The Shareholder Settlement Program: A Pragmatic Resolution to confront a Systemic Banking Crises in view of the Dysfunctional Legal System and Tradition of the Republic of Indonesia

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CHAPTER V

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THE VERGE OF JUDICIARY

The Shareholder Settlement Program that was carried out by IBRA was in its most accurate description truly a government-administrative undertaking. It was never intended to be a legislative affair, nor was it designed to be a judicial enterprise. The Program was initiated and launched as part of the government's overall efforts to confront the systemic banking crisis, which occurred in 1997-1998, and to revitalize the deteriorated financial sector and the national Indonesian economy. The Program was sanctioned to allow the government and the IBRA banks' shareholders to settle their differences and disputes by means of an *out-of-court mechanism*. If no other variables had been involved in the implementation and the completion of the Program, it would have remained a government affair.[634]

The policy decision regarding the Shareholder Settlement Program and its implementation was carried out in the form a *civil-law contract*, which contained contractual terms and conditions that the contracting parties had to fulfill.[635] The signing of the shareholders settlement agreements by IBRA and the banks' shareholders was not only the materialization of their consensus to engage in an out-of-court mechanism, but it also established a new "legal bond" providing IBRA with direct recourse against the banks' shareholders personally and to accomplish part of its mission in recovering the State funds and/or minimizing the costs of the crisis. The new legal bond, however, was not meant to be immune from possible judiciary encounters because it was definitely a legitimate juridical act and in certain circumstances, it was possible that it could end in the court system.

The objective of this Chapter is to review certain *court decisions* relevant to the Shareholder Settlement Program in order to understand the judiciary's standpoint on many strategic issues and to envisage the possible outcome of the ongoing legal proceedings in light of recent law enforcement initiatives launched by the present government.[636] To begin, however, the study will portray the prevailing regulatory and institutional structure of the judicial system, the judicial personnel and the court administration, as well as the ongoing reform that has been carried out by

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634 The Shareholder Settlement Program was unquestionably an integral part of the government's efforts to revitalize the banking system. As aforementioned, the IBRA banks' non-performing affiliated loans had been transferred to IBRA in order to isolate healthy banks from unhealthy ones, which would eventually be restructured through the shareholder settlement scheme. In the effort to revitalize the banking system, the government was to inject recapitalization funds into the IBRA take-over banks, to provide cash to pay up the claims of the IBRA frozen banks' depositors under the Government Guarantee Scheme, and to make funds available to keep IBRA nursed banks in operation. To do that, the government needed to consult with Parliament to obtain approval on the state annual budget that would mention the required expenditure and the expected recovery. In the meantime, the Program involved some well-known bankers and business conglomerates who were closely connected to former President Soeharto, which made the issue even more politically attractive. In this regard, the government was to maintain a proper political groundwork with the relevant parliamentary commissions who were exercising their constitutional function as government watch dog in order to update Parliament with the progress related to the Program and to minimize unnecessary political hurdles outside the official course. Last but not least, the shareholder settlement agreements embedded promissory obligations to be delivered by the government who by law was required to consult the relevant state authorities, which in this case included Parliament. In recognition of Parliament's supervisory function and amidst the power struggle among the existing political muscles, the Shareholder Settlement Program as carried out by IBRA contained political nuances even in its conception.

635 Before signing the shareholder settlement agreements the government had no direct recourse against the banks' shareholders personally except in the form of administrative sanctions based on the prevailing banking prudential regulations. There was no legal ground for the government to compel the banks' shareholders to reimburse the state funds that had been injected into their banks or to compensate the losses the banks had suffered, except by means of legal actions against the banks' shareholders either through a civil or through a criminal court.

636 From the onset, this study discusses the Supreme Court's decision on the request to undertake a judicial review of the legislations that had been enacted for IBRA in order to carry out its tasks and functions, including the Shareholder Settlement Program. The study also discusses several court decisions that sent out rather confusing signals about the judiciary's standpoint regarding IBRA's powers and the way it executed these powers, which evidently hampered the optimal and resourceful execution of many of IBRA's tasks and functions. Ultimately, the study will review several court decisions related to IBRA's affairs on the Shareholder Settlement Program. For example, the validity and enforceability of the settlement agreement will be more clearly revealed.

the Supreme Court.[637] Today, judicial reform is one of the major themes in discussions on Indonesia's legal system. Judicial independence has been the major concern in the efforts to reform the judiciary authority. All the same, judicial independence has never offered an encouraging picture in the Indonesian judicial and justice system.[638]

A. THE JUDICIAL SYSTEM

1. In Quest of Judicial Independence

The judicial system in Indonesia is multifaceted in perspective and in disposition, but as the last bastion of legal order, it has yet to be classified as developed and significant. The story of the judicial system in Indonesia is both lengthy and short. On the one hand, the existence of the judicial system can be traced back to a time long before the State of Indonesia was even created. On the other hand, the system has yet to contribute significantly to the legal system and the legal tradition as well as to public order, except maybe for very recent developments. During the colonial era, the judicial system in Indonesia was an integral part of the judicial system of the Kingdom of the Netherlands, because the colony was not a State in itself.[639] It was not until Indonesia's independence in 1945 that Indonesia finally came to have a Supreme Court of Justice.[640]

After independence, the newly appointed government did not optimally handle the newly established Supreme Court of Justice and the existing court system that was inherited from the colonial administration[641] , because there were many other issues that were more important and needed to be taken care of during that period of transition. The Supreme Court was relatively sedentary, and the court system was still structured based on overlapping and colonial-inspired legislations and regulations. It was not until the enactment of Law No. 14 of 1970 concerning The Principal Laws of Judiciary Authority, that Indonesia finally implemented a unified and comprehensive groundwork for the execution of the judiciary authority: the Supreme Court and the court

637 On the one hand, IBRA's establishment and the introduction of the Shareholder Settlement Program was the direct result of the dysfunctional judicial system. On the other hand, the Supreme Court of Justice of the Republic of Indonesia had taken several decisions relating to IBRA's lawful existence, the legitimacy of the Program, and the disputes between IBRA as representing the State of Indonesia and the shareholders of the IBRA banks who were required to participate in the Program. This Chapter is about the second issue, and the first Section of Chapter V elaborates the actual condition of the judiciary and the Supreme Court under which the court decisions were delivered to give the readers a sufficient degree of understanding of the ongoing transformation the judiciary has experienced during this period of time.

638 Before the *Order of Reformation* was introduced in mid 1998, S. Pompe, in his doctoral thesis at Rijksuniversiteit Leiden, entitled *The Indonesian Supreme Court: Fifty Years of Judicial Development* (1996), had pointed out a long list of problems the Supreme Court of Indonesia confronted that for years had hampered the proper functioning of an independent judicial system. In 2001, the Asia Foundation published a survey, entitled *Survey Report on Citizen's Perceptions of the Indonesia Justice Sector: Preliminary Findings and Recommendations* (Jakarta 2001), in which it was indicated that 46 percent of the respondents believed that the *reformasi* had not changed the legal system, 48 percent considered themselves powerless to affect it, and 62 percent would avoid going to court at all costs.

639 Prof. Dr. R. Soepomo, SH, *The Indonesian Legal System before World War II*, Seventeenth Edition, Pradnya Paramita-Jakarta, 2004. Before Indonesia's independence there was a series of sometimes overlapping legislations and regulations that regulated the court system and the laws that were applicable for each of the court systems. There were multiple court systems in Indonesia during the Dutch colonial administration, and each system was not contained within a certain geographical location *per se*, while their jurisdiction was mainly based on certain kinds of legal action/in-action and/or the ethnicity of the people who were involved in judicial proceedings. The people who lived in Indonesia during the Dutch colonial administration were divided into three groups of citizenship, namely Europeans, Natives, and Far-Easterners, and upon each of the above-mentioned groups applied a different set of laws and regulations. The court system reflected the apartheid civilization and the regulatory multiplicity prevalent in Netherlands-Indië, and had evolved merely as a tool of the colonial administration and for colonial interests. The highest court tribunal during that time was the *Hooggerechtshof*, which was domiciled in Jakarta (previously called Batavia) and covered the legal jurisdiction of the entire Netherlands-Indië area. The role of the tribunal was relatively insignificant, however, due to the very limited probability of cassation that could be brought to the tribunal. This tribunal has to be distinguished from the *Hoge Raad,* which was then and still is, the Supreme Court of Justice of the Kingdom of the Netherlands.

640 The 1945 Constitution of the Republic of Indonesia, Article 24. The merge between the *Hooggerechtshof* and the Supreme Court of Justice as established under the 1945 Constitution, particularly in terms of personnel, physical assets and workloads, took place on January 1, 1950. *See Ibid.*

641 According to the Transitional Provision of the 1945 Constitution, all of the existing legislations and regulations, as well as institutions that prevailed during the Dutch colonial administration continued to be in force until they were replaced by new ones and/or were contrary with new rules and the new spirit of the independent State. As was evident, the court system and the court institution that had prevailed during the colonial regime were still relevant and/or necessary after independence, but they were scattered and fragmentary, and had to be restored and improved from the very beginning.

system.[642] The Law became the "anchor regulation" for further rulings about the court system and the court mechanism.[643]

The past and present laws and regulations,[644] as well as the 1945 Constitution reaffirmed the independency of the judiciary authority in Indonesia. From a political science perspective, however, judicial independence is used to refer to two concepts, namely **(1)** the judges' autonomy from other individuals and institutions, and **(2)** the judges' conduct as indicative of the level (high/low) of judicial autonomy.[645] These two senses of judicial independence are closely related, and one is thought to be a means to the other. Judicial independence is not a novel principle or a new problem the administration has to face, and yet there has been much concern about the danger of taking it too far as there has been with not taking it far enough.

For countries that are in a process of transformation from a state of relative authoritarianism to a liberal democracy, as was the case in Indonesia in 1998, the most urgent questions was what the tolerable minimum requirement of the judicial independence for the country is, and how to struggle with infringements on the most fundamental kinds of judicial independence, such as bribery and corruption, as well as the near total absence of economic security for judges. One thing is clear, judicial independence is a condition that is never established fully or enjoyed without controversy or challenge. This is an ongoing process that has continued until the writing of this study, and it is still in the process of finding the exact right formula and the suitable degree of independence.[646] Judicial independence can be measured from at the least four principal points of view, i.e. institutional structure, personnel, court administration, and the existence of direct approaches.[647]

IBRA was established in 1998, as one of the most important instruments to confront and overcome the unprecedented systemic banking crisis and it was in operation until April 2004, ex-

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642 Before 1970, the judiciary authority was basically fashioned and influenced by revolutionary political movements, and had hardly had the opportunity to revive the resources and the infrastructure necessary to build a strong and respectable justice system, let alone to contribute significantly to the legal tradition. The ongoing judiciary authority was only recently, in 2003, bestowed with the new task to undertake judicial review (*toetsingsrecht*) which had never been the task of the Supreme Court of Justice before. In this regard, the State of Indonesia established the Constitutional Tribunal. The Constitutional Tribunal is authorized to hear, examine, and render judgment on constitutional inquiries and disputed matters related to the Constitution, as well as to terminate political parties and disputes on results of general elections. On the other hand, the Supreme Court of Justice has continued to be authorized to undertake judicial review of legislations and government directives below that of an Act, as may be requested.

643 After 1970, and despite the new regulatory framework as previously mentioned, the judiciary authority remained pretty dormant under President Soeharto's New Order regime, which was fully backed by the military, and it merely functioned as an instrument of the incumbent regime. The Supreme Court executes the judiciary authority, and the court system is to be administered in three instances: two factual instances and cassation (*cassatie*) as the final recourse. The judicial power is supposedly independent of the legislative and executive powers, and yet Indonesia has never implemented a strict sense of the separation of powers as referred to in Montesquieu's *Trias Politica*. In practice, Indonesia has implemented a system of the "distribution" of powers rather than the "separation" of powers, when describing the executive, judicative, and legislative powers and the relations one has to the other, which in turn influenced the shaping of the political organizations in the State of Indonesia. The basic institutional structure of the judicial system remains the same today, but there has been a substantial transformation in the paradigm regarding the judicial independence of the judiciary authority, especially since President Soeharto stepped down in May 1998.

644 Among others, as stipulated in the 1945 Constitution and amended several times, the laws as enacted in 2004 explicitly intended to redefine and reaffirm the conception of judicial independence as prevailed at that time regarding the Supreme Court of Justice and the court system.

645 Peter H. Russell, Towards a General Theory of Judicial Independence, in *Judicial Independence in the Age of Democracy*, ed. Peter H. Russell and David M. O'Brien, University Press of Virginia, 2001. The rationale of judicial independence essentially reflects the judiciary's function in a civil society, where some relations with individuals and with the government are regulated by reasonably well-defined laws setting out mutual rights and duties, and when disputes arise, there would be a mutually acceptable third-party adjudicator to settle disputes. The principle of judicial independence cannot be construed in such a way as to require judges to be totally uninfluenced by anybody whosoever, because it is unrealistic. Judges, collectively and individually, are subject to many influences. There are many undue influences that endanger judicial independence and/or impinge on judicial autonomy, which can be grouped into a number of circumstances under which the judicial independence may be encroached upon. The present Constitution and the regulatory framework concerning the judiciary authority in Indonesia have designed and implemented a suitable platform to exercise "contemporary" judicial independence, and yet there are still many variables that might prejudice the principle of judicial autonomy.

646 As was evident, 1998 was an important milestone in the overall effort to redefine and revitalize the judiciary authority in Indonesia, which led to the establishment of the Constitutional Tribunal in 2003 and the amendments of principal legislations concerning the Supreme Court of Justice and the court system in 1999 and 2004. In 1997, the government was required to revive the Bankruptcy Law under the supervision of the IMF and the World Bank, and at the time it was acknowledged that the problems with the prevailing Bankruptcy Law was merely the tip of the ice berg of the problems the judicial system was facing. *See also* S. Pompe, Understanding the Indonesian Blueprints for Court Reform, *Jurnal Hukum Jentera*, Edisi 15, Tahun IV, January-March 2007 (Pusat Studi Hukum & Kebijakan Indonesia, 2007), pp. 65-68.

647 *Supra* Peter H. Russell, p. 13. Judicial independence is generally viewed as an indispensable feature of liberal democracy, and being also a social value, judicial independence is not only fashioned by the state, but also by the social structure and the social system. Meanwhile, judicial independence determines the depth and the coverage of the judiciary authority at any given time and place. The judiciary authority nowadays is expected to be more independent, both institutionally and in terms of conduct, and at the same time, to be more pro-active in law making undertakings in light of the justice system.

actly the period when the financial system and the national economy had just been rescued from the brink of total collapse. Throughout IBRA's existence, the judiciary authority and the justice system were passing the point of no return into becoming more independent and self-respected.[648] It was also a period of transition for the judiciary, which changed from an executive-driven judicial system to an independent judicial system in terms of judicial and non-judicial matters, under the sole command of the Supreme Court of Justice.

The legal matters relating to IBRA were probably not different from any other legal matters that were being handled by the court. However, it is interesting to discuss the judiciary authority's handling of these legal matters during a period of policy inconsistency and legal uncertainty, and during a period of total reform. It is important to understand the background of what was decided earlier and what and where we are now today, so that we can learn from the experience and prevent repeating the same mistakes in the future. At the time of this study, it was impossible to discuss the court's standpoint on IBRA and the Shareholder Settlement Program in a more systematic and comprehensive manner. Therefore, it is impossible to draw a final and undisputed conclusion at this point in time.

From the institutional viewpoint, it is fair to conclude that the judiciary authority in Indonesia has long been designed, formulated, and operated to be independent in performing its adjudicative functions. It was not until 1999, and followed by the 2004 legislative reform, that the Supreme Court of Justice and the court system *de jure* and *de facto* had become independent, both in terms of adjudicative affairs and in non-judicial matters such as organization, administration, and finance.[649] The judiciary authority would no longer depend on the authority of the executive branch and/or other government agencies, at least concerning these matters. Presumably, the judicial autonomy would also be improved over time. Yet it is not always the case.[650]

In light of the Shareholder Settlement Program as carried out by IBRA, the hypothetical level of judicial independence as indicated before and after the 1999 and 2004 legislative reforms and the actual condition as confronted by the judiciary authority at the aforesaid given time,[651] would in turn influence the court's standpoint on the Program and the many legal matters related to it.

2. The Judicial Personnel

A discussion about judicial personnel should not be confined to the policies and procedures that apply to judges, such as the method of appointment, remuneration, and dismissal, and the promotion and the punishment-reward system for judges, or with contemporary issues such as professional evaluation, training, and continued education. It should also take into account other individuals and groups of people whose lines of work are vital in the operation of the justice system, such as the police, the public prosecutor, lawyers, and others who are parties to the judicial proceedings. In this Study, however, the term "judicial personnel" includes not only judges, but also court clerks and other administrative personnel, but excludes members of the previously

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648 During this period the judges presumably adopted a wait-and-see attitude and to a certain extent there was a kind of administrative stand-still in the justice system and in law enforcement endeavors, and many things came under public scrutiny.

649 Previously, the Ministry of Justice administered and controlled organizational, administrative, and financial matters by. Accordingly, as the Head of Government, the President to a certain extent controlled the Supreme Court and the court system that carried out the function of judicial power. There was a saying at the time that the thought of a judge was administered by the Supreme Court, while the judge's stomach was controlled by the Ministry of Justice. The former structure did not provide the modality for the judiciary authority to be independent or to exercise judicial autonomy.

650 S. Pompe, 'Absen dari Reformasi': The Indonesian judiciary in the face of history, *Indonesian Law and Administration Review*, Vol. 5, No. 1 (Van Vollenhoven Institute, 1999), pp. 73-81. *See also* the Asia Foundation Survey Report, *supra.*

651 Arguably, the period between 1998 and 2004 was a rather difficult moment for the judiciary profession and the judiciary authority. During 1998-2003, especially after President Soeharto stepped down in May 1998 but before the issuance of the legislative mandate for more judicial independence in 2004, the judiciary authority was torn between the emotional demands for ex-President Soeharto and his cronies' punishment at whatever cost, and the need to be impartial and decisive in light of the justice system and the actual influence of former President Soeharto as well as his supporters.

mentioned non-judicial professions.[652] In any case, the civil law tradition in Indonesia has been much influenced by the judiciary and the judicial system.

Traditionally, civil law judges play a substantially more modest role than judges do in the common law tradition. The disparities between the civil law judge and the common law judge are considerable and mainly due to their different judicial traditions.[653] Under the civil law tradition, judges do not make law but only interpret existing law since only legislators create law. Moreover, judges should not interpret incomplete, conflicting, or unclear legislation.[654] In this case, they should refer such questions to the legislature for authoritative interpretation. It was an extreme expression of the dogma of the strict separation of the judicial and the legislative powers.[655]

Of late, judicial authority is expected to be more than the mere mouthpiece of the laws (*bouche de la loi*), but is also to discover laws by means of interpretation and logical construction (*rechtsvinding*), or to invent new laws through its judge made law function (*rechtsschepping*).[656] Generally, Indonesia is considered to have adopted ***a combination*** of the common law and the statute law traditions in recognition of the creation and discovery of law through the judicial system, but with the priority to promote codified laws before the adoption of common unwritten laws.[657] As the role of the judiciary is to adapt law to changing social realities by taking into account the dynamic evolvement of human relationships, there has been a complicated synergy between the legislative and judicial powers in law making affairs.[658]

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652 In all aspects the independence of judges may be threatened by both external and internal forces. The role of the clerks and the administrators is imminent in the management and the completion of the proceedings of a legal case, and yet there have been many complaints and cases of leakages, briberies, and the commercialization of legal cases by these professionals. Things would become more complicated with the existence of seemed-to-be-legitimate foul play among the judges, the court's clerks, and the administrative staff.

653 *See generally* John Henry Merryman, *The Civil Law Tradition: An Introduction to the legal systems of Western Europe and Latin America* (Stanford University Press – Stanford, California, Second Edition, 1984).

654 Conventionally, the function of a judge is a mechanical one as the operator of a machine designed and built by legislators, which makes the function of judicial authority pretty restricted. It is opinioned that systemic legislation is clear, complete, and coherent, thus reducing the function of the judges to merely applying the enacted law to the facts. In other words, judicial decisions are not a source of law, and this is the opposite of the principle of *stare decisis*. The State of Indonesia never officially adopted the doctrine of *stare decisis* but it has been the object of an important discourse among the judiciaries. Thus, even though the highest courts has already decided on a question and has indicated a clear view on its proper resolution, the lowest court in the jurisdiction has the right to decide differently. Although there is no formal rule of *stare decisis*, i.e. no binding precedent rule, the practice is that judges have to consider prior decisions. The absence of the *stare decisis* principle raises concern regarding legal certainty. Legal certainty encompasses certainty on time, procedure, institution, and implementation, and in regard to the judicial decision, also encompasses consistency in judgment. In reality, consistency in judgment does not have to take the form of the obligation on the part of judges to follow prior judicial decisions, either in terms of similarity in circumstances or comparability of facts, but primarily on the legal reasoning as used by the judges to arrive at certain decisions. In a country that is historically and traditionally influenced by the civil law legal system, legal reasoning ought to be primarily established or derived from the interpretation of the relevant legislations, and in certain conditions through the adoption of legal reasoning from prior court decisions and/or by means of the judge-made law function to discover or invent applicable legal norms on the legal facts at hand. The judge may refer to a prior decision because he is impressed by the authority of the prior court, or because he is swayed by its rationale, or maybe because he is too lazy to think of the problem himself, or for a variety of other reasons.

655 In reality, the legislature does not have the exclusive power to make law. The executive enjoys certain law making powers to promulgate executive orders or to enact administrative regulations as duly delegated by prevailing enacted legislation. Likewise, under certain circumstances, the judiciary makes law too.

656 *Infra* Prof. Bagir Manan, p. 3.

657 Ahmad Kamil and M. Fauzan, *The Principle Norms of the Law of Jurisprudence*, (*Prenada Media-Jakarta*, second edition, 2005). The existence of the laws of jurisprudence is based on Article 22 of the *Algemene Bepalingen van Wetgeving voor Indonesia* (A.B.), which by the operation of the Transitional Provision of the prevailing constitution, i.e. the 1945 Constitution as amended several times, is still in force in regard to the duty and the authority of Judges to make new laws or to waive the applicability of prevailing laws. The term "jurisprudence" refers to a judicial decision on unregulated matters, which has become final and binding, and quoted repeatedly by subsequent courts on similar cases. Moreover, the decisions have met the requirement of justice and are to a certain degree explicitly sanctioned by the Supreme Court of Justice.

658 One thing is for certain, the legislature has never been able to construct an all-inclusive set of rules in anticipation of all of the possible legal matters and disputes. Legal relationships, as predisposed by the changes in human relationships cannot be articulated in a static form. Legislations always need interpretation before they can be used or be useful, so judges always need to be creative to some extent when they interpret existing legal rules. Obviously, every judge knows that each of his decisions can be overruled in appeal and cassation. Under normal circumstances, a judge should always try to pass a judgment that will have a high regard for the legal system, survives appeal, and is acceptable to the public. A lower court must consider statutory law, the relevant decisions of the Supreme Court, and other sources of law, including but not limited to relevant social values. This would require a high level of professionalism and integrity of the judges who try the case, interpret the prevailing laws, and render the relevant judgment.

A court decision is the most important consequence in the implementation of the judiciary authority, and therefore ought to be decisive, impartial, and serving public interest. In any case, the judges' knowledge of the law, analytical strength, and sense of circumstance, the aptitude to pay attention, clarity of expression, persuasiveness, and empathy are among the important parameters to operate, maintain, and manage the required level of professionalism. With all these demands to fulfill, it is understandable that judges receive intensive and continuous training. Unlike the aspect of professionalism that can be measured by relatively objective parameters, the integrity of judges is almost always influenced by subjective assessment and affected by many factors beyond the jurisdiction

Meanwhile, two important matters were the source of dissatisfaction relating to judicial personnel, namely **(1)** the quality of judgment and **(2)** the integrity of the judicial personnel.[659] These two issues often converged into one single judgment, and the poor quality of judgment is usually the result of poor quality of knowledge and lack of skills and/or dishonesty of the personnel. The quality of judicial decisions very much depends on the autonomy of judicial personnel. In this regard, the independence of judicial personnel has been determined to a large degree by at least three factors, namely **(1)** security of tenure, **(2)** judicial remuneration, and **(3)** judicial accountability.[660] Moreover, judiciary independence would grow better when there is a strong civil society and there are democracy practices.[661]

In regard to the legal cases related to and the Shareholder Settlement Program the absence of these three important factors certainly would influences the quality of the relevant judicial decisions. Above and beyond, the socio-political conditions at the time were not conducive to generate predictable, accountable, and consistent judicial decisions in light of the prevailing justice system.[662] In other words, it must be presumed that at the time the judicial personnel had yet to contribute optimally to the decision making process to achieve economically desirable

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of the judiciary authority. Hence, it is difficult to measure. Nowadays, significant efforts have been made and progress has been achieved by the Supreme Court to improve the two elements, which will be elaborated later in this section. For the time being, it is important to center the discussion on the actual circumstances surrounding the time and space during which several judgments were delivered by the judiciary concerning certain legal cases involving IBRA and the Shareholder Settlement Program. One thing was certain, IBRA was established to confront and overcome the unprecedented systemic banking crisis that occurred during 1997-2002, and to that end IBRA was given extra-ordinary powers to undertake its tasks and functions. Meanwhile, the judges and the justice system were at the cross roads, both due to the power struggle among the political elite and by the unavailability of a regulatory framework that supported judicial independence. It was not until 2004 that the judiciary authority obtained much greater independence, especially from the executive, which would protect the judiciary authority from non-judiciary unwarranted influences.

As discussed in the previous Chapters, the 1997-1998 financial crises not only succeeded in impairing the financial sector and the banking system at an unprecedented devastating level endangering the national economy, but it also triggered the emergence of a multidimensional crisis in Indonesia. The crisis Indonesia experienced was unquestionably multidimensional in nature because it substantially touched all aspect in the life of the nation and the State. It was a domino effect, in which one crisis had led to another and suddenly the nation and the State were at the brink of total collapse. The demand for total reform in all sectors as exclaimed during the crisis generated a wait-and-see attitude among decision makers and state administrators, because no one was in the position to take any decision that might later be used against him/her. When President Soeharto was forced to step down in mid 1998, the socio-political atmosphere was suddenly filled with intense struggle between those who demanded total reform in all sectors and those who wanted to maintain the status-quo. The most noticeable power struggle was between the executive and the legislative, which led to a series of amendments of the prevailing Constitution, the issuance of new legislations to regulate a new platform for the political life of the nation, and the making of many compromises among existing political powers in the effort to prevent a possible civil war. The judiciary authority was without a doubt also affected by the reform movement, in which the urge to be released from the executive control was getting ever stronger and yet the fear that the judiciary would be out of control was also imminent. However, unlike the executive and the legislative, the reform movement did not contribute significantly to the quality of judicial decisions during the transitional period.

659 Prof. Bagir Manan, *The Honorable Judicial System* (FH UII Press, Yogyakarta-Indonesia, Hj. Ni'matul Huda ed., 2005), p. 17. *See also* S. Pompe (1996), *supra.*

660 The security of tenure as required for judicial independence is not contradictory to mandatory retirement and limited-term appointment, as in the case of Indonesia. What is really essential for judicial independence is that removal should be very difficult and should be based on the objective assessment that the judge is incapable of executing his responsibilities of judicial office. Judicial independence is less at risk at the appointing end if there is a strong system of judicial tenure at the removal end. On the other hand, judicial remuneration is the other point where traditionally there has been concern about judicial independence. The independence of individual judges can be put seriously in peril if the support they receive is so inadequate that they are readily open to corruption or compromising business ventures. By mid 2005, the salary of a Supreme Court's judge in Indonesia was 50 per cent of the salary of a Minister, or much less than 50 per cent than the salary of a president director of an average state-owned enterprise (*Ibid*, Prof. Bagir Manan, p. 24) Meanwhile, the growth of judicial power has been accompanied by demands for new forms of judicial accountability. Corruption, collusion, and nepotism can be best prevented by an unwavering supervisory and reprimand system, and at the same time has to be complemented by a reward and punishment method in the judiciary's career mechanism. In 2004, a Judicial Commission was established to oversee the performance of judges, but unfortunately, it has been disgraced by a recent corruption scandal. *See* Law No. 22 of 2004 concerning The Judicial Commission.

661 Often judges are not as impartial as they are supposed to be because of external or internal political influences and public pressure, as well as to undue influences from the parties to judicial proceedings. Meanwhile, a judge in Indonesia is a civil servant. During the Dutch colonial era, the adjudication of disputes fell increasingly into the hands of public officials who were also learned in the law, but their principal function was clearly understood at the time to be that of applying the ruler's will. To become a judge, a person had to have obtained a university degree in law, to pass the state examination to enter the judiciary, and to have attended the continuing training/education program for judges. A judicial career is one of several possibilities open to a student graduating from a university law school who, before very long, might actually be sitting as a judge somewhere low in the hierarchy of courts. In time, he will rise in the judiciary at a rate dependent on a combination of demonstrated ability and seniority. He will receive salary increases according to a pre-determined timetable and will belong to a special community that enjoys improved salaries, working conditions, and tenure. Although provisions have been made to allow exemptions, such as the appointment of *ad hoc* judges or the appointment of judges to an *ad hoc* court, the great majority of judicial offices, even at the highest level, are filled from within the ranks of the career judiciary.

662 It was certainly a dilemma, because the government needed concrete support from the judiciary for its policy decisions and their implementation in order to confront and overcome the ongoing multidimensional crisis if ever these policies had to be tried, examined, or decided by the judiciary, whilst the judiciary was in the process of becoming truly independent from the executive's control after so many years. In any case, the "one roof policy" of the Indonesian Supreme Court of Justice that comprised of non-judicial and judicial matters was not an entirely new invention, because the independence of judicial matters had been acknowledged and was implemented even before 2004, when the new laws on judiciary authority and the Supreme Court were duly enacted. It was after 1999 (Law No. 35 of 1999) that the Supreme Court and the court system obtained *de jure* independence both in their adjudicative function as well as in non-judicial matters. The non-judicial matters, such as administration, organization, and finance, nevertheless, would be transferred gradually from the executive to the judicative within 5 years after the date of the enactment of the said Law.

judicial decisions.

3. The Court Management

No less important than judicial personnel is the way and the pace the court system needs to be managed. There are at the least three important elements in the management of the court system in Indonesia, namely **(1)** the organizational aspect of the judiciary authority, **(2)** the court administration, and **(3)** the judicial proceeding mechanism.

The **organizational structure** of the judiciary authority reflects the institutional framework related to judicial independence as explained above. In the period since Indonesian independence until 2004, new legislations on judiciary authority and the Supreme Court were enacted, and the prevailing Constitution guaranteed the independence of the judiciary authority as carried out by the Supreme Court of Justice.[663] The "guarantee" of judicial independence for the judiciary authority in Indonesia as contained in the 1945 Constitution is one of the most fundamental forms and/or ways of protecting the very principle. Yet in practice, there is no more independence than in countries that have no such written "guarantee" in their constitutions.[664]

The **court administration** needs to be run by sufficient numbers of employees skilled and knowledgeable, both in regard to judicial and administrative matters, and they have to be supported by office facilities and working conditions that ensure the efficient, effective, and productive execution of their managerial tasks and functions.[665] The weaknesses in the present court administration have generated many problems, and some of them are pretty chronic. Most notably is the pending of thousands of legal cases at the Supreme Court, which has triggered the rampant commercialization of legal cases and deteriorating public confidence in the judicial system.[666] Nevertheless, the pending of legal cases at the Supreme Court is not caused by weaknesses in the court administration alone.[667]

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663 The relevant regulations, the working system, and other matters regarding the way things are to be carried out are not so much different from those before Indonesian independence. Improvement, to say the most, has been limited to the court's organizational framework and to very few legal proceeding matters. As was evident, the simplification of the court system that was launched to eliminate discrimination, which had occurred during the colonial era, has yet to help achieve the reliable, timely, and affordable judicial system as initially intended. The management of the work of the courts and the judges is clearly an area in which the principle of democratic accountability and judicial independence need to be carefully balanced. Judges and courts provide a public service, in which there should be public accountability about the quality of the service that is delivered and how public funds dedicated to it are spent. Until now, the court management in Indonesia has yet to experience any fundamental makeover. *Supra* Prof. Bagir Manan, p. 22.

664 *See generally supra* Peter H. Russell. For example, countries like Israel, New Zealand, the United Kingdom, and Sweden have not constitutionally entrenched judicial independence. *See also* S. Pompe (1996), *supra*. Based on the new laws enacted in 2003 and 2004, the judiciary authority in Indonesia has been carried out by the Supreme Court of Justice and the Constitutional Tribunal. While the Constitutional Tribunal is a stand-alone entity, the Supreme Court is in command of the general court, the religious court, the military court, and the administrative court. The Supreme Court is the highest court of the four court systems and by 2004 was also given the authority on non-judicial matters, such as organization, administration, and finance. As of the writing of this study, the institutional framework of the judiciary authority in Indonesia has provided the nation and the State with the modality to establish, implement, and maintain judicial independence and a justice system suitable for Indonesia.

665 For example, the availability of an information technology system containing prior court decisions and jurisprudence would benefit judges in deciding legal cases of comparable facts, which in turn might prevent the occurrence of the legal uncertainties that are generally associated with a judicial system that has no *stare decisis* principle. Improvement of the judicial resources, namely the judges, the court's clerk, and the people who work in the administration, office facilities, and the working system and environment certainly requires substantial financial support that seems to be unavailable at this point in time. Moreover, the administrative and judicial matters that are carried out by the existing court management have yet to be performed through an integrated mechanism, which disallows for the efficient, effective, and productive functioning of the justice system.

666 As of the end of 2006, the total number of outstanding cases to be resolved by the Supreme Court was 9,681, and 14,366 cases were carried over from 2005. The total number of cases that were submitted in 2006 was 10,460, and the total number of cases resolved in 2006 was 15,245 cases. The above shows that the Supreme Court's backlog has been reduced substantially, which is in line with the Supreme Court's determination to eliminate the backlog in its entirety. *See generally* the 2006 Annual Report of the Supreme Court of the Republic of Indonesia. It should be noted that it was not until 2004 that the Supreme Court began its tradition to announce its annual report directly and openly to the public. Previously, the annual report was only conveyed to the People's Consultative Assembly and Parliament.

667 As discussed in the previous chapter, one of the reasons for the government to introduce the Shareholder Settlement Program as an out-of-court method of dispute resolution was the fact that at that time the judiciary was overloaded by thousands of pending legal cases at the Supreme Court, both in the form of cases for cassation (*cassatie*) and cases for special review (*herziening*). As it turned out, the pending of thousands of legal cases was caused by managerial flaws in the court's administration and due to the fact that the prevailing laws on legal proceeding had no criteria and/or limitation as to what type of legal disputes could be appealed to a higher court. Based on Law No. 5 of 2004 concerning the Amendment to Law No. 14 of 1985 concerning The Supreme Court of Justice, there are now exemptions regarding the legal matters that can be appealed to the Supreme Court. The said exemptions, however, do not include private law legal disputes.

The deteriorating public confidence in the judicial system, particularly in the quality and/or the independence of the lower courts' decisions, also contributed to the strong inclination among the parties to judicial proceedings to always bring the legal disputes up to a higher court and ultimately to the Supreme

The laws on **judicial proceeding** are also responsible for the legal cases that are pending at the Supreme Court, and have been one of the impediments in the implementation of the justice system in Indonesia. For instance, the law on criminal law proceeding has not been implemented as an integrated criminal justice system. The separation of functions between the police and the public prosecutor to undertake pre-trial investigations and prosecutions has generated unnecessary fragmentation between these law enforcement agencies, which in turn has hampered efforts to carry out a dependable criminal justice system. The situation has worsened because of the existence of specialized criminal investigators outside of the police and the public prosecutor, such as in the fields of taxation, forestry, fishery, customs, immigration, and the capital market, which influences the quality of the overall investigations, prosecutions, criminal charges, and relevant court decisions.[668]

The management of the court system should have played an important role in the implementation of the justice system in Indonesia, and yet there is so much to improve in order to achieve a dependable court administration with the capability to provide the public service expected by the people at large. The management of the court system is one of the most important non-legal issues that can either support or hamper the smooth execution of law enforcement undertakings in light of the prevailing justice system. The problems the judicial system in Indonesia faces have long been identified and diagnosed by many, and the present Supreme Court has taken measures to overcome and remedy the problems. This has been part of the efforts to undertake continuing and comprehensive judicial reforms in Indonesia. In this regard, the Supreme Court of Justice has launched an official blueprint in 2003 in its effort to undertake judicial reform in Indonesia.[669]

4. The Judicial Reform: An On-going Discourse

The attempt to overcome the adverse impacts of the acute problems that were entrenched in the judicial system and the judiciary authority became clear in 1970 when the new law concerning the judiciary authority was enacted and promulgated.[670] The law was the most essential milestone in the efforts to reform the judicial system in Indonesia, while at the same time it elucidated, concretized, and defended the principle of the judicial independence of the judiciary authority as had explicitly been bestowed upon the Supreme Court of Justice in the 1945 Constitution. As

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Court, notwithstanding the merit that might be found in the lower court's decision and consideration. The pending of legal cases at the Supreme Court is not a new issue. In other words, the number of legal cases that the Supreme Court could settle has always been lower than the number of cases submitted for cassation to the highest court. Since the 1980s there have been serious efforts to reduce the number of pending cases at the Supreme Court by increasing the number of supreme judges and by introducing a crash program. While able to discontinue the number of pending legal cases temporarily, the crash program created new problems that compromised the quality of the court decisions.

668 Likewise, the condition of the regulations concerning civil law proceeding are no better, because they were scattered among various legislations and regulations that were inherited from the Dutch colonial administration. As a matter of fact, the problem surrounding private law cases is much more acute than that of criminal law cases, because 75 percent of the pending legal cases at the Supreme Court are private law cases. *Supra* Prof. Bagir Manan, p. 52.

It is interesting to note as to why the legislature did not include certain private law cases among the legal matters that cannot be appealed to the Supreme Court. The parties to the judicial proceedings have been disappointed many times with the timing the judgment was delivered and were even more disappointed with the inconsistencies within the judgments.

669 *The Blue Print on The Reform of The Supreme Court of Justice of the Republic of Indonesia,* The Supreme Court of Indonesia in cooperation with the Asia Foundation, United States Agency for International Development (USAID) and the Partnership for Governance Reform in Indonesia, Jakarta, 2003. The Blue Print covers and discusses many issues, namely the Supreme Court's independence, organization, human resources, case management, accountability, transparency and management of information, the supervision, and discipline of judges and chief judges, financial resources and facilities, and the management of reform in the Supreme Court. *See in retrospect* Sebastian Pompe, *Understanding the Indonesian Blueprints for Court Reform* (JENTERA, Edition No. 15, Maret 2007), pp. 59-77.

670 Law No. 14 of 1970 concerning the Principles of the Judiciary Authority. The Law was later amended by Law No. 35 of 1999, which along with the total reform movement that occurred after President Soeharto's resignation in 1998, confirms the authority of the Supreme Court as the sole undertaker of the judiciary authority in Indonesia. During that time, the judiciary authority was only an instrument of the government, i.e. the executive, because the main priority was to promote economic development. The development of non-economic matters, such as socio-political and juridical matters was the second priority towards economic development. As was evident at the time, the approach was surprisingly suitable for Indonesia, particularly in the aftermath of two decades of socio-political turmoil that had only caused suffering among the people and created difficulties for them in acquiring their basic necessities. Even during those times of extreme hardship, the spirit of reform in the judiciary authority never died.

a result, the development of the principle of judicial independence has always reflected the ups-and-downs that occurred in the progress of liberal democracy in Indonesia.

The second most important milestone in the effort to reform the judicial system was launched in 1981 with the enactment of Law No. 8 of 1981 concerning Criminal Law Proceeding. The new legislation, the continuing commitment to reform the judicial system, and the progress afterwards, have been unable to produce the duly expected judicial independence and the judiciary autonomy. It was not until 1999, that the Supreme Court and the court system were finally made independent of other external powers, both in regard to their adjudicative function and in non-judicial matters. Moreover, the year of 2004 *de facto* confirmed the principle of judicial independence, and became one of the milestones in the history of the Indonesian judicial system.

Along the ongoing legislative reforms concerning the Supreme Court and the judiciary authority, many ideas and propositions on how to reform the judicial system were addressed and expressed in many books, articles, reference works, and working papers by many prominent figures, both academics and professionals.[671] In virtually every country, the accepted tradition is to have an independent judiciary authority, which undertakes its adjudicative function impartially in regard to every unresolved legal dispute that arises among the people or between the people and the government, on the basis of an efficient, effective, and productive judicial mechanism and a reliable justice system. There must be common parameters that can be used to measure judicial independence.

As aforementioned, the degree of independence of the judiciary authority can be measures from four angles: structural, personnel, administrative, and the existence of a direct approach. Based on these ideas and propositions, the solutions to the problems surrounding the judiciary authority in Indonesia can be classified into two groups, namely **(1)** the availability of an adequate regulatory framework[672] and **(2)** the capacity of the resources to manage the court system.[673]

a) Do we need A New Paradigm?

Many prominent individuals and institutions have strongly proposed that the adjudicative role of the judiciary authority should be based not only on the technical functionality of adjudication, i.e. to determine what is right or wrong and to decide who wins or loses, but should also be utilized as the acceptable medium to solve problems and legal disputes in a win-win-solution manner. Particularly in civil-law cases, the prevailing laws and regulations seem to encourage judges to provide the conflicting parties with an opportunity to settle their disputes amicably, at any time before the judges deliver their final adjudicative decisions. Many presumed that settling disputes based on agreed common grounds and mutual interests would produce ever-lasting resolutions,

671 They include Prof, Charles Himawan in "Law as the Commander in Chief" (2nd edition, 2006), Prof. Tb. Ronny Rahman Nitibaskara in "Law Enforcement – Law in Use" (2006), Prof, Satjipto Rahardjo in "The Other Sides of Law in Indonesia" (2nd edition, 2006), Alumni Association of the University of Airlangga in *The Law Enforcement in Indonesia* (1st Edition, 2006), Peter H. Russell and David O'Brien in *Judicial Independence in the Age Of Democracy* (1st Edition, 2001), and Prof. Bagir Manan in *The Honorable Judicial System* (1st Edition, 2005), and many other references, books, and articles. Each of them has given his perspective on one or more aspects in the overall effort to reform the judicial system, while some of them repeated each other. However, Prof. Bagir Manan's book is probably the most comprehensive analysis of the judicial system and the judiciary authority in Indonesia to date. His position as the Head of the Supreme of Court makes his ideas and his propositions to reform the judicial system he addressed, elaborated, and discussed in his book and in other books important and closest to any that might become reality.

672 For example, although the 1945 Constitution has been amended from time to time, it guarantees the judicial independence of the judiciary authority as was bestowed upon the Supreme Court of Justice. Moreover, the present regulatory framework has provided the Supreme Court with the groundwork to exercise judicial independence, both in regard to its adjudicative function as well as in non-judicial matters. At least from the institutional viewpoint, the judiciary authority in Indonesia should become more autonomous, now and in the years to come, both institutionally and in terms of conduct.

673 Since 1999, the Supreme Court of Justice had been working very hard to receive the transfer of the responsibility of non-judicial matters regarding the court systems from the executive, i.e. the Ministry of Justice and Human Rights, and at the same time to confront and overcome the chronic problems embedded in the judicial system and in regard to judiciary authority. It has not been an easy task to undertake.

and yet it can only be effective if exercised before the true process of adjudication begins.[674]

The adjudication function of the judiciary authority is commonly elaborated in rules and regulations regarding the mechanism of judicial proceedings, the rights and obligations of the parties to judicial proceedings, the court's verdicts and the procedure for their execution, and the opportunity to appeal and to submit cassation, which on its own, ought to be based on an efficient, effective, productive, clean, impartial, correct, and honest system and ditto mechanism. To build people's confidence in the judicial system and in the judiciary, or rather to repair and regain their confidence, it is important to ensure that the adjudication process and the resulting ultimate judgment be conducted objectively, fairly, transparently, decisively, and accountably. This kind of judicial judgment would provide the expected *win-win solution* to the disputing parties' problems and presumably, none of the disputing parties would feel to be winning or losing.[675]

On the other side of the spectrum, there are always ways to settle disputes between people or between people and the government, without the need to submit the matter to the judiciary authority. These methods of alternative dispute resolution have become more important over the last decades and on numerous occasions have become a better option than the conventional method of dispute resolution. At the same time, the existing judicial and justice system has been unable to establish and maintain the necessary degree of confidence among the public at large about the adjudicative role and the function of the judiciary authority. Actually, the proposition should not only promote a win-win dispute resolution through the adjudicative mechanism of the judicial system, but also should encourage the utilization of alternative dispute resolutions outside of the court system.[676]

So, what should be the meaning of the "new paradigm" in regard to the judiciary authority reform in Indonesia? It is twofold. ***The first part*** is the need to promote the placatory function of the judiciary authority to settle more disputes amicably rather than to adjudicate them, so that people will only go to court if they cannot solve their problems themselves, and with the confidence that the court system will provide them with a *win-win solution*. ***The second part*** is the necessity to utilize many of the out-of-court methods of dispute resolution, so that the court system only needs to function as the *ultimum remedium* for the settlement of disputes, disagree-

674 Adjudication is always about a process or an event to make a judgment or to decide who is right or wrong in an argument between two parties or two groups or more, about something or someone. In reality, once the disputing parties decide to submit the matter with the judiciary rather than to settle the dispute out-of-court, the disputing parties should be aware that somebody or a third party would decide on the matter in question for them and they shall have to accept the decision of this third party whether they like it or not. The result of adjudication seldom generates sincerity between the disputing parties, because it is almost always about winning or losing a quarrel, a standpoint, or a principle, and may also be about the right and/or the obligation to surrendering or conquer something economically precious resulting from the adjudicative decision. This would certainly encourage the disputing parties to the judicial proceedings always to appeal against the decisions, even without legitimate reasoning and causes of action or in-action. This attitude resulted from the inadequacy and the inability of the relevant resources and the infrastructure to provide those seeking justice in an impartial, affordable, and sustainable justice system. For the greater number of people in Indonesia, justice is still an expensive commodity. It has moved forward positively for improvement, though at a slow pace.

675 If the parties to judicial proceedings understand and are convinced of the merit of the consideration of the lower court's decision, it would not be necessary for them to appeal to a higher court. The quality, the authority, and the sustainability of judicial judgment are influenced primarily by the credibility of the judicial personnel, namely the judges, the court's clerks, and the administrative employers, as well as the adequacy of the managerial facilities and resources that are badly needed to keep things in operation. The ongoing improvement of the judicial personnel and the court administration in Indonesia has been an integral part of the effort to reinvent, revitalize, and reform the judicial system and the adjudicative role of the judiciary authority as whole. To obtain the kind of adjudication from the judiciary that would have better served the aspiration of the people and the justice system, a significant overhaul in the way the settlement of disputes is to be carried out and regarding the rights of the parties to judicial proceedings to obtain the commonly acceptable justice, must inevitably be considered, materialized, and enhanced.

676 Some of the alternative dispute resolution methods reflect a more adjudicative character than others, while many of them are more permanent than others. The use of alternative methods has been encouraged more often than resorting to conventional methods. Consequently, the court system should only be treated as "the last resort" in resolving disputes that occur in day-to-day life, because the numbers of legal cases have been exceeding the capacity of the court system and the adjudication function and process would seldom produce permanent resolutions. Out-of-court methods of dispute resolution are relatively more difficult to execute, because there are no standardized proceedings, and the success of the method very much depends on the sincerity of the disputing parties to comply with the agreed process and the final resolution.

The Shareholder Settlement Program as carried out by IBRA, and as sanctioned by the government, as well as encouraged by the Supreme Court, was undoubtedly a very fine example of an out-of-court method of dispute settlement program. The government's decision in 1998-1999 to introduce the Program was triggered by the fact that the judiciary and the justice system were ineffective, unreliable, and far from being simple, timely, and affordable. On the other hand, the policy decision was not in contradiction with the discussions and remarks in regard to the new paradigm, namely to promote the use of alternative dispute resolutions outside of the court system and to effectuate the adjudicative function of the judiciary authority in the provision of win-win solutions to those seeking justice.

ments, and quarrels occurring in daily life. These are two sides of the same coin.[677]

b) The Human Factor

As has been correctly discussed in various places, the human resources are the most important ingredient in the overall effort to undertake a reform of the judicial system and to reinvigorate the public's sense of justice.[678] A country can implement the most sophisticated judicial systems as may be in existence, but the capacity, the integrity, and the leadership of the people who actually promote, operate, maintain, and protect the system and its proceedings represent the determinant factor that influences, shapes, and establishes the authority and effectiveness of the judicial system. The human factor of the judicial system comprises of not only the main judicial personnel, namely the judges, the court's clerks, and the court administration employees, but also other functionaries whose juridical actions and in-actions are determinant in the overall functioning of the justice system.[679]

Besides reforming the capacity of the judicial personnel, in particular their knowledge and skills, and the availability of career security, as well as in their ability to meet sensible basic necessities, there has been a need to improve the supervision of judicial personnel substantially.[680] The Supreme Court and the present structure of the court system allows for the implementation of an internal supervisory system. In addition, there has been an urgent need for an external supervisory mechanism over the judicial system and the judiciary, along with the development of liberal democracy in Indonesia. In 2004,[681] the government and Parliament established the *Judicial Commission,* which was assigned to promote honor, dignity, and respectable conduct among judges, and to propose the appointment of supreme judges to Parliament.[682]

In the juridical context, it would take more than an improvement in the capacity, integrity, and leadership of the judicial personnel to generate more judicial decisions that would

677 The aforesaid premise is relevant mainly to non-criminal legal cases, but the reforms that may be required to materialize and accelerate the utilization of the said paradigm is always relevant for the judicial system in its entirety.

678 As far as the judicial system and the judiciary are concerned, there are four fundamental complications that hamper the materialization of an uncomplicated, timely, and affordable justice system, namely (1) judicial independence, (2) fraudulent conduct, (3) quality of verdict, and (4) legal certainty. There has been a Constitutional guarantee of the judicial independence of the judiciary authority (as was bestowed upon the Supreme Court of Justice) since Indonesian independence. It was only in 1999 and 2004 that the Supreme Court and the judiciary authority obtained its institutional independence. Nevertheless, no one is able to measure the level of behavioral independence of the judicial personnel at present, because the judicial system is still in a dynamic transition. The behavioral independence of the judicial personnel, in particular of the judges, is influenced by the capacity, integrity, and leadership of that personnel, and at the same time is very much related to the frequently fraudulent behavior that allegedly exists among the judicial personnel. This fraudulent behavior can take the form of downright bribery, fixing a verdict, commercialization of legal suits, manipulation of technical-procedural matters, and other types of extortions, which may involve the judges, the court's clerks, and/or other administrative personnel, whether separately or jointly. It is often called "the justice mafia", and it is not limited only to the main judicial personnel as aforesaid, but also involves other important functionaries in the justice system, in particular the parties to judicial proceedings and the lawyers who represent those parties, as well as other possible interested parties. This kind of foul play in the justice system has been long institutionalized and is strongly rooted among the perpetrators and it will certainly not be easy to dismantle the present negative establishment and attitude in a short period.

679 As aforementioned, these are the police, the public prosecutor, the parties to judicial proceedings, and the lawyers who represent the disputing parties. In addition, there are many other individuals and institutions whose mere existence and/or inexistence are influential in the functioning of the justice system, or to make things work efficiently, effectively, and productively. As a rule of thumb, the human factor of the judicial system regarding the judiciary authority must from time to time pass the requirements of certain technical standards and performance criteria, which are very much specialized and are expected to be more than the average standard/performance of similar professions outside the judicial system. The present administration of the Supreme Court of Justice has given more priority to efforts to reform the capacity, the integrity, and the leadership of the judicial personnel, in order to achieve the judicial independence and an efficient, effective, and productive court administration. Nevertheless, the management of the human factor of those within the justice system, but outside of the judicial system, is no less important than the need to reform the judicial personnel.

680 The Supreme Court can improve the technical capacity of the judicial personnel through continuous and progressive education, training, and practicum activities, and it can enhance the integrity of the judicial personnel by means of persuasive and comprehensive enlightening programs of morality, religion, and ethical conduct. However, judges and other judicial personnel are just human beings. They need to be supervised in accordance with their different tasks and functions, in combination with a reward and punishment mechanism that would effect natural selection between bad and good resources.

681 Law No. 22 of 2004 concerning Judicial Commission. The Law was enacted in recognition of the provision in Article 24 B paragraph (4) of the 1945 Constitution, as had been amended for the fourth time.

682 In addition to the *Judicial Commission*, the external supervision system could take many other forms, such as through the ever-growing openness of the mass media, listening to voices of non-governmental organizations interested in law and the judicial system, and many other pressure groups that exert influence on the judiciary, either negatively or positively. The reform in the capacity, integrity, and leadership of the judges in particular and the improvement of the supervisory system and mechanism, would eventually improve the quality of the judiciary in delivering a win-win resolution type of judicial judgment, and over time minimize rampant fraudulent conduct and conveyances of the judicial personnel.

accommodate the expected sense of legal certainty and justice. Let us call it the "ideal judicial decisions". To generate more ideal judicial decisions, there is a need to reform the court management system and also its mechanism, which are very important for the human factor to function efficiently, effectively, and productively. The court management system and its mechanism is an integral part of the judicial supporting infrastructure, which has been undergoing rather piecemeal reform over the last decade and much can be done to perfect the ongoing reform.

c) The Supporting Infrastructure

The judicial system is a type of machinery. The proper functioning of the machinery would produce the desired sense of justice and legal certainty desired by the majority of the people, which is very important in regaining and reinforcing public confidence in the judicial system and/or the judiciary authority. The availability, functionality, and capability of the present supporting infrastructures, namely the rules on legal proceedings, the capacity of the court administration, the operation of obsolete information system technology, the basic requirements of office facilities, and the sensible welfare system for the judicial personnel, have yet to enable the judicial system to operate efficiently, effectively, and productively. We could liquidate the present judicial system and recruit totally new, unspoiled, highly motivated and skillfully capable judges, but without the adequate supporting infrastructures and sufficient resources to operate them, the judicial system would fall victim to the same old unresolved problems.[683]

The 2003 Blue Print on the Reform of the Supreme Court of Justice[684] elaborates several categories of non-judicial matters that the ongoing reform must focus on, one way or the other. These include court administration errands, the management of the court information technology system, the financial resources required for the reform to work and other technical and administrative facilities, as well as the management of the present reform process.[685] One thing is for certain, during a period of transition like at present, strong, visionary, and sincere people have to lead and manage the Supreme Court of Justice. First, as starters, there is a need for adequate and capable support infrastructures. Once the supporting infrastructures are in place, the rest of the story will depend on the capacity, the integrity, and the leadership of the human factor behind the judicial tradition and the justice system.[686]

d) The Relevance

There is actually no direct correlation between the problems confronted by the judiciary and the judicial system in Indonesia, including the ongoing reform that has taken place over the last

683 The pressing old problems the judiciaries confront are *inter alia*, the high number of pending legal cases at the Supreme Court, the gross inconsistency between court decisions on substantially similar legal facts, the existence of the justice mafia and many kind of extortions by judicial personnel, the commercialization of legal cases, the slow regeneration of reliable and honest judges, and many other problems that have hampered the appropriate functioning of justice and the judicial system. Apparently, the supporting infrastructure should not only be dedicated to judicial matters, but also to non-judicial matters such as the administration, finance, and the overall organization.

684 Please see Note 36, *supra*.

685 The need to have an accessible, functional, and capable supporting infrastructure definitely requires a huge amount of funds. The newly independent Supreme Court and the judiciary authority have not be able to provide the needed amount sufficiently and timely. There have been ongoing efforts to strengthen the financial independence of the judiciary authority by the present legislative and executive authorities. From time to time, there has been support from other countries or governments, and multinational or international individuals and institutions, which have encouraged the Supreme Court and the judiciary authority to become financially more independence. Yet, there are many external authorities that seem to question the merit of the financial independence of the judiciary authority, i.e. the Supreme Court, and some of them have been trying to emasculate the execution of the new authority of the Supreme Court to manage its own financial affairs.

686 If one now goes to the premises of the office of the Supreme Court of Justice in Jakarta, one always becomes sad to see the condition of the office facilities of the highest court of the justice system in Indonesia. Nevertheless, one can really sense the dynamic mood in support of the judicial reform among the people, either those who work for the institution or those who do not. The Supreme Court and the judiciary authority are on the move, following the same direction of the motion and the pace of liberal democracy that has gained its momentum during the last decade and has brought tremendous fine-tuning into the socio-political life of the nation.

decade, and the Shareholder Settlement Program as the main topic of this study. Nevertheless, due to the fact that there are a number of judicial decisions related to IBRA's tasks and functions, including those of the Shareholder Settlement Program, it is crucial for this study to analyse the available judicial decisions in order to understand the multifaceted reasoning behind these decisions, and if necessary to question the reasoning of the said verdicts and to envisage the possible outcome[687] of a number of ongoing and unresolved legal proceedings and/or newly submitted legal actions in the near future.

It should be outlined that some of the existing judicial decisions that have been studied are related to juridical cases that were submitted and/or decided in the period during which the Supreme Court and the judiciary authority were experiencing a major overhaul in regard to their independence, and the socio-political atmosphere that was also in significant transformation along with the demand for total reform in all sectors. Some of the decisions on certain legal matters are final and binding, while others are primarily unresolved. These unresolved legal matters may be due to incomplete judicial proceedings, or the present judicial decisions are just not final and binding, and the relevant legal matters have not yet been resolved.[688]

To focus the discussion on the interaction between the Shareholder Settlement Program and the judiciary-judicial system, this study only needs to review the existing relevant judicial decisions and to assess the possible outcome of certain unresolved legal cases. The discussion about the judicial decisions as studied will focus on legal matters concerning **(1)** the legitimacy of IBRA and the Shareholder Settlement Program, and **(2)** the court's standpoint on the enforceability of the settlement agreements as signed by IBRA and the IBRA banks' shareholders. In addition, many other judicial decisions have also been studied concerning the court's standpoint on many other matters related to IBRA's tasks and functions beyond the Shareholder Settlement Program. The material about this group of judicial decisions is provided in an **Appendix** to this manuscript.

From an economic analysis of law it must be presumed that the policy decision regarding the **out-of-court method of dispute resolution** as embedded in the Shareholder Settlement Program was a legitimate juridical act and economically desirable. Therefore, any judicial decision contrary to the said premise would be considered economically undesirable. Likewise, the **contract enforceability** of the settlement agreements would promote efficiency in the overall legal undertaking, provided there is policy consistency and legal certainty. Any judicial decisions that promote inconsistency and uncertainty will be considered inefficient. (Could we agree on the logic?) As previously indicated, the study of the Shareholder Settlement Program is an ongoing event, and this dissertation is just the beginning of such a study and there are one or two parts of this study on which this dissertation is unable to draw a final and binding conclusion.

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687 There are many good books and articles about the possibility to predict the decision making process and the outcome of judicial decisions, and in some cases they even have built a mechanism to do the calculation in the forecasting. *See generally* The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decision-making, Essay by Theodore W. Ruger and Kevin M. Quinn et al., *Columbia Law Review* vol. 104:1150. *See also* Benjamin N. Cardozo, *The Nature of the Judicial Process*, Yale University Press, 1921, Ronald Dworkin, *Law's Empire*, The Belknap Press of Harvard University Press-1986, Alan M. Dershowitz, *The Genesis of Justice*, Warner Books Inc. 2001, Michael Doherty, *Jurisprudence: The Philosophy of Law*, Old Bailey Press, 2003, and John J. Bonsigno et al., *Before The Law: An Introduction to the Legal Process*, Houghton Mifflin Company, 1998.

688 These unresolved legal matters will, one way or another, be resolved in the future. No matter what the future will be, the existing judicial decisions have become juridical facts and may or may not affect the judiciary's future standpoint on the unresolved legal matters. Indonesia's legal system does not officially adopt the principle of *stare decisis*, and it is the official stance that the present judges are not bound by prior court decisions even on similar or identical legal facts.

This being so, consistency of judicial judgment is of the utmost importance to establish, preserve, and enhance legal certainty in the legal system, especially in the case of clear questions regarding the applicable laws and of the similarity and/or identically of the legal facts. There must be consistency of legal reasoning between similar and/or identical legal matters, and yet the judges are expected to be inventive and innovative in their legal reasoning in regard to the legal matters they adjudicate. For Indonesia, consistency of legal reasoning as used, quoted, referred to, and/or analogized in systemized judicial judgments is more important than the principle of *stare decisis*, namely to achieve the ideal condition of legal certainty in the legal tradition and to enhance public confidence in the legal system.

B. THE CONSTRUCTIVE SIGNAL

1. Legitimacy of A Policy Decision

As was clearly pronounced in the earliest part of this Chapter, the Shareholder Settlement Program was *de facto* a government policy decision and implementation, and was also part of the overall strategy to confront and overcome the banking crisis that had occurred during 1997-1999.[689] As part of the overall strategy to confront the crisis and to overcome its impact, the government established the Indonesia Bank Restructuring Agency ("IBRA") in order to revitalize the banking system and to resolve failing banks and banks' bad assets.[690] The establishment of IBRA was a strategic government policy decision, and it had been under attack ever since its inception. The attacks against IBRA did not so much concern its existence and its relevance within the overall endeavor to confront and overcome the ongoing crisis, but primarily concerned the powers that were bestowed upon the Agency and the probability of power abuse by the people who worked for or were in control of the Agency.[691]

All legal actions that were brought against IBRA's powers and IBRA's use of these powers were comparatively important, but the legal action initiated against the legitimacy of the enacted legislations that regulated IBRA's powers and its use of such powers, were arguably unwarranted. In this regard, the study puts particular importance on **"Supreme Court Decision No. 01/P/HUM/1999"**, dated December 1, 1999, concerning the refusal of a request to undertake judicial review against the Government Regulation No. 17 of 1999 regarding the Indonesia Bank Restructuring Agency/IBRA ("PP-17").[692] This judicial decision is particularly important for two reasons. *First*, it concerned the most important piece of legislation to support IBRA in the effort to confront and overcome the banking crises in 1997-1998, and *second*, it declared the court's standpoint to refuse the request that was not based on the actual conditions that had necessitated the establishment of IBRA and its super powers.[693]

Beside the aforesaid judicial decision, this study is also particularly interested in **"Supreme Court Decision No. 03 G/HUM/2003"**, dated May 3, 2006, concerning the adjudication of a request to undertake a judicial review against Presidential Instruction No. 8 of 2002 ("INPRES No. 8") submitted by the Indonesia Legal-Aid Foundation in 2003. As explained above, the Presidential Instruction was the most important expression by the government to support the

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689 As explained, the said financial crisis was apparently unprecedented and eventually became multidimensional in nature, endangering the sustainability of the economies of many hard-affected countries. Indonesia was one of the most affected countries suffering severely from the crisis. Even today, Indonesia has not fully recovered from the hardships experienced by the economic crisis. When the crisis was at its peak in 1997-1999, the administration was faced with multifaceted tribulations that had to be resolved immediately, but the administration only had a limited list of choices

690 It was coupled with the implementation of the government blanket guarantee, and the provision of semi-governmental facilities for private debt restructuring initiatives.

691 As explained earlier, the powers bestowed upon IBRA were instigated by the fact that the existing institutional infrastructure was too ill equipped to handle the multifaceted crisis and, as it turned out, there was no best way to overcome the actual problems efficiently, effectively, and productively. In other words, the powers that were bestowed upon IBRA were inescapable, but were unfortunately in the early days not executed as systematically, openly, and effectively as they should have been.

Until now, there has been much resistance against IBRA's powers. Most resistance was related to various vested interests that might be undermined and/or disturbed if IBRA exercised its powers. The resistance could be felt and/or materialized in many different ways including in the form of political, socio-political, economic, administrative, and/or juridical undertakings and/or events. Much of the resistance would eventually end up in legal action brought against IBRA by constituents whose interests were affected by the execution of IBRA's tasks and functions, in which IBRA was always the defending party. As was evident, the legal actions against IBRA were carried out either individually, for example by individual IBRA banks' debtors, or collectively by a number of people representing a particular interest in society. Moreover, the legal actions were taken against IBRA's individual actions and against the legal grounds by which the IBRA's powers had come into existence and became enforceable.

692 The request was submitted by the Central Governance Council of the Indonesian Advocate Association, based on the argument that certain provisions in PP-17 were not in accordance with the prevailing higher-ranked legislations and/or were against the provisions as stipulated in higher-ranked legislation, and therefore it must be revoked and declared unbinding.

693 Any attempt to emasculate the legal ground for IBRA to exercise its powers would mean to allow the operation and the authority of a different bureaucratic instrument with a most important task but without the appropriate tools to remedy the shortcomings of the prevailing infrastructure, let alone to overcome the problems confronted at the time.

Shareholder Settlement Program that was carried out by IBRA, in which the cooperative obligors would be provided with a warranty of legal certainty and the non-cooperative obligors would be handled decisively and concretely by the relevant law enforcement agencies.[694]

When questions were asked about the inescapable policy decisions, such as the need to have IBRA and/or to implement the Shareholder Settlement Program, it was like questioning the legitimacy of the government/administration to execute its policy decision and its implementation. A legitimate policy decision would be difficult to undermine, let alone to rescind, and when all of the common denominations have been technically exhausted, the judiciary would be the last resort to provide the necessary answer.[695] In that case, the questions would have remained the same: What was the judiciary's degree of independence when adjudicating two of the most important policy decisions the government had taken to meet the multidimensional crisis: namely PP-17 and Presidential Instruction No. 8 of 2002? And: Whether or not the answers to the inquiry would influence the quality of such judicial decisions?

2. The Validity of "PP-17"

The request to undertake a judicial review of PP-17 was submitted on August 5, 1999, and was registered by August 31, 1999. The request was filed by the Central Governance Council of the Indonesian Advocate Association ("AAI"), based on the supposition that PP-17 was unconstitutional and it was petitioned that PP-17's application had to be limited and should have no legally binding authority. Neither disputing the government decision to establish IBRA nor complaining about IBRA's role, task, and function as agent of economic recovery, the request made detailed claims that PP-17 contained provisions that were not in accordance with or were even against the 1945 Constitution, higher-ranked legislations, and vital legal traditions.[696]

According to the request, IBRA's juridical undertakings and extra-judicial authority were against Article 24 of the 1945 Constitution, which states that judiciary authority is bestowed only upon the Supreme Court of Justice or any other institutions as clearly sanctioned and regulated by an enacted law. It was also alleged to be against Law No. 14 of 1970 concerning The Principles of Judiciary Authority, which was the implementing regulation of the Article 24 of the 1945 Constitution and contained the specific provision (Article 40) that declared to be unlawful any other legislations that regulated the judiciary authority in contravention of the said Law. It overlapped with the prevailing tax regulation, in which the tax apparatus could also exercise particular semi-judiciary authority over the same object. It also disregarded the existence of rules and regulations that regulate one or more issues relating to the handling of commercial indebtedness, debt payment and repayment, debt disputes, and collateral execution as carried out by the judiciary authority and through the judicial system.[697]

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694 The request for judicial review was based on the argument that President Megawati had acted beyond her constitutional authority and that the provisions that were stipulated in the Presidential Instruction were not in accordance with higher-ranked legislations or other, higher laws. The said judicial decision was important because it clarified the ongoing misconceptions surrounding IBRA's implementation and completion of the Shareholder Settlement Program and it was also helpful to prevent the judiciary authority from interfering too much into executive affairs. Unlike other Supreme Court Decision(s), the discussion and the study of this particular Supreme Court Decision will reveal the ongoing struggle in the effort to determine the distinction between legal and non-legal matters, juridical and non-juridical issues, and to elaborate the methods that were actually being used in the handling of the matters in question.

695 The judiciary and the judicial system were expected to produce a win-win solution for the parties to judicial proceedings, which would hopefully prevent the occurrence of unwarranted evasive legal proceedings. While on the other hand, the judiciary would be one way or the other influenced by the surrounding happenings, including socio-political events, because the judiciary did not live in a vacuum atmosphere

696 PP-17 was alleged to be unconstitutional because it took over the authority/task that under normal circumstances could only be executed the judiciary and through the judicial system. Apparently, IBRA was representing the government based on PP-17, and was carrying out extra-judicial authority. Therefore, PP-17 had to be declared against or not in accordance with prevailing higher ranked legislations in Indonesia, and therefore had to be immediately revoked.

697 In the effort to collect the State's receivables as generated from the IBRA banks' non-performing loans, based on PP-17, IBRA could issue a warrant demanding the repayment of indebtedness from the debtors, which was executorial in nature and approached the level of a final and legally binding court decision. IBRA could unilaterally declare null and void a contract between IBRA banks and debtors/third parties, which undermined IBRA and the government's interest, which was like exercising the power of the judiciary (*Auctio Paulina*). IBRA could enter private property, land and/or buildings, which were collateral of certain

In its decision of December 1, 1999, the Supreme Court of Justice referred to and used a great number of principles and arguments in its elaboration of the legal reasoning behind its decision to refuse the request to undertake judicial review as submitted by AAI. They can be summarized as follows:

1). The authority to undertake judicial review is vested with the Supreme Court, as reaffirmed by Law No. 14 of 1970, and Law No. 14 of 1985, where the implementation of such authority must be based on the principle of **reasonableness** and cannot be construed as interference by the judiciary into the legislative sovereignty or with the executive authority, which might be executing juridical powers based on certain delegated legislations;

2). In determining whether a piece of legislation was not in accordance with or against higher-ranked legislations, or otherwise unconstitutional, the mechanism to undertake judicial review should be carried out on the basis of the principle of *lex superior derogat legis inferiori*, while diligently taking into account the main objective behind the enactment of PP-17;

3). The Court accepted the fact that it was **inevitable** to provide IBRA with such a huge amount of power, including certain extra-judicial powers even if those powers would have violated higher-ranked legislations or provisions in higher-ranked legislation, because it was reasoned to have been on the basis of an **emergency condition** and **occasional demand** triggered by the need to overcome the shortcomings in the prevailing institutional infrastructure and the unprecedented nature of the crisis confronted;

4). If determined unconstitutional, PP-17 would become null and void, and the minimum parameter is to prove that the said legislation was against *fundamental laws* or *natural justice*. PP-17 would be unconstitutional, if the application of PP-17 would have undermined the civil rights of a person, violated the civil liberty of a person or a society, infringed on the principle of legality, violated the principles of democracy and egalitarianism, and contained discriminatory treatment;

5). Besides refusing the request to undertake judicial review against PP-17, the Supreme Court went further to advice the government to upgrade PP-17 to a higher-ranked form of legislation in order to prevent the occurrence of similar polemics and resistance.

Concisely, while accepting the fact that it was inescapable for the government to enact PP-17, Supreme Court Decision No. 01.P/HUM/1999 strongly suggested that the government replace or reformulate PP-17 into a form of higher-ranked legislation. In reality, PP-17 remained in force until IBRA's dissolution became effective in April 2004. By then it had been amended several times and was never replaced by any other higher-ranked legislation.[698]

3. The Validity of "INPRES No. 8"

Even after the Supreme Court delivered its decision concerning PP-17's validity in 1999, it did not stop the occurrence of impediments IBRA had to confront in light of the efficient, effective, and productive implementation of IBRA's tasks and functions as stipulated in PP-17. The Shareholder Settlement Program was one of the most important programs in the handling of the IBRA banks' bad assets, in which the out-of-court method of settlement was used as the main groundwork for IBRA, the IBRA banks, and the controlling shareholders of the IBRA banks in

State's receivables, and to evict inhabitants from seized premises and thus could act just as if it executed a court decision.

698 The Supreme Court gave this advice without substantive legal reasoning, except maybe the technical argument that judicial review should not be limited to the handling of a request submitted by any citizen or the possible invalidation of certain legislation under review. It was meant to be advisory. However, it was the advice of the highest court in Indonesia, which one way or another would have legal ramifications and would be important especially for lower court judicial personnel. Would the advice undermine the Supreme Court's decision to reject the request to undertake judicial review against PP-17, which in other words preserved the enforceability of PP-17? It was valid legislation in light of the emergency condition and the occasional demand, but would it still be valid in light of the said Supreme Court's advice? Would it remain as a positive law, and not reduced to a mere reference in law?

settling their obligations.[699]

In light of the impediments IBRA confronted, President Megawati issued Presidential Instruction No. 8 of 2002 ("INPRES No. 8")[700] to reaffirm the government's support for IBRA and regarding the need to have policy consistency and legal certainty in the implementation and the completion of the Shareholder Settlement Program. The request to undertake judicial review against INPRES No. 8 was submitted with the Supreme Court of Justice on February 23, 2003 by the Indonesia Legal-Aid Foundation, and was registered on February 26, 2003. The Supreme Court denied the request as submitted by the Foundation on May 3, 2006, in **Supreme Court Decision No. 03 G/HUM/2003**.

The request to undertake judicial review against INPRES No. 8, elaborated the regulatory framework and the background behind the submission of the request, as well as the relevant reasoning, which can be summarized as follows:

1). Based on prevailing laws and regulations, the Supreme Court was authorized to undertake judicial review on any type of legislation below that of an Act, in response to such a request. It was claimed in the request that INPRES No. 8 must be determined invalid, legally defective, and by law was null and void;
2). INPRES No. 8 was legally defective due to the manipulation of the legal facts thus allegedly giving the impression that the relevant legal ground had occurred prior to the actual lawful act, whereas it was mistaken and therefore against the principle of legality (*rechtmatigheid*);
3). INPRES No. 8 contained provisions that violated the 1945 Constitution, the legal provisions concerning certain power of the executive branch to decriminalize offences and/or to waive criminal charges, and the legal provisions regarding corruption, collusion, and nepotism, as well contravening the relevant criminal law proceedings;
4). INPRES No. 8 was not in accordance with the 1945 Constitution, particularly in regard to the principle of equality before the law, because it differentiated between cooperative and non-cooperative obligors with different legal consequences, also regarding Article of 14 of the Constitution concerning the judicial power of the President to grant *gratie*, rehabilitation, amnesty, and/or abolition;
5). INPRES No. 8 was against the Decision of the People's Consultative Assembly, the enacted laws, and the implementing regulations concerning the elimination of corruption, collusion, and nepotism. The waiver of the criminality of an action must be done according to criminal law proceedings, and therefore INPRES No. 8 was also not in accordance with Law No. 8 of 1981 on Criminal Law Proceedings.

Unlike Supreme Court Decision No. 01.P/HUM/1999 concerning the refusal to undertake judicial review against PP-17 that was not only very elaborate but also inventive, this Supreme Court Decision was much more straightforward and actually reflected the hesitation among the judiciary to interfere too much in non-judicial affairs. The Supreme Court was of the opinion that the formality and the legal standing regarding the submission of the request by the Indonesia Legal-Aid Foundation had been satisfied, but it refused to honor the request to undertake judicial review against INPRES No. 8. The Supreme Court was of the opinion that the President has the authority to determine and execute the policy decisions (*beleidsregels*), which were relevant with the compliance level of obligors (IBRA banks' shareholders) to complete their

699 The utmost legal ramifications of the shareholder settlement arrangement between IBRA and the IBRA banks' shareholders would be the government's provision of warranty of legal certainty to the cooperative obligors who signed the settlement agreements and completed their contractual obligations, and to take decisive and concrete legal actions against uncooperative obligors.

700 Presidential Instruction No. 8 of 2002, dated December 30, 2003, concerning The Warranty of Legal Certainty for a Debtor Who Has Fulfilled the Obligation or Legal Action Against a Debtor Who Fails to Perform the Obligation as stipulated in the Shareholder Settlement Agreements.

contractual obligations under the Shareholder Settlement Program as carried out by IBRA.[701]

4. In Summary

Based on the above assessment, the Supreme Court of Justice seemed to support the government policy decisions in an effort to confront and overcome the multidimensional crisis that occurred during 1997-1999, among others to establish IBRA and to carry out the Shareholder Settlement Program. Further, the judiciary was of the opinion that PP-17 and INPRES No. 8 were valid and legally binding legislations.[702] Both Supreme Court Decisions are the most important judicial standpoints to date regarding the need for having IBRA as part of the solution and not of the problem, and in regard to the implementation and the completion of the Shareholder Settlement Program as was carried out by IBRA.

For the present and the future, Supreme Court Decision No. 03 G/HUM/2003, dated May 3, 2006 concerning the validity of INPRES No. 8, is much more relevant to discuss.[703] The inquiries about the validity of INPRES No. 8 were not only based on juridical-legal reasoning, where it was alleged that it contained provisions that were against higher-ranked legislations, but were also influenced by the socio-political climate at the time. If INPRES No. 8 were determined to be unconstitutional by the Supreme Court, in which case it had to be revoked, it would have generated anxiety as to whether the relevant policy decision, and other decisions, were also unconstitutional and that the government itself was therefore untrustworthy. This would provide a strong reason to initiate constitutional proceedings for impeachment. All of these, however, are just hypothetical. The real perception of the Supreme Court was that the issuance of INPRES No. 8 by President Megawati was a non-judicial matter and the judiciary's standpoint regarding its validity was hence undefined, or otherwise it would not prevent the occurrence of non-judicial inquiries or action in the future against INPRES No. 8's validity.[704]

Based on the said Supreme Court Decisions, the study draws the following preliminary conclusions regarding the judiciary's standpoint on the matters in question, as follows:

1). The Supreme Court has been unwilling to question the validity of the policy decision as formulated and executed by the executive and/or the legislative authority for non-judicial matters, let alone to nullify the said policy decision;
2). If thought indispensable, the Supreme Court would have been more than willing to elaborate the legal reasoning behind its decision to refuse a request to undertake judicial review, such as in the case of PP-17;
3). The Supreme Court acknowledged the actual conditions behind the establishment of IBRA and relating to the implementation of the Shareholder Settlement Program as *notoire feiten*, and seemed to have no objection against the policy decision as adopted to confront and over-

701 As an executive policy decision (*beleidsregel*), INPRES No. 8 could not be the subject of judicial review by the Supreme Court of Justice. Nevertheless, the court had given no opinion regarding the allegation that INPRES No. 8 was against higher-ranked legislations and/or certain provision in higher-ranked legislations, and therefore had no opinion regarding the demand to declare INPRES No. 8 null and void and legally unbinding. Would this mean that INPRES No. 8 was still in force concerning the relevant issues? Technically speaking, the Supreme Court Decision preserved the legality of INPRES No. 8 and defended the relevant policy decision and its implementation as embedded in the said legal document.

702 In regard to PP-17, the court's standpoint was clear. PP-17 had no choice but to bestow extra-judicial power upon IBRA because of the emergency and the occasional demands triggered by the banking systemic crisis. And PP-17 was far from unconstitutional, because it did not contain provisions and/or the spirit that were against fundamental laws or natural justice. In regard to INPRES No. 8, the court's standpoint was crystal clear as well. The Shareholder Settlement Program was deemed to be a valid and legally binding government undertaking, and any policy decision and its implementation related to the Program was supposed to be justified as valid and legally binding. The Program was inescapable in light of the government's overall effort to confront and overcome the unprecedented financial crisis. One thing was sure, the Program was an exception to the normal condition.

703 The other Supreme Court Decision, concerning the validity of PP-17, is no longer an issue, because IBRA is terminated and the reasoning of "emergency and occasional demand" is no longer in existence. However, the validity of PP-17 would still be relevant in light of any discussion regarding the other Supreme Court Decision.

704 Since 2008, the policy decision embedded in INPRES No. 8 is now on the test. Parliament is exercising its constitutional authority of interpellation towards President Susilo Bambang Yudhoyono in regard to the government's handling of BLBI-related legal cases and in light of the relevant policy decision that was decided and executed by President Megawati regarding the warranty of legal certainty as pronounced in INPRES No. 8.

come the said unfavorable conditions;

4). The Supreme Court was of the opinion that PP-17 did contain certain provisions that were not in accordance with or against higher-ranked legislations and/or provisions in higher-ranked legislations, but the extra judicial powers as bestowed upon IBRA were inevitable in light of the emergency and occasional demand triggered by the unprecedented multidimensional crisis;[705]

5). INPRES No. 8 was a *beleidsregel*, and therefore it was not subject to judicial review by the Supreme Court. Accordingly, the judiciary has no official standpoint regarding the validity of INPRES No. 8 and in regard to the policy decision behind its issuance.[706]

All the same, the judiciary authority's standpoint regarding the validity of PP-17 and INPRES No. 8, and hence in regard to the policy decision and the implementation of the Shareholder Settlement Program as carried out by IBRA, has been relatively constructive. Nevertheless, the judiciary standpoint will remain in the pre-determined jurisdiction of the judiciary authority, and has merely become a point of reference for the executive and/or legislative in formulating and executing certain policy decisions, as long as they are not unconstitutional. There are many non-judicial measures to deny or to undermine the validity and the authority of PP-17 and INPRES No. 8, but these measures always have to be constitutional and based on procedural due process.

Apart from the peculiar advice, the Supreme Court's decision to refuse the request for judicial review and to revoke PP-17 was arguably economically desirable, because IBRA's establishment in 1998, its *ad hoc* institution, and its powers as regulated by PP-17 was a considerably better allocation of resources to maximize efficiency in the effort to confront and overcome the systemic banking crisis and the economic downturn. Likewise, the Supreme Court Decision to reject to undertake judicial review against Presidential Instruction No. 8 of 2002 was also economically desirable, because the policy consistency and legal certainty it promoted would maximize efficiency in the inception, the implementation, and the completion of the Shareholder Settlement Program. As stated above, policy inconsistency and legal uncertainty had been sources of impediment in regard to the contract enforceability of the shareholder settlement agreements as signed by IBRA and the IBRA banks' shareholders.

C. THE EMPIRICAL IMPRECISION

1. The Out-of-Court Anomaly

As has been discussed above, the Shareholder Settlement Program that was carried out by IBRA was predominantly designed to overcome the technical-procedural difficulties and the *win-lose* nature that normally characterize the conventional court system in regard to the settlement of legal disputes. Basically, IBRA and the controlling shareholders of the IBRA banks agreed to adhere to the terms and the conditions as stipulated in the settlement agreements, and they would only take recourse to the judiciary if the contractual approach failed to accomplish the agreed

705 From the judiciary authority point of view, it would be hardly the case that the judiciary delivered a new standpoint regarding PP-17 and INPRES No. 8's validity that was not consistent with the aforesaid Supreme Court Decisions. At least, it would not be in the very near future. Confusion may be induced from the Supreme Court's conflicting thoughts regarding PP-17's validity, in which the Supreme Court accepted the reasoning behind the enactment of PP-17 and simultaneously advised the government to replace PP-17 with a higher-ranked type of legislation. Yet, it would be almost impossible at present for anyone to argue about PP-17's validity and then to bring the matter to the judiciary.

706 Regarding INPRES No. 8, the court's standpoint as reflected in Supreme Court Decision No. 03 G/HUM/2003, dated May 3, 2006, was pretty much straightforward. The Supreme Court was of the opinion that INPRES No. 8 and the policy behind its issuance was not a judicial matter and it was therefore irrelevant to discuss it in much detail from the juridical point of view. Could we discuss INPRES No. 8 and the relevant policy decision from the non-juridical point of view of whether or not the conclusion would have helped regain and increase the public confidence in the legal system and tradition? In principle, the Supreme Court is of the opinion that INPRES No. 8 was not unconstitutional.

consensus and/or to overcome any problems that might be confronted.[707] From the conceptual viewpoint, the out-of-court characteristic of the Shareholder Settlement Program was an important alternative for the settlement of the disputes between IBRA and the obligors. This was based on the principle of a *win-win solution* in which IBRA and each of the obligors would have control over the pace, the shape, and the end-result of the settlement arrangements.

Naturally, the out-of-court method of dispute resolution as embedded in the Shareholder Settlement Program was sensitive and susceptible to a number of variables and therefore became fragile. Any incompliance and/or unfaithfulness by either of the contracting parties in regard to the agreed terms and conditions would easily have destroyed the trust between the contracting parties. If the trust between the contracting parties were destroyed, it would have been more costly to mitigate the resulting damages or to re-build the trust. It is the anomaly of the out-of-court method of dispute settlement, which was accurately epitomized in the implementation and the completion of the Program by IBRA during its official term. It was an anomaly to accept the fact that the out-of-court settlement that was agreed upon might have ended up in a court proceeding, although it was not impossible.

The government's initiative during 1999-2001 to revise unilaterally the basic contractual terms and conditions that had been agreed upon by IBRA and the IBRA banks' controlling shareholders in the MSAA, as well as the uncoordinated law enforcement undertakings that were brought against various IBRA banks' shareholders who had signed settlement agreements with IBRA, resulted in policy inconsistency and legal uncertainty pertaining to the Shareholder Settlement Program. This caused the obligors to distrust the government about the merit, the implementation, and the completion of the Program. As a result, the obligors stopped fulfilling their contractual obligations and the government ended up obtaining nothing in return. The disputes between the contracting parties remained unresolved and turned into a vicious circle that was even harder to tackle, let alone to end. Otherwise, the out-of-court method would have resolved the ongoing disputes amicably and perpetually.

As is previously indicated, the ups and downs regarding the implementation and the completion of the Shareholder Settlement Program were almost always triggered by forces from within the government itself. The government was far from solid in regard to the policy decision and its implementation related to the Shareholder Settlement Program. Seven different Chairmen of IBRA, 6 different Ministers of Finance and 1 Minister of State-Owned Enterprise as well as 5 different Coordinating Ministers for Economy each had brought with them different colors in the management of the Program. The government's standpoint regarding the Shareholder Settlement Program was much influenced by the dynamic forces that blossomed during the euphoric socio-political atmosphere especially after the 1999 general election and before at end of 1998. Nevertheless, it was difficult to distinguish the legitimate concern for the greater good from the short-lived promises that were usually aimed at fulfilling specific hidden political agendas.

After President Soeharto's fall in mid 1998, the executive and the legislative authorities experienced the most dramatic transformation in light of the platform, belief, attitude, and paradigm concerned with the development and the impact of liberal democracy in Indonesia. During this period, there was also a lack of strong leadership to manage the excesses that resulted from the newly accepted socio-political constellation. The introduction of a multiparty political system in Indonesia in 1999 had generated a more open and self-centered government, but resulted in a massive flow of influences and interests exerted on many government affairs including toward IBRA and the Shareholder Settlement Program The socio-political climate had affected the way and the pace IBRA carried out the Program because IBRA and its chairman were mistakenly considered to be political appointees. As had been elaborated in-depth in the previous Chapters, dur-

707 *See in particular* Richard A. Posner, *Economic Analysis of Law* (Little, Brown and Company, 3rd ed., 1986), pp. 529-532.

ing 1999-2000 and in early 2002, the Shareholder Settlement Program was in its darkest period.

On several occasions, the vicissitudes of the Shareholder Settlement Program were initiated, facilitated, or encouraged by the newly elected members of the new parliamentary system, whether individually or collectively. As clear as it was also unfortunate, the weaker the government compared to Parliament,[708] the more inconsistent and uncertain the implementation and the completion of the Program would be. That would have been true if the new administration and the potential new policies would have disregarded the relevant policy decisions and their implementations the previous administration had sanctioned and legitimately carried out, or on the other hand would undermine the contractual terms and conditions as lawfully agreed upon by IBRA and the controlling shareholders of the IBRA banks as stipulated in the settlement agreements.[709]

President Megawati and her cabinet's decision of March 7, 2002, to inflict the settlement agreements as signed by IBRA and each of the obligors "as is", and the issuance of Presidential Instruction No. 8 of 2002 on December 31, 2002, were predominantly intended to end the policy inconsistencies and legal uncertainties surrounding the inception, the implementation, and the completion of the Shareholder Settlement Program. The President was convinced and affirmed to continue the out-of-court method of dispute settlement of the Program that was introduced by President Habibie and advanced by President Gus Dur. To make it work, the President ultimately decided to reassure the warranty of legal certainty for cooperative obligors and to undertake legal action against non-cooperative obligors, as stipulated in INPRES No. 8.[710]

There are no valid records that show that the judiciary was implicated in the policy inconsistencies and legal uncertainties in the implementation and the completion of the Shareholder Settlement Program. The Study found that the judicial proceedings were more the outcome of these inconsistencies and uncertainties, rather than their origin. After Supreme Court Decision No. 03 G/HUM/2003, dated May 3, 2006 concerning the validity of INPRES No. 8, there has not been any systematic and comprehensive representation of the judiciary's standpoint in regard to the inception, the implementation, and the completion of the Shareholder Settlement Program.[711] The issuance of INPRES No. 8 was one of the most important milestones in the implementation and the completion of the Program when it was proven that the obligors' level of compliance with the contractual obligations as agreed upon in the settlement agreements had been very low because of the absence of the warranty of legal certainty that was ultimately pronounced in INPRES No. 8.

The study on the judicial proceedings and/or decisions is not based on a particular index

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708 The relationship between the executive and the legislative is clearly elaborated in the 1945 Constitution, and when the euphoric demand for total reform was at its peak immediately after President Soeharto's resignation in 1998, the Constitution was amended several times and seems to give more power to Parliament *vis-à-vis* the President. While maintaining the presidential system, the amended 1945 Constitution provided Parliament with new powers and has generated a kind of resemblance to a parliamentary system.

709 When Gus Dur was elected as president and Megawati was his vice-president, the relationship between IBRA and the relevant obligors was not conducive, partly due to contractual incompliance on the part of the obligors and partly by the policy inconsistency on the part of the government. Either way, the problems were most of the time caused by the government's action or in-action. It was not until Megawati's administration that the Shareholder Settlement Program was finally carried out based on a more organized action-plan, clear-cut procedural due process, and in accordance with the relevant State guidelines, enacted laws, and other legislations relating to IBRA and the Shareholder Settlement Program.

710 At the first instance, therefore, one should take into account **Supreme Court Decision No. 03 G/HUM/2003**, dated May 3, 2006, concerning the Supreme Court's refusal of the request to undertake judicial review against INPRES 8. The Supreme Court was of the opinion that the government's issuance of INPRES 8 was well within the jurisdiction of the President as Head of the Government and that it was not considered unconstitutional. Meanwhile, the Supreme Court Decision should always be read, discussed, and adhered to in conjunction with **Supreme Court Decision No. 01/P/HUM/1999**, dated December 1, 1999, concerning the Supreme Court's refusal of the request to undertake judicial review against Government Regulation No. 17 of 1999 ("PP-17"). The 2006 Supreme Court Decision endorsed the out-of-court method of the Shareholder Settlement Program as well as the related warranty of legal certainty, while the 1999 Supreme Court Decision confirmed the legitimacy of IBRA and its task and function as stipulated in PP-17. The two judicial decisions were the main references in analyzing the many legal cases linked to IBRA, including those related to the Shareholder Settlement Program.

711 Of course, there is no more question of the constitutionality of the Shareholder Settlement Program and the related government warranty of legal certainty, especially after May 2006. Nevertheless, several relevant court decisions have been studied that were rendered and delivered before May 2006, while other relevant judicial proceedings were filed, tried, and/or decided before the issuance of INPRES 8. The period before the issuance of INPRES 8 may be called a period of policy inconsistencies and legal uncertainties in the implementation and the completion of the Shareholder Settlement Program, while the period between INPRES 8 and the said Supreme Court Decision was transitional, both in terms of the newly obtained judicial independence and in terms of the judiciary's understanding of IBRA and its mission, including the Shareholder Settlement Program.

or a certain structure because none were specifically created for the Shareholder Settlement Program. Bearing in mind that the judiciary's standpoint on many matters regarding IBRA was more or less passive, and that the existing judicial proceedings and/or decisions were more the consequences rather than the causes, the discussion about the judicial proceedings and/or decisions in this study is intended mainly to share the concerns about the main hindrances surrounding the implementation and the completion of the Program, namely policy inconsistency and legal uncertainty.

On one side of the coin, the observations are based on the premise that some of the judicial proceedings and/or decisions as studied were unwittingly the consequences of policy inconsistencies and legal uncertainties in the implementation and the completion of the Program. On the other side of the coin, the study shares remarks regarding some of the judicial proceedings and/or decisions, which were the result of the effort to keep a balanced harmony between the warranty of legal certainty for cooperative obligors and the concrete/decisive legal action against uncooperative obligors in the implementation and the completion of the Program.[712]

Besides the fact that the out-of-court method of dispute settlement as embedded in the Shareholder Settlement Program might not have been compatible with the prevailing justice system and its tradition, which seemed to prioritize the settlement of disputes through adjudication or operated on the basis of *win-lose solutions*, this study encourages further study on the judiciary's standpoint regarding many legal matters that were about IBRA but were outside of the Program.[713] It should be noted, however, that the judicial proceedings and/or decisions can also be considered as anomalies of the out-of-court nature and mechanism of the Shareholder Settlement Program, and they will remain the dark side of the implementation and the completion of the Program.

2. The Collateral Damages

In principle, an out-of-court method of dispute settlement should never end up in a judicial proceeding, unless as an inescapable necessity to enforce the promissory obligations as contained in the settlement agreements.[714] The Shareholder Settlement Program was an opportunity both for the government and for the IBRA banks' controlling shareholders to settle their disputes by means of an out-of-court method. However, by the operation of the law, the settlement agreements as signed by IBRA representing the government and the IBRA banks' shareholders had established the legal rights for the contracting parties to enforce the contract against the other parties on the basis of tort and/or breach of contract. In other words, it was a win-win solution for both the government and the IBRA banks' shareholders, until one of the contracting parties breached the contract and/or caused the other contracting parties to suffer losses.

The main spirit of the Shareholder Settlement Program was to provide the government and the IBRA banks' shareholders with a venue to settle their differences by means of an out-of-court settlement.[715] The emphasis was to settle the differences between the government and the

712 The study on the selected judicial proceedings and/or decisions is not intended to judge the merit of the relevant judicial decisions or the integrity of the judiciaries. When adjudicating a legal suit, a judge or an assembly of judges must first corroborate that the legal dispute as brought before them was in fact taking place. Having done that, the judges must then qualify the event and determine the proper law to apply in adjudicating the said legal dispute. As aforementioned, the judicial system in Indonesia does not acknowledge the principle of *stare decisis*, which could undermine the level of consistency of judicial decisions and inevitably of legal certainty, and yet would allow the judiciary to develop new jurisprudence along with the dynamic progress in society.

713 *See generally* **Appendix**: Additional Notes on IBRA-related-Legal Cases.

714 As an out-of-court method and mechanism to settle disputes, the Shareholder Settlement Program would have also meant that the parties to the settlement agreement waived their legal rights to submit existing disputes to the judiciary for adjudication, and rather to solve their disputes on the basis of an amicable contractual arrangement. Nevertheless, if the making of the said contract was valid and legally binding in light of the relevant prevailing laws, the contract would have given the parties to the contract the legal right to enforce the contract. *See generally* Richard A. Posner.

715 On one side, the government wanted the banks' shareholders to reimburse the benefits that they had obtained inappropriately from the banks and/or to compensate the losses as suffered by the banks. On the other side, the majority of the banks' shareholders were actually prepared to meet the government's

banks' shareholders on the basis of a more commercial approach. Nevertheless, while the government was not firm on the said policy decision and its implementation, the government was under pressure to undertake legal action based on indications that there had been potentially criminal conduct in the disbursement and the use of the central bank liquidity supports ("BLBI") as reported by the State Supreme Audit in 2000.[716] The law enforcement agencies, in particular the Office of the Attorney General appeared to have had no clear guidelines other than to undertake legal action in light of the alleged misuse of these liquidity supports by the receiving banks. This was where the intricacy began, because it included IBRA banks whose controlling shareholders had signed settlement agreements with IBRA under the auspices of the Shareholder Settlement Program. These banks and their shareholders were the collateral damages of the Program.

In **Decision No. 830 K/Pid/2003**, dated July 23, 2003, the Supreme Court was of the opinion that one David Nusa Widjaya a.k.a. Ng Tjuen Wie, in his capacity as the president director of *PT Bank Umum Servitia Tbk*. (an IBRA frozen bank), was convincingly and duly proven to be guilty of conducting collective criminal wrongdoings with one of the bank's branch heads, Wirjatin Nusa, in violation of Law No. 3 of 1971 jo. Law No. 31 of 1999 concerning Corruption. The Supreme Court Decision revoked the decision rendered by the District Court and the Appellate Court in March 2002 and August 2002 respectively that had also found the accused guilty and the Supreme Court ultimately rendered its own decision that contained a much harsher punishment in terms of imprisonment.[717]

The Supreme Court was of the opinion that the accused had violated Bank Indonesia's terms and conditions for the use of BLBI by the receiving bank, in which the accused approved a series of payments to an affiliated company, encouraged the bank to issue a number of new negotiable certificates of deposit in order to increase the bank's liability which would be reimbursed with BLBI funds, and had endorsed the bank to undertake expansionary credit undertakings. The accused was alleged to have caused losses to the State to the amount of Rp. 1,291 billion. It is interesting to note that the Supreme Court completely disregarded the fact that the accused had signed a settlement agreement with IBRA to the amount of Rp. 3,336 billion,[718] which was a much higher settlement amount than the said judgment, and that the decision was based on the allegation of wrongdoings conducted by the accused in his capacity not as the controlling shareholder of the bank. As the record shows, before the Supreme Court delivered its final verdict on July 23, 2003, the convicted had disappeared and had become a fugitive. Several months later, he was apprehended in the US and has since been serving his time in prison.[719]

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demands provided that the government agreed not to prosecute them for any alleged misconduct related to the use of the state funds by their banks and/or the alleged incompliance of the banking prudential regulations by the banks' management or shareholders.

716 The pressure was partly due to the fact that three of Bank Indonesia's directors had been punished and sentenced to imprisonment by the Supreme Court for the maximum period of 18 months in recognition of their alleged wrongdoings in the disbursement of Bank Indonesia's liquidity supports. They are *Hendrobudiyanto, Heru Soepraptomo*, and *Paul Soetopo Tjokronegoro*. The relevant Supreme Court Decisions are respectively No. 979 K/PID/2004, No. 977 K/PID/2004, and No. 981 K/PID/2004. Based on these Decisions, the Supreme Court was of the opinion that each of the directors had abused his powers causing losses to the State. Therefore, the accused had met the stipulation of corruption in Law No. 3 of 1971 concerning Corruption. In arriving at that conclusion, the Supreme Court adopted the conception of "*detournement de pouvoir"* as known in Law No. 5 of 1986 concerning The Administrative Court. It should be noted, that the related criminal proceedings officially commenced in 2001 when the Shareholder Settlement Program was in its darkest moment and the government had yet to issue Presidential Instruction No. 8 of 2002.

717 The relevant District Court sentenced the accused to imprisonment for the maximum period of 12 months, while the Appellate Court increased the sentence of imprisonment up to a period of 4 years. In addition, the convicted was also required to compensate the alleged losses as suffered by the State to the amount of Rp. 1,291,530,307,776.84. It is unclear, however, what would happen to the convicted individual when his confiscated assets were insufficient to compensate the losses. Was he to be kept in prison indefinitely until he paid the amount in full? For sure, the level of probability to recover the state funds by means of court proceedings was very low indeed.

718 It is even more interesting to note that the accused, in his defense, was of the opinion that the lower courts had not given sufficient legal reasoning (*onvoldoende gemotiveerd*) to arrive at the conclusion that the accusation as charged by the public prosecutor was proven beyond reasonable doubt. Although the Supreme Court revoked the lower courts' decision, in substance it had adopted the legal reasoning used by the lower courts.

719 In the most recent decision of the Supreme Court in regard to a request by the convicted individual to undertake a special review (*herziening*) against the previous Supreme Court Decision on cassation, the term of imprisonment as imposed upon the accused was reduced from 8 to 4 years. The Supreme Court was of the opinion that the alleged wrongdoings could only be adjudicated by the 1971 Corruption Law, which contained more lenient sanctions, because the actual wrongdoings took place before the new Corruption Laws came in effect.

In the same year as the aforesaid criminal proceeding, the Office of the Attorney General also prosecuted one Samadikun Hartono, who was the president commissioner and the controlling shareholder of *PT. Bank Modern Tbk*., also one of IBRA frozen banks. In **Decision No. 1696 K/Pid/2002**, dated May 28, 2003, the Supreme Court was of the opinion that the accused was guilty of conducting criminal wrongdoings collectively and continuously in light of Law No. 3 of 1971 jo. Law No. 31 of 1999 on Corruption. In arriving at its decision, the Supreme Court also invalidated the decision of the District Court who had acquitted the individual from all criminal charges on the basis that the lower court was wrong in its conclusion about the responsibility of the accused as the bank's president commissioner, and was mistaken in its interpretation of certain provisions that were stipulated in the prevailing laws about corruption. It was also incorrect in its opinion that a civil settlement such as the one agreed upon by IBRA and the accused as stipulated in a *Master Refinancing and Note Issuance Agreement/*MRNIA could eliminate the element of criminality of the alleged wrongdoings.

This was probably the first mentioning by the judiciary of the Shareholder Settlement Program as carried out by IBRA, including the out-of-court characteristic of the settlement agreements as signed by the accused and IBRA (MRNIA). The Supreme Court rejected the idea as discussed and opined by the lower courts that a civil settlement could compensate the criminality of an action or in-action, particularly in recognition of the alleged misuse of BLBI funds by the accused and his bank, and yet the Supreme Court acknowledged the validity and the binding nature of the settlement agreement. In other words, the Supreme Court was inclined to demand monetary compensation from the IBRA banks' shareholders but simultaneously inclined to send them to imprisonment. An ideal condition, but very unrealistic.

With the benefit of hindsight, it is argued that the legal reasoning of the District Court was no less compelling than that of the Supreme Court. The District Court fully acknowledged, and was clearly aware of, the government's unstable condition during the period of chaos in 1997-1998 because of the devastating impact on the State and the nation of the unprecedented multidimensional crisis, in which the government had very limited options and the prevailing infrastructure was inadequate to confront and overcome the crisis. The District Court was of the opinion that with the signing of MRNIA by Samadikun Hartono and IBRA representing the government, the accused was deemed to have fulfilled his obligation in regard to the use of BLBI funds and therefore the conduct of the accused could no longer be classified as unlawful. As the conduct was not unlawful, there was no need further to consider the other requirements as stipulated in the relevant law concerning corruption. The charges of the public prosecutor could not convincingly be substantiated, and the accused had to be acquitted.[720]

It was a pragmatic legal reasoning, which in itself was not very legalistic. This way of legal reasoning was sometimes too uncertain, and depended on other people's control. It seemed that the prevailing school of thought of the judiciary was more legalistic than the District Court's point of view, which was ultimately reflected in the aforesaid Supreme Court Decision. In this regard, the position of the Supreme Court was much more convincing than that of the District Courts, because the justice system is all about legal certainty and/or consistency. However, it should not be up to the judiciary how disputing parties should settle their disputes outside the court system, but once it is brought before the judiciary, it must be handled according to the prevailing rules of adjudication. In this regard, the government had to decide whether or not to bring the out-of-court settlement arrangement to the court system.

Last but not the least, in **Decision No. 546/K/PID/2004**, dated September 1, 2004, the

720 The decision of the District Court was unfortunately silent about the obligation of the accused to fulfill his entire contractual obligation as stipulated in the MRNIA. In other words, the signing of the settlement agreement by the obligor should not be construed as a complete fulfillment of his contractual obligation, because MRNIA was not an asset settlement arrangement. As a refinancing arrangement, the obligor had issued a personal guarantee to IBRA with the purpose to fill the gap between the total contractual obligation and the proceeds as obtained for the disposal of the settlement assets. Therefore, as long as the total contractual obligations had not been repaid in full, the obligor could not be considered to have fulfilled his obligations in their entirety.

Supreme Court made the opposite ruling compared to the aforesaid Supreme Court Decision regarding Samadikun Hartono. In this case, the Supreme Court acquitted Leonard Tanubrata and Kaharuddin Ongko, respectively the president director and vice-president commissioner of *PT Bank Umum Nasional Tbk.* (an IBRA frozen bank), from all charges as filed by the public prosecutor representing the State of Indonesia in recognition of the alleged misuse of BLBI funds and/or violation of prudential banking regulations. In this regard, the Supreme Court was convinced and of the opinion that the issuance and the execution of INPRES No. 8 by the government had diminished the element of criminality as might be contained in the aforesaid alleged wrongdoings relating to BLBI and/or the banking prudential regulations as allegedly conducted by the IBRA banks' shareholders who had signed settlement agreements with IBRA, provided that the obligors fulfilled their contractual obligations accordingly.[721]

Specifically, the Supreme Court referred to Supreme Court **Decision No. 42 K/KV/1965**, dated January 8, 1966, which stated that a criminal conduct might be decriminalized not only by the operation of certain laws but also by general unwritten legal principles, such as the requirements that the public interest is served, that the State shall not suffer losses, and that the accused gain nothing from the undertaking. In the District Court ruling, the said Leonard Tanubrata was found guilty of corruption collectively and continuously in light of the prevailing laws on corruption and particularly based on the premise that the accused was the president director of the bank. According to the District Court, the president director must solely take the responsibility as incurred from the alleged wrongdoings conducted by the bank relating to the use of BLBI funds and/or the compliance with the banking prudential regulations, but the Supreme Court disagreed with the said legal reasoning and the judicial standpoint.

Is there anything we can learn and gain from the aforesaid court decisions and the related legal reasoning? From the Shareholder Settlement Program's point of view, however, the relevant court decisions are ultimately in support of the out-of-court character of the Program. In practice, they made everything much easier. However, the present standpoint of the judiciary authority may not be the same as its stand point in the future, because the legal system in Indonesia is not bound by the principle of *stare decisis*. Either way, the court appeared to be rather erratic in its standpoint regarding the Program and anything related to the implementation and completion of the relevant out-of-court method of dispute resolution.

One point of view was that the court was of the opinion that civil settlement could not abolish the criminality of corruptive undertakings in the alleged misuse of BLBI funds and/or in regard to the alleged violation of banking prudential regulations. This was a legalistic point of view. From another viewpoint, the court acknowledged and upheld the validity and legally binding nature of the settlement agreements as signed by IBRA and the obligors. In a way, the court was of the opinion that it was not unconstitutional for the government to bind itself in a civil-law contract in light of the Shareholder Settlement Program and to promise that the government would not prosecute the obligors, provided that they fulfilled their contractual obligations as stipulated in the settlement agreements. It was a rather pragmatic viewpoint.

In general, the court seemed eager to stay away from matters that were clearly under the jurisdiction of the executive and/or the legislative branches. The Supreme Court, at least officially after May 2006, was of the opinion that the issuance of INPRES No. 8 was undisputedly a government matter and therefore the judiciary has no authority to review and to judge its merit.[722] However, no one can guarantee that the judiciary's standpoint will not change in another 5 to

721 Unlike the District Court's decision concerning Samadikun Hartono, this Supreme Court Decision was of the opinion that the criminality of the wrongdoings as allegedly conducted by Leonard Tanubrata and Kaharuddin Ongko were deemed to be abolished by the enactment of Presidential Instruction No. 8 of 2002, and not by the signing of the settlement agreement only. Nevertheless, the Supreme Court was silent about the obligation of the obligors to fulfill their entire contractual obligations as stipulated in the settlement agreement.

722 Supreme Court Decision No. 03 G/HUM/2003, dated May 3, 2006.

10 years from now. Apparently, the court decisions as studied might not have had a substantial impact on the way the Program was implemented and completed, but it remains one of the most interesting archives to study.

Apart from the aforedescribed, the vicissitudes of the implementation and the completion of the Shareholder Settlement Program, whether or not there was IBRA as the sole operator of the Program, would have depended primarily on the government and the climate surrounding it. Certainly, it would not have depended on the judiciary, though there may have been some influence from the legislature. The out-of-court character of the Program would have stayed an out-of-court method in the settlement of disputes if the government had said so and had acted accordingly, and it was a pre-requisite that the government was solid and consistent about the relevant policy decisions and their implementation. From the technical-legal point of view, the government is authorized to undertake or not to undertake legal actions against alleged wrongdoers, both in regard to criminal proceedings and possible civil legal actions. In regard to the Shareholder Settlement Program, the role of the judiciary and the relevant court decisions were only ancillary to the government's ultimate role to carry out the Program evenhandedly and consistently, but there always seemed to have been "collateral damage" in the implementation and the completion of the Program.

Although not completely accurate, the level of probability for the government to settle the disputing matters by means of an out-of-court method might be higher than that of going through court proceedings, but as soon as the government took the matter to the judiciary for adjudication, the out-of-court alternative suddenly collapsed. This is especially true regarding the criminal proceedings. Once started it would have been impossible to have an out-of-court settlement of the criminal charges or to stop the judicial proceedings. Even though the legal cases had no significant impact on the legal system and its tradition, it did reflect the euphoric reform movements that had emerged during this period in history against the incumbent establishment and its corrupt values, and it could hardly be the case that the government could obtain both legal certainty and justice.

3. The Unwitting Legal Actions

While the three legal cases discussed above are examples of unnecessary judicial incidents resulting from uncoordinated law enforcement on the part of the government, which had caused collateral damage in the implementation and the completion of the Shareholder Settlement Program, the next group of legal cases are examples of judicial proceedings the government initiated to implement the Program evenhandedly on the basis of a reward-punishment principle. If a cooperative obligor managed to fulfill his contractual obligations satisfactorily and in full, he would be granted the warranty of legal certainty that the government would discontinue pre-trial criminal investigations or prosecutions (if any) against him for alleged criminal offences relating to the Program. On the other hand, the government needed to take concrete and decisive action against non-cooperative obligors who had or had not signed settlement agreements. Each group of non-cooperative obligors had different backgrounds, complexities, and preferences, and had to be handled diligently on a case-by-case basis.

Nevertheless, it was clearly problematic to decide on the most suitable method and the type of legal action the government should execute in light of the available evidence and against any possible technical difficulties. Would this then mean that the government ought to have put more emphasis on punishing wrongdoings rather than to mitigate ongoing disputes in order to optimize the recovery rate? As it turned out, the level of monetary recovery that resulted from the "in-court method" of dispute settlement was practically zero.

As discussed, the government had several options to undertake legal action against non-cooperative obligors. Against the IBRA banks' controlling shareholders who refused to sign the settlement agreements with IBRA, the government could focus on establishing and proving the criminal offences they allegedly had perpetrated in relation to the misuse of BLBI funds and/or the violation of banking prudential regulations. The government could also file a corporate derivative action against the controlling shareholders on behalf of each of the IBRA banks for damages due to the misuse of corporate funds and the mismanagement of the banks by the shareholders in violation of the banking prudential regulations.[723] These options were available before and are still available today. As was evident, the government appeared eager to try any available options all at the same time.

This unfortunately reflected the disorganized, ill-prepared, and experimental nature of the law enforcement undertakings on the part of the government. On one occasion, the government filed a civil law suit against an obligor who refused to sign a settlement agreement with IBRA, demanding the bank and its controlling shareholders to compensate the government for the BLBI funds that might have been used by the bank. While on another occasion, the government undertook criminal investigations and prosecutions against non-cooperative obligors from the same group, based on the alleged misuse of BLBI funds and the violations of banking prudential regulations. Meanwhile the obligors also sued the government and/or IBRA, which would undermine the State's interests and the State could be required to compensate the obligors. When the government initially commenced these legal actions, the general mood was to generate a deterring effect among the controlling shareholders of the IBRA banks who were required to partake in the Shareholder Settlement Program but refused to do just that, and also to differentiate non-cooperative obligors from those who signed and complied with the settlement agreements (cooperative obligors).

The principle of reward-punishment was the most important groundwork in the implementation and the completion of the Shareholder Settlement Program, and had existed long before the issuance of INPRES No. 8. In regard to the civil law suit that were filed, the government had appointed the Attorney General to act as the State's Advocate to file legal claims against the shareholders of four IBRA frozen banks, namely *PT Bank Pelita*, *PT Bank Istismarat*, *PT Bank DEKA*, and *PT Bank Centris*. The shareholders had to compensate the government to the amount of the central bank's liquidity funds the banks had received and which the banks, the management of the banks, and/or the controlling owners of the banks had misused. This decision was primarily based on the expectation that the civil law proceeding would allow for the possibility of a court settlement, which put more emphasis on a commercial resolution. Somehow, this did not become a very successful undertaking, though it was perhaps an interesting experiment at best.

Two legal cases were inadmissible for reason of *obscure libel*, i.e. **Decisions of the District Court No. 353/PDT.G/20000/PN.JKT.PST** (*PT Bank Pelita*) and **No. 354/PDT.G/20000/-PN.JKT.PST** (*PT Bank Istismarat*), primarily in regard to the certainty of the status of the defendants and/or the clarity of the legal ground based on the legal claim filed with the District Court. In these cases, the court never examined or discussed the legal claims the government had filed in detail, let alone that the settlement amount was discussed or a decision made about the method of payment. Later on, especially after the issuance of INPRES No. 8, some shareholders of the two IBRA frozen banks finally agreed to sign settlement agreements with IBRA in 2003.[724]

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723 According to the prevailing rules and regulations, including the 1998 Banking Law and PP-17, once Bank Indonesia had suspended the banking license of the banks and they were transferred to IBRA, IBRA became the owner of the legal rights and privileges of the banks, their management and the owners of the banks. In other words, IBRA became the holder of power of attorney by the operation of the law and was authorized to act in the interest and on behalf of IBRA banks.

724 Apparently, the new formula now used to determine the settlement amount to be borne by the banks' shareholders was more workable than the old one. In the climate of policy consistency at that time, legal certainty was improving which encouraged interested parties to settle their disputes by means of an out-of-court method of dispute settlement. One shareholder managed to fulfill his contractual obligations in full and satisfactorily, and obtained the evidence of

The status of two other civil law suits, in this regard to *PT Bank Deka* and *PT Bank Centris* was also peculiar. In regard to *PT Bank Centris*, the District Court in its **Decision No. 350/Pdt.G/2000/PN.Jak.Sel** was of the opinion that IBRA's filing of the legal claim against the bank and its shareholders with the District Court was not in accordance with the prevailing rules of legal proceeding and must be rejected because the government should have executed the existing security interest that had been made available for the fulfillment of the bank's obligations as incurred from the use of BLBI funds by the bank. If the proceeds that were obtained from the execution of the security interest were insufficient to repay the banks' obligations in full, IBRA could submit a new lawsuit for the repayment of the remaining amount of the debt. However, the relevant Appellate Court was in favor of a slightly different legal reasoning, where in its **Decision No. 554/PDT/2001/PT.DKI** it was of the opinion that the law suit as filed by IBRA was too premature and therefore inadmissible because IBRA had not executed the existing security interest that was made available by the bank. As of the writing of this dissertation, the legal case is under review by the Supreme Court.

Meanwhile in regard to *PT Bank Deka*, the Supreme Court in its **Decision No. 32 PK/Pdt/2003**, dated August 18, 2004 was of the opinion that the bank owed the State a certain amount of money incurred by the bank's use of BLBI funds, and that the bank was obligated to repay its debt in full. However, unlike the court's decision regarding *PT Bank Centris*, the court was indecisive as to how the bank should pay its obligation. The problem was exacerbated by the fact that IBRA had liquidated the bank. It was supposed to be an ordinary banking undertaking, in which the central bank was in excess of liquidity and in turn had lent some of its excess funds to banks that were experiencing liquidity difficulties. Hypothetically, the shareholders of the banks could be held personally liable if that had been agreed upon by the parties in advance and/or if the bank's shareholder were proven to have misused the public funds that were managed by the bank. All the same, the benefits that these legal actions generated for the State are hard to measure.

Civil law suits were also brought against obligors who had signed settlement agreements, but who were unwilling to complete their contractual obligations. In regard to one Fadel Muhammad, who once was the controlling shareholder of *PT Bank INTAN*, which was also an IBRA frozen bank,[725] the government represented by IBRA submitted a claim of receivables against the bankruptcy estate of the said individual on the basis of the settlement agreement as signed by IBRA and the obligor. In response, the obligor filed a civil law suit against IBRA and Bank Indonesia because they had breached the contract as had been signed by the obligor and Bank Indonesia to rescue *PT Bank INTAN*.[726] This whole saga was triggered by a simple misunderstanding in the implementation and the completion of the Shareholder Settlement Program, which was exacerbated by the filing of a bankruptcy petition against Fadel Muhammad by several creditors outside of IBRA's control, which had developed into a condition where everyone seemed to be trapped in the darkest corner of the out-of-court method of dispute settlement, while the present court system has yet to provide a better atmosphere.

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completion from IBRA.

725 *PT Bank INTAN* was supposedly to be a rescued bank, in which Bank Indonesia had solicited potential investors to rescue the bank from becoming insolvent and Fadel Muhammad et al. were given up to 15 years to restructure the bank. The unprecedented crisis attacked the banking system in 1997-1999 and *PT Bank INTAN* had to be closed and put under IBRA's control. It was very unfortunate that the out-of-court method of dispute settlement as agreed by IBRA and Fadel Muhammad and stipulated in an APU ended up in a dramatic legal battle, but the contracting parties must have been aware from the start that to be successful, an out-of-court method of dispute settlement had to remain out-of-court and had to be executed in good faith.

726 The law suit was filed with the District Court, rather than with the Commercial Court, which made the legal battle even more complicated. The said law suit comprised of two separate legal arguments that Bank Indonesia on the one hand and IBRA on the other hand had breached their warranty respectively in regard to the rescue program of *PT Bank INTAN* and the settlement agreement under the auspices of the Shareholder Settlement Program. In regard to the settlement agreement, the Supreme Court in its **Decision No. 1348 K/Pdt/2004**, dated October 19, 2004, was of the opinion that IBRA had breached its promise as contained in the letter issued by IBRA to the plaintiff to appoint an independent party to verify the carrying cost as incurred by the bank in order to determine the final settlement amount to be borne by the obligor. In other words, the Supreme Court was of the opinion that the settlement agreement is only enforceable upon IBRA's meeting of its promise to appoint an independent party to determine the settlement amount of Fadel Muhammad. The government is now in the process of filing a petition of special review with the Supreme Court against the said decision.

As recorded, several creditors filed a petition for declaration of bankruptcy against Fadel Muhammad, and IBRA just needed to protect its own interests by submitting its claim against the bankruptcy estate. Part of IBRA's claim receivables were established from the contractual terms and conditions contained in the settlement agreement as signed under the auspices of the Shareholder Settlement Program, in which the Commercial Court was of the opinion, among others, that Fadel Muhammad owed IBRA the amount of Rp. 93,280 million as derived from the *Akta Pengakuan Utang* or APU as signed by IBRA and Fadel Muhammad. Regardless, the Supreme Court was of a different opinion. In its **Decision No. 037 K/N/2001**, November 2, 2001, the Supreme Court revoked the lower court's decision that declared Fadel Muhammad's bankruptcy and simultaneously pronounced that all creditors' claims were to be denied, in so far as the protest as submitted by Fadel Muhammad was in accordance with the relevant bankruptcy proceeding or with the District Court.[727]

The handling of IBRA-related-legal matters through adjudication had turned supposedly simple matters unnecessarily complicated. The prevailing legal and justice system were just inadequate and were ill prepared to handle the magnitude and the complexity of the problems the government confronted during the crisis. Not to mention the legal administrative nitty-gritty that needed to be complied with in light of the prevailing judicial proceedings, otherwise the legal action would be lost in vain. It is therefore unthinkable to take legal actions against all of the obligors, without the possibility to settle the disputes by means of an out-of-court method, because it would allow others to decide on matters that were definitely within the realm of the government's concerns, and on a massive scale. This was the reason why IBRA was established in the first place and the motive behind the introduction of the out-of-court mechanism of the Shareholder Settlement Program. It was also important, and still is important, that the Shareholder Settlement Program was carried out evenhandedly, in a better atmosphere and surrounded by consistent policies and legal certainty, in which the warranty of legal certainty for cooperative obligors was executed in balanced way with the legal action as conducted against the non-cooperative obligors.

The aforesaid court decisions represent the struggle within the government concerning the proper balance in the implementation and the completion of the Shareholder Settlement Program as well as the sporadic efforts the government actually initiated and carried-out from time to time in the execution of the stick-or-carrot tactic in light of the out-of-court nature of the Program. It is rather difficult to assess or to measure the judiciary's exact contribution to the implementation and the completion of the Program at this point in time, especially after IBRA's termination in April 2004. The most recent interaction was a Decision by the Supreme Court in 2006 regarding the refusal of a request to undertake judicial review against INPRES No. 8, which had brought a fresh perception and some tangential reasoning about the out-of-court method of dispute settlement and the Shareholder Settlement Program.

The civil law actions the government filed against the controlling shareholders of certain IBRA banks were arguably unwarranted, because no concrete benefits were obtained from the legal action and the relevant court decisions, while there were other options available that were arguably more productive. In these cases, the court seemed reluctant to express its standpoint regarding the merit of the Shareholder Settlement Program as carried out by IBRA and the overall government's program to revitalize the banking system. The whole matter actually resorted under the jurisdiction of the executive and/or the legislative authority.

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727 Supreme Court Decision No. 037 was later canceled by the Supreme Court itself in its Decisions respectively No. 02 PK/N/2002, No. 03 PK/N/2002, and No. 014 PK/N/2002. As it was revoked, Supreme Court Decision No. 037 should have no legal impact whatsoever, regardless whether the court had acknowledged and accepted the amount of obligation Fadel Muhammad owed to IBRA and to other legitimate creditors. In other words, the Decision that Fadel Muhammad had been found bankrupt remained in force and IBRA's claim as derived from the *Akta Pengakuan Utang* or APU was legitimate and enforceable. The curator should first verify the amount of the creditor's claims, but after the declaration of bankruptcy. The legal case between the government and Fadel Muhammad should not have occurred in the first place, if only the contracting parties had put more trust in the merit of the out-of-court nature of the Shareholder Settlement Program.

Besides civil law suits, the government also undertook criminal legal actions against certain IBRA bank's shareholder who had not signed the settlement agreement with IBRA as required under the auspices of the Shareholder Settlement Program. The government charged one Hendrawan Haryono who was the ultimate owner as well as the vice president director of *PT Bank ASPAC*, which was an IBRA frozen bank, and one Setiawan Haryono with corruptive undertaking collectively and continuously in light of the prevailing laws concerning corruption. Specifically, Hendrawan Haryono was charged with the misuse of the BLBI funds and/or the violation of the banking prudential regulations. The Supreme Court in its **Decision No. 135 K/Pid/2002**, dated July 3, 2003, was of the opinion that the government's accusation that Hendrawan Haryono had violated the law on corruption was inadmissible, but that it had been proven convincingly that the accused had violated the prevailing banking prudential regulation.

Just as the judicial accidents described in the previous section, regarding Samadikun Hartono, and David Nusa Widjaja, the criminal legal action initiated against Hendrawan Haryono was successful enough to send the accused to imprisonment for a maximum of 4 years. Nonetheless, the out-of-court method of dispute settlement as embedded in the Shareholder Settlement Program promised a higher recovery rate compared to in-court legal action. Meanwhile, the success rate of the criminal legal actions against the obligors was higher than that of civil law suits, regardless whether or not the obligors had signed the settlement agreements with IBRA. Either way, the rate of monetary recovery of the studied legal actions and the relevant court decisions, would have been lower than that of the out-of-court mechanism of the Shareholder Settlement Program.

4. Eyes Without A Face

It may seem totally irrelevant for this study to discuss rather in detail several court decisions regarding IBRA-related legal cases, particularly those related to the Shareholder Settlement Program, because the Program was by design an out-of-court method of dispute settlement. The very legal facts that there were court decisions and/or judicial proceedings related to the Program is a good example of the anomaly of the implementation and the completion of the in principle of out-of-court settlement, which generated curiosity in regard to the judiciary's standpoint in regard to the Program and the possible positive contribution of the judicial system in the execution of IBRA's overall task and function.

The legal cases studied were the results of the uncoordinated law enforcement undertakings on the part of the government and the materialization of the stick-or-carrot principle in light of the warranty of legal certainty as embedded in the implementation and completion of the Program. Each of the court decisions that were studied contained judiciary standpoints regarding the legal facts and the reasoning that might be relevant in each of the legal cases, but the legal cases as studied failed to establish any systematic pattern that can be useful to represent the judiciary's standpoint pertaining to the merit of the out-of-court method of dispute settlement, the validity of the settlement agreements as signed by IBRA and the obligors, and the legitimacy of the Shareholder Settlement Program.

IBRA's establishment and its mission to revitalize the national banking system was the logical consequence of the government's decision to confront and overcome the unprecedented financial crisis that occurred in 1997-1998, which later on became a national multidimensional crisis. This was inevitable because the prevailing system and the institutional infrastructure were inadequate to do what IBRA was designed for and capable of, hence IBRA's existence was by nature an exception to the normal rules and conditions. The said notion gave IBRA a very important and determinant role in the government's overall effort to prevent the national economy

from total collapse, but simultaneously put IBRA in a most unpleasant situation in light of the resistance it naturally generated from the prevailing normal system and infrastructure. As it turned out, IBRA and its work programs were not always supported and welcomed by the government, especially when a new administration was in office.

IBRA experienced 7 different Chairmen, 6 different Ministers of Finance and 1 Minister of State-owned Enterprise, and 5 different Coordinating Ministers of Economy, and various replacements of the middle management within IBRA itself. Likewise, IBRA had been under scrutiny during its official term by the legislative authority, and in many occasions, it had become the subject of many vested interests from a variety of political power struggles. This was especially true concerning the Shareholder Settlement Program as carried out by the IBRA, in which the struggle between the incumbent regime and those who supported the so-called Orde Reform was at its most obvious. As was evident, most of the obligors who came under the auspices of the Program were closely connected to the late President Soeharto and his New Order regime. At least, this was the general perception at the time. Needless to say, nothing was ordinary about IBRA or anything related to IBRA, because IBRA was extraordinary and many were not familiar with the tasks and the functions that were bestowed upon IBRA, let alone to understand the magnitude of the problems that IBRA had to confront.

During the same period, the judiciary and the judicial system were probably experiencing the most important metamorphosis since Indonesia's independence in 1945. In 1999 and 2004, the entire regulatory framework regarding the Supreme Court and the judiciary authority had been overhauled to make the judicial system more independent from the executive and legislative authorities, both in terms of judicial and non-judicial matters. Even further than the aforesaid reform, in 2003 the government and Parliament established the Constitutional Tribunal. Even though the judiciary authority had obtained its long-awaited independence, both institutionally and behaviorally, the existing resources and infrastructure as well as the prevailing rules of judicial proceedings were not adequate enough to support the newly established independence. Therefore, the main concern had not only been the independence of the judiciary in handling the legal cases brought before them, but also concerned the integrity of the whole system and its personnel to produce the kind of judicial judgment that meets justice and the legal certainty the public expected.

While the judiciary authority was struggling to undertake significant internal reform, the public and other external forces had been pushing the Supreme Court to speed up the reform movement. It was not an easy circumstance, because the judiciary authority was now independent and yet there have been suggestions on how to contain such independence. In this delicate situation, the judiciary authority was also expected to support the government and IBRA in the overall effort to confront and overcome the unprecedented multidimensional crisis, including in the handling of recalcitrant obligors. In other words, just when the judiciary authority was expected to be more independent from unwarranted interventions by the executive, which had occurred during the earlier administrations, the judiciary authority was also urged to support the government's effort in safeguarding the national economy from total collapse.

How would one draw a final conclusion regarding the interaction between IBRA, the Shareholder Settlement Program as carried out by IBRA and the judiciary authority, especially during the period of chaos and uncertainty?

At the policy level, the judiciary authority had been relatively supportive towards the government's struggle to revitalize the deteriorating banking system and the failing national economy. In 1999, the Supreme Court refused the request to undertake judicial review against PP-17, which was the most important piece of legislation for IBRA in carrying out its tasks and functions. In 2006, the Supreme Court again rejected the request to undertake judicial review against INPRES 8 of 2002, which was the most important official pronouncement by the execu-

tive about the warranty of legal certainty in the implementation and the completion of the Shareholder Settlement Program. The general conclusion may be that the judicial standpoints were economically desirable, because they not only supported IBRA's existence and its extraordinary powers amidst the dysfunctional legal system and the inadequate institutional infrastructure, but they also sustained the policy decision regarding the out-of-court method of dispute settlement that was considered to be less costly than the in-court dispute settlement.

Nevertheless, the similar supportive attitude of the judiciary could not be felt at the transactional level, both in terms of the legal cases related to the Program and with other IBRA-related legal cases. The judiciary authority had been inclined to be more supportive of the government when it came to criminal law proceedings, which seemed to put more emphasis on the principle of chastisement rather than on monetary recovery, regardless of whether it was the result of uncoordinated law enforcement undertakings on the part of the government. In regard to related civil law suits, the judiciary seemed to have had a general consensus that the shareholder settlement agreements as signed by IBRA and the obligors were indeed valid and legally binding contracts. Beyond that, the legal cases and the relevant judicial judgments were too erratic and infrequent to draw a specific conclusion, let alone to establish an acceptable jurisprudence. All in all, the legal cases related to the Shareholder Settlement Program were just like many eyes without a face.