency Puncak Jaya, and the Municipality Sorong.

⁶ The name Irian Jaya (meaning victorious Irian) has always been contested.

of human rights violations be resolved by judicial means.¹ And the new administration under President Abdurrahman Wahid initially opted for a different approach towards Papua. Shortly after taking office, the government stopped the implementation of Law 45/1999, or rather that part of the law that dealt with the establishment of the two new provinces.²

At its next annual session in August 2000, the MPR recommended that at the latest on May 1st, 2001, special autonomy legislation for Aceh and Papua should be released.³ Apart from the government, also leading figures in Papua started work on draft legislation.⁴ Endowed with unanimous support by the provincial legislature, the Papuan Draft Special Autonomy Law was eventually submitted to President Wahid. Surprisingly, the DPR then opted for the draft from Papua as the basis for its deliberation. Finally, in November 2001, the Law on Special Autonomy for Papua, as the province was now officially named, was enacted. The law carries the signature of Megawati Soekarnoputri who had in the meantime succeeded Abdurrahman Wahid as president.

What should become a major source of controversy was that the status of Law 45/1999 had not been addressed in the Special Autonomy Law. Thus, two laws concerning Papua were in place with contradictory provisions: Law 45/1999 – although not being implemented – still determining the establishment of the provinces West and Central Irian Jaya, i.e. a partition of Papua into three provinces; and the Special Autonomy Law, which in its Article 76 determines the following mechanism for any possible partition of the province: “The partition [lit.: the making of more provinces out] of the Province of Papua shall be carried out with the approval of the Papua People’s Assembly⁵ and the People’s Representative Council Papua [provincial parliament] after having seriously taken into consideration social-cultural unity, the readiness of the human resources and the economic capacity and the development in the future.”

President Megawati’s policies towards Papua differed markedly from those her predecessor had tried to pursue: In January 2003, she issued the controversial Presidential Instruction 1/2003 on the Acceleration of the Implementation of Law 45/1999. With this instruction, implementing the partition of Papua was back on the agenda. Vocal protest was voiced from different sides, and also prominent legal experts underlined that the presidential instruction was against the Special Autonomy Law.⁶

Nevertheless, the government pressed ahead with the establishment of the two new provinces and West Irian Jaya was officially established in February 2003. But after violent clashes and the loss of lives, the government announced in August 2003 that it put on hold plans to go ahead with the establishment of Central Irian Jaya.

The majority of MPR members seems to have disagreed with the policy shift of the Megawati administration: During the annual session in August 2003, the MPR recommended to the government and the DPR to “reorganise legislation concerning autonomy and partition of Papua including reconsidering Law 45/1999 and Presidential Instruction 1/2003 in order to bring it into

¹ Cf. GBHN 1999-2004, IV G 2. Selected relevant provisions of the GBHN 1999-2004, as well as of Law 21/2001, Law 45/1999 and Presidential Instruction 1/2003 can be found in Indonesian and English translation at: <http://home.snafu.de/watchin/AfP2003docum.htm>.

² Cf. ICG, 2003: 4. The establishment of new regencies/municipalities envisaged in the law went ahead.

³ Cf. MPR Decree IV/2000, Recommendations.

⁴ For details on this and the following cf. Zöllner 2004; for a good overview of the legal developments cf. also Indrati S. 2004; cf. also Verdict 018/PUU-I/2003, p. 39ff.

⁵ The Papua People’s Assembly (*Majelis Rakyat Papua*, MRP) is a new institution provided for in the Special Autonomy Law with considerable political authority, staffed with representatives from *adat* (customary law) communities, religious communities and women.

⁶ For one legal argument on the matter cf. Alrashid 2004a.

accordance with the content and the spirit of the Special Autonomy Law” and to implement the latter “entirely, consequently and comprehensively”.¹

Papuan leaders meanwhile sought other ways to alleviate their grievances over recent developments: In November 2003, the Chairman of the Papuan Provincial Parliament, John Ibo, submitted a petition for judicial review of Law 45/1999² to the Constitutional Court. Requested therein was to declare Law 45/1999 as a whole or at least those parts relating to the establishment of West and Central Irian Jaya as unconstitutional. Law 45/1999 and the Presidential Instruction to accelerate its implementation were regarded as violating especially Article 18 B of the amended constitution which determines:³ “(1) The State recognises and respects the units of regional government which are special⁴ in nature as determined in laws. (2) The State recognises and respects the units of the *adat*⁵ law communities and their traditional rights as long as they are still alive and in accordance with development of society and the principle of the Unitary State of the Republic of Indonesia as regulated in laws.”

Although the case had initially been accorded high priority, a year went by before the verdict was announced on November 11th, 2004. It remains one of the most contested verdicts to date.⁶

Little understood legal consideration

In order to get a clearer picture about the controversial verdict, the judges’ legal consideration shall be presented in some detail.⁷ If the reader finds it difficult to follow, if a feeling of confusion comes up, it might help to know that others had similar difficulties, as we shall see.

The court started its legal argument by considering the validity of Law 45/1999: The law was enacted before the amendment of the constitution therefore its constitutional base was Article 18 of the original constitution. In the court’s view, Law 45/1999 was not against this old Article 18.

Then, the court turned to the legal reasoning that the petitioner put forward in support of his plea: Firstly, the judges rejected the applicability of the principle *lex superior derogat legi inferiori* (the higher ranking legal source overrides the lower ranking one), invoked by the petitioner: As Law 45/1999 was not contrary to the higher legal source at that time, the 1945 Constitution prior to its amendment, this principle did not apply for the case at hand. And, the judges held, for this reason all matters arising as legal effects of the law were valid.

Secondly, the judges also rejected the petitioner’s argument that due to the principles of *lex specialis derogat legi generali* (the special law overrides the general one) and *lex posterior derogat legi priori* (the newer law overrides the older one) parts of Law 45/1999 were invalidated by the enactment of the Special Autonomy Law. The matters dealt with in Law 45/1999 and in the Special Autonomy Law were different, they argued: Whereas Law 45/1999 dealt with the establishment of provinces, regencies, and municipalities, Law 21/2001 was on matters pertaining to special

¹ Cf. Annex 1b, MPR Decision 5/2003.

² Law 45/1999 has been amended with Law 5/2000. For the sake of simplicity I refer here and in the following only to Law 45/1999 although strictly speaking one would have to add each time “as amended by Law 5/2000”.

³ Cf. Verdict 018/PUU-I/2003, p. 5, 78f.

⁴ The Indonesian original mentions both *khusus* and *istimewa* as terms which translate as special, probably as they refer to different administrative arrangements.

⁵ Customary law.

⁶ In December 2004, the Constitutional Court’s Research Center, the Hanns Seidel Foundation and the Constitutional Law Research Center of the University of Indonesia’s Law Faculty jointly organised a roundtable discussion on the contested verdict; for the documentation of the discussions cf. Hanns Seidel Foundation, Mahkamah Konstitusi & Universitas Indonesia 2004.

⁷ Cf. for the following Verdict 018/PUU-I/2003, p. 133ff.

autonomy for Papua. - In the later course of their argument, they conceded, however, that matters dealt with in Law 45/1999 are also touched upon in the Special Autonomy Law. - The judges pointed out that the Special Autonomy Law displayed traits of inconsistency and ambivalence: In its General Explanation, the existence of the one municipality and the three regencies that were established on the basis of Law 45/1999 was acknowledged. However, the existence of the two provinces established with Law 45/1999 was not at all mentioned in the Special Autonomy Law.

The court also referred to the Transitional Provisions of the Special Autonomy Law. These determine that all existing regulations remain valid as long as they are not regulated in the same law. The judges stated that this provision did not provide certainty about the status of Law 45/1999 after the enactment of the Special Autonomy Law. This led to different interpretations on the matter: The government accepted the entire law. But the petitioner questioned the articles of Law 45/1999 relating to the establishment of the two provinces while implicitly acknowledging the provisions on the three regencies and the one municipality. The government's view was that *normatively* the establishment of the provinces had taken place with the enactment of Law 45/1999 and the Special Autonomy Law was effective for the three provinces that resulted pursuant to Law 45/1999. The petitioner, on the other hand, viewed Law 45/1999 as effective only for the establishment of the three regencies and the one municipality, which were *normatively* valid as well as *effectively working*. According to the reasoning of the petitioner, Law 45/1999 lost its validity as of the enactment of the Special Autonomy Law. This meant, in the petitioner's view, that all legal effects before that date were valid, including the regencies and the municipality, whereas those contents of the law that had not been implemented - or: had not been effective - by that date, i.e. the two provinces, did no longer have a legal base.

The court agreed that effectivity (*efektivitas*) could be used a criterion to determine the validity (*berlakunya*) of a law but disagreed with both the government's and the petitioner's view. The court acknowledged, though, that both parties had well-founded arguments for their contrasting positions, which originated from the inconsistency and ambivalence in the Special Autonomy Law as regards the continued effectivity of Law 45/1999.

The difference in interpretation would cause a lack of legal certainty and could spur conflict in society, the court stated. The different views arose due to the constitutional change. This change meant that parts of Law 45/1999 were no longer in accordance with the constitution, especially not with the new Article 18 B (1). But, explained the judges, this new article could *not* be used to assess the validity of Law 45/1999 which had been enacted prior to this constitutional amendment.

Last, but not least, the court gave its view on the above quoted Article 76 of the Special Autonomy Law. Conditions laid down therein concerning any partition of Papua applied only after the enactment of the law, the judges explained. They did not apply for the establishment of Central and West Irian Jaya, which were *normatively* established based on Law 45/1999.

The court closed its legal consideration by stating that as a matter of fact the province West Irian Jaya was already effective. This was amongst others proven by the existence of a provincial government, of a provincial parliament with MPs elected in the 2004 elections, and elected MPs representing West Irian Jaya in the newly established Regional Representative Council (DPD). On the other hand, the establishment of Central Irian Jaya had not yet been realised. Given this, the court was of the opinion that "... the existence of provinces and regencies/municipalities that have already been partitioned based on Law 45/1999 is valid unless the court declares otherwise."

So far the legal consideration of the court. The explicit ruling comprised three points: The court declared that the petition was granted; that, with the enactment of the Special Autonomy Law, the *validity* of Law 45/1999 was contrary to the constitution; and that Law 45/1999 had no longer any binding legal force as of the announcement of the verdict.

Justice Siahaan's concurring opinion: existence of West Irian Jaya legally null and void from the start

One of the judges, Justice Siahaan, submitted a concurring opinion, meaning he agreed with the decision part of the verdict but not with the legal consideration that declared the province West Irian Jaya as valid. In his view, the existence of the new province and all corresponding institutions should be declared null and void. Siahaan argued that although the Special Autonomy Law did not *explicitly* invalidate the entire Law 45/1999, it nevertheless *automatically* invalidated those parts of the older law for which the Special Autonomy Law provided new regulations. Other than the majority of the judges, Justice Siahaan held that the Constitutional Court Verdict should assert the applicability of the legal principle of *lex posterior derogat legi priori* (the newer law overrides the older one), at least for parts of the law.

According to Siahaan, the issuing of the Presidential Instruction, which revived Law 45/1999 constituted a violation of the constitution and the rule of law causing legal uncertainty. "Such legal acts constitute acts that are legally null and void (*van rechtswege nietig*) with all their effects, so that the establishment of the Province of West Irian Jaya, which was established based on Law 45/1999 and realised with Presidential Instruction 1/2003, was automatically legally null and void from the start (*ab initio*), as legitimate legal effect may not be accorded to legal acts that have already been declared legally null and void... ." ¹ Siahaan stressed that the Special Autonomy Law was valid legislation and that the government had to abide by the same. Consequently, further partition of Papua had to be conducted according to the mechanism determined in the Special Autonomy Law.

Reactions

"Completely weird", was the comment by constitutional law expert Sri Soemantri. "What then is the legal basis of West Irian Jaya province? If the court declares Law No. 45/1999 violates the constitution, how can it approve the establishment of a province that has no legal basis", Soemantri wondered. ² "The ruling was made to save the central government's honor as it has already set up West Irian Jaya province. It's no secret that the government always intervenes in the legal process," ³ judged Herman Saud who heads Papua's Indonesian Christian Church (GKI).

Government representative Yusril Mahendra naturally had a rather different view on the matter - and his very own interpretation of the verdict. He explained that the ruling did not apply retroactively, so when the court decided that Law 45/1999 was invalid as of November 11th, 2004, all steps that had already been implemented by way of the invalidated law were nevertheless valid. "So the establishment of the Province of West Irian Jaya, the Province of Central Irian Jaya, the three regencies and a municipality is valid. Although in concrete fact, it is only the Province of West Irian Jaya that has the governmental infrastructure, whereas Central Irian Jaya does not as yet. But actually, the existence of the two provinces is already there." ⁴

¹ Cf. for Siahaan's concurring opinion Verdict 018/PUU-I/2003, p. 139ff, quotation p. 140.

² Cf. The Jakarta Post.com, 12/11/2004.

³ Cf. *ibid.*

⁴ Cf. Suara Pembaruan Online, 17/11/2004. Cf. also footnote 1 p. 44.

The comment in the daily *Suara Pembaruan* probably expressed best the general mood concerning the verdict: “CONFUSED. This is the most precise word to depict the situation faced by several Papuans and those present shortly after the plenary session of the Constitutional Court”¹

Since then, the court had a good bit of explanation to do. Confusion seemed to linger on, not only among ordinary people but also among officials in charge. Several meetings between constitutional judges and officials from Papua, West Irian Jaya and, at times, representatives of the government took place. In June 2005 then, the Minister of Home Affairs requested from the Constitutional Court an official explanation of the verdict. In its answer, as well as on other occasions, the court reaffirmed the existence of the province but pointed out that it still needed a legal basis regulating operational matters.²

Conclusion

In my view, at least three aspects of the verdict merit attention: firstly, how the court dealt with a review petition concerning a law enacted prior to constitutional amendment; secondly, how the court addressed a problem of contradictory legislation; and thirdly and most importantly, how the court dealt with the legal effects of the law in question.

Law 45/1999 was enacted prior to the amendment of the relevant Article 18 of the constitution.³ Here, the court decided that for the subject matter of the law under review the new Article 18 could not be invoked as a base of reference. In terms of its substance the law had to be reviewed against the constitution valid at the time of the law’s enactment. Thus, in terms of substance Law 45/1999 could not be declared unconstitutional. What the court declared unconstitutional was rather the *validity* of Law 45/1999 as of the enactment of the Special Autonomy Law. Not Article 18 of the new constitution was the frame of reference, but, as far as I understand, the constitutional right to legal certainty, which the court saw violated with the uncertainty over the status of Law 45/1999 after the enactment of the Special Autonomy Law.

This leads us to the second aspect: With this interpretation, the court has, in my understanding, opened a door to address problems of contradictory legislation. The validity of a law can be questioned with reference to the right to legal certainty in cases where contradictory legislation is in place. Other review petitions might follow up on this.

The most contested aspect of the verdict was, of course, how the court dealt with legal effects of the law under review, i.e. the establishment of West Irian Jaya. The court declared the province as valid in its legal consideration part, which, as had been mentioned earlier, is of equally binding nature as the decision part as long as the two are not contradictory. But in my view the reasoning in support of the existence of West Irian Jaya is in some aspects puzzling. If I understand the verdict correctly, the majority of the judges portray the situation as follows: West Irian Jaya was established before the enactment of the Special Autonomy Law. The understanding of ‘establishment’ here is ‘normative establishment’, i.e. by enactment of the corresponding law. This is the government’s understanding as well. As the province was established before the enactment of the Special Autonomy Law and the latter may not be applied retroactively, the new mechanism for partition of Papua as determined in Article 76 of the Special Autonomy Law does not apply for West Irian Jaya. Further support for the non-applicability of Article 76 is provided by rejecting the legal principle that the newer law overrides the older law. Given this, the implicit

¹ Cf. *ibid.*, capital letters in the original.

² For the explanatory letter cf. the homepage of the Directorate General for Regional Autonomy: http://www.ditjen-otda.go.id/otonomi/detail_artikel.php?id=67.

³ As was Law 5/2000 that amended Law 45/1999.

assumption seems to be that the government was not breaching valid legislation by issuing the Presidential Instruction to accelerate the implementation of Law 45/1999.

I find two things puzzling concerning this line of argument: Firstly, although the majority of the judges reject the applicability of the legal principle *lex posterior derogat legi priori*, they concede that some matters dealt with in Law 45/1999 are touched upon in the Special Autonomy Law. Obviously, one such matter must be the new procedure for partition (Papua People's Assembly (MRP) and Papuan Provincial Parliament must consent to partition) which consequently replaces the implicitly acknowledged mechanism of partition in Law 45/1999 (government and DPR as legislators decide upon partition). Furthermore it is puzzling that different definitions of 'establishment' are employed by the court in its argument. As just mentioned, for their argument that Article 76 does not apply for the establishment of West Irian Jaya the majority of the judges employ the government's understanding of 'establishment', i.e. *normative* establishment by enactment of the corresponding law. However, when evaluating which legal effects are valid, the court employs the petitioner's understanding of establishment and uses *effectivity* as a criterion. With reference to the fact that West Irian Jaya is effectively working, with all corresponding institutions, it is considered as established and can not retroactively be dissolved after the court declared Law 45/1999 as unconstitutional. The establishment of Central Irian Jaya, on the other hand, which had only been established *normatively*, by law, but was not *effectively working*, was not allowed to be further pursued.¹

Can the verdict be considered as being oriented more towards a political perspective than to legal logic?² Or is it even justified to argue that with this verdict the court has moved into the direction of a political institution?³ Whether the judges bowed to political pressure, as had been alleged, or whether they intentionally issued a verdict that according to one analyst constituted politically speaking a compromise, I neither know nor want to speculate about. The worries that the court may be turning into a more political institution, however, touch on a fundamental issue. How 'political' may a constitutional court be? As the tasks of constitutional judges lie at the junction of politics and law, like other constitutional courts, also the Indonesian one will always have to deal with problems that are of political and not - or not purely - of legal nature. A problem with no easy answers, not only in Indonesia.

In the case of the Papua verdict it was a highly charged political problem. Would there have been other options to deal with the problem? Maybe, rather than arguing about when a province can be considered as established, the judges could have opted for judicial self-restraint and handed the problem back to legislators with the clear task to find a solution to the problem that is in accordance with the amended constitution and with other valid legislation based on the same. The problems concerning Papua need a courageous and creative political solution – like in Aceh. The verdict has not really helped much in this respect.

5. The problem with retroactive effect of law

May a law be applied to a crime that was committed before the law's enactment? The Indonesian Constitution enshrines the right not to be prosecuted on a retroactive legal basis. And yet, two recent laws were applied retroactively – and were therefore brought before the Constitutional Court. One of the petitions was submitted by Abilio Soares, former Governor of East Timor, the

¹ Possibly, Minister Mahendra considered that legal consideration to be contradictory to the decision part of the verdict and for that reason disregarded it in his interpretation of the ruling as had been quoted above?

² Cf. Widjojanto, 2004: 216.

³ Cf. Suara Pembaruan Online, 17/11/2004.

other by Masykur Kadir, one of the accomplices in the Bali bombings. Soares requested from the court to review the Law on Human Rights Courts, which allowed for the law to be retroactively applied to crimes committed in East Timor 1999. Kadir wanted to see Law 16/2003 revoked which made the new Anti-Terrorism Law retroactively applicable to the terror attacks on Bali in October 2002.

The Human Rights Courts Law and to the prohibition of retroactive effect of law

The Law on Human Rights Courts, enacted in November 2000, was a reaction to the continuing domestic and international pressure to bring the perpetrators of the crimes committed in 1999 in East Timor to justice. United Nations sources estimated that at least 1,300 people were killed before, during and after the East Timorese independence referendum.¹ With the Human Rights Courts Law, a legal basis to try two types of gross human rights violations, genocide and crimes against humanity, was established in Indonesia. The law comprises crucial provisions, which are almost identical with those of the Rome Statute of the International Criminal Court.² The comprehensive definition of crimes against humanity is important for prosecution and trial of gross human rights violations, as are provisions on the responsibility of commanders and superiors. Nevertheless, the Indonesian legislators were quite frank about the fact that the law was a reaction to the calls for an international tribunal. That the new human rights courts had jurisdiction also for crimes committed outside of Indonesia – i.e. also in independent East Timor – had the intention “... to protect Indonesian citizens who have committed gross violations of human rights outside the territorial boundaries in the sense that they be tried under this Human Rights Courts Law”.³

How well the ‘protection’ worked in the end can perhaps best be seen in the outcome of the East Timor trials: Of the 18 defendants all but one have sooner or later been acquitted.⁴ But initially, it had not even been certain whether the trials could be conducted at all. The reason was a constitutional amendment in 2000.

During the time of the final deliberations of the Human Rights Courts Law, the MPR enshrined in the Second Constitutional Amendment the right not to be prosecuted on a retroactive legal basis. It is included in Article 28 I (1) which defines the seven non-derogable rights: “The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognised as a person before the law and the right not to be prosecuted on a retroactive legal basis are human rights which may not be diminished in any situation whatsoever.” More than two thirds of the MPR members were at that time concurrently parliamentarians. So while legislators were deliberating a law the *raison d’être* of which necessitated its retroactive application, the same MPs (and others) wrote into the constitution that retroactive effect of law may not take place under any circumstances.

Nullum delictum, nulla poena sine praevia lege poenali – no crime, no punishment without prior penal law. Prohibition of retroactive effect of law is, of course, an important principle as regards legal certainty and it has as such found various forms of international codification. The Universal Declaration of Human Rights states: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.”⁵ The reference to international law herein

¹ Cf. Cohen, 2003: 2.

² As mentioned above, Indonesia is not yet a State Party to the Rome Statute. For details on the Law and on the following cf. Häusler 2004; ICG 2001; Stockmann, 2004: 302ff.

³ Cf. Explanation Art. 5 Law 26/2000.

⁴ For a detailed critical report with recommendations on the trials cf. the report by the the UN-mandated Commission of Experts, id. 2005.

⁵ Cf. Art. 11 (2) Universal Declaration of Human Rights.

shows that - from an international legal perspective - the retroactivity prohibition can not be applied with reference to national law alone. Already the provision in the Universal Declaration of Human Rights opens the door for exemptions with reference to international law. This is then more clearly determined in the ICCPR, in which the right not to be prosecuted on the basis of retroactive legislation is – like in the Indonesian Constitution - considered as non-derogable.¹ The ICCPR contains the same clause as the above quoted one of the Universal Declaration of Human Rights and it adds: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”²

This kind of exemption clause was, of course, not unfamiliar to Indonesian legislators. What is more, it was at the time of the Second Constitutional Amendment already part of Indonesian law: A year earlier, legislators had attached to the non-derogable rights provision in the 1999 Human Rights Law: “An exception to the right not to be tried on a retroactive legal basis can be made in the case of gross violations of human rights which are classified as crimes against humanity.”³ However, no such addition was attached to the corresponding provision in the constitution. And that was no “oversight” as had been stated at the time.⁴

Without expressly mentioning the constitutional retroactivity prohibition, the Human Rights Courts Law addresses the issue stating that the law can be retroactively applied based on Article 28 J (2) of the constitution which reads: “In exercising his or her rights and freedoms, every person is obliged to obey the limitations *which are laid down in laws* with the sole purpose of guaranteeing recognition and respect of other people’s rights and freedoms and to fulfil just requirements in accordance with moral considerations, religious values, security and public order within a democratic society.”⁵

But can a constitutional article referring to limitations laid down in laws be invoked to limit a right that is declared non-derogable by the constitution? A contested issue, as we shall see. In any case, the unconditional prohibition of retroactive effect of law in the constitution could serve as a strong legal argument against the establishment of any human rights court for crimes committed before the law’s enactment in November 2000. And thus, it was at times feared that the East Timor trials would never take place.

In the course of the East Timor trials, the constitutional retroactivity prohibition was indeed invoked. The most persistent defendant in this respect was probably Abilio Soares: In March 2002, his legal team brought forward a corresponding objection during the first instance hearing at the ad hoc human rights court. Furthermore, Soares submitted a request for legislative review to the MPR arguing that the article in the Human Rights Courts Law allowing for retroactive application was against the constitution. All to no avail - Soares was sentenced in first instance to three years imprisonment. His appeal before the high court was rejected as was his cassation appeal before the Supreme Court. In July, Soares applied to the Supreme Court for a review of the verdict (*peninjauan kembali*) on the grounds of new evidence. And, possibly encouraged by Masykur Kadir’s plea, in September 2004, Soares submitted a petition for judicial review to the Constitutional Court.

¹ Cf. Art. 4 (2) ICCPR.

² Cf. Art. 15 (2) ICCPR.

³ Cf. Explanation Art. 4 Law 39/1999.

⁴ Cf. for further elaboration Stockmann, 2004: 284f.

⁵ Cf. General Explanation of Law 26/2000; italics by P.S.

Contested anti-terrorism legislation

Anti-terrorism legislation had already been on the legislators' agenda a good while before the Bali bombings. But up until that time, numerous provisions in the draft law had remained controversial. After the terror attacks, the Megawati administration unilaterally enacted the contested draft law as emergency legislation and, with a second piece of legislation, made it retroactively applicable to the Bali attacks.¹ According to the constitution, this kind of emergency legislation, called government regulation in lieu of a law (*Perpu*), needs parliamentary approval in the next session of the DPR to become an ordinary law or has to be withdrawn.² In the case of the *Anti-Terrorism-Perpus*, parliament agreed only four months later and transformed the formerly so contested emergency legislation without any changes into regular laws.³

The Anti-Terrorism Law⁴ contains a number of provisions on law of procedure, which not only violate internationally codified principles of due process of law but also deviate considerably from provisions in Indonesia's relatively liberal Code of Criminal Procedure (KUHAP) and in the 1999 Human Rights Law. The most vociferous criticism has been levelled against a provision that vests the police with the authority to detain a suspect for up to six months without court order and formal charge.⁵ And there are a number of other procedural regulations in the Anti-Terrorism Law that differ from the corresponding ones in the Code of Criminal Procedure and extend the authority of the police. Vehemently criticised was furthermore a definition of one element of crime concerning terrorism which is so broad that it is open for abuse.⁶

In one of its concluding provisions, the Anti-Terrorism Law contains a clause stipulating that it can be made retroactively applicable for "certain criminal cases" whereby this needs to be determined for each case either by law or by government regulation in lieu of a law.⁷ This means that the legislators empowered themselves to decide for which of the crimes committed before the enactment of the Anti-Terrorism Law the same can serve as the legal basis for prosecution and trial. For the Bali attacks, this retroactive applicability has been included in *Perpu 2/2002*, determined to become a law by Law 16/2003.

Masykur Kadir was prosecuted and tried on the basis of the Anti-Terrorism Law and Law 16/2003. In September 2003, a first instance court sentenced him to 15 years imprisonment against which he appealed. And in October 2003, Kadir furthermore submitted a petition to the just established Constitutional Court and requested that Law 16/2003 be declared unconstitutional and no longer valid.

Two different verdicts

Kadir's petition, the earlier of the two cases, was decided in July 2004. With the narrowest of margins, the judges granted the petition and declared Law 16/2003 unconstitutional and no longer valid. Thus, the majority of the judges ruled against the Anti-Terrorism Law's retroactive application to the Bali attacks. Four of the judges, Justices Siahaan, Palguna, Natabaya and

¹ These are *Perpu 1/2002* (Anti-Terrorism *Perpu*) and *Perpu 2/2002* (making *Perpu 1/2002* applicable to the Bali bombings). For further details on the anti-terrorism legislation cf. e.g. Lindsey 2002; Tapol Press Release, 28/10/2002; Stockmann, 2005: 48ff.

² Cf. Art. 22 (2, 3) 1945 Constitution.

³ *Perpu 1/2002* was determined to become a law by Law 15/2003, *Perpu 2/2002* by Law 16/2003.

⁴ For the sake of simplicity I refer to *Perpu 1/2002*, which was later determined to become a law simply as the Anti-Terrorism Law.

⁵ Cf. Art. 25 (2) *Perpu 1/2002*.

⁶ Cf. Art. 6 *Perpu 1/2002*; the wording of this definition (there are several definitions of elements of crime concerning terrorism in the *Perpu*) resembles parts of the definition of the crime of subversion as had been included in the notorious Anti-Subversion Law that had only been revoked in 1999; cf. Art. 1 (1) Anti-Subversion Law.

⁷ Cf. Art. 46 *Perpu 1/2002*.

Harjono, submitted dissenting opinions arguing for an exemption from the constitutional retroactivity prohibition.¹

In March 2005, the court reached a decision in Abilio Soares's case. The verdict differed from the one in the Kadir case: The majority of the judges this time rejected the petition and ruled that the retroactive application of the Human Rights Courts Law was not unconstitutional. Again, the decision was not unanimous; three judges, Justices Roestandi, Fadjar and Marzuki, disagreed and argued, like they had done in the Kadir case, for a strict retroactivity prohibition.

Terrorism legally not a crime against humanity

In the Kadir verdict, the majority of the judges underlined the importance to strictly uphold the constitutional prohibition of retroactive effect of law. Overriding the non-retroactivity principle, they feared, could open the door for a regime to use law as a tool for revenge against political opponents - a possibility that had to be forestalled in any case. In their legal consideration, the judges quoted at length numerous domestic and international legal sources, which contain the prohibition of retroactive effect, from the Universal Declaration of Human Rights to the Rome Statute and from the Wetboek van Straftrecht (Criminal Code) to the 1945 Constitution. While for the international instruments their quotations included the exemption clauses like e.g. the mentioned one in the ICCPR, the similar exemption clause in domestic legislation, i.e. in the 1999 Human Rights Law, did not find any mention.²

In the course of their argument, the judges conceded that there was one exception from the strict non-retroactivity principle namely in cases of gross human rights violations. For a definition of the same they referred to the Rome Statute and to the Human Rights Courts Law. The former includes the crime of genocide, crimes against humanity, war crimes, and the crime of aggression, the latter genocide and crimes against humanity. In the law under review legislators had characterized terrorism as a crime against humanity.³ This was rejected by the judges who argued there was no universally accepted definition of terrorism and, legally, terrorism could not be classified as an extraordinary crime for which a law could be retroactively applied, neither according to the Rome Statute nor according to the Human Rights Courts Law.⁴ Terrorism could still be classified as an ordinary crime, albeit a very brutal one, which could be dealt with under ordinary criminal law.

Even though the Bali bombings did not fulfil the legal definition of crimes against humanity or war crimes, the constitutional retroactivity prohibition could be overridden, was argued in the dissenting opinions.⁵ In support of this stance, also arguments raised in connection with the Nuremberg trials were referred to. The dissenting judges in the Kadir case were among the majority when it came to the ruling in the Soares case. Many of their objections in the Kadir verdict overlap with the legal consideration in the Soares ruling, which will be discussed below.

¹ For details cf. the Verdict 013/PUU-I/2003.

² It has been quoted above, cf. p. 46; cf. Explanation Art. 4 Law 39/1999. Cf. Verdict 13/PUU-I/2003, p. 38ff.

³ Cf. General Explanation *Perpu* 2/2002. Again, for the sake of simplicity I refer to *Perpu* 2/2002 as Law 16/2003.

⁴ Cf. Verdict 13/PUU-I/2003, p. 43f. Interestingly, three of the five judges who referred here to the possibility to exempt from the retroactivity prohibition in cases of gross human rights violations as among others defined in the Human Rights Courts Law argued as dissenters in the Soares case, i.e. concerning the retroactive application of the very Human Rights Courts Law for the gross violations of human rights committed in East Timor, against an exemption from the constitutional retroactivity prohibition.

⁵ The four dissenting opinions are not distinguished by name in the verdict; cf. Verdict 13/PUU-I/2003, p. 57ff, 69.

Bad precedent: a law for one individual case only

Back to the Kadir case: Another stone of contention was procedural in nature. The majority of the judges criticised that legislators had enacted a law, which dealt with one concrete case, i.e. the Bali bombing, only. The application of general and abstract legal norms for concrete cases belonged to the sphere of either the administration or the courts, they argued. Consequently, they assessed the enactment of Law 16/2003 as being against the constitutionally determined principle of separation of powers. If this case was accepted or declared to be constitutional by the court, it would constitute a “bad precedent”. It could be used as a reference that legislators could put into effect a legal norm by way of a law explicitly for one concrete previous case, this based on their political judgement that the case was to be categorized as a serious crime for humanity. Such a precedent would weaken the efforts to realize the *rechtsstaat* principle, which according to the constitution needed to be upheld.¹

Can the non-derogable rights in the constitution be limited by Article 28 J?

A key line of argument in the Soares verdict was a combined reading of Article 28 I and J, i.e. the reasoning included in the Human Rights Courts Law in support of its retroactive application and the line of argument of both government and parliament.² The majority of the judges pointed out that although literally the formulation in Article 28 I gave the impression that the right not to be tried on a retroactive legal basis was absolute, this provision had to be read in conjunction with Article 28 J. They argued that “in the framework of fulfilling just requirements in accordance with moral considerations, religious values, security and public order within a democratic society” also the non-derogable right not to be prosecuted on a retroactive legal basis might be overridden.³ A balance needed to be found between legal certainty and justice. In this context, also the severity of the crime and the degree of public interest had to be considered. Gross human rights violations were against the spirit of upholding humanity and justice as demanded by the Preamble of the constitution and against legal principles accepted by civilized nations. For such crimes, the judges held, overriding the non-retroactivity principle was not against the constitution.

In his dissenting opinion, Justice Roestandi vehemently disagreed with this interpretation. His reading of Article 28 I and J was that all human rights determined in the constitution could be limited by Article 28 J (2) *except* for the non-derogable rights mentioned in Article 28 I (1). If also the seven non-derogable rights could be limited by 28 J (2) this would mean that there was no longer any difference between these seven rights and the other ones. Why then had the seven rights been specially regulated, Justice Roestandi wondered. The term “may not be diminished in any situation whatsoever” was precise enough. And what was clearly stated as “may not” could not be turned into “may”. Such an analysis could no longer be classified as legal interpretation but would “come closer to the work of a magician”. So in Justice Roestandi’s view the seven non-derogable rights in Article 28 I were absolute as long as there was no amendment of the constitution.⁴

Justice Roestandi also pointed to the danger of such a precedent. Allowing the non-retroactivity principle to be watered down was, as he put it, “like allowing the enemy to seize a beach-head which could be used as a foothold to seize other strategic terrain.” It could be the first step to dilute the other six non-derogable rights as well. If not guarded against, this might be the beginning of a “big disaster” threatening human rights in the future. Watering down the

¹ Cf. Verdict 013/PUU-I/2003, p. 44ff.

² Cf. Verdict 065/PUU-II/2004, p. 35f, 44f. In one of the dissenting opinions in the Kadir case it is reported about differences of opinion among MPR members in charge of drafting the amendment of Art. 28 I. The option to limit Art. 28 (1) with an extra article, i.e. Art. 28 J, had been a last minute “way out”; cf. Verdict 013/PUU-I/2003, p. 61f.

³ Cf. Verdict 065/PUU-II/2004, p. 51.

⁴ Cf. *ibid.*, p. 63.

retroactivity prohibition might suit the interest of the day, but it would damage the long term interests as it could be used as a tool for revenge by the power holders against political opponents.¹

Albeit pursuing a different line of argument, Justice Fadjar arrived at the same conclusion. He also did not mince his words when stating that if Article 28 I was touched the court would become the “butcher of the constitution” and no longer its guardian.²

Not quite so vociferous, but no less determined was Justice Marzuki’s objection. In his dissenting opinion, Marzuki raised the argument that had already been indicated above: Article 28 I (1) could not be negated by Article 28 J (2) “which only determines limitations of the exercise of rights and freedoms of every person on the basis of a law in the sense of *wet*, *Gesetz*, but by no means in the sense of a limitation on the basis of *Grundgesetz* (constitution)”.³

Reactions

The verdict in the Soares case does not seem to have raised much public attention. And for Abilio Soares himself it did not really matter that his petition was rejected. By the time the Constitutional Court delivered its verdict, the Supreme Court had accepted Soares’ review application, overturned its earlier verdict, and acquitted Soares. The former Governor of East Timor could eventually walk free.

However, strong reactions were evoked by the verdict in the Kadir case, especially by the victims of the Bali attacks and their relatives: “That decision belittles the sacrifice of the children and widows of the bomb victims,” one Balinese charged. Others shared his view complaining that the loss and the suffering of the Balinese community had not been properly appreciated. Several concerned people even determined to submit a petition to the president, the parliament, and the Supreme Court calling for the dismissal of the five judges who had ruled in favour of Kadir’s petition and for a limitation of the court’s authority.⁴

Also in Australia emotions ran high: “They just can’t get away with it. ... John Howard’s got to do something,” a father of one of the Australian victims pleaded to the Prime Minister.⁵ And Australian Foreign Minister Alexander Downer expressed his government’s position: “We want those people who have been convicted of the Bali bombing, of killing 88 Australians and in total over 200 people in Bali, we want those convictions to stand. If they get overturned on some technicality in an appeal, well in those circumstances we will be working with the Indonesian Government encouraging them to bring fresh charges. We have been talking to them, they don’t need any persuasion about this, they don’t want to see the Bali bombers released.”⁶

Indeed, Indonesian officials had been swift to counter concerns that the Bali bombers could walk free. Justice Minister Yusril Mahendra declared that the court’s ruling would not have any legal

¹ Cf. *ibid.* I have translated “*menerobos*”, literally to break through or cut in a line, with water down.

² Cf. Verdict 065/PUU-II/2004, p. 67. Justice Fajar added to the argument what he called a theological perspective. He quoted, in an Indonesian version, Sura 17:15 of the Qur’an, which in the Pickthall English translation reads: “We never punish before sending a messenger”. Apart from referring to international human rights instruments such as the Rome Statute and the Universal Declaration of Human Rights he also quotes the Cairo Declaration on Human Rights in Islam, which he considers to be in accordance with the theological perspective derived from the mentioned Qur’an Sura and which states: “There shall be no crime or punishment except as provided for in the Shari’ah.” Cf. Art. 19d Cairo Declaration.

³ Indonesian term, which like the quoted German one literally translates into English as “basic law”, included in brackets; cf. Verdict 065/PUU-II/2004, p. 65; *wet* and *Gesetz* both mean law, statute.

⁴ Cf. Tempo 3-9/8/2004, as posted at: http://www.infid.be/terrorism_anti_law.htm.

⁵ Cf. The Age online, 24/7/2004.

⁶ Cf. *ibid.*

implication for the 25 final verdicts handed down in the Bali trials, as the Constitutional Court's ruling was valid only prospectively and did not constitute new evidence. The Bali trial verdicts included three death penalties for the main perpetrators, Amrozi, Imam Samudra and Mukhlas, and Kadir's legal team had announced that they intended to submit review applications, not only concerning their client's case.¹ "If they want to submit an application for review (*peninjauan kembali*) to the Supreme Court on these grounds, please," Mahendra said. "But as concerns law of procedure it [i.e. the verdict] is really not new evidence."² His position was shared by Supreme Court Chief Justice Bagir Manan who was quick to point out: "The definition of *novum* (new evidence) is not how law is applied, but rather new facts that had not been uncovered found later."³

How to deal with legal effects of unconstitutional criminal laws?

"It is considered as unjust to carry out a verdict ..., for example the death penalty, in the case that the law that previously constituted the basis has already been declared by the Constitutional Court as no longer possessing binding legal force", writes Chief Justice Asshiddiqie.⁴ The situation after the Constitutional Court's verdict raised the question whether court rulings that are based on invalidated laws should be upheld and/or executed. Justice Siahaan, who already in the Papua verdict argued in favour of declaring legal effects resulting from invalid laws null and void, has discussed the problem at some length.⁵ He refers to different examples where no such strictly prospective application of a constitutional court verdict exists, among others to the example of South Korea: In the case that a law relating to criminal law has been declared unconstitutional, the South Korean Constitutional Court Law allows for penalties to be annulled retroactively. Under such circumstances, a retrial should take place. Concerning legal developments in Indonesia, Siahaan suggested waiting for the ruling of the Supreme Court concerning the pending cassation and review cases. He expected that the verdicts would contain important legal arguments. One such petition for review concerning the Bali trial verdicts was submitted to the Supreme Court only in November 2005.⁶ So it remains yet to be seen how the Supreme Court deals with it.

Another of Siahaan's concerns is how such a situation could be prevented in the future, a question that has also been raised by Jimly Asshiddiqie. Both argue in favour of procedural regulations, which would allow for a trial before an ordinary court to be interrupted once the constitutionality of a relevant law is in doubt. – For the Bali bombing trials the legal defence team had apparently questioned the constitutionality of Law 16/2003 from the first session. – Siahaan proposed that judges at ordinary courts could refer such a case to the Constitutional Court for judicial review, either on their own initiative or upon request by the defendant. Both Siahaan and Asshiddiqie suggested that it should be considered to have Indonesian law of procedure amended accordingly. This way, problems such as resulting from the Kadir verdict could be prevented in future.

Conclusion

It remains to be seen whether Asshiddiqie's and Siahaan's ideas will be taken up by legislators in a possible amendment of the Constitutional Court Law. Interestingly, whereas this important problem linked to the retroactivity issue has been theoretically addressed, I have so far not come

¹ For an overview of the Bali trial verdicts at that time cf. Tempo 3-9/8/2004.

² Berita hukumonline, 27/7/2004.

³ Cf. Suara Merdeka CyberNews.com, 28/7/2004.

⁴ Cf. Asshiddiqie, 2005: 294.

⁵ Cf. Siahaan, 2004: 106ff; id., 2005: 220ff. For the Law on the Korean Court cf. *The Constitutional of Korea* 2001, Appendix II, p. 357-279.

⁶ It was lodged by Mukhlas who was among the three perpetrators sentenced to death.

across any suggestion to forestall future problems originating from the way the retroactivity prohibition is enshrined in the constitution.

The problem was from the very beginning that MPR members had not attached an exemption clause for cases of gross human rights to the non-derogable retroactivity prohibition in the constitution. And they have not done so ever after. So what options did the court have concerning the Soares petition? It was, no doubt, important that the court allowed for an exemption from the retroactivity prohibition in the case of prosecution and trial of gross human rights violations. In this respect, their verdict is also in line with international law. My question is, was it necessary to fall back on the ‘constitutional’ argument that non-derogable rights can also be limited on the basis of Article 28 J, i.e., put briefly, on the grounds of moral consideration, public order, security, and religious values? In my understanding, the judges were concerned and argued emphatically with the best of intentions against impunity for gross human rights violations and for upholding justice and humanity. Unfortunately, at the same time, they set a precedent, which could be invoked with less noble intention, in order to work against the very principles that the judges so vehemently defended in the Soares verdict.

With the verdict spoken, the question is: what are the implications of such precedent? Or put into more general terms: what is the role of a precedent in Indonesian constitutional jurisdiction? And another question I would like to raise once again: had there been other options? Is it conceivable that in a case such as the Soares petition the court hands the problem back to the MPR with the request to amend the constitution in a way that brings it into accordance with international law and forestalls the very problem?

Indonesia has now ratified the ICCPR. In the process of bringing national legislation into accordance with the same it would certainly help strengthen the *rechtsstaat* principle if the constitution was among the legal sources to be amended accordingly.

6. Determining the limits of state control in the economy

The founding fathers of Indonesia determined for the newly independent state a system of democracy in the economic realm (*demokrasi ekonomi*). This has been reaffirmed with the Fourth Constitutional Amendment of 2002. And also the founding fathers’ principle of state control over key economic sectors has been retained to the present day: “Sectors of production which are important for the state and which affect the life of the public are controlled by the state. The lands, the waters, and the natural riches contained therein are controlled by the state and used to the greatest welfare of the people.”¹

The oil and gas, the electric power and the water sector are three important branches of the economy which have long been subject to state control in Indonesia. In how far the resources have been used to the benefit of the people is, however, a different matter...

In the oil and gas sector, the state-owned enterprise Pertamina has been the dominant player, in the field of electric power it has been PLN (Perusahaan Listrik Negara). Notorious corruption and mismanagement led both – like many other state-owned enterprises – into deep crisis which was yet exacerbated once the Asian financial crisis struck.²

¹ Cf. Art. 33 and Explanation of the original 1945 Constitution and the amended Art. 33.

² For more information on the history of Pertamina and PLN and on the privatisation process cf. Mahkamah Konstitusi & Konrad Adenauer Foundation 2005, p. 59ff; on PLN and the development of electricity supply in Indonesia cf. also Muhammad, 2005: 25f.

The picture of IMF Managing Director Michael Camdessus standing over President Suharto who signed a Letter of Intent (LoI) had at the time been perceived by many as symbolic for the relationship between the IMF and developing countries. In several such LoIs of late 1997 and early 1998, the Indonesian Government pledged deregulation and privatisation. The first step was a review of the public sector expenditure, which was to serve as a basis for restructuring state-owned enterprises and strategic industries as well as for an accelerated programme of privatisation.¹ The LoIs' structural performance criteria contained amongst others the obligation to drastically increase the prices for fuel and electricity until March 1998. The implementation of these measures gave additional momentum to the massive protests, which eventually resulted in Suharto's resignation two months later.

Restructuring the energy sector

The ensuing *era reformasi* was also an era of enhanced privatisation and restructuring processes under IMF and World Bank supervision. A Letter of Intent agreed upon under President Habibie obliged the government to have PLN and Pertamina audited according to international standards. These audits documented the loss of billions of dollar to corruption and mismanagement and included recommendations which the Indonesian Government pledged vis-à-vis the IMF to fulfil. This and the government's commitment to draft new legislation concerning the oil and gas and the electric power sector were among the comprehensive restructuring and privatisation programme with the IMF which - if complied with - would temporarily provide the Indonesian treasury with additional 5 billion US dollar.²

Concerning the electric power sector, the government subscribed to restructuring PLN, to establishing a new independent regulatory agency and to increasing tariffs while limiting the impact on the poor. For the oil and gas sector, the Wahid administration pledged to restructure Pertamina, to "allow domestic prices to reflect international market levels", and to ensure that "fiscal terms and regulations for exploration and production remain internationally competitive".³

The new Oil and Gas Law was enacted in November 2001. It provides for other than state-owned companies to engage in business in the oil and gas sector. Domestic enterprises can do business in exploration and exploitation (upstream activities) as well as in processing, transportation, storage and trade (downstream activities). Foreign companies may only engage in upstream activities. For the supervision of business activities and adherence to licenses and concessions, two new institutions accountable to the president were to be established. Pertamina was to be transformed into a corporation within two years. Today it is the state-owned limited liability company PT Pertamina (Persero).⁴ Concerning the sensitive issue of fuel prices, legislators determined that these as well as gas prices were subject to a mechanism of "healthy and genuine business competition" whereby this should not diminish the social responsibility of the government for certain societal groups.⁵

In September 2002, the new Law on Electric Power was passed. At the heart of the law is the staged designation of "competition areas". In such areas, competition is not only allowed but mandated for electricity generation and supply.⁶ The law explicitly prohibits that one enterprise dominates the market and rules out mergers leading to monopoly. The importance accorded to competition in the law can perhaps best be seen in that monopoly building and market control

¹ Cf. for this and the following Letter of Intent (LoI), October 1997, Para. 41, Annex E.

² Cf. LoI, July 1998, Annex E; LoI, January 2000, Para. 74; IMF press release, 4/2/2000.

³ Cf. LoI, January 2000, Para. 76ff.

⁴ Cf. Art. 9, 44-49, 60 Law 22/2001; Pertamina homepage <http://www.pertamina.com>.

⁵ Cf. Art. 28 (2, 3) Law 22/2001.

⁶ Cf. Art. 17, 29 (1) Law 20/2002. The sectors of transmission and distribution, on the other hand, are not subject to competition; cf. Art. 18 (1), 19 (1) Law 20/2002.

concerning the supply sector in such competition areas are threatened with a maximum five year prison sentence. For non-competition areas, the law determines the obligation of the government to fulfil electricity needs in the case that state-owned and private enterprises are not able to do so.¹

The WATSAL agreement

In May 1999, the World Bank approved 300 million US dollar for the so-called Water Resources Structural Adjustment Loan (WATSAL). Under the agreement, the government promised among others to revise legislation concerning the water resources sector. Eventually, the passing of the Law on Water Resources “acceptable to the Bank”, became a performance criterion for the disbursement of the third tranche amounting to 150 million US dollar.² From the start, the law met with fierce criticism as it was seen as a tool to turn the common good water into a commodity. Price hikes were feared with devastating effects on the poor and farmers. After a long and strenuous drafting process fraught with difficulties and accompanied with protests against what was perceived as pressure by the World Bank on legislators, the controversial law was eventually passed in February 2004. “The main problem with the Water Law is the lack of protection of water rights of the community. Instead of giving clear recognition and protection of water for people, it gives more access to private investment for private concessions to water resources This law will accelerate water privatization or commercialization of water resources in the country and would cause massive losses for the country’s subsistence farmers”, criticised Longgena Ginting, director of the environmental forum WALHI. And his colleague Raja Siregar summarised the criticism of many: “This new water act is dominated by economic interests. World Bank influence plays a great role in determining the substance and the interests that this act will stand for.”³

The World Bank’s own assessment was that the Law on Water Resources deviated from the Indonesian Government’s policy pledges under the WATSAL agreement only in one aspect, namely concerning the “‘management transfer’ to Water User Associations.”⁴ Transfer of a certain amount of authority to so-called Water User Association has apparently for some time been part and parcel of the World Bank’s overall strategy in the water sector.⁵ Before the enactment of the law, the transfer of authority to water user farmer associations, as they were called in the Indonesian case, had already been determined by the administration in government regulations concerning irrigation.⁶ Legislators eventually decided to leave authority predominantly in the hands of government, which also reflects a shift of the administration’s position on the matter. According to the World Bank, this was against the agreed policy matrix. Their representatives were especially concerned when the Minister for Settlements and Regional Infrastructure announced that all new irrigation regulations had to be revised accordingly – and were placated when they were later informed that the government opted for a “more inclusive interpretation” of the law’s contested provision, which in the end made the envisaged revisions

¹ Cf. Art. 29 (1), 59 (2), 30 (5) Law 20/2002.

² Cf. World Bank 2005a: 48. The enactment of an entirely new law was not envisaged from the start. Cf. also the lessons learned quotation in footnote 2 p. 55.

³ Cf. http://www.citizen.org/cmep/Water/cmep_Water/reports/indonesia/articles.cfm?ID=13879;
http://www.eng.walhi.or.id/kampanye/air/privatisasi/review_wateract.

⁴ Cf. World Bank, 2005a: 41.

⁵ Cf. Hadad, 2005: 73.

⁶ Cf. e.g. Art. 9-12 Government Regulation 77/2001 which was issued under the second tranche of the WATSAL agreement; cf. World Bank, 2005a: 3.

acceptable for the World Bank.¹ - As concerns the third tranche, the 150 million US dollar scheduled to be disbursed after the enactment of the law were never paid.²

This controversy between the World Bank and the Indonesian Government is one example for a key issue in the petitions that were brought before the Constitutional Court concerning the three laws. Where are the boundaries to state control over key sectors of the economy so as to comply with the constitutional mandate? What degree of privatisation is in accordance with the constitution? What tasks and authorities can be delegated to the non-state sector and what has to be left under government control?

All three laws challenged before the Constitutional Court

All in all, nine petitions for judicial review have been submitted to the court concerning the three laws, with partly the same NGOs involved as petitioners.³ In all petitions, the initially quoted Article 33 of the constitution mandating state control has been invoked.⁴ With its three verdicts, the court has outlined limits to state control over key sectors in the economy and thus determined key parameters of Indonesia's future economic policy.⁵

In the first of the three verdicts, concerning the Electricity Law, the court elaborated at length its binding interpretation of the notion of state control, which served as a frame of reference in the verdicts on the Oil and Gas and the Water Resources Law.

Basic interpretation of the notion of state control

The court interpreted the constitutional mandate of state control as linked with the obligation of the state to protect the Indonesian nation, to further general welfare and to realise social justice as demanded in the Preamble of the constitution. The mission connected with the state's control authority was to fulfil three key interests of the people with respect to the resources in question: sufficient availability, even distribution and achievable prices for the public. The question

¹ Cf. Art. 41 Law 7/2004; for details on the issue cf. World Bank, 2005a: 4.

² Cf. *ibid.* p. 12. A follow-up agreement, the Water Resources and Irrigation Sector Project, was signed in June 2005; cf. World Bank, 2005a: 4. - Interesting is what the World Bank writes concerning its lessons learned: "From the perspective of Loan Performance, enactment of a law should be avoided, if possible, as common sense suggests. Details in a water law should be amended, rather than drafting an entirely new law addressing all issues and introducing new principles. Presentation of a new law to parliament invites extensive debate, and its uncertain outcome may conflict with and indeed scuttle the government's LoSP [Letter of Sector Policy] commitments." Cf. World Bank, 2005a: 36.

³ One petition for judicial review of the Oil and Gas Law was submitted by the NGOs APHI (Asosiasi Penasehat Hukum dan Hak Asasi Manusia), PBHI (Perhimpunan Bantuan Hukum dan Hak Asasi Manusia), Yayasan 324, Solidaritas Nusa Bangsa, as well as by the union FSPSI Pertamina and university rector Dr. Pandji Hadinoto. The verdict was announced on December 21st, 2004. Three petitions were submitted concerning the Electricity Law, one by the NGOs APHI, PBHI and Yayasan 324, the second by the PLN labour union and the third by the PLN pensioners association (IKPLN). The verdict was announced on December 15th, 2004. Concerning the Water Resources Law, in total five petitions were submitted, two by various legal aid, human rights and environmental protection NGOs among others PBHI, APHI, YLBHI (Yayasan Lembaga Bantuan Hukum Indonesia), LBH (Lembaga Bantuan Hukum), ELSAM (Lembaga Studi dan Advokasi Masyarakat) and WALHI; and three petitions by citizens, mostly farmers, totalling almost 3.000; Water Verdict p. 1f, p. 477f. The verdict was announced on July 19th, 2005.

⁴ Other constitutional rights were also invoked. However, for the context of this chapter the focus shall only be on Art. 33 related issues.

⁵ In January 2005, the Constitutional Court's Research Center, the Hanns Seidel Foundation and the Constitutional Law Research Center of the University of Indonesia's Law Faculty jointly organised a roundtable discussion on the topic of repositioning energy policies after the Constitutional Court's verdicts on the Electricity and the Oil and Gas Law; for the documentation of the discussions cf. Hanns Seidel Foundation, Mahkamah Konstitusi & Universitas Indonesia 2005.

whether the three aims could not be achieved by the market had to be answered normatively in that the constitution had not opted for such a system.¹

What then was the meaning of “controlled by the state”? Starting from the basic assumption that Article 33 was not at all “anti-market economy”, the court rejected both the understanding of state control as the civil law notion of ownership and the reduction of state control to a purely regulatory role of the state. The notion of state control had to be interpreted in a broader sense, based on the concept of people’s sovereignty over the lands and the waters and the riches contained therein. Constitutionally, the people provided the state with the mandate to determine policies and to conduct acts of administration, regulation, management, and supervision in order to achieve the greatest welfare for the people. The administrative function was implemented with the government’s authority to issue and revoke licences and concessions, the regulative function by way of the government’s and parliament’s joint legislative authority and the government’s authority to decree regulations. The management function was realised with either direct involvement in the management of state-owned enterprises or corporate bodies and with a shareholding mechanism. Last, but not least, the supervisory function was carried out by the government in the framework of monitoring that state control was in fact implemented for the greatest benefit of the people.

Privatisation was not *per se* unconstitutional, elaborated the court. Article 33 did not reject privatisation as long as this did not abolish the control of the state in the sense that the government was the one to determine business policies in key economic sectors. Neither did Article 33 reject the idea of competition as long as the same did not abandon state control, which comprised the power to regulate, to administer, to manage, and to supervise key economic sectors with the aim to achieve the greatest benefit for the people. In further specification, the court argued that the state could hold either the absolute or even the relative majority of shares as long as it was still legally in the position to determine decisions and policies.²

The Electricity Law annulled ...

Applying the criteria to the electricity sector, which both government and parliament considered to be a key economic sector in the constitutional sense, the court declared that only state-owned enterprises may manage electric power businesses whereby national and foreign private enterprises could participate if invited by a state-owned enterprise. The court declared not only individual provisions as unconstitutional but, unanimously, annulled the Electricity Law in its entirety as it considered the paradigm of the law to be competition in management through a system of unbundling. This was not in accordance with the constitution. The court reinstated the 1985 Electricity Law and explained that all agreements, contracts, and business licenses signed respectively issued under the annulled law were valid until they expired as the verdict applied prospectively only.³

... and revived in a different guise?

The verdict was announced in mid-December 2004. A month later, one day before the international Infrastructure Summit in Jakarta and on a Sunday, President Yudhoyono issued a government regulation concerning electric power. This regulation was criticised as reviving the annulled Electricity Law through the backdoor. Six months later, one of the petitioners who had challenged the Electricity Law, the NGO APHI, submitted a judicial review petition to the Supreme Court. “The *ratio* of this government regulation is not to fill the legal void but to put

¹ For this and the following cf. Verdict 001-021-022/PUU-I/2003 p. 330ff.

² Cf. *ibid.* p. 346.

³ Cf. *ibid.* p. 348ff.

once more into effect the 2002 Electricity Law in a different guise”, Hotma Timbul, APHI’s legal counsel criticised. - Until the time of writing, no new electricity law has been passed.¹

Ruling on the Oil and Gas Law

Concerning the Oil and Gas Law, the court ruled that as a whole it was not against the constitution. Other than in the Electricity Law, the substance of state control was rather clear in the law’s line of thought. Nevertheless, the court unanimously declared three provisions, as a whole or in parts, as unconstitutional.²

One stone of contention was the provision which states that the Energy Minister determines those enterprises which “are given the authority” to conduct exploration and exploitation activities. Here the court saw a relinquishment of state control, which was not in line with Article 33 as previously interpreted by the court. The Oil and Gas Law furthermore determines that the fuel and gas prices are submitted to a mechanism of healthy and genuine business competition while limiting the involvement of the government to its social responsibility vis-à-vis certain societal groups. This was unconstitutional and thus no longer valid, the court ruled, as it did not guarantee the principle of democracy in the economic realm. The fuel and gas price should be determined by the government by taking into consideration both the interest of certain strata of the population and the mechanism of healthy and genuine competition.

During the court hearing, the petitioners had furthermore challenged the provision that domestic and foreign private enterprises were obliged to submit “at the most” 25 percent of their oil and gas production to fulfil domestic needs. The court argued that concerning the oil and gas sector, the principle of greatest welfare for the people also implied that fuel supply needed to be guaranteed. As “at the most” could also mean e.g. 0.1 percent, the court declared this to be unconstitutional and ordered the words “at the most” to be deleted from the article.

The court’s letter to the president

On September 30th, 2005, President Yudhoyono determined an increase of fuel prices – amid large scale protest against this long feared move. A week later, he received a letter from Chief Justice Asshiddiqie on behalf of the court. Therein it was noted that in the presidential regulation determining the fuel price increase Yudhoyono had only referred to the Oil and Gas Law as a basis for his decree. The court reminded the president that a final and binding verdict on the mentioned law existed which comprised the annulment of among others the provision concerning the determination of fuel prices. The president had failed to mention that the Oil and Gas Law had been amended by the very Constitutional Court verdict. The court stressed, however, that it did not intent to evaluate a government policy or the substance of the regulation, which was not within the scope of its authority.³ The letter evoked strong reactions by both parliamentarians and government representatives, warning the court against overstepping authority.⁴

¹ Cf. Berita hukumonline, 15/7/2005; The Jakarta Post.com, 9/2/2006. The mentioned regulation is Government Regulation 3/2005.

² Cf. for this and the following Verdict 002/PUU-I/2003, p. 205-231, esp. 221ff.

³ Cf. letter 026/KA.MK/X/2005, 6/10/2005, previously available on the Constitutional Court homepage; the mentioned decree is Presidential Regulation 55/2005.

⁴ DPR President Agung Laksono, for example, warned that the court should not enter into the political arena, and State Secretary Yusil Mahendra voiced strong criticism against the Chief Justice reminding the president of any mistake; for details cf. Tempo (print edition), 24/10/2005, p. 24f.

Contested Water Resources Law entirely constitutional

Yet a different verdict was issued by the court concerning the Water Resources Law. Here, the majority of the judges saw their criteria for state control fulfilled.¹ One main line of argument against the reasoning of the petitioners was that via a licensing mechanism the state remained in control of administrating, managing, and supervising the water resources sector. Concerning the issue of privatization, for example, the court stated that although the law opened the possibility for a role of the private sector to obtain a so-called water utilization business right² and water resources business licenses this did not mean that the control over water resources was “thrown into the hands of the private sectors”. By way of licensing the government remained in control over where and what amount of water was used by license holders.

Also with the provision of the law, which determines that the preparation of the water resources management system should involve the public and the business world as much as possible the majority of the judges found no fault. They stated that this should not be interpreted as giving a large role to the business world only, but equally to the public. State control was not rendered to the business world with this provision.

The verdict is rather long, 523 pages, of which 30 contain the legal consideration of the judges. Needless to say, that a comprehensive outline of the complex problem can not be provided here. I have tried to sketch only the court’s line of argument of one aspect, the degree of state control. In conclusion, however, one unprecedented note of the court shall be mentioned: The court underlined that its legal consideration was binding for implementing legislation, i.e. among others for government regulations of which the Water Resources Law foresees 35 in total. The court now declared if there was a discrepancy between implementing legislation and the court’s interpretation, the law could be brought before the court again.³ - This is especially interesting against the background of the above mentioned disagreements over a contested provision and the government’s commitment to agreements with the World Bank.

“The 19th of July, 2005, will be remembered by Indonesian water activists as a depressing day as the Constitutional Court decided to reject the lawsuit filed by dozens of environmental and social movements and thousands of individuals”, commented Longgena Ginting.⁴ But given the court’s “conditionally constitutional”⁵ declaration, the efforts of the petitioners might not have been entirely in vain. With its verdict the court provided a binding interpretation for a large part of the Water Resources Law, which considerably limits the discretionary powers of the government in implementing legislation. - Shortly after the announcement of the verdict, the environmental forum WALHI said that it planned to make use of the possibility to resubmit a petition.

7. Twenty percent of the state budget for education

“The quality of schooling in Indonesia is low and declining”, the World Bank stated in 2005. “Currently, some 20 percent of children who should be attending junior high school do not.” Official data from 1999 showed that “one in six schools in Central Java is in ‘bad condition’, ... while in at least one in two schools in Nusa Tenggara Timur, students sit in classrooms without

¹ Cf. Water Verdict p. 495ff.

² The introduction of water utilisation rights for consumption and business was one focal point of criticism in the petitions and the dissenting opinions by Justices Fadjar and Siahaan. It would lead too far to go into details here where it shall only briefly be outlined how the court ruled on the issue of state control. For different positions on the matter cf. the Water Verdict; also e.g. Hadad 2005.

³ Cf. Water Verdict p. 495.

⁴ Cf. http://www.citizen.org/cmep/Water/cmep_Water/reports/indonesia/articles.cfm?ID=13879.

⁵ Cf. Water Verdict p. 495.

the rudiments of instruction - textbooks, a blackboard, writing supplies, and a teacher who has mastered the curriculum.” Teacher’s attendance, or rather the lack of it, was another problem. A survey in 2004 found that 20 percent of teachers were absent at a time of a random spot check. School fees, on the other hand, had been rapidly increasing over the last three years.¹

“The heritage of paying for education has made the notion of children’s right to free public education fairly unknown in Indonesia,” commented, Katarina Tomaševski, the United Nations Special Rapporteur on the Right to Education, who visited Indonesia in July 2002. She also found that today teaching was a low-paid and low-prestige profession. “Estimates by teachers themselves were that 80 per cent had parallel jobs, sometimes four, all of which were supposed to be full time.” In her report the Special Rapporteur stated that a six-fold increase of the education budget was necessary for Indonesia to live up to the UNESCO recommendation of six percent of the GDP allocated to education.²

Constitutional order: at least 20 percent of the state budget for education

A month after the Special Rapporteur’s visit, the MPR passed the Fourth Constitutional Amendment which included a reworked chapter on education. As before, the constitution enshrines every citizen’s right to obtain education. New is that the constitution obliges every citizen to attend basic education and the government to pay for it. The most striking among the new provisions is probably the following: “The state prioritises education funding of at least 20 percent of the national and the regional budgets to fulfil the needs of implementing national education.”³ Obviously, the authors of the 2002 Constitutional Amendment were serious about addressing the problems in the education sector. But the mentioning of a specific figure, 20 percent of national and regional budgets, should soon run legislators into difficulties.

If this 20 percent sound like a lot of money earmarked for education, in the eyes of the UN Special Rapporteur it was still questionable whether this would suffice to cover the expenditure in the education sector: “Allocations of 20 percent of government budgets at the central, provincial and district levels provide the pathway towards increasing public funding for education and eliminating financial obstacles. These will not be sufficient because Indonesia’s low tax effort of 11 percent of GDP keeps the budget low.” Calling for clear guidelines concerning budgetary allocations, the Special Rapporteur went on to criticise that “... the definition of ‘education’ in budgetary allocations is broad and includes ‘service education’ for officials and official candidates in government agencies.”⁴

With this, the Special Rapporteur pointed to a key question: Which expenditure would be included in the 20 percent allocation for education funding? The constitution is quiet on the matter, but the 2003 Law on the National Education System provided some guidelines.⁵ Therein, legislators determined that the 20 percent allocation of national and regional budgets *excluded* educators’ wages and the service education expenditure, which the Special Rapporteur had mentioned. However, legislators felt that the constitutional prescription could not be complied with immediately. So they attached to the provision on the generous definition of education fund allocation the following explanation: “The fulfilment of education funding can be implemented in stages.”⁶

¹ Cf. World Bank, 2005: 1ff

² Cf. United Nations, 2002: 9, 18.

³ Cf. Art. 31 1945 Constitution, for the quotation Art. 31 (4).

⁴ Cf. United Nations, 2002: 18.

⁵ This is Law 20/2003 on the National Education System, henceforth simply referred to as Education Law.

⁶ Cf. Explanation Art. 49 (1) Law 20/2003.

In order to specify further details, in December 2003 government and parliament set up the joint Working Committee on the Allocation of Education Funds. Four ministries were involved as was the National Development Planning Agency BAPPENAS. In May 2004, the committee released a joint agreement: Starting from the 6.6 percent allocation of 2004, the education funds would be steadily increased and reach 20 percent in 2009. Envisaged for 2005 were 8 to 9 percent of the budget.¹

Challenging the Education Law and the 2005 Budget

In April 2005, Fathul Hadie Utsman, Chairman of the NGO Abnormal Constitutional Control, submitted to the Constitutional Court a petition to review among others the explanation in the Education Law, which determined the gradual increase of the education funds. Utsman lodged the petition in his capacity as legal representative of a student and he was joined by eight others, among them teachers, lecturers, and students.

The petitioners were of the opinion that the challenged explanation legitimised education funds to remain below the constitutionally determined 20 percent of the state budget.² Concurrently, the group submitted a petition to review the 2005 Budget, which only allocated 7 percent to education.³ The teachers among the petitioners saw their constitutional rights to just and proper remuneration and to social security violated.⁴ Furthermore, the group pointed to the government's constitutional obligation to pay for compulsory basic education. So far, state funds for education were far below the prescribed 20 percent and did not cover costs, so school fees still had to be paid.

Indonesia a welfare state

In October 2005, the court ruled that the gradual increase of education funds was unconstitutional. The contested explanation was thus no longer valid. In their legal consideration, the judges pointed out that Indonesia was a *rechtsstaat* with the character of a welfare state that in the tradition of European states freed citizens from education expenses. As a consequence of the compulsory basic education and the administration's constitutional obligation to pay for it, education expenses constituted a prime responsibility for the government. Both public and private basic education should be free of charge. The court was of the opinion that the implementation of the constitution might not be delayed. It was stated *expressis verbis* therein that at least 20 percent of the budget had to be allocated to education funding; this might not be diminished by a law.

Justices Natabaya, Roestand and Soedarsono objected. In their joint dissenting opinion they held that the contested explanation was not unconstitutional, considering that the constitution included general provisions, which had to be spelled out by the legislators. That the 20 percent budgetary allocation would be implemented "in stages" was not in contradiction with the constitution as it meant that with every stage another move towards the determined objective was made. The explanation only mirrored state efforts to fulfil the aim while taking into account the financial situation.⁵

¹ More precisely: 8.2 respectively 9.3 percent of the budget, depending on whether the progressive or the linear increase model was followed; cf. Verdict 011/PUU-III/2005, p. 46ff.

² They also questioned the constitutionality of Art. 17 of Law 20/2003 concerning the definition of basic education; cf. for this and the following Verdict 011/PUU-III/2005, p. 1-19.

³ Cf. Verdict 012/PUU-III/2005, p. 55; percentage figures mentioned vary.

⁴ Invoked were Art. 27 (2), 28 D (2) and 28 H (1, 3) 1945 Constitution. - The court did not accept that the 2005 Budget violated these rights; cf. Verdict 012/PUU-III/2005, p. 60.

⁵ Cf. Verdict 011/PUU-III/2005, p. 105. Their other main argument was that the petitioners lacked the necessary legal standing. - The majority of the judges furthermore criticised the character of the contested explanation:

The court closed its argument by stating that education in Indonesia had been grossly neglected. Thus, it was time that it was accorded the highest priority. The contested explanation, however, provided a reason for the central government as well as for regional administrations not to fulfil the 20 percent allocation obligation.

2005 Budget unconstitutional...

So, after having ruled against a gradual increase of the education budget, did the judges also invalidate the 2005 Budget, which did not fulfil the constitutional allocation obligation? The majority of the judges indeed argued that the budget was unconstitutional and brought forward one other argument: In their view, the right to obtain an education as laid down in the constitution's Article 31 was a right that the state had not only to *respect* but also to *fulfil*.¹ If it was obvious that in a budget the 20 percent education fund allocation was not fulfilled, the budget was unconstitutional. As was the case with the 2005 Budget.

... but not invalidated

However, others matters had to be considered as well. The constitution lacked specification on what was meant by educations funds. And the generous interpretation that legislators opted for in the Education Law, i.e. exempting educators' wages and service education expenditure, as well as the joint agreement with its schedule for the increase of the education budget showed their good intentions.

With an invalidation of the 2005 Budget, automatically the 2004 Budget would be reinstated. But that budget, argued the judges, had an even smaller amount allocated to education. This would be even worse for the petitioners. What was more, declaring the 2005 Budget invalid would lead to a "governmental disaster" in the administration of state finances and to legal uncertainty. Thus, although the budget was unconstitutional there were enough reasons not to invalidate it. The court decided not to accept the petition.

Justice Natabaya disagreed with the majority's reasoning and underlined the need to take other aspects into consideration. The constitution ordered the state budget to be implemented in a transparent and responsible manner for the greatest welfare of the people. This meant that the government had to consider economic and financial conditions. Other spending obligations clearly narrowed the government's room of manoeuvre. In unison with Justices Roestandi and Soedarsono he stressed – as had the government – that if the education funds included educators' wages and service education expenditure the amount would exceed the prescribed 20 percent.²

Therein, they held, a new norm was introduced. This would obscure the norm in the Article that the explanation was supposed to elucidate. The explanation was against the principle of law making as laid down in corresponding legislation; cf. *ibid.* p. 101. - In another verdict, Verdict 005/PUU-III/2005, the Court had dealt in more detail with the problem of an explanation that limits rather than explains the article it is meant to elucidate; for details on this and other aspects of the verdict cf. Stockmann 2005a.

¹ The judges distinguished between the rights enshrined in Art. 31 and the education related rights as mentioned in Art. 28 C (1) and 28 E (1) 1945 Constitution. The details of their lengthy argument shall not concern us here; cf. Verdict 012/PUU-III/2005, p. 56ff.

² Cf. Verdict 012/PUU-III/2005, p. 65f, 72f. Justices Natabaya and Palguna submitted concurring opinions, i.e. they agreed with the decision part of the verdict but not with the legal consideration. Justices Roestandi and Soedarsono submitted a joint dissenting opinion, opting for a rejection of the petition. Several arguments of the verdict on the Education Law are reiterated in the ruling on the 2005 Budget.

And the 2006 Budget?

Two weeks after the verdicts had been announced, the 2006 Budget was passed. Once more, the education fund allocation was below the demanded 20 percent. This was reason enough for Chief Justice Asshiddiqie to invite people to submit a review petition. Government and parliament were obliged to obey the constitution, he stressed, and their decisions should be in accordance with the same: “It may not happen again that the constitution is just window-dressing.” Referring to the fact that the court may not act on its own initiative, Asshiddiqie remarked that the court’s hands were tied: “According to regulations we can not be proactive to review the [budget] law.”¹

At the end of December 2005, a corresponding petition was indeed submitted to the court. Petitioners were Rusli Yunus, Chairman of the Indonesian Teachers’ Association, PGRI, and Professor Soedijarto, Chairman of the Association of Indonesian Teaching Graduates, ISPI. According to calculations of the petitioners, the 2006 Budget allocated only 8.1 percent of the budget to education. It thus did not only fall short of the constitutional prescription, but also of the amount determined in the previously mentioned joint agreement.²

“The government has violated the constitution by earmarking only 8 percent of the state budget for education and therefore the (budget) law must be overturned,” Yunus stressed, adding that 31 trillion rupiah (3.3 billion US dollar) was not enough: “How can you send more than two million children to school and fix over 8,000 damaged schools with that amount of money?”³

During their introductory hearing in January 2006, the petitioners asked the court to issue an injunction ordering the delay of the new budget’s implementation.⁴ This was rejected by the court. As Chief Justice Asshiddiqie explained, a delay would result in stagnation: “For this reason, the Constitutional Court does not want to add a new problem, we want to provide a solution.”⁵

Two months later, the court issued its verdict.⁶ The majority of the judges declared the 2006 Budget’s allocation of 9.1 percent as a *maximum* allocation for education as unconstitutional and no longer valid. Apart from that, however, the 2006 Budget remained valid and could be implemented. But government and parliament were obliged to allocate funds obtained through economizing state expenses and increased income to education. The court stated that as long as the budget was below 20 percent it was always unconstitutional. However, as concerns implementation, the court took into consideration among others the national and global economic conditions.⁷

¹ Cf. Tempo Interaktif, 9/11/2005.

² I.e. depending on the model, 10.3 or 12 percent respectively.

³ Cf. The Jakarta Post.com, 14/1/2006.

⁴ They referred to Art. 63 of Law 24/2003 which grants the court the authority to order that the implementation of an authority which is the subject matter of the proceedings be suspended until the verdict is announced. Art. 63 is not part of the chapter on the law of procedure for judicial review but for cases concerning conflicts between constitutional organs.

⁵ Cf. Kompas Cyber Media.com, 8/2/2006.

⁶ Other organisations and individuals had in the meantime joined the petitioners.

⁷ Cf. Verdict 026/PUU-III/2005, p. 86f. Concurring opinions were submitted by Justices Palguna and Soedarsono, dissenting opinions by Justices Roestandi and Natabaya. – In April 2006, The Habibie Center and the Hanns Seidel Foundation jointly organised a roundtable discussion on the consequences of the court’s ruling on the 2006 Budget. The documentation of the discussions is forthcoming; cf. Hanns Seidel Foundation & The Habibie Center 2006; for a brief summary of the presentations and discussions cf. also PostScript, Vol. III, No. 5, May 2006, p. 35-39. - Previously, the roundtable discussion had once more been prepared in a cooperation between the Hanns Seidel Foundation and the Constitutional Court’s Research Center. However, the Constitutional Court withdrew after Chief Justice Asshiddiqie had declared it was unethical that the court debated its verdicts in public; interview by the author with Christian Hegemer, Director of the Hanns Seidel Foundation in Jakarta, 24/4/2006.

V. Conclusion

“To the *Mahkamah Konstitusi*, please,” I tell the taxi driver in Indonesian adding, just in case, “Jalan Merdeka Barat No. 7.” “The *Mahkamah Konstitusi*?” asks the taxi driver who has, as the ensuing conversation shows, no idea about the Constitutional Court. This is just one experience which testifies to the fact that the court is still not too well known among the wider Indonesian public. Recent opinion polls found that on average only 34 percent of Indonesians knew at least a little about the court, in rural areas even less.¹

But polls also support the impression conveyed to me in Jakarta that the court is generally well accepted and viewed rather favourably. Ratings as high as 70 to 80 percent on the perception of the court as honest, transparent, fair and independent contrast markedly with the reputation of the Indonesian judiciary in general. And concerning people’s view of the court with regard to corruption, Indonesia’s grand malady, my impression from conversations is even more favourable than the 60 to 70 percent ratings which the polls show. That the court managed to build up this reputation is an achievement in itself and, hopefully, will have positive repercussions beyond Jalan Merdeka Barat No. 7.

The Constitutional Court is in many ways rather exceptional in the Indonesian judicial system. A great difference in terms of transparency is, for example, that its verdicts are almost immediately accessible on the court’s webpage. And not only the rulings but also the minutes of the proceedings can be found there. As a comparison, if verdicts of other courts are at all available they usually need to be paid for and it takes a rather long time to obtain a copy. Also the court’s bilingual, Indonesian and English, Annual Report and the informative homepage, including its question and answer section, contribute to transparency.

And the court’s verdicts are notable. As we have seen, the arguments in legal considerations and dissenting opinions are often emphatic and outspoken. This mirrors a new debate culture which has to be seen against the background of the consensus oriented dominant discourse, with *musyawarah untuk mufakat*, deliberation to reach consensus, officially the preferred mode of decision making. With the usually elaborate legal considerations of the court, the dissenting opinions and not to forget the petitions which are often co-authored by competent and prominent lawyers, rulings show a considerable spectrum of legal opinion on contested issues. With this and the numerous references to foreign legal scholars, to international law and international legal practice the verdicts might furthermore serve as good study material for law students.

As could be seen above, people who do know about the court make good use of it. Especially for civil society organisations it has become a new arena to further their aims and voice their concerns. Here the court not only functions as an outlet for frustration over lack or insufficiency of change but also provides a forum through which citizens can participate in the legal reform process, thereby strengthening democratic elements in the overall system of government.

During the short period of its existence, the court has enhanced democratic *rechtsstaat* principles in Indonesia in a number of ways: With its work marathon concerning its rulings on disputes over election results in 2004 the court has done its share in strengthening the new democratic electoral system. Furthermore, the very possibility of formal as well as material review of laws has contributed to the legal reform process, to the dismantling of the authoritarian regimes’ legacy concerning legislation and legal culture and it has opened the process of law making to external scrutiny.

¹ For this and the following cf. IFES 2004, 2004 a-c, 2005.

The court has upheld and strengthened the principle of legal certainty. Its rulings on cases of contradictory laws and contradictory provisions within a piece of legislation, no infrequent problems in Indonesia, are encouraging precedents in this respect. With its binding legal considerations the court rulings also limit the discretionary powers of the government concerning implementing legislation, which can be viewed again as helping prevent problems of contradictory legislation.¹ The court's explicit comments in this respect in the water verdict may be recalled.

And the judges have strengthened human rights protection, albeit not all their rulings have been perceived as such. The PKI verdict certainly still stands out as a landmark ruling here and is at the same time an example of the court breaking with long cherished taboos. With the court's socialisation efforts as well as with NGOs lodging petitions on behalf of people who might previously not have been aware of the court it can be hoped that in the long run also people's consciousness of democratic *rechtsstaat* principles is raised.

However, the court is not unequivocally viewed in shining bright light; several of its rulings have been subject to quite some criticism, both from within and outside the court. One of the most contested and most criticised rulings, especially among civil society, is still the Papua verdict. The impression I got is that concerning this ruling many share the view that the court here bowed down to the government.

I heard of both discontent over individual verdicts and more general concerns regarding the court's role. Naturally, petitioners who lose a case aren't too happy about it. But at least on the part of plaintiffs I spoke to discontent over individual verdicts has not led to a rejection of the court as an institution. Quite to the contrary, the court is viewed as an important channel of legal redress. One petitioner who had lost a case told me that although he did not like the outcome he acknowledged that the court had dealt seriously with the matter. With respect to acceptance of verdicts by losing parties the existence of dissenting opinions seems to be important: "The dissenting opinions show that there was some reluctance on the part of the court to reject our petition", one plaintiff said. The perception that there is some support, some understanding for their case – and their cause – among the nine judges might enhance the acceptance of the individual verdicts on the part of petitioners who lost a case and contribute to the acceptance of the court as a meaningful institution in general.

Apart from discontent over individual verdicts, a not infrequently heard concern is that the court might turn into a "superbody" or "superman". This means the court is perceived as overstepping boundaries. One especially contested verdict in this respect is certainly the one with which the judges invalidated the time limit that legislators had put on the court's jurisdiction. But this verdict also demonstrates a dilemma which is to no small part due to the situation of a transition country. An observer pointedly noted: "I am glad about the outcome, but I find it problematic that the court ruled on its own authority. So, one cannot easily discard fears that the court might turn into a 'superbody'."

While in terms of procedure the court was perceived as overstepping its authority, viewed from a different perspective it was justice that was at stake. Had the court abided by the limitations to only review laws enacted after October 1999, it would have meant that there was no judicial recourse for people concerning the entire body of law established under the previous authoritarian regimes. Justice Roestandi noted at the time that the judges "need not just uphold the law, but also justice, and they need not only uphold *justice*, but also *the law*". In my view, this case is one example where the judges faced a dilemma, were trapped in having to choose between upholding the law and upholding justice. Sometimes, it seems difficult if not impossible to

¹ It can also be seen as trespassing boundaries, intruding too far into the sphere of government.

reconcile the two principles and the judges have to prioritise the one over the others. And as we have seen, they differ in their priorities. A difficult choice they face there, as both upholding justice and upholding the law are essential for a functioning *rechtsstaat*.

Another such example, which at the same time shows how issues of transitional justice touched upon the realm of constitutional jurisdiction and how the judges dealt with insufficiencies of the constitution was the verdict concerning the Human Rights Courts Law and the East Timor trials. The same dilemma, the necessity to choose between upholding justice, i.e. enable that perpetrators are brought to court, and upholding the law, i.e. the constitutional non-derogable right not to be tried on a retroactive legal basis. The majority opted for justice, but with a highly problematic interpretation of the constitution: Allowing a non-derogable right to be derogated under certain circumstances set a precedent that could be invoked in order to derogate other non-derogable rights and thus work to the very detriment of the principle the judges opted to uphold. Even from among their own ranks the majority of the judges was harshly criticised and perceived as overstepping boundaries here.

As I had indicated above, one could theoretically think of other alternatives. With reference to the principle of judicial self-restraint the judges could have considered handing back both mentioned problems to the institution in charge of constitutional amendment, thus strengthening the principle of separation of powers. The question is, however, whether such a move was a viable option considering the Indonesian political situation. “The constitution’s human rights articles are as good as you could get it at the time”, one interview partner told me. And still today the feeling seems to be that one should rather not touch these provisions. Powers of restoration still have to be reckoned with in Indonesia.

In my conversations with representatives of civil society, parliament, and government, I frequently got to hear that specifically legislators are voicing concerns about the court becoming too powerful. And such concerns are well known to the court. As one interview partner told me, especially Chief Justice Asshiddiqie often talks about the same and advises caution. If the court is continuously viewed by both executive and legislative as intruding too far into their sphere, the danger is that these two branches of government might at some stage react. As legislators they could limit the competence of and/or the access to the court in an amendment of the Constitutional Court Law. Another means at their disposal to influence the court is their competence to select the majority of the next generation of judges. “The judges should be selected by a judicial commission”, one observer told me, reiterating what I heard a number of times: “The judges selected by parliament and government are political appointees.” As can be seen from the analysis above, the current six judges selected by legislators are certainly not en bloc ruling predominantly in favour of government and parliament. But this does not mean that their successors will act likewise.

Concerning the mentioned fears of the court turning into a “superbody” one must nevertheless ask how substantiated the same are, how powerful a position a constitutional court can really have in a state in which the rule of law is not yet firmly established. Given the fact that the court does not have any sanction mechanisms at its disposal, government and parliament might be tempted to simply disregard its rulings. Constitutionally, if the president fails to uphold the constitution and the law this can lead to impeachment. That, however, has to be initiated by the DPR which as a co-legislator will most likely not have much interest in doing so. And if government and parliament are perceived by the public as not fulfilling people’s rights this might – might – have consequences at the ballot box. If and how depends on many factors and here is not the place to discuss the same. But even presuming that it could have some effect, it necessitates or rather presupposes that people know about the problem. Publicity is thus in the

court's very own interest as it does not have many other means at its disposal to further the implementation of its rulings.

After two and a half years, it is half-time for the judges. No doubt, they and the court staff have achieved a lot in this brief period. The court has become a relatively established institution which contributes considerably to Indonesia's transformation towards a more democratic *rechtsstaat*. How this transition phase poses its very special challenges to the court has been shown above.

For an enhancement of rule of law and democracy in Indonesia it is thus essential to strengthen also its new constitutional court. Further institutionalisation and capacity building are crucial, not least to ensure a smooth transition in 2008 which might see nine new judges on the bench. And further socialisation of the court's work is important as it will contribute to strengthening both the standing of the court and people's consciousness of democratic *rechtsstaat* principles. Various forms of international cooperation and support can be helpful in this respect, be it through official cooperation between constitutional courts, through support for capacity building by way of exchange and other programmes or through support for the court's infrastructure or socialisation efforts.

In my view a broad access to the court is of utmost importance, not only, but especially for a country in transition. Thus any narrowing of the relatively broad access Indonesian citizens enjoy today should be guarded against. As a possible limitation of this access could be in reaction to the court being perceived as constantly overstepping boundaries, it is important that all three branches of government respect the principles of checks and balances and of separation of powers. Hopefully, a durable and sustainable equilibrium can be achieved so that the court can become firmly rooted in the Indonesian political system and in Indonesian society and contribute its share to enhancing democracy, rule of law and human rights protection.

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¹ The version on the homepage of the Constitutional Court is in two parts, whereby the second part lacks the pagenumbers. For reference purposes I have added them, continuing counting from part 1.

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