INDONESIA

The process of legal and judicial reform, which began in May 1998, has stalled somewhat during the recent period of political upheaval. However. the Constitution has been amended to limit the power of the President and in favour of greater parliamentary control. The courts are no longer under the administration of the executive, but are now situated under the administration and supervision of the Supreme Court. Nevertheless, corruption in the judiciary remained endemic and popular distrust of judicial institutions persisted.

Indonesia became formally independent from the Netherlands in 1949. According to Article 1 of the 1945 Constitution, Indonesia is a unitary state, which takes the form of a republic. The Constitution of Indonesia vests sovereignty in the people. Popular sovereignty is exercised by the *Majelis Permusyawaratan Rakyat* (MPR), a People's Consultative Assembly consisting 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. The MPR meets at least once every five years and takes decisions by majority vote. It deliberates and decides upon the Constitution and the policy guidelines of the State. The MPR appoints the President and the Vice-President for a five-year term. Candidates may only be re-elected once.

The President of Indonesia is the head of state and the head of government and is assisted by the Vice-President. The President has extensive powers as the Supreme Commander of the army, the navy and the air force. According to Article 12 of the Constitution, the President may declare states of emergency, appoints and dismisses the Ministers of State and may exercise a veto over legislation submitted by the DPR. However, if the Parliament passes a bill and the President does not approve it within one month, the bill automatically enters into force. Article 25 of the Constitution in accordance with law 14/1970 provides that the President appoints and dismisses judges. 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.

The Constitution of Indonesia of 1945 was amended significantly following the fall of President Soeharto in 1998. Through these fundamental changes the formerly extensive role of the President was altered and the powers of the Parliament were broadened. MPR decree no 7/MPR/2000, for example, provides that the appointment and dismissal of the Supreme Commander of the joint staff of the armed forces, and the chief of the police is no longer solely to be decided by the President, parliamentary approval is also necessary. Another significant change was made with regard to the autonomy of the region. Article 18 of the Constitution now explicitly mentions that the regional government has wide-ranging autonomous powers, except in certain matters under reserve to central authority.

The DPR comprises 500 seats, 462 of which are elected by popular vote and 38 reserved for appointed military representatives. The members of the DPR serve for a period of five years. In August 2000 the MPR voted to extend the allocation of 38 seats to the Indonesian military (*Tentera Nasional Indonesia* - TNI) until 2009.

The last general elections on 7 June 1999 were won by an alliance of 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. Abdurrahman Wahid became President, but throughout 2000 he came under increasing criticism by members of the DPR and MPR for his allegedly erratic style of decision-making, his handling of Indonesia's separatist and sectarian conflicts (in regions such as Aceh, West Papua, Sulawesi and the Moluccas) and lagging economic reform. In May 2000, the so-called Bulog (state logistic agency) affair emerged, involving the alleged misappropriation of US $ 4.1 million from the Bulog pension fund by President Wahid's masseur, Anpeng Sui, and a Bulog official, both claiming that they had acted with Wahid's authorisation. A second financial scandal concerned the disappearance of US $ 2 million donated to President Wahid by the Sultan Hassanal Bolkiah of Brunei for humanitarian relief in Aceh. In September 2000 the DPR appointed a 50-member committee to investigate the two financial scandals. The conflict between President Wahid and the parliament (DPR) deepened in January 2001 when President Wahid declined to cooperate with the inquiry committee. On 31 January 2001 the committee concluded that President Wahid had probably been involved in the Bulog scandal and had made misleading statements with regard to the Brunei donation.

On 1 February 2001, the DPR by a vote of 393-4 censured President Wahid, following the report of the committee of inquiry. President Wahid refused the censure and the TNI rejected his proposal to declare a state of emergency. On 30 April 2001 the DPR issued a second censure against President Wahid by a vote of 363 - 52 with 42 abstentions. On 30 May 2001 the DPR voted by 365-4 to convene a special session of the MPR to initiate impeachment proceedings against President Wahid. President Wahid insisted that the legislature did not have the constitutional right to remove the president and threatened to declare a state of emergency. On 22 July 2001 he declared a state of emergency, thereby dissolving the Parliament hours before the beginning of the special session of the MPR. Security forces refused to implement his orders and the MPR convened an emergency session on 23 July 2001, at which it overwhelmingly voted to end President's Wahid's mandate and to install Vice-President Megawati Sukarnoputri as President.

President Megawati, the leader of the nationalist PDI-P and daughter of Indonesia's founding president, Sukarno, has close links with the armed forces and is known to have favoured strong military action against separatists in Aceh and West Papua. Although she apologised in her first major speech to the parliament for past human rights abuses committed by the military in combating the two separatist rebellions, in Aceh and Papua, and called on the armed forces to reform itself, she declared that she would not allow Aceh or West Papua to break away from Indonesia.

HUMAN RIGHTS BACKGROUND

Indonesia is not a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. While Indonesians in most parts of the country have enjoyed increased civil and political liberties, the human rights situation in the regions opposing Indonesian rule deteriorated throughout the period covered by this report. Among the victims of arbitrary detentions, extrajudicial killing, and torture were political activists, human rights defenders and civilians. Freedom of the press was enhanced by the 6 June 2000 decision of a panel of three judges of the Central Jakarta District Court that an article published in 1999 stating the Soeharto family had accumulated some US $ 15 billion was based on facts and not libellous.

The Constitution was amended by the MPR in August 2000 to contain more elaborate provisions on the protection of human rights. Articles 28 a) to 28 j) guarantee, *inter alia*, the right to legal protection and to fair and equal treatment before the law; the right to protection of private life, family, dignity and property; the right to life; freedom from torture; freedom of thought and conscience; and freedom of religion. A ban on the retroactive application of legislation was also included. Neither the Criminal Code nor the Criminal Procedural Code were amended as planned. Both codes need to be reformed significantly in order to comply with international standards of a fair trial. The provisions currently guaranteeing rights of detainees are often not implemented.

The National Human Rights Commission (Komnas HAM) continued to examine reported human rights violations. The Government appointed the original chairman of the Commission who then appointed the other 24 initial members. Law number 39/1999 gives the Commission statutory authority and increases its membership to 35 persons. The Commission highlights abuses and recommends legal and regulatory changes. Although Law number 39/1999 gives the Commission subpoena powers, it does not give the Commission the power to enforce its recommendation or to recommend government action.

Since 1989, a conflict has been ongoing 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. In 2001 a law was adopted to grant Aceh status as a special province with its own Islamic court of Justice (*Mahkamah Syariah*), and receipt of 55 per cent of the proceeds of the gas and oil production and 40 per cent of the natural gas production from Aceh. Throughout the period covered by this report police and military operations against the armed separatist opposition group GAM continued. Hundreds of extrajudicial executions took place. GAM activists and many civilians were ill-treated and tortured in police and military custody and there were reports of many people being detained or disappeared due to their alleged connection with the GAM. Reports of unlawful killings, abductions and torture by members of the GAM also surfaced.

The former Dutch colony of West New Guinea came under Indonesian rule in 1963 as Irian Jaya after a transitional UN administration. The popular consultative process which confirmed the incorporation into Indonesia in 1969 was widely regarded as flawed. On 18 December 1999, the DPR agreed to change the name Irian Jaya to West Papua without acceding to demands for independence for the province. In 2001 the Indonesian authorities took an increasingly forceful stance against pro-independence activities in West Papua and the level of human rights violations escalated. Independence supporters, whether peaceful or armed, faced unlawful killings, disappearances, torture, and arbitrary detention.

Since January 1999 violent conflict between Christians and Muslims in the Moluccase has produced an estimated 3,000 casualties. On 26 June 2000 President Wahid declared a state of civil emergency in the provinces of Maluku and North Maluku in an attempt to bring an end to the escalating sectarian violence in the region. Fighting between Muslims and Christians in Ambon nevertheless continued. The Indonesian Government has been criticised by groups inside and outside the country for not ensuring the neutrality of the troops it sent to end the violence.

The Soeharto cases

The corruption trial of former President Soeharto on charges of embezzling some US$ 571 million of state funds opened on 31 August 2000 in Jakarta. Soeharto failed to attend on grounds of ill health. On 28 September 2000 a panel of independent court-appointed doctors determined that a series of strokes had rendered Soeharto physically and mentally unfit to stand trial, resulting in the

dismissal of charges by the panel of five judges. The decision triggered violent clashes between protesters and supporters of Soeharto outside the court, resulting in at least one death and many injured. The Attorney General Marzuki Darusman appealed the decision on 5 October 2000 and President Wahid urged the Supreme Court to reopen the case, suggesting that judges had been bribed. On 8 November 2000 the High Court in Jakarta upheld a prosecution appeal against the decision by the lower court in September. The High Court judges ordered Soeharto to appear and threatened otherwise to try him in *absentia*. On 5 February 2001 the Supreme Court formally declared that Soeharto was medically unfit to stand trial on corruption charges.

In another development, the Supreme Court of Indonesia on 27 September 2000 found Soeharto's youngest son Hutomo "Tommy" Mandala Putra guilty of corruption in a land deal which had caused the state losses of Rp 95.4 billion. The verdict of a lower court was thereby overturned and he was sentenced to a term of 18 months in prison. On 3 October 2000 Tommy Soeharto admitted his guilt and made an appeal for clemency to President Wahid, who denied the appeal the next day and imposed a one-year travel ban against him. His lawyers appealed the court decision on 31 October 2000. Wahid formally rejected Tommy Soeharto's plea for clemency via a presidential decree on 2 November 2000. Tommy Soeharto failed to appear in the Attorney General's office and disappeared. A nationwide police search for him started, which culminated in his detention in December 2001. He is also being held in connection with alleged involvement in the killing on 26 July 2001 of Syafiuddin Kartasasmita, the Supreme Court judge who had issued his sentence (see cases below).

Aceh and West Papua

Although investigations into human rights abuses in Aceh and West Papua have been carried out, since the beginning of 2000 there has only been one trial of military officials accused of committing violations. The trial of 24 soldiers and one civilian before a joint panel of military and civilian judges in Banda Aceh for carrying out a massacre in 1999 in a village in West Aceh began on 19 April 2000. The court convicted the 25 accused on 17 May 2000 of the massacre of 57 villagers. They received sentences of between eight and a half and 10 years. The proceedings reportedly did not meet with international standards for a fair trial, and the result has been criticised because those convicted were low-ranking soldiers, while no military officers with command responsibility have been charged in connection with the massacres.

East Timor

In September and October 2000, the Attorney General named 23 persons as suspects in connection with crimes committed by Indonesian militias in East Timor in 1999. However, senior army officers, including then commander-in-chief of the Indonesian armed forces, General Wiranto, were not included in the list. On 4 May 2001 a court in Jakarta sentenced six former members of an East Timorese pro-Indonesia militia to sentences of between 10 and 20 months in connection with the murder of three UNHCR workers at a refugee camp at Atambua, West Timor in September 2000. They were found guilty of "violence against people and property", not murder. The judge held that their direct responsibility for the murders could not be proven, as the accused had acted as part of a mob. A UNHCR statement called the lenient sentences a mockery of justice.

On 23 April 2001 President Wahid, acting pursuant to a parliamentary recommendation, issued a presidential decree to establish *ad hoc* Human Rights Courts on East Timor and on the 1984 Tanjung Priok case, in which dozens of Muslim protesters were unlawfully killed, disappeared or imprisoned. The decree was criticised because it restricted jurisdiction to events in East Timor after

30 August 1999. One of President Megawati's first acts was to issue an amendment on the decision to establish an *ad hoc* Human Rights Court on East Timor. However, the amended decree limited the jurisdiction of the court to covering the two months of April and September 1999 and just three out of 13 districts in East Timor.

THE JUDICIARY

The 1945 Constitution makes reference to the judiciary in Articles 24 and 25. However, the nature of judicial power, the content of its exercise and the tenure of those who exercise it is regulated principally by statute rather than by constitutional provisions.

Indonesia has been built 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.

The ideology of Pancasila is founded upon the five broad principles enunciated in the Preamble. 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 may require fine interpretation when applied to particular cases. Such interpretation has tended to be undertaken by the executive rather than the judicial organs of the Government. The President has therefore been able to act in circumstances outside of the law by declaring certain actions or omissions to be contrary to, or in conformity with, Pancasila .

Given these circumstances, the Constitution has had little impact in constraining the executive power. However, since the departure of President Soeharto, the Constitution has been amended to provide for broader control of the executive over the President and a clearer separation of powers between the executive and the judiciary. The judiciary no longer depends upon the executive in legal and administrative terms. Under Article 11 of the former Law 14/1970, each of the branches of the judiciary was subject in their organisation, administration and finance to the ministry in relation to which their jurisdiction was primarily concerned. This substantial threat to the independence of the judiciary in Indonesia has now been removed. The newly enacted Law number 35/1999 amended Law number 14/1970 Article 11 and all the branches of the judiciary are now under the control of the Supreme Court as regards their organisation, administration and finances. Thus, the judiciary is no longer accountable to the executive, and the executive power has been stripped of the authority of the executive to intervene in the decisions of these courts.

Structure

The Supreme Court (*Mahkamah Agung*) stands at the apex of the judicial system. The General Courts of Justice (*Peradilan Umum*) have jurisdiction to try civil and criminal cases; special courts,

such as a Child Court, Economic Courts, the Islamic Courts of Justice (*Peradilan Agama*) have jurisdiction to consider civil cases related to the Islamic religion; the Military Courts of Justice (*Peradilan Militer*) have jurisdiction to try any crime committed by military officers; and the Administrative Courts of Justice (*Peradilan Tata Usaha Negara*) have jurisdiction to deal with administrative cases. The right of appeal from District to High Court to Supreme Court exists in all four systems. The Supreme Court does not review questions of fact, but only the lower courts' application of law.

According to the new Law number 35/1999, a crime committed by a military officer together with a civilian is to be tried in a general court, unless the Chief Justice of the Supreme Court decides that the case should be tried in a military Court of Justice. Under the old Law 8/1981 this decision was made by two members of the executive, the Minister of Law and Legislation (formerly the Minister of Justice) together with the Minister of Defence and Security. This change indicates the shift of authority from the executive to legal assessment by a court. If the case is tried in a General Court of Justice, the panel of judges is to be mixed: two judges, including the President, are civilian judges and one is a military judge. This procedure is called "Peradilan Koneksitas".

The People's Assembly (MPR) has the power to review the constitutionality of legislation.

Article 26 of Law 14/1970 carries negative consequences for judicial independence as it provides that the Supreme Court is empowered only to review the validity of regulations and other inferior statutory instruments. However, a statute is currently under discussion which would provide for the Supreme Court also to be authorised to deal with constitutional issues. In addition, regulations adopted by the Government and by presidential decree may now be examined by the Supreme Court with regard to their constitutionality.

Human Rights Court

In November 2000, the Parliament passed the Law on Human Rights Courts (Law 26/2000). This law was mandated by Human Rights Law 39/1999, which had been adopted by parliament on 8 September 1999. Law 26/2000 creates four new district courts to adjudicate gross violations of human rights. Each court is composed of five members, of which three must be human rights judges appointed for a five-year term by the President upon nomination by the Supreme Court. Cases will be appealed to the High Court and the Supreme Court, but the law requires that those courts include three human rights judges sitting on an *ad hoc* basis when hearing human rights cases. The law contains internationally recognised definitions of genocide, crimes against humanity, and command responsibility as core elements of gross human rights violations. The Attorney General will be the sole investigating and prosecuting authority and will appoint *ad hoc* investigators and prosecutors. The Law also empowers the President, upon recommendation of the Parliament, to create an *ad hoc* bench within one of the new human rights courts for gross human rights violations that occurred before enactment of the law.

The adoption of the new law creating Human Rights Courts constitutes a positive step towards combating impunity. However, the role of the executive in appointing judges and prosecutors and deciding whether or not a Human Rights Court should be set up in cases of gross human rights violations which occurred before the enactment of the law could severely hamper the independence of the courts. Other matters of concern are the fact that the law provides for the death penalty as a maximum sentence for those convicted of genocide, murder and torture and that some provisions are inconsistent with international standards of the right to a fair trial. In addition, the law does not provide for security of tenure for the judges. They may be appointed for an initial term of five

years, renewable once. Judges should be appointed for a non-renewable term in order to guarantee their independence.

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.

Promotion within the judiciary may 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, judges are prone to take decisions they consider will be in conformity with the latter's interests.

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 exceedingly vague. Improper conduct is described as conduct, whether in court or out of court, that 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 murky 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.

ICJ's report on its mission to Indonesia, *Rulers Law*, which covers the situation up until April 1999, states the following in this respect:

> 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.

Problems confronting the Indonesian judiciary

Corruption has been institutionalised in the judiciary, especially in the Supreme Court, an institution notorious in this regard. The ICJ has received information in a number of cases according to which judges had received financial rewards in exchange for a favourable decision.

In an effort to improve Indonesia's discredited judiciary, sixteen new Supreme Court justices were selected in September 2000. However, no plan for a systematic overhaul of the courts has as yet been put forward.

One factor that gives rise to judicial corruption is the extremely low scale of judicial remuneration as compared with that provided in the private sector. Another problem is the entrenched distrust much of the general public have for the police and the legal system as a whole after more than three decades of authoritarian rule. Persons having lost confidence in the judiciary tend to take justice into their own hands. According to some estimates, more than 1,000 suspected thieves were slain by mobs in the year 2000. As Indonesian legal institutions struggle to cope with the transition of the country to the rule of law and human rights, they create an enforcement void that is filled by increasing anarchy on the part of the public.

LAWYERS

In ordinary cases, an investigator, prosecutor or prison official is not permitted to listen to the content of the discussion between a lawyer and his/her client. According to Article 71 (2) of the Criminal Procedure Code, officials may listen to such conversation when crimes against state security are involved. Because of the enhanced penalties involved in national security cases, confidentiality between lawyer and client may be conceived as all the more important.

According to Article 115 b of the Criminal Procedure Code, when an examination is conducted in national security cases, the lawyer may be present to watch, but not to listen to the examination of the suspect. This limitation clearly hampers the minimum rights of a suspect.

Article 56 (l) of the Criminal Procedure Code provides 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 his or her own counsel, is an investigator, prosecutor or judge obliged to assign a lawyer.

The Criminal Procedures Code does not provide for witness immunity 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 may be obliged to testify against themselves.

CASES

Syafiuddin Kartasasmita {judge of the Supreme Court}: Justice Syafiuddin Kartasasmita was the head of general crime cases at the Supreme Court and the presiding Supreme Court judge who sentenced Soeharto`s son, "Tommy" Hutomo Mandala Putera, to an 18-month sentence of imprisonment on charges relating to corruption. Judge Kartasasmita was killed on 26 July 2001 by four men on motorcycles as he drove to work. According to the police, the murder was carried out by professional assassins, and they have repeatedly stated that Tommy Soeharto masterminded the assassination. He had disappeared after his conviction but was detained in December 2001. He is

also alleged to be involved with several other acts of violence. President Wahid had accused him in the bombing of the Jakarta Stock Exchange, in which 15 people died.

Sianturi {judge of the Medan District Court}: On 2 May 2001 Judge Sianturi adjourned the trial of Edward Horas Harahap, who was charged with the murder of Ms. Srikandi, a prominent PDI-P (Indonesian Democratic Party of Struggle) and PP (Pancasila Youth) member, because Harahap`s defence lawyer was absent. Dozens of PDI-I and PP members allegedly ran amok and smashed the Judge`s bench and overturned tables and seats inside the courtroom. Judge Sianturi and his two panel members were forced to flee the courtroom for their safety. The head of the Medan District Court announced that he had asked the Medan City police to press charges.

Jafar Siddiq Hamzah {lawyer and human rights activist in Aceh}: Jafar Siddiq Hamzah disappeared on 5 August 2000. In early September 2000 his corpse was found, marked with signs of torture. At the time of this writing, no suspects had been identified by the police.

Sufrin Sulaiman {lawyer}: On 29 March 2001, the human rights worker Teungku Al-Kamal, his lawyer Sufrin Sulaiman and their driver were shot dead in South Aceh. They were returning from a police questioning of Teungku Al-Kamal about his role in assisting a group of women who alleged that they had been raped by Brimob. The Indonesian police have accused human rights activists who were assisting these women of defamation and kidnapping. At the time of writing, the Indonesian authorities had not mounted any serious investigation into the killings.