

# LABOUR DISPUTES SETTLEMENT REFORM IN INDONESIA

A guide to the Policy and Legal Issues Raised  
by the Industrial Disputes Settlement Bill

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Tim Lindsey  
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## FOREWORD

Indonesia's labour law reform programme which was launched in 1998 immediately after the ratification in the same year of ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise and in line with the *Reformasi* movement in the country consist of the enactment of three main legislation – Trade Union Act, labour Dispute Settlement Act and Manpower Development Protection Act. The new Trade Union Act (Act 21 of 2000) was enacted into law in 2000. The two other acts are expected to be promulgated before the end of 2002.

The ILO through the ILO/USA Declaration Project in Indonesia has deemed it appropriate to commission a paper on “Labour Dispute Settlement Reform in Indonesia” as a most timely and worthwhile contribution to the country's labour law reform process.

The paper provides the necessary historical background in discussing the present industrial dispute resolution mechanism and includes the presentation of relevant case studies. It gives a detailed description of provisions of the proposed dispute settlement law and related legislation which leads to a very thorough and useful analysis of various problems and issues which go to the structure and practical operation of the new system – and which raised a range of interesting legal and policy questions.

In general, the paper provides a useful analysis of the new dispute settlement system and it is our hope that its publication can help ensure that a wide range of policy-makers and industrial relations practitioners will have access to a critical analysis of the new legislation on dispute settlement.

We wish to commend the authors – Colin Fenwick, Tim Lindsey and Luke Arnold – for the excellent paper which represents a genuine

contribution to building a better industrial relations system in Indonesia.

Jakarta, 1 July 2002

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## PREFACE

**T**his paper is produced by the Asian Law Group Pty Ltd for the International Labour Organisation/United State Declaration Project Indonesia as a discussion paper and basic guide for the government, workers and trade union employers and their organization including lawyers and lay people to the policy and legal issues raised by the Industrial Disputes Settlement Bill currently before the Indonesian legislature. It is written from an academic labour lawyer's perspective and does not purport to be an exhaustive examination of the issues it raises. It should be noted that the views expressed are those of the authors, and as such do not necessarily reflect those of the project on the International Labour Organization.

The first chapter of the paper considers the context in which the Bill has been drafted, tracing the background of contemporary Indonesian industrial relations regulation and demonstrating why the reforms contemplated by the Bill are necessary.

The second chapter provides three case studies of recent industrial disputes, showing both the particular shortcomings in the current system and, again, the urgent need for dispute settlement reforms.

The third chapter outlines the contents of the Bill and explains the mechanisms by which the new system will work.

The fourth chapter identifies shortcomings in the Bill and makes proposals for further reform.

The appendix contains a brief clause-by-clause summary of the Bill.

The list of references provides resources for further research and identifies sources used in the preparation of this paper.

Colin Fenwick, Tim Lindsey, Luke Arnold  
Melbourne, 1 May 2002



## TRANSLATION NOTE

The ‘Department of Labour’, and ‘Minister for Labour’ and ‘Labour Development and Protection Bill’ refer to the Departemen Ketenagakerjaan dan Transmigrasi (Depnakertrans), and Menteri Ketenagakerjaan dan Transmigrasi (Menakertrans) and Rancangan Undang-Undang Pembinaan dan Perlindungan Ketenagakerjaan (RUU PPK) respectively. Tenagakerja literally means workforce and is commonly translated as ‘Manpower’. To avoid the gender implications of the latter we have preferred ‘labour’ as the term most commonly used in most English-speaking jurisdictions for these institutions.

State Court refers to the Pengadilan Negri. This term is often translated as ‘District Court’, which is literally incorrect and may be misleading given this Court’s extensive initial jurisdiction over both criminal and civil matters.



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## Chapter 1

### BACKGROUND: THE DEVELOPMENT OF INDONESIAN LABOUR LAW

This chapter describes the development and current state of Indonesian labour dispute resolution, to provide a context for the more detailed examination of the Industrial Dispute Settlement Bill that follows in Chapters 3 and 4 and in the appendix. This chapter identifies consistent patterns of governmental and armed forces intervention in labour disputes in Indonesia since the colonial period. It argues that these traditions of repression of labour constitute a significant challenge for the reforms contemplated in the Bill. Chapter 2 builds on the analysis in this chapter by providing three recent case studies that demonstrate both the shortcomings of the present system and the obstacles to establishing the sort of system contemplated by the Bill.

#### I. Introduction

Since the fall of President Soeharto Indonesia has been undergoing a difficult transition to democracy. Much has been achieved in a relatively short time but the process is far from complete. This is true also of for Indonesia's labour law regime and, in particular, its dispute settlement system.

On paper, Indonesia already enjoys a system that grants an impressive range of fundamental labour rights, many of which are still in dis-

pute in some developed and most developing countries. These include, for example, the right to organize into trade unions and the right to bargain and strike in support of claims. The law also guarantees an extensive array of minimum labour standards, including:<sup>1</sup> minimum wages, set by region; a formal industrial dispute resolution system; work hours restricted to 7 hours per day or 40 hours per week, with 30 minutes rest for each 4 hours worked; public holidays (12 days paid per year); maternity leave (3 months paid per year); sick leave (part salary paid for up to 12 months per year); holiday pay (minimum 2 weeks paid per year); overtime paid at the hourly rate plus 50% for the first hour and then at double time; severance pay, with one month's a month's pay for every year of service, up to a maximum of 4 months for long service; prohibitions on gender discrimination in wages; and restrictions on the rights of employers to terminate employees' rights of termination (permits are required from a tripartite body involving unions, management and the Ministry of Labour).<sup>2</sup>

There is also an absolute prohibition on dismissal for involvement in union activities; pursuing grievances with the employer; absence to fulfill a civic or religious duty; or for discrimination based on tribe, race, marital status, sex, religion or political affiliation).<sup>3</sup>

Likewise, Indonesia has recently ratified several key ILO Conventions, making it the first Asian state to ratify all eight fundamental Conventions: ILO Convention No.87 on Freedom of Association and Protection of the Right to Organise (June 1998); No. 105 on Abolition of Forced Labour (May 1999); No.111 on Discrimination in Employment and Occupation (May 1999); No. 138 on Minimum Age (May 1999); and Convention No. 182 on the Worst Forms of Child Labour (March 2000).

There is, however, a huge gulf between the text of the laws governing labour and the reality of policy implementation and practices. The new Indonesian labour market regime is, in fact, very weak. In most cases, the new laws continue traditions of reserving discretion in the hands of the employer or the state. Where they do not, the laws are

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<sup>1</sup> This section draws on ILO (1999) and ACFOHRO (1991).

<sup>2</sup> These entitlements are all discussed in more detail below in Chapter Three.

<sup>3</sup> Ibid.

routinely ignored by both of these those parties.

As a result, the benefits of the regulatory framework continue to be available to Indonesian workers only on an occasional and arbitrary basis. This reflects the traditions of labour regulation under the Soeharto regime and, in particular, the tensions between, on the one hand, the state, the military and business; and, on the other, organised labour. These tensions are very longstanding and should even be understood not as something created by the Indonesian state but rather as something inherited from Dutch colonial rule after independence in 1945.

It is therefore useful to briefly describe the trajectory of labour regulation from the colonial period through the Old Order of President Soekarno and Soeharto's New Order, before turning to the post-Soeharto reforms.

## II. Labour Law in Indonesia Before 1998

The Netherlands East Indies administration regarded labour organisation as a threat to the colonial state and equated unionism with communism.

[O]rganised labour was generally weak ... for there was an abundance of labour available and the employers (both government and private) were rarely restrained either by law or by sentiment from the use of any available means to break strikes. (Ricklefs, 1993:168):

Equally, early labour organisations of this period equated the oppressiveness of colonial rule with the poor conditions of indigenous workers. The labour movement was thus inherently political and many key nationalist leaders had close links to indigenous nationalist, Marxist and even Muslim movements (Ricklefs, 1993: 172-3). Perhaps the best known of these figures was Tan Malaka (Ricklefs, 1993:175) but even the pre-eminent nationalist leader, the charismatic Soekarno, was a by-product of the anti-colonialist *Sarekat Islam*, originally an Islamic traders association set up to combat Dutch and Chinese domination of commerce.

This blurring of anti-colonial nationalism, the political Left and the labour movement led to open hostility from the colonial state and in the late 1920s the Dutch Governor-General de Graeff presided over the "destruction of the last remnants of the leftist labour union movement",

jailing and exiling its leaders (Ricklefs, 1993:185). By the time of the Japanese occupation in 1942 most Indonesian labour leaders were jailed or exiled, for example in the remote camps of the highlands of West New Guinea.<sup>4</sup>

A consequence of this was that labour was well -represented among the anti-colonial nationalist coalition headed by the Soekarno that led the revolution from 1945. The revolution saw conflict between communists and nationalists within Republican ranks which resulted in a crushed communist coup attempt in 1948, but the government of President Soekarno to which the Dutch reluctantly transferred sovereignty in 1949 was one inherently sympathetic to labour and the political left.

### The First Phase: The Prohibition of Unions (1966 - late 1970s)

Accordingly, by the late years of President Soekarno's Leftist 'Guided Democracy' regime in the mid 1960s, labour affiliations with the (by then) powerful Indonesian Communist Party or PKI<sup>5</sup> resulted in an active and influential union movement. The PKI had 2 million members, making it the "largest Communist party in a non-Communist nation" and the key union organisation, SOBSI,<sup>6</sup> had 3.3 million members (Ricklefs, 1991:271).

The fall of Soekarno in 1966 and the massacre<sup>7</sup> and jailing of hundreds of thousands of members and alleged sympathisers of the PKI and supposed fellow travelers over the period from late 1965 to early 1967 reversed this. In February 1966 SOBSI's Secretary- General, Njono Prawiro, was sentenced to death (Ricklefs, 1993: 289) and after Soeharto and the armed forces (ABRI,<sup>8</sup> now TNI<sup>9</sup>) took effective control from March that year, the unions became key targets for repression. They were effectively banned and members executed or jailed – many on the prison island of Buru. Within this struggle the issues of labour market

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<sup>4</sup> Now the Indonesian province of Papua.

<sup>5</sup> *Partai Komunis Indonesia*.

<sup>6</sup> *Sentral Organisasi Buruh Seluruh Indonesia* or Central Organisation of all Indonesian Workers.

<sup>7</sup> For detailed accounts of these killings, see Cribb (1991).

<sup>8</sup> *Angkatan Bersenjata Republik Indonesia*, Armed Forces of the Republic of Indonesia.

<sup>9</sup> *Tentara Nasional Indonesia*, Indonesian National Army.

management and industrial relations had become irrelevant, subordinated to the essentially political division between the army and the PKI. The old colonial divide was now recast in the ideology of the Cold War.

Thus within the space of just fifteen years then, the Indonesian state had reverted to the traditions of the colonial state in its dealings with labour - and then gone further in repression. As Lev has argued, the political system:

...shared much with that of the colony, but was even more raw in its lack of institutional controls and abuse of power. (Lev, 1999:92)

## The Second Phase: The Co-opting of the Unions (Late 1970s - Early 1990s)

The violent purge of the Left engineered by Soeharto and his military supporters was very effective. So much so that by 1973 the new President and the Indonesian Armed Forces –who now together sat at the heart of the conservative New Order polity they had constructed – felt that the situation was secure enough to allow the reformation of trade union organisations, but in a very different guise.

In fact, the reality was that the debacle of the last 8 years of Soekarno's rule - the radical period of 'Guided Democracy' marked by 'Confrontation' with the 'West' and isolationism- had reduced Indonesia to an economic basket case.<sup>10</sup> It was clear that the labour market had to be remobilised if Indonesia was to recover economically. The solution in the mid-1970s was that the unions, crushed almost into oblivion, were to be resurrected in part – but co-opted and controlled in order to assist the government's search for revenue to fund *pembangunan*, its aggressive 'command'-style economic development policy set.

The mid-1980s brought new motivation for this transition from outright prohibition to 'managed' repression. Until then, the New Order had been able to rely on high oil prices for 65% of its exports (Crouch, 1988: 354) and 60% of its total revenues (Ricklefs, 1991: 307). It had maintained a relatively closed economy and pursued an import substitu-

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<sup>10</sup> By late 1965 the price of rice was rising at 900% per annum and the Rupiah had fallen from 5,100 to the US\$ to 50,000 (Ricklefs, 1993:280). By contrast, even at its worst in February 1998, the Rupiah only hit 20,000 to the \$US during Indonesia's recent economic crisis.

tion strategy. The sharp decrease of the price of petroleum in the world market from the mid-1980s made it impossible to continue to fund this programme.<sup>11</sup> The New Order government found itself forced to reconfigure its investment and industrial policies to adopt an export-oriented industrialization strategy. It saw Indonesia as competing with other low-cost Asian states for foreign capital in labour-intensive industries such as textiles. So, Indonesia began experimenting cautiously with the deregulatory approach that was to dominate economic policy in the mid-nineties, in an effort to attract the foreign investment necessary to fund its new export strategy.

From this perspective, workers' organisations were, paradoxically, both dangerous and necessary. They were dangerous for two reasons. First, because a strong labour movement that could deliver higher wages and better conditions to workers was seen as a disincentive for the foreign investors Soeharto was now courting. Secondly, the New Order's entrenched Cold-War attitudes – formed, as mentioned, in the late 1960s – saw unionism as inherently Communist and thus, ideologically, as an enemy of state.

On the other hand, workers organisations were necessary because an effective structure for organising workers and monitoring workplace politics was seen as the only viable strategy for containing wages and preventing the rise of the effective unionism the elite so feared. In short, a vehicle to implement the New Order state's security approach (Tanter, 1990) in the workplace was required. Accordingly, labour organisations were to be revived but, at the same time, were to be manipulated to create a system that would ensure wages and conditions could be tightly controlled by the state.

This strategy was centred on the compliant All-Indonesia Workers' Federation<sup>12</sup> (FBSI), established in 1975 and reinvented in 1985 as the All Indonesia Employees Union<sup>13</sup> (SPSI). SPSI was protected from competition by a network of laws<sup>14</sup> that guaranteed it was Indonesia's only lawful union and it rapidly became little more than an arm of govern-

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<sup>11</sup> By 1986 the OPEC oil price had fallen from \$34.50 to less than \$10 (Ricklefs, 1991: 307).

<sup>12</sup> Federasi Buruh Seluruh Indonesia.

<sup>13</sup> Serikat Pekerja Seluruh Indonesia.

<sup>14</sup> See Fehring and Lindsey (1995).

ment. The laws that protected SPSI were only one part of a whole edifice of regulations constructed during this period – mostly issued by the Minister of Labour – that were clearly anti-labour and in some cases even contradicted existing legislation. These were focused on controlling workers’ freedom to organise and negotiate, and on legitimising military intervention in labour disputes. In practice, pre-existing laws that offered relatively strong protection for workers’ rights were simply sidelined and ignored.

The ideological justification of this new system was the Pancasila Industrial Relations concept (HIP). Essentially a co-opting of state ideology to create a vociferously anti-strike grundnorm for industrial relations in Indonesia, HIP tied the very notion of the integrity of the state to a range of subordinate institutions, filtering down to workplace level. These were specifically designed to rapidly bring the full weight of military and government to bear on any industrial dispute in any workplace, no matter how small. Fehring has described HIP as:

... a re-working of the traditional notion of Pancasila as embodied in the 1945 constitution. The HIP operates at all levels of industrial relations within Indonesia and it is not just an overriding ideological formulation. It reaches down to the day-to-day operations of employer and employee relationships. At the national level there is the Department of Labour, the SPSI and the *Panitia Penyelesaian Perselisahan Perburuhan Pusat* (the Central Labour Dispute Arbitration Committee, “P4P”) and various national employer bodies. This structure is reproduced at the regional levels. However at the regional levels there is the involvement of *Kodim*,<sup>15</sup> *Polres*,<sup>16</sup> and *Walikota*.<sup>17</sup> *Bakorstanas*<sup>18</sup> to co-ordinate these organisations, particularly when there is industrial unrest or strikes.

At a local level there are SPSI units and officers from the Ministry of Labour. Members of *Koramil*<sup>19</sup> and *Polsek*<sup>20</sup> will be involved if there are industrial disputes or disturbances. Regional and national bodies can reinforce any of these local units if the matter requires such attention.

(Fehring: 1999: 368-9)

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<sup>15</sup> *Komando Distrik Militer*, District Military Command.

<sup>16</sup> *Polisi Resort*, District Police.

<sup>17</sup> The Mayor.

<sup>18</sup> *Badan Koordinasi Bantuan Pemantapan Stabilitas Nasional*, Co-ordinating Agency for National Stability and Security.

<sup>19</sup> *Komando Rayon Militer*, Sub-district Military.

<sup>20</sup> *Polisi Sektor*, Sub-district Police.

The intrusive nature of this system and the extent to which it was able to mobilise security and military forces to protect employers' interests has been documented.<sup>21</sup> It allowed the government to proceed with economic development programmes based on monopsonistic partnerships between the indigenous political and military elites and foreign capital, and it ushered in a period of institutionalised exploitation of labour (McLeod, 2000).

In many ways, the HIP system reflected broader changes in New Order polity that began in the 1970s. Ali Moertopo, one of Soeharto's key strategists, was the first proponent of the HIP concept. He was also the inventor of the 'floating mass' concept: "the idea was that the populace would become a floating mass allowed to vote once every five years but otherwise refrain from political activity" (Schwarz, 1994:32-3). Bans on grassroots political activity and a forced amalgamation of independent political parties to form three puppet organisations ensured that only the structural vestiges of popular political groups remained and these were entirely controlled by the executive elite. The elaborate new HIP/SPSI construct was a reflection of this method in the industrial sector and was clearly both strategies were part of Soeharto's highly effective consolidation of personal power across the whole of Indonesian society, with the result that he:

... stood at the apex of the pyramid; his appointees sat in each of the key executive, legislative and judicial branches of government ... His writ extended down into every department and into every state-run corporation; it reached down, if he chose, to every village.

(David Jenkins, in Schwarz, 1994:37)

### The Third Phase: The Market as Veneer (1990-8)

For most of the 1990s, up to the start of economic crisis in mid-1997, Indonesia enjoyed a boom. It was widely touted by multilateral agencies as the example par excellence of the success of the deregulatory policies they promoted for developing countries.

Economic growth appeared to be robust ... Capital inflows remained buoyant. The stock market was rising ... almost all available economic and financial indicators looked either buoyant or reasonably comfortable. (Hill, 1999: 6-7)

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21 See Lambert (1993); Fehring and Lindsey (1994) for references.

During this period, the Soeharto regime presided over a nation with a rapidly burgeoning middle-class in which “life was almost certainly improving for the vast majority of Indonesian citizens” (Hill, 1999:7). The key to this boom was, however, an ever-greater dependence upon foreign investment, now grown exponentially beyond the expectations of the mid-1980s. This in turn made the government vulnerable to Western demands for a more open market. The dilemma for the New Order state was how to achieve the *deregulasi*<sup>22</sup> demanded by the United States and its multilateral allies (the IMF and World Bank, most significantly) without losing its iron control over labour and thus production costs.

The solution was to deliver deregulation in areas attractive to foreign capital, for example, by removing credit and capital controls in the banking sector and encouraging a vast increase in the number of lenders and the amount of credit available (Bennett, 1999). Similar reforms included the removal of restrictions on investment by opening previously-closed sectors and the effectively waiving of joint venture ‘Indonesianisation’ divestment provisions (Lindsey, 1997:101). At the same time, however, very little changed in the area of worker’s’ rights. The HIP concept continued as the paradigm, with only marginal regulatory window-dressing to put a gloss on its more brutal aspects. If anything, repression became stronger, thinly concealed beneath the veneer of nominal liberalisation.

### III. The LBH Analysis

Indonesia’s Legal Aid Institute (LBH)<sup>23</sup> has analysed industrial relations laws under the New Order as having three aims (Masduki, 1999). First, the laws were intended to systematise the government’s control of labour affairs by introducing a corporatist and coercive model. This included:<sup>24</sup>

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<sup>22</sup> Deregulation.

<sup>23</sup> *Lembaga Bantuan Hukum*.

<sup>24</sup> See generally for discussion of the regulations referred to in this section: Fehring, (1999: 373) and Fehring & Lindsey (1995 passim).

- (a) an overall control of all aspects of labour organization – and, in particular, the recognition and registration of new unions – by the Ministry of Labour. The key regulation here was *Ministry of Labour Regulation No. 3 of 1993*. This required that a union must be represented in 100 workplaces, 25 regions and 5 provinces in order to qualify for registration; and that membership of 10,000 members was required for industries of a ‘special kind’, a category left undefined. It also gave SPSI an effective veto over registration of new union federations. This meant that it was impossible for new unions to be recognised unless the government approved and this approval was, of course, not forthcoming.
- (b) tight limitations on the right to strike, based on mandatory bipartite and tripartite negotiations involving the Ministry of Labour and the security forces and a mechanism deeming a worker to have resigned after six days absence on strike. The key regulations that established this constructive dismissal system were *Ministry of Labour Decrees No. 4/of 1986* and *No. 1108/of 1986* and *Ministry of Labour Regulation No. 62/of 1993*.
- (c) controls on labour dispute resolution through the government’s labour arbitration body (the ‘P4P’ system).
- (d) government monopoly over the management of the *Jamsostek* workers’ social security fund, though *Law No. 3/992*.

Secondly, the ‘market’ era reforms were intended to ensure labour market flexibility. This was specifically intended to assist employers in implementing sub-contract or short-term contract job systems based on either production fluctuation, change of production technology or capital mobilization. Under this system the workers’ collective power was weakened. Individual contracts meant that collective bargaining was much less effective.

Thirdly, the laws were aimed at facilitating government mobilization of labour to suit the needs of capital mobility. Its massive population (now around 215 million) means that Indonesia has nearly always had an abundant labour market and since June 1997, when the economic crisis first began to damage a previously booming economy, at least 20 million workers – or 40% of the workforce – have lost their jobs (Masduki, 1999), further increasing competition. The mobilization of this necessarily vulnerable labour market has had an important role in maintain-

ing labour costs at the lowest level possible. When labour costs in one area increased, the government could shift the workforce to an area with a lower salary level (sometimes in conjunction with official transmigration programmes) – or simply replace it entirely. These methods were used with increasing efficacy to replace striking workers with substitute labour, a simple tactic because of the constructive resignation provisions for strikers noted above.

The mix of aggressively repressive security and/pro-investment provisions, and a transparently dishonest rhetorical commitment to labour rights that typified Indonesian industrial relations policy in the 1990s, was maintained by the New Order, right up to the last months of Soeharto's rule. This was so *despite* evidence that the approach was ineffective. Total membership of the government union, the SPSI, never exceeded one million (6% of the workforce) (Fehring & Lindsey, 1995: 4) and the entire oppressive apparatus of bureaucracy, military and intelligence failed to prevent industrial action. In fact, if anything, it seemed to provoke underground unionism and wildcat strike-action, around 81% of which was chiefly concerned with the basic “wages and welfare issues” which the government believed it had under control (Suwarno and Elliott, 2000, 139).<sup>25</sup> Active, albeit unrecognized, unions such as SBSI<sup>26</sup> and Solidaritas continued to spring up and, in the case of SBSI, prosper, despite the government's best efforts, which included the jailing and brutalizing of members and leaders like Muchtar Pakpahan, the pre-eminent independent labour leader. (Suwarno and Elliott, 2000: 137; Zifcak, 1999)

#### IV. The Post-Soeharto Reform

These unions – victimized and illegal in most cases – became key partners in a coalition with opposition political groups, Muslim organizations, student radicals, the urban poor and, ultimately, factions within the armed forces opposing Soeharto. With his resignation and

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<sup>25</sup> For figures on this from 1991 to 1994 see Tjajo (1996) and Fehring and Lindsey (1995: 5-6).

<sup>26</sup> Serikat Buruh Seluruh Indonesia, All Indonesia Workers' Party.

the almost immediate announcement of the new Habibie government's intention of de-regulating unionism, they found themselves faced with two main challenges. One of these challenges was familiar: how to ensure labour protections were actually implemented? The second was entirely new: how to organize effectively, now that it was possible to do so freely?

The Indonesian labour movement now finds itself forced to undergo transition from the experience of repression and agitation to face the very different challenges of a (nominally) ILO-compliant modern industrial relations environment. The new tasks for Indonesian unions include such basic activities such as workplace organisation, worker representation and, ultimately, reforming the regulatory system. They will attempt these tasks, however, in the face of two very significant obstacles.

First, many of the new reforms are motivated more by the need to seek legitimacy by being seen to roll back the overt repression of Soeharto's HIP system, than by any genuine commitment to labour market reform. With some notable exception, the post-Soeharto state has therefore provided only weak leadership for labour market reform and, indeed, more often than not, its agencies covertly sabotage change.

Secondly, as mentioned, unions face massive employer resistance in the workplace, as businesses struggle to survive massive debt burdens created by the economic crisis that began in 1997. In the words of one prominent labour activist, "it was easier opposing than organising".<sup>27</sup> The growth of dozens of new unions has created new rivalries and disunity in the labour movement and many of the new unions are simply unable to cope with the challenges of organising across Indonesia's far-flung provinces in the face of the worst economic conditions in four decades, and related communal violence, regional separatism and resistance from the old Soeharto-Habibie elite.

## Habibie

Under Soeharto's successor, President B.J. Habibie, *reformasi* (reformation) dramatically accelerated the liberalisation of industrial relations. Unions were effectively freed from government control. As mentioned,

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<sup>27</sup> Teten Masduki, Jakarta, December 1999.

Indonesia acceded to most ILO conventions and a plethora of statutory reforms were initiated. In the workplace, however, Habibie's reforms, delivered only limited improvements for workers: his government was therefore, in many ways, little more than an extension of Soeharto's New Order regime.

In 1998, the Habibie government issued *Ministerial Regulation No.5/1998* in pursuance of ILO Convention No.87 (on Freedom of Association and Protection of the Right to Organise). This replaced, replacing the much-criticised *Ministerial Regulation No. 3/1993*, introducing. The regulation introduced a new system for registration of trade unions and effectively ending the stranglehold of the previous monopoly union body, the SPSI federation. This regulation is, however, still regarded by workers and NGOs as failing to comply with the terms of the Convention. Specifically, it reinforced provisions in the Soeharto-era *Social Security and Labour Law No. 25/1997* (discussed below) by requiring certain highly-restrictive forms and structures for newly-established labour organisations and requiring also that the unions must be approved by the government through registration with the local Ministry of Labour Office. The regulation also restricted workers' freedom to form organisations based on political belief, gender, etc. In reality, the regulation – which is accepted by the ILO as implementing the Convention (ILO, 1999:8-9) – did not allow the sort of free unionism anticipated by workers.

Around the same time that *Regulation No.5/1998* was introduced, the government also released leading trade union activists, including, most notably Muchtar Pakpahan, followed later by Dita Sari. As head of the independent and unrecognised opposition union, SBSI,<sup>28</sup> Pakpahan had been jailed on spurious charges linked to riots in Medan and in Jakarta at which he had not been present, and had been re-arrested after acquittal on the Medan charges. At the time of his release, he had been awaiting a continually-postponed trial on the Jakarta allegations, while his health gradually deteriorated (Zifcak, 1999: 362-4). Since the release of these and other leaders, some 21 different union federations have since been registered (ILO, 1999; 10). This should not be seen,

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<sup>28</sup> *Serikat Buruh Sejahtera Indonesia*, Indonesia Workers' Prosperity Union.

however, as evidence that *Regulation No.5/1998* was effective. If anything, it acted as a brake on union recognition rather than an enabler. Dozens, even hundreds, of unions have been formed over the last 2 years and most were forced to operate without registration, at considerable risk to members (Masduki, 1999).

In November 1998, the government also responded to massive NGO and union demonstrations against the key labour regulation labour statute, *Law No. 25/ of 1997* on Labour, by postponing its commencement to October 2000 to allow it to be overhauled. This statute, one of the last 'reforms' of Soeharto's rule, nominally recognised the failure of the 'Market' approach and the need to 'sweeten' the international appearance of Indonesian labour regulation by revoking many of the more outrageous provisions. However, this was another initiative in bad faith. The Law continued to recognise only the 'government' union, SPSI, and introduced a new seven-day mechanism for strike approval by the Department of Labour, thus maintaining state control over industrial action. It also restricted the right to strike to a single workplace, banning sympathy strikes as a threat to security and the public interest. It likewise rendered illegal strikes a criminal act and imposed severe penalties, including imprisonment.

There is now a consensus amongst reformist members of government, independent unions and scholars that most of the rest of the existing regulatory framework, however superior it may be to the regimes in some other regional developing states, is still either ultimately inconsistent with the relevant ILO Conventions (ILO, 1999, 9-16) or is no longer politically acceptable in post-Soeharto Indonesia. The more controversial laws covered by this assessment include *Ministerial Decree 1/of 1994 on the Establishment of a Labour Union at the Company Level* and *Law No. 4/ of 1974 on Basic Matters relating to the Public Service*.

Accordingly, in the end the concessions made to labour by Habibie's regime failed in the intended purpose of providing his interim government with legitimacy, as did many other of the wide-ranging reforms he introduced across many other sectors. In November 1999 Habibie lost power, mired in the Bank Bali fraud scandal.

## Wahid

Abdurrahman Wahid, who replaced Habibie as President in late

1999, differed from his predecessor in that he was never a member of the inner circle around Soeharto. He was, however, a compromise President, negotiating power from a weak base. His PKB<sup>29</sup> party won only 12% in the general elections of mid-1999, trounced by both Habibie and Soeharto's party, GOLKAR, and Megawati Soekarnoputri's PDI-P.<sup>30</sup>

Ultimately, he emerged as a weak leader and the latter part of his term, from mid-2001 onwards, was marked by policy paralysis amid threats of impeachment stemming from allegations of corruption. Real labour reform therefore remained politically impossible. Wahid's labour reform record was thus only slightly better than Habibie's and made little difference to labour law practices in the workplace.

During Wahid's term, amendments were made to Labour Law No. 25 /of 1997, and the *Trade Union Law* was passed to replace *Regulation No.5/1998*. This statute contains guarantees of workers'<sup>31</sup> rights to organise and contains provisions that would allow unions to be formed on the basis of 'business sectors or kinds of work' rather than enterprises alone, as was previously the case. It also guarantees workers the right to conduct collective labour agreement negotiations and to choose which union will represent them in those negotiations, as sought by the ILO (ILO, 1999:19).

## Megawati

Megawati Soekarnoputri, whose party, PDI-P party, won a plurality of 36% in the 1999 elections, replaced Wahid after he was impeached for corruption and dismissed in 1999. The *Industrial Dispute Settlement Bill* which is the main focus of this paper is now in proceeding through the legislature.

A *Migrant Workers Bill* is also in development and is clearly important given that the continuing *krismon*<sup>32</sup> is forcing increasingly large num-

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<sup>29</sup> *Partai Kebangkitan Bangsa*, National Awakening Party.

<sup>30</sup> *Partai Demokrasi Indonesia-Perjuangan*, Indonesian Democracy Party - Struggle. Megawati is the popular daughter of Indonesia's first President, Soekarno. Her party won a plurality with 35%, while GOLKAR achieved 26% (down from 76% at the last manipulated election in 1997, when Soeharto was its candidate).

<sup>31</sup> - other than civil servants.

<sup>32</sup> *Krisis Moneter*, economic crisis.

bers workers overseas.

The other key area in which statutory reform is likely in the near future is workers' compensation. The current JAMSOSTEK<sup>33</sup> system is regulated by *Law No.3/of 1992* and injury compensation is conducted exclusively through a government-owned company, which is widely seen as incompetent. The system is based on the collection of contributions of 10-12% of workers' wages, with 2% funded by employers and the balance by workers (Manning, 1998:207). Benefits theoretically include social security for retirement and, pregnancy, and cover for injury, sickness and death, but, as in the case of the minimum wage, unions claim that premiums are not consistently collected and compensation is, in fact, not often paid and, even then, rarely in full. Proposals currently under consideration include allowing private insurance companies to enter the market (ILO, 1999: 21) and increased penalties for non-compliance.

## Conclusion

Industrial relations law in Indonesia has, until the last three years, been predominantly directed at controlling and co-opting the labour force to support government development objectives. This has been consistently true since colonial times, with the exception of the Leftist period of Soekarno's rule, when unions briefly enjoyed a degree of political ascendancy.

This policy of containment and repression has meant that industrial dispute settlement has usually been conducted by aggressive governmental or armed forces intervention, either on the basis of regulations that authorized this or in an extra-legal, even covert, fashion. Recent reforms introduced in an atmosphere of continuing economic weakness and widespread social and political turmoil have done little to change this state of affairs. This is demonstrated in the next chapter, which provides three detailed case studies of recent industrial disputes, focusing on how they have been resolved, usually in a violent or coercive fashion and outside the formal industrial relations framework, such as it is.

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<sup>33</sup> *Jaminan Sosial Tenaga Kerja* (Workforce Social Guarantee).

Now, however, the new *Industrial Dispute Settlement Bill* proposes the creation of a dedicated judicial system to provide independent dispute settlement. The Bill has been drafted in the anticipation of this system being capable of, to overcome the problems described in this and the next chapter, and of bringing Indonesia into line with best international practices. Chapters Three and Four examine this Bill in detail and make proposals for its further improvement.

## Chapter 2

# LABOUR DISPUTE RESOLUTION IN INDONESIA : THREE CASE STUDIES

The aim of the *Industrial Dispute Settlement Bill* is to provide an effective and fair dispute resolution system for labour disputes, for the first time in Indonesian history. This section chapter draws on three recent Indonesian disputes to demonstrate why this is necessary: the Shangri La Hotel case, the ‘sandal bolong’ case and the PT Kadera case, outlining in more detail the nature of the proposed new system. In the following chapter the nature of the proposed new system is outlined in detail and the last chapter (Four) identifies shortcomings in the new system and what suggests further amendments are required to avoid the sort of problems identified in this chapter in this chapter.

These case studies in this chapter show that the current system, inherited from Soeharto’s New Order – and only superficially improved by reforms introduced since his fall, – is biased in favour of employers, often usually invokes intervention by the armed forces and is linked to judicial corruption and bureaucratic intimidation. It should be noted, however, that these cases have occurred in the context of a persistent economic crisis, the deregulation of trade unions, reduced government subsidies for basic needs, and an increasing awareness among the general population of their legal rights. Given these conditions, the number of disputes that have actually been resolved without encountering the sort of problems documented below has been quite impressive. Nevertheless, the very occurrence of cases such as these discussed in this chapter is remains evidence, as far as the authors are concerned, of the need for They demonstrate why a new dispute resolution system is necessary. In the next chapter the nature of the proposed new system is outlined in detail and the last chapter (Four) identifies shortcomings in the new sys-

tem and what further amendments are required to avoid the sort of problems identified in this chapter.

## I. The Shangri-La Hotel Case: Persistence of the New Order Labour Model

The still-unfolding Shangri-la Hotel case has received much international attention. It represents a classic example of the political, economic and legal ramifications for all parties of the current inadequate labour dispute system. The case involved a dispute between the management of the five-star Shangri-la Hotel in Jakarta – which is incorporated in Indonesia as PT Swadharma Kerry Satya and is part of the internationally owned Shangri-la chain – and 600 of its employees.

The dispute arose in September 2000 following attempts to renegotiate the terms of the Collective Labour Agreement (CLA) under which the parties had been working. The CLA was due to expire in December 2000. The negotiations were carried out in accordance with Law No. Act No. 21/1954 on *Labour Agreements*, which provides that negotiation for renewal of a CLA should be conducted at least three months before its expiry. During the negotiations all employees were represented by their union, the Jakarta Shangri-la Independent Workers Union (SPMS – *Serikat Pekerja Mandiri Shangri-la Jakarta*), an affiliate of the Geneva-based International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco, and Allied Workers (IUF).

The negotiations continually broke down, particularly with regard to holiday pay and the implementation of a pension fund that was already part of the CLA and common to Jakarta's other five-star hotels. Following several failed meetings with the Hotel management, the President of the SPMS, Mr Halilintar Nurdin, held a meeting on 8 December with other union members in which he is alleged to have made offensive statements about the General Manager of the hotel and his secretary.<sup>34</sup>

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<sup>34</sup> No sources clarify exactly what Halilintar actually said. See, for example, International Labour Organisation Governing Body (2001: 96).

In the days following the meeting, the management found a poster in the possession of Halilintar which that they considered offensive. He was then therefore called and called him into a meeting during which he allegedly repeated the statements he made on 8 December. On 22 December management sent a suspension letter pending dismissal to Halilintar, claiming that his behaviour was in breach of both the CLA and *Department of Labour Regulation No. 150/Men/2000 on Termination of Employment*. Article 18 of the *Regulations* holds that grounds for terminating employment include “abusing, threatening (mentally or physically) or unduly humiliating the employer, the employer’s family, or fellow employees”. In communications with the International Labour Organization on 10 January 2001, the IUF stated that the Hotel management had bribed a local representative from the Department of Labour in order to facilitate the suspension and subsequent dismissal of Halilintar (International Labour Office Governing Body, 2001:93). The Department of Labour responded to this accusation by stating that the money received was a redundancy payment to be passed on to a former Shangri-la employee, Mr Nuril Fuadi, who was involved in a separate dispute. It claimed that Nuril had decided to appeal the settlement, so the payment could not be made immediately (International Labour Organisation Organization Governing Body, 2001:97).

## The strike

At any rate, the suspension of Halilintar aroused strong emotions among his fellow employees. It seems the Hotel management had predicted some kind of reaction as there was evidence that from the early morning of 22 December 2000 it had increased security personnel numbers and had requested the presence of police and military personnel (International Labour Office Governing Body, 2001:93). This did not, however, prevent the hotel employees from meeting in the hotel lobby, where they signed a petition protesting the suspension and then proceeded to prevent guests and other personnel from entering the hotel. The SPMS has since claimed that the protest was not intended to cause a cessation of all hotel activities, as it did not involve all union members on duty at the time, and that there was no attempt to compel any party to leave the Hotel (International Labour Organisation Organization Governing Body, 2001:93). Nevertheless, in the afternoon of 22 De-

ember the Hotel management began to relocate guests to other hotels in Jakarta and several hours later it closed all hotel operations.<sup>35</sup>

## The evacuation

After several days of employees occupying the hotel lobby, the Hotel management asked the police to remove them. On 26 December 2000, approximately 350 members of the police force carried out this request, during which they broke a glass door and damaged employee lockers (for which the Hotel management subsequently paid compensation). They then transported 20 union organisers to the Central Jakarta police station where they detained them for a day. The Hotel management then secured the premises, preventing union organisers from accessing their office in the basement of the Hotel.

The Hotel remained closed to guests following these events and in early January 2001 management sent most employees a letter stating that their participation in the strike would result in the termination of their employment at the Hotel unless they signed an affidavit agreeing to terminate their membership of SPMS (International Labour Organisation Organization Governing Body, 2001:94).

Employees continued, however, to protest outside the Hotel. On 20 February 2001, violence broke out at such a protest. Following this violence, which Mr Muhammed Zulrahman, treasurer of the SPMS and an employee of the Hotel, was hospitalised with bruises to the head, torn lips requiring stitching and missing teeth. The IUF claims that the Zulrahman was attacked by Mr Kaleb Ehanusa, a bodyguard for one of the major shareholders in Shangri-la Jakarta, Mr Osbert Lyman (Goss, 2001). The Department of Labour, however, claimed that Zulrahman was in a private fight with someone unconnected to the Shangri-la (International Labour Organisation Organization Governing Body, 2001:93).

On the same day, the Governor of Jakarta Mr Sutiyoso, announced that he would provide the Hotel with special security forces if the Hotel were to decide to reopen with “non-striking” employees (Goss, 2001:93). This statement came under heavy criticism from employee rights advocates, who claimed that it showed an intention to breach *Article 28 of Act*

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<sup>35</sup> A South Korean Independence dinner, however, did go ahead as planned on the night of 22 December.

*No. 21/2000 on Labour Unions*, which provides that it is an offence to obstruct union activities ('Serangan Balik untuk Shangri-La', 2001). Despite this, the Hotel reopened on 17 March 2001 with a new, non-unionised workforce. According to news reports, the Hotel had received four thousand applications for jobs. The same reports suggested that the three-month closure had resulted in an estimated loss to the Hotel of US\$8.59 million ('Shangri-la to Accept Verdict on Labor Row', 2001).

### The arbitration

On 11 May 2001, the dispute appeared before the Central Labour Dispute Arbitration Committee Central Labour Dispute Tribunal (*Panitia Penyelesaian Perselisihan Perburuhan Pusat* or P4P), for arbitration. The employees argued that they did not intend to cause the closure of the Hotel, and that the Hotel management chose to close the Hotel to guests as a strategy to weaken their employees' bargaining power.

The Committee Tribunal held, however, that the employees' spontaneous strike was illegal because it was conducted without permission from the relevant Regional Labour Dispute Arbitration Committee Tribunal (*Panitia Penyelesaian Perselisihan Perburuhan Daerah* – P4D), the City Council or the Police Force. The Tribunal therefore took the view that this gave the Hotel management the right to dismiss the employees, including SPMS Vice-Secretary Mr Timron who was on vacation in Medan at the time of the strike. The Tribunal also held, however, that since the offences were not serious, the employees were still entitled to severance pay. Pursuant to *Department of Labour Regulation No. 150/Men/2000* this was assessed as a lump sum based on duration of employment, medical benefits, and one month's wages.

All but 79 of the employees accepted this ruling and settled with the Hotel management. The 79 who refused to settle immediately signalled their intention to appeal the decision to the Administrative Court (*Pengadilan Tinggi Tata Usaha Negara*, or PT TUN) and to have the ILO make formal recommendations when its Governing Body next sat in Geneva.

These rulings came at the same time as a civil suit against the employees was being heard in the South Jakarta State Court (*Pengadilan Negeri Jakarta Selatan*). In that case, the Hotel management was seeking damages of approximately IDR8 billion (\$US8 million) from several SPMS

organisers and the Indonesian representative of the IUF. A review of the termination of Halilintar (who was a defendant in these proceedings) was conducted by the P4D. That Tribunal considered that his actions in the capacity of union leader were to be classified as a serious offence and that the Hotel management was justified in terminating his employment (Ibid, 97). At this point Halintar seemed to change his position, accepting a settlement offered by the Hotel management, reportedly in the vicinity of IDR30 million (\$US3000) ('Demo Karyawan Shangri-la Tuntut Pengadilan Tolak Gugatan Manajemen', 2001). He then proceeded to accuse the IUF of inciting the employees to continue their fight against the Hotel ('Fired Hotel Workers Vow To Fight On', 2001) and the management later withdrew him from the list of union organisers against whom they were seeking civil damages.

### The civil suit

On 1 November 2001, Judge I Gede Putra Djadnya of the South Jakarta State Court (Pengadilan Negeri) ordered seven union officials to pay damages of IDR20.7 billion (US\$2.2 million) from of the IDR80 billion claimed by the Hotel management for damage to reputation, damage to hotel facilities and losses suffered due to closure.<sup>36</sup> Throughout the judgment the Court made reference to the illegality of the strike, and also ordered the seven defendants to make written apology to the Hotel management for publications in five national newspapers. The Hotel management later offered to waive its entitlement to damages if the employees would withdraw their appeal against the P4P ruling and undertake not to bring any counterclaims (Yasin, 2001). The defendants, however, declared they would continue with their appeal and, further, would lodge an appeal against the civil judgment with the High Court in Jakarta (*Pengadilan Tinggi DKI Jakarta*).

The State Court judgment met harsh criticism from both employee advocates and members of government ('Dita Threatens Action', 2001). The Minister for Labour, Mr Jacob Nua Wea, even described the decision as "crazy" ('Menakertrans Kecewa Dengan Putusan Pengadilan Kasus Shangri-La', 2001).

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<sup>36</sup> Case No 22/Pgt.G/2000/PN Jaksel.

## Pressure from the ILO

On 15 November 2001, the ILO Governing Body heard the case brought against the Indonesian Government brought by the IUF (International Labour Organisation Organization Governing Body, 2001: 92-100). It found that the Government had acted in a way that was not conducive to the implementation of *ILO Convention 87 on Freedom of Association and ILO Convention 98 on the Right to Organise*, to both of which Indonesia is a signatory. The ILO was particularly critical of the detention by police of union officials, and requested that an independent judicial review be carried out in relation to the injuries suffered by done to Zulrahman. The ILO also recommended that the Government take concrete steps to ensure the reinstatement of all employees who had not accepted the Hotel's settlement proposals.

The Hotel management was quick to say that the ILO rulings were recommendations only and had no binding effect on Indonesian domestic law. Lawyers for the employees predictably asserted that both courts and the Gggovernment should take close consideration of the ILO recommendations in view of Indonesia's status as a signatory to the conventions ('Serangan Balik untuk Shangri-La', 2001).

## Appeals

It appears the ILO recommendations did, in fact, carry some weight, as the Administrative Court found in favour of the employees upon deciding their appeal from the P4P Tribunal on 26 March 2002. The Court reversed the rulings of the P4P, stating that the administrative body did not have the authority to declare the strike illegal as the Hotel had never officially filed any charges with the police. The Court then replaced the P4P ruling with an order that the 79 remaining employees be reinstated.

The P4P and Shangri-la announced several days after the ruling by the Central Administrative Court that they would appeal to the Supreme Court (*Mahkamah Agung*), the final Court of Appeal in the Indonesian judicial system, and, as the time of writing, the defendants in the civil suit are in the process of appealing to the High Court inof Jakarta.

## Comments

The political and economic cost of the strike and protracted legal proceedings that followed have been high for all parties involved: many of the employees who went on strike are now without a job; several union members have been ordered to pay a sum of civil damages which they will not come close to earning in their lifetime; the Jakarta Shangri-la Hotel management suffered a significant financial loss and a severely tarnished reputation; the Shangri-la chain has lost important international tenders;<sup>37</sup> and the Indonesian Government has had to fend off international criticism. Eighteen months later, however, the dispute still lingers on.

Mr Hadi Wasikoen of Commission VII of the DPR (*Dewan Perwakilan Rakyat* - the Indonesian legislature) – the parliamentary body charged with the task of industrial reform – remarked with regret that “this kind of thing continues to happen because businesses don’t have access to mechanisms for the settlement of labour disputes” (Susanto, 2001). The Jakarta Office of the International Labour Organization agrees, stating that “the logical thing would be to institute a law that encourages collective bargaining and negotiation with employers to prevent problems and solve disputes quickly.”<sup>38</sup> It is clear, however, that such reforms will not be achieved without an overhaul of the Labour Dispute Arbitration Committees Settlement Tribunals (the P4D and P4D). These institutions are left over from the New Order ‘Pancasila Industrial Relations’ system described in the previous chapter, and as such are not accustomed to functioning in an industrial relations environment free from military intervention and prohibitions on non-government unions. All employee representatives on these Tribunals are, for example, from the FSPSI<sup>39</sup> – the government-run union of the New Order. Moreover, the Committees are rife with corruption and have little knowledge of the relevant regulations – particularly at the regional level (‘Jacob Nuwa Wea: Banyak Pejabat Disnaker Tak Tahu Soal Buruh’, 2002). As a result, most decisions are ignored or appealed (‘Memintas Keadilan buat Buruh’, 2001).

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<sup>37</sup> See, for example, Robinson (2002: 6).

<sup>38</sup> Carmello Noriel, cited in ‘Labor Problems “Due to Same Old System”’ (2000).

<sup>39</sup> *Federasi Serikat Pekerja Seluruh Indonesia (Pan-Indonesia Workers’ Union)*.

The proposed labour dispute legislation discussed in following chapters 3 and 4 would go a long way to resolving these problems by abolishing the P4P and the P4D. It also contains express prohibitions on employers terminating employment due to an employee's membership in a labour union or participation in a labour union's activities (art 163), a prohibition on employers replacing striking employees (art 146), and a reiteration of the right of employees to join independent labour unions (art 115).<sup>40</sup> However, it has also been criticized for not going far enough to reform the system sufficiently to prevent a repeat of the Shangri-La debacle. For example, it contains a clause holding that employees can be dismissed without any severance pay for "serious misconduct" (art 158). As this includes "damaging the reputation of the enterprise", it could be used against employees in disputes like Shangri-la. Although the Minister for Labour seems genuinely committed to the reforms, only the reality of how they are eventually applied to industrial disputes will tell whether the government is bona fide about improving the system, or whether it is simply passing laws on paper in order to be seen as complying with obligations under ILO conventions ratified by previous governments, as has been the case with much of the reform introduced since 1998.

## II. The "Sandal bolong" Case: Criminalising Unionism

The so-called "Sandal Bolong" ('holey sandals') case involved a Taiwanese-managed company, PT Osaga Mas Utama, and one of its employees, 25-year-old Mr Hamdani. On 10 August 2000, Hamdani had been involved in a strike. Employees at the company's Tangerang factory were demanding the implementation of their statutory rights to medical benefits and the reinstatement of nine fellow employees. Less than a month later on 4 September 2000, Hamdani was detained and accused of stealing a pair of the company's sandals from outside of the company's prayer room. His employment was subsequently terminated.

Hamdani, a Muslim, argued that he was only borrowing the sandals for his obligatory Friday prayers, and pointed out that the sandals were worn and had holes in them. It is not unusual in Indonesia for

employers to provide spare sandals for use during the ritual washing required prior to such prayers. He attempted to get his job back by seeking arbitration at by the Tangerang P4D, which found in favour of the employer. He then appealed to the P4P, which ruled on 5 September 2001 that PT Osaga Mas Utama had the right to terminate Hamdani's employment. To add salt to the wound, Hamdani was then charged with theft under Article 362 of the Indonesian Criminal Code (*Kitab Undang Hukum Pidana* – KUHP),<sup>41</sup> which carries a maximum penalty of five years imprisonment.

The case appeared before the Tangerang State Court,<sup>42</sup> where the prosecutor, Mr Misbah, contended that Hamdani should be sentenced to five months imprisonment. The panel of judges, headed by Judge Suprpto, held that although Mr Hamdani's offence was not serious, it damaged the fabric of society and thus warranted two months and 24 days imprisonment. This happened to be exactly the length of time Hamdani had already spent in the Tangerang Youth Prison awaiting hearing, so he was released on the day the sentence was handed down.

### Criminalising Labour

This case is good example of how criminal law intrudes into labour disputes that have little to do with criminality, and how the use of criminal law is invariably weighted against employees. In February 2002, following a spate of cases such as this where the KUHP was used to convict labour activists and 'break' unions, a prominent group of Indonesian labour activists lodged an official complaint with the DPR, claiming that the Indonesian legal system and law enforcement agencies were criminalising organised labour ('Buruh "Sandal Bolong" Mengadu ke DPR', 2002). They cited the increased use by employers of Article 335, which prohibits "unsatisfactory conduct towards another"<sup>43</sup> but is now often unofficially referred to as "breaching the rights of an employer" (Susanto, 2001).

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<sup>40</sup> This right is already stated in Act No. 21/2000 on Labour Unions, art 5.

<sup>41</sup> The pervading lack of confidence in the judicial system has caused many Indonesians to refer sarcastically to the KUHP as *Kasih Uang, Habis Perkara* - "give money and the case will be over".

<sup>42</sup> Case No 587/Pid.b/2001/PN Tangerang.

<sup>43</sup> Perbuatan yang tidak menyenangkan terhadap orang lain.

These claims appear justified in light of the relatively more lenient treatment of non-union defendants convicted under the KUHP. Shortly before Hamdani's case, for example, the Central Jakarta State Court sentenced Ari Sigit – grandson of former President Soeharto – to only two months and 22 days imprisonment for possession of illegal firearms and explosives. This was despite of the fact that the charge carried a maximum penalty of life imprisonment. Similarly, the East Jakarta State Court recently sentenced businessman Amrin Gobel to only three months and 15 days after he was implicated in the killing of two striking employees.<sup>44</sup>

This disparity in the treatment of unionists on the one hand and, on the other, elite criminals, obviously impedes the rebuilding of confidence in the legal system in Indonesia. It also, perpetuates New Order's propaganda that presents organised labour as inherently 'wrong' and linked to illegal and subversive communist activities.<sup>45</sup> As argued in the first chapter, despite the reformist rhetoric of post-Soeharto industrial relations, the Indonesian government has been slow to move to abandon the central role it played in industrial relations throughout most of the New Order. So, for example, the proposed new legislation (discussed below in chapters 3 and 4) still prohibits strike action for those employed in 'essential' sectors, and severely limits the right to strike for those in "important" sectors. (art 147). It also provides for up to two years imprisonment for public servants who strike. Most significantly, perhaps, art 77 provides for a penalty of six months imprisonment for industrial action taken while cases are being handled by the government.<sup>46</sup>

The criminalisation of organised labour may be seen as a result of pressure from frustrated employers as they struggle to make the transition to a new political climate in which the government no longer able to controls of employees as closely and as aggressively as it they did in the past. It may also reflects growing pressure from employees who are both motivated by post-Soeharto *reformasi* rhetoric and, at the same time, facing the often overwhelming social pressures created by the declining real wages and widespread unemployment delivered by Indonesia's drawn-out economic crisis.

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<sup>44</sup> See PT Kadera case below.

<sup>45</sup> See, for example, Heryanto (1999).

<sup>46</sup> Article 77, as discussed above.

### III. The PT. Kadera Case: Official Violence as Dispute Resolution

The PT Kadera case is a clear example of the increasingly common practice of involving (usually violent) ‘third parties’ in labour disputes as a response to the absence of a satisfactory labour dispute resolution system. Many of these parties are, or have close links with, *preman* or gang organizations and are able to function with relative impunity largely due to the protection and co-operation of certain factions within the police and the military.

On 29 March 2001, 300 employees at a car upholstery manufacturing plant operated by PT Kadera demonstrated and went on strike demanding an increase in wages. Before long, approximately 500 unknown men arrived at the site, wearing *Masyarakat Cinta Investor* (‘Investor Lovers Society’) headbands. They arrived in buses and carried iron bars, glass bottles, machetes, knives and explosives. In the violence that ensued, one young employee was killed by an explosion, while eight more were hospitalised with either stab wounds to the stomach or heavy bruising to the head. One died several days later.

Police investigating the incident announced that the violence was carried out by at least two different gangs. The first was a Bantenese gang, allegedly with links to Mr Maman Rizal of the Serang Local Government (in the newly formed Banten province). This gang, based in the North Jakarta district of Warakas, numbered at least 70 and was running under the front of a Bantenese martial arts school. The leader of this group, Mr Sugianto (alias Abi) admitted to receiving IDR27 million (US\$2700) from the Deputy Manager and Head of Personnel at PT Kadera, Mr Amrin Gobel (‘Polisi Tangkap Penggerak Penyerang Buruh PT Kadera’, 2001).

The other group was led by an Ambonese gangster Mr Palesesen Masahuwa. It is unclear whether this group has any links to a gangster named Abubakar, who was also present at the PT Kadera attack and is a member of a “security” organisation working for PT Timor in the Cikampek industrial zone of Jakarta. Explosives found in possession of other members of this organisation happen to match the Ambonese-made explosives used in the recent Cikoko and Duren Sawit bombings.

The presence of Abubakar at the attack may also be evidence of a

link to the military, as he admitted to police that he was paid IDR300,000 (US\$30) by a Mr Kino to throw Molotov cocktails into the crowd. The elusive Kino, who apparently also goes by the name Tikino, has been reported as being a member of Kostrad (the Army Strategic Reserve Command) (Taufik et al (2001). Meanwhile, the lawyer for the families of the PT Kadera victims, Mr Zainudin Paru, claims that the police Brimob (Mobile Brigade) and the local Chief of Police are involved. He has stated that despite being present during the attack, members of the police force did little to stop it ('Catatan Akhir Tahun FNPBI: Buruh Bangkit, Ditindas Kian Keras' (2001). As yet investigations into the role of the police and military in the attack have not yielded any concrete results.

At present, 7 *preman* are being tried before the East Jakarta State Court for assault under Article 170 of the KUHP.<sup>47</sup> On evidence presented by Sugianto, PT Kadera's Deputy Manager, Amrin Gobel, was sentenced to three months and 15 days imprisonment under Article 335 for inciting another to commit unsatisfactory acts towards a third party. In sentencing, however, Judge Surya Dharma Belo of the East Jakarta State Court stated that the Gobel was only involved in calling a third party in to encourage calm negotiations over the dispute. Judge Surya also cited the defendant's polite attitude throughout the trial, the efforts he took to ensure the medical treatment of the injured employees, and the condolence money he gave to the families of the two workers who died in the attack.

It has been suggested by investigative journalists that the sentencing of Gobel involved collusion between the judges, the defendant and even the prosecutor, Mr Taufik Hidayat ('Pengacara Korban Kadera Tuduh ada Permainan Persidangan', 2001). Gobel was not even charged under Article 55 of the KUHP, which holds that those convicted of inciting a criminal act by payment, promise, or misused authority may be sentenced as if they had committed the act themselves. If he had been charged with inciting the violence that caused the two deaths, reliance on Article 55 could have resulted in a sentence of up to fifteen years imprisonment on each count.

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<sup>47</sup> Case No 811/Pid/b/2001/PN Jaktim.

## Systematised Industrial Relations Violence

The *PT Kadera* case clearly illustrates the systematically violent nature of industrial relations disputes in Indonesia. The employer's first reaction to employees striking was not to examine legal avenues but to call on third parties in the form of gangsters and the police to informally 'settle' the dispute, obviously with the expectation that violence would be used. As in the case studies above, this can be seen as a consequence of the absence of any effective legal mechanism for the resolution of industrial disputes.

A real change in the system can thus only come about after a retreat from the "Pancasila Industrial Relations" paradigm used by the Soeharto regime to undermine formal labour dispute resolution, prevent effective employee representation and facilitate these kinds of actions.<sup>48</sup> As such, the Minister for Labour's recent announcement that the new industrial relations reforms would do away with the entire concept of "Pancasila Industrial Relations" is a step in the right direction ('Pancasila Tidak Lagi Dipakai Dalam UU Ketenagakerjaan', 2002), as are the provisions in the proposed legislation that hold the government responsible for promoting an understanding of the new industrial relations system to those parties directly affected and to the community at large (arts 154-9). However, although, once again, the real issue is whether this positive rhetoric will actually be implemented 'on the ground' sufficiently to bring real change.

## Ethnicity in Labour Disputation

Another issue raised by this case is the ethnic dimension to the violence. As a result of the economic crisis that accompanied the fall of Soeharto and has persisted since then, rival gangs are now engaged in vicious competition over both standover operations and legitimate employment. The extreme centralisation of the Indonesian economy has precipitated an explosion of migration to Jakarta, resulting in many of the gangs being formed along ethnic lines and bent on keeping newcomers out of their rackets – and their workplaces. A recent example of this

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<sup>48</sup> See, for example, Lindsey and Masduki (2002); and Thamrin (1999).

has been the standover tactics used by the *Forum Betawi Rempug* (FBR – Betawi Brotherhood Forum) to fund its bid to build a IRD16 million (US\$1,600) ‘Worker Training Centre’ for native Jakartans (Junaidi and Siboro, ( 2002).

The recent moves towards regional autonomy and the introduction of *Law No. 22 of 1999 on Regional Governance* should help to improve the opportunities for employment outside Jakarta, Surabaya and other major urban centers on Java and this may, in turn, ease gang warfare over employment in these metropolises. The problem of standover operations in collusion with the military or the police, however, will only be solved when the Indonesian legal system is able to prosecute and punish offenders in a transparent and appropriate fashion.

## Chapter 3

# HOW WILL THE NEW LABOUR DISPUTES SETTLEMENT LAW WORK?

Chapter One gave an overview of the background to reform of labour dispute settlement laws in Indonesia and included a description of the system developed under Soeharto's New Order and the key reform packages introduced since then. Chapter Two provided three case studies of recent disputes, illustrating both how the New Order 'Pancasila Industrial Relations' system operated and how the reforms have, in fact, done relatively little to improve labour dispute settlement in Indonesian workplaces. This chapter now turns to the current legislative proposals, aimed at introducing an entirely new institutional structure for labour dispute settlement. The analysis is divided into two parts.

Part One provides an overview of the proposed new dispute resolution system as it appears in the *Industrial Dispute Settlement Bill*, before the DPR (*Dewan Perwakilan Rakyat* or House of Representatives DPR) at the time of writing.

Part Two covers aspects of the Trade *Union Act* and the *Labour Development and Protection Bill*, also now before the DPR. This is necessary to understand the full scope of the application of the *Industrial Dispute Settlement Bill*, which has a particular definition of the industrial disputes to which it will apply. In other words, it is necessary to outline and to understand the various sources of working conditions in Indonesian law, present or proposed, in order to understand the scope of application of the *Industrial Dispute Settlement Bill*.

Chapter Four will bring together the material in this and the preceding two chapters by identifying some of the weaknesses of the proposals in the *Industrial Dispute Settlement Bill*, in light of the recent history of labour law reform in Indonesia. Chapter Four will also make

suggestions and making suggestions for further reform of the Bill.

## I. Overview of the New System

The meaning of “industrial dispute” under the new law

An industrial dispute is “a difference of opinion that results in a conflict” about certain matters. An “industrial dispute” can occur between an employer, or an association of employers, on the one hand, and a worker or a trade union on the other. A dispute can also take place between trade unions (Art. 1).

According to Article 2, there are four types of “industrial disputes”:

- disputes over rights;
- disputes over interests;
- disputes over termination of employment; and
- disputes among trade unions in the same enterprise.

The Bill defines each of these types of disputes in more detail, and includes definitions that are relevant to identifying clearly the parties to an industrial dispute. These matters are addressed in the next two sections.

What can be the subject matter of an industrial dispute?

A *dispute over rights* is one that “arises because the rights that have been specified and acknowledged and whose exercise has been pledged in work agreements, enterprise rules and regulations, collective work agreements, collective deals or statutory laws are not fulfilled.” (Art. 1(2)). Work agreements, enterprise rules and regulations, and collective work agreements are all to be regulated in the *Labour Development and Protection Bill*.<sup>49</sup> It is clear that disputes about rights are disputes that concern the proper application of existing conditions of work. They are about whether or not parties to work relationships are fulfilling their existing obligations.

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<sup>49</sup> There is reference to “collective deals” but the meaning is unclear: the term does not appear in the *Trade Union Act* or the *Labour Bill* *Labour Development and Protection Bill*, or elsewhere in the *Industrial Dispute Settlement Bill*.

A *dispute over interests* is one “that arises because of the absence of mutual understanding concerning changes to employment requirements which have been determined in work agreements or enterprise rules and regulations or collective work agreements.” (Art. 1(3)). Thus, a dispute about interests is different from a dispute about rights. While a dispute about rights is about what conditions are and how to apply them, a dispute about interests is about what rights should be. Here again, it is necessary to have a clear understanding of the sources of rights and obligations with respect to these different categories.

A *dispute over termination of employment* is one “that arises because of the absence of mutual understanding concerning the termination of an employment relationship performed by either side . . .” (Art. 1(4)). Termination of employment is dealt with at some length in the *Labour Development and Protection Bill*.

An *inter-trade union dispute* means one arising between trade unions that operate in the same enterprise over “absence of mutual understanding concerning the implementation of trade union rights and obligations” (Art. 1(5)). The matters about which unions might be in dispute would appear to be membership and the right to represent workers, both in negotiating collective work agreements and in seeking the resolution of industrial disputes. These rights derive from both the *Trade Union Act* and the *Labour Development and Protection Bill*.

There is more detail on the subject matter of industrial disputes and the sources of working conditions in Part Two of this Chapter.

## Who can be a party to an industrial dispute?

The definition of industrial dispute refers to employers, associations of employers, workers and trade unions. These terms are also defined in the Industrial Dispute Settlement Bill. It is important to examine these definitions, as it should be assumed that only those parties that meet them can be parties to industrial disputes within the meaning of the Industrial Dispute Settlement Bill. In other words, they will be the only parties that can have access to the dispute settlement system. Thus:

- “employer” means
  - an “individual, partnership or legal body that runs an enterprise that he, she or it owns”;

- an “individual, partnership or a legal body that independently runs an enterprise that he, she or it does not own”; and
- an “individual, partnership or a legal body that is situated in Indonesia representing an enterprise that domiciles outside Indonesia” (Art. 1(6)).
- “enterprise” means any form of business, whether or not it has separate legal status, “that employs workers”, whether or not it seeks to make a profit, and whether or not it is owned by an individual, a partnership, a legal person, or the state (Art. 1(7)).
- “trade union” means “a workers’ organisation that is independent, free, democratic, and responsible”. It may be, but need not be, limited to a single enterprise. The definition includes a federation or a confederation of trade unions (Art. 1(8)). The definition closely follows the definition in the *Trade Union Act* but it does not specifically refer to a trade union that has a record number, available under the *Trade Union Act* (Art. 20) to unions that have registered. Nevertheless, for practical purposes, it would seem that only a trade union with a record number under the Trade Union Act can have access to the dispute settlement system, as the right to represent workers in dispute settlement arises by having a record number (Trade Union Act, Art. 25).
- “worker” means a person “who is part of a workforce in an enterprise or an industry and who works within the framework of an employment relationship by receiving wages.” (Art. 1(9)).

The *Industrial Dispute Settlement Bill* will also cover disputes that arise in “social undertakings and undertakings other than enterprises which have administrators and which employ people and pay them wages” (Art. 79).

## Dispute settlement principles and procedures

The *Industrial Dispute Settlement Bill* will establish an important basic principle in dispute resolution: the parties must try to resolve their disputes by bipartite negotiation before trying other methods (Art. 3).

The Industrial Dispute Settlement Bill will also create an important new institution: the Industrial Tribunal. The Tribunal will have jurisdiction over all types of disputes. However, not all disputes will reach

the Tribunal the same way. Disputes over rights that cannot be settled by the parties themselves are to be resolved by the Industrial Tribunal (Art. 4). The parties may agree to attempt to settle other types of disputes (disputes over interests, over termination of employment or between trade unions) by mediation or arbitration. If the parties cannot agree to try to settle a dispute by mediation or arbitration, or if the dispute is not settled by these mechanisms, then either or both of the parties may refer it it may be referred to an industrial tribunal for settlement by either or both of the parties (Art. 5).

### Bipartite dispute settlement

All parties to industrial disputes must attempt to settle their disputes directly. This is referred to in the *Industrial Dispute Settlement Bill* as “bipartite negotiation”, (Art. 3) and also as “bipartite industrial dispute settlement” (Art. 6). The latter term means “a negotiation in which both sides shall deliberate to reach a consensus” (Art. 6).

If the parties reach an agreement during mediation they must sign a written agreement and inform their mediator (Art. 13(1)). Where no agreement is reached the mediator must issue a written recommendation that must be sent to the parties within 14 days (Arts. 13(2) and (3)). The parties then have a further 14 days in which to advise the mediator whether they accept the recommendation (Art. 13(4)). They are presumed to have rejected the recommendation if they do not respond to it (Art. 13(5)).

### Arbitration of disputes

The parties to an industrial dispute (other than a dispute over rights) may agree in writing to refer it to industrial arbitration (Art. 17). “Industrial arbitration” means a method of negotiating a settlement outside the Industrial Tribunal, based on an arbitration agreement (Art. 1(12)). An ‘industrial arbiter’ is a person (or group of persons) chosen by the parties or appointed by the Minister to determine how such a dispute (other than a dispute over rights) should be settled (Art. 1(13)). The parties may only choose an arbiter who is registered as such at a government agency responsible for manpower labour affairs (Art. 19), in accordance with the qualifications specified in Art. 20. These include com-

prehensive knowledge of relevant laws (Art. 20(d)). The Minister is to make regulations concerning “registration procedures, membership and working procedures” for industrial arbiters (Art. 27).

The parties must agree on the appointment of the arbiter, (Art. 18) and refer their dispute to the arbiter in writing (Art. 17(2)). The written reference must contain certain specified information, as it will constitute the basis for the arbitration itself. The parties must identify, for example, the problems that led to the dispute, and their “willingness to totally submit the case to the industrial arbiter, to trust his judgment and let him decide the arbitration process or procedures that are necessary to settle the dispute” (Art. 17(3)). If the parties cannot agree on the appointment of an arbiter they may apply to the Industrial Tribunal to have one appointed (Art. (21)). If the parties agree to refer the dispute to industrial arbitration, it cannot be transferred to the Tribunal for determination (Art. 26).

The decision of the arbiter must comply with certain formalities (Art. 22), and must be made according to “justice, valid laws, conventions, statutory rules and regulations” (Art. 24). Once made, the decision is legally binding on the parties, and final and permanent (Art. 23(1)). A decision of an arbiter may be enforced by lawsuit filed in the nearest State Court. The State Court does not have jurisdiction to reconsider the arbitration outcome, that is, to review it on the merits, and must make its order within 30 days of the application (Art. 23).

There are some grounds in which the parties will be able to seek review of an arbiter’s decision in the Supreme Court (*Makamah Agung*) (Art. 25(1)). These include:

- The use of fake documents during the examination;
- The concealment of important documents “that should have been used as deciding factors”;
- Where a decision is based on the deceit of one of the parties during the examination;
- Where a decision is made beyond the power of the industrial arbiter (presumably to be determined in accordance with the Ministerial decision on working procedures for arbiters, the terms of the written agreement and the general injunction to arbiters to make their decisions according to law); and
- Where a decision is contrary to “statutory legislation, public or-

der or morality”.

The Supreme Court may to decide whether to review an arbiter’s decision, so it would appear that the right of review is not automatic (Art. 25(2)). If the Supreme Court does agree to review a decision, then it will determine the consequences of a partial or complete change to the decision (Art. 25(2)). The Supreme Court has 30 days in which to decide whether it will review an arbiter’s decision (Art. 25(3)).

## The Industrial Tribunal

The Industrial Tribunal is to be a new judicial dispute resolution institution, with links to the courts. It is often described, in fact, as a ‘Labour Court’. Specifically, the Tribunal will be invested with “judicial power within the scope of the general judicature that has the authority to examine and decide the settlement of an industrial dispute” (Art. 1(14)). The Tribunal will have “first and final” jurisdiction in disputes over rights, and inter-trade union disputes (Arts. 53 (a) and (d)). It will have initial jurisdiction in disputes over interests, and disputes relating to termination of employment (Arts. 53 (b) and (c)). Decisions of the Industrial Tribunal in these cases may be the subject of appeal to the Supreme Court (*Makamah Agung*) (Art. 71).

Membership of the Tribunal will include ad-hoc judges. In Indonesia, which has adopted the Dutch career system for judicial appointment, this term is usually understood to mean the appointment to judicial office of persons with appropriate technical knowledge but not holding existing judicial appointment, such as lawyers, academics or other persons with relevant professional experience, for example as a senior public servant. In this case they will be chosen from panels nominated by workers’ and employers’ organisations. Ad-hoc judges are discussed further below.

### *Establishment and composition of the Industrial Tribunal*

The Tribunal will be established in the State Court (Pengadilan Negeri) in each provincial capital city, and also in the Supreme Court (Makamah Agung). It will also be possible for it to be established in the State Courts in certain regencies or municipalities/cities, by Presidential Decree (Arts. 28, 29). The judicial and administrative personnel of the

Tribunal will include Supreme Court Justices, Judges, Ad-Hoc Judges, Deputy Registrars and Substitute Registrars (Art. 30). Judges are to be appointed to and dismissed from the Industrial Tribunal by the Chief Justice of the Supreme Court, in accordance with “valid statutory rules and regulations” (Arts. 31, 32).

#### *Ad-Hoc Judges*

Ad-hoc judges are to be appointed and dismissed by Presidential decision, based on a recommendation to the Minister by the Chief Justice of the Supreme Court (Art. 33(1)). Ad-hoc judges are to be selected from candidates submitted to the Chief Justice, with the approval of the Minister, by workers’ and employers’ organisations (Art. 33(2)). The qualifications for appointment include experience in industrial relations and graduate qualifications in law, as well as being “a man of integrity”, having “an authoritative bearing” and having “an unblemished behavioural record” (Art. 34). Ad-hoc judges will hold office for a five-year term, and may be re-appointed for another term (Art. 37(2)).

The *Industrial Dispute Settlement Bill* includes extensive details of the circumstances in which aAd-hHoc jJudges might be removed from office, whether with ‘honour’ or ‘dishonour’ (Arts. 36-39). There are also provisions to ensure the independence of aAd-hoc judges: for example, an ad-hoc judge may not concurrently hold a wide range of other offices or positions, including membership of Pparliament or head of an administrative region (Art. 36). Procedures for these matters are to be determined in a Government regulation (Art. 42).

#### *Judicial supervision of the work of the Tribunal*

The Chief Judge of each State Court is to supervise the work of the jJudges, ad-hoc judges and the Substitute Registrar of the Tribunal with the State Court. The Chief Justice of the Supreme Court is to carry out a similar function with respect to the Supreme Court Justices and the Substitute Registrar of the Tribunal at the Supreme Court. This supervisory power includes a power to give directions, and to issue reproofs (Art. 41(4)). These powers, however, are not to be taken to be as a reduction in the freedom of the judicial and administrative officers whose tasks are being overseen (Art. 41(5)).

### *Sub-Registries*

A Sub-Registry is to be established at each State Court where an Industrial Tribunal is established. Its work is to be overseen by a Deputy Registrar, assisted by Substitute Registrars (Art. 44). The main function of the Substitute Registrar will be to participate in hearings of disputes and to record what is said during court sessions of the Industrial Tribunal (Art. 49(1)). Sub-registries are generally to carry out administrative functions, including record keeping (Arts. 45-50). The records shall include records of all disputes and disputants, which are to be recorded in a disputes log (Art 45). Initially the offices of Deputy Registrar and Substitute Registrar are to be held by civil servants from the government agency responsible for overseeing manpowerlabour affairs (Arts. 47, 51).

### *Dispute settlement procedure in the Industrial Tribunal*

The Tribunal will operate according to the *Law of Civil Procedure* (Art. 54). A three- member dispute panel is to be formed by the Chief Judge of the State Court within seven days of a request for the settlement of an industrial dispute. The panel must be composed of a JJ judge, and two ad-hoc judges. One of the ad-hoc judges is to be , onemust be selected from those nominated by workers, and the other from those nominated by employers (Art. 55). A date for hearing the dispute must be set within 7 days of the establishment of the panel (Art. 56).

The panel of judges may summon witnesses or expert witnesses (Art. 57). It may also compel people to assist it in its work, including by requiring the production of books and documents (Art. 58). The law makes certain provision for the hearing of matters in cases where parties are unable to attend (Arts 60, 62). The panel is to open its court sessions of the panel is to the publicto hold its hearings in open public hearing, unless it determines otherwise (Art. 62). In determining a dispute, the Tribunal must operate in accordance with “existing laws, agreements, conventions and justice” (Art. 63). It must reach its decision within 90 days (Art. 65). The Tribunal must read the decision in an open court, and communicate it to the parties (Arts 66-69).

### *Appeals to the Supreme Court*

The decision of the Tribunal has “permanent legal force” unless one of the parties appeals (in writing) to the Supreme Court within 14 days of the decision (Art. 71). Appeals are to be heard by Industrial

Tribunal Supreme Court Justices (Art. 74), who must determine an appeal within 30 days of its lodgement (Art. 76). Appeal procedures are to be in accordance with statutory rules and regulations (Art. 75).

## Termination of Strikes and Lockouts

Workers are to have the right to strike, and employers the right of lockout, according to the conditions specified in the *Labour Development and Protection Bill* (Arts. 146, 147, and 151-153). Nevertheless, the *Industrial Dispute Settlement Bill* reflects a policy that parties to industrial disputes should not exercise these rights at the same time that dispute settlement is being attempted. The prohibition on strikes and lockouts applies where:

- the parties mutually agree to submit their dispute either to mediation or to arbitration; or
- either one of the parties requests that the dispute be submitted to the industrial tribunal.

In either case, “those responsible for either a strike or a lockout must put an end to either the strike or the lockout” (Art. 77(1)). The strike or lockout must stop from the date on which bipartite negotiations begin, or from the date on which it is agreed that the dispute shall be submitted to a mediator or an arbiter (Art. 77(2)). It is a criminal offence not to comply with the obligation in Art. 77. The maximum penalties are a term of six months’ imprisonment, or a fine of IDR Rp 50 million,000,000 or both (Art. 78).

## Transition from the old system

The new system will not come into place immediately. In order to allow for the establishment of institutions and the training of personnel, the new system will come into operation two years after the promulgation of the Industrial Dispute Settlement Act (Art. 82, and Explanatory Notes).

Until the establishment of the Industrial Tribunal, the existing dispute resolution bodies will retain their functions (Art. 80(1)). Thereafter, disputes not already settled will be transferred to the Tribunal for settlement (Art. 80(2)). Appeals in these cases will be resolved by the Industrial Tribunal at the Supreme Court (Arts. 80(2)(b) and (d)).

## II. The Subject Matter of Industrial Disputes

Part One of this chapter gave an overview of how the proposed new dispute settlement system is to function. It also dealt briefly with the subject-matter of industrial disputes that can be settled under the new system. However, many of these subjects are dealt with in other legislation. This Part now aims to provide an overview of some of the more important aspects of those laws. The material is organised, however, to reflect the types of disputes that are contemplated by the Industrial Dispute Settlement Bill.

### Inter-Trade Union Disputes

*What is a trade union?*

“Trade union” is defined in the *Industrial Dispute Settlement Bill* as a “workers’ organization/organisation that is independent, free, democratic, and responsible”. It must “come from and be established by and for workers”. It may be limited to one enterprise, but this is not necessary. The term includes a federation or a confederation of trade unions (Art. 1(8)).

These stipulations are similar to those contained in the *Trade Union Act*, although, as noted above, the *Industrial Dispute Settlement Bill* does not restrict itself only to a trade union that has been registered under the Trade Union Act.

To turn specifically to the *Trade Union Act*, trade unions remain obliged to accept the state ideology of Pancasila Industrial Relations (*Trade Union Act*, Art. 2). They must also be “free, open, democratic and responsible” (*Trade Union Act*, Art. 3). There are various provisions in the *Trade Union Act* concerning how unions may be formed and registered with the government authorities. Once a trade union is properly registered it will receive a record number (*Trade Union Act*, Art. 20).

It is also important also to note also that civil servants have the right to form unions (*Trade Union Act*, Art. 44).

*What is an inter-trade union dispute?*

The definition of “industrial dispute” includes disputes among trade unions in the same enterprise (Art. 2(d)) “concerning the implementa-

tion of trade union rights and obligations.” (Art. 1(5)). The Trade Union Act further provides that an inter-trade union dispute is one “over membership and the exercise of union rights and responsibilities.” (Trade Union Act, Art. 1(9)).

#### *Trade union rights and responsibilities*

A number of matters might give rise to disputes between trade unions. Those most likely to do so include the right to represent workers in collective agreements and industrial disputes; and the question of determining a workers’ proper union membership.

The functions of trade unions include being a party to a collective labour agreement, and representing workers in settling industrial disputes (*Trade Union Act*, Art. 4(a)). As mentioned, a trade union that has a record number has the right to carry out those functions (*Trade Union Act*, Art. 25(1)(a) and (b)).

Trade unions may control their own membership according to the provisions of their constitution (*Trade Union Act*, Art. 13). A person may not, however, be a member of more than one union (*Trade Union Act*, Art. 14). A member may resign in writing from their union (*Trade Union Act*, Art. 17(1)) or may be removed from membership in accordance with its rules (*Trade Union Act*, Art. 17(2)).

The *Trade Union Act* protects the right to organize. It prohibits a person from preventing a worker from forming a union, or forcing a worker to join a union. It prohibits intimidating workers, or campaigning against the establishment of labour unions. These prohibitions apply to “everybody” – not just to employers (*Trade Union Act*, Art. 28). They may therefore be relevant to inter-trade union disputes where a new union meets opposition from an established union.

#### *Resolution of inter-trade union disputes*

In addition to the dispute resolution system under the *Industrial Dispute Settlement Bill*, the Trade Union Act imposes certain obligations on trade unions. They must seek to resolve their conflict by deliberations with the other trade union or unions involved (*Trade Union Act*, Art. 35). If the deliberations are unsuccessful, the dispute must be settled in accordance with valid national statutory rules and regulations (*Trade Union Act*, Art. 36). This presumably means that unions may follow the proce-

dures of the *Industrial Dispute Settlement Bill*. It is not clear whether compliance with the obligation in Art. 35 of the Trade Union Act will satisfy the requirement of participation in bipartite negotiations under the *Industrial Dispute Settlement Bill* (Art. 3).

## Disputes over termination of employment

Experience from other countries shows that disputes about termination of employment are likely to form a significant part of the workload of any such disputes settlement system. Thus, it is important to have a clear understanding of Chapter XI of the *Labour Development and Protection Bill*, which regulates termination of employment in some detail.

The parties to an employment relationship must try to avoid ending it and must negotiate about its termination where it is unavoidable (*Labour Development and Protection Bill*, Art. 160). An employer must not dismiss an employee for certain prohibited reasons. These include absence due to illness, service to the State, religious observance, marriage or pregnancy, family relationships with other workers at the enterprise, or trade union membership or participation in trade union activities (*Labour Development and Protection Bill*, Art. 161).

If an employee's employment is terminated, his or her employer must provide severance pay and/or a payment as reward for service. The employer must also provide compensation pay (*Labour Development and Protection Bill*, Art. 162(1)). These payments are not required if the employee's employment is terminated while on probation, at the expiration of a fixed term contract, or because they have reached retirement age (*Labour Development and Protection Bill*, Art. 162(2)).

A worker who resigns from his or her employment is entitled to service pay and 'compensation' pay if he or she has served for at least three years (*Labour Development and Protection Bill*, Art. 163(1)). A worker who is dismissed from employment because they he or she has abandoned employment is entitled to service pay and/or to compensation pay (*Labour Development and Protection Bill*, Art. 166(4)). An employer must pay severance pay, service pay and compensation pay to a worker who resigns from employment because of bad treatment by the employer, failure to pay wages on time or to fulfil other obligations promised to the worker, or because of directions to perform unsafe or immoral work

(*Labour Development and Protection Bill*, Art. 168). Indeed, compensation pay is due no matter what the reason is for the termination of employment (*Labour Development and Protection Bill*, Art. 167).

An employer may, however, dismiss a worker for certain “major mistakes”, without the obligation to pay severance pay (*Labour Development and Protection Bill*, Art. 165(2)). Major mistakes include theft, dishonesty, drug use, immoral practices, and intentional or careless destruction of the employer’s property that causes the employer loss (*Labour Development and Protection Bill*, Art. 165(1)).

## Disputes over rights and disputes over interests

### *Sources of rights and interests*

Disputes over rights involve failures to fulfill obligations to provide agreed conditions at work, or to comply with conditions at work that are prescribed by statute. Disputes over interests are about proposed changes to agreed conditions at work. For each type of dispute, it is necessary to understand the possible sources of work conditions.

Work conditions that might be negotiated and agreed by the parties can operate at the level of either the individual employment relationship, or at the level of collective labour relations. These include individual work agreements (*Labour Development and Protection Bill*, Chapter VIII, Arts. 63-76), enterprise rules and regulations (*Labour Development and Protection Bill*, Arts. 121, and 125-128), and collective work agreements (Arts. 129-141 of the *Labour Development and Protection Bill*). It should also be noted that many important conditions covered by the Labour Development and Protection Bill are left to be covered dealt with in more detail by Ministerial or Government regulations or decrees. This is true, for example, of conditions relating to occupational health and safety, provision of facilities at the workplace for breastfeeding of babies, leave entitlements, working hours and child labour.

Conditions are also provided directly by several statutes, principally the *Labour Development and Protection Bill*. They relate to individual employment conditions in a wide range of matters including leave, wages and occupational health and safety. The *Trade Union Act* also prescribes some relevant work conditions, particularly the right to form and to join trade unions, and the right to take industrial action.

### *Work agreements*

A work agreement is essential: it may be oral or in writing, but either way it determines whether or not there is an employment relationship (*Labour Development and Protection Bill*, Arts. 63, 64). A work agreement must be based on the free will of both parties; and must be for a job that can be performed in accordance with the terms of the agreement and which is not against public order, morality or legislation (*Labour Development and Protection Bill*, Art. 64). A work agreement must specify the amount of wages and the manner of their payment (*Labour Development and Protection Bill*, Art. 67(1)(e)), and the job requirements and the obligations of both the entrepreneur and the worker (*Labour Development and Protection Bill*, Art. 67(1)(f)). These two aspects of the work agreement must not be inconsistent with the enterprise's rules and regulations, the collective work agreement, or any valid statutory provisions legislation (*Labour Development and Protection Bill*, Art. 67(2)). If the work agreement is oral, then the entrepreneur must issue the worker with a letter of appointment that includes details of similar matters (as well as others) (*Labour Development and Protection Bill*, Art. 76).

A work agreement can only be changed if both parties agree (*Labour Development and Protection Bill*, Art. 68).<sup>50</sup> A work agreement may be for a fixed term. A party to a work agreement for a fixed period who terminates the agreement before that period has expired is liable to pay compensation to the other party (*Labour Development and Protection Bill*, Art. 75). A work agreement that is not for a fixed period may include a probation period (*Labour Development and Protection Bill*, Arts. 69 to 73). A work agreement may end on the occurrence of a specified event (*Labour Development and Protection Bill*, Art. 74(1)(d)).

### *Enterprise rules and regulations*

All enterprises that are not already bound by a collective work agreement must have rules and regulations, which must be endorsed by the government (*Labour Development and Protection Bill*, Art. 121). The entre-

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<sup>50</sup> This provision gives rise to an interesting question: does a change to a work agreement which is proposed by one party but not agreed by the other party give rise to a dispute over rights, or a dispute over interests. The author's view is that it probably gives rise only to a dispute over interests unless the existing agreed condition is withdrawn pending resolution of the new condition, in which case disputes probably arise in respect of both rights and interests.

preneur is to formulate the enterprise rules and regulations, in consultation with a workers' representative; where there is a trade union in the enterprise it will act as the workers' representative (*Labour Development and Protection Bill*, Arts. 122, 123).

Rules and regulations are to cover, at the least, the rights and obligations of the entrepreneur and of the workers in the enterprise; work requirements; enterprise discipline and rules of conduct; and the period for which the rules are to be valid, for which a maximum is fixed of two years.

Provided the enterprise has valid rules and regulations, the entrepreneur is bound to negotiate with a trade union that wishes to negotiate a collective work agreement (*Labour Development and Protection Bill*, Art. 124). It is only possible to change enterprise rules and regulations during their validity by negotiation with workers' representatives (*Labour Development and Protection Bill*, Art. 126).

#### *Collective work agreements*

One or more entrepreneurs and one or more registered trade unions may enter into a collective work agreement, however there may be only one agreement in any one enterprise (*Labour Development and Protection Bill*, Arts. 129, 130).

A collective work agreement that is supported by more than half the workers in an enterprise applies to all workers in the enterprise, but in other cases it applies only to the workers who support it (*Labour Development and Protection Bill*, Art. 131). An agreement runs for a maximum of two years, extendable by a further year by written agreement (*Labour Development and Protection Bill*, Art. 132). A collective work agreement must contain at least the rights and obligations of the employer; the trade union and the worker; and the period during which it will be effective. Its content must also be consistent with other laws (*Labour Development and Protection Bill*, Art. 133).

A collective work agreement takes precedence over the terms of an individual work agreement (*Labour Development and Protection Bill*, Art. 136), and applies as part of an individual work agreement where it is silent on the matter (*Labour Development and Protection Bill*, Art. 137). A collective work agreement cannot be replaced with enterprise rules and regulations as long as there is a trade union in the enterprise. Enterprise regulations may replace a collective work agreement if there are no more

trade unions in the enterprise, however, they must be no less favourable to employees than the collective work agreement (*Labour Development and Protection Bill*, Art. 138).

A collective agreement remains valid and effective notwithstanding the dissolution of a relevant trade union, or a transfer of ownership of the enterprise (*Labour Development and Protection Bill*, Art. 139(1)). If there is a merger of enterprises that both have collective work agreements, then the more favourable of the two will apply (*Labour Development and Protection Bill*, Art. 139(2) and (3)).

## Statutory work conditions

The *Labour Bill* *Labour Development and Protection Bill* deals with a range of employment and industrial relations matters. It provides for protection of the basic rights of workers including protection in relation to wages, social security and occupational health and safety. Thus, it confers many rights upon workers, and upon trade unions, that might be the subject of industrial disputes over rights. These include the following:

- *Non-Discrimination*

Employers must offer employment, and provide equal treatment to all workers, without discrimination (*Labour Development and Protection Bill*, Arts 5 and 6). The requirement not to discriminate is also part of an employer's obligation to offer job training (*Labour Development and Protection Bill*, Art. 12). Discrimination is unlawful on the grounds of sex, ethnic origin, race, religion, political affiliation or being disabled (*see Explanatory Notes on the Draft Bill*).

- *Job-Placement*

Job placement (*Labour Development and Protection Bill*, Arts 31 to 54) may give rise to disputes. However, a specific dispute resolution regime is to be provided for these disputes (*Labour Development and Protection Bill*, Arts. 43-45).

- *Protection of workers*

Part One of Chapter IX of the *Labour Development and Protection Bill* contains provisions relating to the following matters:

- Child labour, including a prohibition on the employment of children under 15 years of age (*Labour Development and Protection Bill*, Arts. 74-84);
  - Protections for disabled workers (*Labour Development and Protection Bill*, Art. 77);
  - Restrictions on night work for female workers (*Labour Development and Protection Bill*, Art. 85);
  - Working hours and overtime (*Labour Development and Protection Bill*, Arts. 86-88), rest periods (*Labour Development and Protection Bill*, Arts. 89 and 95), opportunity to pray (*Labour Development and Protection Bill*, Art. 90), leave (*Labour Development and Protection Bill*, Art. 91), and public holidays (*Labour Development and Protection Bill*, Art. 96);
  - Protections for women workers (*Labour Development and Protection Bill*, Arts. 92-95), including paid maternity leave (*Labour Development and Protection Bill*, Arts. 93 and 95) and menstrual leave (*Labour Development and Protection Bill*, Arts. 92 and 95); and
  - General provisions relating to occupational health and safety (*Labour Development and Protection Bill*, Arts. 97 and 98) and good treatment, in particular protection against sexual harassment or abuse, and treatment that shows respect for human dignity and religious values (*Labour Development and Protection Bill*, Art. 97).
- *Wages*
    - Part Two of Chapter IX of the *Labour Development and Protection Bill* includes provisions relating to the following matters:
      - *Minimum wages*. These are to be determined at the Provincial or District level, on the basis of the concept of the n' 'need-for-proper-living' (*Labour Development and Protection Bill*, Arts. 99 and 100). The minimum wage is legally binding on employers, who are not to pay less than that amount (*Labour Development and Protection Bill*, Art. 100(4));
      - *Wages above the minimum* may be negotiated between employers and workers (*Labour Development and Protection Bill*, Arts. 101-103). Employers and trade unions in their negotiations must not discriminate, and must respect the principle of equal pay for work of equal value (*Labour Development and Protection Bill*, Art. 101(2)).

Entrepreneurs must review their workers' wages regularly (*Labour Development and Protection Bill*, Art. 103(2)).

- *Paid sick leave and other entitlements* are also provided (*Labour Bill* *Labour Development and Protection Bill*, Art. 104), although a worker has no entitlement to wages if he or she does not “do his or her job” (*Labour Bill* *Labour Development and Protection Bill*, Art. 104(1)). A worker is, however, still entitled to wages where the employer is responsible for not employing an employee willing to do his or her job, or where the employer could have avoided the circumstances that prevented employing the worker from doing the job (*Labour Bill* *Labour Development and Protection Bill*, Art. 104(2)(e));
- *Late payment of wages* (*Labour Development and Protection Bill*, Art. 105); and
- *Claims for payment of wages*, which expire after two years (*Labour Development and Protection Bill*, Art. 106).

- *Welfare*

Part 3 of Chapter IX of the *Labour Development and Protection Bill* deals with Welfare. It includes provisions relating to the following matters:

- *Obligations to establish welfare facilities* for workers, and also to encourage the development of workers' cooperatives as far as possible (*Labour Development and Protection Bill*, Arts. 110, 111); and
- *Workers' entitlement to social security*, which is to be administered in accordance with other legislation (*Labour Development and Protection Bill*, Art. 109).

- *Trade union rights, industrial action and dispute settlement*

All workers have the right to form and to join trade unions (*Labour Development and Protection Bill*, Art. 115; *Trade Union Act*, Art. 5). Workers also have the right to strike, provided they exercise the right in a way that is peaceful and orderly. Workers intending to strike must also give 7 day's written notice, including the reasons for the strike. Entrepreneurs may not replace striking workers (*Labour Development and Protection Bill*, Art. 146).

The right to strike is, however, prohibited in enterprises that serve the public interest, including telecommunications, electricity, gas, and drinking water (*Labour Development and Protection Bill*, Art. 147(1)). The right to strike is also limited for workers in a range of other important, but not essential, areas of the economy (*Labour Development and Protection Bill*, Art. 147(2)).

The Bill also contains similar provisions to regulate lockouts by employers. Lockouts are prohibited in certain industries that serve the public interest, and employers must give 7 days' notice to workers of their intention to exercise their right of lockout, including the reasons for the lockout (*Labour Development and Protection Bill*, Arts. 151-153).

Enterprises that employ more than 50 workers will have to establish a bipartite cooperation forum "for communications, consultations and deliberation aimed at solving manpower/labour problems" (*Labour Development and Protection Bill*, Art. 119). It is not clear whether discussion in a bipartite cooperation forum of matters in dispute will satisfy the obligation in Art. 3 of the *Industrial Dispute Settlement Bill* to seek settlement of industrial disputes through bipartite negotiation.

### III. Conclusion: In a Nutshell

This Chapter has provided an overview of the labour dispute settlement system proposed in the *Industrial Dispute Settlement Bill*. It has also summarised the sources of individual and collective employment conditions under existing and proposed labour laws in Indonesia.

This has been necessary in order to give a full account of the wide range of subject matter that may be brought within the jurisdiction of the new dispute settlement mechanisms. Those mechanisms are intended to be used to settle four types of disputes:

- Disputes over rights;
- Disputes over interests;
- Disputes over termination of employment; and
- Inter-trade union disputes.

Disputes over rights might involve conditions that are provided in individual work agreements, collective work agreements, enterprise rules

and regulations, and various statutes. The rights that derive from statute cover important matters including wages, leave, occupational health and safety, the right to form and join trade unions, and the right to strike.

- Disputes are to be resolved by a range of methods, including:
- Bipartite negotiation;
- Mediation;
- Arbitration;
- Determination by a panel of judges of the Industrial Tribunal;  
and
- Appeals to the Supreme Court.

The next chapter examines some of the shortcomings of the proposed system, particularly in light of the problems that have beset labour relations in Indonesia since the colonial period, identified in Chapter One, and efforts since 1998 to reform Indonesia's labour regime.

## Chapter 4

### PROBLEMS WITH THE INDUSTRIAL DISPUTE SETTLEMENT

The *Industrial Dispute Settlement Bill* in its present form may go a long way to assisting in the development of a fair and effective labour dispute settlement system in Indonesia.

Nevertheless, it is apparent that the Bill has weaknesses, some of them significant. Some of these derive from failure to ensure the conceptual consistency within the Bill, necessary to implement the best international standards for labour dispute resolution mechanisms. Other difficulties derive from the general unreliability of the public sector – including the judiciary – in Indonesia, in particular because of problems of widespread corruption in government and the courts. These problems are well demonstrated by the case studies in Chapter Two, which show that it is vital that the Bill introduce a system that will gain the confidence of the social partners through its independence and transparency, so that it can gain the confidence of the social partners. At present, it appears that there is great willingness to avoid existing dispute resolution mechanisms in favour of the use of violence, or the invocation of other forms of law, particularly the criminal law, in order to avoid an independent resolution of a dispute at all.

The following discussion pays particular attention to a common criticism from employee rights advocates that the proposals will lead to an unfair and inefficient juridification of industrial disputes; the lack of conceptual clarity in the Bill; the related issue of the likely workload of the Industrial Tribunal; the types of disputes that are not presently covered by the Bill; the functions and powers of the Industrial Tribunal; and certain aspects of the Bill in which the legislative drafting is presently unclear. It is not, however, intended to be an exhaustive analysis of the Bill.

## I. Conceptual Flaws

The Indonesian Legal Aid Institute (LBH), which frequently represents employees in labour disputes, has signalled its opposition to the Bill on conceptual grounds.<sup>51</sup> For reasons described in Chapter Two, LBH encourages the vast majority of disputants seeking its assistance to settle their disputes by negotiation outside the dispute resolution system. However, it sees the proposed replacement of this system with judicial-based dispute resolution mechanisms as an unwarranted signal to the executive arm of government that they it is are no longer responsible for creating an environment conducive to freedom of association. It fears that corruption and inefficiencies within a judicially-based system will be as rife widespread as they are in the current Labour Dispute Arbitration Committees .

LBH therefore, and contends that a better option would be to reform the Labour Dispute Arbitration Committees by extending the range of its personnel to incorporate a broad range of employee groups rather than simply “bureaucrats” from the SPSI as described in Chapters One and Two above.

A further concern of LBH is that the proposals in the Bill will lead to a ‘juridification’ of industrial disputation that will put the majority of Indonesian employees – who have limited formal education, almost no knowledge of their legal rights and an inability to afford legal representation – at a disadvantage vis-à-vis the information available to their employers who can, in most cases, afford sophisticated legal advisers.

## II. Lack of Conceptual Clarity

### Bipartite negotiations

The Bill’s requirement that parties first try to resolve their disputes by bipartite negotiation is a significant innovation, particularly given the possibility that parties to disputes may not have confidence initially in

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<sup>51</sup> Rita Olivia, Head of the Labour Division, LBH, <ritaolivia@cbn.net.id>, email (26 June 2002).

the independence and reliability of a new judicial institution. However, it is necessary also to consider whether the system proposed by the Bill contains sufficient incentives to engage in bipartite negotiation. This is particularly important in light of the case studies set out in Chapter Two, which do not bode well for workers or trade unions seeking to resolve disputes directly with employers. Perhaps the only reason bipartite negotiation has been engaged in at all to date is that the inefficiencies of the formal tripartite dispute resolution system have usually meant that its utilisation may bring about even more unfair results than direct negotiation.

No doubt there is some incentive to engage in bipartite negotiation simply by virtue of the fact that a settlement reached this way will be legally binding (Art 8). However, there is no provision that specifies how such an agreed outcome is to be enforced, or in what jurisdiction. This is to be contrasted, for example, with the outcome of an arbitration that, pursuant to Art 23, may be filed for enforcement in the nearest State Court.

### *Good Faith*

A further weakness is that there is neither a positive obligation to engage in bipartite negotiations in good faith, nor a negative incentive in the form of consequences for failing to do so. In fact, the Bill specifies no consequences at all for a party that fails to engage conscientiously in bipartite negotiation. It is true that under Art 6 the parties must record the matter in dispute and also the positions taken by them during the negotiations. However, there is no provision that indicates whether a mediator, an arbiter or the Industrial Tribunal will, or even should, have regard to the outcome of unsuccessful bipartite negotiations. It may be implicit in the obligation to record the outcome, but it is certainly not clear from the Bill what is envisaged in this respect. (There are similar weaknesses in the Bill relating to the mediation provisions and these are discussed below).

A solution to both these difficulties would be to amend the Bill to include an express obligation on the parties to negotiate in good faith. This is a concept that is explicitly or implicitly included in several labour dispute settlement systems around the world. It is an explicit requirement of collective bargaining in the USA and Canada. It is arguably implicit in Australia. It is a more wide-reaching obligation and concept

in the recently enacted New Zealand legislation. It is true that in most cases the concept relates to collective negotiations with a view to the conclusion of a collective agreement, but the case of New Zealand shows that the concept can be more broadly used.

If a good faith bargaining obligation were to be included in the Bill, it follows that there would have to be some further policy design to conceptualise and specify the consequences of a failure to bargain in good faith. These consequences might include, for example, liability to orders by the Tribunal, or automatic determination made against a party's expressed interests. It might also be necessary to consider a similar amendment to the provisions of the *Labour Development and Protection Bill* that regulate negotiations between trade unions and employers for collective agreements, in the interests of conceptual consistency throughout the system.

Other matters would have to be considered, including how the concept of good faith bargaining might be clarified legislatively, or whether it should be left to the Tribunal or to the cCourts. Of course, it may also be that the social partners are not in fact sufficiently experienced and comfortable with bargaining at this time to make it appropriate to introduce such an obligation into the Indonesian system. However, the point remains that no such obligation or incentive is presently contained within the proposed system.

The fundamental point is that the introduction of an important threshold concept such as the obligation in Art 3 to engage in bipartite negotiation must be bolstered by other elements of the labour dispute system in order for it to function effectively. If this is done well, it can have several significant impacts on the effectiveness of the dispute resolution system. It can empower the social partners to consider themselves able and responsible to resolve their own disputes as much as possible. This in turn can have a significant impact in moderating the workload of mediators, arbitrators and subsequently of the Tribunal. Together these effects can help to establish the dispute resolution system as one that will develop, and be able to maintain, the confidence of the social partners that it will require in order to continue to function effectively as a whole.

#### *Bipartite Cooperation Forum*

Another issue relevant to the functioning of bipartite negotiation

concerns the requirement in the *Labour Development and Protection Bill* that enterprises with 50 or more employees should have a bipartite cooperation forum to discuss manpowerlabour issues. Given the breadth of the definitions of disputes about rights and disputes about interests, many disputes at a workplace over manpowerlabour issues are likely to come under the ambit of the Billfall within those definitions. There is, however, no reference in the Bill to bipartite cooperation forums, notwithstanding their likely importance. A particular issue is whether an attempt to resolve a dispute over interests in a bipartite cooperation forum will satisfy the general obligation in Art 3 to attempt bipartite dispute resolution before considering mediation, arbitration or access to the Industrial Tribunal. Presumably if the requirements of Art 6 have been met, then Art 3 may also have been satisfied.

It would be appropriate, however, to make the link between the two systems more explicit. A significant advantage of this would be to provide further incentive to the parties to utilise the bipartite cooperation forums envisaged by the *Labour Development and Protection Bill*. It would also save those parties that have attempted to resolve an issue in a bipartite cooperation forum from having to repeat their deliberations in order to begin using the dispute resolution processes under the *Industrial Dispute Settlement Bill*.

### *Mediation*

The policy of the Bill is clearly that disputes ( other than disputes over rights) should not necessarily proceed from (unsuccessful) bipartite negotiation directly to the Industrial Tribunal. Rather, the parties should consider attempting to resolve the dispute through mediation, and/or through arbitration. As it stands, however, the parties are not obliged to engage in mediation: Art 5(2) clearly provides that the parties may elect whether to refer a dispute to mediation. If they cannot agree to do so then either or both may refer the matter to the Tribunal. There is thus no direct incentive to resolve a dispute by mediation. The fact that a mediator is required to act speedily when a dispute is referred for mediation may be some incentive if the workload of the Tribunal is significant and there are delays in having matters heard (a mediator must complete his or her task within 30 days (Art 16)). This however would be a rather indirect means of achieving the goal.

A significant drawback to the use of mediation is that there is no provision in the Bill for the settlement of a dispute achieved through mediation to be legally binding. The parties must sign a written agreement and inform the mediator if they reach an agreement (Art 13(1)). However, there is no equivalent to Art 23(1) which unequivocally gives legally binding force to the decision of an arbiter.

So, there is neither any positive incentives nor any obligations to use mediation. Nor is there any obvious ‘negative incentive’. The Bill does not, for example, appear to specify any consequences for refusing to accept the recommendation of a mediator. It may of course be that in time the Tribunal will develop principles that include attention to the positions taken by the parties during mediation (and for that matter in the preceding bipartite negotiations), but the Bill itself is silent as to this.

Finally, there is the question of the appointment of the mediator. If the parties to an industrial dispute agree to try to resolve it through mediation then they must also agree also on the identity of the mediator (Art 9). There is no provision, however, for resolving any deadlock between parties who cannot agree on the identity of the mediator from the list that is to be maintained. It is to be hoped that if the parties have been able to agree to try mediation, their spirit of negotiation and compromise will be such that this difficulty will not arise; however, it is certainly not safe to assume so! It would be appropriate for the Bill to provide a means of resolving such disagreements, in order to promote the use of mediation and it . It may be appropriate necessary to empower the State Court Registrars or judges of the Tribunal to undertake fulfill this function .if needs benecessary.

## Disputes over termination of employment

The separate categorisation of dDisputes over termination of employment gives rise to two possible problems. are identified as a separate category of dispute, however, the issue is still problematic in two ways. First, despite the definitions in the Bill, there is still potential for jurisdictional uncertainty about whether a dispute arising out of the end of an employment relationship is a dispute over rights, or over termination of employment. Secondly, the implications of identifying disputes over termination of employment separately may need to be reconsidered given that the Industrial Tribunal is to have “first and final” jurisdiction over

disputes over rights, but not for disputes over termination of employment.

The *Labour Development and Protection Bill* affords rights to workers in respect of termination of employment. Some of these relate to protection from discriminatory practices in termination of employment. Others relate to payments that have to be made in the event of termination of employment. The range of rights available, however, could give rise to jurisdictional questions of some importance. Consider the case of a worker whose employment is terminated, but who does not receive payments as required under the *Labour Development and Protection Bill*. Is this a dispute over termination of employment or a dispute over rights? Or, is the question of payment separate from the question of termination, so that for jurisdictional purposes there are two disputes arising out of this one controversy?

As mentioned, the Tribunal will have first and final jurisdiction in disputes over rights, but not in disputes over termination of employment. Thus, disputes over termination of employment may be subject to the processes of mediation and/or arbitration. Assuming that bipartite negotiations have not resolved the dispute, a number of possibilities arise. One is that the parties agree to mediation, and that the dispute is resolved in that process. Another is that the parties refer the matter to arbitration. Fundamentally it is important for workers that disputes over termination of employment be resolved as quickly as possible, so that they can either find alternative employment, or return to work with their employer. The importance of such speedy resolution is only increased in Indonesia, where there is high unemployment and significant informal sector work. Accordingly it is appropriate to consider how many times a dispute over termination of employment should be considered: too many steps in the process could give an employer too many opportunities to string the process out, rather than allowing the dispute to be determined on its merits.

Under the arrangement envisaged by the Bill, the parties may seek to resolve the matter through mediation, before going to the Industrial Tribunal. On the one hand, this might have the positive effect of ensuring that some disputes are resolved rather than finding their way into the workload of the Tribunal. On the other hand, it might serve only to be an extra obstacle of time, cost and effort that an employer can put in the way of a worker seeking resolution of a dispute. The employer might

consider their chances better in the Tribunal, for example if they think, or if they can, bribe the personnel there. Another difficulty is that an appeal lies from the Tribunal to the Supreme Court. It is, of course, important that the Tribunal act according to law, and that such questions are determined in the country's final court of appeal, however, the problem remains that the Indonesian Supreme Court has a very bad reputation for corruption and has long suffered from a massive case backlog.<sup>52</sup> As matters stand, an appeal to this court will probably favour the employer, who is more likely to be able to bribe the bench while employees are, at the least, exposed to further delay and effort they probably cannot afford. These concerns have led the Indonesian Legal Aid Institute (LBH) to adopt a very sceptical view of the reforms, as described above.

Another matter of interest concerning disputes over termination of employment is that the definition (Art 1(4)) refers to "absence of mutual understanding concerning the termination of an employment relationship *performed by either side in the relationship.*" (Emphasis added). Thus, it is possible for an employer to initiate a complaint about an employee's termination of an employment relationship. This may give rise to interesting issues in respect of the remedies that the Tribunal might be able and willing to grant to employer applicants. Will the Tribunal, for example, require that an employee who has not completed a fixed term contract of employment must return to that employment and complete it? Or, in that situation will it fix some other remedy?

## The Tribunal's Jurisdiction & Disputes Over Rights

A problem concerning disputes over rights relates to the question of how such disputes will formally come before the Tribunal. Article 4 provides that where bipartite negotiations do not succeed in resolving a dispute "the industrial tribunal . . . shall settle the dispute." This is in contrast with Article 5(2) which provides that if a dispute not resolved by bipartite negotiation is not to be referred to mediation or to arbitration, "either one of [the parties] or both of them may request the help of the industrial tribunal to settle their differences."

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<sup>52</sup> See Lindsey, (2000). It is pertinent to again reiterate that the views expressed here are those of the authors and do not necessarily reflect views held by the International Labour Organization.

The question therefore arises how the Tribunal will come to determine be seized of disputes over rights that are not settled by bipartite negotiations? Is it the obligation of the parties to bring the dispute to the Tribunal, or is it optional to do so? The use of the word “shall” suggests that there may be something mandatory about the use of the Tribunal. This may be deliberate and explicable on the basis that it is important that there be final resolution of disputes, particularly disputes over existing rights and conditions. If that is the policy of the government, and it is evidenced in some way by the use of the word “shall” then well and good, but how does the dispute get before the Tribunal? If on the other hand Article 4 is to be read consistently with Article 5(2) as making it possible for the parties to a dispute to have access to the jurisdiction of the Tribunal, then questions may arise about the incentives for employers to block bipartite negotiations in order to force employees and/or unions to take the next step, presumably at a cost to them.

### Matters to be covered by regulations

A number of potentially significant aspects of the dispute resolution system are not dealt with in the Bill, but are left to be determined by Ministerial regulations at a later date. Of course it is reasonable for some matters of detail to be covered in regulations, but this should not be at the expense of establishing a self-contained transparent and accountable dispute resolution system in the Bill itself. Accordingly, where possible, matters that may affect the integrity of the system should be dealt with by the Bill itself. In the present climate of slow and uncertain labour reform it is particularly important to ensure that the dispute settlement system is isolated as much as possible from potential political interference. Unfortunately, this has not been achieved in the present draft of the Bill.

An important example is the many matters referred to in Art 16, which leaves the following important issues to be determined by Ministerial regulations:

- Qualifications required of a mediator
- Procedures for appointing and for dismissing a mediator; and
- Procedures for mediation.

This may be contrasted with Arts 33 to 40, which regulate in con-

siderable detail the appointment and the service of ad-hoc judges of the Industrial Tribunal (although as noted below, there are weaknesses in these provisions as well in the area of Ministerial powers).

It would be better if the Bill included similarly detailed provisions in respect of mediators as those relating to Ad-hoc judges. The fundamental difference between a mediator and an ad-hoc judge is determined by their place in the dispute resolution framework, rather than by the knowledge, experience and skills that they must possess (although it is true that mediation is a separate area of skill in its own right). It should therefore be possible to identify the desired qualifications and procedures for appointment as a mediator and specify them in the Act.

The matter of procedure in mediation is, however, rather different. It is not apparent why there should be specified procedures for mediation at all. No procedures are specified in the Bill for the work of arbiters, or for that of the Industrial Tribunal. Commonly enough it is necessary to be flexible in seeking to mediate labour relations disputes, and it may therefore be appropriate to give mediators considerable discretion in the performance of their functions, rather than require them to follow detailed procedures.

### III. The Industrial Tribunal: Jurisdiction & Workload; Establishment, Powers & Functions

The Industrial Tribunal is in many respects the centre-piece of the system proposed in the Bill. It is appropriate therefore to consider the following issues: first, whether the allocation of individual disputes over rights to the jurisdiction of the Tribunal will mean that it is so over-worked that it cannot fulfill perform its functions; and secondly, whether as presently conceived the Tribunal is sufficiently independent and appropriately empowered to carry out its role.

#### Jurisdiction and workload

The Tribunal will not be able to carry out its functions effectively if it is overwhelmed with cases. This in turn will have a significant effect

on public confidence in the Tribunal, and so lessen the likelihood that the dispute resolution system will function effectively. It is therefore important to consider the breadth of the jurisdiction that the Bill will give to the Tribunal.

The concept of disputes over rights in the Bill takes into account significant areas of regulation of labour relations. For example, a significant part of the *Labour Development and Protection Bill* is concerned with the allocation of rights (for example working hours and overtime, *Labour Development and Protection Bill* Arts 86-88); and with the creation of mechanisms for the allocation of rights (both individual work agreements and the collective agreements are likely to be important sources of rights at work). Disputes over rights may also arise out of obligations relating to social security: Art 109 of the *Labour Development and Protection Bill*. On any reading, the possible content of disputes over rights is broad and varied.

Of course, the mere fact that the Tribunal has a wide jurisdiction over all disputes over rights at work does not necessarily mean that there will be adverse consequences for its workload and its ability to play its role effectively. It is significant, however, that while all disputes are first to be the subject of bipartite negotiations, disputes over rights thereafter proceed, as mentioned, directly to the Industrial Tribunal (Art. 4). Thus, there is only one step between a dispute over rights arising, and it being eligible for determination by the Tribunal, which has first and final jurisdiction in this area. As noted above, there are few incentives to engage in conscientious bipartite negotiation and this might have an adverse impact on the Tribunal's workload. While both parties might prefer to seek a resolution of their dispute by bipartite negotiations rather than risk an adverse outcome due to corruption at the level of the Industrial Tribunal, this is, as mentioned, more likely to affect employees and trade unions adversely than employers.

A final issue in respect of the Tribunal's workload is the possibility that it will be overwhelmed with individual disputes over interests. According to the definitions in the Bill, any change proposed to working conditions that have already been determined is a dispute over interests. On its face, therefore, this definition would include every situation in which an employer proposes an alteration to any existing condition of employment. Each such situation would need to be the subject of bipartite negotiation, but then could find its way into the Tribunal if the par-

ties do not reach agreement.

## The Tribunal's functions and powers

The institutional status of the Tribunal is not clear from the Bill: is it to be a fully independent institution or, on the other hand, will it be fully integrated into the existing court system?. The very use of the term "Industrial Tribunal" suggests an institution that exists separately from others, in particular from the courts. However, there are clearly significant links between the Tribunal and the existing court system. The Tribunal is to be established *at* the Supreme Court and *at* the State Court in each Provincial capital city (Arts 28, 29). The Chief Justice of the Supreme Court has the power to appoint and dismiss the judges of the Tribunal (Arts 31, 32). The Chief Justice of the Supreme Court and the Chief Judge of each State Court are to oversee the operations of the Tribunal at the Supreme Court and each State Court, respectively (Art 41).

On the other hand, these chief judicial officers are not charged with responsibility for overseeing the work of the State Court Registrars, who are to be appointed from within the government agency responsible for manpowerlabour affairs (Art 47). This may raise issues concerning the proper functioning of the Tribunal: while chief judicial officers will be able to control and direct the work of the judicial officers of the Tribunal, they will not, apparently, have authority to direct the work of the administrative arm of the Tribunal. This has the potential to cause significant difficulty in the Tribunal's operations. Among other things, it allows for the possibility of direction to the State Court Registrar as to how the Tribunal should function, from within the Department of Labour, rather than from within the judiciary. Ultimately, of course, the Department of Labour is answerable to the Minister, and so this is a potential avenue for political manipulation of the workings of the Tribunal that should be removed from the Bill if possible.

The definition of "industrial tribunal" in the Bill is not particularly helpful in seeking to clarify the issue of whether the Tribunal is to be fully independent: "the implementation of judiciary power, within the scope of the judiciary, general judicature that has the authority to examine and decide the settlement of an industrial dispute." The definitions of "judge" and "Supreme Court Justice" each suggest that the Tribunal

is to be an institutional part of the respective courts, referring to “an industrial tribunal judge of a district court” and “an industrial tribunal judge of the Supreme Court” respectively (Arts 1(15) and 1(16)).

On balance, it would appear that what is intended by the Bill is the establishment of a specialist industrial jurisdiction within the ordinary operation of the State and Supreme Courts. This would appear to have some similarities with the former Industrial Division of the Federal Court of Australia. The Tribunal, it seems, is not to be a fully- fledged independent Labour Court. There are two principle disadvantages of this.

First, from the point of view of establishing dispute resolution mechanisms that develop and maintain the confidence of the parties to disputes, it might be preferable to have a fully independent and functioning specialist jurisdiction. Of course, it is true this issue is to some extent addressed by the fact that it would appear that the Tribunal is to be constituted by persons with appropriate expertise in labour relations matters and, in particular, the ad-hoc judges.

The second difficulty created by the apparent incorporation of the Tribunal into the existing cCourt structure is not one of labour dispute resolution theory. Rather it is the issue of whether the Tribunal will suffer from “guilt by association”, and be perceived from its inception as subject to the same types and levels of corruption that presently beset the judiciarygeneral Court system in Indonesia. The case studies demonstrate that there is already at least a perception that the cCourts will not independently resolve labour disputes that come before them; and that employers, prosecutors and judges may collude with each other to determine the outcome of cases.

Accordingly, it may be appropriate to consider establishing the Tribunal as a fully independent entity. Ideally, an independent Tribunal would have its own Hhead, who could be styled as a Chief Judge/Justice or a President as the occasion demands. An independent Tribunal would ideally be required to report annually to the President, or to Parliament, or to the Minister, with the Minister obliged to table the report in the legislature. Of course, the establishment of a totally new independent body might have significant budget implications and it is essential for such a body that it have sufficient and guaranteed funding if it is to be function in a truly independent and effective way. Subject to what is said in the following paragraphs about the lack of precision in the provisions relating to the appointment of ad-hoc judges, the use of such officers in

principle is potentially a useful and appropriate model for the dispute resolution system; indeed it is one that is commonly employed in other countries. It is not be unusual in dispute resolution systems to provide that appeals from an independent Tribunal should proceed to the Supreme Court, but only on restricted matters of law. This would, however, need careful consideration in the Indonesian context, given the institutional problems of the Supreme Court.

### Ministerial control over appointment of ad-hoc judges

A separate but related issue is the provisions for appointment of ad-hoc judges to the Tribunal. These are lengthy and detailed - there is, in fact, more regulation of ad-hoc judges than of any other persons in the dispute resolution process. Nevertheless there are significant gaps in the legislative scheme and they concern the significant role given to the Minister in the selection and appointment of the ad-hoc judges. This contrasts significantly with the provisions relating to appointment of other judges who are to be appointed by the Supreme Court Chief Justice of the Supreme Court and whose activities are to be overseen by the Chief Justice of the Supreme Court or the Chief Judge of the State Court Chief Judge, as the occasion demands.

For ad-hoc judges, however, the situation is rather different. They are to be appointed by Presidential decision. The persons who might be appointed are to be recommended to the Minister by the Supreme Court Chief Justice of the Supreme Court (Art 33(1)) and the names from which the Chief Justice may choose are to be nominated initially by workers' and employers' organisations (Art 32(2)). This would appear to effectively give the decision on appointment of ad-hoc judges to the Chief Justice of the Supreme Court. However, the names that are submitted to the Chief Justice must be approved by the Minister. Thus, the Minister will approve the nominations to the Chief Justice, from which the Chief Justice will make a recommendation to the Minister, who will then take it to the President so, in reality, the real power lies with the Minister.

The Bill does, of course, specify qualifications for appointment as an ad-hoc judge, so appointment is not completely in the Minister's gift. However, the Bill does not specify the grounds on which the Minister might approve a candidate's nomination by a workers' or an employ-

ers' organisation. Nor is there any mechanism in the Bill by which a person whose name has been put forward by a workers' or an employers' organisation, but not approved by the Minister, may appeal against that refusal to approve.

A further shortcoming of the Bill is that it does not specify which employers' and workers' organisations might have the right to put forward candidates for appointment as Ad-hoc judges. The criteria might include, for example, that the organisations are those which are most representative. A further issue that needs to be addressed is that Art 33 refers to workers' organisations rather than to trade unions that have a record number under the Trade Unions Act. It might be more appropriate to use this as a criterion (although this would potentially put trade unions at a disadvantage when compared with employers' organisations, which are not required to participate in a similar process of scrutiny to obtain a record number).

Ultimately, the Bill should implement a system that is independent, transparent and accountable. In its present form, the Bill is not specific enough with respect to the qualifications and conditions under which persons may be nominated and appointed as ad-hoc judges, although this is a position of some importance in the proposed new dispute resolution system. Moreover, the Bill presently leaves too great a degree of unguided discretion to the Minister in the process of nomination and appointment. This could have the potential to leave the process open to political manipulation or, almost as damaging, to perceptions of political manipulation.

## Powers of the Tribunal

The Tribunal is to have a wide jurisdiction – and in some cases a final jurisdiction. To this end it is to be invested with “judicial power within the scope of the judiciary general judicature” (Art 1(14)) but it is not clear what this means, particularly as regards the extent of the Tribunal's powers, the orders it can make and remedies it can order. It may be that the fact that the Tribunal is to operate according to the law of Civil Procedure (Art 54) sheds some light on this question, but the text of the Bill does not. The question of the remedies that the Tribunal may order is, however, critical to its functioning. Certainly the parties will have little incentive to take their disputes to the Tribunal for resolution if

they don't know what possible outcomes they might expect.

The question of remedies is of particular importance in disputes over termination of employment. International labour standards and the municipal laws of many countries make specific provision for particular remedies in cases involving termination of employment. Commonly the institution that is responsible for determining such matters is empowered to order that an employee found to have been wrongfully dismissed from employment should be reinstated in that employment. Is that an option that new Industrial Tribunal will have? If so, according to what principles will the power be exercised? The Bill should clearly be amended to deal with this issue expressly.

Another area of importance is the capacity of the Tribunal to involve itself in cases where the parties may be taking industrial action. Will the Tribunal, for example, have powers in such circumstances to require that the parties cease taking action, perhaps for a period of time while efforts are made to resolve matters in the Tribunal?

### III. Omissions from the Bill

There are several possibly important sources of labour disputes that are not covered by the Bill and so not subject to its dispute resolution mechanisms. These may be significant shortcomings.

#### Disputes between trade unions and their members

It is not absolutely essential for disputes between trade unions and their members such disputes to be part of the jurisdiction of a labour dispute resolution system. They can be considered disputes to be resolved according to the general principles of civil law that regulate the application of the rules of any civil society organisation.

However, disputes within trade unions can have a significant relationship with the general purpose and functioning of trade unions as representatives of workers in labour disputes and so with the functioning of the labour dispute settlement system as a whole. In the Indonesian system, for example, it is trade unions with a record number that have the right to represent workers in negotiations for a collective agreement

and to bring disputes before the Industrial Tribunal. It is because of that relationship, and the importance to the dispute settlement system of having fully functioning trade unions, that it may be appropriate to consider including disputes between trade unions and their members in the proposed new jurisdiction. While this type of dispute may be over matters unrelated to collective or individual labour disputes, it is not uncommon for them to be caused by, or to be a part of broader issues affecting, a trade union – particularly factional or political differences within it. It may be that such matters can be more rapidly and effectively resolved if they part of the jurisdiction of the Tribunal and so the system overall would benefit.

From a practical point of view it can also be of advantage to trade unions and their members to have their internal disputes resolved in the Industrial Tribunal rather than in the ordinary courts, as a Tribunal is more likely to have more specific knowledgeable of labour relations issues.

### Disputes between workers and the Government

Under the *Labour Development and Protection Bill* the government has a wide range of obligations toward workers. These include obligations with respect to job training and job placement. Disputes over job placement are to be subject to their own dispute resolution mechanism under the *Labour Development and Protection Bill* (Arts 43 - 45), however there is no similar provision for disputes relating to job training or in respect of some of the other obligations of the government to workers under the *Labour Development and Protection Bill*. A failure to fulfill these kinds of obligations could be considered a labour dispute and so perhaps disruptive to labour relations. For this reason it might be appropriate to bring them within the jurisdiction of the Industrial Tribunal.

### Disputes between employer organisations, and between employer organisations and their members

Another category of labour relations disputes that is not covered by the definitions in the Bill is disputes between employer organisations, and between employer organisations and their own members. Experience from other jurisdictions suggests that this is perhaps not a terribly

significant omission: there are relatively few such disputes that come to the attention of Labour Courts of other countries. Nevertheless, it may be appropriate to give consideration to whether such disputes occur in Indonesia in the context of labour relations matters, and if so whether it would be most appropriate to include them within the jurisdiction of the dispute settlement system.

### Disputes involving interns

The *Labour Development and Protection Bill* refers to interns (Art 22) and requires that they have an internship agreement with the enterprise where they are working. It is not clear, however, how disputes between interns and the enterprises in which they work may be resolved, in part because of the operation of the *Labour Development and Protection Bill*. If the parties comply with Art 22 and have an internship agreement, then the intern is not deemed to be a worker in the enterprise. Does this, however, mean that they are therefore unable to make use of the dispute settlement procedures envisaged by the Bill? An internship agreement is not among the sources of rights that might be the subject of a dispute over rights. If an intern is not deemed to be a worker in the enterprise, must the employer also afford him or her the statutory rights provided by the *Labour Development and Protection Bill*? If so, then are these disputes about rights that an intern may take to the Industrial Tribunal, after bipartite negotiation?

Alternatively, if the parties do *not* comply with Art 22 by having an internship agreement, the intern is deemed to be a worker in the enterprise. Paradoxically, this might have the effect of making the intern better off, as it might be interpreted as entitling the intern to all the rights in the *Labour Act*, and therefore granting him or her the ability to activate the jurisdiction of the Tribunal.

To some extent these may be matters that ought to be addressed under the *Labour Development and Protection Bill*. However there are omissions from the Industrial Dispute Settlement Bill that are also of significance. It defines a worker as a person who receives wages: thus if the intern is unpaid they are totally excluded from the dispute resolution mechanisms. A further provision that might be amended to overcome the omission is that of the definition of disputes over rights, which does not refer to internship agreements, or to interns deemed to be workers

by Art 22 of the *Labour Development and Protection Bill* because they have no internship agreement.

## IV. Drafting Difficulties and Other Issues

A number of questions arise from the legislative drafting, or at least from the English language version of the *Industrial Dispute Settlement Bill* on the basis of which this commentary has been prepared.

### The Arbiter

In what circumstances is an arbiter to be appointed by the Minister? The definition of arbiter in Art 1(13) includes reference to an arbiter being appointed by the Minister. However, there does not appear to be any provision in Arts 17 and following about Ministerial appointment of arbiters.

According to Art 26, a matter that has been determined by an arbiter may not then be transferred to the Industrial Tribunal. It is not clear, however, whether this provision would prevent parties to a dispute from withdrawing an *unresolved* matter from an arbiter and seeking to have it resolved in the Industrial Tribunal instead.

As the basis of an arbiter's jurisdiction would appear to be the agreement of the parties, on one view there would be no reason to prevent them from withdrawing their consent to the arbiter resolving the matter. On the other hand, the system is presumably designed to encourage the parties to resolve their disputes outside the Industrial Tribunal. That aim would not be assisted if the parties, seeing for example that they were likely to be unhappy with an arbiter's determination, could then 'second guess' the arbiter by removing the matter to the Industrial Tribunal. Given that there is provision for independent determination of the identity of the arbiter, including by the Minister, it would arguably be inappropriate to allow the parties effectively to void those decisions. If however the policy of the Bill is that no matter that has come before an arbitrator should be referred to the Industrial Tribunal, then it may be prudent to amend Art 26 to this effect.

## Judicial appointment & dismissal

Art 32 of the *Industrial Dispute Settlement Bill* refers to “valid statutory rules and regulations” according to which the Chief Justice of the Supreme Court might determine whether to appoint a person as a judge of the Industrial Tribunal. It is not clear from the Bill, however, what these rules are regulations are. Are they to be made under this Bill, for example? Or, is this a reference to provisions that already exist in other contexts to determine whether persons may be appointed to a court in Indonesia?

Art 34 specifies the qualifications required for appointment as an ad-hoc judge. As noted, this is an area that, is on the one hand, is closely regulated, and but, on the other hand, leaves much to the unguided discretionary power of the Minister. For this reason alone it may be better therefore to remove specifications such as the one requiring that candidates “have an authoritative bearing”. This simply invites subjective judgments that could be used to exclude otherwise qualified candidates for political or other reasons not appropriate to influence the determination of who should be an ad-hoc judge.

Art 42 refers to government regulations to be made concerning the procedure for dismissal of ad-hoc judges. Is there a difference between government and Ministerial regulations that has been deliberately invoked here? In any case, the procedures for dismissal of ad-hoc judges of the Tribunal would be better included in the Bill itself. It would considerably enhance the independence from political interference of ad-hoc judges, and thus of the Tribunal itself.

## Finality of Decisions

Art 70 specifies that a Tribunal decision in a dispute between trade unions is to be final and permanent. The provision should probably be in the same terms for decisions in respect of disputes over rights, as the Tribunal’s jurisdiction in relation to both these types of disputes is expressed to be “first and final” (Art 53).

## Appendix

### CLAUSE BY CLAUSE GUIDE TO THE INDUSTRIAL LABOUR DISPUTE SETTLEMENT BILL

#### **Chapter One      General Definitions**

- Art. 1                      Definitions of:
- Industrial dispute
  - Dispute over rights
  - Dispute over interests
  - Dispute over termination of employment
  - Inter-trade union dispute
  - Employer
  - Enterprise
  - Trade union
  - Worker
  - Mediation
  - Mediator
  - Industrial arbitration
  - Industrial arbiter
  - Industrial tribunal
  - Judge
  - Supreme Court justice
  - Ad-hoc judge
  - Mminister
- Art. 2                      Definition of industrial disputes
- Art. 3                      Disputes to be settled through bipartite negotiation
- Art. 4                      Settlement of disputes by Industrial Tribunals if  
negotiation fails

Art. 5 Procedures for dispute settlement by mediation, arbitration or industrial tribunals if negotiation fails

**Chapter Two Industrial Dispute Settlement Procedures**

*Part One Bipartite Settlement*

Art. 6 Obligation to attempt, and definition of, bipartite settlement

Art. 7 Written record of the outcome of bipartite negotiations

Art. 8 Written record of bipartite agreement; legally binding nature

*Part Two Settlement through mediation*

Art. 9 Mediation of disputes, (other than those over rights,) by mediators

Art. 10 Mediator to begin investigation within 7 days

Art. 11 Mediator's power to summon witnesses; their right to expenses

Art. 12 Obligation to assist a mediator in their investigation

Art. 13 Parties to sign a joint agreement after mediation, or, mediator to issue a recommendation to which the parties must respond

Art. 14 Settlement by Industrial Tribunal if mediator's recommendation rejected

Art. 15. Mediator to finish within 30 days

Art. 16 Minister to make regulations concerning mediators

*Part Three Settlement through industrial arbitration*

Art. 17 Parties may agree in writing to settle dispute by industrial arbitration

Art. 18	Parties must agree on the arbitrator
Art. 19	Arbitrator to be registered
Art. 20	Requirements for registration as an arbitrator
Art. 21	Appointment of arbitrator by Industrial Tribunal if parties cannot agree
Art. 22	Formalities concerning arbitrator's decision
Art. 23	Arbitrator's decision to be legally binding and enforceable
Art. 24	Legal principles that are to guide arbitrators in their work
Art. 25	Grounds for review of arbitrator's decision by the Supreme Court
Art. 26	Certain disputes under settlement, or settled by arbitrator, not to be transferred to an Industrial Tribunal
Art. 27	Minister to make regulation concerning arbitrators (called arbiters)

### **Chapter Three    The Industrial Tribunal**

#### *Part One*

#### *Generalities*

Art. 28	Industrial Tribunal venues
Art. 29	Establishment of Industrial Tribunals and venues
Art. 30	Membership of Industrial Tribunals

#### *Part Two*

#### *Judges, Ad-Hoc Judges and Supreme Court Justices*

Art. 31	Appointment and dismissal of Industrial Tribunal judges (by Supreme Court Chief Justice/Chief Justice of the Supreme Court)
Art. 32	Appointment of judges to be according to regulations

Art. 33	Appointment and dismissal of ad-hoc judges
Art. 34	Qualifications for being an ad-hoc judge
Art. 35	Oath of office of ad-hoc judge
Art. 36	Ad-hoc judge not to hold certain other positions
Art. 37	Grounds for honourable dismissal of ad-hoc judges
Art. 38	Grounds for dishonourable dismissal of ad-hoc judges
Art. 39	Temporary suspension of ad-hoc judges if threatened with dishonourable dismissal
Art. 40	Concerning the number of ad-hoc judges and ad-hoc Supreme Court justices to be appointed
Art. 41	Power of Supreme Court Chief Justice Chief Justice of the Supreme Court to oversee and direct the work of judges, ad-hoc judges and Substitute Registrars of Industrial Tribunals
Art. 42	Procedures for removal of ad-hoc judges
Art. 58	Obligation to assist judges in endeavours to resolve disputes
Art. 59	Validity of court session
Art. 60	Further court sessions where parties unable to attend
Art. 61	Powers of Tribunal if parties fail to appear
Art. 62	Court session to be open to the public; other aspects of procedure
	Second Paragraph: Decision Making
Art. 63	Panels to act according to law and justice
Art. 64	Decisions to be read in public and notified to parties
Art. 65	Panels of judges to decide within 90 days

Art. 66	Formalities concerning decisions
Art. 67	Notification of decisions to parties not in attendance
Art. 68	Publication of copies of decisions
Art. 69	Copies of decisions to be sent to parties
Art. 70	Tribunal decisions in disputes between unions to be final and permanent
Art. 71	Tribunal decisions in disputes over interests or termination may be appealed to the Supreme Court within 14 days
Art. 72	Procedure for lodging Supreme Court appeal
Part Two	Industrial Dispute Settlement by Supreme Court Justices
Art. 73	Appointment by Supreme Court of Industrial Tribunal Supreme Court Justices
Art. 75	Procedures for appeals and for settlement of certain disputes to be carried out in accordance with regulations
Art. 76	Appeals to be resolved within 30 days

**Chapter Five      Termination of Strike and Lockout**

Art. 77	Cessation of industrial action where dispute settlement procedures invoked
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**Chapter Six      Criminal Regulations**

Art. 78	Offences for failure to comply with obligation to end industrial action, or to assist Supreme Court Justices
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**Chapter Seven      Miscellaneous Regulations**

Art. 79	Application of act to disputes in social undertak-
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ings and undertakings other than enterprises,  
where people are employed

**Chapter Eight      Transitional Regulations**

Art. 80              Effect of this law on previous dispute settlement  
institutions and disputes not yet settled by them

**Chapter Nine        Closing Paragraphs**

Art. 81              Repeals of other laws

Art. 82              This law to take effect two years after its promul-  
gation

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