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Report

Training Needs Assessment for Industrial Relations Court Judges



Report

Training Needs Assessment for Industrial Relations Court Judges

Miranda Fajerman
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January 2011

International Labour Organisation
Jakarta Office

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Foreword

ILO Jakarta Office

Law No.2 of 2004 was enacted on 14 January 2004, marking the passage of the final piece of major labour legislation under the Labour Law Reform Program of the Government of Indonesia. The passing of this law on dispute settlement for industrial relations also signified recognition that, in an era of democratization and increasing globalisation, employment issues and labour disputes have become more complex and require new and innovative approaches to promote the prevention and resolution of industrial disputes. The role of the Industrial Relations Court and ability of judges to adjust and respond to the evolving nature of the world of work, employment relationships and disputes is critical for the realisation of decent work and social justice for all.

International labour standards are the International Labour Organisation's principle instrument to realise decent work. Although some international instruments and standards were developed many decades ago, labour law and the interpretation and application of these standards are not static. Policy, regulations and an understanding of labour standards and what they translate to in the domestic context develops progressively over time in order to remain relevant and appropriate in its responses to social trends and changes. As such, international labour standards and labour law should to be seen as living instruments.

In addition to the traditional domestic resources for the interpretation and application of law, judges are increasingly being inspired by international instruments and decisions reached in other jurisdictions. Judges throughout the world are constantly and systematically reviewing, analysing and interpreting legal principles and decisions from other jurisdictions to further enrich the application and adaptation of labour law principles in their own countries.

The Report highlights the value of continuous learning and training for judges and the value of international labour law and comparative approaches to labour law to enrich domestic decision-making. The Report also recommends a list of core competencies for Industrial Relations Court judges and recommendations to build judges' technical expertise.

With its tripartite panel of ad-hoc and career judges presiding over cases, the Industrial Relations Court at the District and Supreme Court levels is now in a unique position to strengthen public confidence and to influence the evolution of labour relations and labour law in Indonesia. It is hoped that the Report will be useful and beneficial to future planning of training programmes and policy formulation.



Peter van Rooij
Director
ILO Jakarta Country Office

Foreword

Supreme Court of the Republic of Indonesia

Law No. 2 of 2004 concerning Settlement of Industrial Relations Disputes, which is a jurisdiction of the Supreme Court and courts under its jurisdiction, is aimed at settling industrial disputes in fast, simple, cheap and justified manners.

As we are all aware of, the Industrial Tribunal is authorized and assigned to examine and decide following cases:

- Rights-related disputes at the first instance.
- Conflict of interests at the first and final instances.
- Work termination disputes at the first instance.
- Disputes related with labour unions in companies at the first and final instances.

Based on its tasks and authorities, we may assume that cases being handled by the Industrial Relations Court are sensitive, complicated and multi-dimensional as they are directly or indirectly related to the interests of employers and workers. If these conflicts are not handled carefully and comprehensively, they may affect the development of industrial relations and the national economy.

In this era of globalization and transparency, the settlement of conflicts or cases involving employers and workers receive attention, not only at the domestic level but also at the international level. Industrial disputes are related to universal values prevailing around the world. These are manifested in conventions relating to workers' interests, including discrimination issues in various aspects, perspectives and developments.

The international community, including the UN, in this case ILO, always pays attention to law enforcement for workers' rights, not only in terms of supporting various actors and agencies, but also legal institutions, including the courts,

Based on these facts and phenomenon, it is necessary to improve our organizations and human resources involved in handling industrial disputes so that such disputes could be resolved harmoniously and quickly through comprehensive decisions. An essential way to create reliable and professional law enforcers is by conducting continuous certification training. And to produce an effective and efficient training, it is necessary to establish a comprehensive curriculum, syllabus and training modules.

Therefore, the Supreme Court, in this case its Research and Development Department for Law and Justice Education and Training, is collaborating with ILO Jakarta to develop curriculum and modules.

We highly appreciate and thank Mr. Peter van Rooij, the Director of ILO Jakarta Office and his staff for their collaborations thus far. I believe under his leadership, ILO Jakarta Office will be able to improve relations and collaborations between ILO and the Indonesian Supreme Court.

We also like to thank the Head of Research and Development Department for Law and Justice Education and Training at the Indonesian Supreme Court and the Tribunal Technical Education and Training Centre for their efforts and commitments to improve industrial disputes-related training.



Dr. Moh Salleh, S.H. M. Hum

Deputy Chief Justice on Special Civil Matters
Supreme Court of the Republic of Indonesia

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1. Background

The International Labour Office (ILO) and the Education and Training Center for Technical Law and Justice of the Supreme Court of the Republic of Indonesia (Technical Training Unit) are collaborating to strengthen the technical capacity of judges of the Industrial Relations Court (IRC) to perform their duties in accordance with the mandate of the Supreme Court and the common vision of realizing social justice and decent work for all.

The Technical Training Unit currently delivers certification training to career and ad hoc judges upon their appointment to the IRC. The Supreme Court and Training Centre plan to revise this curriculum and establish clear competencies for all judges entering the IRC. An advanced technical training program for career and ad hoc judges of the IRC is also anticipated. Given the ILO's technical expertise and experience in labour law, labour administration and in designing and delivering training on national and international labour law and standards for legal professionals, the Supreme Court requested the support of the ILO in the development of these training and education programs for IRC judges.

The objective of the partnership between the ILO and Supreme Court is to strengthen career and ad hoc judges' technical knowledge, understanding and application of national labour laws and international labour standards through the development of a sustainable and integrated training program. This collaboration shall also strengthen the capacity of the Supreme Court and Technical Training Unit to revise, develop and deliver competency-based curriculums for IRC career and ad hoc judges in response to the training needs of IRC judges and the demands of society for justice.

This Training Needs Assessment was designed to identify and assess the current level of knowledge, skills and performance of IRC judges, the level of competency, standards and performance ideals that the Supreme Court and stakeholders envision, and the possible disparity between present conditions and the ideal/necessary performance of the IRC. This Assessment has also attempted to identify some of the reasons for the gaps identified.

2. Methodology

A broad understanding of the expectations, needs and challenges facing IRC judges from many sources and levels, including from within the IRC, the Supreme Court and the Ministry of Manpower and Transmigration (MoMT), as well as from stakeholders of the industrial dispute resolution system was sought for the development of this Assessment.

A combination of the following elements was relied on:

- a) **Desk study** involving a review and analysis of the following:
 - current curriculum for IRC judges;
 - Supreme Court & IRC cases and decisions including those using and/or referencing international labour standards;
 - job descriptions and profiles for career and ad hoc judges (including nomination and appointment criteria for ad hoc judges);
 - relevant legislation, Supreme Court Decrees;
 - Supreme Court and IRC data on cases and case management;
 - proposed policy reforms and other matters relating to IRC judges, including media coverage of IRC performance;
 - reports from the ILO Committee of Experts and Committee on Freedom of Association;
 - comparative review of use of international labour standards by labour courts in other jurisdictions; and
 - ILO training materials on international labour standards and domestic law.
- b) **Discussions** with Supreme Court and IRC career and ad hoc judges, court registrars, education and training administrators at the judicial training institute, officials in the Ministry of Manpower & Transmigration involved in the recruitment of judges and resource trainers involved in the delivery of the current curriculum.
- c) **Focus group discussions** involving stakeholders of the IRC - persons familiar with the IRC & who have a vested interest in the IRC, including, trade unions, APINDO and employers' representatives, labour lawyers, legal aid providers, NGOs, academics, former justices in the labour field.
- d) **Pilot training activity** - a two-day pilot training workshop conducted with IRC judges from 5 district courts and the Supreme Court to explore and assess current levels of understanding of key international labour standards and challenges experienced in resolving labour disputes.

The process of assessing the training needs of judges in the IRC involved a gap analysis to compare the needs of the IRC with judges' capacities and matching of these needs against opportunities, good learning practices and available resources (time, money and people).

A series of focus group sessions with stakeholders and IRC judges were organised and facilitated by the ILO in Jakarta and four additional provinces. The following Courts were involved in this Training Needs Assessment: the Supreme Court, Central Jakarta IRC, Surabaya IRC, Tanjung Pinang IRC, Makassar IRC, and Bandung IRC. These courts represent varying capacity, size and geographical locations. As such, the results from these discussions have provided a reasonable indication of some of the conditions and challenges faced by the IRC in Indonesia.

The discussions for this Assessment encouraged dialogue among stakeholders and within the courts on challenges faced by the IRC and produced some interesting outcomes. Not all challenges raised in discussions directly relate to the capacity or training needs of IRC judges, however, some of these concerns and issues have been noted in this Assessment to provide a broader understanding of some of the factors influencing the overall performance of the IRC. Senior judges and Vice-Chief Justices of the Supreme Court have been actively participating in information gathering sessions. The Technical Training Unit has also been very active and accommodating in their support of this Assessment.

This Assessment identifies the current level of skills, knowledge and abilities of judges serving on the IRC as well as provides an overview of the general level of skills of newly appointed judges. The Assessment also examines the objectives of the IRC, the working environment and internal and external constraints impacting on the IRC's performance. The gaps between current and necessary skills are identified with supporting recommendations for capacity building of judges.

3. Overview of the IRC and Industrial Relations Dispute Resolution System

3.1 Legal framework

In December 2003, Indonesia passed the final piece of legislation in its labour law reform program. One month later, this received presidential assent and was introduced as Law No. 2 of 2004 on Industrial Relations Disputes Settlement (or the 'PPHI Law'). To allow for the necessary preparations for the transition, this law came into effect in January 2006. This Law repealed the 1957 regulation on Industrial Dispute Settlement and Law No. 12 of 1964 on Termination in Private Enterprises, whereby disputes between workers and employers were to first be reported to the Ministry of Manpower and Transmigration (MoMT).

Under the former system, an officer from the MoMT would mediate the matter or refer it to compulsory arbitration by a Labour Dispute Resolution Committee (usually a P4D *Panitia Penyelesaian Perselisihan Perburuhan Daerah* - Local Labour Dispute Resolution Committee). Appeals were then sent to the P4P *Panitia Penyelesaian Perselisihan Perburuhan Pusat* (Central Labour Dispute Resolution Committee) in Jakarta. These Committees consisted of MoMT officials, and representatives from employers and the All-Indonesia Workers' Union, (SPSI, as the only recognised trade union). The Committees operated through an informal process, but had the authority to make legally binding decisions. There were no time limitations on the settlement of disputes before the Committees and individual workers did not have legal standing to bring individual disputes to the Committees. The Minister of Manpower could veto all decisions. In 1991, the Administrative Court extended its jurisdiction (under Law No. 5 of 1986) to hear appeals from the P4P. This resulted in an influx of appeals, many of which were, in turn, appealed to the Supreme Court.

At the time of passing the PPHI Law, it was met with much broader public support than the Manpower Law. Stakeholders were content that the judges in the IRC would be able to bring both legal and industrial relations expertise to the cases, unlike in the P4Ds, P4P and the Administrative Court. Employers and unions were pleased that the initiative would curb government intervention in industrial relations and remove the right of government officials to be involved in issuing binding decisions. There were, however, some concerns. Legal aid providers, namely LBH opposed the PPHI Law on conceptual grounds— chiefly because they feared that the law would negatively impact on the role of labour inspectors to enforce the rights of workers in companies. Trade unions also feared that the new system would be overly legalistic in nature and inaccessible to workers.

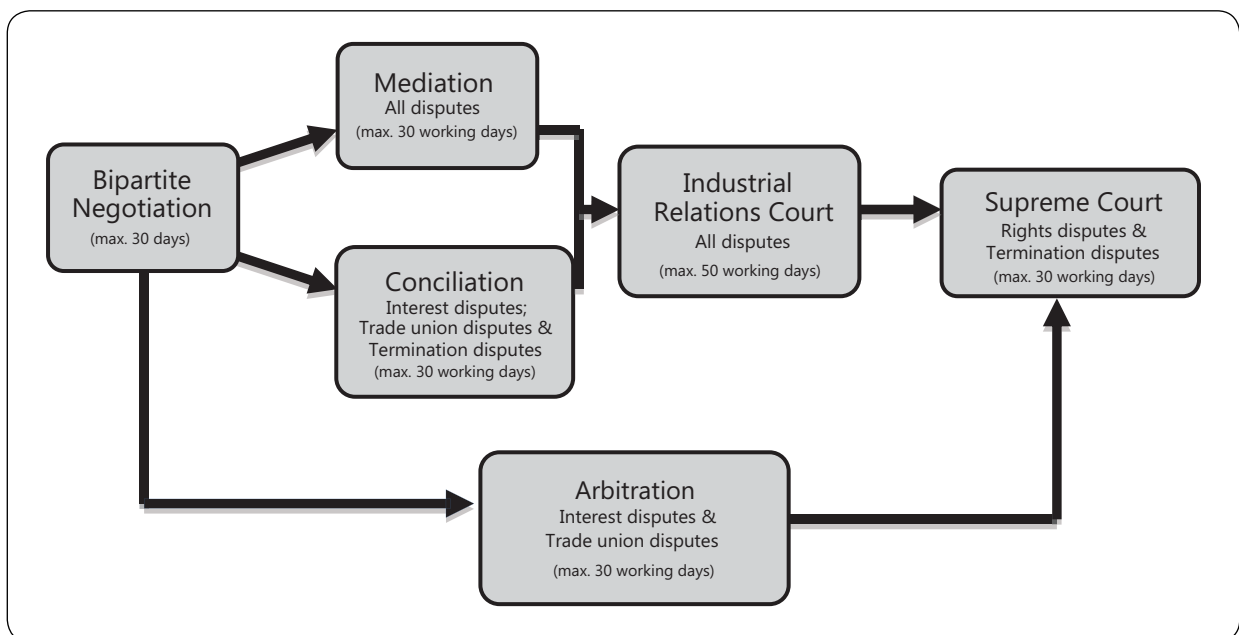
3.2 Objective of the new dispute resolution system

The PPHI Law was designed to establish a '*prompt, appropriate, just and inexpensive*' system for dispute resolution.¹

3.3 Four categories of disputes

In an attempt to create more effective and efficient mechanisms to resolve labour disputes, the PPHI Law provides for four categories of disputes – rights disputes; interest disputes; termination disputes; and inter-union disputes.² A rights-based dispute involves a dispute over the non-fulfilment of rights, as provided by laws and regulations, work agreements, company regulations or collective labour agreements. An interest dispute is a non-normative dispute involving disagreement between the parties over an issue that falls beyond any legal right or obligation. Termination disputes relate to the termination of employment contracts by either workers or employers,³ and inter-union disputes refer only to disputes between two or more unions within the one enterprise.

3.4 Basic structure of the dispute resolution procedure



The Industrial Relations Court was created by the PPHI Law. It hears all categories of disputes and has final jurisdiction over interest disputes and inter-union disputes, which cannot be appealed to the appellate IRC at the Supreme Court. Unlike the former system, the Minister of the MoMT cannot veto decisions of the IRC. The PPHI Law allows individuals to bring disputes to the IRC without requiring trade union representation, as in the former system. Trade unions and employers organisations may represent parties as their proxies, even if they do not have a background or education in law. The IRC operates according to Indonesian civil procedure and relevant court rules.⁴

1 PPHI Law, preamble.

2 PPHI Law, art 1.

3 This could be seen as a 'rights' dispute, however, given the sensitive nature of termination of employment disputes in Indonesia, it was decided that this would be treated as a separate category of disputes.

4 PPHI Law, art 57 – unless otherwise provided by the Supreme Court

For all categories of disputes, parties must first attempt to resolve the dispute through bipartite negotiation.⁵ If this fails, it is compulsory for parties to engage in mediation, conducted by a local MoMT official, or refer the dispute to a conciliator or arbitrator before taking the dispute to the IRC.⁶ Mediation and conciliation are essentially the same, but conciliators are appointed upon agreement by both parties and cannot hear rights-based disputes. There are no obligations on disputing parties to engage in 'good faith' negotiation during this phase and mediators and conciliators only have power to issue non-binding recommendations. Mutually agreed settlements can be registered at the IRC. Parties involved in interest disputes or disputes between trade unions may appoint an independent arbitrator to hear the dispute.⁷ Decisions issued by an arbitrator are final and legally binding.⁸ Arbitration decisions may only be appealed to the Supreme Court on administrative grounds, including illegality or fraudulent use of evidence.⁹

3.5 Composition of the IRC

The PPHI Law regulates the composition of the IRC. The judges on the IRC include regular, or 'career', judges from the State Court, regular judges from the Supreme Court and ad hoc judges.¹⁰ The Chief Justice of the Supreme Court makes all appointments, subject to endorsement from the President in the case of ad hoc judges.¹¹ Ad hoc judges are appointed from a list of candidates provided by the Minister of Manpower & Transmigration and are based on nominations from trade unions and Apindo.¹²

A panel of three judges presides over each case before the IRC at the first instance and on appeal at the Supreme Court. The judge panel consists of one trade union-nominated ad hoc judge, one employer-nominated ad hoc judge and one career judge.¹³

3.6 Qualifications and selection criteria

There are various reasons for appointing ad hoc judges to the IRC. Ad hoc judges are able to contribute to the decision-making process through their practical experience working in industrial relations and, as nominees from trade unions and employer organisations, can provide a better understanding of the perspectives and challenges faced by parties to the disputes. Ad hoc judges generally have a strong understanding of the substantive issues, which complements the career judges' expertise in civil procedure and general litigation. All ad hoc judges must have at least five years of experience working in the field of industrial relations and must have attained (as a minimum) a bachelor degree from a recognised university to be nominated for appointment to the IRC.¹⁴ Ad hoc judges serving in the appellate IRC at the Supreme Court must have a Bachelor of Laws. Career judges are appointed to the IRC by the Chief Justice of the District Court after a number of years serving in the District Court. Career judges are not appointed as full time judges to the IRC; they retain some of their duties in the District Courts.

All candidate ad hoc judges must pass a written exam on substantive labour law. This involves a series of multiple-choice questions and an extended written response. It is unclear from discussions

5 PPHI Law, art 3.

6 PPHI Law, arts 4 & 5.

7 The ILO Committee of Experts on the Application of Conventions and Recommendations has noted that articles 5, 14, and 25 of the PPHI Law permit compulsory arbitration at the request of one party to a dispute. This is in violation of the provisions of C No. 98 on the Right to Organise and Collective Bargaining.

8 PPHI Law, art 51.

9 PPHI Law, art 52.

10 PPHI Law, art 60.

11 PPHI Law, art 61.

12 PPHI Law, art 63.

13 PPHI Law, arts 88 & 113.

14 PPHI Law, art 64.

with MoMT Officials what level of knowledge needs to be demonstrated in these exams. The MoMT did not provide examples of successful exams for analysis. These exams are conducted in MoMT offices in provincial capital cities as the first stage of the recruitment process (following nomination by worker/ employer organisations). Upon successful completion of the exam, candidates attend an interview with the Supreme Court and undergo a psychological assessment (conducted by the University of Indonesia). The psychological test is predominantly a behavioural test to assess the personality and mental health of judges. It does not include a formal background check or assessment of the integrity or standing of the candidate. Nonetheless, the psychological test tends to be the most difficult component for candidates during the recruitment process.

There is a requirement that each ad hoc judge demonstrate 'dignity, honesty, and fairness and has a good reputation', however it is unclear from the recruitment procedures how this is assessed.¹⁵ Stakeholders, particularly trade unionists and legal aid providers, are particularly critical of the lack of transparency in the recruitment process and demand a more transparent and independent assessment of ad hoc judge candidates. They also request that all candidates undergo a 'fit and proper' test similar to that of ad hoc judges appointed to the Anti-Corruption Court.

Ad hoc judges are initially appointed for a five-year term. This can be extended by one further year.¹⁶ Discussions have begun within the Supreme Court and MoMT on further extending the service term of ad hoc judges' as the term of service for the majority of experienced ad hoc judges (those appointed in 2006) is coming to an end.

3.7 Challenges to recruitment

According to MoMT officials involved in the recruitment of ad hoc judges, the quality of ad hoc judge nominees and their backgrounds are not highly desirable. There are concerns that many ad hoc judge candidates are merely job seekers and that career judges are often recruited from mid-level law faculties in Indonesia, while the best graduates pursue careers as lawyers or in private business.¹⁷ It is also difficult to attract women to the role.

In the most recent recruitment of ad hoc judges, MoMT officials noted that the Supreme Court and the MoMT needed to adjust the standards for recruitment to support ad hoc employer-nominated candidates to pass the selection tests. Despite the lowered standards, only eleven from twenty-three employer-nominated candidates were appointed as ad hoc judges in the last recruitment.¹⁸

There is currently a significant shortage of judges in the IRC. Of the 33 provinces in Indonesia only eight IRC have sufficient numbers of career and ad hoc judges presiding over labour disputes.¹⁹ Surabaya, Padang and Jambi respectively require as many as seven additional judges according to recent Supreme Court recruitment estimates. The IRC at the Supreme Court level similarly does not have enough judges. With a backlog of over 400 cases, the Supreme Court currently only has eight ad hoc judges to deal with these appeals.²⁰ The Jakarta Central IRC has only four career judges, despite a growing backlog and over 30 new cases per month.

15 The criteria for the recruitment of ad hoc judges have been requested from the MoMT and Supreme Court. They are yet to be received.

16 PPHI Law, art 67.

17 LBH JKT

18 Sekretaris Mahkamah Agung Republik Indonesia, letter number 200/SEK/01/IV/2010, Jakarta 21 April 2010.

19 Data Hakim Pengadilan Industrial SE – Indonesia. The provinces with sufficient judges are Bengkulu, Tanjungkarang, Serang, Semarang, Banjarmasin, Kendari, Denpasar, and Manokwari.

20 Discussion with Vice Chief Justice of Judicial Matters (Pak H.Abdul Kadir Mappong) and Vice Chief justice on Special Civil Matters (Pak Mohammad Saleh), Supreme Court, 28th June 2010.

Some courts have no employer-nominated ad hoc judges. This has resulted in the Supreme Court having to transport judges from nearby provinces to hear cases. Nonetheless, the Supreme Court is not recruiting employer-nominated ad hoc judges for some of the provinces without such representation. In Denpasar, there are five career and four trade union nominated ad hoc judges, but no employer nominated ad hoc judges. In Semarang there are seven career and seven trade union-nominated ad hoc judges and no employer-nominated ad hoc judges, and in Bengkulu there is one career judge, four trade union-nominated ad hoc judges and no employer-nominated ad hoc judge. The Supreme Court has noted that for each of these provinces there are '*cukup*', enough, human resources.²¹ Given the requirement in the PPHI Law that a panel of three judges, one career, one trade union and one employer-nominated ad hoc judge must preside over every case before the IRC, it is difficult to understand why there are not greater efforts to allocate or recruit employer-nominated ad hoc judges for these courts.

3.8 Motivation to join the IRC

When asked, most ad hoc judges stated that they were concerned about the low level of wages of ad hoc judges, but that they chose to become a judge in the IRC despite these low wages. They chose to become ad hoc judges to expand their experience in industrial relations and to gain a better understanding of the interaction between the theory and practice of labour relations.²² Many career judges are reluctant to be appointed to the IRC due to the highly sensitive nature of labour disputes, frequent demonstrations outside of the courtroom and the (often) inconvenient distance between the IRC and the District Court.

3.9 Role of ad hoc judges

There is significant confusion particularly among stakeholders of the IRC of the role and 'independence' of ad hoc judges on the IRC. This confusion partly derives from the provision in the PPHI Law that ad hoc judges may be recalled or 'honorably discharged' by their nominating institutions.²³ Specific grounds to exercise this power are not prescribed by law. The PPHI Law simply requires that the nominating institution 'request' their removal. According to Supreme Court justices, this power has only been exercised once since the new system began functioning, however, judges expressed concern during discussions that their respective nominating organisations may recall them. There were also concerns among Supreme Court judges that two ad hoc trade union-nominated judges at the Supreme Court may be recalled by trade union confederation, KSPSI, due to internal disputes within the confederation.²⁴

According to all judges interviewed, ad hoc judges are expected to be neutral in the IRC. However, many trade unions and employers believe ad hoc judges should represent the interests of their nominating organisations and some express their disappointment when ad hoc judges do not appear to be actively supporting their interests in the courtroom.²⁵ Training programmes organised by the Trade Union Rights Centre for trade union-nominated ad hoc judges, advise judges to 'work to push forward and protect the interests of unions in the PHI (IRC)'.²⁶ The Supreme Court has also identified the lack of neutrality among ad hoc judges as problematic in the IRC, both in the provincial capital cities and at the Supreme Court level.²⁷

21 Data Hakim Pengadilan Industrial SE– Indonesia.

22 PHI Bandung ad hoc judges.

23 PPHI Law, art 67.

24 Discussion with Vice Chief Justice of Judicial Matters (Pak H.Abdul Kadir Mappong) and Vice Chief justice on Special Civil Matters (Pak Mohammad Saleh), Supreme Court, 28th June 2010.

25 Discussion with Jakarta Central PHI judges, Jakarta, 22nd July 2010.

26 Surya Chandra (ed), *Praktek Pengadilan Hubungan Industrial: Panduan Bagi Serikat Buruh*, Trade Unions Rights Centre, (2007), 15.

27 Vice Chief justice on Judicial Matters, Pak H.Abdul Kadir Mappong and Vice Chief Justice on Special Civil Matters, Pak Mohammad Saleh, 28th June 2010.

From the Supreme Court's perspective, ad hoc judges are appointed to the panel of the IRC to ensure there is integrity in decision-making and that there is fair representation and understanding of workers and employers' perspectives. The provision that organizations can withdraw nominated ad hoc judges supports this. Yet ad hoc judges are expected to make decisions independently from their organizations.²⁸

The nuances of the position and role of ad hoc judges in the IRC need to be made clearer to judges and stakeholders. Creating a clear job description that delineates ad hoc judges' duties and/or a specific code of ethics for ad hoc judges would be a good step towards achieving greater clarity.

3.10 Dishonourable discharge

The grounds on which a judge may be discharged for dishonourable conduct are outlined in the PPHI Law. These include: criminal conviction, neglect to perform work functions without valid reason three successive times during the period of one month; or violation of oath or promise to the Supreme Court.²⁹ Judges have the opportunity to challenge their discharge before the Supreme Court. If ad hoc judges are assessed as not being able to perform their work competently, they may also be 'honorably discharged'.³⁰

3.11 Evaluation of judge performance

There are no evaluations conducted by the Supreme Court or District Court on the individual performance of ad hoc judges. Ad hoc judges are not provided with written job descriptions. They commonly understand their job to involve 'attending hearings, examining cases and drafting decisions. That's it'.³¹ The Trade Union Rights Centre (TURC) sometimes provides informal performance feedback for trade union nominated ad hoc judges. This form of feedback, however, mostly relates to judicial integrity rather than level of knowledge or skills.

As part of their career progression, career judges undergo an evaluation process, however this is not a transparent process.³² The review of career judges' performance includes a quantitative review of cases handled by each judge, a qualitative review of their legal knowledge and application through examinations, and a critical appraisal of judges' decisions.³³ Cases selected for review are chosen randomly. Sometimes they include decisions that were appealed and sometimes cases that attracted significant public attention. The results of such reviews are noted in the judge's file (*conduite*) and are important in determining the judge's career within the judiciary. However, according to legal reformers who have worked with the Supreme Court for many years, it is difficult to ascertain exactly how important this appraisal is and '...even though the judge is independent, he must take care in deciding a case, because any decision he takes also determines his advancement'.³⁴

There is no mechanism for on-going or periodic feedback within the IRC on judges' performance or to review decisions or challenges in the application of the law. Monthly meetings take place in the IRC, but these sessions aim to provide information on recent Supreme Court Circular Letters or other developments and do not address issues of specific concern to the IRC.³⁵

28 See article 65.

29 PPHI Law, art 68.

30 PPHI Law, art 67.

31 Ibid.

32 PHI Bandung.

33 Sebastiaan Pompe, *The Indonesian Supreme Court. A Study of Institutional Collapse*, Cornell University (2005), 271.

34 Ibid

35 Ibid

3.12 Judicial disciplinary body & complaints

Statistics on the cases submitted and investigated by the judicial disciplinary body were requested, but were not available at the time of printing this Report. From discussions with judges and stakeholders, complaints to the judicial disciplinary body for conduct of IRC judges are not common, however, most stakeholders could name a few cases where complaints have been submitted.³⁶

The disciplinary system for judges appears to be responding to concrete problems and will discipline seriously errant judges. Recently one ad hoc judge in the Supreme Court was investigated as a result of corruption allegations. However, in spite of recent attempts to improve judicial oversight, the overall operation of the oversight system continues to be somewhat vague and changeable.³⁷

3.13 Costs

The PPHI Law guarantees that all parties will be exempt from court fees in cases of Rp 150 million (approx USD 16,000) in value or less.³⁸

3.14 Time

To address the time-consuming nature of dispute resolution under the former P4D/P4P system, the PPHI Law imposes specific time limits on hearing cases in the IRC. The IRC is required to hear a dispute within fourteen days of it being lodged with the court registrar³⁹ and must deliver a verdict within 50 working days from the date of the first hearing,⁴⁰ or fourteen working days in special circumstances and upon the request of one or more of the parties.⁴¹ At the appeals stage, the Supreme Court is required to issue a verdict within 30 working days.⁴²

In practice, it takes between two and four months for the IRC to resolve a case and usually between one and two years for the Supreme Court to issue a verdict.⁴³ The major difficulties preventing judges from dealing with cases within the stipulated timeframe at the district level relate to notification challenges and summoning of parties and witnesses (particularly those who live a significant distance from the provincial capital city). Some courts also face an increasingly burdensome caseload and insufficient human resources.

Labour disputes on cassation to the Supreme Court are never resolved within the stipulated timeframe of 30 working days. According to the National Director of Lembaga Bantuan Hukum (LBH, a legal aid provider), 'I have never heard that there was a labour case in the Supreme Court that has been decided within 30 days. Usually it takes at least one year. And not infrequently the verdict comes after the workers have already tragically died.'⁴⁴ With only eight ad hoc judges at the Supreme Court level and a handful of career judges presiding over IRC disputes, the Supreme Court can currently resolve approximately 30

36 Discussion with legal aid providers at LBH Bandung, 19th August 2010. For instance, LBH Bandung had recently submitted a complaint against the judges' decision that workers had resigned following a strike.

37 Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010.

38 PPHI Law, art 58

39 PPHI Law, arts 88, 89.

40 PPHI Law, art 103.

41 PPHI Law, art 99.

42 PPHI law, art 52.

43 Discussion with legal aid providers at *Lembaga Bantuan Hukum* ('LBH'), Bandung, 19th August 2010.

44 Kiagus Ahmad, *Mengembalikan Penyelesaian Perselisihan Perburuhan Ke Ranah Hukum Publik*, (unpublished) Jakarta.

cases per month. This means that even if it received no new cases, it would take at least 13 months to resolve the existing backlog of 400 cases sitting in the Supreme Court.⁴⁵

Reportedly, a lot of time is felt to be wasted at the initial stage of registering a case at the IRC. Sometimes the challenge lies in serving documents on defendants and getting them to appear in court, sometimes the court registrar is slow to respond or process submitted documents. Trade union representatives acknowledged that they frequently pay 'tips' to court registrars to hasten the process.⁴⁶

Interval verdicts

Judges can immediately pass an 'Interval Verdict' in form of an order to employers to pay wages and other rights of workers.⁴⁷ This can be issued as early as the first or second day of a hearing. However, judges rarely make use of this power.⁴⁸ They reason that when they have done so in the past, it has had little practical effect or benefit for workers. Employers generally ignore such decisions and workers are forced, due to the IRC's lack of execution powers, to petition to the district court to ensure enforcement. As such, in practice, interval verdicts can make a case even more costly and time consuming.⁴⁹ Often a decision to issue an interval verdict is only mentioned in the final verdict, in which case it has little practical value.⁵⁰

3.15 Appeals

Following a decision by the IRC, parties have the right to appeal their case directly to the Supreme Court. The PPHI Law prevents only interest disputes and disputes between trade unions from being appealed to the Supreme Court.⁵¹ There are no significant restrictions within the IRC system preventing parties' right to appeal labour disputes – virtually any decision can be appealed.⁵² In early drafts of the PPHI Bill, there were attempts to place restrictions on the right to appeal.⁵³ However, these limitations were removed from the final text that became the PPHI Law. Currently, the only requirement for appeals is that they must be carried out in accordance with civil procedure rules⁵⁴ and within 7 working days of notification of a verdict from the IRC at the district level.⁵⁵ The ease with which one can appeal a decision has resulted in an increasing backlog of disputes at the Supreme Court and ever-lengthening timeframe for their resolution.

IRC judges believe that parties have little to lose by appealing a case. Whether or not they understand the court's legal reasoning, many workers and employers will try their luck by applying for cassation or will sometimes exploit it as a tactic to delay court orders.⁵⁶ There is no need for party representation at the Supreme Court level and most cases have their court fees waived (under value of Rp 150,000,000) so

45 Discussion with Ibu Rani, Supreme Court Registrar for IRC cases, Jakarta, 28th June 2010.

46 Discussion with legal aid providers at LBH, Bandung, 19th August 2010.

47 PPHI Law, art 96.

48 Surya Chandra TURC book. Article 96 of Law No. 2 of 2004 stipulates that if an employer does not show evidence of implementing his/her responsibilities as provided by article 155(3) in Law No.13 of 2003, the leading judge must immediately order the employer to pay workers their wages and fulfil other rights of ordinary workers.

49 Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010.

50 Ibid.

51 IRC is the first and final court for hearing cases on interest disputes and disputes between trade unions.

52 Except in relation to art 110.

53 Fenwick et al, above n 3, 49-50. These related to the use of fake documents during the examination; the concealment of important documents 'that should have been used as deciding factors'; instances where a decision is based on the deceit of one of the parties during the examination; instances where a decision is made beyond the power of the industrial arbiter; or where a decision is contrary to statutory legislation, public order or morality.

54 PPHI Law, art 114.

55 PPHI Law art 110.

56 Discussion with Jakarta Central IRC judges, Jakarta, 22nd July 2010; Discussion with IRC Judges, Surabaya, 26th July 2010.

there is little in the way of disincentives for parties with spurious, weak or insignificant claims to appeal to the Supreme Court.

In recent years, the vast majority of labour dispute cases have been appealed to the Supreme Court and the percentage of cases being appealed is increasing.⁵⁷ In 2009, the Jakarta Central IRC issued verdicts for 376 cases. Of these, 212 went on cassation to the Supreme Court.⁵⁸ In Surabaya and Makassar, approximately 90% of all cases are appealed to the Supreme Court.⁵⁹ According to anecdotal accounts this trend is similar in other provinces.⁶⁰ Generally speaking, this influx of cases to the Supreme Court reflects a considerable lack of trust in the decisions of the lower courts and serves as a tactic for employers (mostly) to use to circumvent and delay the implementation of court orders.

The inability of the Supreme Court to manage the influx of appeals has serious implications on parties to industrial relations disputes. When an appeal is made, parties have no knowledge of the progress of the case until they receive a formal receipt from the Supreme Court registrar, and then again when they receive a final verdict, which can be up to three years later.⁶¹

The ease with which cases can be appealed to the Supreme Court is particularly problematic for cases concerning termination of employment. As noted above, it usually takes between one-two years for the Supreme Court to issue a verdict, but can sometimes take up to 3 years,⁶² by which time, reinstatement is inappropriate and compensation is well overdue. Disputes concerning termination of employment (approx 80% of all cases) need to be dealt with more expeditiously. Currently, the long delays in issuing verdicts in the Supreme Court leaves workers without a salary or job for a significant period of time and employers with little ability to plan for production. This also negatively impacts on the execution of judgements. Often an employer has replaced the worker(s) while awaiting a final verdict, making reinstatement virtually impossible. According to trade unions, employers also often construct ways to evade execution orders by moving/relocating workers to another part of the company to remote locations where workers are reluctant or refuse to accept the offer because it is too far from where they domicile.⁶³

The Supreme Court has broad powers to supervise and manage the way courts operate and the manner in which judges behave.⁶⁴ In this context, the Supreme Court can issue 'Instructions', 'Reminders' and 'Reprimands' to courts collectively or to judges individually. Despite the inconsistent application of the PPHI Law and civil procedure between the district IRC, and even within courts, the Supreme Court's quasi-legislative powers have not been sufficiently used to strengthen the authority of Supreme Court over the IRC.⁶⁵ There have only been negligible efforts made to ensure legal uniformity and predictability in the IRC through Supreme Court decisions and other instruments such as Supreme Court Regulations (*Peraturan*). These have been insufficient to supplement the gaps and problems in applying the law of procedure in labour disputes.

57 Surabaya – approximately 90% of cases are appealed to the Supreme Court, Discussion with IRC Judges, Surabaya, 26th July 2010.

58 IRC Statistics Jakarta Central Court. Viewed on 22nd July 2010, during discussion with IRC Judges.

59 Discussion with IRC Judges, Surabaya, 26th July 2010; Discussion with Makassar IRC judges, Makassar, 3rd August 2010.

60 Discussion with Ibu Rani, Supreme Court Registrar for IRC cases, Jakarta, 28th June 2010.

61 Discussion with trade union representatives, Surabaya, 27th July 2010.

62 Discussion with trade union representatives, Surabaya, 27th July 2010. One advocate had a termination of employment case from 2006 still sitting at the Supreme Court.

63 Discussion with Vice Chief Justice of Judicial Matters (Pak H.Abdul Kadir Mappong) and Vice Chief justice on Special Civil Matters (Pak Mohammad Saleh), Supreme Court, 28th June 2010.

64 Pompe, 255.

65 Such powers have been used to direct proceedings in other courts.

3.16 Value of precedent

Despite the large number of appeals to the Supreme Court the decision-making in the IRC of first instance is not consistent. Differences in the application of the law by the IRC are apparent throughout Indonesia.

Some common differences involve:

- Legal standing of trade unions who have no presence in the company in question, but who wish to represent the worker anyway. The Supreme Court has ruled that such trade unions do not have the requisite legal standing, but some courts such as the IRC in Surabaya continue to allow trade unions to represent any worker so long as the worker is a valid member of the union.
- Whether or not witnesses can provide testimony without taking an oath, and the circumstances in which a witness is not required to take an oath. For instance, some courts allow witnesses who are employed by one of the parties to the dispute to provide testimony without taking an oath.⁶⁶
- Some courts apply the law without consideration of the employers' financial circumstances, whereas other courts consistently take into consideration the financial capacity of the employer to comply with the law.⁶⁷
- Whether or not courts of first instance should follow a ruling by the Supreme Court that article 158 of the Manpower Act can be applied⁶⁸ - in spite of a ruling by the Constitutional Court of Indonesia in 2005, that this article was unconstitutional and therefore void. There is significant confusion among judges in the IRC whether or not the Supreme Court's decision should be followed. If judges were to ignore the Supreme Court's judgement, then only once an employee has been determined guilty of a crime, can an employer terminate the employment relationship on the basis of gross misconduct.⁶⁹

3.17 Percentage of cases overturned on appeal

Requested data was not available. The Junior Registrar of the IRC at the Supreme Court advised that the majority of cases appealed to the Supreme Court were upheld. Judges in the IRC were unsure when asked, of the approximate percentage of cases that were overturned on appeal.⁷⁰ In the Surabaya IRC for instance, some judges thought 90% of cases from their court were upheld by the Supreme Court, while other judges in the Surabaya IRC believed only about half the cases were upheld, and another judge indicated that around two thirds of decisions were upheld.⁷¹ Judges also have little knowledge of whether their decision-making is consistent with courts in other provinces.⁷² This is indicative of poor internal communication, training and/or interest by IRC judges in verdicts of the Supreme Court or other industrial courts.⁷³

The IRC in Central Jakarta has plans to collect decisions and analyse the similarities and differences in decision making between the Supreme Court and their decisions. Bench Books, including information and case examples for each technical subject area, should also be developed for the IRC to support consistent decision-making.

66 Chandra, 116.

67 Various discussions with stakeholders and IRC judges in Makassar, Jakarta and Surabaya.

68 No. 21/G/2007/PHI.MDO.

69 Various discussions with stakeholders and IRC judges in Makassar, Jakarta and Surabaya.

70 Discussion with IRC Judges, Surabaya, 26th July 2010; Discussion with Makassar IRC judges, Makassar, 3rd August 2010.

71 Discussion with IRC Judges, Surabaya, 26th July 2010.

72 Discussion with IRC Judges, Bandung, 19th August 2010.

73 In the case of the Bandung IRC, this was confirmed by legal aid providers at LBH Bandung. According to those interviewed, most cases appealed to Supreme Court are upheld

3.18 Consistency in decision-making

According to stakeholders, judges are not consistent in their decision-making, even within the same court. Various examples were given by stakeholders of inconsistent decision-making, particularly in cases concerning outsourced and contract workers, and anti-trade union discrimination.⁷⁴ Stakeholders do not attribute these inconsistencies to the level of knowledge, understanding or ability to interpret the law. Rather they cite laziness, apathy and corruption as reasons for the inconsistencies.

3.19 Alternative Dispute Resolution

Trade unions and employers are critical of the requirement for compulsory mediation.⁷⁵ During consultations most, (particularly trade union representatives) considered it to be valueless, and simply delays their access to the IRC. Although data on the success of mediation was not accessible,⁷⁶ MoMT officials, judges and stakeholders believe at least 90% of cases fail at the mediation stage and proceed to the IRC. A common joke within the IRC is that disputing parties see a recommendation from mediation as their ticket to the court.⁷⁷

The following factors contribute to the low success rate of mediation:

- There are no requirements for parties to engage in 'good faith' in mediation;
- Most parties are not ready to engage in dialogue at this stage;
- There are often low levels of trust by parties in the government mediator. Parties often do not trust the opinions of government officials whose knowledge of the substantive law is sometimes somewhat lacking. According to stakeholders, parties are often more willing to engage in mediation with IRC judges as they value the advice and knowledge of judges more than mediators;
- The capacity of parties and their proxies (trade unions or representatives from employer organisations) to negotiate can be very weak;
- Sometimes mediations are conducted in such a way that parties never meet in person. The local MoMT Official acts as a conduit between the two parties. As a result, negotiations are protracted and it can be difficult to reach agreement within the specified 30 working days;
- The non-legally binding nature of mediated agreements mean that parties often find it difficult in practice to enforce such agreements and often agreed terms and obligations are ignored. Even though agreements can be registered at the local IRC, thus strengthening their legal force, the perceived lack of enforceability of these agreements was commonly cited as a key disincentive for parties to settle disputes through mediation.

3.20 Enforceability of decisions

There is a common saying among trade unions that 'even if you win, you never win'.⁷⁸ According to anecdotal accounts from legal aid providers and stakeholders of the IRC, voluntary execution of verdicts is low.⁷⁹ Trade unions and employers believe that decisions of the IRC are not as strong as verdicts in former system due to the IRC's lack of powers to enforce execution. Where there is no voluntary execution or a third party contests a verdict, the successful party must file a separate petition at the

74 Various discussions with stakeholders and IRC judges in Makassar, Jakarta and Surabaya.

75 In the event parties cannot agree on an independent conciliator or arbitrator, the dispute must be mediated by a local Official from the MoMT.

76 Data from the MoMT has been requested.

77 Discussion with Jakarta Central IRC judges, Jakarta, 22nd July 2010.

78 Focus Group Discussion with stakeholders of the IRC, Jakarta, 28th July 2010.

79 See minutes from discussions with LBH Bandung, Focus Group Discussion with stakeholders of the IRC, Jakarta, 28th July 2010.

district court to seek execution orders. This presents additional financial and time burdens on parties and is particularly challenging for workers who are required to source evidence of employers' assets for security of payment.⁸⁰

As noted above, voluntary execution is particularly challenging in judgments requiring reinstatement of workers. Many employers have already replaced the worker, ignore the verdict or attempt to transfer the worker to another company branch.

According to IRC judges, voluntary execution can be a problem in as many as 90% of cases.⁸¹ Given the difficulties associated with obtaining an execution order, most parties will drop their claim following non-execution of verdicts from the Supreme Court.

IRC judges feel the PPHI and Manpower Laws should provide greater powers to the judges to enforce these decisions.⁸²

3.21 Physical locations of the IRC

The IRC is established as part of the District Court in each provincial capital city.⁸³ The PPHI Law anticipated that a Presidential Decree would be issued to establish an IRC in selected districts and municipalities with high levels of industrial activity.⁸⁴ However, despite various attempts, there are no additional industrial courts outside provincial capital cities even though industrial hubs are often a considerable distance from these cities. This poses significant barriers to access for many workers and employers who live and work far from the provincial capitals. In Batam, a Special Economic Zone employing the bulk of workers in the Riau Islands, parties to an industrial dispute must travel by ferry to the nearby island of Bintan to file their case at the Tanjung Pinang IRC. Parties can be required to attend hearings up to 7-9 times. This can result in considerable time and financial costs to the parties. Some judges in Tanjung Pinang believe the costs associated with travel between the islands has contributed to the court's decreasing caseload.⁸⁵ Trade unions also complain about their inability to lodge a dispute at the nearest IRC when the closest court is in fact in a different province.

There have been numerous attempts to establish additional courts in industrial areas, but coordination and funding challenges have prevented this from being realised. The Supreme Court requires that the local government transfer properties over to the ownership of the Supreme Court before opening a court due to past experiences with local governments, whereby incoming local governments have reclaimed buildings that outgoing government authorities had provided for use by the Supreme Court. Better coordination between the MoMT, Supreme Court and provincial and district-level governments need to occur to respond to the demand for better access to the IRC.

3.22 Physical condition of the IRC

Judges in each of the 5 provinces visited complained about the physical condition of the IRC and their lack of facilities and resources for judges.

80 Discussion with trade union representatives, Surabaya, 27th July 2010.

81 Discussion with legal aid providers at LBH, Bandung, 19th August 2010.

82 Discussion with Vice Chief Justice of Judicial Matters (Pak H.Abdul Kadir Mappong) and Vice Chief justice on Special Civil Matters (Pak Mohammad Saleh), Supreme Court, 28th June 2010. Enforcement of decisions is further complicated in employment cases relating to bankruptcy or state owned companies.

83 PPHI Law, art 59.

84 PPHI Law, art 59.

85 Chandra, 93.

The main complaints related to:

- the condition of the buildings;
- inadequate security, particularly protection of judges and facilities from demonstrators;
- lack of work space or dedicated judges' chambers for ad hoc judges;
- inadequate resources (see below).

3.23 Caseload

The caseloads in the IRC vary dramatically between provinces. The larger courts (such as Central Jakarta, Surabaya, Bandung) receive around 20-30 cases per month. The smaller courts, in cities such as Makassar, receive 2-5 disputes each month.

According to judges in the larger courts, approximately 20% of cases are rejected upon first submission.⁸⁶ This is generally due to the applicants' lack of understanding of civil procedural law and most often occurs in cases submitted by individual workers or trade unions (in contrast to legal aid representatives or employers).

Example of disputes submitted to the IRC

Central Jakarta IRC	2006 (P4D)	2006	2007	2008	2009	2010 (30 June)
Total No. cases	145	220	376	351	362	185
Employer initiated	12	15	12	38	49	
Worker initiated	133	205	364	313	313	
Out of court settlement	4	70	10	N/K	N/K	
Appealed to SC	67		200	180	212	96
Percentage of cases appealed to SC*	18%		53%	51%	59%	52%
Reviewed			38	21	50	20

* this percentage is calculated from the total number of cases received by the IRC, not the total number that were issued a verdict because such data is incomplete

Category (Jakarta IRC)	2006 (P4D)	2006	2007	2008	2009
Right Dispute	1	2	2	2	32
Interest Dispute	-	-	-	1	5
Termination of Employment	144	218	374	348	325
Inter-union dispute	-	-	-	-	-
TOTAL	145	220	376	351	362

Bandung IRC	2006	2007	2008	2009	2010 (30 July)
TOTAL	50	240	?	228	136

86 Discussion with Jakarta Central IRC judges, Jakarta, 22nd July 2010; Discussion with IRC Judges, Surabaya, 26th July 2010; Discussion with IRC Judges, Bandung 19th August, 2010.

Although most cases are classified as termination of employment disputes, these usually involve the determination of questions over normative rights or interests as well.

3.24 Attendance at court

The Chief Justice of the Supreme Court has recommended that all judges, including ad hoc judges, attend the court every day, even on days without hearings (most IRC visited held hearings 2 or 3 days a week). In the Supreme Court, it was reported that the ad hoc judges usually attend the court at 10:00am and leave around 2:00pm each day.⁸⁷ During discussions, ad hoc judges reported that they did not mind attending court every day, but complained about the lack of transport allowance to support the daily travel needs and the inadequate facilities to support them in their work and research when they were not hearing cases. None of the IRC visited provided a library, sufficient computers or other facilities to support continued learning or research.

87 Discussion with Ibu Rani, Supreme Court Registrar for IRC cases, Jakarta, 28th June 2010.

4. Needs assessment

4.1 Current training programmes for judges

Upon appointment to the IRC, judges receive an initial 'certification' training, organised by the Technical Training Unit. No continuous or advanced trainings, knowledge management or study programs are provided by the Supreme Court or MoMT to judges in the IRC. Apindo and the Trade Union Rights Centre have provided trainings and facilitated knowledge sharing sessions among ad hoc judges nominated by their respective organisations. Judges rely on self-study and informal information sharing to up-skill themselves. Consequently, the standard competency and level of knowledge and understanding among IRC judges of labour law and its application varies significantly between judges.

There is no written curriculum for the training programme. Resource persons assigned to each of the training sessions prepare and deliver the materials for each session. This generally consists of a powerpoint presentation on the relevant law/theme.

The training schedule for certification training of judges in the IRC in 2009 (12-17th October, 2009) indicates that the following topics were covered in brief:

- (1) Professional ethics for judges (1.5 hrs)
- (2) Law No. 2 of 2004 on Industrial Relations Dispute Settlement (2 hrs)
- (3) Law No. 13 of 2003 on Manpower (2 hrs)

Specifically:

- a. Outsourcing agreements
 - b. Wages and wage protection
 - c. Employment of foreign workers
- (4) Act No. 3 of 1992 on Jamsostek (social security) (½ hr)
 - (5) Act No. 21 of 2000 on Trade Unions (½ hr)
 - (6) Act No. 12 of 1964 on Layoffs in Private Firms (½ hr)
 - (7) Core ILO Conventions (½ hr)
 - (8) 'Technical Guidance on the Industrial Relations Court' (2 hrs)
 - (9) Layoffs and their legal status (ref: Manpower Act) (1 hr)
 - (10) Strikes and company lockouts (ref: Manpower Act) (1 hr)
 - (11) Interrogation of witnesses in the IRC (2 hrs)

Following each 2 hr session, a 1.5 hr session with advanced materials was scheduled.

On the final day of training, participants are presented with and discuss two case studies.

Although the current training program attempts to establish a common level of competency by covering each of the main domestic labour laws, the program has been managed in an ad hoc manner and has not been consistent.⁸⁸ The sessions for the most recent training program (October 2009) were provided by a combination of Supreme Court and High Court judges (H.H Suparno, Heru Pramono, Ansyahrul, Atja Sondjaja, SH) and officials from the Ministry of Manpower & Transmigration. The training takes place over 4.5 days, beginning at 16:00 on the Monday. A brief closing ceremony takes place on the Saturday morning before participants' departure.

There are no sessions devoted to teaching legal research, self-study or national and international information resources on labour law. Judges are not appointed a mentor or 'trainer' to support them in their role or their integration into the IRC.

There are no continuing education or training programmes for IRC judges delivered by the Supreme Court training institute, District Courts or MoMT beyond these basic introductory lectures on key areas of labour law. Despite acknowledged increases in funds allocated to the Supreme Court in recent years, the budget has constrained the Court's activities and ambitions in two important respects. Budgetary restrictions have limited the publication and distribution of Court decisions as well as the training of IRC judges. To date, no specific publications on labour law or IRC decisions have been created by the Supreme Court for IRC judges. The judicial training institute is still new, and the mandate of the Technical Training Unit includes improving the expertise of IRC judges. However, before the Technical Training Unit can design and deliver sophisticated training programs for IRC judges, this institute requires significant technical support and capacity building itself. According to Vice Chief Justices of the Supreme Court, 'funding at present is simply inadequate and we can do little but make the best of it'.⁸⁹

Discussions with stakeholders and judges, including during a 2-day workshop with judges from various provinces, revealed that there is only a basic common level of knowledge among judges - understanding of the main contents of the major labour laws and implementing regulations. Some judges demonstrated a much deeper knowledge and understanding of the domestic law, but very few judges have a solid understanding of international or comparative labour law. According to stakeholders, and some ad hoc judges, the capacity of IRC judges to apply legal logic is also noticeably varied.⁹⁰

Besides the initial training program, there have not been any courses developed for IRC judges on specific topics of labour law, legal ethics or procedural law (nor for career judges). The Supreme Court has largely relied on judges to carry out their own self-funded study. Apindo has responded to this gap in human resource development by providing trainings for employer-nominated ad hoc judges. The Trade Union Rights Centre has attempted to do the same for trade union-nominated ad hoc judges. This has contributed to creating a situation whereby the level of knowledge, understanding and application of law varies considerably between judges.

Apindo organises annual meetings for employer-nominated ad hoc judges to discuss and share challenges faced in the courtrooms with Apindo board members, management and advocacy teams. When technical subjects are covered they are determined based on comments and input from ad hoc (employer-nominated) judges or advocates prior to, or during the course of the annual meeting. Specific sessions are designed to discuss recruitment of ad hoc judges and to facilitate dialogue around

88 Discussions with Pak Agung Sumantha, Director Technical Diklat Supreme Court, 28th June 2010. Note the Supreme Court has recognised the poor quality of its training programme for PHI judges and has requested technical support from the ILO to create new curriculums.

89 Discussion with Vice Chief Justice of Judicial Matters (Pak H.Abdul Kadir Mappong) and Vice Chief justice on Special Civil Matters (Pak Mohammad Saleh), Supreme Court, 28th June 2010.

90 Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010.

challenges faced by employer-nominated ad hoc judges in the IRC. These meetings usually take place over two-three days in December of each year.⁹¹

The Trade Union Rights Centre has organised various national consultative meetings with trade union-nominated ad hoc judges to discuss particular issues of concern, including law reform. In 2010, a meeting was held with selected trade union-nominated ad hoc judges to discuss priority areas for reform of Law No.2 of 2004 on Industrial Relations Dispute Settlement. Due to resource constraints, these meetings are only organised on an ad hoc basis.

4.2 Knowledge and experience of judges prior to appointment to the IRC

Upon appointment to the IRC, career judges generally have a sound knowledge of civil procedure, but very little experience in industrial relations or labour law. Upon appointment, career judges tend to heavily rely on the experience and knowledge of ad hoc judges during the hearings and decision-making process.⁹² In discussions, career judges also demonstrated a particularly weak understanding of the foundations and philosophy of labour law.

Ad hoc judges, on the other hand, often have a good understanding of the key rights and obligations of workers and employers under the main labour legislation and some have experience in alternative dispute resolution.⁹³ Ad hoc judges do not need to have a background or education in law to be nominated or appointed to the IRC. As such, they frequently lack knowledge of civil procedure and have had no practical experience or training in legal research, legal reasoning, or in formulating judgments. The Supreme Court perceives this to be one of the major challenges of the IRC in each of the provinces.⁹⁴

4.3 Available resources

Judges in all five IRC visited for the purpose of this Assessment highlighted the lack of resources available to them to assist in their deliberations. The IRC generally had a few books containing relevant legislation, some copies of (mostly) recent Supreme Court verdicts and a few other publications distributed by the Trade Union Rights Centre or ILO. These were by no means extensive, nor are there sufficient copies of relevant texts to ensure each individual judge had his/her own collection of resources. Any additional resources to assist judges in the performance of their duties such as computers, academic texts, journals, internet access, and other study materials are expected to be self-financed by the judges.⁹⁵ In Makassar, where the IRC is not located in a separate building to the District Court, IRC judges did not have a specific office or space allocated to them for their work until recently (June 2010).⁹⁶ It is likely that judges in other provinces are presented with similar resource challenges.

Insufficient resources to support the publication and effective communication of decisions have resulted in weak levels of knowledge sharing among IRC judges and poor consistency in decision-making between provinces. With no structure to facilitate internal meetings among IRC judges (even within the one IRC), information about cases and decisions is only shared on an informal and ad hoc

91 See, *Schedule and Agenda- Consultation and Coordination National Forum on Apindo National Management Board, Chairmen of Apindo Provincial Management Board, Advocacy Teams of Apindo Provincial Management Board, Apindo IRC Ad-Hoc Judges and IRC Ad-Hoc Judges of the Supreme Court* 2009.

92 Discussion with legal aid providers, LBH Bandung, 19th August 2010

93 Discussion with IRC judges in Bandung IRC, 19th August 2010.

94 Discussion with Vice Chief Justice of Judicial Matters (Pak H.Abdul Kadir Mappong) and Vice Chief justice on Special Civil Matters (Pak Mohammad Saleh), Supreme Court, 28th June 2010.

95 Discussion with Jakarta Central IRC judges, Jakarta, 22nd July 2010.

96 Discussion with Makassar IRC judges, Makassar, 3rd August 2010

basis. The result is that, in some respects, each IRC in Indonesia is operating independently. They are often not aware of decisions of labour courts in other provinces, historical or global changes and trends in industrial relations, or the majority of Supreme Court decisions.⁹⁷ One compilation book of decisions, which was collated by the Trade Union Rights Centre in 2007 after just one year of operation of the IRC, is excessively relied on by IRC judges.⁹⁸ Knowledge of international developments in labour law and international labour law is particularly weak and ratified ILO Conventions are very rarely referred to in verdicts.⁹⁹

4.4 Assessment of gaps in training and knowledge

A pilot workshop was organized to provide further input to this Training Needs Assessment for IRC judges by introducing international labour standards and facilitating discussion on the usefulness of international labour law to address challenges experienced by judges in resolving disputes in Indonesia. Three themes - employment contracts; wage protection and discrimination, were selected as the focus areas for discussion and knowledge sharing. The workshop confirmed that all 3 themes were highly relevant focus areas for future curriculum development, but should be complemented with training on other areas as well.¹⁰⁰

Participating judges in the workshop included career and ad hoc judges from the Supreme Court (four) and the IRC in Jakarta (three), Bandung (three), Surabaya (three), Tanjung Pinang (two) and Makassar (two).

The presentations were delivered in an interactive manner, and were very well received, evoking lively discussions and knowledge sharing among judges, which were of both practical and theoretical value. The group was very interested and motivated to learn about the main topic areas, which became clear from the lively reporting on group work and interesting debates among judges on each of the thematic areas – particularly in relation to employment relationships and discrimination.

4.5 Gaps in knowledge and skills

Given the limited training opportunities, judges serving on the IRC largely rely on learning through experience and through informal knowledge sharing between colleagues to build their expertise. As a result knowledge gaps remain, particularly in terms of knowledge of international and comparative labour law and of verdicts delivered by the IRC in other provinces.

During discussions with judges from various districts and the Supreme Court, judges indicated that along with the Manpower Act, PPHI Law and Trade Unions Law, the following areas were important for newly appointed judges to the IRC:

- ILO Conventions & Recommendations;
- Comparative labour law;
- Civil procedure (particularly for ad hoc judges);
- Facilitating court-based mediation;
- History and philosophy of labour law;

97 Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010.

98 Discussions with IRC judges in Surabaya and Makassar revealed that this compilation was the most used resource by judges in these courts.

99 Discussion with Pak Nurkholis, Director of LBH, 12th July 2010.

100 There was particular interest from judge in receiving training on anti-trade union discrimination.

- Resolving interest disputes;
- How to determine cases when the national law is silent;
- Formulating decisions;
- Dealing with witnesses;
- Outsourcing;
- Strikes;
- Contracts; and
- MoMT implementing regulations.

In terms of advanced training, judges indicated that they were most interested in gaining deeper knowledge about ILO Conventions and Recommendations and decisions and trends in industrial relations dispute resolution in other countries, particularly other developing countries. Training to read and interpret financial statements of companies was also requested to assist judges in deciphering evidence presented in hearings.

An elaboration of some of the specific training needs and challenges faced by judges are provided below -

4.5.1 International Law

During discussions, all judges raised their concern that they had no or very limited knowledge of international labour law, or how it could be used to support them in their work.¹⁰¹ C 87 on freedom of association is the only international labour Convention that judges acknowledged they had referred to in their decision-making. The lack of internet facilities at the IRC (see below) and limited English skills of most judges have restricted judges' access to materials on international labour law via the internet and otherwise. Key ILO and international labour law publications and resources need to be translated into Bahasa Indonesia and distributed to the IRC.

During the 2-day workshop, judges also demonstrated keen interest in applying the ILO's standards to determine the nature of employment relationships during the group work. These principles complemented the indicators (subordination, the existence of a job description and receipt of wages) already prescribed by the Manpower Act.

4.5.2 Wage protection

Specific training on wage protection is needed. During an exercise on wage protection in the 2-day pilot workshop, judges failed to identify many of the pertinent issues in the case study (such as the legality of in-kind payments, whether deductions were legal, the relevance of advanced notification and consent of workers to deductions/in-kind pay etc). Analyses were focussed largely on the 'fairness' of the deduction of wages for damages to the company's property in proportion to the overall salary received in cash. This is indicative of some of the substantive gaps in the current training of IRC judges.

During discussions on wage protection laws, judges also voiced concern about the unclear prioritization under Indonesian law of workers' wages in bankruptcy cases. It was noted that, contrary to international standards – as outlined in C 173 on Protection of Workers' Claims (Employer's Insolvency), following payments to the State, workers in Indonesia compete with employers' obligations to private creditors for payment of outstanding wages. Some confusion and disagreement persists among judges on whether or not workers' wages should be prioritised over private creditors and whether or not judges in the IRC had the necessary jurisdiction to make this determination.

101 Various discussions with stakeholders and judges.

4.5.3 Illegal strikes

During discussions with judges in the Bandung IRC, some judges indicated that they sometimes chose not to strictly apply the law in the case of illegal strikes if they believe it is not in the broader interests of the enterprise to do so. One judge provided an example of an illegal strike where the panel of judges permitted the employer to recruit new workers and terminate the employment of all workers who participated in the illegal strike to ensure the 'broader interests of the State and company' were maintained. They concluded that if the company could not dismiss participating workers, it would negatively impact on the company's performance and thus the broader economic interests of the State.¹⁰² Other judges disagree with this reasoning and believe they should strictly apply the law irrespective of the broader consequences. Here, training on international labour standards on the right to strike and principles of labour law would be useful.

4.5.4 Informal enterprises and NGOs

Termination of employment cases involving workers in Non-Government Organisations (NGOs) are presenting particular challenges for judges. Based on the law, workers are covered by the Manpower Act, however, these organisations often do not have plans in place to provide the high levels of severance pay mandated by the Act. This is particularly the case for staff who have worked for ten or more years in the organisation.

Similarly, employers in home industries do not usually make any provisions for social security or severance pay for their workers. When cases concerning home enterprises are presented to the IRC, judges have difficulty determining the most 'just' solution as they generally consider the provisions in the Manpower Act to be too demanding and unrealistic for small, informal employers. According to judges in the Jakarta Central Court, close to 50% of cases coming to the court now involve informal employers. Currently judges are attempting to resolve many of these cases through court-based mediation, but have requested specific training to deal with cases involving informal enterprises, micro-small employers and NGOs.¹⁰³

4.5.5 Procedural law

There are conflicting views and implementation of civil procedural law – particularly in relation to the use of witnesses and areas where Law No.2 of 2004 and civil procedure are seen to overlap.¹⁰⁴ This was a common concern of most judges.

4.5.6 Employment relationships, contracts & outsourcing

Judges expressed a need for greater guidance to support them in defining 'core-business' activities in relation to cases concerning outsourcing and fixed-term contract workers. Judges are increasingly being presented with cases where they need to determine the nature of the employment of workers on fixed-term and casual contracts, particularly in circumstances involving subcontracting enterprises and ambiguous employment relationships. Currently, judges feel there is insufficient guidance in the national law to support them in determining what constitutes core and non-core business activities'.¹⁰⁵ This is an area where training on approaches and criteria formulated by courts in other jurisdictions and international labour standards would be particularly useful.

¹⁰² Discussion with Bandung IRC judges, Bandung, 19th August 2010.

¹⁰³ Discussion with Jakarta Central IRC judges, Jakarta, 22nd July 2010

¹⁰⁴ Discussion with Bandung IRC judges, Bandung, 19th August 2010.

¹⁰⁵ Judges in the Bandung and Central Jakarta particularly indicated this was a challenge.

4.5.7 Interest disputes

Interest disputes, by definition, involve a disagreement between parties over non-legal interests. This poses particular challenges for judges in the IRC, especially in cases where the Collective Labour Agreement (CLA), includes terms, such as provision for significant annual wage increases, which can be perceived as 'excessive'.¹⁰⁶ In such instances, because there is a lack of guidance in the law on how to handle disputes over interests, judges consider wage setting the privilege of the employer and will often merely refer to the relevant minimum wage levels, and any terms negotiated in the CLA will be removed.¹⁰⁷ During discussions with stakeholders, it emerged that many believe judges do not adequately understand the principle and right of workers to collectively bargain. Often, according to stakeholders, judges will rule in favour of an employer without taking into consideration the right of workers to collectively bargain for better conditions.¹⁰⁸ As the court with final jurisdiction over interest disputes and thus no guidance from the Supreme Court, judges in the IRC have requested specific training on ways to resolve interest disputes.

4.5.8 Discrimination

The judges who partook in the 2-day pilot workshop were particularly interested in learning about international labour standards on discrimination and ways to apply these principles in Indonesia. It was apparent from the questions raised, that judges have not had a great deal of experience in dealing with discrimination cases and have not received substantial training on this area. Nonetheless, they demonstrated a keen interest in understanding the different forms of discrimination under C 111 (ILO Convention on Discrimination in Employment & Occupation). Examples such as migrant worker recruitment companies, retrenchment and discretionary severance payments to various groups of workers, tax laws, differential treatment between ad hoc judges of different courts (the IRC, Fisheries and Anti-Corruption Courts) and anti-trade union discrimination cases were all raised by judges, as they sought clarification on the application of C 111.

Ignorance of gender issues is also a challenge. Although judges responded well during the 2-day pilot workshop to the training on sexual harassment in the workplace, it was apparent that there was a significant gap in their awareness of discrimination on the basis of sex, and gender issues in employment.¹⁰⁹ Prior to the 2-day workshop, most of the participating judges were unsure where sexual harassment fits within discrimination in employment and occupation and C 111, and in particular how it should be defined in disputes appearing before the IRC. Although the materials on discrimination and, in particular sexual harassment, were relatively new, judges' responses to the case studies and exercises following presentations were impressive and emphasized the usefulness of interactive teaching styles and training on the content of international labour standards and comparative labour law for judges.

Some ad hoc judges (trade union-appointed) have also noted that discrimination in working relationships is present in some cases before the IRC, but that judges and lawyers are failing to correctly identify discrimination as the underlying cause of the dispute. Examples of cases involving workers with disabilities (particularly those who become handicapped, injured or sick during the term of their employment) were provided. In these cases, employers are electing to dismiss these workers and defend their actions in the IRC, claiming the worker does not have the necessary 'capacity' to perform the tasks. There is concern that judges are prima facie accepting this argument, rather than examining the dispute from the perspective of a rights-based case involving discrimination.¹¹⁰

106 Discussion with Bandung IRC judges, Bandung, 19th August 2010.

107 Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010.

108 Focus Group Discussion with stakeholders of the IRC, Jakarta, 28th July 2010.

109 Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010.

110 Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010. This also highlights a need to build the capacity of legal advocates and proxies on discrimination in employment and occupation.

4.5.9 Anti-trade union discrimination

During the 2-day pilot workshop, judges raised various concerns on dealing with cases of anti-trade union discrimination. They were particularly interested to discuss and learn about ILO recommendations and international experiences in relation to anti-union discriminations cases that are difficult to prove. It became apparent that Indonesian judges do not generally reverse the burden of proof in anti-union discrimination cases (as recommended by the Committee on Freedom of Association (CFA)). Judges specifically requested copies of the CFA digest of decisions to assist in their decision-making.

4.5.10 Termination of employment

Some judges believe that if the final verdict for a termination case is in favour of the employer, then the worker should not receive any salary during the duration of the court case. Others believe that the employment relationship persists until a final verdict is reached and workers should receive salary benefits until that date.¹¹¹ Judges requested further training on this to help resolve the issue.

4.5.11 Reinstatement vs compensation

There was a level of disagreement among judges on the question of reinstating workers vs compensating them for unlawful termination of employment. Some judges likened the employment relationship with that of a marriage, stating that once the relationship is no longer 'harmonious' between the parties, reinstatement is impossible. Others disagreed and referred to the Manpower Act, which explicitly provides for reinstatement (see art 153(2)) in the case of unlawful termination. Some judges noted that employers rarely comply with reinstatement orders so it is of more practical benefit to workers to order compensation. Discussions with judges revealed that they usually provide compensation in addition to the mandated severance pay to compensate for unlawful termination of employment rather than ordering reinstatement.

4.5.12 Legal standing of trade unions

There is significant disagreement among judges on whether or not trade unions who are not represented in the enterprise in question, have legal standing to defend a worker's claims in a dispute. The Supreme Court has ruled on this, (stating that they do not have the requisite legal standing) however, some district courts, for instance, Surabaya IRC, continue to recognize the legal standing of any trade union that is registered and has issued a valid membership to the worker(s) in question.¹¹²

Some of the challenges noted above can be resolved through additional training, education and access to resources. Others, however, may require a combination of training and legislative interventions.

4.6 Judges' response to 2-day pilot workshop

Judges provided very positive feedback in their written evaluations of the 2-day pilot workshop on international labour standards.¹¹³ The relevance of the workshop to their daily tasks as judges was rated highly (14 judges ranked this as 'very high', 3 as 'high'). They all enjoyed the training methodology – combining presentations with group work and case studies and most (15) found these case studies highly relevant to their current work as judges. Most (13 judges) reported that they would apply the knowledge

111 Discussion with Pak Saepul Tavip (Director of OPSI) 8th July 2010.

112 Discussions with judges at the 2-day pilot workshop on International Labour Standards, Supreme Court Judicial Training Centre, Mega Mendung, 24th-25th November 2010.

113 An introduction to international labour standards, ILO supervisory bodies and the themes of discrimination, wage protection and employment relationships and contracts were covered in the 2-day workshop.

they acquired from the workshop in their daily occupations.¹¹⁴ All judges believed their institutions would benefit from their participation in the training and they indicated that would share the materials and knowledge they gained from the workshop with colleagues.

With the exception of one respondent, all of the judges responded that they 'very highly' believed this form of training and information on international labour standards would be useful for newly appointed judges to the IRC as well as for advanced training programmes. Judges considered the training and information shared on discrimination to be of greatest value, but also indicated that the knowledge gained on employment contracts/relationships and international standards on wage protection were highly relevant to their work as judges, particularly C 95 (Protection of Wages). Overall, judges commented that the workshop was 'very useful' and 'very important' for improving judges' knowledge and understanding of comparative approaches to labour disputes and labour rights, and for providing answers when the national law is silent. Judges indicated that they need a much longer training program to be adequately skilled on international labour standards and that such workshops should occur periodically to keep judges informed on evolving issues.

In addition to the themes covered in the 2-day pilot workshop, judges involved in the workshop indicated they would also like to receive advanced training on the following areas:

- termination of employment, strikes, occupational health and safety and 'other issues';
- ILO's Committee of Expert's opinions on Indonesia's violations of Conventions; and
- decisions and cases from labour courts in other countries, particularly Asian courts.

4.7 Perceptions of stakeholders

A series of focus group discussions with stakeholders – trade unions, employers, lawyers, academics and legal aid providers – were conducted to solicit the opinions of court users of the training needs of judges.¹¹⁵ All stakeholders provided constructive input and feedback on the challenges faced by the IRC. Overall, stakeholders found it difficult to generalise about the quality of judges' knowledge. As one legal aid provider phrased it, 'some are good, some are very good and some continue to ask ridiculous questions in the courtroom.'¹¹⁶

There is a feeling among many trade unions and legal aid providers that 'even if an employer comes to the court without a lawyer, the employer has a lawyer'.¹¹⁷ This is indicative of the low level of trust in the system and perceived inconsistent actions of judges in the courtroom. For example, in Surabaya, legal aid providers, LBH, reported that they frequently witness ad hoc employer-nominated judges acting as advocates during trials, asking interrogatory questions and providing 'clues' to the employers when employers were poorly represented by legal counsel, or unrepresented.¹¹⁸ Some claim that if a trade union-nominated ad hoc judge attempts to do the same for workers, he/she will be reprimanded by fellow panel judges. In other IRC, however, it was noted that occasionally ad hoc trade union-appointed judges have assisted proxies in their legal reasoning and presentation of their cases in the court when they demonstrated very little or no understanding of law.¹¹⁹

114 4 judges gave a 'neutral' response to this question.

115 Some legal aid providers and trade unionists oppose the IRC and new dispute resolution system on conceptual grounds. They believe that allowing courts to deal with rights-based disputes weakens the role of labour inspectors and feel that the IRC has adopted a corrupt court culture.

116 Discussion with legal aid providers, LBH Bandung, 19th August 2010.

117 Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010.

118 Discussion with legal aid providers, LBH Surabaya, 27th July 2010.

119 Discussion with Vice Chief Justice of Judicial Matters (Pak H.Abdul Kadir Mappong) and Vice Chief justice on Special Civil Matters (Pak Mohammad Saleh), Supreme Court, 28th June 2010.

According to many stakeholders, and some ad hoc judges, judges are perceived as constantly weighing the effects of applying the law as articulated in the Manpower Act on employers. Many disagree that the judges should consider the effect of the law on employers vis-à-vis workers and should simply apply the law as it is written. Most examples of instances where stakeholders felt this was occurring were mostly in termination of employment cases, where judges would elect to not reinstate workers. Other cases where stakeholders felt this was the case involve disputes involving large numbers of contract or outsourced workers, who, in their perspective, should be considered permanent workers, but if this were the case, the employer would not be able to adequately pay all severance payments to the concerned workers.¹²⁰ Many stakeholders believe judges should apply the law irrespective of the consequences on the employers – if there is a problem with the implementation of the law, it is for the legislatures to address.¹²¹

Trade unions and legal aid providers also feel that the IRC favours employers, in its interpretation of employment relationships.¹²² Two examples of this relate to the findings of the Supreme Court that taxi drivers are in 'partnership' with company owners, rather than employees and classifying teachers as contractors rather than employees.

Low levels of workers' trust in the IRC judges' impartiality are most clearly being demonstrated in the recent trend to take cases regarding violations of freedom of association to the local criminal courts instead of the IRC.¹²³ On February 5th, 2008, the Bangli District Court in Pasuruan, East Java, sentenced a general manager of a private company to 18 months imprisonment for violating trade union rights. This was the first case of an employer being jailed for violating the labour law. The Surabaya High Court upheld the verdict, as did the Supreme Court in June 2009. Although the judgment was never actually executed, it has encouraged trade unions to shun the IRC and pursue labour issues with criminal penalties in the criminal courts instead.¹²⁴ This has created a level of confusion and conflict between trade unions and employers around the relevant jurisdiction of courts to deal with freedom of association cases.

Upon examination of the composition of cases filled by parties and the verdict reached, there is no systematic pattern or bias towards or against either employers or workers. According to recent research by the World Bank, just over half of the petitions submitted by workers in the Jakarta IRC received verdicts that were in their favour.¹²⁵ However, it noted that workers who are self-represented or represented by trade unions with little legal training and/or experience and who are not represented by legal counsel certainly are disadvantaged in the court. This is particularly problematic in relation to complying with procedural law. Irrespective of the substance of the case, workers tend to lose if they cannot comply with the procedural rules governing evidence.

4.7.1 Greater judicial activeness during a trial

Article 90 of the PPHI Law states that a judge 'can' call witnesses or expert witnesses to the court. However, given the nature of labour disputes and (often) inequality in representation in the courtroom, trade unions, legal aid providers and some lawyers feel it would be appropriate for the Supreme Court to use its powers to direct judges to be more flexible and active in supporting the trial, making the process more efficient and in assisting both parties in the search of the truth. Many trade unions feel that where there are palpable weaknesses in one party's ability to obtain evidence, judges should be encouraged to intervene, identify and call for the submission of evidence.

120 Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010; Focus Group Discussion with stakeholders of the IRC, Jakarta, 28th July 2010.

121 Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010.

122 Various examples were provided in discussions with trade unions, some IRC judges and LBH in Jakarta, Surabaya and Bandung.

123 Surya Chandra, 'Imprisoning employers', *The Jakarta Post*, 15th January 2010.

124 Ibid.

125 World Bank, *Indonesia Jobs Report: Towards better jobs and security for all* (2010).

4.7.2 Payment of wages

Although the law stipulates¹²⁶ that until a final decision is made, wages should be paid, the Supreme Court has determined that only a maximum of 6 months of back wages are to be paid by employers to workers in legal disputes concerning termination of employment. Therefore if a case takes two years to resolve, the worker will only receive 6 months worth of back pay.¹²⁷ This provides weak incentives to employers to not prolong the dispute process and is hotly contested by stakeholders (and internally in the IRC).

4.7.3 Need to respond to the capacity of users

Stakeholders feel that the Supreme Court needs to respond to the limited capacity of users, particularly workers, employers of small enterprises and human resources managers, to effectively engage in the new dispute resolution system. Some stakeholders believe poorly represented parties are losing cases based on formal mistakes in the application process and during court proceedings, rather than due to the substance of their claim.¹²⁸ This is a result of some judges strictly applying the rules of civil procedure in all cases.¹²⁹ Imposing strict legal procedures in cases in a sophisticated and well-established legal system may be necessary to ensure procedural fairness is maintained, however in an environment where pro bono legal aid is not readily available, legal counsel is expensive and workers are getting caught out by the procedural rules, such a system may not be conducive to achieving fair results.¹³⁰ When workers fail to summon sufficient evidence, judges 'can't help but trap workers' and they feel there is little leeway within the current system to prevent this.¹³¹

One example of this, given by stakeholders of the IRC is, that despite the legal requirements in the Manpower Act for employers to provide written work agreements to workers, many workers are never provided with written contracts or letters of appointment. Often enterprises only ask workers to sign a receipt of wages in a special wage record book, where workers are usually forbidden to know the wage of their fellow co-workers. This reportedly makes it very difficult for workers to prove the conditions of their employment because they have to rely on witness support to prove their employment status and income and the testimony of co-workers is inevitably weak and undermined by the enterprises' processes.¹³² In such a case, one could reasonably presume if there was sufficient anecdotal evidence of the worker's employment, then the absence of a written agreement or letter of appointment, as required by law, would constitute a failure of the employer to implement their responsibilities and result in a judgement against their interests by virtue of this failure. However, according to LBH and trade unions, an over reliance on procedural rules by many IRC panels has resulted in workers losing their case by reason of poor evidence. As such, stakeholders believe judges should have greater flexibility to be able to collect and introduce various types of evidence, apart from those required by the rules of civil procedure and to assess a case based on its substantive merits, even without the presence of tangible evidence by the plaintiff.

Better access to legal aid or some leniency in the application of civil procedure rules is needed to strengthen the trust of users in the system and to ensure a fairer trial.

126 Manpower Act, art 155.

127 Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010.

128 Discussion with Pak Surya Chandra, Director TURC, 2nd July 2010; Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010.

129 Discussion with Surabaya IRC Judges, Surabaya, 26th July 2010.

130 Discussion with trade union representatives, Surabaya, 27th July 2010.

131 Discussion with Surabaya IRC Judges, Surabaya, 26th July 2010.

132 TURC Surya Chandra. Not all cases with poor evidence of a working relationship or wages necessarily result in the workers losing their case. See, for example, case No.27/G/2007/PHI.MDO, where the lack of appointment letter resulted in ruling in workers' favour.

4.7.4 Summary of training needs from the perspective of stakeholders:

- legal ethics and professionalism. Some stakeholders emphasised the lack of integrity demonstrated by judges (as opposed to skills deficits);
- knowledge of substantive and procedural law. This was raised predominantly by lawyers and legal aid providers;
- philosophy and history of labour law. In the opinion of a number of stakeholders, judges do not understand the purpose of labour regulations, particularly those governing termination of employment – namely the objectives of regulating high severance pay and employment protection for workers;¹³³
- witnesses and evidence. It is believed that judges do not deal with witnesses and evidence in a consistent manner and that there is an over-reliance on written evidence, which in most cases is unavailable to workers;¹³⁴ and
- international law.

133 Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010.

134 Discussion with legal aid providers, LBH Bandung, 19th August 2010.

5. Recommendations

5.1 Desired competencies of IRC judges

No job description or list of required competencies for IRC judges exists. The following list of competencies was formulated on the basis of a desk review, interviews with judges and the Supreme Court senior management.

It is suggested that judges in the IRC are required to perform the following functions:

- access and interpret legal sources (legislation, court verdicts, academic literature, international jurisprudence, international labour standards) efficiently and accurately;
- demonstrate an in-depth understanding of domestic labour laws and implementing regulations;
- demonstrate an in-depth understanding of international labour laws, instruments, principles, and the supervisory machinery of the ILS system, including how and when judges can make use of these sources to resolve labour disputes;
- demonstrate an understanding of developments in the field of labour law and industrial relations, both domestically and globally (and be able to keep up-to-date on new developments);
- identify relevant issues in labour disputes and resolve cases by interpreting and applying principles of labour law;
- formulate bona fide opinions on legal questions in areas where practices or precedents do not exist or are of a conflicting nature;
- formulate and effectively communicate judgments on technical questions concerning labour law and industrial relations in a consistent, ethical, fair and logical manner;
- critically evaluate processes for resolving conflicts in light of broader public interest concerns and legal rights.

To effectively perform their duties in the courtroom judges should be able to:

- examine and analyse case dossiers and parties' legal arguments;
- examine and evaluate witnesses and evidence;
- identify and consider matters and issues which are not clearly raised or exposed during the hearing or parties' submissions;
- facilitate out-of-court settlements through mediation between disputing parties where appropriate;
- assess the merits of passing interim verdicts and execution orders (seizure of assets etc);
- prepare and administer a trial (these skills should be already developed by career judges. There is no need for ad hoc judges to receive in depth training techniques to administer a hearing given this is the key role of career judges in the IRC).

5.2 Competency gaps

From discussions with stakeholders, judges and the 2-day trial workshop, it is apparent that most judges in the IRC do not consistently or satisfactorily demonstrate a high level of skill in performing the above functions. It can be deduced that part of the reason for this is due to a lack of knowledge and skills-development. This can largely be addressed through education and training.

The greatest substantive knowledge gaps demonstrated (and acknowledged) by judges are those of international and comparative labour law and, to a lesser degree, knowledge of domestic jurisprudence in Indonesia. Judges, largely through experience serving on the IRC and self-study, have acquired substantial knowledge of the contents of domestic labour law, however, would benefit from training on international labour law and approaches taken by other Asian countries to similar challenges in labour disputes. To support judges in the IRC to perform within the context of an increasingly globalised economy and labour market, judges need to be aware of ways to research and access information on international and regional developments. This will support the evolution of industrial relations jurisprudence in Indonesia, and assist in bringing decisions of the IRC to the international stage. Similarly, judges require the skills to research, adapt and apply international principles to domestic disputes where there are gaps or ambiguities in the domestic legal framework.

5.3 Recommendations for curriculum content

The curriculum should focus on providing a solid introduction to key issues in labour and employment relations and equip judges with the necessary skills to know where and how to access and apply domestic and international legal resources to support them in their decision-making. The proposed curriculum shall support judges to progressively realise the required competencies of IRC judges.

The content covered in the current curriculum should also be covered in the new curriculum, however, rather than introducing each piece of legislation separately, topics could be covered thematically and be complemented by practical exercises that are designed to equip judges with the necessary skills to research, interpret and apply the law - including making use of international and comparative law to complement and strengthen application of national legislation and jurisprudence.

Key pieces of labour legislation (Trade Union Act, Manpower Act, PPHI Law, Social Security Laws, Occupational Health and Safety Law) and implementing regulations should be provided to all participants prior to the course along with a few questions and short case studies. This prior reading and application practice will ensure that all participants are already aware of key aspects of the relevant laws and some of the challenges in resolving labour disputes and that they are ready to engage in discussion. This will also support effective and efficient use of training time. Training materials can build on judges' initial responses.

To fulfil their role as judges on the IRC, judges need in depth knowledge and skills in the following technical areas:

- freedom of association and trade unions
- termination of employment
- strikes & lockouts
- foreign workers
- protection of wages,
- discrimination,
- forced labour
- employment relationships (including informal workers and enterprises)

- contracts, subcontracting and casual labour
- interest disputes and collective labour agreements
- occupational health and safety, including HIV/Aids
- social security and Jamsostek
- introduction to international labour standards and labour law (scope, relevance, resources & tools to apply international labour standards)
- ILO's supervisory bodies and their relevance to domestic disputes
- legal research for international and comparative labour law
- legal ethics
- legal reasoning & decision-writing¹³⁵
- civil procedure and the PPHI Law
- witness examination and evidence
- facilitating out-of-court settlements

Suggested Modules

The following modules integrate these the above subject-areas and could form the foundations for a competency-based training curriculum for the certification of IRC judges. These modules were formulated based on discussions with the Supreme Court Training Centre and IRC and Supreme Court judges. The modules significantly vary in content size and expected duration: some modules may be delivered in one or two hours, while others may require one-two days.

1. Role and Function of the IRC

- Background and objectives
- Unique jurisdiction (4 categories of disputes, PPHI Law etc)
- Role of career and ad hoc judges

2. Special Characteristics of Labour Law

2a. International labour standards

- Introduction to international labour standards (scope, relevance to Indonesia, resources & tools to apply international labour standards)
- ILO's supervisory bodies and their relevance to domestic disputes
- Freedom of Association & trade unions
- Collective Bargaining
- Discrimination & equality of opportunity
- Forced labour

2b. Specific aspects of labour law

- Termination of employment
- Employment relationships (contract of employment, informal workers, contractors)
- Bargaining & making collective labour agreements

¹³⁵ Note that the National Law Reform Project has just recently developed a curriculum syllabus for candidate judges. Elements from this, such as legal ethics and civil procedure can be adapted for use for ad hoc judges appointed to the IRC.

- Strikes and lockouts
- Wages and wage protection
- Migrant & foreign workers

3. Civil Procedure (mainly for ad hoc judges)

- Overview of civil procedure rules
- Procedural fairness
- Witness examination
- Execution
- Preliminary decisions (interim verdicts)

4. Evidence

- Rules of evidence
- Factual investigation
- Critical appraisal of information

5. Court-based mediation

- Role of a judge
- Mediation process
- Communication
- Power issues
- Identifying interests

6. Decision-making

6a. Legal Ethics

- Ethical standards and professional responsibility
- Recognising and resolving ethical dilemmas

6b. Legal Research; reasoning & decision-writing

- Problem solving
- Legal research (including for comparative and international law)
- Legal analysis and reasoning

7. Future development – improving the legal system & knowledge sharing

- Transparency
- Engagement with stakeholders
- Availability of decisions & information to parties
- Use of IT resources
- Continuing professional development of judges
- Meetings and knowledge sharing
- Mentoring
- Comparative and international experience & best practices
- Participation in legal academic community & policy discussions

Training on international labour standards and comparative labour law, including some cases from South-East Asian countries should be integrated into each of the subject areas above. This shall enrich judges' understanding of domestic law by supporting judges to better understand the broader context in which they operate, the foundations of various legal principles and to understand how to use international sources to assist in their interpretation and application of domestic labour law. It is important that gender issues, human rights and national laws that interact with the labour law (such as commercial law, marital law) are mainstreamed in the content to ensure such issues are not overlooked and are appropriately understood and dealt with in disputes before the IRC.

Rather than solely relying on lecture-style presentations to present information to judges, the training should focus on integrating a range of case studies, role-plays, simulations, group work and discussions/debate. This will encourage active participation and learning. A range of these activities should be developed for each thematic area.

Participatory training is the same as 'learning by doing' or 'experiential learning'. This style of learning involves less focus on the trainer providing lectures or presentations, and greater attention to sessions where participants participate in an activity or practical exercise. Participants then share their observations and findings with the trainer and group of learners and analyse and draw learning points and conclusions from these experiences. Newly appointed judges (and judges already serving on the IRC) already have established values, beliefs and opinions based on years of experience working in either the industrial relations environment or, in the case of career judges, in the district courts. They therefore tend to have a problem-solving orientation to learning and can relate the new information to their own experiences and understanding of disputes.

A pre and post-training questionnaire should be developed for participants to measure the changes in their knowledge, skills and attitudes. Each training programme should also include a final session for feedback and written evaluation. The evaluation should seek the participants' views on their satisfaction with the course, what they have learned, teaching methods and their reactions to the contents and practical exercises. The evaluation should also seek comments and recommendations for future trainings. This feedback will be invaluable for continued revision and improvement of the materials and training programme.

Given the volume of content that needs to be covered, a two-three week introductory training program is recommended. On-going learning programmes should also be developed to complement and build on the introductory course.

5.4 Training Needs / Competencies Matrix

Curriculum Contents	Access and interpret legal sources (legislation, court verdicts, academic literature, international jurisprudence, international labour standards) efficiently and accurately.																							
	Demonstrate an in-depth understanding of domestic labour laws and implementing regulations.																							
	Demonstrate an in-depth understanding of international labour laws, instruments, principles, and the supervisory machinery of the ILS system, including how and when judges can make use of these sources to resolve labour disputes.																							
	Demonstrate an understanding of developments in the field of labour law and industrial relations, both domestically and globally (and be able to keep up-to-date on new developments).																							
	Identify relevant issues in labour disputes and resolve cases by interpreting and applying principles of labour law.																							
	Formulate bona fide opinions on legal questions in areas where practices or precedents do not exist or are of a conflicting nature.																							
	Formulate and effectively communicate judgments on technical questions concerning labour law and industrial relations in a consistent, ethical, fair and logical manner.																							
	Critically evaluate processes for resolving conflicts in light of broader public interest concerns and legal rights.																							
	Examine and analyse case dossiers and parties' legal arguments.																							
	Examine and evaluate witnesses and evidence.																							
	Identify and consider matters and issues which are not clearly raised or exposed during the hearing or parties' submissions.																							
	Facilitate out-of-court settlements through mediation between disputing parties where appropriate.																							
	Assess the merits of passing interim verdicts and execution orders (seizure of assets etc).																							
	Prepare and administer a trial.																							

5.5 Ongoing learning

Considering the limitations and financial and time costs of conducting face-to-face trainings, it is recommended that additional platforms and systems be established to facilitate knowledge sharing and on-going learning for judges. Given that most ad hoc judges find they have some spare time during the week when they are not engaged in hearings, deliberations or writing verdicts, there are opportunities to engage judges in knowledge sharing and capacity building initiatives. Sufficient resources – notably computers, internet access and dedicated work space for IRC judges are required (as a minimum) to support this.

Some suggestions for consideration:

- Initiate monthly peer trainings. Organising a group of judges to meet and exchange experiences on a fortnightly or monthly basis can be an effective means of learning. Internal meetings could provide informal training to judges on specific thematic areas. On a rotational basis, judges could be selected to prepare and present specific themes for discussion with colleagues. This could cover recent decisions of the Supreme Court or landmark decisions from labour courts overseas, emerging trends, challenging cases, implications of new legislation, review of academic or journal articles etc. This could be done internally, or in collaboration with IRC in other provinces through teleconferencing or electronic media.
- Create a common platform for a 'community of practice' for judges to share questions, insights, further develop their expertise and foster good practices through the exchange and creation of knowledge on areas of labour law. This could be achieved by developing a common internet forum that allows judges to post questions, discuss and exchange knowledge. The site could also act as an informal resource centre, where judges can upload and download articles, decisions and other resources for common use. The required electronic resources would need to be made available in all IRC to facilitate judges' participation in the network.
- Routinely publish decisions issued by the IRC and Supreme Court on publicly accessible court websites. A proper search engine to enable research functions should also be created to support knowledge management.
- Develop a monthly/quarterly bulletin written and edited by IRC judges on recent judgments, emerging issues, and academic papers on labour law could also be created to keep judges and the legal professionals informed of labour trends and challenges across the country.
- Collect, collate and routinely publish and share data on cases among judges to enable the IRC to measure its performance against other provinces and to support better case management, allocation of resources and to identify and respond to challenges preventing the timely resolution of disputes.
- Appoint a senior judge as a 'mentor' to coach and support newly appointed judges.
- Develop international partnerships to collaborate and share knowledge and experiences with judges in labour courts in other jurisdictions.

5.6 Advanced modules

Advanced curriculum modules should focus on specific topic areas in greater detail and depth. Given the experience and expertise of serving judges on the application of domestic law, these advanced modules should specifically focus on areas of international and comparative labour law, areas in which judges demonstrated less familiarity. The contents for these modules shall build upon the competency-based curriculum.

The contents shall be determined following pilot implementations of the introductory curriculum.

5.7 Potential barriers to improved training

There are various barriers that may impact on the quality of training and access to information sources for IRC judges. These include:

- time (of judges, specialist resources persons and the Technical Training Unit);
- availability and number of skilled trainers;
- resistance to new approaches;
- lack of knowledge sharing systems/platforms among courts;
- lack of resources for IRC judges to use – computers, internet, journals, legal books;
- lack of English language skills among judges and availability of international resources in Bahasa Indonesia.

5.8 Way forward

It is suggested that a working group of expert judges from within the Supreme Court be established for the purpose of developing curriculum in partnership with the ILO. A working group consisting of trainers, curriculum developers and administrators from the Technical Training unit should also be established). It is suggested that these groups work in close collaboration with the ILO in the development and testing of the curriculum.

6. Annex

6.1 Other challenges - challenges for users engaging the dispute resolution system

The new system for dispute resolution presents significant barriers to access for individual workers, trade unions and small employers.

At the time the PPHI law was being drafted, a tradition of trade union repression under the Soeharto regime was still obvious. Eleven years later, the effects of decades of repression are still reflected in the weak institutional capacity of trade unions to represent their interests. This is clearly manifested in the poor capacity of workers' organizations and employers (mostly small and medium sized enterprises who are not affiliated to Apindo) to engage in bipartite and tripartite dispute resolution, and, particularly, to use the formal court system. Although the PPHI Law has permitted individual access to the dispute resolution system, this has proven almost impossible for the average worker and owners of small-medium enterprises.

The main obstacle faced by workers and many trade unions attempting to engage in the IRC system generally lies in their lack of knowledge of legal terms and often low understanding of the substantive law.¹³⁶ There is a lack of professionals within the trade union structure who are skilled in dealing with technical legal matters and engaging the court. The knowledge that does exist within the trade union structures is not evenly distributed among unions. Very few trade unions provide a labour law or paralegal training program for their leaders. This is proving to be a significant challenge for unions as service organisations.¹³⁷

In 2007, one-fifth of cases were removed from the Central Jakarta PHI due to insufficient evidence (or successful negotiations). Generally, workers or workers represented by trade union proxies, are most likely to receive an N.O (Niet Onvankelijke) verdict from the IRC for not being able to comply with the application requirements.¹³⁸

Workers and their proxies often poorly understand judicial reasoning and, as noted earlier, they have little trust in the system. Their response is to stage demonstrations outside of the courts. Worker demonstrations are frequently staged (on a daily basis in some provincial capitals) and are of significant concern to IRC judges.¹³⁹ Career judges interviewed often made reference to the frequency of demonstrations as one of the chief reasons they are reluctant to serve on the IRC. These demonstrations have also contributed to the Supreme Court's reluctance to create additional IRC outside of the provincial capital cities unless a separate building is available. There is no data available to analyse whether or not the threat or presence of a large demonstration has influenced decision-making.

¹³⁶ Surya Chandra (ed), *Hakim Ad Hoc Menggugat (Catatan Kritis Pengadilan Hubungan Industrial, Trade Union Rights Centre, (2009).*

¹³⁷ Ibid.

¹³⁸ Discussion with Jakarta Central IRC judges, Jakarta, 22nd July 2010.

¹³⁹ When asked their main concerns about being a judge, the response from IRC judges was that their court was not a proper building for escaping demonstrations. Discussion with IRC Judges, Surabaya, 26th July 2010.

Given the low levels of understanding and often weak ability of workers and trade unions to engage in the IRC system, the new dispute settlement system has failed to establish the trust and confidence of its users. Trade unions demand a less complex and more flexible system that is better able to accommodate the varying levels of capacity of users and which does not demand reliance on legal professionals to represent parties to the dispute.

6.2 Challenges to transparency

Although the Supreme Court has attempted to strengthen its supervisory functions over judges and increase public access to court information and decisions in recent years by issuing a Decree on public access to court information in 2007, SK144,¹⁴⁰ allegations of corruption continue and the IRC has not yet made sufficient information on its decisions or operations available to the public.

Most judges interviewed were aware of the Supreme Court Decree, but stated that they only announce that the reading of verdicts is open to the public.¹⁴¹ IRC websites publish news items (which are often out-of-date), but not decisions. Most IRC do not publish data collected on labour dispute cases.¹⁴² At the Supreme Court level, approximately 560 labour dispute cases have been published on the Supreme Court website.¹⁴³ The Supreme Court still decides which of its cases will be made available to the general public through publication, and more importantly, which ones will not be available. With 99 percent of cases at the IRC level and at least 50 percent¹⁴⁴ of cases at the Supreme Court level hidden from the public eye, and no real possibilities of finding out what happened in them, it is difficult to determine whether the Supreme Court strictly follows and applies the law (including its own published precedents) or simply just does as it pleases.

IRC decisions, like most decisions of the civil courts, are generally treated as private decisions available only to those persons or officials with an interest in a particular case and are only now slowly beginning to be regarded as public documents to be studied by legal scholars or other interested members of the public. Although cases are sent to the parties to the dispute and they could theoretically publish them, there is little public scrutiny of the IRC.¹⁴⁵

Efforts to strengthen the implementation of SK144 on access to information in the PHI are needed. Even with limited resources, this could be achieved by providing greater pressure, incentives for compliance and/or penalties to courts for non-compliance, or by making available additional resources to courts such as internet access and training to fulfil their obligations.

140 See, Supreme Court Decree, 144/KMA/SK/VIII/2007 on access to court information.

141 Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010.

142 The Central Jakarta IRC is the only IRC that occasionally publishes data on cases on its website (as of September 2010).

143 See, <http://www.mahkamahagung.go.id/>

144 As of July 2010, the Supreme Court indicated that it was resolving between 20 and 40 cases per month. Assuming this has been the case since the PHI came into existence in 2006, the Supreme Court would have issued verdicts for between 840 and 1,680 cases. If this assumption is correct, then the published cases represent no more than half of the cases the Supreme Court has received since 2006.

145 Discussion with IRC Judge of Central Jakarta IRC, Jakarta, 24th June 2010.