

Indonesia

The Indonesian Constitution has little practical effect. Effective judicial review is absent and the judiciary depends upon the executive, in both legal and administrative terms. Human rights were extensively violated in 1999, inter alia, in East Timor, Aceh, Irian Jaya (West-Papua) and the Maluku.

The year 1999 was a turbulent year for Indonesia: the people of East Timor voted by a wide majority for independence, but military backed violence resulted in serious human rights violations; President Habibie lost the elections and was replaced by President Wahid in October 1999; communal and religious violence continued in the Maluku; and violence related to separatism in Aceh and Irian Jaya (West Papua) persisted.

Article 1 of the 1945 Constitution proclaims that Indonesia is a unitary state, which takes the form of a republic. The Majelis Permusyawaratan Rakyat (MPR) exercises sovereignty over the people. The MPR is the sovereign deliberative assembly of the nation and is comprised of members of the Dewan Perwakilan Rakyat (DPR), the Indonesian parliament, together with delegates from regional and special interest groups provided for by statute. The most important of these groups is the Indonesian military forces.

Article 6 of the Constitution provides that the President and Vice-President of the Republic shall be elected by the MPR for a renewable five-year term. The President has extensive powers as the Supreme Commander of the army, the navy and the air force (Article 10 of the Constitution). According to Article 12 of the Constitution the President may declare states of emergency. The President also appoints and dismisses Ministers of State (Article 17 of the Constitution) and may exercise a veto over legislation submitted by the DPR. The President appoints and dismisses judges (Article 25 of the Constitution in accordance with law 14/1970). The President may issue decrees having the standing of law and in the event of an emergency, the President may issue regulations in lieu of laws (Article 22 of the Constitution).

Before the elections in June 1999, three bills passed by the DPR reformed the election laws. The legislative seats reserved for the military were reduced from 75 to 38, the restriction allowing only three parties to contend elections was ended and a proportional representation system for voting was introduced. Furthermore, in a presidential decree President Habibie prohibited campaigning by civil servants during the elections. In the past civil servants, including judges, were obliged to endorse the ruling Golkar Party.

General elections took place on 7 June 1999. The three leading opposition parties, the Indonesian Democratic Party (PDI-P) of Megawati Soekarnoputri, the National Awakening Party (PKB) of Abdurahman Wahid and the National Mandate Party (PAN) of Amien Rais formed an electoral alliance against the Golkar Party.

The count was completed on 15 July 1999 but the declaration of the results was postponed when 27 of the 46 political parties rejected the figures on grounds of electoral fraud. The official result was endorsed on 3 August 1999 by the President: the PDI-P gained 154 seats, the Golkar Party 120, the PKB 51, the United Development Party (PPP) 58 and the PAN 35 seats, with the remaining seats for minor parties.

On 30 August 1999, a referendum on the future of East Timor took place. The voters could choose between independence and autonomy within Indonesia. About 98.6% of the 438,500 registered voters participated in the referendum. Before and after the referendum the militia caused widespread destruction in East Timor, killing people, forcing people to flee and destroying property. Around 80% of the voters chose for independence.

On 20 October 1999, Mr. Abdurahman Wahid, leader of the PKB, was chosen as the new President by the MPR. Mr. Wahid had, since 1984, been the leader of the largest Muslim organisation in Indonesia, the Nahdlatul Ulama. Megawati Sukarnoputri, leader of the PDI-P was appointed Vice-President.

General Wiranto lost his position as Commander-in-Chief of the armed forces and was replaced as Defence Minister. Juwona Sudarsono became the first civilian to be appointed Defence Minister in Indonesia. Mr. Wiranto was appointed Coordinating Minister of Politics and Security.

Human Rights Background

Indonesia has not ratified important human rights treaties such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The UN Working Group on Detention conducted a mission to Indonesia from 31 January to 12 February 1999 and stated that:

In its contacts, particularly with lawyers and representatives of civil society, the Group developed the feeling that several decades of authoritarian regimes in Indonesia have often contributed to some form of desensitisation in relation to human rights. This can take the form of loss of confidence in institutions, of acceptance of the absence of the Rule of Law and of a certain fatalism vis-à-vis the phenomena of impunity and corruption. On this last point, the Working Group considers that the envisaged judicial proceedings against the highest official of the former regime, especially for embezzlement of public funds and other economic crimes, should be conducted with firmness, independence and transparency so as to permit public opinion to regain confidence in the country's institutions.

The Working Group spent three days in East Timor, but was not allowed to visit Aceh or Irian Jaya. The Working Group, inter alia, concluded that:

[t]he incidence of violence accompanying repressive activities has hardly diminished (for example, in Aceh, Irian Jaya and East Timor). Arrests continue to be characterised by numerous flaws that result in detentions being arbitrary within the meaning of one of the three categories under the Group's working methods.

The 1963 Anti-Subversion Law that was often used to detain political opponents of the Soeharto regime was abolished in April 1999. The Indonesian Criminal Code, however, was then revised and many of the articles of the 1963 Anti-Subversion Law were incorporated into the Criminal Code.

Political prisoners began to be released under the Habibie government. The Wahid government continued with the release of more political prisoners and by the end of the year most or all had been freed.

The International Commission of Jurists conducted a mission to Indonesia from 20 March - 3 April 1999 to review issues related to the Rule of Law, judicial independence and human rights. The mission's report, *Rulers Law*, was issued in October 1999.

Aceh

Since 1989, conflict has been erupting between the Indonesian military and the armed separatist opposition group Free Aceh Movement (Gerakan Aceh Merdeka, GAM) in Aceh in the north of the province of Sumatra. The region was declared an Area of Military Operation (DOM), a status which was only lifted in August 1998. Large scale human rights violations were committed during this period by the military (TNI). There are also reports of human rights abuses by the GAM.

In December 1998, violence erupted again, despite President Habibie's promise to deal with the human rights problems in Aceh. As the situation deteriorated the call for a referendum to decide on the status of Aceh became stronger. Human rights violations were committed by the military and the police in 1999 and, along with many victims from the GAM, many civilians were killed, tortured, disappeared and arbitrarily detained. Human rights activists were prevented from carrying out their work in Aceh and also became the target of severe human rights violations. Again there were also reports of human rights abuses committed by the GAM.

In November 1999, President Wahid made a statement confirming that a referendum on Aceh could be an option. The referendum would only offer the possibility of a broad degree of autonomy, not independence. The armed forces, however, opposed such a referendum out of fear of disintegration of the country.

In November, former Commander-in-Chief of the armed forces, Wiranto, along with six other generals, had to testify before a committee of the DPR on human rights abuses by the army in Aceh. In the first trial dealing with human rights violations committed by the military forces in Aceh, five military officers stood trial in December 1999 before a combined military-civil court. Although this was the first time military officers were held legally responsible for committing human rights abuses in Aceh, only military officers of low rank were tried.

Irian Jaya

During the year voices for independence grew stronger in Irian Jaya. Many people were killed in clashes between the police and the Free Papua Movement (OPM). The UN Working Group on Arbitrary Detention was denied access to Irian Jaya when it conducted a mission to Indonesia from 31 January to 12 February 1999.

On 18 December 1999, the DPR agreed to change the name Irian Jaya to West-Papua without recognising demands for independence for the province.

Maluku

Throughout the year religious violence between Christians and Muslims continued to claim many victims. The Indonesian armed forces were sent to the Maluku to suppress the violence but were unsuccessful. By the end of 1999 about 1, 500 people, mainly civilians, had died.

Jakarta

On 23 and 24 September 1999 student demonstrations were held in Jakarta against the proposed State of Emergency Bill. The bill would have given the armed forces far reaching powers to declare states of emergency. Six demonstrators were reported to have been killed by the military. Finally, the bill was suspended by President Habibie.

There were reports of more killings on the occasion of other demonstrations during the year.

East Timor

During the whole year many people were killed by pro-integration forces, especially in the period immediately before and after the poll of 30 August 1999. Many people fled from East Timor when the violent incidents continued to occur. There were numerous attacks on villages, and the army was accused of supporting the pro-integration militia.

On 5 May 1999, the Foreign Ministers of Indonesia and Portugal, Ali Alatas and Jaime Gama, signed an agreement on holding a poll in East Timor on 8 August in which the population of the former Portuguese colony would choose between an Indonesian autonomy package and independence. The agreement was backed by UN Security Council Resolution 1236 on 7 May 1999. On 28 July 1999, the UN Secretary-General postponed the poll until 30 August 1999 because of the dangerous security situation.

On 30 August 1999, 98.6 % of the 435,000 registered voters participated in the ballot. The overwhelming majority of the votes (78.5%) chose for independence as opposed to 21.5% who choose for autonomy within Indonesia. In the weeks before the vote hundreds of people were killed and injured and thousands driven from their homes by militia attacks. The Indonesian military (TNI) was condemned by the international community for cooperating with the militia or failing to stop them. After the poll, the violence erupted again, and personnel of the UN Assessment Mission in East Timor (UNAMET) were evacuated and its compound was burned by the militia. Many people were killed or fled the region, including priests and nuns who tried to protect the refugees.

A delegation of the UN Security Council visited Indonesia on 7 September 1999 and two days later President Habibie gave his approval for a peacekeeping force, which arrived in Dili on 20 September 1999. The International Force East Timor (INTERFET) was headed by Australia's Peter Cosgrove. Fierce attacks on journalists, UN workers and local people by the militia followed.

From 23 to 27 September 1999, a special session of the UN Commission for Human Rights convened in Geneva at the request of Portugal. The special session was convened against the background of increasing reports of widespread violence and serious human rights violations in East Timor, following the referendum on the future status of East Timor. This was the fourth special session of the Commission. Two special sessions had been held, in 1992 and 1993, on the situation in the former Yugoslavia and one in 1994 on the situation in Rwanda.

The Commission adopted a resolution calling for the establishment of an international commission of inquiry to "investigate violations of human rights and acts which may constitute breaches of international humanitarian law committed in East Timor since the announcement in January 1999 of the vote". The International Commission of Inquiry was requested to cooperate with the Indonesian National Commission on Human Rights and UN thematic rapporteurs, to gather and compile systematically information.

East Timorese independence leader, José Xanana Gusmao, returned to Dili on 22 October 1999 after having been released from prison and house arrest some time earlier. In December 1999, José Ramos Horta, the Vice-President of the National Council of Timorese Resistance (CNRT) returned to East Timor after 24 years of exile.

The International Commission of Inquiry delivered its report to the UN General Assembly on 31 January 2000 and concluded, *inter alia*, that:

there were patterns of gross violations of human rights and breaches of humanitarian law which varied over time and took the form of systematic and widespread intimidation, humiliation and terror, destruction of property, violence against women and displacement of people. Patterns were also found relating to the destruction of evidence and the involvement of the Indonesian army (TNI) and the militias in the violations.

There is evidence that the policy of engaging militias was implemented by the Kopassus (Special Forces Command of TNI) and other intelligence agencies of the Indonesian army. The policy manifested itself in the form of active recruitment, funding, arming and guidance, and of the provision of logistics to support the militias in intimidation and terror attacks.

There is evidence to show that, in certain cases, Indonesian army personnel, in addition to directing the militias, were directly involved in intimidation and terror attacks. The intimidation, terror, destruction of property, displacement and evacuation of people would not have been possible without the active involvement of the Indonesian army, and the knowledge and approval of the top military command.

The Indonesian police, who were responsible for security under the 5 May agreement, appear to have been involved in acts of intimidation and terror and in other cases to have been inactive in preventing such acts.

The Commission is of the view that ultimately the Indonesian army was responsible for the intimidation, terror, killings and other acts of violence experienced by the people of East Timor before and after the popular consultation. Further, the evidence collected to date indicates that particular individuals were directly involved in violations of human rights.

The Commission received allegations that armed groups supporting independence were also involved in violent attacks during the period from January 1999. The incidents were relatively fewer in number and confirmation of their existence has not been obtained.

From 4 to 10 November 1999, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Ms. Asma Jahangir, the UN Special Rapporteur on Torture, Sir Nigel Rodley, and the UN Special Rapporteur on Violence against Women, Ms. Radhika Coomaraswamy, conducted a joint mission to East Timor. The visit was undertaken pursuant

to the resolution adopted by the Commission on Human Rights at its special session on the situation in East Timor. The Special Rapporteurs concluded, *inter alia*, that the attacks:

took place in the context of an attack against the East Timorese population that overwhelmingly supported independence from Indonesia. They include murder, torture, sexual violence, forcible transfer of population and other persecution and inhumane acts, including destruction of property. These have all been committed on a scale that is widespread or systematic or both.

The MPR voted in October 1999 in favour of revocation of the 1978 decree that annexed East Timor to Indonesia. On 25 October 1999 the UN Security Council voted unanimously to replace INTERFET with a UN force of military personnel and police to support the establishment of the UN Transitional Administration in East Timor (UNTAET). UN Under-Secretary-General for Humanitarian Affairs, Sergio Viera de Mello, was appointed as transitional administrator in charge of rebuilding the infrastructure of East Timor.

The 13-member National Consultative Council (NCC) was established to make policy recommendations to the UNTAET. The NCC included seven members of the National Council of Timorese Resistance (CNRT), a Catholic priest, UN officials and a former pro-Indonesia leader of the East Timorese People's Front.

The Judiciary

The 1945 Constitution makes reference to the judiciary in Articles 24 and 25. It is apparent from these articles that the nature of judicial power, the content of its exercise and the tenure of those who exercise it will be regulated principally by statute rather than by constitutional provisions.

Indonesia is constructed upon the principles of "Pancasila", the official state ideology. The principles of Pancasila are set out in the Preamble of the Constitution as follows:

...the national independence of Indonesia shall be formulated into a constitution of the sovereign Republic of Indonesia which is based on the belief in the One and Only God, just and civilised humanity, the unity of Indonesia, democracy guided by the inner wisdom of deliberations amongst representatives and the realisation of social justice for all the people of Indonesia.

As described in the ICJ's mission report *Rulers Law* the ideology of Pancasila is founded upon five broad principles. It is accepted in Indonesian constitutional theory that the Constitution's provisions, and the provisions of all statute law, should be interpreted so as to be consistent with these principles. The principles are so broad, however, that they can attain meaning only in the hands of definitive interpreters. While in normal circumstances one might expect that such interpretation would be within the sole jurisdiction of the courts, in Indonesia, where the courts are very weak, the task of interpreting the principles has passed to the executive government. It is thus made easy for the President to declare that actions or omissions are contrary to Pancasila and therefore contrary to the interests of the state.

Given these circumstances, the Constitution has had little or no effect upon the constraint of executive power. It has not and cannot act as the foundation of a state based on the Rule of Law as this term is commonly understood. A vague and imprecise Constitution has been

preferred to one that constitutes the supreme law of the nation. The open-textured nature of the constitutional document, the absence of effective judicial review, the very limited guarantees of human rights, the judiciary's dependence upon the executive in both legal and administrative terms and the heavy emphasis on breadth and flexibility in the exercise of presidential power, have all contributed to a situation in which the Constitution is accorded symbolic respect but not practical effect.

Structure

The Supreme Court (Mahkamah Agung) stands at the apex of the judicial system. Beneath the Supreme Court four branches of the judicature are created (Article 10) - the General Courts of Justice (Peradilan Umum) which have jurisdiction to try civil and criminal cases. There are special courts such as a Child Court, Economic Courts, the Islamic Courts of Justice (Peradilan Agama) which have jurisdiction to try civil cases related to the Islamic religion, the Military Courts of Justice (Peradilan Militer) which have jurisdiction to try any crime committed by military officers, and the Administrative Courts of Justice (Peradilan Tata Usaha Negara) which have jurisdiction to try administrative cases.

The right of appeal from District to High Court to Supreme Court exists in all four systems. The Supreme Court does not consider factual aspects of a case, only the lower courts' application of law.

According to Law 8/1981, a crime committed by a military officer together with a civilian should be tried in a general court, unless the Minister of Law and Legislation (before: Minister of Justice) together with the Minister of Defence and Security decide that the case should be tried in a Military Court of Justice. If the case is tried in a General Court of Justice, the panel of judges is mixed: two judges, including the President, are civilian judges and one is a military judge. This procedure is called "Peradilan Koneksitas".

Article 11 of Law 14/1970 provides that each of these branches of the judiciary shall be subject in their organisation, administration and finance to the ministry in relation to which their jurisdiction is primarily concerned. The General Courts of Justice, therefore, are responsible to the Minister of Justice, the Military Courts of Justice to the Minister of Defence, and so on. Where the courts are required to review the laws and actions of their parent ministry, a potential conflict of interest will clearly and inevitably arise. Article 11 is a substantial threat to the independence of the judiciary in Indonesia.

Jurisprudential supervision remains with the Supreme Court but the fact that the Minister of Justice supervises the organisation, administration and financing of the court provides for the potential of governmental interference with judicial decision-making. In fact, during its mission from 20 March - 3 April 1999, many cases of actual interference were cited to the ICJ.

Article 26 of Law 14/1970 provides another threat to judicial independence as it contains that the Supreme Court is empowered only to review the validity of regulations and other inferior statutory instruments. The People's Assembly (MPR) has the power to review the constitutionality of legislation.

Human Rights Court

On 8 September 1999, a law on human rights was passed in the parliament allowing, inter alia, for the establishment of a Human Rights Court within four years. On 8 October 1999, President Habibie created a government regulation in lieu of legislation with regard to the establishment of a Human Rights Court. This court has the authority to deal with cases that take place after 8 October 1999 and that involve extinction of a national or ethnic group, extrajudicial killings, forced disappearance, slavery, systematic discrimination and torture. The regulation gives the National Commission on Human Rights the right to request an explanation regarding a human rights case from the Attorney General at any moment.

Appointment, Promotion, and Dismissal

The position of judges may be prejudiced when their mode of appointment and dismissal is considered. In accordance with Article 31 of Law 14/1970 judges are to be appointed and dismissed by the President without further consultation or approval by either the legislature or the judiciary itself.

Article 16 of Law 2/1986 Concerning the General Judicial System elaborates on the provisions of Law 14/1970. Article 16 elaborates on Article 31 of Law 14/1970 by providing that:

A judge of a court is appointed and discharged by the President in his capacity as head of state on the proposal of the Minister of Justice and based on consultation with the Chief Justice of the Supreme Court.

Furthermore, according to Article 14 a judge in Indonesia is a civil servant which means that Law 8/1974 on the Principles Concerning Civil Servants is applicable to them.

Promotion within the judiciary can be made in Indonesia only from within and only from the ranks of judges in the courts immediately below. There is no possibility for the appointment of a judge to a senior judicial office from outside the ranks of the existing judiciary. Within this system in which judges rely completely on the Minister of Justice and the President for their promotion, it is likely that judges will try to please them.

According to Article 13 of Law 2/1986, judges may be dishonourably discharged from office when they have: committed a crime; engaged in improper behaviour; neglected their duties; or violated their oath of office.

The definitions of improper conduct and neglect of duty, however, are very vague. Improper conduct is defined as meaning that a judge, whether in court or out of court, dishonours a judge's dignity. Duty, with respect to neglect of duty, is defined simply as all duties entrusted to the judge concerned. The decision as to whether these criteria are met and whether dismissal should follow rests entirely with the Minister of Justice and the President .

With respect to appointment, dismissal, transfer and remuneration of judges in the Islamic Courts, the Administrative Courts and the Military Courts, the same legislative foundation is applicable except that regarding the Military Courts the Minister of Defence makes decisions instead of the Minister of Justice, etc.

The ICJ report of its mission to Indonesia, Rulers Law, which reports on the situation until April 1999 states in this respect that:

The most persistent complaint we received was that the Minister of Justice has used his authority with respect to the appointment, promotion, transfer, and remuneration of judges in order to reward judges whose decisions the Minister approved and penalise those whose decisions he disapproved. In the alternative, the complaint was framed in terms of judges at all levels below the Supreme Court having been unwilling to take difficult decisions adverse to the government for fear of having their prospects for promotion and desired geographic location prejudiced by adverse Ministerial response.

Judicial Corruption

Corruption is institutionalised in the Indonesian judiciary, especially in the Supreme Court, which is notorious for its corruption. In the past the military has always held the post of Minister of Justice and the Chairman of the Supreme Court. Now, however, both these positions have been filled by civilians.

One reason for the judicial corruption could be that judicial salaries in Indonesia are very low compared with the private sector. The ICJ was informed of several cases where judges had received financial rewards in exchange for a favourable decision.

Reform of the Judiciary

Decree 10/1998 altered the division of authority between the Minister of Justice and the Supreme Court so as to make it clear that principal responsibility for the supervision of the judiciary rests with the Supreme Court rather than the Minister. The Ministry may still play a role in court administration.

The Supreme Court Act 14/1985 is in the process of being amended. The draft bill on the Supreme Court was scheduled to be ready early January. It will establish an independent committee that will select Supreme Court judges. A very important question is where the committee should be placed in the system; under the parliament or under the assembly.

Lawyers

In ordinary cases, an investigator, prosecutor or prison official cannot listen to the content of the discussion between a lawyer and their client. According to Article 71 (2) of the Criminal Procedure Code, officials may listen to the conversation when crimes against state security are involved. Because of the high penalties involved in national security cases, confidentiality between lawyer and client is all the more important. Furthermore, according to Article 115 b of the Criminal Procedure Code, when an examination is being conducted in national security cases, the lawyer may be present to watch, but not to listen to the examination of the suspect. This clearly hampers the minimum rights of a suspect.

Article 56 (1) of the Criminal Procedure Code states that only in cases where the accused is being tried for an offence punishable by imprisonment of at least five years and does not have their own counsel, is an investigator, prosecutor or judge obliged to assign a lawyer.

The Criminal Procedures Code does not provide for witnesses' impunity or for the defence power of subpoena. Therefore, witnesses are often reluctant to testify against the authorities. Forced convictions are common and defendants do not have the right to remain silent and can be obliged to testify against themselves.

Cases

Herman Abdurrachman, S.H. (lawyer and legislator in the Regional House of People's Representatives): As the defence lawyer in a case in Sleman District Court, Mr. Abdurrachman was banned, on 25 January 2000, from attending the court proceedings on the ground that he is also a member of the Regional House of People's Representatives (DPRD).

The legal ground of banning him to act as defence lawyer is not solid, because it is only based on the Law on Composition and Position of MPR, DPR, DPRD Membership (Law No. 4 of 1999) which does not explicitly prohibit a legislator from also holding the position of advocate/lawyer.

Mr. Abdurrachman had been a legislator and advocate for seven years and had never faced a problem before.

S.H. Herlambang (lawyer): On 22 July 1999, Mr. Herlambang, as defence counsel in a minor criminal offence case, was treated disparagingly by the presiding judge. The judge would not except the objections of Mr. Herlambang against the charges and expressed the opinion that the defendants were guilty during the trial. The judge accused Mr. Herlambang of obstructing her.

Sinar Mahadini, S.H (lawyer): Ms. Mahadini, who was acting as defence counsel, was harassed on 20 December 1999 and 17 January 2000 in the Yogyakarta District Court by relatives and friends of the accusing party in a criminal case. She was not protected by the authorities.