

Status and Outlook of Indonesia's Judiciary Reforms

An Interview with Todung Mulya Lubis

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This year marks the third direct presidential election in Indonesia since the end of the Suharto regime in 1998. Government institutions, including the judiciary, have continued to undergo significant reforms during this period. Given the recent spotlight on Indonesia's judiciary following controversial rulings against foreign firms, NBR spoke to Todung Mulya Lubis (Harvard University) to better understand the progress of judicial reforms in Indonesia, the perception of the judiciary domestically and internationally, and the positions of the leading presidential candidates on judicial reforms ahead of the 2014 elections.

Indonesia's "reformasi" period, which began after the fall of Suharto in 1998, ushered in an incredible amount of change to Indonesian society and institutions, including the judiciary. Could you give us a brief rundown of the major reforms that the judiciary has successfully undertaken during this period?

There have been a number of reforms taking place in the Indonesian judiciary. First and foremost, the country has strengthened the powers of the Supreme Court by making it the only state body that administers the judiciary. Under Suharto's rule, judges were under both the Ministry of Law and Human Rights and the Supreme Court. The Ministry of Law and Human Rights dealt with administrative functions, such as recruitment and promotion of judges, while the Supreme Court dealt with judicial functions, such as examining the quality of judges. When Suharto stepped down, all supervision of judges fell under the auspices of the Supreme Court. This conferred independence on the judiciary in the sense that it no longer has any ties with the executive branch of the government. Whether or not judges are truly independent is another issue.

Indonesia also established the Constitutional Court to deal with cases such as the impeachment of a president, election disputes, and dissolution of political parties. More recently, the Supreme Court began publishing its decisions online, making them more accessible and transparent, and began imposing sanctions on judges who are indicted for corruption and other unethical

behavior.

What aspects of Indonesia's judiciary could be improved? What measures need to be taken, and what are the major hurdles?

Indonesia needs a better recruitment process for judges to place the brightest and most qualified people into the system. This is an extremely important process to ensure judicial independence. Highly qualified judges are harder to corrupt. We also have to keep the doors open for practicing lawyers who would like to change their profession and sit on the bench. I think the presence of former lawyers on the bench would be beneficial for Indonesia's judiciary.

We also need continuing legal education for judges. The infrastructure already exists in Indonesia for such education, but we need to make it mandatory. In addition, there should be better remuneration for judges to put them in a position to make fair decisions.

Yet all of these changes would require commitment on the part of the government, and I do not think that the government realizes the importance of a strong judiciary. In fact, in the short term an independent judiciary could harm government interests by hindering officials' capacity to act and make decisions that may not be in accordance with the law. For that reason, the government by default has not supported independence of the judiciary. This perspective is very shortsighted, however, and the government has to realize that in the long run it is better for Indonesia to have a stronger judiciary.

In 2013, Transparency International's Corruption Perception Index showed that the Indonesian public perceives the judiciary as one of the most corrupt institutions in the country, along with the legislature, political parties, and police. Why do you think there is such poor public perception of the judiciary, and is there any credence to it?

The judiciary has failed the people again and again. Recent cases showing the Corruption Eradication Commission sending court judges, prosecutors, lawyers, and even public notaries to jail exemplify why there is such poor public perception of the judiciary. The judiciary in Indonesia is called a "court mafia." It is a mafia consisting of judges, prosecutors, police, and lawyers who obstruct justice and the due process of law.

There have also been statements by former Supreme Court justices in the past saying that over 50% of Indonesian judges may be corrupt. Of course, no one knows the exact number, but the perceptions of the people have been and still remain very negative.

Local and international media have shone a spotlight on recent Indonesian courts' decisions against foreign firms on charges of corruption and the like. Many perceive the trials as flawed and intended to target international companies in Indonesia. Should foreign investors be worried about being targeted by Indonesian courts? What issues might foreign investors face in the judiciary as they look to invest in Indonesia?

I do not blame foreign firms for being worried about Indonesia's judiciary. Criminalization of business matters in Indonesia is becoming very common, and it can be done by competing firms, local partners, or organizations that are acting as proxies to local partners. Local politicians may also use the judiciary to pressure and extract money from foreign firms. Therefore, it is common and advisable for these companies to settle disputes through foreign arbitration. The problem with such arbitration is that it is difficult to enforce decisions in Indonesia. As a result, foreign companies often try to find other ways to settle their disputes outside of the courts.

Another problem is the lack of competence and preparedness among many Indonesian judges to examine complicated business transactions, which is a cause for concern for the business community. This is why the country's domestic judiciary must be improved in areas such as recruitment, education, and remuneration.

The Indonesian government's intention to terminate more than 60 of its bilateral investment treaties (BIT) is another big problem, not only because it weakens protection for foreign companies but also because the termination of these treaties would be done unilaterally. If the Indonesian government deems unfair or is unhappy with a specific BIT, the correct legal process should be to propose an amendment that could be agreed on by the government and the opposing treaty party. Termination of a treaty should not be the answer.

Where do the leading presidential candidates stand on judicial integrity? How could the presidential election results potentially affect the judiciary?

Anyone who is elected has no choice but to continue with judicial reforms; everybody agrees that it needs to be done. But independence of the judiciary is harder to achieve. All presidential candidates have expressed their commitment to the independence of the judiciary, but it will not be easy to achieve because they all must compromise and form coalitions with parties that may have conflicting interests.

I have been asked by one presidential candidate to prepare a legal roadmap. Unfortunately, other candidates have shown no or little interest in pursuing judicial reform. Many see it as secondary to economic and political reforms, and they assume that judicial reforms will automatically take place following economic and political reforms. There is always room on the legislative side of the government to play a constructive role in strengthening the independence of the judiciary, but the prevalence of money in Indonesian politics makes that extremely difficult.

Do you have any other insights into the judiciary that you think are valuable for observers of Indonesia and Asia to understand?

Indonesia's free press is extremely important, not only to oversee the government but also to strengthen the idea of an independent judiciary. Indonesia also has a very active and vibrant civil society, which plays a countervailing role in the country's reforms vis-à-vis the judiciary and the government. The source of reform in Indonesia thus comes from both the media and civil society, which will be extremely important for reforms to continue.

Author Bio:

Todung Mulya Lubis is a Founder and Senior Partner of Lubis Santosa & Maramis, one of the leading law firms in Indonesia. He is also a Research Fellow in the Ash Center for Democratic Governance and Innovation at the Harvard Kennedy School. Dr. Lubis graduated from the Faculty of Law, University of Indonesia, and also completed law courses at the Institute of America and International Law in Dallas. He obtained master's degrees from University of California–Berkeley and Harvard University and also holds a Doctor of Judicial Science from the University of California–Berkeley.