The Habibie Government and the Law on Eradication of Corruption in Indonesia

Nadirsyah Hosen*

I. Introduction

Corruption cannot co-exist with the rule of law. Checks and balance mechanisms, independence of the judiciary and the relationship between government and parliament cannot properly function when corruption is part of the game. The situation deteriorates when democracy is reduced to a political compromise between political actors and/or legal actors, and the interests and welfare of society are neglected. For a corrupt government, society as such, the people, will never be a top priority.

The Republic of Indonesia was created when the former Dutch East Indies became independent on 17 August 1945. With more than 200 million largely Muslim inhabitants, almost 2 million km^2 of land on over 13,000 islands, and a rather diversified economy, it is one of the key countries in South East Asia. Unfortunately, it is also one of the most corrupt. This article describes the efforts of the Habibie Government to bring to an end the corruption that had entrenched itself during the preceding Soeharto Government. It goes on to analyze how and why these efforts largely failed and in any case did not produce the desired results. The author hopes that the case-study of Indonesia, in particular the law reforms undertaken in 1998/99, can provide useful lessons about how to and how not to go about combating corruption, and that these lessons will be useful for Indonesia and for other parts of the world.

During the Soeharto era (1966-1998) of Indonesian history, corrupt practices could be identified in almost all areas of Government involvement. Rather than completing investigations and bringing KKN (the Indonesian acronym for corruption, collusion and nepotism) cases to court, many high ranking officials preferred to rely on rhetoric in their 'battle' against KKN. In practice, the investigation of KKN cases faced many hurdles, not only difficulties in collecting sufficient evidence

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* Nadirsyah Hosen is a lecturer at the State University of Islamic Studies (UIN) Syarif Hidayatullah, Jakarta. He holds a Bachelor degree (IAIN, Jakarta), a Graduate Diploma in Islamic Studies (University of New England), a Master of Laws in Comparative Law (Northern Territory University), and a Master of Arts with Honours from the University of New England.

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to bring a case to court. Most incumbent Government officials did not make proper investigations as they themselves often had political links with the case or the people being investigated.

By any standards, the 1971 Anti-Corruption Law was ineffective when President B.J. Habibie[1] took over the power from Soeharto in 1998. By the time Soeharto lost his authority, Indonesia had become one of the most corrupt countries in the world. This clearly indicates that the Soeharto Anti-Corruption Law not only failed to eradicate corruption, it failed to even discourage it. Reform was a must. When President B.J. Habibie took over the leadership on 21 May 1998, following the resignation of Soeharto,[2] he was aware that the eradication of KKN would have to become his top priority.

Combating corruption became a national commitment, as determined in the People's Consultative Assembly Decree No.XI/MPR/1998. It is being carried out under various laws and regulations, in particular Law No. 31 of 1999 on Eradication of the Criminal Act of Corruption. The main question posed in this article for discussion is whether Law No. 31 of 1999, as signed by President Habibie, provided

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1 After attending the Bandung Institute of Technology for about a year in 1954, B.J. Habibie won a scholarship from the Ministry of Education and Culture to study aircraft construction engineering in Aachen, West Germany, a course he completed in 1960. Five years later, at his own expense, he obtained an engineering doctorate from Rheinisch-Westfälische Technische Hochschule, Aachen. He passed with honours and a perfect grade point average. As a research assistant at Aachen's Technische Hochschule (1960-1965), Habibie created a design for a deep sea submarine and a high-pressure temperature room for the Jülich Nuclear Research Centre. With Hamburger Flugzeugbau (HF), an aircraft company, he designed the world's first aircraft with one consolidated wing, which remains the only aircraft capable of vertical landing and takeoff. He designed more aircrafts, including those for satellite and nuclear projects while he was an expert staff member and later vice president of Messerschmidt Bölkow Blohm (MBB) – another aircraft company – that subsequently merged with HF. He is often nicknamed 'Mr. Crack' for his outstanding ability to calculate random crack propagation down to the very atom.

Bacharuddin Jusuf Habibie (born on 25 June 1936) is married to Hasri Ainun, a physician by training, who gave up her professional career to raise their two children, Ilham Akbar and Thareq Kamal. Habibie returned to Indonesia in 1974 when President Soeharto asked him to come back. He was appointed Minister of State for Research and Technology in 1978 and maintained this job for five terms-of-office during Soeharto's Cabinet until March 1998. He was appointed Vice President on 11 March 1998 and, following the fall of Soeharto, President on 21 May 1998. He served his country for 512 days in office. See A Makmur Makka, *BJ Habibie: His Life and Career*, 5th ed., March 1999.

2 As is widely known, on 21 May 1998, Soeharto stepped down and appointed his Vice President, B.J. Habibie, as his successor. Popular pressure, student demonstrations and the economic crisis forced Soeharto to resign. On 20 October 1999, in accordance with constitutional procedures, the new People's Consultative Assembly (MPR) elected Abdurrahman Wahid as the new President and Megawati Soekarnoputri as Vice President. On 23 July 2001, President Wahid faced 'impeachment' during the special session of the MPR and, consequently, Megawati Soekarnoputri replaced him.

adequate tools and measures to combat corruption, and thereby to win the battle over KKN. The article begins with an examination of the legal and political processes leading to the adoption of Law No. 31 of 1999. The parliamentary debate, public responses, and compromises achieved between different elites, will be examined. This analysis intends to determine whether or not the legal and political processes were democratic, accountable and transparent.

The article goes on to analyze the content and the implementation of the law. I argue that the process, the content and the implementation of Law No. 31 of 1999 are far from any ideal standard for promoting good governance and the rule of law. Furthermore, this article will show the dilemma faced by President Habibie, between his personal interests and the demands for reform. The article will ultimately argue that corrupt practices actually became worse during the Habibie Government, including several legal and political scandals in his inner circle.

In the end, I will show that even though the 1998 Indonesian reform movement recognized corruption as the chief evil of the State and was motivated to end it, the reforms actually achieved in the post-Soeharto era (1998-1999) were not nearly enough to satisfy its demands.[3]

II. Political and Legal Aspects of the Adoption of the 1999 Law

On 8 February 1999, President Habibie sent a draft bill for the Eradication of Corruption Crime to the Parliament (DPR).[4] On 1 April 1999, the Minister of Justice, Professor Muladi, introduced and explained the draft bill. According to Muladi, the bill was written against the background that corruption cannot long co-exist with

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[3] Special focus will be given in this article to the period of Habibie's Cabinet (May 1998 to October 1999) since this period was a critical one in the history of Indonesia's movement towards democracy. The political system was revamped to provide for separation of powers with an executive branch, comprising of a President and an appointed Cabinet, who were ultimately accountable to a directly elected Parliament, and with promising steps towards the establishment of an independent judiciary. See Nadirsyah Hosen, *Indonesian Political Laws in Habibie Era: Between Political Struggle and Law Reform*, 72 Nordic Journal of International Law (2003), pp. 483-518.

[4] The DPR (Dewan Perwakilan Rakyat) with its 500 members is the principal legislative body of Indonesia. Members of the DPR are automatically members of the consultative assembly MPR (Majelis Permusyawaratan Rakyat). The MPR is constitutionally the highest authority of the State, and is charged with meeting every five years to elect the President and Vice President and to set the broad guidelines of state policy. Some of its members were traditionally appointed by the political leadership. Based on the Amendment of the 1945 Constitution, however, the composition of the MPR, following the 2004 elections, will consist of the People's Representative Council (DPR) and the Regional Representative Council (DPD), both of which will be fully elected bodies. Therefore, the MPR itself will become simply a joint session of the DPR and the new DPD. Its sole remaining powers – to amend the Constitution and to formalize the removal of a president convicted under the new, stricter impeachment procedures – are still significant but much narrower than before.

democracy and the rule of law. He admitted that Law No. 3 of 1971 on Corruption was out of date and acknowledged on behalf of the Habibie Government that a new law was necessary for the successful combat against corruption, as demanded by the reform movement.[5]

Muladi explained that one of the improvements contained in the draft in dealing with corruption was that reimbursement for losses inflicted upon the finances of the State, or the economy of the State, would no longer prevent punishment of the perpetrator of a criminal act of corruption (Article 4). This position differed from the previous law. Under Law No. 3 of 1971, according to Muladi, many cases did not go to court after the State received reimbursement.[6] All political parties agreed with the Government on this matter, and therefore Article 4 was fully accepted.

Another improvement was that the draft bill recognized corporate crime, which the old law did not recognize. Although Megawati Soekarnoputri's Democratic Party of Struggle of Indonesia (PDI) and the Golkar Party of Soeharto and Habibie questioned this matter, at the end of the discussion, all political parties accepted the explanation from the Government that corporate liability should be recognized in criminal law. They agreed that corporate criminals and crimes by corporations are a new development, which should be answered by the new law. As a result of the debate on this matter, the 1999 Anti-Corruption law explicitly extends criminal punishment to acts of companies as well as those of individuals, and authorizes punishment of managers and directors for a company's corrupt acts. In the case of corrupt companies, it authorizes revocation of the companies' licenses/permits and other facilities, as well as the suspension of some or all of their businesses for up to one year.

Further, in the draft bill, the Habibie Government proposed the reversal of the burden of proof. The Government's stand was that defendants would be required to prove that they were not involved in acts of corruption, but at the same time, the Government admitted that the public prosecutor would remain under an obligation to prove the charges. This means that the Government sought a limited and balanced reversal of the burden of proof. A full discussion of this issue, particularly in relation to human rights and the presumption of innocence, will follow in the next section.

The United Development Party (PPP Party), representing mostly Muslim interests, first responded positively to the idea of reversing the burden of proof. The PPP Party went so far as to claim that the idea had been proposed by its own politicians long before, but that the Soeharto Government and other political parties had rejected it. In their formal statement of 8 April 1999, the PPP Party reminded both the Habibie Government and other political parties of the political compromise in Article 3 (3) of MPR Decree No. XI/MPR/1998. According to them, in the Ad-Hoc Committee II at the MPR Special Session of November 1998, there had been a consensus amongst the parties that the reversal of the burden of proof would be

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5 See Keterangan Pemerintah Dihadapan Rapat Paripurna DPR RI Mengenai RUU tentang Pemberantasan Tindak Pidana Korupsi, Jakarta 1 April 1999 (unpublished material; copy on file with the author).

6 Id.

mentioned in Article 3(3).[7] However, in only a matter of hours, members of the PPP Party were lobbied to cancel the consensus on the grounds that a reversal of the burden of proof would violate the principle of presumption of innocence. The PPP Party as such stood firm, but when the vote was held at the Plenary Session of the Working Committee, they lost.[8] It was unclear who lobbied the PPP Party members to cancel the consensus.

Apart from the political tension described here, two months after the MPR's 1998 Session, the Habibie Government accommodated itself to the idea of the reversal of the burden of proof in the draft bill. Having discussed this issue, all political parties agreed on a limited, or balanced, burden of proof. Both the defendant and prosecutor would have their own separate roles according to this scheme.

Another distinct feature of the draft law was that it provided for longer prison terms and larger fines than the 1971 Anti-Corruption Law. None of the political parties expressed dissatisfaction on this matter.

Further, the Golkar Party proposed capital punishment under certain circumstances, such as during national emergencies, or at times of economic and monetary crises. Again, no single political party disagreed with the proposed capital punishment. Based on the reactions from outside the parliamentary debate, as reported in the mass media, the people also generally did not seem to oppose capital punishment, as proposed by the Golkar party. The acceptance can be explained in light of the demands for reform, particularly to eradicate corruption, because the imposition of capital punishment was held to have a deterrent effect in the society.

> 'Article 2(1) Anyone unlawfully enriching himself and/or other persons or a corporation in such a way as to be detrimental to the finances of the State or the economy of the State shall be liable to life in prison, or a prison term of not less than 4 (four) years and not exceeding 20 (twenty) years, and a fine of not less than Rp. 200,000,000 (two hundred million rupiah) and not exceeding Rp. 1,000,000,000 (one billion rupiah).
> (2) In the event that corruption, as referred to in Paragraph (1), is committed under certain circumstances, capital punishment may be applied.'

Moreover, based on Law No. 28 of 1997 on the Indonesian Police, and Law No. 5 of 1991 on the Attorney General, both the Attorney General and the Police could act as investigator and prosecutor in a corruption case. This invited chaos and tension between the two offices. Under this situation, Members of Parliament hoped that the draft bill would end the controversy by selecting either the Police or the Attorney

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7 I have confirmed the PPP Party's information on Risalah Rapat Panitia ke-5 Panitia Ad Hoc Badan Pekerja MPR RI on 22 September 1998 (copy on file with the author). From the minutes of the meeting, all political parties admitted the need to introduce the reversal of the burden of proof in combating corruption.

8 See Pemandangan Umum Fraksi Persatuan Pembangunan DPR RI terhadap RUU tentang Pemberantasan Tindak Pidana Korupsi, Jakarta 8 April 1999 (unpublished material; copy on file with the author).

General. However, as explained by Muladi, the Habibie Government chose to keep both in charge in order to maximize the fight against corruption. The only benefit was that this avoided conflict between the draft bill and other laws. Instead of selecting one of the agencies, the draft recognized both of them.

In order to deal with tensions between the two institutions, however, the draft bill introduced the possibility of establishing a joint investigation team. The idea of the joint team served as a compromise between the Attorney General, the Police and the Government/ Parliament on the issue of dualism of the role of the Police Force and the Attorney General's office. Article 27 of Law No. 31 of 1999 stipulates that 'In the event that a case of corruption being found to be difficult to prove, a joint team under the coordination of the Attorney General may be formed.' This means that the Joint Team would function temporarily, and on a case by case basis. It would consist of the Police Force, the Public Prosecutors of the Attorney General's Office, and other experts needed for the investigation. Muladi hoped that this joint investigation team would eventually become an embryo of the Anti Corruption Agency.

The Elucidation of the law explains that corruption cases which, *inter alia*, involve sectors such as banking, taxation, the stock market, trade and industry, and futures trading are classified as 'difficult cases.' Corruption cases that are difficult to prove also include monetary and financial transactions, which involve the use of sophisticated technology or, which implicate public officials, as defined in Law No. 31 of 1999.

The draft bill itself did not go so far as to propose the establishment of an Anti-Corruption Commission. It was assumed that the establishment of a joint team would act as an embryo to form such a commission in the future. The Parliament, however, immediately opened discussion regarding the establishment of a new Commission as a means of winning public trust, since neither the Police nor the Attorney General's office were widely regarded as being free from corruption.

The PPP Party went further by suggesting the establishment of a special court to deal with corruption. One of the reasons for this proposal was that both civil servants and military officers would then be charged in one and the same court. The judges were to be 'hired' from the private sector as Ad Hoc Judges. Apparently, the PPP was suggesting that not only the Police and the Attorney General were unclean, but also that many judges were not free from allegations of corruption. Again, compromise was achieved. The PPP was forced to withdraw its proposal on the grounds that there was not enough time to discuss it.[9] Minister Muladi was of the opinion that a special court was unnecessary.[10] Therefore, the proposal for a new Commission was accepted, but the proposal for a special court was not. The role and authority of the Commission were to be regulated by a new law, and the Commission was to be established within two years time.

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9 See Pendapat Akhir Fraksi Persatuan Pembangunan DPR RI terhadap RUU Pemberantasan Tindak Pidana Korupsi, Jakarta 23 July 1999 (unpublished material; copy on file with the author).

10 *Pengadilan Khusus Korupsi Akan Timbulkan Fragmentasi*, Kompas (Indonesian newspaper), 3 August 2002, p. 9.

> 'Article 43 (1) By no later than 2 (two) years from this law taking effect, a Corruption Eradication Commission shall be formed.
> (2) The commission, as referred to in paragraph (1), shall have the task and authority to coordinate and supervise, as well as to inquire, investigate and press charges, in accordance with the provisions of the applicable laws and regulations.
> (3) Membership in the commission, as referred to in paragraph (1), shall comprise of elements from the government and the public.
> (4) The provisions regarding the formation, organizational structure, work procedures, accountability, duties and authority, as well as membership, as referred to in paragraph (1), paragraph (2), and paragraph (3), shall be set forth in law.'

The question could be asked, why did the Government not propose the establishment of the Anti-Corruption Commission in the draft bill? The story below will explain the political struggle behind the attempt to form the Commission. By the end of November 1998, two months before he sent the draft bill to Parliament, President Habibie was ready to move ahead with granting unprecedented powers to an independent Commission, with a mandate to investigate and order the prosecution of the Soeharto family and its cronies.[11]

The Commission, which was to be headed by the outspoken human rights lawyer and activist, Adnan Buyung Nasution, had received the President's agreement in principle that it would be allowed to carry out its duties, with the right to conduct its own investigations and interrogations, independent of the Attorney General's office. President Habibie also agreed in principle that the Commission was to receive the legal mandate to issue subpoenas ordering parties to provide testimony and documents. Most significantly, Nasution and his Commission were to be given the right to order the confiscation of Soeharto family assets and bring charges against Soeharto, his children, and his other cronies.[12]

However, shortly after the President gave his word to Nasution that the Commission would be allowed to perform its duties without undue interference from third parties, trouble started. Only one day after Habibie offered his blessings to Nasution, the President's top advisors stepped in and tried to persuade the President not to allow the Commission to go ahead as planned. General Wiranto, for one, stated that he would consent only if the Armed Forces were represented in the Commission. Among others, Attorney General Andi Ghalib, also strongly rejected the idea of such a Commission. As the Attorney General, Ghalib thought that the Commission was unnecessary, since his office was ready to fight and combat corruption.[13] He could not agree to a committee that had the same powers as his own office,

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11 *Habibie Setuju Komisi Korupsi*, Republika (Indonesian newspaper), 20 November 1998, p. 1.

12 *Komisi Antikorupsi Segera Dibentuk*, Kompas, 24 November 1998, p. 9.

13 Usamah Hisyam (et al.), *HA Muhammad Ghalib: Menepis Badai-Menegakkan Supremasi Hukum*, Jakarta, Yayasan Dharmapena Nusantara, 2000, p. 293.

and according to Nasution, also feared that the committee would expand its work to include officials still in office.[14]

It was also apparent that some people inside the Habibie inner-circle were leaking information to the Soeharto family, prompting Soeharto's lawyer to issue threats to the Habibie Government that it, too, would suffer consequences if the Commission were to be given official approval to move ahead. In a signed statement by Yohannes Yacob, Soeharto's lawyer, a thinly veiled threat to the Habibie Government was prepared on the same day Habibie met Nasution: 'We need to point out that the probe, if taken to court, will also drag down the government officials, ex-officials and all the cronies who are also suspected of improper gains through corruption, collusion and nepotism.'[15]

After much wavering, and a flurry of late-night meetings between Habibie's men and Nasution, the Commission was called off, just hours before it was supposed to be announced to the public.[16] In its place, Habibie issued a presidential order to Attorney General Ghalib to pursue the investigations on his own without the independent Commission.

Another important issue is that the drafters of the bill were aware of the significance of public participation. The drafters encouraged public participation by providing grant recommendations to members of the public who had rendered their assistance in efforts to prevent and eradicate acts of corruption. Members of Parliament thought that the draft bill did not provide enough legal protection and detailed provisions on the rights of the public to participate in combating corruption. Minister Muladi agreed with suggestions from Members of Parliament and the text of Article 41 became the following:

> '(1) The public shall be able to participate in assisting efforts in the prevention and eradication of corruption.
> (2) Participation of the public, as referred to in Paragraph (1), may be realized in the following forms:
> a. the right to seek, obtain and provide information, regarding suspicion of the occurrence of acts of corruption;
> b. the right to obtain services in seeking, obtaining and providing information, regarding suspicion of crimes of corruption having occurred, to law enforcement authorities handling criminal acts of corruption;
> c. the right to convey advice and opinions, in a responsible manner, to law enforcement authorities handling criminal acts of corruption;
> d. the right to obtain answers to questions, regarding reports submitted to law enforcement authorities, within 30 (thirty) days;
> e. the right to obtain legal protection with regard to:

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14 Interview with Adnan Buyung Nasution in Forum Keadilan (Indonesian Weekly Magazine), 28 December 1998, p. 32.

15 Kees van Dijk, *A Country in Despair: Indonesia between 1997 and 2000*, Jakarta, KITLV Press, 2001, at p. 258.

16 Id., p. 282.

> 1. Implementing their rights as referred to in Sub-paragraphs a, b, and c;
> 2. Being summoned to be present during the inquiry, investigation process, and in court sessions, as witnesses or expert witnesses, in accordance with the applicable laws and regulations.
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> (3) The public, as referred to in Paragraph (1) shall have the right and responsibility to make efforts to prevent and eradicate acts of corruption.
> (4) The right and responsibility as referred to in Paragraph (2) and Paragraph (3) shall be conducted with due adherence to the principles and provisions set forth in the applicable laws and regulations, and with due adherence to religious and other social norms.
> (5) Provisions regarding the procedures for the implementation of public participation in the prevention and eradication of criminal acts of corruption, as referred to in this Article, shall be further stipulated by a government regulation.'

A Special Committee, consisting of fifty Members of Parliament, discussed the draft bill from 19 April to 22 July 1999. There were thirty members from the Golkar Party, eight members from the Indonesian Military representatives in the Parliament, ten from the PPP Party and two from the PDI Party. The draft bill consisted of five Chapters and forty-four Articles. Having discussed the draft, both the Parliament and the Government agreed to modify the draft to seven Chapters and forty-five Articles. On 23 July 1999, the Chair of the DPR, Harmoko, sent a letter to the President saying that the revised draft had been passed. President Habibie signed Law No. 31 of 1999 on 16 August 1999, stating that as from the time the new law takes effect, Law No. 3 of 1971 would become null and void.

III. Content Analysis of Law No. 31 of 1999

Although Law No. 31 of 1999 was a repressive measure enacted to fight corruption, it had several problems, which have contributed to the inability of the Habibie Government (and the subsequent Governments) to deal effectively with corruption. This section will focus on the Law's penalty system, provision for public participation, the reversal of the burden of proof, transitional provisions and the independent commission. This section will argue that the content of Law No. 31 of 1999 is vague and that it does not achieve the maximum standard of reform required.

1. Penalty Systems

As has been mentioned, Law No. 31 of 1999 takes the approach that the penalties provided play the single most important role in reducing the probability that criminal or illegal acts will take place. Considering the deterrent effect of a penalty, it was thought that corruption could be reduced by increasing the penalties imposed on

those caught. Law No. 31 of 1999 goes further than the 1971 Anti-Corruption Laws by setting minimum and maximum sentences and also modifies the penalties imposed by the previous laws.

At least theoretically, higher penalties may reduce the number of acts of corruption, but they may also lead to demands for higher bribes for the corrupt acts that will still take place. There seems to be a wide gap between the penalties specified in the laws and regulations and the penalties that are actually imposed. Increasing the penalty alone will not help much if not followed by other measures. There is also the danger that an unscrupulous Government would use this weapon to go after political opponents. In other words, these strict penalties could be used selectively or worse, in connection with fabricated accusations.

It must be noted that the conclusion of research on the economics of crime holds that the optimal amount of corruption is not zero once one takes into account the costs of prevention. Deterrence expenditures should be set so that marginal benefits equal marginal costs.[17] The deterrence of criminal behaviour depends on the probability of detection and punishment, and on the penalties imposed – both those imposed by the legal system as well as more subtle costs, such as loss of reputation or shame.

In addition, there should be a close connection between increasing the penalty and limiting the judge's discretion. This is particularly important in the Indonesian context, where minimum and maximum sentences set by the law could be used as a 'bargaining chip' between all parties involved before the court. It is important to note that while Law No. 31 of 1999 uses and modifies nineteen Articles from the Criminal Code, it does not state that those nineteen Articles become null and void at the time Law No. 31 of 1999 is promulgated. It states only that Law No. 3 of 1971 is null and void, not the Criminal Code. This leaves 'room for bargaining' between all parties (defendant, Police and/or Attorney General, lawyers, judges) in choosing whether to use the Criminal Code or Law No. 31 of 1999 depending on which one is of greater 'benefit' to them.

For instance, while the Criminal Code sets 2 years and 8 months on Article 209 of the Criminal Code, Law No. 31 of 1999 sets 1 year as the minimum sentence for the same crime. Through the 'bargaining' process, which is allegedly practiced, a judge could send a person to prison for only one year, whereas under the Criminal Code it could be for 2 years and 8 months. The resulting uncertainty regarding the appropriate manner in which to proceed against individuals accused of corruption risks creating a perception that penalties will be applied selectively, or arbitrarily. This is not in line with the principles of good governance and the rule of law.

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17 Susan Rose-Ackerman, *Corruption: Study in Political Economy*, New York, Academic Press, 1978, at pp. 108-109.

2. Public Participation

Successful law enforcement and anti-corruption strategies are largely dependent upon both the willingness and the availability of individuals to provide information and/or to give evidence. Individuals will not be willing or available unless they have confidence that the Government will protect their rights, as well as their safety. Potential accusers are often reluctant to come forward and to spend the time and effort to go through the full legal procedure. Also, when corruption is widespread, the costs to the accusers in terms of social capital, such as loss of friends and family relations, can be high.

Although Law No. 31 of 1999 encourages public participation by giving rewards, it does not set up a witness protection scheme. Minister Muladi said that the Government would consider it in the future because, borrowing his own words, 'it is a key component or valuable instrument of good government.'[18] As a professor of criminal law, Muladi was aware of the significance of legal protection for witness. However, as the Minister of Justice, he did not take the opportunity that presented itself during the drafting and adoption of the Anti-Corruption Law as a step towards the establishment of a witness protection scheme.

Witness protection usually starts with a risk-based assessment of the direct threat to the witness and the vulnerability of the witness.[19] Where the risk is assessed as relatively low, there is a wide range of actions that can be taken. These actions include, but are not limited to the local police patrolling the person's home on a regular basis; improving the person's home security; installing an alarm-system, monitored by the law enforcement agency; screening phone calls with an answering machine; having malicious calls traced through the local telephone authority; and providing immediate protection at the person's home or safe house.

Where the risk is assessed as very high, the person can be entered into the formal witness protection scheme, and this can involve the person and/or his/her family being relocated to another province or even overseas, and being given new identities. A substantial amount of witness protection involves counselling the witness and/or his/her family to alleviate their fears. Witness protection legislation would encourage testimony by protecting material witnesses and improving the prosecution and conviction of corrupt persons.

As noted, Law No. 31 of 1999 does not provide the above-mentioned protections for witnesses. Instead, it merely states that the public has 'the right to obtain legal protection.' The significance of the witness protection programme will be discussed in the section concerning the implementation of Law No. 31 of 1999.

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18 See Jawaban Pemerintah atas Pemandangan Umum Fraksi-fraksi DPR RI terhadap RUU tentang pemberantasan Tindak Pidana Korupsi, Jakarta 16 April 1999 (unpublished material; copy on file with the author).

19 See John Feneley, *Witness Protection Schemes- Pitfalls & Best Practice & Covert Investigations*, paper presented at 8th International Anti-Corruption Conference (IACC), held by Transparency International, 7-11 September 1997.

3. Burden of Proof

As a general rule applicable to all proceedings, the party that asserts a case against another must establish or prove it with evidence sufficient to satisfy the tribunal that the assertion is well made. He who asserts must prove; he bears the onus of proof. The onus of proving an issue or of producing evidence in proof or disproof of an issue is only cast on one party.[20] The placing of an onus of proof on one party can often be expressed as the obligation to displace a presumption. In other words, a certain conclusion will follow unless evidence to the contrary is given. Essentially, onus of proof and presumption are two sides of the same coin.

It is a common feature of modern legal systems that, in criminal cases, the prosecution bears the legal burden of proving all the elements of the offence the accused is charged of, including disproving any defence presented by the defendant. In some countries, the legal burden of defending oneself has to be discharged by the defendant. In such cases, the legal onus of proof is said to be 'reversed' because on the particular issue the onus is put on the defendant. It is important to realize, however, that the so-called reversal is so, only in the sense that the issue to be proved by the defendant is one raised by the defendant, himself. Reversal does not mean that the defendant is ever required to disprove an assertion made by the prosecution.[21]

In criminal proceedings, the international and regional declarations of human rights and fundamental freedoms protect the right of the individual to be presumed innocent until proven guilty. Article 11 of the Universal Declaration of Human Rights stipulates, 'Everyone charged with a penal offence has the right to be presumed innocent until proven guilty, according to law....' Likewise, Article 14, Paragraph 2 of the International Covenant on Civil and Political Rights states: 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.'

In summary, the right to a fair trial and the right to be presumed innocent until proven guilty according to law, require that the onus of proof fall upon the prosecution. However, Law No. 31 of 1999 states in Article 37:

> '(1) Defendants shall be entitled to prove that they were not involved in acts of corruption.
> (2) In the event that defendants are able to prove that they were not involved in corruption, such information shall be used in their favour.'

This means that besides the right to be presumed innocent, the 1999 Law gives additional rights to defendants – the right of defendants to prove their innocence. At the same time, the public prosecutor remains under an obligation to prove the charges. It seems that the question here is not so much whether having to contradict

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20 More information can be found in William Twining and Alex Stein (eds.), *Evidence and Proof,* Aldershot, Dartmouth Pub. Co., 1992.

21 Bertrand de Speville, *Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights Norms*, paper presented at 8th International Anti-Corruption Conference (IACC), held by Transparency International, 7-11 September 1997.

an assertion by the other party is inconsistent with human rights and norms, but rather whether requiring the defendant in criminal proceedings to prove any element of his defence is inconsistent with the universal norms established for the protection of the individual.

In relation to corruption offences, the question becomes important when anti-corruption policy-makers have to decide how to strike the right balance between ensuring the successful prosecution of the corrupt, and safeguarding the accused from unfairness or wrongful conviction. Given the difficulty of proving that a bribe was sought or paid, especially in relation to senior officials, is it justifiable, for example, to make it an offence for a public official to own wealth, acquired since he took office, which far exceeds his official salary, and to require him to explain how he came by that wealth? The policy-makers and the legislator need to know whether such a requirement would fall foul of the universal norms of human rights and fundamental freedoms.

Both the Habibie Government and the Parliament apparently thought that the obligation to prove assertions may be transferred to the accused, when he/she seeks to establish a defence. Provisions which enshrine the right to be presumed innocent do not prohibit presumptions of fact or law against the accused, although such presumptions must be confined within reasonable limits. These limits must take into account the importance of what is at stake and maintain the rights of the defence. Nor must they prohibit offences of strict liability, namely offences that do not require a criminal intent on the part of the accused. The limits do, however, impose certain evidential and procedural requirements to some of the charges that bear on the pursuit of the corrupt.

As can be seen, Law No. 31 of 1999 maintains a balance of the burden of proof. By doing so, it could be argued that a presumption of fact, or of law, which an accused is required to rebut, is not necessarily contrary to the fundamental rights of the accused person. Moreover, the implementation of the reversal of the burden of proof can be useful in cases where the accused appears to have in his/her possession or to have available, directly or indirectly, goods or assets and means, which are clearly beyond his/her normal financial standards. In other words, those who are, or have been maintaining a standard of living, or holding pecuniary resources or property, which are significantly disproportionate to their present or past known legal income, and who are unable to produce a satisfactory explanation for this, could be charged under Law No. 31 of 1999.

In this context, Law No. 31 of 1999 is in line with an increasing tendency to criminalize the possession of unexplained wealth by introducing offences that penalize any current and/or former public servants. Several national legislators have introduced such provisions; also, at the international level, the offence of 'illicit enrichment' or 'unexplained wealth' has become an accepted instrument in the fight against corruption. Examples of such a trend are Section 10 of the Hongkong Prevention of Bribery Ordinance; Article 34 of the Bostwana Corruption Economic Crimes Act; and Article IX of the Organization of American States, Inter-American Convention against Corruption.

4. Transitional Provisions

Law No. 31 of 1999 does not provide for the enforcement of Law No. 3 of 1971 to remain in effect until its functions are superseded or supplanted by new ones, in accordance with Law No. 31 of 1999. Instead of such a transitional provision, the 1999 Law simply says: 'As from the time this law takes effect, Law No. 3/1971 regarding the Eradication of Criminal Acts of Corruption (Government Gazette of 1971, No. 19, Supplement to the Government Gazette No. 2958) shall be null and void.' (Article 44).

This invites the question whether the new Law can be applied retroactively, i.e. whether a suspect of corruption during the Soeharto era, also known as the New Order period, can be prosecuted under Law 31 of 1999? It is worth remembering that one of the demands of reform was to bring Soeharto and his followers to justice. Can one use the 1971 Law to trap suspects of corruption who committed their crime before 16 August 1999 – the date when Habibie signed the law?

There are three possible answers. First, the answer could be 'no' because the 1999 Law is without retroactive force. Since Article 44 of the 1999 Law states that 'the 1971 Law shall be null and void at the time the 1999 Law takes effect,' past corruption cases would then be immune from both the 1971 and the 1999 laws. Persons who allegedly committed corruption *before* Law No. 31 of 1999 came into effect would escape court trials because Law No. 3 of 1971 has been annulled, and they could not be charged under Law No. 31 of 1999 either, since it came into effect *after* the alleged commitment of the crime.

The second answer might be: the promulgation of the 1999 Law annuls only the 1971 Law, not the Criminal Code. This would mean that a person suspected of corruption during the New Order period, who could not be charged using Law 31 of 1999, could still be prosecuted using the Criminal Code. The justification would be that the Criminal Code is the main body of all criminal acts, including corruption. Laws 3 of 1971 and 31 of 1999 are only special developments of the Criminal Code, in accordance with the demands of the time. However, it should be noted that the Criminal Code on corruption is seen as being out of date – the primary reason why both the 1971 and the 1999 Laws were created.

Thirdly, one could argue that although Law No. 31 of 1999 does not include transitional rules, this does not mean that suspects of corruption in the past may go free. They could still be tried using Law No. 3 of 1971. This would be in accordance with universal principles of law *(lex temporis delicti)*, namely that an older law can still be applied to judge violations that occurred while this law was in force, even after a new law is passed, unless the new law stipulates otherwise. Law No. 3 of 1971, therefore, could remain applicable for acts of corruption committed prior to its repeal.

In order to avoid this controversy, however, the Parliament and the Government have amended the 1999 Anti-Corruption Law by passing Law No. 20 of 2001 with the necessary transitional provisions. While clear rules on important issues such as this one are always welcome, the impression of a conspiracy between the Habibie Government and Members of Parliament at that time of first adoption of the new law is still strong. Even Marzuki Darusman, the Attorney-General in the Wahid Cabinet,

and Todung Mulya Lubis (a prominent lawyer), admitted that Law No. 31 of 1999 could be suspected of being the product of a Government-led conspiracy, supported by the Parliament, and intended to protect corrupt leaders.[22]

Teten Masduki of the Indonesian Corruption Watch (ICW) was certain of a conspiracy behind Law No. 31 of 1999, as it was drawn up by a legal expert. According to Masduki, the ICW once reminded the Parliament to have a paragraph inserted about the transitional rules. However, the House at the time (elected in 1997) did not pay attention to this warning.[23]

It is reported that Professor Muladi strongly denied this, and claimed that there was no conspiracy. According to him, transitional rules were not included due to the assumption that people already knew that new laws do not directly make old laws ineffective. The old anti-corruption laws could still be used to judge a suspect of corruption committed during the past period. He claimed that a transitional rule was intentionally omitted because there was already a universal legal principle to deal with the issue.[24]

On reading the minutes of the meeting, one can confirm that the respective Members of Parliament did not ask why a transitional rule was not included in the draft bill. Therefore, the claim of a conscious conspiracy cannot be proven through formal documentation. A conspiracy theory is not supported by subsequent practice either, since prosecutors indeed continued to use Law No. 3 of 1971 to deal with persons suspected of corruption during the relevant period. For instance, former President Soeharto was investigated under Law No. 3 of 1971, although Law No. 3 of 1999 had already annulled it.[25] If suspects of corruption went free, this was not caused by the absence of transitional provisions. They got away because of other factors.

What can be seen is that Law No. 31 of 1999 (as it happened with other laws) was drafted and debated in a very hurried manner. The Habibie Government's ambitions to reform the legal system by passing more than forty new or improved laws had a negative impact on the quality of such laws. In this context, the Parliament could also be criticized. Since Members of Parliament from the PPP and PDI Parties were not as numerous as members of the Golkar Party (as a result of the 1997 General Election under the Soeharto Government), several Members of Parliament joined different committees to discuss two or three different draft bills at the same time, leading to a compromise in the quality of the laws.

From another perspective, this was also a dilemma for the Habibie administration. On one hand, he needed to immediately settle corruption cases in Indonesia as demanded by the reform movement. This forced him to reform the law. On the other hand, he could not investigate suspects of corruption in the Soeharto era using

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22 *UU No. 31/1999 Dirancang untuk Hambat Pemberantasan Korupsi*, Koran Tempo (Indonesian newspaper), 6 July 2001, p. 10.

23 *UU No. 31/1999 Konspirasi Melindungi Koruptor*, Kompas, 13 May 2000, p. 1.

24 *Tersangka Korupsi Masih Bisa Dijerat dengan UU Lama*, Kompas, 15 May 2000, p. 6.

25 See Indriyanto Seno Adji and Juan Felix Tampubolon, *Perkara HM. Soeharto: Politisasi Hukum?*, Jakarta, Multimediametrie, 2001.

a reformed law, since it came into effect *after* they had allegedly committed their crimes. This means that creating a new law was only part of the story in combating corruption. He had to prove that his Government was capable of bringing corrupt persons to justice, whatever the law used for this purpose. Did he succeed in implementing the law? This leads us to the next discussion.

IV. Implementation of Law No. 31 of 1999

1. Introductory Remarks

The main question in this section is: did the Habibie Government succeed in reducing the practice of corruption? This discussion will use data from Transparency International (TI) and the Political & Economic Risk Consultancy (PERC). Both pieces of data are summarized in Tables 1 and 2, respectively. According to TI, in 1998, Indonesia's corruption perception index was 2.0, whereas, in 1999, Indonesia achieved a 1.7. Since the score ranges between 10 (highly clean) and 0 (highly corrupt), the corruption in fact became worse during the Habibie period (1998-1999).

Comparing this data with surveys of Asian states conducted by the Political & Economic Risk Consultancy shows the same trend. Indonesia obtained a grade of 8.95 in 1998, and one of 9.91 in 1999, according to this data. Here, grades are scaled from zero to 10, with zero being the best grade possible and 10 the worst. The statistics indicate an increase in corruption, both in terms of quantity and quality.

In February 2002, the Partnership for Governance Reform in Indonesia released the final result of its Diagnostic Study of Corruption in Indonesia. The total sample population was 2,300 respondents, consisting of 650 public officials, 1,250 households, and 400 business enterprises. The survey found that corruption in the public sector was regarded to be very common by approximately 75% of all respondents. Corruption was considered the most serious social problem by household respondents, ahead of unemployment and the poor state of the economy. Approximately 65% of households reported actually having experienced corruption involving public officials.[26]

Respondents were asked to rank a list of 35 public institutions in terms of integrity – from the least to the most honest. The traffic police, customs authority and the judiciary were ranked the most corrupt institutions, while the news media, post office and religious organizations (i.e. mosques, churches and temples) were considered the least corrupt. Mean scores were computed, which ranged from a low of 2.13 for the traffic police to a high of 4.55 for religious organizations.

The terms 'wet' and 'dry' agencies are used to refer to the degree of opportunities provided by public institutions for corruption. Donald P. Warwick illustrates this distinction made by civil servants between 'wet' and 'dry' agencies. 'Wet' agencies are generous with honoraria, allowances, service on committees, boards, and

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[26] Partnership for Governance Reform in Indonesia, *A Diagnostic Study of Corruption in Indonesia*, Final Report, February 2002.

development projects, and, recently, opportunities for foreign training. They are departments that deal in money, planning, banking, or public enterprises. 'Dry' agencies are those doing traditional administrative work. Perceptions of unfairness about benefits not only reduces staff morale, but leads to the feeling that illegal compensation is a fair way to even out staff benefits across agencies.[27] Thus, 'wet' agencies like the Police, Customs, Immigration and Taxation, will provide more opportunities for corruption than 'dry' agencies like research and administrative departments that do not interact with the public.

Apart from this statistically proven increase in corruption during the Habibie era, the Attorney General reported to the Parliament on 28 March 2000, that despite the changes in the political atmosphere and the demands for reform, less than twenty percent of corruption cases had been resolved. While the national Attorney General office had completed investigations of approximately thirty percent of the corruption cases brought to their attention, a number of regional offices completed no investigations at all. According to the Police Report, only thirty two percent of reports filed on corruption during 1996-2001 were processed completely.[28]

Dwight King, a Professor of Political Science at Northern Illinois University, claims that 'the occurrence of corruption has not been due to the lack of anti-corruption laws.'[29] By contrast, I argue that Habibie's failure at combating corruption, as illustrated above, can be seen as the failure of the enforcement of Law No. 31 of 1999. Which aspects of the law were not implemented, and which factors contributed to such failure, will be analyzed below. The focus will be on the political will of the Habibie Government, the Bank Bali Scandal, the Soeharto case, the Joint Investigating Team, and the Anti-Corruption Commission.

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27 Donald P. Warwick, *The Effectiveness of the Indonesian Civil Service*, 15 Southeast Asian Journal of Social Science 2, 1987, p. 43.

28 Data quoted from Ibrahim Assegaf, *Legends of the Fall: An Institutional Analysis of Indonesian Law Enforcement Agencies Combating Corruption*, in Tim Lindsey and Howard Dick (eds.), *Corruption in Asia: Rethinking the Governance Paradigm*, Sydney, The Federation Press, 2002, p. 131.

29 Dwight Y. King, *Corruption in Indonesia: A Curable Cancer?*, 53 Journal of International Affairs, Spring 2000, p. 622.

Table 1: The CPI for Indonesia according to Transparency International[30]

Year	2001	2000	1999	1998	1997
CPI Score	1.9	1.7	1.7	2.0	2.72
Rank	88 of 91	86 of 90	97 of 99	80 of 85	46 of 52

Table 2: Corruption in Indonesia according to Political & Economic Risk Consultancy (PERC)[31]

Year	2001	2000	1999	1998	1997
Grade	9.67	9.88	9.91	8.95	8.67

2. Political Will

The enforcement of law depends primarily on the political will of the government. 'Political will' refers to the demonstrated credible intent of political actors to attack perceived causes or effects of corruption at a systemic level. It is a critical starting point for sustainable and effective anti-corruption strategies and programmes.

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30 Transparency International, the only international non-governmental organization devoted to combating corruption, brings civil society, business, and governments together in a powerful global coalition. TI, through its International Secretariat and more than 90 independent national chapters around the world, works at both the national and international level, to curb both the supply and demand of corruption. In the international arena, TI raises awareness about the damaging effects of corruption, advocates policy reform, works towards the implementation of multilateral conventions and subsequently monitors compliance by governments, corporations and banks. At the national level, chapters work to increase levels of accountability and transparency, monitoring the performance of key institutions and pressing for necessary reforms in a non-party political manner. See http://www.transparency.org/cpi/index.html.

CPI stands for Corruption Perception Index. The CPI Score relates to perceptions of the degree of corruption, as seen by business people, risk analysts and the general public, and ranges between 10 (highly clean) and 0 (highly corrupt).

31 Established in 1976, the Political and Economic Risk Consultancy is headquartered in Hong Kong. From this office, PERC coordinates a team of researchers and analysis in the ASEAN countries, Greater China and South Korea. Some of the world's leading corporations and financial institutions regularly use PERCs services to assess key trends and critical issues shaping the region, to identify growth opportunities and to develop effective strategies for capitalizing on these opportunities. See http://www.asiarisk.com/lib10.html.

Grades on the PERC scale range from zero to 10, with zero being the best grade possible and 10 the worst.

Without 'political will,' governments' statements of their determination to eradicate corruption remain mere rhetoric.

During the Habibie *interegnum*, the Government should have galvanized supporters through moral exhortation by attempting to redefine a new public morality or service ethic. Political will among government officials and politicians should be strong during transitional periods. However, Habibie did not take this chance; rather he faced a dilemma. It could be argued that Habibie's Government may simply have been new wine in old wine skins, with many Soeharto-era politicians and bureaucrats still in place. On the one hand, demands for reform were very strong on both the international and the national levels. On the other hand, Habibie was forced by political circumstances to make compromises and even to engage in political bargaining. The Soeharto case is an excellent example of such political bargaining.

The reason why Soeharto has managed to remain relatively unscathed in the Government investigations of corruption is simple: many of the family businesses were tied up in ventures either directly or indirectly linked to members of the Habibie administration. This meant that if the Habibie Government were to have carried out wide-ranging and politically untainted investigations of the business ventures between the Soeharto family and their cronies, there could have erupted an uncontrollable momentum and groundswell of public demand for accountability, which ultimately might have landed on the doorstep of Habibie's office.

This fact explains partly why Attorney General Ghalib limited his investigations of the Soeharto family's wealth to land and cash-holdings in local banks. Since the time he had been appointed, Ghalib had acted like a well-rehearsed strip-tease dancer in uncovering the extent of the Soeharto wealth: bit by bit, and at an excruciatingly slow pace. His office revealed that the former President's family controlled nine million hectares of forest concessions (an area the size of Austria), and that Soeharto held around US $3 million in local bank accounts.

Not surprisingly, Ghalib's audience remained unimpressed and frustrated. Most Indonesians suspected that the Soeharto family had stashed billions of dollars in foreign bank accounts, and practically the entire country was aware of the huge amounts of wealth tied up in Soeharto family businesses – many of which enjoyed (and still enjoy) monopoly licenses and still permeate practically every major industrial sector in the economy.[32]

What did Habibie do with the Soeharto case? While sending a message to the public that he was not Soeharto's crown prince, Habibie was also carefully building the impression in the minds of Soeharto's supporters, such as the Golkar party, the Members of the Cabinet, the Armed Forces of the Republic of Indonesia (ABRI) and

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[32] According to recent estimates by Transparency International, Indonesia's former President Soeharto tops the all-time corruption league table, having looted his country of somewhere between US $15 and 35 billion during 31 years of rule; see BBC News of 25 March 2004, available at http://news.bbc.co.uk/2/hi/business/3567745.stm. This puts Soeharto ahead of Ferdinand Marcos (the Philippines, US $5 to 10 billion), Mobutu Sese Seko (Zaire, around US $5 billion), and Sani Abacha (Nigeria, US $2 to 5 billion); see http://www.parapundit.com/archives/002017.html.

other groups of society, that he had not betrayed Soeharto. This made his decisions ambiguous.

On 2 December 1998, in response to a mass demonstration, Habibie instructed Attorney General Ghalib to investigate Soeharto's wealth. On 8 March 1999, Habibie agreed when Ghalib reported that his office had found enough evidence to prosecute Soeharto. However, when General Wiranto (the Chief of ABRI) came to a meeting on the same day, Habibie changed his mind and asked the Attorney General to wait for the results of the June 1999 General Elections.[33]

Habibie's party lost the June 1999 General Elections. On 11 October 1999, the Attorney General's office, in a decision signed by the Acting Attorney General, formally cancelled the investigation of the Soeharto case on the grounds that there was not enough evidence. It seemed that whether there was adequate evidence for prosecution or not, depended on Habibie. Clearly, Habibie influenced the legal process, and this contravened the rule of law.

Why did Habibie wait for the results of the General Elections? He may have calculated that, if his party won, he would have strong support to take any action necessary regarding Soeharto. There was speculation that by postponing the prosecution of Soeharto, he hoped to get support from Soeharto's followers to run the country. He saw that even though he could not win the Indonesians' hearts, he still had a chance to get support from Soeharto himself. It was widely known that the Soeharto family was angry with Habibie's decision to start the examination. Therefore, Habibie may have thought that they would be happy if he stopped the examination and he would thereby repair his relationship with Soeharto. When Habibie was reminded by his advisors that this decision might result in losing his position at the MPR Session,[34] he was reported to have said, 'I will not betray Soeharto, and am ready to face the consequences, including my position.'[35]

When his party lost, he found that he had neither received support from the society nor from Soeharto's followers.

The Soeharto case concerned the 'big fish' (i.e. the rich and famous). If Habibie was able to catch the big ones, he would be seen as sincerely committed to the elimination of corruption. However, if the 'big fish' are protected from prosecution for corruption, and only the 'small fry' (i.e. ordinary people) are caught, the government cannot gain or maintain credibility, and will fail, as indeed, Habibie's did.

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33 See Usamah Hisyam, supra, note 13, at p. 341.

34 Although his party lost, Habibie still had a chance to be elected as President since Megawati's party did not win the majority vote. Establishing a coalition with small parties could help Habibie, at least in theory. But when the MPR decided to reject his speech, he completely lost hope.

35 Interview with Dr. Dewi Fortuna Anwar, Canberra, 2002 (Unpublished material, on file with the author).

3. Scandals which Involved Habibie's Inner Circle

The first political scandal concerning money to affect the Habibie administration surfaced in May 1999, when the World Bank postponed the disbursement of funds for the Government's social safety-net because of worries that the funds would be misused. Indonesia has historically not had much of a social safety-net system; so introducing one in mid-1998 on an emergency basis to address poverty and unemployment was difficult. The Government initially created programmes in three areas to help the poor: ensuring food availability (almost 10 million households were said to be purchasing rice at subsidized prices, as of February 1999); supplementing purchasing power through job creation and loans to small enterprises (labour-intensive public works projects, for example); and preserving access to education and other critical social services (in part through block grants to poor schools).

Gunawan Sumodiningrat, Deputy Head of the National Development Planning Agency (Bappenas), revealed in a seminar that at least 8 trillion rupiah of the total 17.9 trillion rupiah social safety-net funds for the 1998/1999 fiscal year had failed to reach its intended targets.[36] Only 9 trillion of the funds had been properly channeled to provide subsidized rice to the poor, and to subsidize agriculture, health care and education. The World Bank then told Bappenas to stop using the funds for labour-intensive projects and poverty-alleviation programmes. The World Bank delayed the payment of a US $600 million loan to Indonesia, scheduled to be disbursed on March 31, because the Government had failed to provide a reliable system to monitor the allocation of the money for its poverty-alleviation programmes.

Meanwhile, opposition parties and non-governmental organizations (NGOs) alleged that the Government had used the money to ensure votes. They claimed that the Social Safety-Net Programme, promoted by the IMF and initiated as a result of World Bank balance-of-payments support, failed to reach the right targets as a result of poor planning, corruption, poor design, poor implementation and poor monitoring. The Habibie Government admitted publicly that 8.6 trillion rupiah out of the total 17.9 trillion rupiah for the Social Safety-Net Fund had been misappropriated,[37] including sixty percent of the education scholarship funds.[38]

Secondly, the State Auditors (BPK) disclosed that in his capacity as head of Bulog (the State Logistics Agency), the Minister of Industry and Trade, Rahardi Ramelan, had authorized at least 40 billion rupiah in spending on 'state needs.' This involved Akbar Tanjung (Secretary of State in the Habibie Cabinet and General Chairperson of Golkar) and Habibie himself. Later, in 2003, Ramelan and Tanjung were found guilty of such corruption. They appealed and to date are awaiting a Supreme Court decision on their case. Habibie denied any involvement and, so far, is merely one of the witnesses in this case.

The third serious scandal was revealed in July 1999 by the Indonesian Corruption Watch (ICW). This group published bank documents, which showed that the

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36 *Govt dismisses reports of social safety net fund misuse*, The Jakarta Post, 24 April 1999, p. 1. 1 trillion rupiah was roughly equivalent to US $120 million in 2000.

37 *Dana JPS Salah Sasaran*, Republika, 26 April 1999, p. 8.

38 *Dan Pendidikan pun Lenyap*, Kompas, 4 May 1999, p. 7.

Attorney General Ghalib had received over 50 billion rupiah paid directly into his personal bank accounts. The payments were made by tycoons under investigation by Ghalib's office, thereby implying that Ghalib had been using his office's power to extort bribes from wealthy individuals. ICW also produced receipts showing that Ghalib's wife had used 500 million rupiah – about US $60,000 – from one such account to purchase jewellery.

Ghalib denied all these accusations. According to him, contributions from Prajogo Pangestu and The Nin King, mentioned by ICW, were not deposited into his personal account; rather, it was a joint account with the Treasurer of the PGSI (Indonesian Association of Wrestling). Therefore, all the money belonged to the PGSI, since Ghalib was the Chairperson of the PGSI. He claimed that he was not aware that Prajogo Pangestu and The Nin King contributed to the PGSI because the treasurer had not reported this to him, and was told about this only later: 'Certain people have transferred funds to your account, without you knowing about it. Of course you can't be blamed for this, can you? If I was informed of this beforehand, we should have rejected the funds.'[39]

It was too late to reject the funds. Habibie was forced to sack Ghalib. Habibie then asked Ghalib to become in-active and chose Ghalib's deputy, Ismudjoko, to run the Attorney General's office. Although the prosecutor claimed a lack of evidence, and therefore the evidence against Ghalib was never taken to court, he had lost face. Later, in his biography, he claimed to believe that all allegations were only political conspiracy.[40]

The fourth scandal was 'Bank Bali-Gate.' The scandal involved a US $72.8 million payment by Bank Bali to two businessmen – Setya Novanto, former Golkar vice-treasurer, and his business partner Djoko Tjandra who owned PT Era Giat Prima – linked to the Golkar Party. Back in late 1998, when the saga began, Bank Bali needed US $320 million to remain in operation. To qualify for a bailout, Bank Bali had to come up with 20% of the $320 million by 22 July 1999; otherwise, IBRA (the Indonesian Bank Restructuring Agency) would have had to take it over. Rudy Ramli, whose family controlled the bank, was desperate to reduce its recapitalization burden by reclaiming US $120 million in credits.

Ramli believed that the Government's deposit guarantee scheme, which was introduced by Soeharto in January 1998, covered the claim. He tried for more than a year to secure his claim from the IBRA and Bank of Indonesia officials. In early 1999, he was forced to use the 'facilitation' services of a private company, whose owner acted as a middleman between the bank and the Government. The 'fee' or 'commission' was a staggering sixty percent of the claim. Because inter-bank loans are guaranteed by the Government, no commission should have been paid. Critics say that a large chunk of the funds went into Habibie's re-election war chest. According to rumours, the US $78 million 'commission' was used as bribes to buy votes in the People's Consultative Assembly (MPR).

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39 *How Could This Be…*, Gatra (Indonesian Weekly Magazine), No. 31/V, 19 June 1999, available at http://www.gatranews.net/_english/V/31/LPTI-31.html.

40 See Usamah Hisyam, supra, note 13, pp. 594-596.

The Indonesian Democratic Party-Struggle (PDI-P), Megawati's party, accused one of Habibie's younger brothers, four Cabinet ministers, two Golkar Party leaders, and five businessmen, of being directly involved in the Bank Bali transaction. A PDI-P's statement claimed that three other senior Government officials and a close presidential confidante were also implicated.

The purported transcript of a police interview with former Bank Bali President Rudy Ramli was circulated to journalists in Jakarta. In the document, Ramli named Finance Minister Bambang Subianto, Bank Indonesia Governor Sjahril Sabirin, State Minister for the Empowerment of State Enterprises Tanri Abeng, the head of the Supreme Advisory Council (DPA) A.A. Baramuli, President Habibie's younger brother Suyatim 'Timmy' Habibie, IBRA deputy chairman Pande Lubis, and five top businessmen, as being involved in the case.

The IMF called for a full investigation including an investigation of the Central Bank. On 19 August 1999, the 'commission' payment was returned to Bank Bali. IBRA agreed to an independent audit of its actions. Satrio Billy Yudono, chief of the BPK, said he would not make public a 123-page report of the scandal, submitted by auditors Price Waterhouse Coopers (PWC) in early September 1999. This was despite pressure from both the International Monetary Fund and the World Bank, which had suspended loans to Indonesia due to the controversy. Yudono cited banking secrecy laws as a reason for giving the PWC report only to the police.

Meanwhile, Members of Parliament demanded the resignation of Finance Minister Subianto and other officials, only to be rejected by Habibie. While the businessmen, Satya Novanto and Djoko Tjandra were released by the court, the Governor of the Bank of Indonesia, Sjahril Sjabirin, is still awaiting the Supreme Court's decision on this case.

Thus far, I have shown political scandals arising from the fight against corruption. It is time to move to the next sub-topic: legal scandals. It will be demonstrated that the capacity of anti-corruption agencies is weakened not only by the insufficiency of their mandate and resources, but also by the weaknesses of political and legal institutions more generally. While public demands for the effectiveness of such an agency or commission may be high, other 'legal actors' may try to limit and weaken its performance.

4. The Joint Investigation Team

The establishment of the Joint Investigation Team to Eradicate Criminal Acts of Corruption (TGPTPK) was based on Government Decree No. 19 of 2000, as mandated by article 27 of Law No. 31 of 1999, which stipulates that in the event of a hard to prove criminal act of corruption, a joint team shall be set up under the coordination of the Attorney General. According to that Article, the TGPTPK was to be responsible to the Attorney General in performing its duties and powers. Otherwise, the team was to be independent in the performance of its duties and execution of its powers, free from any interference involving executive and legislative power. Moreover, the team was to be created ad hoc and temporarily, depending on cases to be investigated. Consequently, was not to be a single team, but several joint teams.

For example, in the Soeharto case, the Bank Bali case, and other cases, the Attorney General should have set up different teams.

However, on 17 May 2000, the Government signed a commitment with the International Monetary Fund (IMF) by a Letter of Intent (LoI), requiring the Government to quickly establish one Joint Team to focus on complex corruption cases.[41]

Less than a week after the signature of the LoI, the Government established the TGPTPK through Government Regulation (GR) No. 19 of 2000, dated 23 May 2000. Intended to be the 'embryo' or fore-runner of the Anti-Corruption Commission, the TGPTPK was expected culturally and structurally to unite law enforcers and civil society.[42] Under this Regulation, the TGPTPK became one unit, which dealt with *all* difficult cases.

Instead of establishing the Anti-Corruption Commission, as it was obliged to do by Law No. 31 of 1999, the Government chose to establish the TGPTPK. One of the reasons was that according to Article 43 (4) of Law No. 31 of 1999, the formation, organizational structures, work procedures, accountability, duties and authority, as well as membership of the Anti-Corruption Commission, were to be defined within two years' time. On the one hand, the Government needed the IMF's funds and had to provide evidence on its progress in combating corruption. On the other hand, setting up a new Anti-Corruption Commission would follow the same process as drafting a new law – a parliamentary debate and so on. The Government (and the IMF) could not wait too long. The situation forced the Wahid Government to establish the TGPTPK through 'the shortcut,' a Government Regulation. It was to dissolve once the Commission was set up. Even after the TGPTPK was dissolved by the Supreme Court, however, the Anti-Corruption Commission was not formed and still remains to be formed today.

The legal bases on which the Joint Team was established were the following: i) Article 27 of Law No.31/1999, stating: 'In cases where corruption is difficult to prove, a joint team may be established under the coordination of the Attorney General,' and ii) Article 32 (b) Law No. 5/1991 on the *Kejaksaan Agung* (Attorney General's Office), which stipulates: 'The Attorney General's Office has the task and

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41 Sources: Department of Foreign Affairs of the Republic of Indonesia available at http://www.dfa-deplu.go.id/policy/economy/eissues/gover-19may00.htm. Point 37 of the Letter of Intent states:

> 'Key reforms have also been put in place to address governance problems in the court system. The Chairman of the Joint Investigating Team (TGPTPK) has been appointed and the TGPTPK will become fully operational during May. The TGPTPK will function under the direction of the Attorney General, focusing on complex corruption cases and the court system. The TGPTPK is retaining a core group of staff members to facilitate its work, and we have made available adequate budgetary and infrastructure support for it. External technical assistance is expected from the Netherlands and other donors to assist the efforts of the Team.'

42 See Elucidation of GR No. 19/2000.

authority to coordinate the handling of certain criminal cases with relevant government-regulated institutions, as defined by the President.'

Therefore, the establishment of the TGPTPK did not occur from an explicit provision in Law No. 31 of 1999. Rather, it was formed because the Government agreed to it as an entry point for the LoI. At the same time, the existence of such an institution was very much needed and called for by the people, considering that it would take too much time to establish an anti-corruption commission.

The membership of the TGPTPK consisted of active National Police officers, active prosecutors, related institution officials and prominent leaders of society. The duties and tasks of the Joint Investigation Team were to coordinate the investigation and prosecution of corruption crimes. The first six months of the TGPTPK, however, were useless, since there was no budget disbursed to run its tasks and functions.[43] At the same time; neither office space nor any secretarial staff was available for the TGPTPK to begin its work. The Government was in such a hurry to establish the TGPTPK that it neglected to provide facilities for it.
The detailed tasks and authority of the TGPTPK were specified as follows:

> 1. To coordinate the investigation and prosecution of every individual strongly suspected of committing difficult to prove corruption;
> 2. To query relevant bank(s) and instruct them to block suspects accounts if necessary;
> 3. To open, investigate and confiscate letters and packages sent via mail, telecommunication or other devices, which are believed to be related to an on-going investigation;
> 4. To conduct communications interception;
> 5. To propose refusal of exit permits for potential suspects, and other such measures;
> 6. To recommend to a suspect superiors, if there is sufficient evidence, that the suspect employment be suspended.

One criticism of the TGPTPK was that it investigated cases of corruption committed *before* the promulgation of Law No. 31 of 1999. On 6 July 2000, the TGPTPK announced that two active and one retired Supreme Court judges would be investigated for corruption.[44] The judges were suspected of receiving bribes from Endin Wahyudin, a witness in a land dispute. The bribes were aimed at influencing the vote of the three justices. It was alleged that between them, the justices received 196 million rupiah. The three justices were: Supraptini Suprapto, Marnis Kahar and Yahya Harahap (retired). Based on the TGPTPK's work, Supraptini Suprapto and Marnis Kahar were tried at the Central Jakarta District Court, while retired justice Yahya Harahap was tried at the West Jakarta District Court.

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43 See Hamid Chalid, *A Personal Experience in Combating Corruption in Indonesia: The Wrongful Dissolution of the Joint Investigating Team against Corruption*, paper presented at the Australia-Indonesia Legal Fellowship Seminar conducted by the Asian Law Centre, Faculty of Law, the University of Melbourne, 18 October 2001.

44 *MA Berikan Peluang TGPTPK Ajukan Keberatan*, Kompas, 7 July 2001, p. 12.

This invoked anger from the Judges' Association (IKAHI). It was probably the first time that three Supreme Court Judges had been formally brought to the lower court on corruption cases. The Judges Association was afraid that the credibility of judges and the Supreme Court would be lost.[45] They struck back by proclaiming that they would question the authority of the TGPTPK to handle a corruption case that had occurred in 1998, when the TGPTPK itself was not established until 2000, pursuant to Law No. 31 of 1999.

In a Pre-Trial Hearing at the District Court, the Judge decided that the TGPTPK was not authorized to investigate cases in which the *tempus delictum* is under Law No. 3 of 1971. The court held that the TGPTPK was authorized to investigate only cases arising after the enactment of Law No. 31 of 1999, while the alleged corrupt acts in the three judges' case took place before the new law establishing the JIT had come into force. The judge further stated that the case involving the judges was not within the meaning of 'difficult to prove,' as explained in the Elucidation of Article 27 of Law No. 31 of 1999.[46]

The three justices also initiated criminal litigation against the witness, Endin Wahyudin, persuading the police to initiate criminal defamation proceedings. Wahyudin was claimed to have defamed their good names by reporting the bribery to the TGPTPK, and the court found Wahyudin guilty. He was also charged with corruption for bribing the judges, whereas the judges were released untouched. He was found guilty of ruining the justices' credibility, and was convicted.[47]

Regardless of his motivation or interest to testify, Wahyudin should have had legal protection. Here is solid evidence of the significance of a witness protection scheme. The Wahyudin case would obviously discourage public participation in combating corruption. Wahyudin was a key witness of the TGPTPK under the coordination of the Attorney General, but the Attorney General's office prosecuted him. How could the Attorney General use Wahyudin as a witness and as a defendant simultaneously? The law does not protect the public from any possible allegations with regard to their testimony. So far, the message from this story is that whoever dares to disclose a corruption case could suffer the same fate.

The story of the TGPTPK ended when the lawyers of the judges filed a petition for judicial review with the Supreme Court against Government Regulation No. 19 of 2000. On 23 March 2001, the Supreme Court decided through its decision No. 03/P/HUM/2000 that Government Regulation No. 19 of 2000 was invalid as it violated higher laws and regulations. Supposedly, it went far beyond what was authorized by law by giving investigation and prosecution authority to a new institution.

Based on this decision, on 8 August 2001, the Attorney General dissolved the TGPTPK.[48] However, the legal scandal remained. Article 42 Paragraph (1) of Law No. 14 of 1985 clearly stipulates that, 'A judge must not hear a case in which he himself has a conflict of interest, directly or indirectly.' Justice Paulus Effendy

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45 *Hakim Agung Tersangka Kasus Korupsi Lapor Polisi*, Kompas, 23 August 2000, p. 6.
46 Chalid, supra, note 43.
47 *Saksi Kasus Korupsi Hakim Agung Diadili*, Kompas, 24 April 2001, p. 12.
48 *Kejaksaan Agung Resmi Bubarkan TGPTPK*, Kompas, 21 August 2001, p. 7.

Lotulung was appointed to chair the presiding panel of justices at the Supreme Court on this judicial review case, while at the same time he also acted as legal counsel to the suspects, pursuant to an order from the chairman of the IKAHI.[49]

The attempts of TGPTPK to combat corruption were not supported by other 'legal actors' such as the Judges Association, the Attorney General or the Supreme Court. Giving priority to the combat against corruption in the judicial institutions, mainly the Supreme Court, was based on the consideration that the Supreme Court, seen as the last fortress of justice, can be expected by the people to be a clean and honest institution that people can trust and where they may obtain justice. However, such attempts faced strong resistance from most of the judges' colleagues, who felt that the TGPTPK hurt collective sentiment towards the Judges' Corps.

5. The Anti-Corruption Commission

Article 43 Paragraph (1) of Law No. 31 of 1999 provides that a form of independent commission against corruption must be established no later than two years after the enactment of the Law, and must consist of representatives of Government bodies and elements of civil society. A new law would be established to regulate the formation, organizational structure, work procedures, accountability, duties, authority and membership of the Commission. Since Law No. 31 of 1999 was signed by President Habibie on 16 August 1999, the Anti-Corruption Commission should have been established by 16 August 2001, at the latest. However, to date, such a Commission is yet to be established – an obvious example of the failure to implement Law No. 31 of 1999.

The proposal to establish a commission or an agency to deal with corruption is not a new one. The Soeharto Government established several such agencies. On the one hand, such a commission is needed on the grounds that corruption in Indonesia is both systemic and systematic. Since even the 'legal actors' are not free of corruption, the concept behind the proposal for the Anti-Corruption Commission can be understood. However, the commissions in the Soeharto era failed to reduce corruption rates. This means that if a better and more successful commission is to be established in the post-Soeharto era, the authority, membership and power of the commission have to be adequate for combating corruption.

According to the Department of Justice, one of the reasons for delaying the establishment of the commission is that the Government and the Parliament had different opinions on the authority of the commission.[50] One group maintained that the commission should have the power to examine, but not to prosecute. Others believed that in order not to follow the failure of such commissions in the past, the new commission should have the power to both investigate and to prosecute. Also, the commission should have the ability to take over corruption cases handled by the Attorney General's office and the police force, if either is unable or unwilling to

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49 Chalid, supra, note 43.

50 *Pembentukan Komisi Antikorupsi Sudah Melewati Batas Waktu*, Kompas, 13 June 2001, p. 14.

handle the case properly. A draft bill to this end was submitted by the Government in June 2001.

Having considered all the issues, finally, on 27 December 2002, President Megawati Soekarnoputri signed Law No. 30 of 2002 on the Anti-Corruption Commission. The Commission should be established in the nearest future. The Commission will work in four areas: prevention of corruption; follow-up legal action; information and data; and internal monitoring and public reports. Once the Anti-Corruption Commission is established, the KPKPKN (The Commission for Examination of the Assets of State Functionaries) established under Law No. 28 of 1999 will be merged with the Commission. Law No. 30 of 2002 also orders the establishment of an Ad Hoc Corruption Court. The Ad Hoc Corruption Court will be a special court dealing only with corruption cases.

Another significant matter to be noted is that the Anti-Corruption Commission cannot become a substitute for a corrupt and dysfunctional legal system (police, prosecution and judiciary), all the elements of which are essential to the rule of law in society. In other words, the commission may serve as an antibiotic, but if the patient does not change his lifestyle and follow all the treatments, the antibiotic will not help much.

V. Conclusion

Although President BJ Habibie (1998-1999) signed Law No. 31 of 1999 to meet one of the most pressing demands for reform of the time – the eradication of corruption, collusion and nepotism (KKN) – the Law had several problems.

Firstly, the Habibie Government saw corruption, collusion and nepotism only as ordinary crimes. Habibie did not take the opportunity to declare corruption to be a special crime needing special regulation. Secondly, the law was poorly drafted and contained many conflicting and confusing articles. It was obvious from the draft that the Habibie Government was unwilling to establish the Anti-Corruption Commission, despite the Parliament pushing the idea firmly. According to Law No. 31 of 1999, the Anti-Corruption Commission would be established two years after the law took effect. This shows that this law was not meant for the Habibie Government and the then Members of Parliament (based on 1997 General Election), since their period in office ended in October 1999. Thirdly, the content of the law was vague. For instance, Law No. 31 of 1999 did not have a transitional provision to clarify its application to pending cases. This invited public suspicion that the law was a product of a conspiracy to protect Soeharto's followers against prosecution. Law No. 31 of 1999, thus, can be seen as a product of political compromise between the Habibie administration and the Members of Parliament.

The fight against corruption cannot be independent from the reform of the State and the political leadership. Political leaders must show exemplary conduct, and should not be involved in corrupt practices themselves. The scandals, discussed above, indicate that Habibie and his inner circle were not free from corruption, collusion and nepotism. The data from Transparency International and the Political & Economic Risk Consultancy (PERC) in fact show that corruption got worse in the

Habibie era. Essentially, there was no significant improvement in fighting corruption.

Moreover, Habibie was seen as not having a strong will to combat corruption. By delaying the establishment of the Anti-Corruption Commission, Habibie lost the chance to prove to the public that he was free from corruption. Both systematic and systemic forms of corruption can be minimized only if there is demonstrated political will on the part of the political elite to end the causes and effects of corruption. Such determined resolutions were sadly lacking in the post Soeharto period (1998-1999).

Clearly, one of Habibie's biggest failures was his failure to prosecute former President Soeharto. His close relationship with Soeharto was one of the reasons for his hesitation in having a clear anti-corruption strategy and consistently following the strategy. His actions conflicted with popular demands for reform, since the Soeharto case was considered to be a symbol in the drive for reform, and a clear indication as to whether or not Habibie was reformist. Habibie's unwillingness to bring Soeharto to justice was in contravention of good governance and the rule of law. And this was a decisive factor in the rejection of Habibie's re-election bid by the supreme People's Consultative Assembly (MPR) in October 1999.[51]

The absence of law enforcement in the Habibie period has continued the 'culture' of impunity of the Soeharto Government. It is not surprising that Indonesia is still considered as one of the most corrupt countries in the world today, because corrupt people not only walk on the streets freely, but also serve the country as state functionaries. If no radical change occurs soon, corruption in Indonesia will become even more entrenched.

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[51] Personal Communication with Khofifah Indarparawansa on why her PKB party rejected Habibie's speech, Canberra 2002.