CHAPTER III

SUMMARY OF PUBLIC HEARINGS

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The third part of this report describes the responses of the public, particularly the legal community, to the operation plan of the National Law Commission (NLC). All the responses heard during the public hearings became material of evaluation for the NLC in deciding the content and sharpening the priorities of its working plan.

A. Sub Commission A: 30 May 2000, Hotel Indonesia, Jakarta.

1. Introduction

The judicial system is the main pillar of the administration of justice. Hopes and trust rest on it. When the judicial system is not able to give a feeling of justice to the community, a planned and systematic effort is required to improve the situation. The efforts made must have a bottom up approach, in the sense that all components of the society should be involved and provide assistance in the form of ideas that are deemed the best to find a solution to the judicial system's problems. In a broad outline, the issues being faced are: corruption, collusion and nepotism. The following is the proposal arrived at during discussions.

2. Establishment of a Corruption Court

Establishment of a corruption court as a special chamber in the public court administration to handle corruption cases, such as the commercial court in the public court administration, is deemed quite necessary to handle corruption crimes.

3. General Training

As a follow up to the establishment of a corruption court, training for judges who will handle corruption cases is urgently needed. The training material that is urgently needed is material on financial crimes including corruption crimes in the field of banking and mark ups of development projects.

4. Recruitment System and Career in the Administration of Justice

The recruitment system of judges by court institutions should not be separated from the higher education that produces 'sarjana hukum' (law graduate). One-roof education system such as in Japan for law graduates who will be active in the practical world can probably be used as an example for Indonesia to solve the problems of the low quality of 'sarjana hukum' who follow recruitment courses to become judges.

At present it is deemed necessary to set up a Judicial Commission for the recruitment of Supreme Judge candidates. The recruitment pattern will run smoothly if control is conducted for judges within a continuous time.

The career of a judge should be based on a merit system taking into consideration the judge's education and performance. In promoting/mutating a judge, consideration should be given to the following matters: the existence of a management system including: reports and complaints, the handling of abuse of authority by a judge, the 'dirty play' conducted by an element of the judicial system; the examination of decisions that can be used to assess the quality of judges in understanding the law; and a dissenting opinion institution, e.g. dissenting opinions by judges in making decisions should be recorded and visible and used as performance indicators for promotion/mutation of judges.

Attention should also be given to the welfare of judges. It is quite possible that the desire of a judge to seek an additional income to meet his needs could lead to corruption.

5. The Supreme Court

The independence of the judiciary and the reform of the Supreme Court will hopefully create a constitutional state within civil society. The existence of Law No. 35/1999 re Amendment of Law Number 14/1970 re Basic Judicial Authorities provides a great opportunity for the reform of the Supreme Court.

There is a concern, however, that the independence of the judiciary may not be appropriate if the current conditions do not change as the Supreme Court could use this independence to abuse the authority it will have.

The Judicial Commission, whose members will be elected by the House of People's Representatives (DPR), should play an active role in supervising Supreme Court Judges. Improvements within the Supreme Court would strongly influence the Higher Courts and the District Courts to follow.

6. Court Administration

The authority of the Secretary General is limited to the administrative function of the Supreme Court, although he is not involved in the handling of cases.

Accumulation of cases has become a very serious problem at the Supreme Court. Straightening up the law of procedure should include: studying the administrative selection of incoming cases before trial, creating optimum alternatives for the solution of a case, and a steep high penalty for the party submitting an appeal/cassation if defeated at the appeal/cassation level.

The public has the right to access certain information from state institutions as part of their accountability to society. The Supreme Court or the judicial institutions thereunder are expected to disclose information to the society. If more information can be accessed by the public, the chance for the occurrence of corruption, collusion and nepotism will be reduced.

B. Sub Commission F: 31 May 2000, Hotel Indonesia, Jakarta

1. Introduction

To have an integrated criminal justice will require the government and the DPR to create criminal law procedures, both materially as well as formally. During that process there will be legal apparatuses that will be responsible for the enforcement of the legal marks or the said legislation so that justice can be achieved. But it is quite often that discriminative practices in the implementation of laws by the legal enforcement apparatuses are found because of the existence of loopholes that can be exploited, or the legal apparatus concerned does not have much professionalism. Based on the above, there are a number of issues that should be taken into consideration for the achievement of an integrated criminal justice system that is based on justice, namely:

a. The law material, both formal as well as material, that creates the confusion (not compatible and compromising) as well as criminal justice bodies (such as the police, the prosecutors etc.)

b. Human resources

c. Selected justice system.

2. Alteration of Legislation

There is an urgent desire within society for the realization of the supremacy of the law through the implementation of a reliable legal system, including an integrated criminal justice system. This system requires the independency of the respective sub-systems that are at the same level but have a similar objective. Among the said sub-systems, there must be a mechanism that controls each other. At present, this cannot be carried out orderly because the laws regulating the said sub-systems are the product of the old (New Order) government, which was repressive, so that the sub-systems are still contaminated and continue to place themselves as part of the government, not as the servants of the law. As to the institutions that are related to the criminal justice system, there are some notes that must be taken into account if we want to change the legislation regulating their tasks and authority, namely:

a. The Courts

The main purpose of the judicial authority-it's raison d'être - must be restored, namely, the realization of a feeling of justice by the public. Viewed from the criminal justice system, a judge must be positive, meaning that he must use the law in a positive manner to reach the truth.

b. The Prosecutors

Considering their strategic role as providers of a public service, the independence of the prosecutors is an important factor that must be pursued by the prosecutors' corps. Their position although under the Ministry of Justice is not a problem because the most important thing is its independency as occurred before 1959. At present it is necessary to consider whether the position of the Attorney General is appropriate, because many circles are doubtful about its independency if it remains under the President. Furthermore, laws and regulations that contradict each other and are compromising have placed the prosecutors in a dilemmatic situation. The law on Customs and Excise, for example, knows only one investigator, namely the PPNS, but its implementing regulation (PP) also mentions a police investigator. Issues such as this need close attention.

c. The Police

Basically the task of the police is to guarantee and maintain 'Kamtibmas' (security, order and public safety), to protect and serve society through its preventive functions that guide and invite the population to help maintain the 'Kamtibmas' together. The authority of the police to conduct investigations often causes a problem as there is another institution, such as the prosecutors' office, that has a similar function. This needs to be studied so that there will be no institutional jealousy and the most important element will be the creation of an integrated criminal justice system.

d. Penitentiary Institutions

The concept of penitentiary that has existed so far is the old concept that is based on the concept of incarceration. Whereas on the other side the reformation of the implementation of punishment through the penitentiary system has not yet been comprehended or fully adopted as an integral part of an integrated criminal justice system. It is quite clear that the penitentiary system cannot optimally play its role and carry out its function. On top of that, the task of self introspection by judges has not been carried out as it should.

C. Sub Commission C: 6 September 2000, Hotel Indonesia, Jakarta

1. Introduction

The MPR's achievement in making amendments to certain articles of the 1945 Constitution, particularly to article 5, article 20 (1) and article 23, will have a constitutional influence on state institutions which have to adjust themselves to the reform agenda expected by the public. For the DPR, these amendments will have a positive influence on how people judge its performance. But, on the other hand, it also brings a remarkable consequence, namely DPR members do not yet possess the capability of carrying out their legislative function.

In essence, big changes have been occurring in our state administration. The most important aspect of the said changes is based on three fundamental elements: first, the constitutional element that is related to the aspect of the state administration instrument; second, the institutional element that is related to the institutional reformation; and third, the element of the state administration tradition that is related to the culture of law.

2. The Consequence of Amendments to the 1945 Constitution

The amendments to the 1945 Constitution, have positive sides as well as bear consequences. For instance on the format of the endorsement of laws mentioned in article 30 (4), a draft law that has been unanimously agreed (by the DPR) shall be endorsed by the President. But if connected to the involvement of the President, the said matter shall be of mutual agreement. In this case, paragraph 5 in the same article, states that the time of endorsement is limited to 30 days, giving rise to an interpretation that the endorsement by the DPR is similar or identical to the veto right of the President such as that already amended. The concept of endorsement can also be formal not material in nature, with the reason that with the words 'mutual agreement by the President and the DPR' the possibility of creating a new format might be taken into consideration.

In addition, the mechanism for discussions during the legal drafting should also mention the position of the DPR and the government in making an endorsement, namely it must be at the consent of the President as Head of the government, and the DPR. There must also be a regulation on the enactment of laws by the DPR and the endorsement by the President as Head of State.

3. Urgency of Legislative Section in the DPR

The weakness of the DPR so far is its lack of initiative in carrying out its role and function. This is evidenced by the Data of Legislation drawn up by the DPR and passed in the first period. From 36 draft laws discussed since the establishment of the DPR in October 1999, 23 draft laws have been initiated by the Executive branch of State.

Actually the DPR could be more productive and could show better results if it was able to make its Legislative Section effective. This Legislative Section which should act as a support system should possess a team of assistants who are experts in their respective fields.

Regarding this Legislative Section, many circles suggest that the DPR should recruit experts in a number of fields, i.e. not only experts in the technique of legal drafting but also experts having other expertise in the context of carrying out a supervisory function such as in the field of banking. To reduce the budget, the status of these experts need not be permanent.

In addition to the ideas regarding the Legislative Section supporting the implementation of the legislative function of the DPR, there is another idea, namely the establishment of a commission like a standing committee, for example a Legislation Commission or Law Drafting Commission. It could also be more institutionalized with the name *'Badan Perancangan Undang-Undang'* (Law Drafting Body). To make the DPR more complete, particularly the DPR's General Secretariat, a law on its administration system is needed in connection with the administration of legal documents such as the State Gazette, so that laws need no longer be published in the State Gazette as currently done by the State Secretariat.

At present the most important priority to be carried out by this Legislative Section of the DPR, or the DPR itself, consists of three groups of legal drafting issues. First: determine the working priorities in the political, economic and social fields. Second, make amendments to old legislation that is no longer in line with the developments and demands for reform and the democratic life of the nation. Third, draft laws to make adjustment to legal developments and international conventions, particularly in the political and economic fields.

To improve the quality of the legislative products of the DPR, there are two aspects that should be taken into account. First, the practical technical aspect, namely the legislation process, involving the full dedication of legal drafters in the framework of drafting legal instruments. Second, the aspect of expertise and specialized knowledge, which so far has apparently been totally neglected. In drafting a legal instrument there are a number of principles that should be taken into consideration by experts, so that no contradiction will occur in the final result.

D. Sub Commission E : 7 September 2000, Hotel Indonesia, Jakarta

1. Introduction

In the framework of restoring Indonesia's economy through a market mechanism, with emphasis on the people's welfare, the participation of the public, in particular the legal community, is very important. The involvement of the public is necessary because stability, predictability and fairness should be ensured so that economic restoration can be achieved more quickly.

2. Indicators of Economic Recovery

Various indicators can be used to assess the efforts made for economic recovery, among others:

a. The capital market index

b. Investments level

c. Availability of employment

d. Prices and currency rate.

The law is an instrument which could encourage economic recovery. This means that the law can improve efficiency and reduce transaction costs, thus instigating economic growth. For this purpose the role of the government must be reduced, and a definition of which economic activity becomes the responsibility of the government and which becomes the responsibility of the private sector be made.

3. Optimizing the Role of the Law for Economic Recovery

Optimizing the role of the law to achieve economic recovery is a priority that must be tackled both over a short period and a long period.

The short term priority is closely related to the settlement of debts of private companies. In this case the law, particularly Indonesia's economic law system must be able to make a legal breakthrough to assist the government to increase its revenue.

In solving the issue of the private companies' debts, the government should, improve the law on bankruptcy. But besides that, the government should also prepare a "Restructuring Law" dealing with consequences of solving private companies' debts, particularly as regards their work force. The objective of a Restructuring Law will be that the debtor private company can remain operational during the time it takes to find a solution to the settlement of the company's debts so that it will not disturb the national economy.

In the long term, what must be considered are improvements to the Law on Intellectual Property Rights, the Law on Investment and Capital Market, and the Banking Law. It is also necessary to create laws regulating other aspects needed for Indonesia's future, particularly to anticipate new issues

that are related to the development of technology, such *as a Cyber law* and *an E-commerce law.*

a. Improvements to the Bankruptcy Law

As improvements to the bankruptcy law will be reactivated, it is necessary to think about the participation of preference creditors in the process of the Debt Payment Obligation (PKPU). If the majority of creditors agree to a reconciliation (homologation), in which the reconciliation agreement can be used as the basis for a debtor to continue his business, then the reconciliation will be binding to all creditors.

At present a Team at the Department of Justice and Human Rights has drafted an amendment to the Bankruptcy Law retaining the concept of *Chapter Eleven* in America (particularly in the second part), in which it is possible to apply for the PKPU, not only by the debtor as currently practiced. So all creditors without exception, including preference creditors, will be able to and may decide on the PKPU without losing their preference status, so that if a decision is made, the decision will be binding to all creditors.

b. Improved Investment Legislation

Since Indonesia has become a member of the WTO, the Foreign Capital Investment Law and the Domestic Capital Investment Law will have to be changed or even cancelled to avoid discrimination between foreign capital investors and domestic capital investors. However, not all fields of business should be opened to foreign investment so that it will not wipe out small industries and will allow local industries, particularly small industries, to compete with bigger industries.

In order that small industries can develop, probably a new legislation is needed to help economic growth to spread to the regions. When the Law on Regional Autonomy is implemented, regions will have more authority to develop their economy; also, with the Anti Monopoly Law prohibiting the practice of monopoly by a certain party, and once a new capital investment law giving more authority to regions is created, the law will be able to encourage the development of small industries, and economic growth can spread out evenly to the regions.

E. Sub Commission B : 12 September 2000, Hotel Indonesia, Jakarta

1. Development of a Good Governance System

The development of a good governance system is affected by many factors, amongst others good governance must be based on a professional bureaucracy. A professional bureaucracy means a clean, transparent and responsible government. In order to achieve this, the mass media, NGOs and political parties must have a function of control. This will create a control system for the government apparatus, particularly in the distribution of authorities to various governmental institutions, thus reducing the present accumulation of authority, and at the same time it will create a mutually controlled condition.

With regard to the development of a good governance system, the dissemination of information to the public is the duty of the government. This duty must be spelled out in a regulation regarding the dissemination of information to the public.

Good governance must also be supported by public accountability. Public accountability for all bureaucratic activities of the government demands a clear working system and the existence of a code of ethics for the government apparatus. The straightening up of the government apparatus into an accountable apparatus must take place in order to support good governance. A good education system would have a very big influence in the creation of human resources supporting good governance. Therefore it is necessary to have a law, not a government regulation, on the criteria for holding a position including the educational background and experience required for the position being occupied.

In addition, public accountability can also create a control of the government apparatus to prevent deviations. The participation of the society is needed to provide inputs and complaints, both through formal as well as informal institutions on all deviations happening during the operation of the government.

2. Improved Administrative Law

The reformation of administrative law must contain normative values. It must also pay attention to practical values, in the sense that the law should be used as a basis for the establishment of a government that is responsive to the demands of the public.

The legislation must also encompass modern principles such as: (a) the principle of non-discrimination: ethnic, religious, racial and gender issues; (b) it must be written in simple language that can be understood by lay people and it should not be partial (giving preference to a certain party); (c) wrong practices such as delegating details to lower regulations, where a government regulation is used as an implementing regulation of a law but is not in line with the law concerned. The drafting of legislation should be conducted after making an empirical and normative research so that it will be in line with the aspirations of the public and will not contradict existing laws.

The loss of confidence of the public in the Indonesian judicial system is due to law enforcement weaknesses and interventions made by the government apparatus beyond its authority. Therefore, the need for administrative law reform covering judicial reform, human resources and law enforcement.

The human resources reform can be conducted through education, in which our education system should be directed to produce individuals who have an attitude of openness, togetherness and partnership in their role as government employees. The application of strict sanctions against government apparatus violations should be part of this administrative law reform to ensure proper law enforcement.

F. Sub Commission D : 13 September 2000, Hotel Indonesia, Jakarta

1. Introduction

The legal profession is a profession that is needed by society because this profession is expected to protect the public from possible abuse of authority that may be conducted by the authorities or other strong parties. As well, the public also needs a standard so that in using this professional service the public can expect a minimum service standard. With this standard it is hoped that the enforcement of professional discipline can be achieved as many complaints have been voiced by the public concerning this profession.

2. The Need for Legal Professional Standards

In order for legal professionals to carry out their duties with professional competency and integrity, regulations are needed, amongst others:

a. Requirements on knowledge and minimum practical experience for appointment.

b. Continuous monitoring of the quality of legal professional services

c. Consistent application of the duty to follow legal developments and continuous education

d. Creating regulations on professional standards and professional codes of ethics that give attention to the interest of and are open to the public.

e. Control on the observance of professional ethics.

3. Professional Discipline Standards

At present there are several professional organisations, such as AAI, IKADIN, and IPHI. The above fact causes a difficulty in the control and enforcement of professional discipline, because those who are dismissed from an organization following a discipline violation can easily move to another organization or even establish another organization as a rival.

With regard to this matter, attention should be given to the codes of ethics of existing organizations, because the code of ethics constitutes the spirit of the said professional organizations. An organization will not be respected by the public if its code of ethics is not applied consistently.

4. Implementation of Advanced Legal Training

Advanced legal training should be carried out with the purpose that legal professionals will remain up-to-date with the latest and newest developments in their profession and in society. The education given so far by formal educational institutions or during employment does not guarantee awareness of legal developments in Indonesia.

5. Legal Professional Testing Standards

Legal professional testing standards are meant to meet the minimum needs of a person entering the said profession so that a minimum level of knowledge for a profession can be achieved. Up till now, the High Court has carried out the testing and provided testing standards to those aspiring

to become advocates. It is necessary to note that beginning in 2001 there will be no more testing conducted by the High Court and it will instead be conducted by a professional organization.

6. Accreditation of Professional Education

The difficulty has been to decide which criteria should be applied in order to carry out an orderly accreditation system that will determine the minimum standards of law graduates to become legal professionals. Although accreditation has been conducted, re-accreditation should be conducted periodically so that the results of the accreditation will depict the educational criteria necessary to produce graduates of a certain quality.

In short, there are four issues that should be taken into account in deciding on professional education accreditation, namely:

a. Components of criteria to decide accreditation standards

b. Implementation of the accreditation

c. Accreditation result

d. Periodical evaluation

CHAPTER IV

TERMS OF REFERENCE