

## **Chapter IV**

### **THE LEGAL PROFESSION AND EDUCATION**

#### **A. JUDGES**

##### **The status of Judges in Indonesia.**

During the colonial era, Judge (*Hakim*) in the *Hoogrechtsthoof* and *Raad van Justitie* were officials (*pegawai*) completely separate of the government. Meanwhile, the colonial government established special courts for the indigenous/native population known as *Landraad*. All Heads of the *Landraad* on the islands of Java and Madura and almost all *Landraad* Heads on the other islands had the effective status of government official (*pegawai pemerintah*) under as such under the direct authority and control of the Department of Justice. In fact most of the *magistraatsgerecht*, *regentschapsgerecht* and *districtgerecht* were ordinary government officials that were appointed to serve as judges at those courts.

During the Sukarno government the function of the judiciary in general and the role of judges in particular were placed in the outer circle of State power. State power during this period was clearly dominated by the executive. The independence of the courts was not acknowledged and to a greater degree legislated against. This is explicit in Law No. 19 of 1964 on the Basic Provisions of Judicial Power which states that all institutional instruments of judicial power are subordinate to the President as the Great Leader

of the Revolution. Furthermore, this law purported to grant the President the necessary power to intervene in judicial matters when cases were being decided. This power was presumably to ensure the protection of the public interest but neither the Law nor the Elucidations to the Law placed any real constraints on this power which would have protected the power from being abused for personal gain or other reasons.

During the Soeharto regime (or as it is most often referred the 'New Order'), the matter of judges official status was regulated indirectly through Law No. 14 of 1970 which simply stated that Judges are to be appointed by the President (Art. 31). Obviously, this implies that an appointed Judge is in fact a government official and subsequently subject to all the prevailing laws and regulations that govern the actions and behavior of State or government officials. This situation was further exacerbated by the enactment of Law No. 8 of 1974 on the Basic Provisions of Judicial Power which stated that Supreme Court Judges are State officials and that Judges appointed to lower courts are civil servants. Judges of the Supreme Court, including the Chief Justice, are not simply appointed by the President but are in fact appointed by the President on the recommendation of the Parliament (Law No. 14 of 1985 Art. 8 on the Supreme Court).

After the fall of the Soeharto New Order regime in 1998, the Peoples Consultative Assembly (MPR) passed MPR Resolution (*Ketetapan MPR/ TAP MPR*) No. X / MPR / 1998 on Basic Provisions of Development Reform in the Framework of Ensuring and Normalizing National Life. This resolution allowed for a real separation of the functions of the judiciary and the executive. In 1999, Habibie (the then President) issued Presidential Decree No. 21 of 1999 on the Formation of a Joint Working Team for the Implementation of TAP MPR No X / MPR/ 1998 in Relation to the Explicit Separation of the Functions of the Judiciary and Executive (Joint Working Team) under the Coordination of the Minister for State for State Administrative Reform. Two of the teams'

recommendations dealt with the need to establish the one roof system in the interests of the management of court administration and the need to change the status of judges from civil servants to State officials.

These recommendations were then implemented in Law No 35 of 1999 on Amendments to Law No. 14 of 1970 on the Basic Provisions of Judicial Power and Law No. 43 of 1999 on Amendments to Law No. 8 of 1974 on the Basic Provisions on the Ordinance of the Civil Service. Law No. 35 of 1999 allowed the Supreme Court to take over the organization, administration, and financial matters relating to the judiciary, which had previously been the authority of the Department of Justice and Human Rights. This arrangement was known as the 'one roof system'. Law No 43 of 1999 changed the status of judges from civil servant (*pegawai negeri sipil*) to state official (*pejabat negara*). This status change was further strengthened under the provisions of Law No. 8 of 2004 on the Amendment of Law No 2 of 1986 on General Courts (*Undang-Undang Peradilan Umum*), which stated that the judge of the general court is a state official whose duty is to implement the provisions of the Law on Judicial Power.

### **The Appointment of Judges**

Under Law No. 8 of 2004 the judges of General Courts are appointed and dismissed by the President on the recommendation of the Chief Justice of the Supreme Court. In order to be recommended by the Chief Justice for appointment a prospective judge must first be recognized by the government as a Judge Candidate (*Calon Hakim*). All Judge Candidates are required to have qualifications in law and experience in the practice of law. Furthermore, the Judge Candidate should have successfully participated in and completed a series of examinations and training over approximately two years prior to their acceptance as a Judge Candidate. Once a Judge Candidate has been accepted they will then complete at least a 1-

year internship at a number of different District Courts. On the successful completion of the internship the Chief Justice of the Supreme Court at their discretion will recommend to the President that the Judge Candidate be appointed as a judge.

## **B. PROSECUTOR**

The task of prosecuting a criminal case through the General Court (*pengadilan umum*) system is the responsibility of public attorneys, public prosecutors, and prosecutors (*Jaksa*). All prosecutors and prosecuting activities are to be administered by the *Kejaksaan Republik Indonesia* (Public Prosecution Services of the Republic of Indonesia or PPS). This PPS is a governmental organization established by Law to implement and execute State authority with respect to the prosecutorial activities and other duties as described in the Law. The hierarchy of the PPS is described below in descending order:

- (1) *Kejaksaan Agung* (The Office of the Attorney General). The Attorney General is the highest ranking authority within the PPS. The head office is located in Jakarta and there are representative offices throughout Indonesia and its jurisdiction is inclusive of all the sovereign territory of Indonesia.
- (2) *Kejaksaan Tinggi* (State Attorney) is the authority which possesses the jurisdiction at the provincial level to prosecute cases. The offices of the *Kejaksaan Tinggi* are located in the capital city of the province.
- (3) *Kejaksaan Negeri* (District Attorney) is the authority which possesses the jurisdiction at the regional level to prosecute

cases. The offices of the *Kejaksaan Negeri* are located in almost all regional centers.

### **Duties and Authorities of Prosecutors**

The roles, duties, and authorities of prosecutors within the Indonesian judicial system has developed and changed throughout Indonesian legal history. In the period after Indonesia's independence, the two central activities of law enforcement, investigating crime and prosecuting criminals, was integrated into one organizational system. The 1951 Emergency Law (Law No. 1/Drt of 1951) provided that public prosecutors would supervise and coordinate the investigative instruments of the police. This included conducting their own further investigations and providing direction, coordination, and supervision of the police. In 1955 (Law No. 7/Drt of 1955) the Prosecutors were made the central investigators for economic crimes, including investigation of public corruption. This central role was expanded to include customs and smuggling (Law No. 73 of 1967) and corruption (Law No. 3 of 1971). This integrated system had the advantage of insuring that evidence sufficient to ensure convictions would be produced in court. It had the disadvantage of centralizing all the powers in one place with few institutional checks and balances.

In 1981 as part of an overhaul of Indonesian criminal procedure, a committee made up of the leaders of the police, prosecutors, and judiciary recommended separating the functions of the police and the prosecutors in order to create a much-needed level of checks and balances. These recommendations were codified in Law No. 8 of 1981 on Criminal Procedure which generally restricted the previously expansive role of prosecutors to the prosecution of crime only. Prosecutors could not investigate crimes except when investigating public corruption, smuggling, and subversion. This is known as, and is referred to, the residual power of prosecutors to investigate crime.

While on face value there are a significant number of benefits to be derived from the 1981 law, the reality is that it has resulted in an increasing lack of cooperation between the police and prosecutors and the development of an unhealthy institutional rivalry. This usually leads to competing claims of incompetence between the police and prosecutors about the quality and value of evidence collected and submitted by the police in dossiers that are to be used by the prosecutors to secure a conviction against the alleged criminal.

In 1991 the Attorney General Law (Law No. 5 of 1991) provides prosecutors with additional authority to complete the dossier where it is deemed insufficient to secure a conviction, particularly with respect to the carrying out of any further examination that may be required to complete the dossier to the satisfaction of prosecutors prior to the dossiers submission to the relevant court. Although these provisions did provide additional power to the prosecutors it still did not permit them to interview the accused.

The mandate of the prosecutors has undergone a number of important and significant changes in the recent past, particularly during the New Order where prosecutors represented the interests of the State in securing convictions in criminal cases. Clearly, this meant that the prosecutorial service was not independent and not free from the influence of government. Since the fall of the New Order government the prosecutorial service has focused on development of a sustainable rule of law and developing into its role as the guardian of the public interest. These new roles and developments are plainly seen in the PPS's willingness to engage in public debate with regard to the performance or non-performance of its duties and functions, particularly with respect to outstanding corruption cases.

In July 2004, Law No. 16 /2004 on the Public Prosecution Service was enacted (*Undang-Undang Kejaksaan Republik Indonesia*). Article 30 of this Law describes in a more

comprehensive and broader manner the duties and powers of prosecutors; namely, to prosecute criminal case, to implement final and binding judicial decisions, to investigate special crimes enacted by laws (corruption and smuggling), to complete dossiers, and to conduct further investigation in certain circumstances.

Furthermore, prosecutors are also granted powers to represent State or government officials (the executive) in civil cases and State administrative cases. The law demands that prosecutors participate and play an integral role in the maintenance of public order including to enhance public awareness of the law; to assist in the development of sustainable law enforcement policy; the control of publicly published and disseminated materials; the control of identified threats such as religious sects (*aliran kepercayaan*); to prevent the abuse of religion and eliminate blasphemy; to conduct legal research; to assist in legal development and law reform; and, to maintain criminal statistics.

### **C. LAWYERS and ADVOCATES**

The Indonesian legal profession can trace its roots back to the Dutch colonial era and the two types of lawyer that practiced in the jurisdiction; namely, *pokrol bambu* (*zaakwarnemer* or native/indigenous lawyer) and *advocaat en procureurs* or advocate. Both types of lawyer consulted and assisted people with legal problems and also were primary players in the litigation process.

However, there were also differences. The two major differences dealt with professional requirements and the venue in which they were allowed to represent or assist their clients. In order for an advocate to practice it was compulsory for them to hold a Master of Law degree. Furthermore, an *advocaat en procureurs* provided legal services for Europeans throughout the colonial court

system including the District Court (*Residietie-Gerecht*), the Appellate Court (*Raad van Justitie*), and the Supreme Court (*Hogerechtschof*). In contrast, the Dutch colonial government did not require the pokrol bambu to have any legal education or even a legal background as neither was considered to be of critical importance to the intended functions of the pokrol bambu. The function of the pokrol bambu was to provide legal services for and to the indigenous population throughout the native/indigenous court system; namely, the *Landraad*, *Districsgerecht*, and *Regenstschaps-gerecht*.

The Dutch colonial government recognized the functions and duties of both advocates and pokrol bambu by enacting *Staatsblaad* 1847 on Judicial Organizations and Justice Policy (*Reglement op de Techterlijke Organisatie en het Beleid der Justice*) and *Staatsblad* 1927-496 on Assistance and Representation to Parties in Civil Cases at the Native/Indigenous District Court (*Landraad*).

*Staatsblad* 1847-23 was the first attempt by the Dutch colonial government to establish a legal regulatory framework setting out the rules of legal practice in Indonesia (or at that time the Dutch East Indies). The regulatory framework included provisions for advocates to be supervised by judges sitting on the appellate courts and *Staatsblad* 1927-496 set out provisions designed to protect indigenous clients from any malpractice and manipulation that may arise as a result of retaining the services of untrained pokrol bamboo representing clients that possessed even less knowledge of the law and the legal system. The structure of the legal system was prone to abuse and corrupt practices within both the judiciary and the government, a concern that remains even to the present day.

## **Laws and Regulations for Advocates**

In the post independence period specific laws were enacted to address matters relating to the practice of law in Indonesia, such as Law No. 12 of 1970 on the Basic Principles of Judicial Power (Law 14/1970). One issue that received particular attention was legal aid for clients and the obligation on advocates to provide legal assistance to those that require it. This is highlighted in Law 14/1970 which states that legal aid must be made available to individuals that may require it at any point in the legal process. Furthermore, the Criminal Procedure Code (Law No. 8/1981) enumerates the rights and obligations of advocates including an obligation to provide legal assistance to individuals through both the investigative and trial phases of cases.

The issue of regulating the behavior and acts of advocates in Indonesia through the enactment of specific legislation has always been a source of contention, conflict, and controversy. Many advocates hold a belief that the enactment of laws infringes on their professional independence and amounts to State interference in the performance of their functions. The concept of professional autonomy, although not unique to Indonesia, is premised on the belief that self-regulation of advocates is the best method to ensure a competent profession. In contrast, the government believes that regulation by the State is the most effective method of maintaining professional and political stability. The concept of political stability and the advocate profession became intimately intertwined during the Suharto era as a means of controlling the profession and removing the threat that knowledgeable advocates would oppose the government's policies on human rights and democratic grounds.

However, the need for formal acknowledgement of the advocate's role in the judicial system was a primary motivating force for advocates to become involved in the drafting and enactment of Law No. 18 of 2003 on Advocates (Advocates Law). The preamble to the Advocates Law endeavors to justify the enactment of the law:

“...that in order to ensure that judicial powers are free from all outside interference and intervention, an independent, autonomous and accountable Advocates’ Profession is required to ensure justice, honesty and legal certainty for all seekers of justice, as well as to uphold the law, truth, justice, and human rights;

that the independence, autonomy and accountability of the Advocates’ Profession in upholding the law needs to be guaranteed and protected as part of the effort to uphold the supremacy of law”

### **Rights and Obligations of Advocates**

The Advocates Law describes the rights of advocates as follows:

- (1) An advocate shall be free and independent to voice opinions or make statements to pursue a case in which s/he is involved before any court, meanwhile adhering to the professional code of ethics and the provisions of the prevailing laws and regulations;
- (2) An advocate shall be free to perform his/her professional duties to pursue a case in which s/he is involved, while also adhering to the professional code of ethics and the provisions of the prevailing laws and regulations;
- (3) An advocate may not be sued or prosecuted in either a civil or criminal court on account of something s/he has done in good faith as part of the performance of his/her professional duties in the interest of a client before the court;
- (4) In the performance of his/her professional duties, an advocate shall be entitled to obtain information, data, and documents, whether from government agencies/institutions or other parties, where such information, data and documents are necessary for

the pursuit of a client's interest, subject to the provisions of the prevailing laws and regulations;

- (5) An advocate shall be entitled to have the confidentiality of his relationship with a client respected, including a prohibition on the seizure or inspection of case files and documents, and on the electronic monitoring of communication devices used by an advocate.

Furthermore, the Advocates Law states a number of obligations upon advocates, namely:

- (1) An advocate in the performance of their professional duties shall be prohibited from differentiating between clients based on gender, religion, political affiliation, ethnicity, race, or social and cultural background;
- (2) An advocate shall be required to maintain confidentiality of all matters that come to his/her knowledge or which s/he is informed by a client based on their professional relationship, unless otherwise stated by the law.
- (3) An advocate shall be prohibited from holding any other position that could give rise to a conflict of interest with the duties and dignity of his profession.
- (4) An advocate shall be prohibited from holding any other position that requires such services that could prejudice the Advocates' Profession, or reduce the advocate's independence and freedom in their ability to perform their duties and responsibilities.
- (5) Should an advocate accept appointment as a state official, the advocate shall not be permitted to practice as an advocate during the term of appointment.

### **Appointment and Disbarring of Advocates**

According to the Advocates Law only those that have successfully graduated from an institute of higher learning

specializing in law may be appointed as advocates once they have completed a professional education program approved by the Bar Association. Advocates may be dismissed for breaches of the Advocates Law or the Bar Association's Code of Ethics both of which enumerate a number of reasons that would lead to an advocate being disbarred.

#### **D. NOTARY**

Notaries in civil law countries have at least three principal functions, namely; drafting important legal instruments, authenticating and certifying documents that will serve a particular evidentiary function, and they act as an office of public record. Therefore, to maintain the evidentiary value of the documents produced a Notary is required to retain an original copy of every document that they produce, authenticate, or certify and upon request or pursuant to any prevailing laws and regulations furnish authenticated copies to the requesting party. An authenticated copy is deemed to have the same evidentiary value as the original document at law.

Until very recently the legal framework regulating notaries remained an antiquated set of Dutch colonial regulations; namely, *Staatsblad* 1860 No. 3 (“*Reglement op Het Notaris Ambt in Indonesie*”) and published in the State Gazette (*Lembaran Negara*), No. 101:2 of 1945. This was complemented by the Ordinance of 16 September 1931 on Notary Honorariums, Law No. 33 of 1954 on Deputy and Substitute Notaries (*Wakil Notaris and Wakil Notaris Sementara*) published in State Gazette (*Lembaran Negara*) No. 101 of 1954, and Government Regulation No. 11 of 1949 on Notarial Oaths (*Sumpah / Janji Jabatan Notaris*). However, the recent enactment of Law No. XX on Notaries was a result of the perceived

need to modernize the law on notaries and to ensure that the prevailing provisions of the law reflected the prevailing social conditions within modern Indonesia.

Essentially, notaries do not have any competition for their services as the current status of the law states that notaries are the only public entities that may perform these functions of producing, authenticating, or certifying documents to provide them the necessary force of law to make them binding upon the parties to them.

Furthermore, the prevailing laws and regulations in a number of areas strengthens the monopoly that notaries have in providing these specialized services to the community including laws and regulations in Family Law, Company Law, Corporate Documents Law, Archive Law, Agrarian Law, and Capital Market Law, among others. However, the role of a notary was much more expansive than just producing, authenticating or certifying documents, as notaries played a significant role in inheritance and real property transactions, an impartial witness to commercial activities such as at the draw of a lottery or some other prize giving competition. Notaries have historically played an important role in financial agreements, underwriting agreements, the authentication of Articles of Incorporation and Association, constitutional documents for Political Parties, legalizing documents and witness' for the converting of documents (Archival Law and Document Corporation Law), and many other activities.

Finally, the duties and functions of Indonesian notaries are more than just the clerical and administrative functions associated with the creation of legal documents but notaries provide an important contribution across a broad spectrum of social activities as noted above ensuring that notaries are an integral party of the Indonesian legal profession.

## **E. LEGAL EDUCATION**

Law and legal education has occurred as a matter of necessity throughout the history of humanity and not always in a structured or regular format. In this regard Indonesia is no different from any other country with respect to the development of legal education and as such has and continues to encounter many of the issues encountered by others. Nevertheless, Indonesia can trace its modern legal educational institutions and form to the Dutch and the colonization of Indonesia by the Netherlands through to a period after the conclusion of World War II and the eventual full independence in 1949. However, it is important to note that even to this day much of the Indonesian legal system still maintains remnants of Dutch colonial laws and regulations. Despite the more than 300 years of colonization by the Dutch it was not until 1909 that the Dutch colonial government considered establishing a secondary school for law or "*rechtsschool*" to train the native population in legal administrative practice to work as clerks in the burgeoning district court system. Initially the *rechtsschool* was not an institute of higher education. As the demands from the indigenous population increased along with the need to distinguish the quality of education provided the Dutch upgraded the *rechtsschool* into a *rechtshogeschool* or an institute of higher education for law studies in 1924. The school was established in the colony's capital, Batavia. In the post-World War II period where Indonesia gained its independence from the Dutch the *rechtshogeschool* became the faculty of Law at the University of Indonesia.

In the period after World War II the demand for legal education has increased exponentially and there are now more than two hundred accredited law faculties stretching the length and breadth of Indonesia. The potential profits that education can generate for private educators and companies providing private education services has meant that there has been significant growth

in the provision of private education including legal education. This has meant that two parallel legal education systems have developed; namely, State or public education based faculties of law and privately-owned institutes of higher education with a faculty of law.

Of the more than two hundred accredited law faculties throughout the country, a mere twenty seven of these are state-owned or approximately 10%. The majority of these state-owned law faculties offer undergraduate programs that allow students to graduate with a Bachelor of Laws or LLB (“*Sarjana Hukum*” or “*SH*”). Only a small number of these state-owned institutions have sufficient resources available to them to run post-graduate law programs at the Masters level and even fewer still at the Doctorate level. Legal education in Indonesia is undergraduate in nature and students are not required to have a first degree before enrolling in a legal education program. This is similar to the systems offered in Europe and Australia. It is important to note that one of the primary differences in the Indonesian legal education system from that of Europe, Australia, and the USA is that the system does not currently cater for a professional skills component within the program. An Indonesian law degree in this regard is considered to be general in nature preparing students for further academic study or employment in any other number of professions outside of law rather than necessarily equipping them for the professional practice of law.

The Indonesia legal system is based on Minister of Education Decision No. 17 of 1993 (the “Decision”) which stipulates the basic framework of legal education at university level law schools that is to be universally taught throughout the country. The purpose of the Decision is not only an attempt to standardize the study of law but also an attempt to reduce the disparity between the burgeoning numbers of law faculties offering a legal education. The basic premise of the law curriculum is to produce graduates with legal skills (“*kemahiran hukum*”) that are ready for immediate employment in the law profession. The concept of ‘ready for employment’ does not distinguish between public and private

practice and the Decision can reasonably be construed as preparing law graduates with generic legal skills that are applicable to both the public and private practice of law. An initial and persistent criticism of the standardized law curriculum was and is that it is in fact too academic and too generic in nature to adequately prepare graduates for anything but further academic study. It is important to distinguish the national law curriculum from other regulations that govern the provision of continuing legal education and professional skills such as advocacy training. The overall responsibility for setting the law curriculum resides with the Consortium for Legal Science (the “CLS”) within the Ministry of Education.

The current CLS curriculum is divided into two main areas; namely, compulsory subjects (the national curriculum) and elective subjects (the local curriculum). The national curriculum is inflexible and contains a list of law subjects that must be taught by each accredited faculty of law. These national curriculum subjects in essence do not differ substantially from law faculties located in any other part of the world and include such subjects as ‘Introduction to Law’, ‘The Indonesian Legal System’, ‘Civil Law and Procedure’, ‘Criminal Law and Procedure’, ‘Administrative Law’, and ‘Public International Law’, among others. The local curriculum, in contrast, is determined by each individual faculty and as such reflects the strengths and weaknesses of the staff on each individual faculty. Although this system is not resistant to change, any changes that have occurred have been labored and slow. However, it is interesting to note that increasing emphasis is being placed on the provision of professional legal skills at the under-graduate level although a comprehensive curriculum of professional skills is still not readily available to be taught nor would most law faculties have the necessary resources, financial or human, to support such an initiative.

One of the major criticisms of the current national law curriculum is that it does not provide graduates with the necessary analytical skills that are required to adequately apply the generic

legal skills that their law school educations have provided them. However, there is perhaps a more fundamental criticism that must first be leveled to understand the plight of legal education in Indonesia; namely, the *ad hoc* application of the national legal curriculum and the disparity in resources, human and others, between law faculties throughout the country. Although the universal application of the national law curriculum may alleviate some of the disparity issues between law faculties in Jakarta and the regions, the reality remains that many of the leaders in legal education are concentrated in Jakarta, which leaves only the most committed of legal educators in the regions outside of Jakarta.

Finally, legal education is the most critical component of the development of a sound legal profession in Indonesia, as without it the enforcement of the law by highly-qualified and skilled legal practitioners is not a reality but an unsustainable fantasy. The necessary building blocks for a comprehensive legal education sector are already in place but this infrastructure and the ongoing commitment to the development of legal education needs to be clarified and regulated to ensure that all objectives are successfully met.

