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## Labour law and development in Indonesia

Tjandra, S.

### Citation

Tjandra, S. (2016, February 4). *Labour law and development in Indonesia*. Meijers-reeks.  
Retrieved from <https://hdl.handle.net/1887/37576>

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**Author:** Tjandra, Surya

**Title:** Labour law and development in Indonesia

**Issue Date:** 2016-02-04

## The Industrial Relations Disputes Court, quo vadis?<sup>1</sup>

*Is it possible to legalize the class system in a class-divided society and to make it a component of the legal system? Can the state recognize the idea of class and yet remain 'neutral'? Must not the conflict eventually break up the legal system or the legal systems suppress the conflict?*

(Kahn-Freund, 1981: 190-1; cited in Hepple, 1986: 30)

### 1 INTRODUCTION

The instrumental aspect of labour laws requires enforcement and, in the event of a dispute, a formal examination and adjudication process. Indeed, while labour inspection and prosecution have developed as means of enforcing protective legislation,<sup>2</sup> the enforcement of employment contracts is very much dependent upon an effective labour dispute settlement mechanism.<sup>3</sup> In the case of Indonesia, the mechanism for settling industrial disputes was originally marked by excessive government involvement; particularly during the authoritarian New Order regime. This led some observers to call for the establishment of special court to deal with industrial relations issues, (see, e.g., Boulton, 2002, Mizuno, 2009). In particular, two benefits were claimed. First, the establishment of such a court would provide the opportunity to develop greater legal certainty – as the labour dispute settlement would not be directly controlled by the executive branches of government, thereby reducing the political influence that had plagued labour law practices in the country over recent decades (see Chapter 3). Second, there would be an important benefit in having a clear and accessible history of court deci-

1 Some parts of this chapter draw on Tjandra (2007) 'The Industrial Relations Court in Indonesia, Quo Vadis? Some Notes from the Courtroom'; an article presented at the Conference on Current Issues in Indonesian Law: In Honour of Professor Daniel S. Lev, University of Washington School of Law in Collaboration with the University of Indonesia, Faculty of Law, Seattle, February 27-28, 2007.

2 For a discussion on the development of labour inspection and prosecution in Europe, see Ramm, 1986: 73-113.

3 As noted by Ramm (1986: 270-274), one of the most important developments in labour law was the establishment of special courts, designed to overcome the problems commonly encountered in ordinary courts, including the judiciary's class bias and lack of industrial experience; and the costs, delays and formalities of the courts which made the legal process inaccessible to the majority of workers. The first labour court was established in France (1806 – the *conseils de prud'hommes*), followed by Belgium (1809), Italy (1893 – *magistratura non togata*, literally meant 'gownless' courts) and Germany (1890, 1904, 1926 – *Arbeitsgerichte*). Ramm (1986) also outlined the major problems normally found in ordinary courts.

sions; in order to establish precedent and thus provide the opportunity for a self-sustaining labour law system to develop, in which matters involving labour relations are handled independently and fairly (see also Cooney and Mitchell, 2002: 254).

However, such a proposal may face challenges in its implementation – as this Chapter and the case of Industrial Relations Court in Indonesia will demonstrate. Indonesia's Industrial Relations Court (*Pengadilan Hubungan Industrial*, PHI), which was established as a special court within the scope of the general court, has seen major challenges to its operations from the beginning; both from within the system and from without. These challenges include ongoing internal problems related to the generally high levels of corruption within the Indonesian judicial system; the problematic relationship between 'special' and 'ordinary' civil procedural laws predominant in the PHI; problems related to the technical competence and legal integrity of career judges, ad hoc judges and registrars; and external problems including the workers' lack of competence in civil litigation procedures and thus access to the court's litigation processes. Together these problems have led to declining public confidence in the performance of the PHI; a situation which has a greater adverse effect on employees and trade unions than on employers. Given this situation, it is clear that the PHI needs to be reformed; for example, by turning it into a special court equal to the civil court as suggested by several ad hoc judges from union circles (see Tjandra, 2014). Such progressive reforms, however, require strong political commitment both from the judiciary and government; both of which appear currently to be mired in the past.

#### 1 THE INDUSTRIAL RELATIONS COURT (PHI)<sup>4</sup>

The Industrial Relations Court is a 'special court' within the scope of the court of general jurisdiction, commonly referred to as the District Court (*Pengadilan Negeri*).<sup>5</sup> According to former Chief Justice of the Supreme Court, Bagir Manan, the term 'special court' refers not only to the special case objects of focus – namely, labour disputes in labour relations – but also to the special composition of the panel of judges in this particular court, and the use of special procedures. Uniquely, this court uses a judging panel which comprises one ordinary judge (a career judge) and two ad hoc judges (so-called expert judges, sourced from within union and employers' circles respectively); and special procedures including the waiving of case fees for certain cases, as well as strict time limits for court hearings (a maximum of 50 working days in the PHI, plus 30 working-days in the Supreme Court),

4 See Tjandra and Suryomengolo, 2004, which provides critical notes on Law No. 2/2004, especially from the perspective of labour unions. See also Tjandra, 2006 and 2009.

5 Article 55.

and a restriction on appeals in certain types of dispute.<sup>6</sup> During the establishment of the PHI, the initial selection of ad hoc judges began with the nomination of tens of potential candidates by the employers' organization(s) and trade unions, for consideration first by the Ministry of Manpower, and then by the Supreme Court; with the latter responsible for assessing the nominees' credentials with respect to relevant legal knowledge and technical skills. The Supreme Court was then also responsible for training the ad hoc judges in the specifics of civil procedural law, finalizing the selection process, and submitting the names of the accepted ad hoc judges to the President for formal appointment. The Supreme Court was also responsible for preparing the career judges who were to be assigned to the PHI.<sup>7</sup> This selection process presently continues to occur on an occasional basis, as required to replace judges in the system.

### 1.1 Birth of the Industrial Relations Court

As stipulated by Law No. 2/2004 on Industrial Relations Dispute Settlement, the Industrial Relations Court should have become effective and commenced operations one year after its enactment.<sup>8</sup> This was postponed, however, due to delays in building the infrastructure,<sup>9</sup> and the PHI only began official operations on January 14, 2006. On the same date, the ad hoc judges, half from labour organization circles and half from employers' organization circles, were symbolically 'inaugurated' by President Susilo Bambang Yudhoyono, in Padang, West Sumatera province, in the presence of the Chief Justice of the Supreme Court, Bagir Manan. PHIs were to be established in 33 District Courts in 33 provincial capitals throughout Indonesia (*Kompas*, January 15, 2006). Effective operation of the PHIs commenced in April-May 2006, with the release of Presidential Decree No. 31/M/2006, which appointed a total of 155 ad hoc judges for the PHIs in the provincial capitals, and an additional four ad hoc judges for the PHI at the Supreme Court.

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6 'The Chief Justice of the Supreme Court inaugurates 33 Industrial Relations Courts', *Tempo Interaktif*, January 14, 2006.

7 Nine career judges from the Supreme Court, and an additional 90 career judges from 33 District Courts around Indonesia, were trained for this purpose (Suparno, June 2006).

8 Article 126 of Law No. 2/2004. Hereinafter, unless otherwise stated, all articles referred to in footnotes are articles from Law No. 2/2004.

9 Based on Government Regulation In Lieu of Law No. 1/2005; also Law No. 2/2005 regarding the Delay in the Implementation of Law No. 2/2004 concerning Industrial Relations Dispute Settlement.

In conjunction with Law No. 2/2004 coming into effect, two other laws were annulled – Law No. 22/1957 on Labour Dispute Settlement, and Law No. 12/1964 on Termination of Employment in Private Enterprises.<sup>10</sup> Also annulled was the existing labour dispute settlement system, which has been known as the ‘P4P/D’ (*Panitia Penyelesaian Perselisihan Perburuhan Pusat/Daerah*; Central/Regional Labour Dispute Settlement Committee). The P4P/D system was considered no longer suitable to meet the community’s needs for a ‘fast, precise, fair, and cheap’ dispute settlement mechanism (Introduction, Law No. 2/2004). The Director of the ILO in Jakarta, Alan Boulton, assessed the future of Indonesia’s labour relations structure as follows: ‘the needs felt by the new economic, social, and political environment with respect to the formation of a legal framework for the development of a fair and effective industrial relation that is capable of assisting the settlement of industrial disputes’ (Boulton, 2002: 5).

The decisions to annul Law No. 22/1957, Law No. 12/1964 and P4P/D-based labour dispute settlement mechanism were based on three main arguments (see Hanartani, n.d., also Boulton, 2002). First, after Law No. 5/1986 concerning the State Administrative Court came into effect, the decisions reached through P4P/D, which had previously been final and binding, could be challenged by submitting a lawsuit to the Administrative Court (*Pengadilan Tata Usaha Negara*), and in addition, could subsequently be appealed via the Administrative Appellate Court and the Supreme Court. This process took considerable time, which was not considered ideal for labour cases (labour relations); where quick settlement would benefit employment and the production process. The establishment of the PHI was expected to tackle these problems by providing a new system of labour dispute settlement.

The second argument to support the annulment of the two laws and the existing settlement system involved the recognition, under Law No. 22/1957, of the authority (or ‘veto’ right) of the Minister of Manpower to delay or cancel the decisions of P4P. Supporters of the annulments considered this veto right by the Minister to be an example of excessive government interference in labour issues and labour dispute settlement, which, they argued, should be abolished.<sup>11</sup> The third argument concerned the application of Law No. 21/2000 on Trade Unions. This law was originally inspired by ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize, which was ratified by Indonesia in 1998; based on which all workers should have the same opportunity to form or participate in any organization. However, as a consequence, the rights of workers *not* to participate in an organization should be respected as well; and this right was not currently recognized. Thus, Law No. 22/1957, which required that the

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10 Article 125.

11 See also Bappenas’ ‘White Book’ (2003) on ‘Employment Friendly Labour Policies.’

disputing party be a worker/labour union,<sup>12</sup> was considered unsuitable for the 'new paradigm' in the field of labour relations; namely, the 'democratization at the workplace' (Boulton, 2002). The preservation of Law No. 22/1957 would have meant that individual parties in labour disputes could only seek assistance through the general court, based on civil law procedures.<sup>13</sup>

## 1.2 The industrial relations dispute process

As a special court, the PHI is authorized to examine, adjudicate, and decide on 'industrial relations dispute' cases, defined in Law No. 2/2004 as: *a difference of opinion resulting in a dispute between employers or an association of employers with workers/labourers or trade unions due to a disagreement on rights, conflicting interests, a dispute over termination of employment, or a dispute among trade unions within one company.*<sup>14</sup> By this provision, the Law limits its jurisdiction, and therefore the PHI's authority, to four types of labour disputes; namely disputes over rights,<sup>15</sup> disputes over interests; disputes over termination of employment (PHK); and disputes among worker/labour unions within a company.<sup>16</sup> Before a case can be brought before the PHI, the parties concerned are required to attempt a bipartite (two party) negotiation between worker and employer.<sup>17</sup> This negotiation must be completed within 30 days,<sup>18</sup> and minutes of each negotiation meeting must be drawn up

12 Law No. 22/1957 (article 1 subsection 1.c.) defined a 'labour dispute' as: *conflict between employers or employers' associations with a combined trade union or trade union in relation to the lack of understanding regarding the employment agreement, terms of employment, and or labour circumstances.* Thus, Law No. 22/1957 was concerned with collective disputes between employers/employers' organizations and unions, rather than disputes between employers and individual workers; and only organizations (not individuals) could be parties to the dispute with the P4P/D as the settlement institution. Some argued that such provisions encouraged individual workers to join unions, and emphasized that unions were essential to defend the interests of individual workers (Tjandra and Suryomenggolo, 2004).

13 In practice, however, with the enactment of Law No. 12/1964 on the Termination of Employment at Private Enterprises, most individual cases concerning termination of employment could be brought before the P4D/P. Indeed, few such cases were brought to the civil court as a tort action. This was related to the expense of the civil court system for plaintiffs (in particular for the dismissed workers who brought the cases), while the P4D/P was generally free of charge (see Tjandra and Suryomenggolo, 2004).

14 Article 1 subsection (1).

15 As noted by Mizuno (2009), with reference to Soepomo (1994: 177), before the establishment of the PHI few disputes over rights were brought to the regular courts. Instead, any claims that companies were not meeting their normative obligations would be investigated by labour inspectors, who would issue a report based on their investigation if necessary. If a rights dispute was passed onto the P4P/D, a labour inspector would be appointed to handle the case, and dismissals would not be permitted if they were in contravention of the law.

16 Article 2.

17 Article 3 (1).

18 Article 3 (2).

and signed by the parties concerned.<sup>19</sup> If no resolution can be obtained, the PHI's Panel of Judges will use these minutes during their consideration into whether to accept or reject a case.<sup>20</sup>

In the event that the bipartite negotiation fails, or a decision is not reached within 30 days, one or both parties are required to register their dispute with the Regional Manpower Office at the district level, including providing the minutes of their bipartite negotiation as evidence.<sup>21</sup> In the event that the complainant fails to provide this evidence, the Regional Manpower Office, to be completed within seven days, may return the case file to the complainant.<sup>22</sup> After receiving the written complaint, the Manpower Office is required to offer both parties the option of a settlement through either conciliation (through a private institution), or arbitration (through a private institution with the authority to make final and binding decisions).<sup>23</sup> The parties have seven days in which to select either conciliation or arbitration, after which time, if a decision has not been reached, the Manpower Office will refer the dispute to mediation (by a government institution).<sup>24</sup> According to Law No. 2/2004, labour disputes may be settled in different ways, depending on the type of dispute in question. The first and second type of disputes (disputes over interest, and disputes among the trade unions in one company) may be settled through mediation, conciliation or arbitration. The third type of

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19 Article 6 (1).

20 Article 83 (1). The use of the term 'minutes' in this article sometimes leads to confusion over whether the 'minutes' in question are those from the bipartite negotiation between the employer and worker(s), or the written records of the mediation undertaken by the Regional Manpower Office. Technically, the term 'minutes' is reserved for the records produced through the bipartite negotiation, while those produced during the mediation at the Regional Manpower Office are referred to as 'written recommendations'. This distinction can prove difficult however, with some panels of judges requesting to see the 'written recommendation' from the mediator or conciliator, while other panels request instead to see the minutes from the bipartite negotiations.

21 Article 4 (1). As noted by Mizuno (2009), such a requirement as established under Law No. 22/1957 and maintained in Law No. 2/2004, is unique. It differs from the labour laws of many countries, in that in Indonesia, workers and employers can request help if they cannot resolve a dispute; and the government can intervene if the dispute is seen to threaten the national interest (see also Hanami and Blanpain, 1984: 81-106).

22 Article 4 (2).

23 Article 4 (3).

24 Special officials in the local Manpower Office (regents/cities) are assigned to undertake the mediation. Many of these officials were previously members of the abolished P4P/D. The provision to make mediation compulsory using these nominated officers is an interesting aspect of the new general labour dispute settlement system developed through Law No. 2/2004. According to one government official, the provision arose largely as a concession during the Law's formulation; in order to appease the many former mediators from the abolished P4P/D who faced the loss of their jobs once the new Law on labour dispute settlement was enacted (Personal communication with Syaiful Bahri, Ministry of Manpower, Jakarta, 9 January 2010). Mizuno (2009) notes that the requirement for mediation using the appointed mediators is one of the main weaknesses in Law No. 2/2004, because it will just prolong the process of reaching a final decision.



dispute, disputes over termination of employment, may be settled through either mediation or conciliation; while the last type, dispute over rights, may only be settled through mediation. In each dispute, the mediator, conciliator or arbiter must complete their duties within 30 working days after receiving the transfer of responsibility for settlement of the dispute (see the Dispute Settlement Scheme, based on Law No. 2/2004, below).

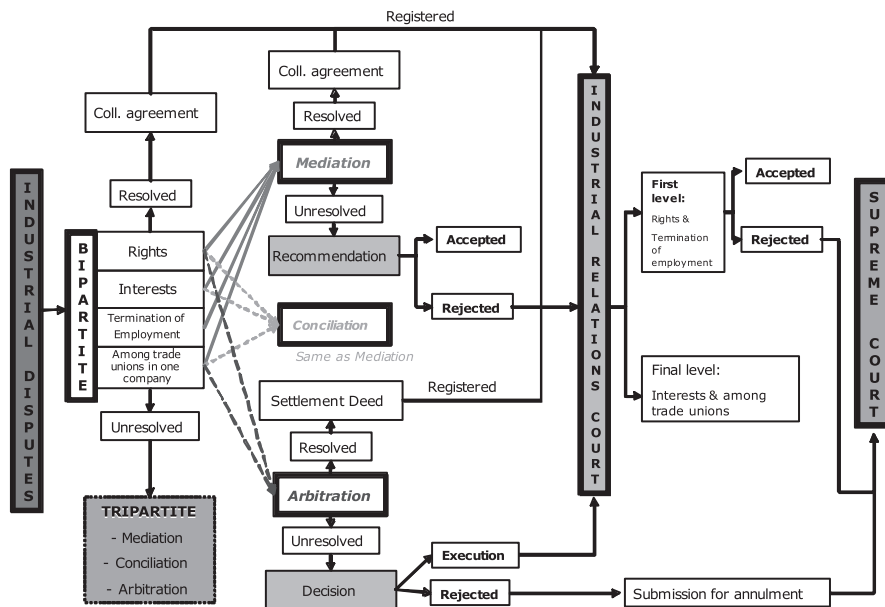


Image: The Dispute Settlement Scheme, based on Law No. 2/2004

When an industrial relations dispute can be settled through mediation, a collective agreement is drawn up and signed by the parties involved, witnessed by the mediator, and registered at the PHI in the District Court within the relevant jurisdiction; whereupon the parties can obtain a registration deed.<sup>25</sup> If no agreement can be reached through mediation, the mediator will issue a written recommendation, and the parties are required to provide a written answer to the mediator within 10 working days after receiving the recommendation, to indicate whether they accept or reject it. If one of both of the parties fail to provide their answer within the allotted time period, this is taken as a rejection of the written recommendation,<sup>26</sup> and either of the parties may then file to continue with settlement of the dispute through the PHI in the local District Court.<sup>27</sup>

25 Article 13 (1).  
 26 Article 13 (2).  
 27 Article 14 (1).

Law No. 2/2004 on the Industrial Relations Dispute Settlement states that the PHI has the duty and is authorized to examine and make a decision at different stages in the dispute settlement process, depending on the type of dispute in question. For cases involving disputes over rights and disputes over termination of employment, the PHI is the deciding authority at the first stage of the process; while for cases involving conflicts of interest and disputes among the worker/labour unions in a company, the PHI may be the deciding authority at both the first and final levels of the process.<sup>28</sup> As stipulated in article 100 of Law No. 2/2004, the judges must take into account all relevant laws, existing agreements, customs and justice in reaching a verdict.<sup>29</sup> The procedural law which is applied at the PHI, is the Civil Procedural Law, which is also used in the courts of general jurisdiction.<sup>30</sup> Law No. 2/2004 also stipulates that for lawsuits worth not more than Rp 150 million (based on the figure requested as compensation when the lawsuit is filed), there will be no case fee, including for execution.<sup>31</sup> The Law stipulates that a PHI is to be established in each District Court within the capital city of each province, with the court having jurisdiction over the particular province.<sup>32</sup> Subsequently, PHIs are also to be formed under Presidential Decree in certain other regencies/cities, especially those that are heavily industrialized.<sup>33</sup> Below is the summary of dispute settlement roles of mediator, conciliator, arbiter, Industrial Relations Court, and the Supreme Court, as provided by Law No. 2/2004 on the Industrial Relations Dispute Settlement.

One important strength of the PHI's dispute settlement process is the right of unions and employers' organizations to act as attorneys to represent their members during litigation at the PHI.<sup>34</sup> A similar provision was included in Law No. 21/2000 on Trade Unions, specifically article 25 paragraph (1) point b.<sup>35</sup> Another important new development is the composition of the panel of judges at the PHI, comprising the single career judge and two ad hoc judges<sup>36</sup> as nominated by the employers' association and trade unions respectively.

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28 Article 56.

29 For the P4P/D there was one more consideration: 'Interest of the State'.

30 Article 57.

31 Article 58.

32 Article 59 subsection (1).

33 Article 59 subsection (2). The elucidation of the Law states that 'immediately' is 'within 6 (six) months after the Law comes into effect', or in July 2006.

34 Article 87.

35 This paragraph states: 'A trade union/labour union, federation or confederation of trade unions/labour unions that has a record number has the right to: [...] represent workers/labourers in industrial dispute settlement.'

36 The composition of the panel of judges at the PHI is very different from the P4P/D, which consisted of government officials and representatives of the unions and the employers' association, each five persons, and was headed by an official from the Department of Manpower.

The term of office of the ad hoc judges is five years, following which they may be reappointed for another five years.<sup>37</sup>

Table 6.1: Summary of the Typology of Mediator, Conciliator, Arbiter, Industrial Relations Court (according to Law No. 2/2004)

	<b>Mediator</b>	<b>Conciliator</b>	<b>Arbiter</b>	<b>Industrial Relations Court</b>	<b>Supreme Court</b>
Status	Government employees	Registered private	Registered private	– Career judge – Ad hoc judge	– Career judge – Ad hoc judge
Type of resolution	Compulsory if not choosing	Voluntary	Voluntary	Compulsory	Compulsory
Type of submission	Written/oral	Written	Written	Written (legal lawsuit)	Written (appeal/cassation)
Type of disputes	– Rights – Interests – Termination of employment – Among trade unions	– Interests – Termination of employment – Among trade unions	– Interests – Among trade unions	First level: – Rights – Termination of employment Final level: – Interests – Among trade unions	Final level: – Rights – Termination of employment – Annulment of arbiter's decision
Final result	– Collective agreement – Written recommendation	– Collective agreement – Written recommendation	– Settlement deed – Arbiter's decision	Decision	Decision
Time	30 working days	30 working days	30 working days	50 working days	30 working days
Number of officials	Not regulated	One or more	One or more	Three (one career judge, two ad hoc judges)	Three (one career judge, two ad hoc judges)
Jurisdiction	District/city	Province	All Indonesia	Province	All Indonesia
Type of hearings	Not regulated	Not regulated	Close	Open	Close
Appearance of attorneys	Not regulated	Not regulated	Allowed	Allowed	Allowed

<sup>37</sup> All ad hoc Judges appointed for the first term (2006-2011) were reappointed for the second term, excepting those who had resigned or reached the stated maximum age of 62 (interview with Saut Manalu, ad hoc judge at the PHI Jakarta, June 2011).

Concerning the time limit for examination of disputes, Law No. 2/2004 states that a PHI's Panel of Judges must pronounce a judgment within fifty working days from commencement of the first PHI hearing.<sup>38</sup> The PHI's Substitute Registrar must then issue the copy of the decision within fourteen days after the signing of the decision.<sup>39</sup> This copy must be delivered to the parties within seven days.<sup>40</sup> An appeal may be made by submitting a written request to the substitute registrar's office of the PHI, which will forward the request to the Court of Cassation.<sup>41</sup> The brief must be conveyed to the Head of the Supreme Court within fourteen days following the appeal application receipt date.<sup>42</sup> The Law also sets forth that in disputes over rights, or disputes over termination of employment, the examination of the case at the Supreme Court must be concluded within thirty days following the date of the receipt of the appeal application.<sup>43</sup> The composition of the panel of judges (one career Judge and two ad hoc judges) also applies to the Supreme Court.<sup>44</sup> The ad hoc judges at the Supreme Court will have been nominated and will have followed the same recruitment procedures as those at the district level; but the judges directly apply for their position at the Supreme Court.

Under the aforementioned system, the proponents of Law No. 2/2004 claim that the Law can provide a 'fast, precise, fair, and cheap' labour dispute settlement mechanism.<sup>45</sup> Key questions include: does the system work in practice? How do we understand the practice of Indonesia's new labour dispute settlement mechanism, with the PHI as the core; and its impact upon labour? How do labour groups respond to this system? These questions will be the focus of the discussion in the following section of the chapter.

### 1.3 Key aspects of administration of the dispute process

The PHI system commenced operations officially on 14 January 2006, and the ad hoc judges began examining cases between May and June 2006. However, the Presidential Decree on allowances and other rights for ad hoc judges in the PHI was not released until 7 December 2006; and the disbursement of the state budget for honorary payments for ad hoc judges was not issued until around two years later, in 2008. This means that for over two years after PHI operations commenced, ad hoc judges were required to work without

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38 Article 103.

39 Article 106.

40 Article 107.

41 Article 111.

42 Article 112.

43 Article 115.

44 Article 113.

45 See specifically the section on 'Consideration'.

payment.<sup>46</sup> One ad hoc judge from union circles complained, 'How can we work properly and not commit corruption if our most basic rights are not even fulfilled?'<sup>47</sup> He described how difficult it was for him to refuse offers from employers to go out for 'lunch' or accept 'gifts' from one of the parties in a case being handled by him. 'I am only human, I also have needs,' he stated.<sup>48</sup> The lack of payment led several ad hoc judges to threaten to conduct public action if they were not paid soon, including to go on strike by refusing to attend court hearings in the PHI Tanjung Pinang, Riau Islands, causing delays to court hearings (*Batam Pos*, 23 November 2006). When asked about the issue, the Director of Law and Judicature of the Supreme Court, Suparno, said: '[The issue] is still with the State Secretary.'<sup>49</sup> One problem was that a partial budget for the infrastructure development of the PHI had already been disbursed while the budget for the salaries of the ad hoc judges was in limbo. This budget included funds for an official vehicle for the chief justices of the district courts, *ex officio* chief justice of the PHI, who were able to enjoy their new cars (a Toyota Kijang Innova or Toyota Vios) soon after PHI operations began in May 2006.<sup>50</sup>

For the ad hoc judges who came from employer circles, this discrepancy in disbursement of funds was not usually a significant hardship, as most retained their previous paid positions while acting as judges part-time. But for ad hoc judges from labour unions, the ongoing lack of funds posed a serious problem, as many had quit their previous jobs to become ad hoc judges full-time (*Tempo Magazine*, 12 November 2006). As reasons for choosing a full-time role, some cited their new position as a 'noble responsibility', or a 'calling to fulfill their duties',<sup>51</sup> while for others, becoming a judge was an opportunity to upgrade their social status and position in society. One ad hoc judge in the PHI Jakarta, for example, prior to his appointment as a judge, worked as a 'barefoot lawyer' at the legal aid office in the Jakarta District Court, with no certainty of income.<sup>52</sup> For him, becoming a judge significantly raised his income and his social position in the eyes of his neighbours

46 Several ad hoc judges from larger district courts, such as Jakarta and Bandung, did actually receive their salaries, which in these cases were paid directly from the district court budget at the discretion of the Chief Judge of that particular district court.

47 Interview Muhamad Mushlih, an ad hoc judge at the PHI Serang, June 2006.

48 Among ad hoc judges, one widely-circulated joke about their missing allowance held that there were 'three phases of one's career': 'mantab' ('makan tabungan', or living from one's savings); 'matang' ('makan utangan', or living from debts); and 'makar' ('makan perkara', living from cases).

49 Stated in the Workshop of Ad Hoc Judges from Labour Union circles (so-called Labour Judges) throughout Java, organized by the Trade Union Rights Centre, June 2006.

50 Interview with Asmiwati, an ad hoc judge at the PHI Banjarmasin, South Kalimantan, June 2008. Other ad hoc judges from various PHIs confirmed this, joking that 'Our chief judges are driving cars with two wheels,' (as the chief judge had previously enjoyed official cars as chief judge of the district courts as well).

51 Interview with Saut Manalu, ad hoc judge at the PHI Jakarta, June 2008.

52 Interview with Tri Endro, ad hoc judge at the PHI Jakarta, June 2008.

and colleagues, and he felt proud when people called him 'Pak Hakim' ('Mister Judge'). Similar sentiments were expressed by ad hoc judges from employer circles, but to a lesser extent than by those from union circles. Once working in the position full time, most ad hoc judges were highly dependent on the salaries they were entitled to: Rp 3,750,000,-/month for ad hoc judges at the district level, and Rp 7,500,000,-/month for ad hoc judges at the Supreme Court level (based on Presidential Decree No. 96/2006).<sup>53</sup> This amount was relatively small, and less than the salaries some ad hoc judges received in their jobs before joining the PHI; particularly those from employer circles. Several chose to resign after a couple of years of working with the PHI.<sup>54</sup> This led to a shortage of ad hoc judges from employer circles in some regions.<sup>55</sup> In response, after five years of PHI operations, in 2011 the President raised the salaries of ad hoc judges at the PHI to Rp 5,5 million/month, and those at the Supreme Court to Rp 10 million/month (Presidential Decree No. 20/2011). These new salaries were enjoyed immediately by newly recruited ad hoc judges, but not by the original cohort. In January 2013, a new salary scheme was implemented, with ad hoc judges at the PHI receiving Rp 17.5 million/month, and those at the Supreme Court receiving Rp 25 million/month, regardless of whether they were new or earlier recruits. As explained by one ad hoc judge from union circles, these significant increases of salaries encouraged many people to apply for the position of ad hoc judges at the PHI.<sup>56</sup>

The salaries received by the ad hoc judges still required a deduction of 15 percent income tax, which was controversial, given the existing government regulation which ruled that 'state officials' were exempt from income taxes

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53 This district level amount was smaller than that received by ad hoc judges at various other special courts, such as the Fisheries Court, which was Rp 4 million/month (see Presidential Decree No. 23/2008). Even more was received by ad hoc judges at the Corruption Court, which equated to Rp 10 million/month at the district level, Rp 12 million/month at the higher court level, and Rp 14 million/month at the Supreme Court level (see Presidential Decree No. 49/2005).

54 Personal communication with Abdul Khakim, an ad hoc judge from PHI Samarinda, who later resigned and then worked with an oil company in Kalimantan as Human Resources Manager. While he was a judge he wrote several books on industrial relations dispute and also undertook university teaching; activities he gave up after his resignation from the PHI.

55 One ILO report (Fajerman, 2011: 17) noted that in some PHIs there were no ad hoc judges available from employer circles at all, leading to the Supreme Court having to transport ad hoc judges from nearby provinces to hear cases. As the report detailed: 'In Denpasar, there are five career and four trade union-nominated ad hoc judges, but no employer-nominated ad hoc judges. In Semarang there are seven career and seven trade union-nominated ad hoc judges and no employer-nominated ad hoc judges, and in Bengkulu there is one career judge, four trade union-nominated ad hoc judges and no employer-nominated ad hoc judge.' The ILO report expressed concerns that the Supreme Court apparently did not engage in greater efforts to recruit ad hoc judges from employer circles for these regions.

56 Personal communication with Joko Ismono, ad hoc judge at the PHI Surabaya, September 2013.

(which were covered by the government as the employer). Ad hoc judges were concerned that they were not recognized as 'state officials' by the government, despite the fact that they were appointed by the President with Presidential Decrees published in the State Gazette, as per normal procedures for 'state officials'. Indeed, the ad hoc judges at the Supreme Court even held the right to stay at 'the official apartment for state officials' in Kemayoran region, Jakarta.<sup>57</sup> Some ad hoc judges, particularly from union circles but also from employer circles, brought the issue to the attention of the Tax Offices in their regions, as well as to the Ministry of Finance in Jakarta, arguing that they should be exempt from taxes and treated as full 'state officials'. These efforts failed: in late 2010, the Minister of Finance issued a letter stating that ad hoc judges were not 'state officials' and thus not exempt from taxes. The letter did not provide any explanation.

Initially the Supreme Court seemed to support the formation of the PHI, at least to a degree. This was despite the fact that the PHI was considered to be 'a project of the Ministry of Manpower,' which had drafted Law No. 2/2004 without close consultation with the Supreme Court. This lack of consultation was considered to be a factor in the subsequent problems with payment of ad hoc judges. As the Director of Law and Judicature of the Supreme Court, Suparno, observed later regarding the year-long delay in payments, '[The situation] would not be this messy if we had been involved since the beginning'. Given these issues, it is clear that at the beginning, both the government and the Supreme Court were unprepared to provide the full infrastructure to enable the PHI to operate effectively; and with the previous institution which had handled labour disputes (the P4P/D) no longer functioning, many labour dispute cases were cancelled without proper resolution.<sup>58</sup>

During their early days as ad hoc judges at the Industrial Relations Court, while waiting for payment, many people survived through their incomes from side-jobs or other side-activities. Some ad hoc judges, for example, ran small shops at home, while others worked part-time as human resources consultants at the companies where they had previously worked. One common side-job was the position of resource person for training workshops about PHI procedures. Such training was held frequently by companies in the PHIs' early days, and was referred to by ad hoc judges as 'socialization,' in reference to the formal activities of the Supreme Court during the

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57 This unclear status of ad hoc judges at the PHI was similar to that experienced by ad hoc judges from other special courts. The most outspoken were the ad hoc judges at the Corruption Court, who voiced public complaints several times (*Detiknews*, 16 June 2011)

58 Personal communication with Sahat Butar Butar, a union activist who had been a member of the P4P/D before the establishment of the PHI, June 2007. Butar claimed that during this transition period, many workers he knew had to 'give up', and chose instead to accept their employers' offers, although these offers were below those required by law.

early stages of PHI operations.<sup>59</sup> One human resource manager from a private bank in Jakarta, who frequently organized such workshops for his staff, referred to the training instead as 'networking', observing that the primary intention was to develop closer contacts with judges from the PHI and the Supreme Court.<sup>60</sup>

These 'socialization' activities were preferred, by some ad hoc judges, to their primary task of ruling on disputes – as the training tasks were straightforward and therefore relatively 'easy money', requiring only that the trainer explain the contents of the law. The financial returns were reasonable: for a two-hour presentation, focusing mostly on normative parts of the Law, ad hoc judges at the district level could expect to be paid around Rp 6 million; almost double their monthly PHI salaries, while career judges, especially those from the Supreme Court, could expect up to around Rp 8 to 10 million per session.<sup>61</sup> Such opportunities for side-incomes, however, could be problematic, for several reasons. First, these opportunities were distributed inequitably among the ad hoc judges, with those from big cities such as Jakarta or Surabaya receiving higher income than those from smaller, less industrial cities. Second, despite the claims from organizations that the 'socialization' and training were focused on legal issues, it is doubtful that the companies' motives were purely related to capacity building. Instead, they may have been interested in influencing judges, and the important question emerged as to whether the ad hoc judges and career judges recruited by companies to run their training would be able to maintain their impartiality in future cases involving those companies – or would they then feel, as one ad hoc judge confessed, 'morally obliged' (*berhutang budi*) to the company.

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59 The Supreme Court, as the institution responsible for the operation of the PHI, conducted a series of socialization activities around Indonesia to introduce the new court to the public and to respected parties such as employers and workers. Interview with Tri Endro, ad hoc Judge at the PHI Jakarta, June 2008.

60 Personal communication with Sigit Bintoro, HRD Manager in Jakarta, June 2008.

61 This discrepancy led some career judges at the district and Supreme Court levels to preferentially offer training to companies rather than unions, given that the latter could not pay the same as the former. One Supreme Court judge complained that he only received Rp 750,000 for a training session organized by a labour NGO in Jakarta, and observed that he could get much more from companies (interview by Dela Feby, Secretary of TURC, June 2008). The director of the NGO in question heard about the complaint second hand (from an ad hoc judge who had been speaking with the disgruntled Supreme Court judge), and immediately wrote an official letter to explain why his organization could only pay a limited amount. The letter also referred politely to the duty of judges to socialize or introduce the new law to all parties indiscriminately. This letter was copied in to all the key related authorities, including the Chief Judge of the Supreme Court, the Minister of Manpower, and the Director of the ILO Office in Jakarta. The judge who had expressed the complaint did not respond to the letter (interview Tri Endro, ad hoc judge at the PHI Jakarta, June 2008).



The conditions described above in relation to salaries and other challenges left many ad hoc judges discouraged. One ad hoc judge explained why he felt discriminated against: 'maybe because we're considered as "contract judges", therefore they don't feel it necessary to treat us well, or at least as equal to other state officials.' Another said, 'I feel really like the ordinary worker that I used to be. I just have to demand my own rights just to gain what I deserved.' This statement was in reference to his new obligation to pay income tax for his PHI work, once the Minister of Finance had revoked the exemption which had been granted by the Chief Judge of the PHI. 'I don't know how I can pay all those taxes, as my salary [including taxes] has already been used up.'<sup>62</sup> Some confessed that they thought of quitting their PHI roles because of the taxes issue, but kept working for the PHI due to what they referred to as a 'higher calling'. As one ad hoc judge explained, 'I just thought that the job was honourable, and I wanted to prove to myself that I could stay at least until the end of my term in 2016.'<sup>63</sup> For other ad hoc judges, who received additional income from side-jobs and other side-activities, their role as an ad hoc judge was not a negative experience at all, but rather an opportunity to make a better income than before. This was particularly the case for some ad hoc judges from union circles, many of whom had been working previously as union advocates, whose income is uncertain. For these individuals, becoming an ad hoc judge was seen as a stepping stone to enable access to new payment opportunities, such as the aforementioned 'socialization' training.

The difficulties encountered in the recruitment of ad hoc judges to the PHIs were mirrored by similar challenges in recruiting career judges, as summarized in a report on the issue by the ILO (Fajerman, 2011: 16-18). With reference to the Jakarta Legal Aid Institute, the ILO report noted critically that not only were many ad hoc judges merely job seekers, but the career judges applying for the positions were of similarly questionable quality – often recruited from mid-level law faculties in Indonesia, while the best graduates instead chose careers as lawyers or in private business. The report also noted that for the most recent recruitment of ad hoc judges, so few applicants were put forward from employer circles that the Ministry of Manpower and the Supreme Court were required to lower the recruitment standards for employer-nominated candidates. Despite this, only 11 candidates were appointed from 23 applicants. Overall according to the ILO report, there was a shortage of judges in the PHIs, with only eight of the country's 33 district-level PHIs having an adequate quota of both career and ad hoc judges. Similarly, at the Supreme Court level there were only eight ad hoc judges available, who were expected to deal with over 400 cases a year. As another example, the PHI in Jakarta had only four career judges to deal with over 30 new cases per month (which would add to the burden of the ongoing cases).

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62 Interview with Bahal Simangunsong, ad hoc judge from the PHI Palu, July 2010.

63 Interview with Juanda Pangaribuan, ad hoc judge at the PHI Jakarta, December 2010.

The report further observed that many career judges were reluctant to be appointed to the PHI, 'due to the highly sensitive nature of labour disputes, frequent demonstrations outside of the courtroom and the (often) inconvenient distance between the IRC and the District Court.' (Fajerman, 2011: 18).

Another concern with respect to the operations of the PHIs was related to the working hours of the ad hoc judges. Although the PHIs operated officially from 8 am to 4 pm, Monday to Friday (the same hours as the District Court opening hours) in practice the PHI's court hearings were only held two or three days per week. In the PHI in Jakarta, for example, hearings were held from Monday to Wednesday only; while in the PHI Tanjung Pinang, Riau Islands, hearings were only scheduled on Thursdays and Fridays. According to the ad hoc judges, the other days were used by the judges to conduct internal examinations among the judging panel, and to make decisions.<sup>64</sup> They also claimed that the typing of judgments was often performed by them personally, rather than being undertaken by substitute registrars<sup>65</sup>; while the career judges were too busy to carry out their primary duties in the district courts (that is the handling of civil, criminal and commercial cases). Various parties from the unions also claimed that non-hearing days during the week were sometimes used to extend case registrations. For example at the PHI Jakarta, a case could be registered on Monday, but it would be forward-dated the subsequent Thursday, when the ad hoc judges were working. According to one plaintiff, he agreed to this practice of changing registration dates in order to ensure that the hearing period, at least formally, did not take too long and did not exceed the 50-day limit of the PHI.<sup>66</sup>

In sum, it is clear that when the PHI commenced operations in 2006 (one year later than the date stipulated by Law No. 2/2004), the operational infrastructure was not fully prepared; a situation exacerbated by the lack of communication between the Ministry of Manpower, which had drafted the law, and the Supreme Court, whose duty it was to run the court. This lack of preparedness led to several problems, most critically the delaying of payment of salaries for ad hoc judges; the uncertainty surrounding the status of ad hoc judges as 'state officials' (or not) and the consequences with regard to tax exemption; and the lack of clarity or consistency around working hours. Together these issues had a negative impact on the performance of the ad hoc judges, and thus on the performance of the PHI as an institution. Fortunately, as described above, after five years of operation the PHI was subject

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64 Interview with Saut Manalu, ad hoc judge at the PHI Jakarta, December 2010.

65 In the early period of the PHIs' operations, many ad hoc judges, especially those from union circles, expressed their reluctance to assign their typing work to substitute registrars (*Panitera Pengganti*, who were officially supposed to perform such work), out of concern that their decisions could be 'sold' by the substitute registrars through bribery and corruption.

66 Personal communication with a lawyer at the PHI Jakarta, December 2010.

to a number of changes with the goal of improving the courts' effectiveness, including regular and higher salary payments for the ad hoc judges; and revisions to other administrative issues. It remains to be seen to what extent these administrative changes will result in a better performance of the PHIs. We will return to this question later.

#### 1.4 Effects of the PHI on unions

To examine the effects of the PHI on unions, it will be useful to begin with a summary of the relationship between the PHI, trade unions, and the ad hoc judges from union circles. As stipulated in Law No. 2/2004 (article 1 subsection [19]), both unions and employers' organizations have special roles in the PHI system: in particular, they have the right to propose candidates to selection as ad hoc judges. In practice, however, proposing candidates to be ad hoc judges simply required a piece of paper from the union or employers' organization, stating that the organization supported the person concerned in their application to become an ad hoc judge at the PHI. It was only at the subsequent stages of the application process – the administrative selection by the Ministry of Manpower, and the testing of legal knowledge by the Supreme Court,<sup>67</sup> that the candidates were assessed in a more impartial manner. These latter two stages of (relatively) independent assessment, in combination with the doctrine of impartiality of judges as emphasized by the Supreme Court, may go some way to explaining the relative detachment of ad hoc judges from the unions which had originally nominated them.

Despite concerns from certain observers that some unions might not be able to nominate candidates as ad hoc judges (see Fenwick *et al.*, 2002), currently any union which has met its legal requirement to be a union, and has been registered as a union in the Regional Manpower Office, is officially able to nominate a candidate – regardless of the union's background, number of members, level (regional or central organization), location of their domicile or other variables. The selection committees, both within the Ministry of Manpower and within the Supreme Court, have demonstrated their willingness to select ad hoc judges from a wide variety of different unions and backgrounds. Only on occasion has this led to unexpected situations, for example since ad hoc judges can be nominated by either national- or regional-level unions (the latter sometimes with no affiliates in other regions), on one occasion an ad hoc judge in the PHI Medan had been nominated by a union from the local Medan area, yet after he became a judge, that particular union's activities declined to the point that it was barely operating as a union anymore.<sup>68</sup>

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<sup>67</sup> Article 64 (g) requires that ad hoc judges at the PHI have a relatively high level of education: they must have at least a university degree (S1) which at the district level can be from any discipline, and at the Supreme Court level, must be a law degree.

<sup>68</sup> Interview with Christina Tobing, an ad hoc judge from union circles at the PHI Medan, August 2008; she was nominated by the union KBM (*Kesatuan Buruh Marhaenis*, the Marhaenist Labour Union).

Most ad hoc judges from union circles were people who were already well known to the unions; either former union officials, or legal advocacy practitioners for the unions; or NGO activists and academics who supported the unions.<sup>69</sup> With such backgrounds, many of these ad hoc judges, particularly with the support of the Trade Union Rights Centre (TURC), have been active in pushing for PHI reforms, including through the judgments they make, and through activities designed to advance the judicial system. Such efforts, however, have not led to significant reforms to date, due to structural obstacles from within the judiciary itself. We shall return to this in later sections of this chapter.

According to Law No. 2/2004 (article 67 subsection [1f]), unions have the power, if they so choose, to request the removal of the ad hoc judge they originally proposed, by requesting the court to ‘honorably discharge’ the particular judge. This power has, to date, only been exercised once, according to Supreme Court judges quoted in an ILO report (Fajerman, 2011: 17). The request was granted, but the report does not mention the details of the case. The same report noted that two other ad hoc trade union-nominated judges at the Supreme Court had been at risk of being recalled by their trade union confederation, KSPSI, due to internal disputes that had split the confederation into two. This discharge did not, in the end, eventuate. Even in cases where unions may request that a judge be removed, this may not be implemented as the Supreme Court has the final authority as to whether to discharge the judge, and according to one Supreme Court official, it would usually decline to do this.<sup>70</sup> Indeed, the Supreme Court has been particularly critical of this provision in the Law, calling it a violation of the principle of judges’ freedom, whereby judges should only be discharged if they have committed a criminal act, not merely because their performance is not considered acceptable to the organization which nominated them. Ad hoc judges from union circles also expressed some concern about this provision, but to a lesser extent, tending to avoid controversy on this issue and stating that such a ‘recall’ mechanism should not be implemented arbitrarily.<sup>71</sup>

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69 There were, however, exceptions, such as the ad hoc judge from union circles in the PHI Surabaya, East Java province. Although he was nominated by a union in East Java, (FSP KEP; an affiliate of the KSPSI), his background was from the employers’ organization Apindo. Union officials claimed that he had bribed the union to give him the recommendation letter, after he failed to obtain one from his own organization (interview with Pujianto and Jamaludin, union officials in East Java, August 2009). When asked directly about this allegation, the ad hoc judge, Hardi Purwanto, replied ‘It was just a ticket to the nomination. I didn’t bribe the union, just gave them an expression of gratitude’ (interview with Hardi Purwanto, January 2010).

70 Presentation by Suparno, the Director of Law and Judicature of the Supreme Court, December 2010. See also article 68 subsection (1.a) of Law No. 2/2004.

71 Personal communication with Junaidi, ad hoc judge at the PHI Jakarta, December 2010.

The impartiality of ad hoc judges is a point of particular concern in this system. During the 21-day training and selection process for ad hoc judges at the Supreme Court, the principle of impartiality is the most emphasized issue.<sup>72</sup> The judges are told that from the moment they are appointed and begin to work for the PHI, they must 'take off their clothes' as union's or employers' representatives, and become totally independent and free from any intervention from their organizations. Ad hoc judges from both union and employer circles stated this in interviews, and emphasized that there was no obligation whatsoever for them to continue serving either the unions or the employers organizations which had nominated them.<sup>73</sup> One ad hoc judge from union circles, for example, said: 'I understand the union would expect us to work for their interests, but I am bound by the principle of impartiality. At the time we serve as judges, we have to take off our labour status.'

It is obvious from interviews that at the start of their appointment as judges, most ad hoc judges from union circles are concerned about this requirement. On the one hand, they feel they must take the side of the workers; on the other hand, they recognize their obligation to be impartial. This issue, appears to be less of a concern for ad hoc judges from employer circles, who often appear happy to remain more tightly associated with their employers' organization. They gather regularly at annual 'development conferences' organized by Apindo, in order to ensure their 'maintenance' as their employers' representatives at the PHI.<sup>74</sup> As explained by Hasanuddin Rahman, Head of the Central Leadership Board of the Apindo, 'They [the ad hoc judges from employer circles] need to be fostered as our representatives at the PHI.'<sup>75</sup> Having learned that the ad hoc judges from employers' circles were still acting as 'representatives' of Apindo's interests in the PHI, some ad hoc judges from union circles became more relaxed and certain about maintaining their own impartial position. As noted by one ad hoc judge from union circles, 'We in fact become partial when we pretend to be impartial. So what I do is simply look at the law and try to do my best to apply it in my judgments.'<sup>76</sup>

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72 The first training for ad hoc judges was held in August 2005, at the Bidakara Hotel in Jakarta. The 240 candidates competing to be ad hoc judges were trained from 9 am to 5 pm during weekdays, with weekends free. At the end of the training, 215 contenders were accepted as ad hoc judges, and distributed to 32 PHIs in 32 provinces in Indonesia. At the same time, in July and August 2005, 90 career judges from 32 District Courts were also trained to become PHI judges.

73 Interview with various ad hoc judges from union and employer circles, at the PHI Jakarta, March 2006, just after the appointment ceremony at the PHI Jakarta.

74 2006 Activity Plan of the Industrial Relation Permanent Committee of the Indonesian Chamber of Commerce and Industry', undated, presented by Hasanudin Rahman of Apindo, August 2008.

75 Stated in the workshop of ad hoc judges from the Labour Union (Labour Judge) throughout Java and Sumatra, in Jakarta, organized by the Trade Union Rights Centre, August 2008.

76 Interview with Daulat Sihombing, ad hoc judge at the PHI Medan, June 2008.

The issue of impartiality in the special courts, with workers and employers both seeking representation, is often problematic. As noted by Cordova (1984: 236), the experience of Latin American countries shows that attempting to have fair representation of employers and workers in the composition of judging panels is, in practice, useless, because in most cases it leads to judges systematically awarding their votes on behalf of their own organization, and any claim to impartiality is merely a formality. In the case of Indonesia, however, one could argue that despite the inherent problems with respect to the position of the ad hoc judges at the PHI, the system is nonetheless better and fairer than not having the ad hoc judges at all. We shall return to this point later.

In the first half of this chapter, we have discussed the PHI in general, including its origin, the processes of labour dispute settlement through the PHI, its administration and associated problems, and the involvement of the unions and Apindo. The second half of the chapter will focus on how the court functions in practice, by looking at the context in which the court operates, including the daily activities of the judiciary, the transitional issue of the cases bestowed from the previous labour dispute settlement institution to the PHI, key problems associated with its procedures, the costs of cases, the length of time for handling case, and the consequences of these problems for labour.

## 2 THE INDUSTRIAL RELATIONS COURT (PHI) IN PRACTICE

Law No. 2/2004 on Industrial Relations Dispute Settlement has been criticized since it first appeared as a draft Bill, not only by labour unions and NGOs, but also by academics contracted by the ILO. Various labour unions, for example, argued that Law No. 2/2004 had been formulated based on 'false assumptions' (see Tjandra and Suryomenggolo, 2004). First among these is the assumption that the opportunity to provide work (of any kind) for workers was considered 'fortunate,' due to the existing high levels of unemployment in the country. According to this assumption, it was acceptable to boost the economy by increasing 'flexibility' in the labour market – including by relaxing regulations to make it easier to hire and fire workers, and by adopting efficient and cheap dispute settlement mechanisms.<sup>77</sup> Second is that the public judicial system was already reliable, unbiased, and 'clean' of corruption; when in fact the court institutions had never been reformed from either within or without, and corrupt practices were still the norm. A third false assumption was that workers and labour unions had sufficient legal skills to take part in litigation processes at the court; when

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77 This assumption was closely related to the so-called 'trade-off between job security and job opportunity' policy, developed by the Indonesian government after the economic crisis in 1998 (Bappenas 2003, see also Chapter 4).

in reality many workers and unions did not understand the complex civil litigation mechanisms. Together, these false assumptions resulted in the impairment of the role of labour unions in the process of labour dispute settlement; and many union officials became so busy handling cases that they had insufficient time to organize their members; which is arguably the most important task to be undertaken by Indonesian labour unions.

Some labour law scholars, including those hired by the ILO to assess the draft Bill, expressed early concern about the Bill's lack of conceptual clarity (see Fenwick et al., 2002: 65-74). One example is that in the provisions for bipartite negotiations, the Law did not include a provision to specify how any agreed outcome of negotiations was to be enforced. Nor did the Law specify either a requirement of good faith negotiation, or any negative incentives to discourage either side from failing to implement the agreed outcome.<sup>78</sup> Likewise, the decision to classify disputes about termination of employment ('PHK') in a separate category from disputes over rights has led to confusion; specifically, as to whether a dispute arising from dismissal is a 'dispute over rights' or a 'dispute over termination of employment'. This problem, scholars argued, needed to be considered carefully, because the PHI would have the 'first and final' jurisdiction for disputes over rights, but not for disputes over termination of employment. Fenwick et al. (2002: 79-80) have described several additional shortcomings in the Bill. These included the lack of clarity around the power of the Court to give orders, which is arguably critical for the court to function.<sup>79</sup> The Bill was also limited with respect to the types of labour disputes over which the PHI had jurisdiction, with five important types of disputes left out of it, including disputes between a labour union and its members; disputes between workers and the government; disputes between employer organizations; disputes between an employer organization and its members; and internship disputes.<sup>80</sup> Many of these early criticisms of the Bill were not heeded, with the points of concern remaining as part of the final Law that was enacted. These concerns

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78 The 'good faith negotiation' concept is stipulated in the explanatory notes of Article 116 (2) of Law No. 13/2003 on Manpower, stating that collective labour agreements 'must be made in good faith'. The Law, however, does not state any requirement of good faith in relation to individual work agreements.

79 As noted by Fenwick et al. (2002: 80), the question of remedies was important particularly in disputes over termination of employment, whereby there were international labour standards that made specific provision for particular remedies in the case of unfair dismissal, i.e. reinstatement. There was not, however, any clear provision as to whether the court had the power to undertake this reinstatement, nor how it could be exercised.

80 Much of the subject matter of industrial disputes in Law No. 2/2004 is dealt with in other legislation, in particular in Law No. 13/2003 on Manpower. However, none of the issues described here are covered by Law No. 13/2003. There is no report, as yet, concerning disputes between employers' organizations and their members; or between employers' organizations, and there is only one report regarding a dispute between trade unions in Tangerang, which was brought to the PHI (see Rokhani, 2008).

have posed challenges for the PHI in practice and have the potential to affect confidence in the effectiveness of the new court.

### 2.1 Cases bestowed from the P4P/D

As described earlier, the PHI was established to replace the earlier P4P/D (Central/Regional Labour Dispute Settlement Committee), the government's institution to resolve labour disputes based on Law No. 22/1957. As stipulated by Article 124 (1) of Law No. 2/2004, the P4P/D was required to continue to carry out its function until the PHI was established. Further, based on Article 124 (2) of Law No. 2/2004, once the PHI was established any disputes over industrial relations or termination of employment which had already been submitted to the P4P/D, but not yet adjudicated were to be settled by the PHI at the local district court. Any disputes from the P4P/D that had already been rejected but were in the process of being appealed by one or both of the parties were to be settled by the Supreme Court. The new Law, however, did not provide clear guidance as to how exactly this transition from the P4P/D to the PHI would be managed. The transition posed a significant problem, given that thousands of unresolved cases were put on hold after the official dissolution of the P4P/D, while waiting for the PHI to become fully operational.

The numbers of unresolved cases bestowed on the PHIs by the P4P/D varied by region, but were frequently high. Those on the PHI Jakarta, for instance, during the transitional time between January and September 2006, reached approximately 138 cases. This was in addition to around 130 newly submitted cases, bringing the total to around 268. In 2007, only 100 cases were decided. The problem, as explained by a substitute registrar at the PHI Jakarta, is that cases bestowed from the P4P/D were not prioritized by the PHI. Instead, priority was given to newly submitted cases; because the newly established PHI wanted to be sure to meet the 50-day time limit for examination of newly submitted cases, to be sure that decisions were issued on time. No limitation of deliberation was imposed for cases that had been bestowed from the P4P/D, either in Law No. 2/2004 or in the Technical Instructions for the Implementation of Law No. 2/2004 as issued by the Supreme Court later on.<sup>81</sup> This led to very long delays for the parties concerned.

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81 Decisions of the Chief Judge of the Supreme Court Nos. 034 and 035 in 2006. It was only in 2009 that the Supreme Court started to pay attention to this issue, by limiting the time for judgments to be reached (see the Supreme Court Annual Report 2009).



According to a 2010 report from the Bandung District Court,<sup>82</sup> during 2006 the PHI Bandung received 125 cases from the P4P/D Bandung region. Cases that had been decided by the P4P/D's regional committees but had been appealed, along with all cases awaiting either decision or appeal through the P4P/P's central committee, had [as of the time the report was published] never even been bestowed. During this time the PHI Bandung received a large number of review applications for P4P/D decisions, and in response, on 17 July 2006 the PHI Bandung, sent a letter to the Head of Manpower Office Bandung, requesting that the mentioned cases be bestowed immediately. The aforementioned 2010 report from the Bandung District Court, however, did not mention whether or not the Manpower Office met the request. Either way, the cases formerly handled by the P4P/D were left in limbo, with no clarity as to when, how or even if they would be addressed, given the dissolution of the previously-responsible institution and the ongoing issues with regard to the PHI not having received the cases, let alone examined them.

For new cases being handled by the PHI, disputes over termination of employment were the most frequent, as shown for instance in table 6.2 below for cases submitted to the PHI Tanjung Karang, Lampung. As can be seen, very few disputes over interests, or disputes over rights, were submitted to the PHI; and not a single dispute among trade unions. By far most cases (90%) were submitted by workers. A similar situation existed for PHIs in other regions; which had also been mirrored the situation in the P4P/D, where the majority of cases submitted by workers rather than employers. The confusion and delays associated with the transition between the two institutions placed workers – most of whom were disputing their dismissals – in an extremely difficult situation.

Table 6.2: Cases at the PHI Tanjung Karang, Lampung (2006 – 2010)

Year	Number of cases	Type of disputes				Workers as plain-tiffs	Employers as plain-tiffs
		Rights	Interests	Termination of employment	Among unions		
2006	9	-	1	8	-	8	1
2007	19	1	-	18	-	17	2
2008	10	1	-	9	-	9	1
2009	13	-	1	12	-	11	2
2010	11	-	-	11		10	1
<b>TOTAL</b>	<b>62</b>	<b>2</b>	<b>2</b>	<b>58</b>	<b>-</b>	<b>55</b>	<b>7</b>

82 Accessed through <http://pn-bandung.go.id/uploads/profil%20phi%20bandung2.pdf> in December 2010. This report is exceptional, as in general, Indonesian courts have not yet developed such transparency in policy.

## 2.2 Which procedural laws?

With a few exceptions as specifically set forth in Law No. 2/2004, the procedural law applicable in the PHI is civil procedure (Article 57). The legal basis for the procedures at the PHI, based on both Law No. 2/2004 and the Decision of the Chief Justice of the Supreme Court (as the implementing and case administration guidelines during the transition between the old and new systems), consists of four key instruments, namely:

1. The *Herziene Indonesisch Reglement* (HIR) or the Revised Indonesian Regulation (*Staatsblad* 1848 No. 16; *Staatsblad* 1941 No. 44), applicable in Java and Madura;
2. The *Rechtsreglement Buitengewesten* (RBg) or the Outer Islands Regulation (*Staatsblad* 1927 No. 227), applicable in areas outside Java and Madura<sup>83</sup>;
3. Law No. 2/; and
4. Decision of Chief Justice of the Supreme Court No. KMA/034/SK/IV/2006 regarding the Instructions for the Implementation of Law No. 2/2004, and Decision of the Chief Justice of the Supreme Court No. KMA/035/SK/1V/2006 concerning the Guidelines for the Implementation of Case Administration at the Industrial Relations Court, both issued on April 19, 2006.

In practice, there has been significant variation between different PHIs, and even among different panels of judges within the same PHI, with respect to interpretation and implementation of procedural law. With respect to differences between judges, career judges tend to comply closely with the civil procedural law from the HIR or the RBg, while ad hoc judges are more likely to make 'adjustments': ad hoc judges from union circles favouring workers' interests, and ad hoc judges from employers circles favouring employers. Key issues, which were decided differently by different PHIs, include the question as to whether particular Heads of Personnel, or Human Resources Development (HDR) officials, are entitled to represent their employer organization at the PHI (as regulated under Article 87 of Law No. 2/2004).<sup>84</sup> Some panels of judges in the PHI (including the PHI Bandung) rejected any HRD officials from representing their employers if they could not present a membership card to the Indonesian Bar Association<sup>85</sup>; while other PHIs (such as the PHI Jakarta) were content to accept the officials, with the intention of 'expediting and facilitating the examination process at the PHI', and considered their actions to be 'an existing practice in the civil litigation

83 The HIR and RBg were the main procedural law used in the civil and criminal court in the Netherlands Indies. In content they were generally the same. After Indonesia's independence they continued to be used as part of the colonial legal legacy. In 1981, Law No. 8/1981 on the Code of Criminal Procedures replaced the criminal procedure part of the HIR.

84 This issue had previously been complained about by Apindo, see statement by Djimanto, Apindo Vice President, as quoted in *HukumOnline*, 24 September 2007.

85 Interview with Tony Suryana, ad hoc judge at the PHI Bandung, July 2007.

mechanism'.<sup>86</sup> Similarly, some PHIs prohibited trade union officials at the branch level from representing their members at the plant level, even when no plant level union existed. Another issue that was addressed differently by different PHIs was whether or not workers who were still working for their employer could become witnesses for the same employer in the PHI. Some PHIs chose to allow workers to be a witness for their employer, although as a witness the employee was not sworn in on the ground that they were dependent and potentially under the influence of their employer. Other PHIs did allow workers to be sworn in; while still other PHIs prohibited such witnesses entirely. As stated by Djimanto, Apindo's Vice-President, 'This ambiguity has created confusion in practice' (*HukumOnline*, 24 September 2007).

In relation to these issues, it is interesting to look at the Supreme Court and its role in promoting uniform interpretation of the law. Despite being considered generally to have played a role in this regard, the Supreme Court has also been criticized for being too 'formally legal' in its approach – for instance by sticking closely to the civil litigation procedural laws, while neglecting the actual social conditions surrounding the cases.<sup>87</sup> In the case of whether or not branch level union officials could represent their members at the plant level, for instance, panels of judges in the PHI Jakarta held different opinions. Some judges allowed the representation, based on the argument that in the current situation it remained difficult for workers to establish unions at plant level, and thus they were likely to become members of the union at the branch level instead; and besides, the Trade Union Law No. 21/2000 stipulated that workers could become members of unions at both levels. Other judges, however, did not allow such representation, based on the argument that branch level union officials had no direct responsibility for plant level workers. The Supreme Court generally took the latter position, and cases that supported the former position were normally overruled at the casation level. Despite this, some judges, mostly from union circles, urged each other to stand by their decisions to allow such practice, even though they knew the Supreme Court would likely reject the decision. As one ad hoc judge from the PHI Jakarta explained: 'This is not merely procedural law we hold, but also justice. I think the Supreme Court is wrong on this issue, and it also concerns our principles.'<sup>88</sup>

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86 Interview with Juanda Pangaribuan, ad hoc judge at the PHI Jakarta, August 2007.

87 I am grateful to Juanda Pangaribuan, ad hoc judge at the PHI Jakarta, who brought this issue to my attention.

88 Interview with Juanda Pangaribuan, August 2009.

### 2.3 Law No. 2/2004 versus HIR/RBg?

Compared to the regular civil litigation procedural laws applied in the civil court (HIR/RBg), there are several procedures stipulated in Law No. 2/2004 which in practice have led to problems; especially when judges have emphasized the HIR/RBg rather than the Law. One of the most controversial issues for workers and employers is related to the injunction as specified in Article 96 of Law No. 2/2004. This article states: 'If in the first court session it is decidedly proven that the employer is not performing his/her obligations as meant in Article 155 (3) of Law No. 13/2003 concerning Manpower, then the Chair of the court session should immediately pass the injunction in the form of an order to pay the wage and other rights that are normally received by the concerned worker/labourer.' Article 155 of Law No. 13/2003 guards against arbitrary termination of employment, stipulating that any termination of employment without the decision of the industrial relations dispute settlement should be considered 'null and void' (subsection (1)); and as long as there is no such decision, both employers and workers should continue to perform their obligations (subsection (2)): workers to work; and employers to pay their wages. However, the employer is allowed to suspend a worker who is in the process of having his/her employment terminated, although until a decision is reached, the employer must continue to pay the worker's wages and other entitlements that he/she normally receives (subsection (3)).

The problem in practice is that there are not many injunctions passed, as judges normally rely on what is stipulated in article 185 (1) of the HIR, which states: 'Decisions of judges that are not the final verdict, though they be stated in the trial, are not made separately, but only recorded in the minutes of the trial.' Such a provision could be interpreted to mean that the civil court does not recognise the injunction; and since the PHI is under the jurisdiction of the civil court, Article 96 of Law No. 2/2004 is effectively not applicable in the PHI. This special procedure in Law No. 2/2004 is slightly different from the one recognized in the HIR and others; but according to many union activists, the PHI judges tend to adhere relatively strictly to the HIR, rather than trying to implement the procedures in Law No. 2/2004 – which arguably is more protective towards labour. Many ad hoc judges from union circles confess that they have difficulties in implementing the provision on injunction, because other judges, both career judges and ad hoc judges from employer circles, tend to avoid it. 'So it's like two against one, and I always lose,' said one ad hoc judge. Some other judges, as reported by the ILO (Fajerman, 2011: 20), justified their reluctance to implement the provision on injunction by reasoning that there may be little practical impact either way, and such an attempt may be costly and time consuming, as 'employers generally ignore such decisions and workers are forced, due to the PHI's lack of execution powers, to petition to the district court to ensure enforcement.'

Another issue of concern is the debate as to whether or not a *dwangsom* (daily fine) should be imposed in the PHI's decisions. The *dwangsom* was considered a way by which the law enabled the enforcement of the court decision. One viewpoint on this issue, held for instance by a Chief Justice from the PHI Tanjung Pinang, Riau Islands, was that a *dwangsom* could not be imposed through the PHI's decisions, because a rule existed which stated that a *dwangsom* could not be imposed in cases of monetary claims. This rule referred to Article 606a Rv (*Rechtsvordering*),<sup>89</sup> which provides reference on such cases in civil litigation procedures.<sup>90</sup> It may be true that many PHI cases and judgments deal with monetary claims for compensation or severance payment; but not all cases do. Some ad hoc judges from union circles held the opinion that a *dwangsom* could be imposed through the PHI's decisions, arguing that not all claims in labour disputes were related to money; for example the claim for reinstatement in cases of the arbitrary termination of employment. They were aware that companies were often reluctant to implement verdicts to reinstate their workers unless they were forced to do so, even in unfair dismissal cases.<sup>91</sup> Yet, even in such cases judges remained less than enthusiastic about the *dwangsom* and to the present, PHI judgments with *dwangsom* in them remain rare.<sup>92</sup>

#### 2.4 'The case is free, but costly'

In accordance with Article 58 of Law No. 2/2004, in litigation processes at the PHI the litigants whose lawsuits are worth not more than Rp 150 million are not subject to payment of any expenses, including execution expenses.

89 This states: 'All of a judge's decision contain a penalty for something other than paying some amount of money, then it can be determined that all or any times the sentenced does not meet the punishment, to him should be handed over an amount of money which amount set out in the decision of the judge, and the money called *dwangsom* (daily fine).' This translation will not be understood clearly by English readers – a better translation may need to be provided. In particular, there are several grammatical errors.

90 Rv (*Reglement van de Rechtsverordering, Staatblad 1849 No. 63*) was a regulation for civil litigation procedures during the Dutch colonial time specially applied to European and Foreign Orientals in the court. Indonesian civil courts still use it as a supplement to HIR/RBg.

91 See the ILO Termination of Employment Convention No. 158, adopted in 1982, which entering into force on 24 November 1985; and the Termination of Employment Recommendation No. 166 in 1982.

92 One of the first such decisions was a judgment from the PHI Serang, Banten. Apart from the order of reinstatement of the worker, the ruling also imposed a 'dwangsom' to the amount of Rp 400,000.-/day for each day the company was not willing to implement the verdict voluntarily (see PHI Serang Judgment No. 18/G/2006/PHI.SRG, in Tjandra and Pangaribuan (Eds.) 2007: 987-1027) One ad hoc judge from union circles who played a key role in this decision claimed that he had to 'really struggle' to ensure the verdict. This judge observed that his colleagues in the panel of judges (the career judge and the ad hoc judge from employers circles) were both inclined to reject the worker's claims before looking closely at the case (interview with Hotlan Pardosi, July 2007).

es.<sup>93</sup> Based on an *a contrario* interpretation, if a lawsuit is worth more than Rp 150 million, it is subject to payment of certain expenses. Problems arise in practice, however, because for lawsuits worth more than Rp 150 million, the actual amount of expenses to be paid was not set forth expressly in the Law; leading to ambiguity and frequent examples of discrimination. According to the Technical Instructions for the Implementation of Law No. 2/2004, issued by the Supreme Court, the amount is to be stipulated by the Chief Justice of the PHI (*ex officio* the Chief Justice of the District Court), and this instruction has often led to differences in interpretation among PHIs in different regions. Problems also arose for cases worth less than Rp 150 million. Although these are supposed to be exempt from fees, field observations indicate that in practice, fees are being imposed unlawfully on the person filing the case, varying from Rp 1 million to at least Rp 1.5 million. One lawyer from a law firm in Jakarta claimed that he was forced to pay case fees of Rp 1.8 million for one labour case handled by himself (although the case was worth less than Rp 150 million), simply because he represented an employer.<sup>94</sup>

Although the intention of the law is to assist workers by not imposing case fees for many cases, the law appears far from achieving its goal. The value of Rp 150 million is relative, depending on the individual payee. For cases submitted by individual workers, or small numbers of workers, the aforementioned figure is substantial. However, if a labour case involves hundreds or even thousands of workers, the total value will reach well beyond Rp 150 million, although the individual contributions, divided among many, will be small. Therefore, cases involving large numbers of workers are subject to case fees. One strategy often used by union officials is to split a case into several lawsuits, with each lawsuit not exceeding the maximum value allowed for exemption from case fees. The problem is that then these lawsuits are distributed among different panels of judges, and there is the risk that the judgments may differ from one panel to another.<sup>95</sup> There are no data available to indicate how often this approach is actually adopted in the PHI, but one ad hoc judge at the PHI Jakarta claimed it occurred 'quite often', and one union official said that he always used the strategy in cases involving many workers (where the amount exceeds the limit of Rp 150 million). This official claimed that since 2006, he had filed lawsuits using this strategy for about 20

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93 According to Franky Tan (interview in June 2008), who was one of the workers' representatives involved in the 'Tim Kecil' ('small team') during the formulation of the Law (see Chapter 4), such an exemption from case fees for cases worth a maximum Rp 150 million was a result of a compromise during the deliberation process, as there had been no such provision in the original draft. In the beginning, workers wanted the amount to be Rp 300 million, arguing that under the previous system of the P4P/D, there had been no fee at all for cases to be submitted. The amount of Rp 150 million was proposed by the Minister of Manpower, Jacob Nuwa Wea, as a 'third way,' to reach a balance between what workers demanded, and the regular practice in the civil court.

94 Interview with a lawyer from RSD Law Firm on September 28, 2006.

95 Interview with union advocate Timboel Siregar, July 2007.

cases, to various PHIs; and he claimed that many other union officials, as well as employers in mass dismissal cases, often used similar strategies.<sup>96</sup> Some ad hoc judges, especially those from busy PHIs like Jakarta, have labeled these strategies as 'cheating'; and have attempted to deal with such practices by holding regular meetings between panels of judges to coordinate their approach and avoid inconsistencies in their judgments for split cases.<sup>97</sup> Interestingly, in some PHIs with relatively few cases to adjudicate, for example PHI Yogyakarta, the strategy of splitting cases seems to be well liked by ad hoc judges who even suggest that the plaintiffs split their case.<sup>98</sup> One reason for this may be, that the ad hoc judges get extra income for each case they handle; receiving Rp 250,000,- in 'case support' ('tunjangan perkara').

To date, the regulation of fees for civil cases in Indonesia is set forth in Article 121 (4) of the HIR or Article 145 (4) RBg, which state that the listing of the case in the case registry may only occur if the parties have paid a sum of money to cover registration fees, summoning fees, and fees for notification to the parties. The article does not, however, mention a specific amount for case fees nor a sanction imposed on parties committing case fees manipulation. As specifically ruled for the PHI, and as further conveyed by the Supreme Court Junior Chairman for Civil Law, the state had provided funds amounting to Rp 7.5 million for each industrial relation dispute case submitted to and examined by the PHI.<sup>99</sup> In practice, however, various additional fees needed to be paid by the parties, such as fees for the legalization of the power of attorney and legalization of evidence (the official amount being Rp 11,000,-<sup>100</sup>), and several other 'unofficial' charges such as: 'folder fees' (for folders for the case documents), 'typing fees' (charge for typing the decisions<sup>101</sup>), 'electricity fees' (for typing the decision at home), 'copying fees' (for the copying of decisions when asked by parties), fees for 'delivering briefs to the Supreme Court', and other non-specific fees.

The total figure for unofficial fees varies highly between cases, and depends on who the litigants are, and who handles the case. If, for example, the case was filed by a worker and was handled by the worker him/herself person-

96 Personal communication with Timboel Siregar, August 2008.

97 Interview with Junaedi, ad hoc judge at the PHI Jakarta, July 2007.

98 Interview with ad hoc judge at PHI Yogyakarta. The PHI Yogyakarta receives only some 5 cases every year.

99 'MA: Biaya Perkara Bukan Pungli' ['Supreme Court: Case Fee is not a Bribe'] (hukumonline.com 16 August 2006)

100 In June 2005, Pos Indonesia Ltd. issued a Circular Letter stating that the fee for the legalization of items of evidence at Court was Rp 5,000.- per item, in addition to a Rp 6,000.- stamp duty for each item of evidence.

101 In reality, the substitute registrar only asks for the soft-copies of the documents submitted by the parties, which are subsequently merged to be included in the judgment. In addition, the ad hoc judges usually typed the main points of the judgment personally, not the registrar.

ally, or if he/she was accompanied by a union official, the unofficial fees would be relatively small, or even zero. However, for cases filed by employers, especially if handled by professional lawyers, higher unofficial fees were likely imposed. As one professional lawyer at the PHI explained, the substitute registrars were the primary drivers of this practice. According to a substitute registrar at the PHI Jakarta,<sup>102</sup> no unofficial fees were imposed for duties such as legalization (see table 6.3 below). However, for some cases, the registrar admitted that fees were allowed, insofar as parties paid them 'voluntarily'. In his own explanation: 'to help cover the operational costs of the court.' These remarks were made as part of a complaint about the lack of attention to the new court from the District Court, with the registrar giving examples that the ad hoc judges' room still had no air conditioner, although it had at that point been in use for a couple of years already.

Table 6.3: Details of official and unofficial fees at the PHI Jakarta (September-October 2006)<sup>103</sup>

Types of Expenses	Official Fee	Unofficial Fee
Legalization of power of attorney	None	Up to Rp 50,000,-
Legalization of evidence at post office	Rp 11,000,- per piece of evidence	Often requested again at the court
'Folder Fees'	None	Rp 50,000,-
'Typing Fees'	None	
Fees for the copying of the decision, by the registrar ('for electricity' because the registrar types the Decision at home)	None	Rp 100,000,- (or more, depending on the person taking the copy; e.g. lawyers pay more than workers)
Fee for delivering appeal brief to the Supreme Court	None	Rp 50,000,-
'Miscellaneous' Fees	None	Rp 159,000,-

For some parties, especially workers, the establishment of PHIs in provincial capitals only was a major handicap. For workers who live in Bekasi, West Java, for example, their homes are closer to Jakarta than to Bandung, (Bekasi is 30 km east of Jakarta). However, they have to file their lawsuits in Bandung, (180 km from Bekasi), since the PHI in West Java is located in Bandung, the capital of West Java. The travel costs from Bekasi to Bandung to attend hearings are about nine times higher than to Jakarta. This is obviously burdensome, especially when compared to the previous dispute settlement mechanism under the P4P/D, which was free and was always held near the parties' own domiciles. These financial, travel and time costs associated with the PHI system are discouraging workers from bringing their cases to the

102 Interview with Asri Tajudin, substitute registrar at the PHI in Jakarta, September 2006.

103 Data collected at the PHI Jakarta (September-October 2006).



PHI, instead often forcing them to choose bipartite resolution directly with the employers, although the amount they tend to receive in compensation through this avenue is typically much lower than that stipulated by law.<sup>104</sup> Thus, as one union official observed, 'Although the case fee is free, bringing cases to the PHI is costly and burdensome, especially for workers.'<sup>105</sup>

## 2.5 Time for case proceedings

As stipulated by Articles 103 and 115 of Law No. 2/2004, the PHI must settle an industrial relations dispute within less than 50 working days after the date of the first court session; while the Supreme Court must settle the case within 30 working days. Almost all the parties involved with the PHI, however, report much more time for a case to reach a final decision, both at the PHI and, in particular, the Supreme Court. In an evaluation of the PHI's performance, the Chairman of Apindo, Sofyan Wanandi, blamed the large number of cases at the PHI, observing that this will 'create conflicts between employers and unions, and may create a mess [in the system].' (*Kompas*, 6 February 2008). In contrast, Junior Chairman of Special Civil Cases of the Supreme Court, Kaddir Mappong, blamed Law No. 2/2004 itself, which he stated: added an additional burden of cases to the already overloaded Supreme Court (*Hukumonline*, 29 September 2007). He claimed that 'The 30 days requirement of case-handling at the Supreme Court is impossible. Even for the commercial court, which gave us 60 days, we could not reach decisions on time'. To resolve this problem, Mappong suggested an amendment of Law No. 2/2004 to extend the time limit, which he claimed would be more realistic for the court.

Further investigations into the situation at the PHIs and the Supreme Court indicated that case handling at the district court level was relatively on schedule (approximately 30 days per case); but that it was at the Supreme Court that cases tended to take very long. This was due to time delays in internal case administration within the Supreme Court itself. A conservative estimation suggested that it would take at least eight months for one case to go through the full process, from registration to decision, in the Supreme Court (see table 6.4 below). Such an amount of time was considered normal at the Supreme Court, and despite efforts to cut time and accelerate the process, there appeared to be little that Supreme Court judges could do to avoid

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104 Interview with Machmud Pedmana, a union official in Karawang, West Java, September 2007. See also the 'Joint Statement' resulting from the Labour Law Practitioners' Conference, Cipayung, 5 March 2007, organized by the TURC and ACILS (American Center for International Labor Solidarity), gathering around 50 labour law practitioners from various unions, labour NGO activists, ad hoc judges, etc. claiming that labour dispute settlement under Law No. 2/2004 is 'not quick, inappropriate, unjust, and expensive', causes widespread labour rights violation and forces many workers to reach 'under the table agreement' with employers.

105 Interview with Indra Munaswar, August 2008

the delays, as they involved established stages; the same stages as other cases in the Supreme Court.<sup>106</sup> Some union activists claimed that in many cases, the time needed at the Supreme Court was even longer than eight months (see Munaswar, 2008).

Table 6.4: Stages and times for case handling at the Supreme Court

No.	Stages	Time lenght
1	Administration	Two months
2	Directorate for Civil Case (analyzer and registrar)	
3	Special Civil Case Registrar	
4	Junior Chairman of the Supreme Court on Special Civil Cases (choosing the member of the panel of judges – consisting of three people: one career Supreme Court Judge and two ad hoc judges)	
5	Chair of the panel of judges (career Supreme Court Judge)	Two months
6	Reader 1 ( <i>Pembaca 1</i> – P1) – member of the panel of judges (ad hoc Judge from employer circles)	
7	Reader 2 ( <i>Pembaca 2</i> – P2) – member of the panel of judges (ad hoc Judge from union circles)	
8	Reader 3 ( <i>Pembaca 3</i> – P3), Chair of the panel	
9	Meeting of the panel for case deliberation and the reading of the decision	Two months
10	Operator (typing the decision)	
11	Registrar (correction of the decision)	
12	Operator (revision of the decision)	
13	Reader 1 and Reader 2 (further revision of the decision)	
14	Chair of the panel (further revision of the decision)	
15	Signing (Reader 1, Reader 2 and Reader 3)	
16	Decision finalization (by the Special Civil Case Registrar)	Two months
17	Expediting the decision to parties through the PHI/District Court (Directorate for Civil Case) <sup>107</sup>	
<b>TOTAL</b>		<b>Eight months</b>

But even at the PHI of first instance there are delays. Article 106 of Law No. 2/2004 stipulates that the substitute registrar must have produced a copy of the judgment within 14 working days after it is signed. Article 107 then requires the registrar of the district court to dispatch the copy to the parties within seven working days after receipt of the judgment. In practice, as noted by one union activist (Munaswar, 2008), two months after a judgment

106 Interview with Fauzan, an ad hoc judge at the Supreme Court from union circles, May 2009.

107 The time needed to expedite the decision from the district court in which the case was registered to the parties takes two additional months.

has been read, it has often still not been signed by the judges – sometimes because the chair of the panel is too busy with his duties as a career judge.<sup>108</sup> As Munaswar has noted, ‘This situation is detrimental to workers, because it hampers the preparations they need in order to prepare for cassation or a counter memory cassation. If you encounter this problem, then the only way to resolve it quickly is to ask for “good service” from the substitute registrar, of course with some money, in order to get a photocopy of the unsigned judgment, to be able to draft the cassation document.’

The problems with time delays continue once an appeal is made. As noted by an ad hoc judge at the PHI Tanjung Pinang, Riau Islands, after an appeal has been requested, the person requesting the appeal must wait at least four months before the documents are sent from the PHI Tanjung Pinang to the Supreme Court (see Agung 2009: 89). Indeed, in one case at the PHI Tanjung Pinang the documents were only sent to the Supreme Court after a 1.5 years delay. The reasons given were a lack of substitute registrars at the PHI Tanjung Pinang, combined with unwillingness on the part of the substitute registrars available to work on the PHI cases.<sup>109</sup> For them, handling the PHI cases was an additional burden and cost, over and above their regular work. One judge observed that ‘Going to the PHI, which was located far from the District Court where they have to go every morning, requires extra costs for transportation; and there were no subsidies from the District Court for this.’<sup>110</sup>

Many ad hoc judges and union activists from various regions shared the experiences and opinions described above with respect to time delays. The Indonesian judiciary is notorious for lengthy processes (see Pompe, 2005); and delays are clearly the norm. But arguably many cases, especially those involving workers, are also bound by requirements and standards devel-

108 Ad hoc judges cannot sign the judgement, as according to the guidelines, the chair of the panel of judges is required to sign the form first.

109 According to Article 77 (1) Law No. 2/2004, registrars at the PHI are appointed from ‘Civil Servants of Government Agencies that are responsible in the manpower sector’, i.e., the P4P/D in the regions, particularly the former registrars (*panitera*) there. In practice, not many former P4P/D registrars wanted to be assigned to the PHI. One key reason mentioned by them was lower allowances. In the P4P/D they had been ‘registrars’ and employees of the Regional Government; whereas in the PHI they were only ‘substitute registrars’.

110 According to Agung (2009: 88-90), an ad hoc judge in the PHI Tanjung Pinang, this situation, combined with the high travel costs for ferries between Batam city on Batam island (where most of industries were located) and Tanjung Pinang city (Bintan Island; where the PHI is located) contributed to the declining number of cases brought to the PHI Tanjung Pinang. This judge also explained that local unions had sent a petition to the Minister of Manpower and the Supreme Court about this issue, and asked for a PHI to be established in Batam instead of Tanjung Pinang, or for trials to be held on site by judges who could visit Batam. The Minister replied that this could not be done, since the Law stated that ‘the PHI had to be in the capital of the province’ (as did the Supreme Court). The Minister did not address the possibility of amending the Law to address this obvious problem.

oped internationally, for example by the ILO, through its conventions and recommendations. ILO Convention No. 151 (1978) concerning Labour Relations, for example, emphasizes that labour dispute settlement procedures need to be 'established in such manner as to ensure the confidence of the parties involved'. Likewise, ILO Recommendation No. 92 (1952) concerning Voluntary Conciliation and Arbitration states that 'The procedure should be free of charge and expeditious', and adds that 'such time limits for the proceedings as may be prescribed by national laws or regulations should be fixed in advance and kept to a minimum.' PHI practices in relation to the time for case handling clearly deviate greatly from these international standards, which, eventually, will be felt most severely by Indonesia's workers.

### 3 CONSEQUENCES OF THE PHI FOR LABOUR

In addition to the problems discussed above, the PHI system has experienced other problems as well. One significant issue involves the rules of evidence and the burden of proof, and associated problems with the execution of the PHI's decisions. While this will be discussed in detail later, one important initial point here is the question of whether 'pure' civil procedural law must be applied in labour dispute settlement. As the founders of the PHI system emphasized from the beginning, as a discipline, labour law is an effort to surpass the dichotomy between private law and public law (see also Hepple, 1996). Unlike common private law labour law and labour relations are about human work, which cannot be separated from workers as human beings. Therefore, if the labour law courts focus too much on civil litigation procedures, this could hamper the disputing parties' access to a fair and sound labour dispute settlement; particularly for the weaker party (usually the workers). The following discussion will provide a more detailed analysis of the consequences for labour if such is the case.

#### 3.1 Conceptual inadequacy and enforcement issues

As described earlier, Law No. 2/2004 is conceptually inadequate in some respects, and contains several confusing provisions. One of the most obvious and recurring problems has been the law's separation of disputes into different categories; specifically, the distinction between disputes over termination of employment, and disputes over rights – which has given rise to confusion over jurisdiction, with judges uncertain whether a dispute arising from termination of employment should be considered a 'dispute over rights' or a 'dispute over dismissal of employment'. Actual practices indicate that cases brought before the PHI that initially involve disputes over rights can suddenly be transformed into disputes over termination of employment. As reported by one union alliance, labeling a dispute as 'a dispute over termination of employment' has become an easy way for a company to prevent its workers from fighting directly for their rights (see, for example, KSN,

2009). This situation has forced workers and their unions to find other ways to redress their grievances, such as through initiating criminal legal procedures, in preference to the regular industrial dispute settlement mechanism.

One well-known case that exemplifies this issue is one involving a Japanese subsidiary company, King Jim Indonesia Ltd., located in Pasuruan, East Java. This employer dismissed four union leaders over a strike they had led, and when the case was brought before the criminal court, the court found the employer guilty of violation of trade union rights, leading to imprisonment of the company's director (Tjandra, 2010). This is a clear example of how workers and unions can become 'fed up' with the problems inherent in the regular (PHI) dispute settlement mechanism, and choose alternative strategies, which they claim to be more effective and practical. Using mass action as a tool to enforce the rights they enjoyed based on the existing laws, workers and unions have often avoided the standard mechanisms for 'dispute' (*perselisihan*) resolution, and instead chosen to attempt to enforce the law through focusing on rights 'violation' (*pelanggaran*) cases. This strategy allowed them to alleviate their concerns around enforcement; with the labour rights enforcement system seen as problematic and not to be trusted. Workers believed that focusing on 'violation' procedures was a safer and more reliable approach than focusing on 'dispute' mechanisms, not least because there are stricter penal sanctions associated with violations of law.

According to the workers, the involvement of the PHI in the rights violation cases would have distorted the enforcement of labour law, and diverted attention away from the real issue at stake: the violation of trade union rights manifested in the dismissal of four union leaders. This would have allowed the company to hide behind the dispute process at the PHI, while its crimes continued with impunity. To prevent this, the workers focused on the police and the public prosecutor and succeeded; the employer was eventually jailed for 18 months for unlawfully dismissing union leaders in contravention of the Trade Union Law No. 21/2000.

But a major dilemma remains. Despite the unprecedented success of getting an employer into jail for misconduct against union officials, the four union leaders who had been unfairly dismissed were unable to get their jobs back, and, in addition, the initial problem of collective bargaining rights remained unresolved. The criminal justice system can not provide solutions to issues involving the dismissal of workers and the collective bargaining rights of union' – these require resolution through the system of labour dispute settlement with the PHI as the main institution. This system, as already noted, is seen as highly problematic by workers, partly due to its conceptual inadequacy, and partly because of the problems surrounding the enforcement of workers' and trade unions' rights.

### 3.2 'Pure' civil procedural law?

As already noted, civil litigation procedure, as regulated in the HIR/RBg and applied in the general civil court, also covers all court hearings in the PHI. One of the most important principles in the HIR/RBg is the passivity of the judge: the judges should be passive with respect to the evidence brought before them, and are not allowed to be proactive with respect to giving input and advice to the disputing parties. This passivity must be upheld even when it is clear to the judge that workers are not familiar with the civil litigation procedures applied at the PHI, and their case risks being annulled (see Batserin, 2009: 27-43).<sup>111</sup>

Field observations have shown that when ad hoc judges first examine the briefs of labour lawsuits, the main challenge they face is the incomplete procedural and standard requirements for a civil lawsuit. These include issues concerning power of attorney and formulation of lawsuits, i.e. consistency between *posita* (legal facts) and *petitum* (legal remedies); litigation techniques and techniques for raising questions; as well as incomplete lawsuit requirements with respect to evidence, witnesses and the like. The lack of understanding surrounding these formalities and requirements often results in the annulment of lawsuits by the court. As noted by an ad hoc judge at the Supreme Court, of 1000 appeal cases brought to the Supreme Court in 2008, the majority, particularly those filed by workers or unions, were overruled and annulled, due only to accidental errors in formalities (Fauzan, 2009: 95). Although in cases of annulment based on formalities, the procedural law allows the plaintiffs to file the lawsuits again (after revision), this tends not to happen, because from the workers' perspective this only means further time in the attempt to reach resolution through the courts. Most appeals are filed by employers; indicating that workers win most cases at the PHI, and

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111 Batserin (2009: 35) also notes that the PHI Manado, North Sulawesi, once held a so-called 'dismissal process' – a set of pre-trial hearings aimed at informing and guiding the plaintiffs on formalities. These hearings were considered to be extremely helpful in avoiding the risk of annulment of lawsuits due to procedural errors: 'Especially those [lawsuits] applied by workers directly, without legal representation.' These hearings were justified by reference to Article 83 (2), which states that 'The judge is required to examine the contents of the petition, and if there are shortages, then the judge should request the plaintiff to complete his/her petition'; and also to the Explanatory Notes, which state that 'During the process for completion of a legal action, the Registrar or Alternate Registrar may assist in drawing up/completing the legal action.' The practice of pre-trial hearings did not, however, continue for long; as cases began to be more frequently handled with the assistance of unions' legal aid officers, or professional advocates; and other judges in the PHI Manado panel eventually rejected the pre-trial concept on the basis that workers already had their own legal assistance.

suggesting that for some employers, lodging an appeal serves as another tactic to avoid or delay the implementation of the PHI's decisions.<sup>112</sup>

Field observations also indicate the risk of bias by career judges against labour disputes, in comparison to their views on 'pure' civil law disputes. One career judge in the PHI Tanjung Pinang, for instance, confided that he believed that unlike civil lawsuits, lawsuits at the PHI were 'not real'<sup>113</sup> – since the disputes were about rights and interests, which, according to him, were 'vaguer' than regular damage claims. Another career judge in the PHI Jakarta stated that handling PHI cases was a burden for him, with his work becoming 'more intensive' but with 'less incentive.' He compared his work at the PHI to his other work at the Corruption Court and the Commercial Court (both special courts like the PHI); at the latter two courts he could obtain additional income for additional work, to the value of more than Rp 10 million above his regular salary.<sup>114</sup> This situation has apparently reduced the interest of career judges in pursuing PHI work, and act as a greater disincentive than 'the highly sensitive nature of labour disputes,' as reported by the ILO (see Fajerman, 2011: 17). This may also explain the observation that most of the work required to draft judgments at the PHI is handled not by the career judges but by the ad hoc judges.

The presence of ad hoc judges on the judging panel appears to be helpful to address the problem of the bias towards 'pure' civil litigation procedures, but, as pointed out by one ad hoc judge, only if 'career judges do not feel that they have to demonstrate their "authority" as Presiding Judge in the Panel'.<sup>115</sup> Indeed, statements from several ad hoc judges from labour union circles indicate that at least some career judges disapprove of the use of ad hoc judges in the general court system, which they apparently deem to be an intrusion in the established general court system. Consequently, some career judges referred to ad hoc judges using insulting nicknames, such as 'contract judge'.<sup>116</sup>

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112 One ILO report (Fajerman 2011: 21) estimates that around 90 percent of labour dispute cases at the PHI have been and continue to be appealed to the Supreme Court. This reflects the lack of trust in PHI decisions, and 'serves as a tactic for (mostly) employers to circumvent and delay the implementation of court orders.'

113 Statements from career judge Ratmoho, in 'Labour Judges Workshop', Batam, 26 November 2006.

114 Interview with Heru Pramono, career judge at the PHI Jakarta, November 2008.

115 Interview with Daulat Sihombing, ad hoc judge at the PHI Medan, November 2006.

116 Bedner (2010: 212) noted a similar bias against ad hoc judges during the formation of the Administrative Court, during which ad hoc judges were perceived by some in the legal establishment to be a threat to the 'closed-shop' nature of the Indonesian judiciary. Later, ad hoc judges were removed altogether from the administrative court system.

### 3.3 Problems of judicial corruption

While ad hoc judges face a range of structural challenges, the most concerning one is probably the issue of corruption within the PHI; an issue which directly affects the performance and the existence of the new institution. According to one union official from Karawang, West Java province, corruption is typically seen in cases related to disputes over interests, and in cases of collective dismissal, which involve large amounts of money. The union official claimed that he was once approached by an ad hoc judge (from employer circles) in the PHI Bandung who asked him to provide some money for the judges in return for a promise to help the workers win the lawsuit. The union official said that he was very worried, as the consequences of losing the case would be serious for the workers involved, because the case was related to the annual wage increases in the company. 'We wanted to give the [requested] money, for the sake of our members, and the risk was too high of losing the case. The problem was that our union did not have money for such purpose.' The union officials were therefore unable to give the money to the judge, 'But I've told the [ad hoc] judge that later if we win the case we would not forget about her and her colleagues [the panel of judges].' In the end, the official and his union did win the case, and the court decided to award a wage increase of 14.8 percent – 4.8 percent higher than the employer had originally accepted. The union then gave the ad hoc judge an amount of money, which the union official believed would be divided among the members of the panel of judges. 'It was not really a bribery' the union official rationalized 'As we only gave them our expression of gratitude.'

Various union activists in various regions have reported similar corrupt practices, although very few were made public. One exception was a case involving a cement factory, PT Semen Kupang, in East Nusa Tenggara; which gained widespread media attention. During the case, union officials claimed that one of the ad hoc judges at the Supreme Court, Arief Sudjito, had accepted a bribe of Rp 2 billion from the company, and claimed that they had lost their case after failing to give the judge a requested 'handling fee' of Rp 300 million. The union admitted their involvement in the bribery, that they could only afford Rp 150 million, and that this was the figure that had been handed to the ad hoc judge. The union said they had been approached by the ad hoc judge who had advised that if the union wanted to win the case, they needed to give him the other half of the 'handling fee'; the judge told the union that he had been offered Rp 2 billion by the company to find in its favour. After losing the case, the union officials said that the ad hoc judge returned the union's money. 'We suspect the judge had [also] received a bribe from the company Semen Kupang,' the union leader was quoted in the media (*Koran Tempo*, 5 May 2010). The company denied the allegation (*Koran Tempo*, 6 May 2010), while the ad hoc judge in question was later investigated and monitored by the Judicial Commission (*Koran Tempo*, 7 May 2010). Although the Supreme Court said they would investigate this



judge for a possible violation of ethics, and although they had questioned the union officials (*Kupang Metro*, 7 May 2010), no follow-ups were reported, and the judge, Arief Sudjito, continued to work without any penalty.

The name Arief Sudjito appeared a year later in conjunction with a corruption claim involving another ad hoc judge. Imas Dianasari, an ad hoc judge from employer circles at the PHI Bandung, West Java, was arrested on 30 June 2011 while taking a bribe, along with a lawyer representing the company PT Onamba Indonesia. The case was dealt with by the Indonesian Eradication Commission (*Komisi Pemberantasan Korupsi*, KPK), and received extensive media attention (*Kompas*, 1 July 2011, *Koran Tempo*, 1 July 2011). Imas Dianasari claimed that she had contacts who assisted with corrupt activities, including contacts in both the PHI and the Supreme Court. Importantly, she named ad hoc judge Arief Sudjito as her contact at the Supreme Court who helped preparing the cases she handled in the PHI Bandung which went to appeal. In response to these allegations, the KPK summoned Sudjito for interrogation as a witness (*Inilah.com*, 18 July 2011). He denied the allegations (*Metronews.com*, 26 July 2011), claiming that he only knew ad hoc judge Dianasari because they were both ad hoc judges at the PHI. 'It is normal that we know each other from work,' he explained. According to several union officials who were often involved with cases at the PHI Bandung, ad hoc judge Imas Dianasari was widely known for corrupt practices. 'We could feel it, but it is also very difficult to prove,' said one union official, while mentioning several 'big cases' handled by ad hoc judge Dianasari he had lost in the PHI Bandung.<sup>117</sup> Ad hoc judge Dianasari was later suspended by the President (*Jakarta Post*, 7 September 2011); however, ad hoc judge Sudjito continued to work.<sup>118</sup>

The above and similar reports suggest that the so-called 'court mafia' (*mafia peradilan*), common and widespread in other courts in Indonesia, has also infiltrated the PHI. Some complainants compare the situation to that of the commercial court, which they consider has 'committed suicide'; such is the level of acute corruption taking place there.<sup>119</sup> Given this reputation, the

117 Personal communication with Saepul Tavip, union leader, July 2011.

118 Sudjito's reputation preceded him even before he became an ad hoc judge at the Supreme Court. He had been chairman of the Plantation and Farm Union – an affiliate to the All-Indonesia Trade Union Confederation, a former New Order government-sanctioned union – and obtained positions on several national tripartite institutions. Prior to his appointment as an ad hoc judge, he was also a union-backed member of the P4P/D. During that time he was already notorious among workers and union officials for his handling of disputes. One union official described Sudjito as the key actor behind the so-called 'death chamber' – a particular chamber of the P4P/D in which, for cases that were brought before it, all workers could be sure they would lose the case (personal communication with Timboel Siregar, June 2006).

119 Interview with Muhamad Hafidz, August 2010; a union official who had filed several judicial reviews against Bankruptcy Law No. 37/2004, for constitutional violation of labour rights.

number of people willing to use the commercial court for case settlements has been decreasing; people are unwilling to deal with the court's inefficiency and corruption (see also Pompe, 2004).<sup>120</sup> It is particularly interesting, and perhaps ironic, that the commercial court was the source of 'inspiration' for legislators when they established the Industrial Relations Court.<sup>121</sup>

### 3.4 Solutions outside the PHI

In most cases, it is the workers rather than the employers who file lawsuits to the PHI. In some locations, including Jambi, Bengkulu, Gorontalo and Palu, between 2006 and 2009 all lawsuits brought to the PHI were filed by workers or unions. When asked why workers file the large majority of claims, one career judge in Jambi said that it was understandable, as a labour issue more often disadvantages workers than employers. Despite this, the number of cases brought annually to the PHI has stagnated, and in some places has declined (see table 6.5 below). According to some ad hoc judges, this is worrying, and provides clear evidence of the need to amend Law No. 2/2004 (Agung, 2009), to increase the effectiveness of the court and thereby increase confidence in the system.

Most disputes continue to be resolved by means other than the PHI. One survey conducted by the Research and Development Division of the Ministry of Manpower in 2009 indicated that around 20 percent of disputes were settled through bipartite negotiation; 20 percent through mediation; and 50 percent through bipartite negotiation and mediation. It was not clear, however, whether the remaining 10 percent of labour disputes were actually being handled by the PHI. Research conducted by an alliance of labour NGOs and unions in East Java confirmed the findings above (see Jamaludin et al., 2008). Mediation in particular has proved a popular way of redressing disputes, in particular mediation by government officials. Indeed, many cases involving violations of labour laws, are being channeled to mediators instead of labour inspectors. Numbers of mediators, and their budgets, currently far exceed the numbers of and budgets for labour inspectors. Research also shows that despite some doubt about mediators from workers, who sometimes accuse

120 The commercial court has often been in the spotlight due to the relative ease with which corruption can occur. As explained by a commercial court practitioner, businesses tend to have confidence in this court not because it is free of corruption but because of its relative 'predictability' and, to some extent, 'certainty'. Most people reportedly accept the corrupt practices of the court as granted, and are not concerned, as long as the court can provide them with decisions that enable them to continue with their business. There is little consideration for the point that in disputes between businesses, there are workers who may lose their jobs if their employer goes bankrupt (personal communication with Santy Kouwagam, October 2013).

121 Interview with Indra Munaswar, July 2006; a member of the 'Tim Kecil' (Small Team) of union leaders involved in the formulation of the new labour bills in 2002-2004 (see Chapter 4, also Suryomengolo, 2008).

them of being 'in favour of the employers', the workers and unions still prefer mediation to conciliation or arbitration, due to the relatively cheap and easy procedure, reminiscent of the practice of the P4P/D.

Another reason for the workers' and unions' preference for mediation according to the Ministry of Manpower survey, was that the time frames were considered reasonable – the mediator's 'recommendation' is given within 30 days. Another valid reason is, of course, that according to Law No. 2/2004, mediation is a compulsory 'second step' in the dispute resolution process.<sup>122</sup> If agreement cannot be reached during the initial bipartite negotiations, the parties are required to see a mediator before progressing to the PHI. One professor of labour law at the University of Indonesia, Aloysius Uwiyono, argues that this highlights a problem with the formulation of the law; which prohibits arbiters from handling disputes over terminations of employment, even though this type of dispute accounts for, in the professor's estimate, 98 percent of cases.<sup>123</sup> As Professor Uwiyono noted, 'As a consequence, all disputes over termination of employment are pooled to the mediation and mediators [and then the PHI], and [eventually] will end up in the Supreme Court, causing a backlog of cases that cannot be resolved fast.' He recommended for the law to be amended to make it possible for arbiters to handle disputes over termination of employment, and in addition, to facilitate alternative dispute resolution mechanisms to help resolve labour issues outside the courts.<sup>124</sup> Unlike arbitration about other issues, such as trade agreements, arbitration in the context of labour issues seldom occurs – sometimes not once in a year, according to the Ministry of Manpower's statistics for 2005-2010.<sup>125</sup> The situation is similar for conciliation, which seems not to have contributed much to the dispute resolution process, despite efforts to increase recognition of the role of conciliators and encourage their use.<sup>126</sup>

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122 Some ad hoc judges from union circles have expressed their disappointment in mediators, who reportedly often counsel workers not to go to the PHI, telling them that the PHI system will take a long time and that it will be expensive for workers to get a resolution.

123 Interview in the Indonesian Voice of Human Rights radio station, 26 July 2006.

124 Uwiyono may have vested interests in the the role of arbitration in labour disputes: apart from teaching labour law in universities and running a law firm, Uwiyono is also the Chairman of the Indonesian Labour Arbitration Association.

125 See 'Data on Industrial Relations and Workers Social Security: 2005-2010', which also revealed that most labour disputes were resolved during the bipartite negotiation.

126 One attempt to increase the profile of conciliators was made by the Communication Forum of Conciliators of Jakarta, which placed a list of their members' names and addresses on the announcement board at the Regional Manpower Office of Jakarta. This seemed not to be effective, as parties attending the Regional Manpower Office continued to attend mostly to see mediators (personal communication with Ekalaya Halim, chairman of the communication forum).

Mediation, although the primary choice for workers looking to resolve labour disputes (as discussed above), has a major flaw: there is no provision in Law No. 2/2004 which stipulates that the settlement achieved through mediation is legally binding. Although Article 13 requires that the parties sign a written agreement, no part of the law gives unequivocal, legally binding force to the decision reached (see also Fenwick et al. 2002: 70). This is in contrast to the Law's directives on arbitration: for which Article 51 (1) states specifically that the arbiter's decision is legally binding. This difference means that the Law does not, in its present form, give any positive incentive to the disputing parties to use mediation to resolve their disputes. Nor does the Law include any useful disincentives for non-compliance; the Law does not specify any consequences if one party chooses not to implement the recommended agreement – instead, Article 14 (1) states that 'the parties may continue to file settlement of the dispute to the PHI'. By making mediation a necessary part of the process without ensuring that decisions reached are binding, the Law as it currently stands has ensured that the mediation process prolongs the time that disputes take to settle, when arguably labour disputes, because of the risks for workers, are the kinds of disputes for which it is most important that settlement times are kept to a minimum.

Employers have reportedly not hesitated to take advantage of the loopholes in the current Law. Union activists across several regions have reported there is now a tendency for employers to choose not to abide by the settlement agreement following disputes – especially when dealing with individual workers, who have neither unions nor lawyers to assist them.<sup>127</sup> In many reported situations, once the first stage (bipartite negotiation) fails, and workers bring the dispute to mediation, the mediator often gives a recommendation in favour of the workers, in which case the employer often ignores the recommendation and does nothing – neither files the dispute to the PHI, nor implements the recommendation voluntarily. This leaves the workers in limbo. If they manage to negotiate with the union to push the employer to respond, the employer may eventually file the dispute to the PHI, but will often ensure that it is filed in such a confused and incomplete state that the PHI can be expected to reject it. As a last step, the employers often take the option of filing an appeal to the Supreme Court, which, as explained earlier, can take years. This practice has reportedly been repeated in several cases, including by several companies that were assisted by one particular lawyer.<sup>128</sup>

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127 Interview with various union activists in East Java, November 2008.

128 Interview with Pujianto and Jamaludin, union activists in East Java, November 2008.

Table 6.5 below presents some key statistics of cases brought to the PHI in the first four years of its existence (2006-2009). Many of the data will likely reflect the current situation at the PHI. The majority of cases were brought by workers and/or unions, rather than by employers, and the PHI's Jakarta and Bandung received most claims. The most active PHI outside Java was the PHI Medan, while the most inactive were the PHI Papua and the PHI Banjarmasin. Despite the increasing number of cases brought to the PHI in some regions, such as Jakarta and Bandung, in general the trend was for the number of cases to be decreasing – even in PHI based in areas with large numbers of workers and industries (and, presumably, disputes), such as Semarang, Serang, and Makassar.

Table 6.5: Number of cases (lawsuits) brought to the PHI (Java, Sumatera, Kalimantan and Papua, 2006-2009)<sup>129</sup>

No.	Industrial Relations Court (PHI – <i>Pengadilan Hubungan Industrial</i> )	Year	Number of cases (lawsuits)	Number of cases submitted by employers	Number of cases submitted by workers/unions
1.	PHI Jakarta <sup>130</sup> (Java)	2006	224	19	205
		2007	384	36	348
		2008	351	41	310
		2009	362	46	316
2.	PHI Bandung <sup>131</sup> (Java)	2006	250	22	228
		2007	196	32	164
		2008	190	38	152
		2009	196	31	165
3.	PHI Semarang <sup>132</sup> (Java)	2006	57	6	51
		2007	90	2	88
		2008	140	4	136
		2009	89	4	85
4.	PHI Serang <sup>133</sup> (Java)	2006	57	17	40
		2007	92	7	85
		2008	84	16	68
		2009	82	7	75

129 There are no public data available concerning the number of cases brought to each of the 33 PHIs around Indonesia. The Supreme Court data, as accessible through its website [www.mahkamahagung.go.id](http://www.mahkamahagung.go.id) mentioned only the total number of judgments of the PHI in the Supreme Court. Data shown here were collected from ad hoc judges at the PHI from various regions. Numbers of cases bestowed from the P4P/D were not included in the figures.

130 Source: Juanda Pangaribuan, ad hoc judge at the PHI Jakarta.

131 Source: Lela Yulianti, ad hoc judge at the PHI Bandung, West Java.

132 Source: Daryono, ad hoc judge at the PHI Semarang, Central Java.

133 Source: Hotlan Pardosi, ad hoc judge at the PHI Serang, Banten.

5.	PHI Medan <sup>134</sup> (Sumatera)	2006	142	2	140
		2007	208	3	205
		2008	140	2	138
		2009	108	17	91
6.	PHI Palembang <sup>135</sup> (Sumatera)	2006	32	0	32
		2007	25	1	24
		2008	37	0	37
		2009	52	2	50
7.	PHI Tanjung Pinang <sup>136</sup> (Sumatera)	2006	56	2	54
		2007	70	3	67
		2008	37	0	37
		2009	45	1	44
8.	PHI Jambi <sup>137</sup> (Sumatera)	2006	18	0	18
		2007	13	0	13
		2008	31	0	31
		2009	25	0	25
9.	PHI Pekanbaru <sup>138</sup> (Sumatera)	2006	70	24	46
		2007	57	19	38
		2008	41	9	32
		2009	62	11	51
10.	PHI Tanjung Karang <sup>139</sup> (Sumatera)	2006	9	1	8
		2007	19	2	17
		2008	10	1	9
		2009	13	2	11
11.	PHI Bengkulu <sup>140</sup> (Sumatera)	2006	8	0	8
		2007	5	0	5
		2008	2	0	2
		2009	23	0	23
12.	PHI Gorontalo <sup>141</sup> (Sulawesi)	2006	12	0	12
		2007	14	0	14
		2008	13	0	13
		2009	6	0	6
13.	PHI Palu <sup>142</sup> (Sulawesi)	2006	54	0	54
		2007	29	0	29
		2008	11	0	11
		2009	15	0	15

134 Source: Christina Tobing, ad hoc judge at the PHI Medan, North Sumatera.

135 Source: Hermawan, ad hoc judge at the PHI Palembang, South Sumatera.

136 Source: Agung Widiyono, ad hoc judge at the PHI Tanjungpinang, Riau Islands.

137 Source: Hery Simanjuntak, ad hoc judge at the PHI Jambi, Jambi.

138 Source: Sardo Manullang, ad hoc judge at the PHI Pekanbaru, Riau.

139 Source: Janter Nababan, ad hoc judge at the PHI Tanjung Karang, Lampung.

140 Source: Charisman, ad hoc judge at the PHI Bengkulu, Bengkulu.

141 Source: Tommy Haras, ad hoc judge at the PHI Gorontalo, West Sulawesi.

142 Source: Bahal Simangunsong, ad hoc judge at the PHI Palu, Central Sulawesi.

14.	PHI Makassar <sup>143</sup> (Sulawesi)	2006	19	0	19
		2007	32	4	28
		2008	14	2	12
		2009	16	0	16
15.	PHI Banjarmasin <sup>144</sup> (Kalimantan)	2006	15	2	13
		2007	20	3	17
		2008	17	-	17
		2009	20	2	18
16.	PHI Jayapura <sup>145</sup> (Papua)	2006	-	-	-
		2007	-	-	-
		2008	16	1	15
		2009	12	5	7

### 3.5 All parties disappointed

The PHI's performance appears to have disappointed all parties involved. Workers and unions are complaining about the inaccessibility of the PHI, particularly given the lack of litigation skills among workers. They also complain also about the official and unofficial costs of the court, as well as about judicial corruption, and the lengthy and uncertain court processes just to obtain the first decision (so not even including the time and uncertainty associated with appeals). In particular, workers and unions have criticized the tendency of the PHI to apply civil procedural law in a strict manner. Some union officials<sup>146</sup> also criticize employers for being deliberately obstructive by using various techniques such as choosing not to conduct bipartite negotiations; not attending mediations meetings organized by mediators (thereby preventing workers from obtaining the minutes of bipartite meetings required in order to take further legal action); ignoring the mediator's recommendations if those recommendations support the workers, and choosing instead to 'do nothing' – neither accepting and implementing the recommendations nor filing to the PHI. These tactics, left unchecked, obviously discourage workers from using the PHI as a forum through which to resolve labour disputes. Workers instead have tried to find other ways to redress their grievances, such as through using criminal procedures. Or, even more concerning for justice, they have simply given up, and accepted the employers' offers of pay or conditions, even if these are lower than those stipulated by the law.<sup>147</sup>

143 Source: Chandrayana, ad hoc judge at the PHI Makassar, South Sulawesi.

144 Source: Asmiwati, ad hoc judge at the PHI Banjarmasin, West Kalimantan.

145 Source: Delima, ad hoc judge at the PHI Jayapura, Papua. The PHI Jayapura only operated during 2008, therefore there were no lawsuits in the PHI Jayapura in 2006 and 2007.

146 Interview with FSPMI union officials, Surabaya, East Java, August 2009.

147 I have discussed these in detail elsewhere (see Tjandra 2010). Galanter and Krishnan (2009) conducted a study in India which showed a similar decline in the number of cases brought to court, indicating the declining confidence of ordinary people in the court system, due largely to 'massive problems of delay, cost, and ineffectiveness' (Galanter and Krishnan 2009).

The employers have their own complaints about the PHI. Apindo has raised concerns about the inconsistencies between individual PHIs, and judges within them, in decisions on issues such as who can represent employers or whether their own staff is allowed to appear as a witness for them (*Hukumonline*, 24 September 2007). One Apindo official was also concerned by what he called acts of 'kidnapping' and 'contempt of court' by unions, when they pressured the PHI by mass demonstrations during the court hearings. The official referred in particular to an incident in the PHI Jakarta, when hundreds of workers who just found out that they had lost their case ransacked the courtrooms, leading to the judges fleeing from the angry masses through ventilation shafts (*Hukumonline*, 30 March 2007).

The Supreme Court has voiced its own concerns about the PHI. In an opening speech for the National Workshop of the Supreme Court in Makassar, South Sulawesi, on 2-6 September 2007, the Chief Judge of the Supreme Court, Bagir Manan,<sup>148</sup> called for a 're-examination of the PHI.' This, he argued, should cover several key issues. First, labour disputes would be resolved more effectively if not conducted by judiciaries but instead by an institution other than a court, such as the National Mediation Body for Labour Dispute Settlement. Second, if the judiciary remained involved, the use of ad hoc judge representing both the unions and employers' organizations should be abolished, and case deliberation should be handled by regular judges only. Third, the state should not be burdened with the costs for labour disputes; *pro bono* services (legal services performed free of charge for the public good) should be sufficient.

These negative perceptions towards the PHI from workers and unions are particularly interesting, because many cases brought to the PHI were actually won by workers. Apparently it is the overall system of dispute settlement mechanisms, including in the Supreme Court, that workers are concerned about<sup>149</sup> (*Batam Pos*, 16 May 2007). Investigations did, however, identify a few ad hoc judges from union circles who were positive about the PHI. We will discuss this further in the following section.

#### 4 REFORMERS FROM WITHIN?

Before making an assessment of the PHI based on the discussions above, I will discuss the role of ad hoc judges, particularly those from union circles. Despite at least one instance of a corruption case involving an ad hoc judge from union circles (as discussed above), the performance of the ad hoc

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148 The complete opening speech of Bagir Manan can be found at in *Varia Peradilan* (No. 263, October 2007), the official publication of the Indonesian Supreme Court.

149 Various union officials and ad hoc judges from various regions confirmed this point, during the 'Labour Law Practitioners Conference,' Cisarua, 2-5 March 2008.



judges has been reported as relatively sound, both with respect to their judicial integrity and their level of knowledge and skills. Their roles are arguably crucial for the future of the PHI, and in particular for efforts to reform the judiciary to help it become more effective at resolving labour disputes. If this is the case, then efforts to remove their role may lead to additional problems for the PHI.

A consideration of the characteristics typical of ad hoc judges from union circles in the PHI suggests that in comparison to their counterparts in other special courts established in Indonesia,<sup>150</sup> union-nominated judges at the PHI have some unique characteristics. Most are from trade union backgrounds,<sup>151</sup> and have had previous experiences with labour advocacy. Thus, most bring with them some form of idealism, to 'defend workers' rights'.<sup>152</sup> In a meeting of ad hoc judges from various regions organized by the Trade Union Rights Centre on 7-9 April 2006 in Jakarta,<sup>153</sup> just a few months after their appointment, ad hoc judges from union circles generally reported that being an ad hoc judge at the PHI was a 'challenge'; a new 'mandate'; and a 'new stage' in the struggle for workers – with the option to work 'from within'.

The ad hoc judges from union circles also expressed pride at being chosen for what they considered to be an 'honourable job', with great responsibility. However, there was also some concern at being 'new people' in the system, which they perceived to carry a risk of being easily 'forced' to go along with existing systems and customs in the court. Some ad hoc judges voiced concern about the many points of confusion at the start of the PHI's operations, including the overdue salaries. There was in particular concern about the widespread corruption practices in the judiciary. They were also worried about their perceived unofficial duty to 'side with the workers', while at the same time needing to be impartial as judges. Nonetheless, many expressed hopes of being able to learn and exchange knowledge on the subject of labour law, and some even showed interest in pursuing further studies in the field.<sup>154</sup> They mentioned the need to have solid networks among

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150 For a discussion of the special courts in Indonesia, see Arsil (2009).

151 Being union members has given these ad hoc judges direct experience with the problems faced by workers, enabling them to establish sensitivities toward workers and union interests, and appreciate the roles that workers and unions play in society. Often the ad hoc judges reported a perception of their ability to effect social change through the decisions they make.

152 Various statements made by ad hoc judges from various PHIs, at the opening of 'Labour Judges Workshops', organized by the Trade Union Rights Centre, on 17-20 August 2006.

153 The official title of the meeting was 'Empowering Ad Hoc Judges, Towards Fair and Trustable Decisions.' The meeting was designed as a planning workshop to draft a series of further workshops for ad hoc judges from union circles.

154 Indeed, many ad hoc judges have actually been taking post-graduate studies while working at the PHI. Most of them choose labour law for their theses, in particular aspects of dispute settlement mechanisms. This enables them to gather data and information from their daily work on cases at the PHI. Some have gone on to become lecturers, teaching labour law subjects at various universities in their regions.

the ad hoc judges, including some kind of 'information centre' along with 'supporting systems', to help them to support each other and work properly. All these sentiments were nurtured during the series of workshops that followed and will be discussed further below.

While working within the PHI system, many ad hoc judges from union circles continue their contact with unions, albeit informally.<sup>155</sup> One ad hoc judge from union circles in Pekanbaru, for example, explained that although she was no longer registered as an official of her union, she continued to attend regular meetings with her former colleagues, mainly to discuss cases and to provide input if they wanted to file a case to the PHI. The judge commented: 'I have to do that, since many of my colleagues are unfamiliar with processes at the PHI. And it is important that they will not be misled by the mediator, who seems to scare workers not to bring cases to the PHI.' In this way she justified her continued contact with the union, despite her awareness of the requirement for judges to be impartial. Another ad hoc judge, from Palembang, justified his continued contact with unions by referring to the non-permanent nature of his work as an ad hoc judge. 'When I finish my term, it is likely that I go back to my own union. So it is important to maintain my communication with them.'

Where ad hoc judges from union circles maintained contact with unions, this was at their own initiative. The unions, even those that had nominated the ad hoc judges, seemed disinclined to take the initiative and left it up to the ad hoc judges to decide what they would do.<sup>156</sup> This led to disappointment on the part of some ad hoc judges. One ad hoc judge from Medan complained that his union seemed disinterested in his work, since there had never been any effort to contact him. 'We need to be watched by unions, otherwise we could become a "wild ball" [*bola liar*] in the court,' he said, referring to the notorious corruption problem in the judiciary, which, he believed, had started to infect the PHI as well.

In order to provide support for the ad hoc judges from union circles, a series of training workshops has been held in Jakarta annually since 2006, and it is likely to continue. The main organizer has been the TURC, but the trainings were usually facilitated by two ad hoc judges chosen by the ad hoc judges'

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155 Similarly, all ad hoc judges from employer circles are brought together regularly at the headquarters of their organization, Apindo (the Indonesian Employers' Association), to discuss and share cases which have been heard at various PHIs. The Norwegian Employers Association, in cooperation with Apindo, has funded the gathering.

156 Some unions, e.g., SBSI – Indonesian Prosperous Labour Union, once gathered together several of ad hoc judges, which they had nominated, in a meeting to coincide with their national congress. Some of these judges responded negatively because, while other union officials attending the congress had their transport costs covered by the organizer, the ad hoc judges were asked to cover their own travel costs to attend the congress (interview with Juanda Pangaribuan, ad hoc judge at the PHI Jakarta).

collective itself – normally one judge from the district PHI, and one from the Supreme Court. Selected ad hoc judges from union circles from various PHIs across Indonesia are invited. The subjects discussed include recent developments and issues in the PHI, including those related to court administration (undue salaries, tax, facilities and the like), and issues arising from actual cases handled by the PHI. The ad hoc judges are also asked to bring their recent verdicts to be shared and discussed with other ad hoc judges, and in this manner they often obtain new perspectives and insights. Since ad hoc judges at the Supreme Court sometimes came to the training workshops as well,<sup>157</sup> an exchange of ideas between the two levels within the judiciary can take place, which provides an opportunity to address differences among PHIs and between the district PHIs and the Supreme Court.<sup>158</sup> Later on, the ad hoc judges participating in the training also drafted an academic paper on proposed reforms for the PHI and amendments to Law No. 2/2004 (Tjandra, 2013).<sup>159</sup>

The training of ad hoc judges by TURC was well received according to an independent evaluation (see Ford, 2007: 8). Many of the participants said that the program was ‘a top priority’ for them, and that ‘they would put aside other activities in order to be able to attend the training sessions for ad hoc judges.’ The evaluation showed that as well as increasing their confidence ‘the training had resulted in tangible improvements in their [ad hoc judges] practice, in particular on their ability to think critically about particular cases and to develop and apply an understanding of the labour law framework as a whole to particular cases.’ There was another important and unexpected benefit from this training: it generated the view among ad hoc judges that they were ‘being watched’ by an ‘outsider’ (TURC), as well as by other colleagues.<sup>160</sup> This both directly and indirectly deterred them from

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157 The TURC normally invites three ad hoc judges from union circles at the Supreme Court, but only one always attends: His name is Fauzan, and he is also one of the two facilitators of the workshops.

158 Two books were produced as a result of the workshops: a compilation of early PHI decisions, and a book with ‘critical notes’ about the PHI written by ad hoc judges (see Tjandra and Marina (Eds.), 2007 and Tjandra (Ed.), 2010.). The compilation book in particular was praised by the ILO as an important step to more accessible and consistent decisions of the PHI, especially when neither the Supreme Court nor the Ministry of Manpower took the initiative. The same book was popular with unions’ officials, as it gave them access to key examples of legal documents needed to draft lawsuits, based on particular issues that are often found in labour disputes. In fact, union officials sometimes used the book as ‘evidence’ to convince the Panel of Judges at the PHI about certain issues, and about certain interpretations of issues (statement by Jazuli, a union activist from Pasuruan, East Java, August 2009).

159 After being postponed for several years since 2012, finally the amendment of Law No. 2/2004 on Industrial Relations Disputes Settlement has become a priority in the parliamentary session in 2015; at the time this dissertation was submitted the parliamentary discussions had not yet started.

160 Personal communication with Tri Endro, ad hoc judge at the PHI Jakarta, June 2007.

becoming corrupt. As Dela Feby of TURC explained, 'Ad hoc judges who attended our training could be said to be relatively "clean" compared to those who did not. We received confirmation of this from our union networks in various regions. In fact, those who were reported by unions to be "problematic" normally chose not to attend the training, although they were still invited.'<sup>161</sup> She also explained that it was at TURC's full discretion to choose which ad hoc judges were invited to the training. 'If we think he/she is not appropriate anymore, or we suspect his/her judicial integrity, based on our direct knowledge or as reported by our networks, we simply won't invite them anymore.'

The training thus subjected the ad hoc judges to some level of social control for their behaviour and integrity. The training coincided with several positive breakthroughs in PHI practices, with the initiatives driven largely by the ad hoc judges from union circles. One of the most important of these was an increased sensitivity to labour perspectives, which were mentioned by members of the panel of judges before passing judgement. This resulted in a range of notable judgements, including those regarding 'dwangsom' discussed earlier; and efforts to relax some of the procedural laws in order to increase access for ordinary workers. The increased sensitivity to labour issues also led to initiatives uncommon in Indonesian judicial procedures – such as 'dissenting opinions.' Some judges even sent a 'petition letter' to the President of Indonesia regarding the overdue salaries for ad hoc judges.<sup>162</sup> This letter in generated concern among some career judges at the PHI, who stated that it was a 'direct attack' on the 'harmonious' environment of the courts.<sup>163</sup>

On another occasion, the same innovative ad hoc judges who sent the petition letter also submitted a petition to the Chief Justice of the Supreme Court, regarding 'improvement of the PHI's performance'.<sup>164</sup> This letter summarized their evaluation of the PHI's performance in the first year after it commenced operation, and included suggestions for reforms. More recently, these same ad hoc judges drafted amendments to Law No. 2/2004, including various reforms, which they considered would make the PHI

161 Interview with Dela Feby, Executive Secretary of TURC, June 2007.

162 See the 'Batam Petition for President Susilo Bambang Yudhoyono: Resolve the Overdue Ad hoc Judges' Salaries,' dated 25 November 2006, signed by 16 ad hoc judges from the union circle in Sumatra. In part, the petition claimed that the government's lack of attention to the matter 'had led to speculation about asystematic effort to undermine ad hoc judges and damage the PHI.' This was quite a strong statement; unusually strong for members of the judiciary.

163 Noted by Eko Pristiwantoro, ad hoc judge at the PHI Semarang.

164 The petition, dated 11 June 2007, was signed by 38 ad hoc judges from 26 district PHIs, and one ad hoc judge from the Supreme Court. It was submitted to the Director of the Special Civil Case Division of the Supreme Court, after a three-day workshop facilitated by TURC on 9-11 June 2007 in Jakarta.

more effective.<sup>165</sup> These included ensuring that the burden of proof lies with those most capable of finding the resources to present the evidence (employers, rather than workers); the establishment of a special chamber for labour disputes at the Supreme Court; the empowerment of the Court of Appeal at the provincial level, to become the final instance; the revision of the complicated procedural mechanism in the PHI; the establishment of PHI in industrial dense areas; and the appointment of full-time career judges to the PHI.

All these recommended amendments were based on the judges' own experience of real problems faced by the PHI during its daily work; which, combined with their expertise in the field, gave the judges' recommendations credibility and quality. It remains to be seen whether the government and the judiciary (the Supreme Court) will support the recommendations. According to the Indonesian government's Legislative Program 2012, parliamentary discussions about the recommendations were to be conducted during 2012. However, parliament ended up not discussing the document or associated issues during 2012, citing that it was caught up with other 'urgent' matters,<sup>166</sup> and the deliberation about amendments to Law No. 2/2004 were postponed until 2015 at the earliest. This indicates a lack of political will and attention to issues of justice in labour law, from both the executive and the legislature. As with the judiciary, as reflected in the speech of the Chief Justice of the Supreme Court, Bagir Manan,<sup>167</sup> the political will to resolve the problems has not been as strong as hoped. In this situation, removing ad hoc judges from the system would arguably only cause new problems, rather than resolve the existing problems.

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165 These were compiled at the ad hoc judges' workshop on 27 March 2010.

166 An example of the lack of support includes the controversial bill on 'community organizations' and 'national security,' which recently raised concern and protests from civil society organizations. The bill was promulgated as Law No. 17/2003, and was immediately considered by civil society groups to be a setback for justice in Indonesia, and a real threat to democracy and popular participation; its aims were considered to be based more on meeting the pragmatic needs and interests of the government on the eve of the 2014 elections, than on meeting any needs of the people. Some large civil society organizations, including Muhammadiyah – the second largest Moslem organization in the country with millions of members – have filed a judicial review against the Law to the Constitutional Court (for the resume of the judicial review see <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Resume&id=1&kat=1&cari=82%2FPUU-XI%2F2013>; and for a critical review from the civil society perspective, see [www.yap-pika.or.id/uuormas](http://www.yap-pika.or.id/uuormas); accessed in October 2013).

167 See *Varia Peradilan* (No. 263, October 2007).

## 5 CONCLUSION

The establishment of special courts and tribunals, with workers' representation has been an approach taken first by European and then by other countries worldwide, to overcome some of the problems found within ordinary courts (Ramm, 1986: 270). Problems special courts intend to address include the resentment harboured by some groups toward the 'spirit' or aims of labour legislation; the inaccessibility of legal processes to most workers; the class bias of many career judges; the lack of experience by the judiciary in labour issues; and the burdensome cost, delays and formalities normally found in ordinary courts. Addressing these issues formed a large part of the motivation behind the establishment of the Industrial Relations Court (PHI) in Indonesia as well. However, once established as a special court within the scope of general court, the Industrial Relations Court in Indonesia has found itself in a difficult position since the beginning of its existence. Issues such as conceptual inadequacy and the obscurity of some of the provisions in Law No. 2/2004; the problematic relationship between the PHI and the district court it is a part of; and corruption from the lowest level of substitute registrar at the District Court right through to the ad hoc judge at the Supreme Court, have all combined to increase the challenges for the disputing parties – particularly workers – in their efforts to maintain confidence in the court and resolve their disputes adequately.

It is important to mention that there have been some efforts, particularly from ad hoc judges from union circles, to be sensitive to labour needs; and to try to optimize dispute resolution within the PHI, as originally intended. Examples do exist of PHI practices and case decisions that represent fresh interpretations and the courage to maintain integrity. These include the decision about *dwangsom* (daily fine); the initiative to maximize pre-trial hearings in order to explain to litigants the administrative requirements of lawsuits, and thus reducing the risk of annulment of lawsuits based on small errors during submission; and the efforts to reduce corruption in the court by preventing any person from taking case documents home to type the decisions. As discussed, many of these efforts were challenging, as the existing judiciary apparatus, which saw the changes as an attack on the 'internal harmony' of the judiciary, and may have often held an unconscious bias against, or a sense of superiority over, the non-permanent judges, did not support most initiatives.

Any positive, creative initiatives and proposals have also been overshadowed by the structural problems, which continue to plague the Indonesian judiciary in general, and the PHI in particular. Inconsistencies and sometimes obscurity in the court's practices, low levels of technical knowledge and legal integrity of both career and ad hoc judges as well as the court's registrars, and the lack of competence of workers and labour unions to conduct litigation, have all contributed to the declining confidence in the court.

Further ongoing problems include the long duration of the process before a verdict is reached, when a quick resolution is so crucial in labour disputes. The tendency of the Supreme Court to act merely as a guardian of procedural law has also contributed to the growing distrust and disappointment in the PHI among workers. The absence of an effective enforcement mechanism has moreover encouraged unethical employers to ignore the court's decisions, knowing that they are unlikely to face negative consequences. The existence of ad hoc judges, particularly those from union circle, may provide the foundation for future reforms of the PHI. For this to happen strong political commitment will be required from both from the judiciary and government; and this may arguably be unlikely in the near future.

Just as courts cannot work well when they are overwhelmed with cases, courts cannot function properly without the confidence of the parties who are using them to resolve conflicts. Thus, perception plays a very important role in the success of the court system: courts must not only be able to perform their main duties – conflict resolution, social control, and lawmaking – ; they must also be perceived to be doing so (Shapiro, 1981). The case of the PHI in Indonesia is a story about Indonesia's effort to channel labour disputes into a legal mechanism, and while labour dispute resolution is much needed, to date these efforts have tended to fail. The PHI courts still operate in Indonesia, but until reforms are tackled to ensure consistently fair and effective outcomes, the PHI will be as unlikely to elicit confidence in the system, as any other court in Indonesia today (cf. Bedner, 2009).

