CHAPTER IV

TERMS OF REFERENCE

The fourth part of this report depicts the results of the National Law Commission's undertakings (NLC), specifically related to the second duty of the NLC up to this moment namely: "to design a general plan for reform in the field of law". The said product constitutes the terms of reference/guidelines for the working groups.

A. Sub Commission A: Improved Administration of Justice

1. Introduction

To improve the administration of justice in Indonesia involves some urgent issues that need urgent solutions. The issues are: how to improve the administration of justice in trying corruption cases, developing a rational and modern system including an improvement of the careers of judges and registrars, how to reform the Supreme Court and how to reform the administration of justice.

How to improve the administration of justice in trying corruption cases involves finding a method to try corruption cases that have been so socially systematized in Indonesia. In the Indonesian context, the dimension of corruption cases has reached a socially systematic dimension: namely, corruption has invaded all layers of society as well as the social system. A process of 'making corruption as a routine and acceptable means for the implementation of daily transactions' has taken place and has institutionally influenced the behaviour of individuals at all levels of the political, social and economic systems. In this situation, a separate chamber for the trial of corruption cases becomes very important.

Then, how to develop a rational and modern system for the improvement of the careers of judges and registrars so as to become a means of appreciating judges and registrars as the 'spear head' of law enforcement in Indonesia. Also needed are a judicial academy (under one-roof educational system) and a merit system giving consideration to education and performance. Then, with regard to reforming the Supreme Court, this should be an effort towards making the Supreme Court an independent institution. The last issue is how to reform the administration of justice so that an effective and efficient administration can be realized and provide service to society.

2. Issues

a. Improved Administration of Justice in the Adjudication of Corruption

Some issues that should be closely taken into consideration in trying corruption cases:

(i) Legal Instruments

- The fact that law No. 31/1999 re Corruption Crimes is not accompanied by provisional stipulations.
- The need for laws and regulations dealing with the trial of corruption.

(ii) Law enforcers

- A prosecutor assigned with the investigation and prosecution of a case must be independent and not under the influence of an authority. Thus in this case the existing Law on Prosecutors also needs to be amended.
- The existence of the principle of opportunity for the interest of the public that is owned by the Attorney General is not something absolute for investigators. This must be conducted through intensive discussions with the investigators.
- Training is needed for judges entrusted with the trial of corruption cases.

(iii) Supporting Facilities

The availability of supporting facilities should also be taken into account before carrying out a plan for the establishment of a separate chamber at the court in which corruption crimes are discussed.

b. Building up a rational and modern system for the careers of judges and registrars

(i) Recruitment system and judicial careers

It is high time that a judicial academy (under one-roof educational system) be established and becomes a prerequisite for the assignment of judges, lawyers or advocates. A note for the judicial academy, namely, the importance of affordable educational cost and also in-depth discussions regarding the one-roof educational system.

(ii) *Career System in the Administration of Justice*

- This should be based on a merit system that will give consideration to education and performance. This system should look at: reports, complaints and the process of handling abuse of authority by judges; the 'dirty practices' conducted by judicial elements; examination of decisions made by judges to assess the quality of their understanding of the law, also a dissenting opinion record in which the argumentation of a judge in handling a case becomes visible – all this should become a matter for consideration in the promotion/mutation of a judge.

- Supervision needs to be improved by establishing a judicial commission outside of the Supreme Court, and also to conduct recruitment of judges and court clerks. A fit and proper test, for candidate justices could be a "model" for the recruitment of judges and registrars in the judicial system.

- Law No. 35/1999 re Amendment of Law No. 14/1970 concerning Basic Principles of Judicial Authority cannot be easily implemented because this law mentions that all judges are government functionaries, except Supreme Court judges, whereas all judges at judicial level still need evaluation and promotion. Those government functionaries have no supervisor and therefore officials whose positions are above them (not as supervisors) cannot reprimand or promote them. The problem is that the performance of a judge in a District Court, Public Administration Court and a High Court needs to be assessed in order to be promoted to a certain position or to become a Supreme Court judge.

c. Supreme Court

(i) Only rarely has the Supreme Court performed the following functions: material examinations on regulations under Law; supervision of supreme judges, supervision of advocates and notaries, the Circular of the Chairman of the Supreme Court (SEMA) that can function as a letter with special powers (Surat Sakti) and other matters concerning the administration of justice.

(ii) The Supreme Court is expected to be responsible to the public at large through open sessions attended by functionaries of higher institutions of the State and should not be responsible to and cannot be assessed by the People's Consultative Assembly (MPR) as happened during the Annual Session of the MPR in August 2000.

The above problems derive from the need for an amendment to Law No. 14/1985 concerning the Supreme Court.

d. Administration of Justice

(i) Case Management
Some proposals being raised include amongst others:

- Developing cooperation with campuses in making decisions on cases, with a note that it should remain under the coordination of the Supreme Court;
- Reviewing the requirements of cases that need cassation or review;
- A crash program, to handle the backlog of cases should be undertaken immediately, whereas new cases should be handled with a new management system and not mixed with old cases;
- Setting up a task force comprising retired Supreme Court judges that are considered by the public and academics as being relatively good.

The above proposals require an in-depth study.

(ii) Information Management
In addition to the support provided by the media, some matters should be openly informed to the public at large including:

- The type and number of cases received;
- The name of the judge deciding on cases;
- The number of complaints/claims and the level of punishment given to a convict;
- Information on fees for the acquisition of services at the court;
- Information on reasons for mutation and promotion;
- Information on measures taken against a judge and a registrar;
- The process for handling reports and complaints;

- And any other matter that is deemed appropriate for information dissemination.

The above matters constitute very useful information both for assessing the performance of the courts and judges as well as for the formulation of policies and others.

3. Priorities

Areas of priority can be described as follows:

a. The need for a methodology (a systematized scientific method) for the reform of the administration of justice by involving persons within the institutions or involved in the problems to be reformed;

b. The need for training credible judges for the trial of corruption cases;

c. The need for legislation regulating the trial of corruption cases;

d. The need for a merit system, considering education and performance in assessing the promotion and career of a judge;

e. The need for the establishment of a Judicial Commission outside the Supreme Court;

f. The need for the establishment of a task force comprising retired Supreme Court judges that are considered by the public and academics as being relatively good.

g. The need for amendment of Law No. 14/1985 concerning the Supreme Court.

h. The need for public access to information on issues that are appropriate for dissemination.

B. Sub Commission B: Good Governance and Administrative Law Reform

1. Introduction

There are some matters that need to be corrected in order to bring about good governance, namely the role of government law bureaus. A

reorganization of the bureaus should be conducted through the creation of a mechanism of transparency involving the participation of the public, encouraging the accountability of the bureaus in making decisions that affect the public and ensuring effective control by the public. Transparency and accountability will not be easily reached without the improved capability of the individuals working in the government law bureaus, in which the individuals concerned must be able to show a professional attitude and respond to the interests of the public. Empowerment of the public is essential in order to bring about good governance. Therefore the public should know all and any information on existing laws through existing government institutions. To strengthen the institutions, it is necessary to set up an independent institution that functions as an information commission. In order to provide better public service, administrative laws should be reformed and the service procedures should be improved so as to become more effective and efficient. Thus it needs the reformation of individuals assigned with the task of serving the public, in order to bring about orientation changes: public service is the right of the public and should become its ownership. Therefore the public also has the right to submit complaints whenever it receives unsatisfactory service. The complaints should be channeled through an institution specially set up for that purpose.

2. Problems

a. Enhancing the role of government law bureaus

(i) In making decisions that affect the public, the following should be taken into consideration:

- Transparency
  - Disseminating each public decision;
  - Giving the public the right to react to any decision made by government law bureaus, which should then act in response.

- Accountability
  - Giving the public the right to assess the implementation of each public decision;
  - Providing equal opportunity for all social groups to participate in the process of public decision making;
  - Determining priorities in the process of decision making.

(ii) Drafting of laws and regulations:

- The drafting of laws and regulations should be conducted through a cross-sectoral and cross-departmental method.

- Employees of government law bureaus are expected to enhance their professionalism through improved capability in understanding their respective fields of work and in making an in-depth study of the legal issues arising in the society so that they will later be able to produce down-to-earth regulations.

- Creating a system that can involve the public in the drafting of laws and regulations.

(iii) Participation of law bureaus in the economic sector:
Government law bureaus rarely participate in the making of decisions concerning economic issues due to the tendency of economists brushing aside legal factors. To change this situation, employees of the government law bureaus should improve their knowledge and the structure of the said bureaus should also be re-examined.

b. Public Access to Legal Information

(i) Drafting of regulations on information
At present legislation is needed that will regulate the obligation of the government to announce each legislation in the State Gazette and Supplement of the State Gazette; and, a law regulating the public's freedom to access legal information is also needed.

(ii) *Legal Information Channel*
- Setting up an Information Commission at Central and Provincial Government levels with the assignment of:
  - Providing information services to the public;
  - Acting as a Dispute Settlement Forum for the public if their right to access information is violated.
  - The commission should be given the task of developing the capacity of institutions with regard to management and public service.

- Maximizing the role of government law bureaus as networks of legal documentation.

c. Reform of Administrative Law in Public Services

(i) Public Service Procedures
Public service is seen as having no integrity and no professionalism. The lengthy procedures that the public has to go through for the acquisition of services gives rise to the practice of bribery for the obtainment of quick service. This needs the

reformation of public service procedures by reducing them until they become more effective and efficient.

(ii) *Changing Public Service Orientation*

- Changing the awareness of public service administrators, namely that the public being served by them are not just a consumer but they are also the owner and therefore have the right to submit complaints in relation to unsatisfactory services.

- Professionalism in public services can be obtained through individuals having an appropriate education, professionalism and who do not practice nepotism. The source of this matter is a recruitment pattern that should be based on a merit system.

- Services should be provided based on laws and regulations and the application of sanctions on violations should be conducted.

- The drafting of a Code of Ethics.

(iii) *Sharing of Services*

Good governance should also give an opportunity to the public to serve themselves by reducing their dependency on the government. By strengthening civil society, the public will hopefully be able to settle their own problems. The government can share certain portions of the public service with the private sector, whereas services that cannot be provided by the public themselves will still be provided by the government.

d. Procedure for Public Complaints Submission

(i) The ignorance of the public on how and where to submit their complaints inflicts a loss upon the public. Even if people submit a complaint, the settlement is still uncertain because the follow-up to such a complaint is often unclear. It is recommended to set up special bureaus receiving complaints of the public and the said bureaus should be at the executive level. Besides receiving public complaints, the bureaus should also follow up the complaints received.

(ii) Maximizing existing non-formal institutions to become independent institutions that can channel out public complaints. The function of these institutions should not be limited only to

receiving complaints and passing them on to the government but also to participate in the process of further settlement.

3. Priorities

Implementation priorities are as follows:

a. Improved human resources in government institutions, starting from a recruitment system and a human resources development system.

b. Involving the public in the process of public decision making through the application of transparency so that the civil servants making decisions will become accountable.

c. The importance of the government giving access to information and fulfilling the right of the public to information.

d. The straightening out of public service procedures including improved ethics of public service administrators who should always meet the needs of the public.

e. The need for a mechanism for submission of complaints by the public to formal institutions by giving the public a strong bargaining power to participate in further settlement of the complaints.

f. Transferring part of the public service to the private sector.

C. Sub-Commission C: Improved Legislative Role of the House of Representatives

1. Introduction

In connection with the changes in the legislative role of the House of Representatives (DPR) on the basis of amendments to the 1945 Constitution that have been made twice, introspection should be made as to the readiness of the DPR in playing a role as a legislative institution. One of the measuring instruments will be by revealing the data on the quantity as well as the quality of laws that have so far been successfully made by the DPR at the initiative of its members. Starting from this point, it is obvious that the performance of the DPR in drafting laws together with the government is still far from optimum. This can be seen from the number of laws discussed by the DPR from 1966 to August 2000, namely

497 bills of which 467 (94.92%) originated from government initiatives and the remaining 30 bills (5.08%) being initiatives of the DPR. When reviewing the quality of the laws already passed by the DPR, it is clear there are a number of laws that cannot be effectively implemented or contain controversies and are assessed as not supporting the process of democracy, the protection of human rights (HAM), integrated law enforcement, and are also viewed as being unjust and not supporting the development of the people's economy.

The weakness of the DPR in optimizing its function in the field of legislation is acknowledged by DPR circles, observers and academics and is due to various factors, amongst others, the intellectual quality of DPR members. It is pointed out that this is related to the structure, working mechanism and the human resources recruitment process that should have been foreseen when the legislative role of the DPR was being formulated. For this reason a fundamental change should be made so that the shifting of the legislation drafting power from the President to the DPR will have a more practical bearing on the life of a democratic state.

Another factor of the weakness of the legislative performance of the DPR is that it has minimum human resources, in particular experts and legal drafters. If this factor was well taken care of, it could become a supporting system for the DPR. In addition to the time not sufficiently provided by the DPR in drafting legislation, or the failure of the DPR members to reserve a special time to prioritize its legislation role, the time available is often used for other tasks, including for the implementation of its supervisory role. Besides the minimum budget available, the DPR and the government have also not reached an agreement on legislation drafting that could be used as a National Legislation Program.

2. Problems

a. Revision of DPR Internal Regulations

(i) A procedural reform/change on legislation drafting at the initiative of the DPR is necessary, namely a more practical mechanism of legislation drafting that is adjusted to the spirit of the amendments of the 1945 Constitution, particularly on the organizational rules of the DPR. In relation to this, discussions of a bill through four stages should technically be shortened without reducing its substance. Many circles recommend that it could be sufficient if conducted in two stages: the first stage should be directly conducted by the Consultative Board (*Badan Musyawarah*) and the second stage to be arranged by the Commission or Special

Committee (*Pansus*) for the implementation of the acceptance or rejection of a bill.

(ii) Besides reforming the organizational structure of the DPR, the existence of a Code of Ethics for members of the DPR is also essential.

b. Establishment of a Board or Commission Specially Assigned for Legislation

Although a Legislation Board has been set up at the DPR, it has no strength for optimizing the legislative function of the DPR as its status, function and authority are very limited. It is recommended that the DPR should choose between two alternatives, namely:

(i) The DPR could set up a separate Commission specially dealing with legislation, with the same status and authority as that of other commissions at the DPR. It is advisable that the DPR should have 3 commissions only, adjusted to its 3 functions, namely: Legislation Commission, Budget Commission and Supervision Commission. Members of the respective commissions should be members of the DPR's various factions who carry out their tasks on the basis of the functions of their respective commissions.

(ii) The DPR could set up a permanent Board or Commission that is independent in carrying out its function in the field of legislation. Its membership should consist of members of the DPR from various factions who are assessed as being capable in the field of legislation and have no other position or work at other commissions of the DPR.

c. Setting Up a Legislation Support System at the DPR

(i) Expert support that could be institutionally developed, in one form or the other:

- A Standing Committee called Legal Planning Commission that is provided with a professional secretariat. The commission should be led by a DPR member, elected by and responsible to the DPR. Its membership should consist of experts from various fields who are skillful and experienced legal drafters; they should work in line with the terms of office of the DPR membership and have a staff of university or academy alumni that are openly recruited.

- A legal Planning Board with a membership consisting of experts working after office hours. They should be appointed and dismissed by and be responsible to the Secretariat General of the DPR.

- An assistance team to the Legal Drafting Special Committee set up on the basis of the needs of the DPR. Its membership should consist of experts from various circles with a working period that is based on the term of the program of the draft law being handled, or a short-term working program or an ad-hoc system.

- The DPR in cooperation with the National Law Development Agency or together with universities and NGOs could carry out studies and research in the framework of preparing academic draft legislation or by making the National Law Commission a counterpart of the DPR to optimize its legislative function.

(ii) *Informal support for this matter can be in the form of:*

- Availability of information facilities sufficiently in line with current information technology trends.

- A complete library comparable to the Library of Congress of the United States of America or at least the same as that of the parliament of one of the South East Asian countries.

- A mechanism for the absorption of public aspirations by DPR members, particularly from their respective constituents, for the sake of the creation of a communication exchange that produces clear information. Its implementation can take the form of a representative office for the respective members of the DPR or working together with other DPR members from different factions. This could be carried out by staff who are professional in the acquisition of information and the people's aspirations.

d. Legislation Administration System

(i) Improved legislation administration is necessary. Before the amendments of the 1945 Constitution were made, the publication of laws was conducted through the State Gazette which was coordinated by the State Secretariat; then, in line with the spirit of the amendments of the 1945 Constitution, particularly on laws, consideration should be given for the Secretariat of the DPR to

publish laws under the name 'Law Gazette' *(Berita Undang-Undang)*.

(ii) Administration of legislation could continue to be devolved to the executive, but should still be placed under the authority of the Ministry of Justice and Human Rights.

(iii) A draft law on the Procedure for the Drafting of Laws and Regulations should immediately be submitted/enacted.

(iv) Print laws at the State Printing Company (PERURI, Balai Pustaka or PNRI).

(v) To enable the people to obtain legislative products of the DPR cheaply, with simple and reliable contents, it would be better that the printing of legislative products of the DPR be entrusted to the State Printing Company (*Perum Percetakan Negara*).

(vi) An agreement should immediately be made between the DPR and the government concerning priorities on the drafting of laws that will be used as part of the National Legislation Program.

(vii) Budget

(viii) As the legislative authority is in the hand of the DPR, a special budget should be allocated to make the legislative function of the DPR successful.

(ix) Recruitment of DPR members.

(x) In the long term or during the period of membership of the DPR after 2004, preparations should be made regarding the recruitment of human resources that will occupy positions as people's representatives. Consideration should be given to their intellectual quality with the purpose of improving the functions of the DPR, particularly the legislative function.

3. Priorities

a. Short Term:

(i) Amendment to the organizational system of the DPR through adjustments to the spirit of the amendments of the 1945 Constitution

(ii) Formulation of a Code of Ethics for members of the DPR.

(iii) Immediate submission/enactment of a draft law on Procedures for Drafting Laws and Regulations.

(iv) Simplification of the structure and working mechanism of the DPR to support the optimization of the legislative role of the DPR.

(v) The DPR and the government should immediately come to an agreement on the priority given to the drafting of laws through the creation of a National Legislation Program.

(vi) Forming a support system to optimize the legislative role of the DPR.

(vii) Allocating a special budget that will support the optimization of the legislative role of the DPR.

b. Long Term:

(i) The recruitment process of DPR members must take into consideration the quality of the human resources who will carry out functions within the DPR, particularly in the field of legislation.

(ii) Simplifying DPR Commissions by downsizing to 3 commissions in line with the functions of the DPR so that the DPR commissions will consist only of a Legislation Commission, a Budget Commission and a Supervision Commission.

D. Sub Commission D: Advanced Legal Training, Testing and Discipline

1. Introduction

The birth of legal professions and the acknowledgment of their legal existence are based on the interest of the public. To meet its needs, the public requires the services of legal professionals. The public needs the legal profession to treat clients as subjects and this requires committed institutions.

The legal professions should have the character of enforcer of justice and maintainer of human values and therefore their role is noble. As

members of a profession, advocates or notaries are bound by a code of ethics created by representatives of the said profession to carry out their professional duties. The community of the said profession as a group of professional individuals is selective because not every individual can become a member of the said profession. The codes of ethics of advocates or notaries should also function as an internal control of the conduct of advocates or notaries in carrying out their work.

The profession of advocates is a noble profession (*officium nobile*) because advocates have the obligation to defend all and any persons without differentiating their racial background, skin, religion, culture, social level, political conviction, gender and ideology. An advocate is needed at the time when one or more members of society are facing a legal problem. An advocate/legal adviser is different to other law enforcers. An advocate is not part of the legal apparatus that is bound by a bureaucratic hierarchy. Thus he can have more freedom in looking at the development of legal issues and at the same time he is expected to give credible responses to legal issues that are developing.

The profession of an advocate is not merely to earn a living because he must have idealism (such as the values of justice and truth) and high morality. Therefore changes in the legal professions should be seriously made, including professional disciplinary standards, legal training, legal testing standards, professional education accreditation and legal aid for the poor.

The legal profession will play a big role in our steps towards law reform as a whole and therefore attention should be given to matters concerning this profession, such as matters that have been mentioned above.

2. Problems

a. Maintenance of professional discipline and professional disciplinary standards:

(i) Creating professional standard regulations and professional codes of ethics that give attention to the interests of and are open to the society.

(ii) Setting up a supervisory agency for the maintenance of professional discipline and professional disciplinary standards.

(iii) Creating a law on advocates/legal consultants so that legal professionals will not loose their direction and will have a clear

status and position, clear rights and obligations, clear roles and functions. Thus their respective ideas and perceptions will not divide them. This law on advocates/legal consultants is also needed to guarantee the independence and the code of ethics and the accountability of the profession of advocates. On the basis of this law, an Indonesian Bar Association that regulates and manages itself, free from the intervention of the government, should be set up.

(iv) The codes of ethics of advocates or notaries should be socialized to the public so that the public may be able to differentiate between the practice of good advocates or notaries and those who violate their code of ethics.

(v) The existence of a joint code of ethics for all legal professions. The content of a joint code of ethics can be jointly discussed by the respective main organizations.

(vi) Control on the observance of professional ethics.

(vii) Continuous monitoring of the quality of legal professional services.

b. Advanced Legal Education and Training

(i) A one-roof educational system for S-1 law graduates is needed for the continuance of study in various professional fields. The benefit of a one-roof education system is the existence of a similar perspective of enforcers of the law on law enforcement issues, in seeking truth and justice and a similar interpretation of the law by law enforcers. This will reduce corps arrogance that may have detrimental effects on the public and on those who are seeking justice.

(ii) An apprenticeship program is urgently needed for improved professionalism of new legal professionals, because S-1 law graduates are considered as not ready for professional life. Higher educational institutions are always challenged into producing professional legal experts, either judges, lawyers, lecturers, prosecutors or others. They are expected to anticipate the provisioning of knowledge in facing the globalization era, either as regards language, legal material or the procedures that must be mastered by professionals.

(iii) An obligation to follow the development of legal sciences should be consistently applied through continuous education for the improvement of the knowledge of legal professionals. For instance, arranging courses that discuss the development of new legal sciences.

(iv) Revitalization of advanced legal education by determining clear criteria on the competency of lecturers, curriculum and teaching methods. Advanced legal education institutes cannot evade giving an educative role contribution to professionals in order to meet the needs of society's dynamics. Advanced legal education lecturers should have certain qualifications. Educational methods in the said educational model must be prepared with accurate formulations.

c. Legal Testing Standards

Legal testing standards are needed to determine whether an S-1 law graduate can be ready for the legal profession. In the past, testing standards were in the hands of the government. The step taken to allow professional organizations to conduct legal testing is a positive step that must be further developed, because those who know about the legal profession are the legal professionals themselves, in this case the respective professional organizations.

d. Professional Education Accreditation

The existence of a National Professional Education Accreditation Agency is needed to determine the minimum standards required of S-1 law graduates to become legal professionals. The agency should integratively consolidate the quality of the law faculties curriculum, improve the recruitment system by standardizing intellectual requirements and the mental ideology of legal professionals, and improve the process of career evaluation and guidance through education that is relevant to the profession and needs.

e. Legal aid for the poor

Legal aid for the poor is the responsibility of all legal professions and the government. In connection with the responsibility of the legal profession, all legal professionals have the obligation to not reject a person coming with a request for legal aid. For instance, direct handling of pro bono cases at the office of the legal professional concerned or taking part in donating and giving funds for legal aid activities that in practice can be carried out by professional

organizations or legal aid institutions. It can also be carried out by setting up Legal Aid Posts.

The government can also play a role in supporting this activity, such as by eliminating or reducing the judicial fee as much as possible.

3. Priorities

a. Maintenance of Professional Discipline and Professional Disciplinary Standards

b. Advanced Legal Education and Training

c. Legal Testing Standards

d. Accreditation of Legal Profession Education

e. Legal Aid for the Poor

E. Sub Commission E: Law and Economic Recovery

1. Introduction

For Indonesia to achieve economic recovery, the law must be used as a means for encouraging economic growth. For this purpose the law must be initiated from below, which means that there must be social involvement and participation. In addition the law must have the objective of creating stability, predictability and justice in the country so that economic recovery can be achieved more speedily. In this case, the government must be serious in consistently implementing the laws already passed. The role of the government or State must be reduced so that it will become clear which economic activity is the responsibility of the government and which is the responsibility of the private sector.

The economic crisis experienced by Indonesia started with a monetary crisis in 1997. The closing of 67 banks required the indebted companies to immediately pay their debts. Various efforts have been made to settle the debts of the private companies, amongst others through bankruptcy (Commercial Court), restructuring of private debts and the establishment of the Indonesian Bank Restructuring Agency (IBRA), The Indonesian Debt Restructuring Agency (INDRA) and the Jakarta Initiative Task Force.

But the main problem has been the absence of a serious intention on the part of the debtors to settle their debts. This has caused difficulties for the institutions assigned to find a solution to the private debt problems and bring the debtors to negotiate with the government to seek a solution. In addition, private debt problems indicate the existence of violations against criminal regulations in the field of banking, particularly if viewed from the context of the issuance of BLBI and the violation of BMPK, and the existence of corruption crimes conducted by bank owners, who spent the BLBI funds for purposes other than banking. The existence of a dualism between economic interests in the case of the settlement of debts and the interest of the law in the framework of law enforcement and legal certainty causes a dilemma for the government in settling private debt problems.

The law, however, must become a means to encourage economic recovery with the purpose of creating stability, predictability and justice in the country. Therefore, a scale of priority should exist. The short-term priority is closely related to the settlement of debts of the private companies in the form of improved laws on bankruptcy, the contents of which mention the role of the Commercial Court as having the authority to examine and decide on bankruptcy cases. Improvement efforts can also include efforts for debt restructuring so that companies owned by debtors remain operational so as not to obstruct the course of the economic wheel. Besides, it is also necessary to settle private debt problems through a capital market instrument, such as through the conversion of debts to equity swapt.

The long-term priority involves thinking about ideal preparations, such as improvement of legislation in the field of Intellectual Property Rights, in the field of investment and capital market and improvement of legislation in the field of banking. In addition it is also necessary to draw up legislation regulating other aspects needed to move towards a new Indonesia, particularly to anticipate new issues that are developing, which are related to the development of technology such as a Cyber Law and an *E*-Commerce Law.

However, the law is not only legislations and the enforcement of the law is not just the enforcement of rules. Legislation is only an aspect. Other aspects are the apparatus, including the Courts, in this case the Commercial Court, prosecutors, the police and registrars. Still another aspect is the legal culture of the Indonesian society, which is related to the behaviour and habits of business agents within the Indonesian economy.

2. Problems

a. Improved bankruptcy law

(i) An amendment in the form of improvements, deletions and additions can be undertaken for chapters dealing with bankruptcy, Delay of Debt Payment Obligation (PKPU) and the Commercial Court.

(ii) Improvement of the bankruptcy law can cover debt restructuring efforts, particularly in the chapter regulating the Debt Payment Obligation (PKPU). In case a deadlock occurs in a debt restructuring negotiation, then if the majority of the creditors agree, a homologation (reconciliation) can be made as a basis for the indebted company to continue its business. The homologation should be binding to all concurrent creditors. Therefore it is necessary to think of the participation of preference creditors in the process of the Debt Payment Obligation (PKPU). What is wanted by the business community is a change aimed at the concept of Chapter 11 in the United States in which there is the possibility for a company to be restructured, and if possible to be revived.

b. Improved Commercial Court

(i) Special training for Commercial Court judges should be conducted so that they will have a better knowledge on issues that are within the authority of the Commercial Court, particularly on bankruptcy cases. As the effectiveness of the Bankruptcy Law depends on the enforcement of the law by the Commercial Court through the decisions made by the judges concerned, the judges are required to have a broad knowledge as well as a good personality. In addition, independent judges and courts, procedure of examination at an open and neutral court, and the effectiveness of the enforcement of the codes of ethics of legal professions are also required.

(ii) The Commercial Court should become a "model modern court". For this purpose, in line with the provisions of the bankruptcy law on Commercial Court, a government regulation regulating the authority of the Commercial Court should be made so that other commercial cases, such as those relating to Intellectual Property Rights, can be handled.

c. Broader Authority of IBRA in the form of Law

So far the Indonesian Bank Restructuring Agency (IBRA) has not been able to carry out its function effectively and efficiently due to a lack of political support. For this purpose a regulation on IBRA is required, strengthening the authority of the agency so that IBRA can become independent and accountable only to the DPR.

d. Negotiations Outside the Court for Debtors Having Good Intentions and are Willing to Cooperate

The purpose is to get back as many state assets as possible. For a company or bank having good intentions and willing to cooperate and later manages to return the state assets that have been used, elements reducing legal claims may be obtainable because in this effort there must be a reconciliation with the business parties.

e. Usage of Capital Market Instruments

(i) The purpose of this activity is to seek more effective debt restructuring steps through the capital market and develop restructuring steps that have been taken, such as a capital increase with a rights issue and conversion of debt to equity by giving an opportunity to existing shareholders to gain back the said shares on the basis of the success of the said shareholders in implementing restructuring plans.

(ii) Enforcement of the law, particularly in the enforcement of full disclosure at the capital market.

(iii) Closer cooperation between IBRA and the Capital Market Supervisory Agency (BAPEPAM). The purpose being that there should be no hindrance for IBRA to ask for information from the capital market authority.

f. Improved banking legislation

Banking constitutes an important factor in the life of the Indonesian economy. Many of the provisions of the banking laws have no implementing regulations, even one provision contradicts other provisions. In this case more emphasis should be given to the provision of banking crimes and the mechanism of banking control by Bank Indonesia or by another agency scheduled to be established by the government in this year (2001). In addition, the banking laws must

also be adjusted to the provisions of the new law on Bank Indonesia, namely Law No. 23/1999. Here the Indonesian banking community must be able to give commitments to the public that it is independent. Another matter to be taken into account is the improvement of banking legislation: the public begins to know about the *syari'ah* banking concept, for which special regulations should be made.

g. Improved Investment Legislation

As a result of Indonesia becoming a member of the World Trade Organization (WTO) in 1995, the Foreign Capital Investment Law and the Domestic Capital Investment Law will have to be amended in order to abide by the TRIM's agreement. It will be necessary to review whether all fields of business should be opened for foreign investment, otherwise small industries might be destroyed. Besides, there must be a new legislation so that economic growth will be able to reach all regions, particularly when the Regional Autonomy laws have been implemented, in which the regions will have wider authorities to develop their own economy.

h. Protection of Intellectual Property Rights

Indonesia is very rich in its natural resources. Therefore laws will need to be put in place for the protection from foreign exploitation of the various plant species in Indonesia, the geographic resources and the traditions and cultures of the indigenous people in the outback. From the aspect of Intellectual Property Rights, these are assets that must be taken into account by the government, particularly after the signing of the agreement on the establishment of the World Trade Organization by the government. So far Indonesia has passed a Patent Law, Copy Rights Law and the Brand Law; in line with the TRIP's agreement Indonesia must also have three other Intellectual Property Rights laws, namely in the field of Confidential Trade, Industrial Design and Integrated Circuit Lay Out Design.

i. *Cyber Law* and *E-Commerce Law*

To anticipate market developments in information technology (IT) and multimedia technology, particularly in Indonesia at present, special Information Technology and *E-Commerce* laws regulating the said matters should be drawn up because technology can be beneficial but can also be detrimental to human beings. In addition to legal sanctions against crimes using these technologies, the effect of using these new technologies on economic and business developments in Indonesia should also be regulated. Besides a *Cyber Law* and an *E-Commerce*

law, many other special regulations will be required following the advances made in Information Technology and E-commerce and their implications.

2. Priorities

a. Short Term:

(i) An Improved bankruptcy law

(ii) An Improved Commercial Court, particularly an improved performance of judges of the Court

(iii) Greater authorities for IBRA in the form of laws

(iv) Negotiations outside the Court for debtors having good intentions and who are willing to cooperate

(v) Capital market development for debt restructuring

b. Long Term:

(i) Improved banking legislation

(ii) Improved investment legislation

(iii) Intellectual Property Rights protection

(iv) Cyber Law and E-Commerce Law

F. Sub Commission F: Improved Integrated Criminal Justice System

1. Introduction

The current Indonesian criminal justice system has not been able to show a stable and sustained process aimed at enforcement of the law for the sake of justice. The absence of the said constancy is visible from the judicial institution's service to the people who must face the criminal justice system. It results in the public's feeling of skepticism regarding law enforcement. But actually, if we talk about the criminal justice system, we must remember that the said system is created or regulated on the basis

of state policies guaranteeing a feeling of orderliness and justice in the state itself. These weaknesses occur due to an absence of a clear vision and mission of the judicial institution itself and of a strong leadership in the maintenance of justice in the country.

An integrated criminal justice system must have similarities of perception, objective and framework. All these elements must exist. The integrity of the criminal justice system relies on an effectiveness indicator, which means that there must be a consensus that the indicator is what is called professional standards that should be the same for all law enforcement apparatuses. Then a similar vision and mission for an integrated justice system should lead to an integrated cooperation between the subsystems to achieve a similar objective, namely justice.

Integrated cooperation between the subsystems constitutes a series of processes that can best be described as the process of rotation of a wheel, starting from preliminary investigation, police investigation, indictment, examination before the court, execution of the sentence until the implementation of the process of punishment in a penitentiary institution and back to society.

The law of criminal procedure should become a manual for the police, prosecutors and lawyers (legal advisers) in carrying out their tasks concerning preliminary investigation, investigation, indictment, detention and examination at the court. In carrying out their tasks, the law enforcers should not deviate from the legal principles of the criminal procedure. In order the achieve integration, the law of criminal procedure should as far as possible clearly regulate the tasks and authority of the respective state apparatuses working within the criminal justice system.

2. Problems

a. The Criminal Justice System

One of the basic factors obstructing the effectiveness of the criminal justice system is the disorderliness prevalent in the system itself. Elements in the criminal justice system are: the police, the prosecutors, the courts and the penitentiary institutions each having its respective mission. The police and the prosecutors play a role in dealing with a criminal act, namely through investigation and prosecution. There are changes in the law of criminal procedure regulated in Law No. 8/ 1981, compared to that regulated in Het Herziene Indonesisch Reglemen (HIR) / Renewed Indonesian Code (RIB) as well as in other legislation. One of the changes is on the

authority of the prosecutor in the field of investigation. According to Law No.8/1981, the authority of the prosecutor in the field of investigation has been reduced to:

(i) a prosecutor has the authority to return the dossier to the investigator (police) whenever the result of an investigation is deemed not complete by the prosecutor (known with the term of pre-prosecution).

(ii) a prosecutor has the authority to investigate economic, corruption and financial crimes.

Thus with the existence of the law of criminal procedure (KUHAP), the role of the police and the prosecutor becomes clear, namely the police is the investigator and the district attorney is the prosecutor, except for some special crimes, in which the prosecutor can also make an investigation. This issue of the sharing of authority and role continues to create problems. This is evidenced by frictions that often occur during the course of the criminal procedure between the police and the prosecutors concerning the party having the strongest authority in conducting investigations.

b. The Police

In the HIR, the status of the police is as an assistant to the prosecutor in making investigations. As far as the investigation of a criminal case is concerned, the role and status of employees of the public police or State police are as assistants to the prosecutor. Thus it can be said that according to the law of criminal procedure mentioned in the HIR, the police is the right hand of the prosecutor in the investigation and the processing of criminal cases. The authority of the police in investigating a criminal act has increased with the issuance of Law No. 13 /1961 on basic provisions of the State police. According to article 12 of Law No. 13 /1961, investigation should be conducted by certain police officers, to be further regulated by a Ministerial Regulation.

c. The Prosecutors

Among the investigative authorities mentioned in article 39 of the HIR, the authority of the prosecutor in the field of investigation has given rise to an issue. Seen from the HIR, the authority of the prosecutor to make an investigation is no longer doubtful. But this authority becomes uncertain after the enactment of Law No. 15 /1961 concerning Basic Provisions on Prosecutors. The task of the prosecutor in a preliminary examination that includes the task of

investigation, advanced investigation, supervision and coordination of instruments of investigation, prosecution and the implementation of a sentence and decision of the judge of a criminal case as mentioned above, together with his authorities, has placed the prosecutor in a key position. Law No. 15 /1961 firmly mentions that the prosecutor has the authority to make advanced investigations, whereas the authority of making investigation is not firmly stated.

d. The Courts

The courts and their operation should be evaluated and repositioned because they are not transparent. Their operational concept should be divided into 2 parts, namely:

(i) pre-adjudication: the function of control / supervision during the arrest, detention and the course of justice itself is expected to exist. This part should be carried out by a pre-adjudication institute (or examining judge) which scope should not be limited only to an administrative function, i.e. only looking from the aspect of the legitimacy of an arrest / detention. The pre-adjudication institute should actually function as an investigating judge, in which the function of control is conducted maximally. It is expected that the function of the police in deciding whether a person should be detained or not will no longer be the sole authority of the police but will become the authority of the investigating judge, which means the severance of the relationship between the observer and the investigator. It is the judge who should review whether a preliminary evidence is enough or not and the police should no longer decide on the detention of a person.

(ii) post-adjudication: an effort conducted by the criminal justice system so that the accused will no longer repeat his criminal act.

The Criminal Procedure must be able to dispel the public's distrust in the national law, or in other words, the weaknesses of the judges could be redeemed if judges did not have so much influence on the public's sense of justice. In Indonesia, the relationship between the judges and the bureaucratic system is very close and it is necessary at present to apply an ad hoc judge system in the criminal justice system. The system can be described as follows: Suppose there are 3 judges in a court, then the composition can be increased to 5 judges in a session, namely 3 career judges and 2 ad hoc judges taken from social elements that are deemed as having sufficient knowledge in the field of law. It is essential to bring about a breakthrough such as this, because

it will automatically change the working system of the police institution, the prosecutors and the judges.

3. Priorities

Priorities for the settlement of issues can be specified as follows:

a. The attention so far given by the Government to the enforcement of the law is very weak. This can be seen from the legal development fund of the state budget, including the salary / social security system for the law enforcers. Law enforcement is at a high level on the priority scale of the State Police Guidelines (GBHN), but the budget itself is in the lower priority, namely 0,291% of the total budget. For comparison, our neighbouring countries provide 2% of their total budget for law enforcement activities. From here it is clear that the Government is not consistent with its own program. This constitutes one of the reasons causing the doubtful morality of the law enforcers. With the low appreciation given to the work of the law enforcers, the apparatus cannot be expected to work maximally. For this reason the State budget for law enforcement must be increased.

b. Increased professionalism of the law enforcement apparatus, namely the police, the prosecutors, the judges, lawyers and officers of penitentiary institutions must be carried out immediately. The law enforcement personnel should be made aware of the importance of carrying out their duty with full responsibility, not only carrying out their duty with the target of completing their duty on time, because it is the public that will assess how far law enforcement has been conducted. Here one should also include an improved recruitment system for law enforcement personnel so that the recruitment will be more selective and integrated.

c. The importance of an integrated law regulating the authority and tasks of the law enforcement apparatus so that the same vision and mission can be achieved with regard to the enforcement of the law.

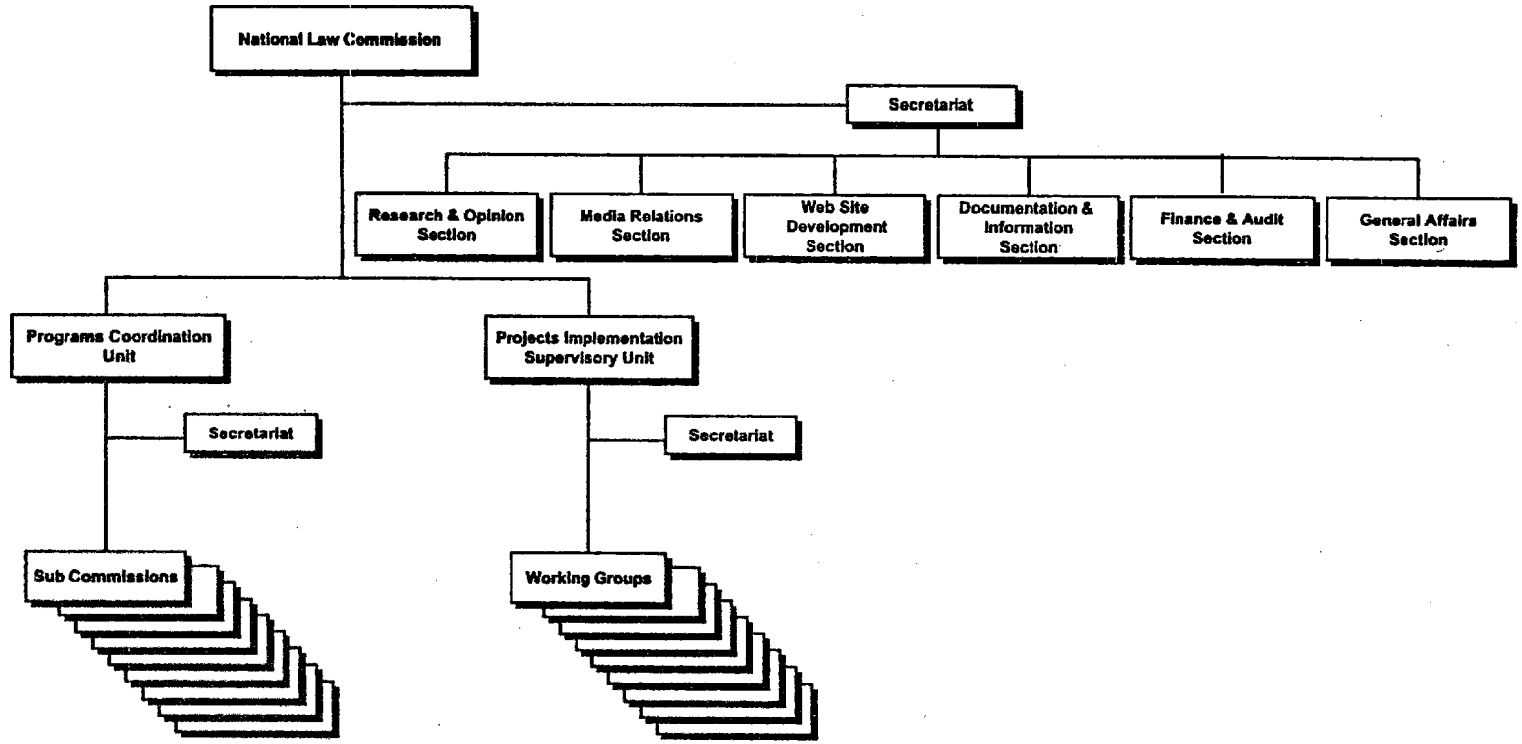
d. The repositioning of the substance of the criminal law and the law of criminal procedure so that an equitable law enforcement can be achieved.

APPENDICES

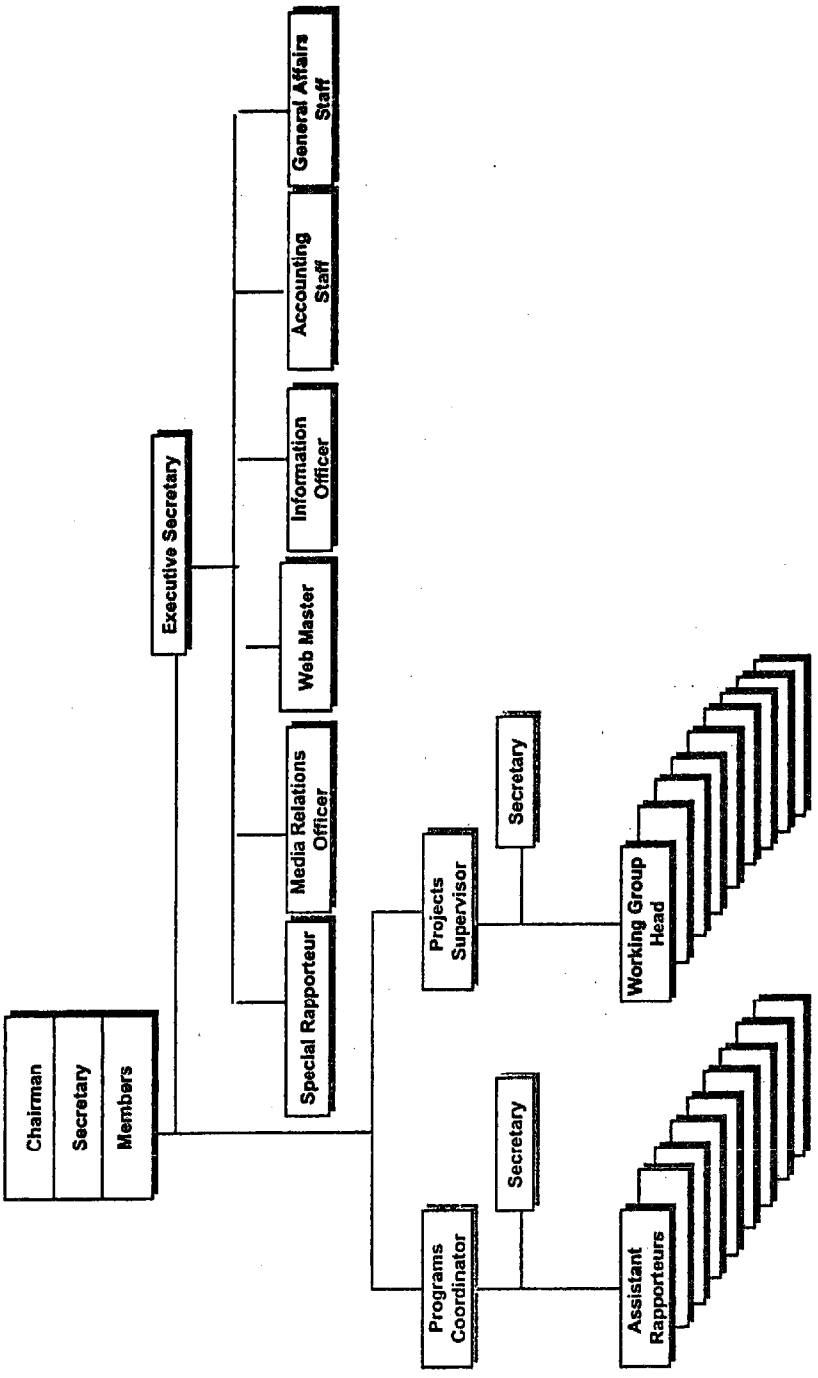
Appendix - 1

ORGANIZATION STRUCTURE

A. Sections



B. Personnel



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