

CAVEAT

INDONESIA'S MONTHLY HUMAN RIGHTS ANALYSIS

VOLUME 10/II, MARCH 2010

MAIN REPORT |

Framing in Law and Human Rights Framework

The practice of framing not only violates a persons right to liberty and security because the victims are arrested, detained, and sentenced on unreasonable grounds, but framing also violates a persons right not to be tortured. Framing victims have stated they had no choice but to admit to crimes that they did not commit after being tortured. Despite the clear severity of framing crimes, framing unfortunately is not categorized as a human rights violation or even a crime in Indonesia.

ADDITIONAL FEATURE |

Judicial Mafia within the National Police?

Over the past year the Indonesian National Police Force has come under fire for a number of reasons, the most recent of which is claims by former head detective Susno Duadji of case-brokering, rampant corruption more akin to a mafia organization than a National Police Force. At present, the public's perception of the Police Force is at an all time low, and as such is a perfect time to implement reform. President SBY is in a unique position to strike a lasting blow against judicial corruption in Indonesia, an opportunity he must seize with both hands.

OPINION |

Protecting Foreigners' Rights in Indonesia

Three foreign citizens who were sentenced to death by an Indonesian court – three of the “Bali Nine” convicted in Indonesia of drug trafficking in 2005 – filed a constitutional review two years after their conviction. But the court rejected their request because they were not Indonesian citizens. This raises the question: What legal avenue can be pursued to protect their right to life, a fundamental human right that applies to all human beings regardless of nationality?

www.lbhmasyarakat.org

CAVEAT:

Let her or him be aware

CONTENT

THE EDITOR'S CUT | 2

MAIN REPORT | 3

Framing in Law and Human Rights Framework

ADDITIONAL FEATURE | 8

Judicial Mafia within the National Police?

OPINION | 10

Protecting Foreigners' Rights in Indonesia

RIGHTS IN ASIA | 12

REPORTAGE | 13

CAVEAT is published by the Community Legal Aid Institute (LBH Masyarakat), Jakarta, Indonesia. All rights reserved. Neither this publication nor any part of it may be reproduced without prior permission of the LBH Masyarakat.

CAVEAT invites feedback and contributions. If you are interested in contributing a guest editorial piece or article, please contact us: contact@lbhmasyarakat.org

Editorial Board:

Ricky Gunawan, Dhoho Ali Sastro, Andri G. Wibisana, Ajeng Larasati, Alex Argo Hernowo, Answer C. Styannes, Pebri Rosmalina, Antonius Badar, Feri Sahputra, Grandy Nadeak, Vina Fardhafa

Special Adviser:

Maeve Showell

Finance and Circulation:

Zaki Wildan

Address:

Tebet Timur Dalam III B, No. 10, Jakarta 12820, INDONESIA

Phone:

+62 21 830 54 50

Fax:

+62 21 829 80 67

E-mail:

contact@lbhmasyarakat.org

Website:

www.lbhmasyarakat.org

LBH Masyarakat welcomes any financial contribution for the development of CAVEAT

Name : Lembaga Bantuan Hukum Masyarakat

Bank : Bank Mandiri

Branch : Tebet Timur, Jakarta, Indonesia

No. Acc. : 1 2 4 - 0 0 0 - 5 0 3 - 6 6 2 0

Swift Code : B E I I I D J A

THE EDITOR'S CUT

LBH Masyarakat welcomes you to the tenth edition of CAVEAT, our monthly report analyzing human rights in Indonesia. In this edition we present to you some articles on human rights and police reform which has become a hot topic of late. This month, CAVEAT's Main Report highlights the issue of 'charge fabrication' by the police or in short, framing. We draw attention to the case of Sukandi Sukatma who has told how he was framed by police simply because he refused the police's request to become a witness and give false testimony in an illegal firearms possession case allegedly committed by his former employer. The case has suddenly sparked public discussion.

The practice of framing not only violates a persons right to liberty and security because the victims are arrested, detained, and sentenced on unreasonable grounds, but framing also violates a persons right not to be tortured. Framing victims have stated they had no choice but to admit to crimes that they did not commit after being tortured. Despite the clear severity of framing crimes, framing unfortunately is not categorized as a human rights violation or even a crime in Indonesia. It's seen as merely a violation of the police code of conduct and thus perpetrators are not punished properly. The absence of proper punishment for framing is aggravated by the fact that both internal and external monitoring mechanisms of the police institution are very weak. The phenomenon of framing has stressed the need for reformation in the police institution.

Similarly our additional feature in this CAVEAT also calls for police reform. The article tells of the confession of Susno Duadji -former National Police Head of Criminal Investigators- stating that a number of high ranking officers were involved corrupt activities during the investigation of an IDR 25 billion (US\$ 2,75 millions) tax case. Susno's confession has polarized public opinion. His supporters see

Susno's comments as a strong sign for reformation within police institution whereas detractors claim him to be unethical and manipulative. Either way it is clear that reform is needed to halt the rampant corruption from within the Polri.

We're happy to inform you that we have started our new programme in conducting law and human rights education for people living with HIV/AIDS (PLHAs). Supported by the International Development Law Organization (IDLO), we have initiated our programme to empower more communities including Injection Drug Users (IDU), sex workers, and lesbian, gay, bisexual, transgender (LGBT) communities. Besides starting our new programme, we are continuing our current activities including our cooperation with the Voice of Human Rights (VHR) in broadcasting a law and human rights consultation radio show regularly. You can find more details about our activities in Reportage.

This month's Rights in Asia report brings you human rights issues from three Asian countries: India, Sri Lanka, and Pakistan.

Last but not least, the opinion piece 'Protecting Foreigners' Rights in Indonesia' written by Answer C. Styannes explores the provision in Constitutional Court Law which enables foreigners to lodge a constitutional review to Constitutional Court. Styannes argues that the fact that the constitution is a social contract between the state and its citizens does not mean that it is not allowed to provide human rights protections to foreigners.

We sincerely hope that this edition of CAVEAT will help you to have a clearer understanding on the current state of human rights in Indonesia.

Thank you for your ongoing support!

The Editor

MAIN REPORT

Framing in Law and Human Rights Framework

'In exercising their law enforcement duties, Indonesian National Police members are obliged to maintain trustworthy conduct, by stating what is right as right and what is wrong as wrong'
(Article 4 letter (a) Indonesian National Police Code of Conduct)

INTRODUCTION

The past year has been a rocky one for the Indonesian National Police Force notably due the very highly publicized Corruption Eradication Commissions (KPK) scandal. The KPK scandal showed, in a very public light the practice of case fabrication or 'framing' by police. However, framing cases are not limited to the wealthy and powerful; in fact most framing victims are not wealthy at all and thus are even less able to protect themselves from such allegations.

One such example, a case that has sparked public discussion as well as the attention of the Judicial Mafia Eradication Task Force (*Satgas Mafia Hukum*) is the case of Susandi Sukatma, known as 'Aan'. In December 2009 Aan was charged with drug possession (in the form of a crushed ecstasy pill) that the police allegedly found hidden in his wallet. Aan denied the charge and pleaded not guilty; he accused the police force of framing him to further an already ongoing investigation. According to Aan, he was framed as a result of his refusal of police officer's requests to act as a witness and give false testimony in a case of illegal firearms possession allegedly committed by his former employer. In order to force him to comply they arrested Aan on charges of drug possession. In addition to his framing, Aan also stated that he was tortured by police. Aan later filed a complaint with the Polri's Division of

Profession and Security (*Propam*) accusing the police force of framing and torture.

Aan's story is not an isolated incident. Another police framing victim, Chaerul Saleh has also come forward with complaints regarding the fabricating of cases by police. Saleh works as a scavenger and lives in Jakarta. He has told of being forced by police to admit that he was the owner of 1.68 grams of cannabis allegedly found by police in his house. The investigation brief states that Saleh was arrested by three police officers and later confessed however Saleh tells a different story. Saleh has declared that he wasn't arrested by three police as mentioned in the investigation brief, but coerced by someone called 'K' to go to the police station where police forced him to admit the cannabis as his own.

The past year has been a rocky one for the Indonesian National Police Force notably due the very highly publicized Corruption Eradication Commissions (KPK) scandal. The KPK scandal showed, in a very public light the practice of case fabrication or 'framing' by police. However, framing cases are not limited to the wealthy and powerful; in fact most framing victims are not wealthy at all and thus are even less able to protect themselves from such allegations.

Following the increasing number of complaints of framing, the National Head of Police Bambang Hendarso Danuri promised that he will meet with Head Criminal Investigators. He stated that framing is one of the main concerns of the National Police Force and promised to conduct an investigation into the claims as soon as possible. At the time of print this meeting has yet to be announced.

Novel Ali, a member of the National Police Commission has pointed out that although

the issue of case fabrication has attracted a lot of media attention of late it is not necessarily a recent dilemma. Several times, LBH Masyarakat has been asked to provide legal aid for victims of police framing, most of which are concerning fabricated narcotics cases. The practice of using narcotics charges to frame innocent citizens has been admitted to by former Head of *Propam*, Oegroseno. The practice is allegedly prompted by the unofficial-yet-widely-known 'war on drugs' policy which includes a target number of drugs related arrests per month by each Narcotics Division in each police station. These kind of 'arrest quotas' put pressure on local police stations that cause some to frame innocent citizens to meet their monthly quota.

Even worse, the policy is supported by the existence of a problematic provision in Indonesian Law. Law No. 35 2009 on Narcotics, Article 112 states that someone can be sentenced for 4-12 years imprisonment for his or her unintentional possession of narcotics. Under this provision, there is no need for police to prove whether someone is the owner of the narcotics in their possession or even whether the person intentionally possesses said narcotics. The only proof that police need is that someone has narcotics in their possession. Who actually placed the narcotics under their possession -whether it was third party or even maybe the police officer himself - is not an issue under this provision.

FRAMING: THE NON-PUNISHABLE HUMAN RIGHTS VIOLATION?

The aforementioned Indonesian Police Code of Conduct obliges all police members to declare 'what is true as true and what is wrong as wrong'. Unfortunately, framing by police is not categorized as a crime in Indonesia. The only specific prohibition on framing is found in Article 6 letter (k) of Government Regulation No. 2 Year 2003. The Discipline Rule for Members of Indonesian National Police states, 'in

exercising their duties, the members of the Indonesian National Police are prohibited to manipulate cases'. As this is regulated in Government Regulation level, such prohibition may not be equipped with criminal provisions to punish wrongdoers. This leaves framing as an essentially non-punishable act.

According to Article 9 of the Government Regulation, violations of its provisions by any Polri's member will, at worst result in the offending officer being moved to a 'special spot' on authority of a superior officer. This punishment is permissible for maximum 21 days and in some conditions may be extended a further seven days.

Framing, therefore, is only deemed as a *violation* of the police code of conduct and will be processed by an internal monitoring mechanism. Such an investigation is unlikely to be transparent and cannot be held accountable. For example in Aan's case even though *Propam* has announced its result of an investigation which found that three Maluku police officers framed Aan, no significant disciplinary steps have been taken. Even if the police officers involved are subjected to punishment, Aan will only be able to see the violators of his rights subjected to mild disciplinary punishment. Due to the absence of a criminal provision for framing, the best case scenario if the offending officers are brought to criminal trial is that they will be charged and punished for forging a police brief. The use of the forgery provision to punish framing degrades the severity of framing, effectively replacing it with a different charge entirely.

As one of the State's representatives police are obliged to protect and respect human rights. The obligation to protect is reflected in its' duty to ensure every human rights violation is processed according to law, while the obligation to respect should be reflected by not committing human rights violations such as torture and arbitrary

As one of the State's representatives police are obliged to protect and respect human rights. The obligation to protect is reflected in its' duty to ensure every human rights violation is processed according to law, while the obligation to respect should be reflected by not committing human rights violations such as torture and arbitrary arrest or detention.

arrest or detention. Some police authorities such as the power to arrest and detain someone, however, are essentially human rights infringement. It is true that these powers held by police are permissible so as they can carry out their function to investigate and solve crimes; however, essentially they are depriving somebody's rights. Therefore, it is reasonable to expect that all of such powers have to be conducted in strictly, lawful, and careful manner.

As enshrined in article 9 of the International Covenant on Civil and Political Rights (ICCPR), in human rights framework an arrest or a detention may be categorized as a permissible limitation on the right to liberty and security if it meets two criteria: **first** that the arrest and detention are conducted in a lawful manner and **second**, they are conducted on such ground. While the former criteria is related to procedural and formal issues such as providing a warrant to the suspects and giving a prompt notification to the suspect of the reasons why he or she is arrested or detained, the latter one covers the actual reasons of why he or she is arrested or detained. Specifically, is the arrest or detention reasonable? If someone is arrested and detained for crimes they have not committed but as a result of fabricated charges and simply because the police want to or are able to do so in order to reach arrest quotas, then the arrest and detention are not conducted in accordance to human rights principle.

Not only a violation to a persons right to liberty and security, almost all framing cases also violate ones right to freedom from torture. An innocent person is unlikely to confess to crimes that they did not commit. Therefore, it is likely that in a framing case police will manipulate and coerce the witnesses and force the suspect to admit to crimes fabricated by police. This is done a number of ways, including torture. David, Kemat, and Maman Sugianto –who were framed by police for the murder case of Asrori in 2008 and even initially convicted as guilty by trial- alleged that they were tortured both physically and mentally by the police. The men eventually confessed

to the murder that they did not commit. Kemat states that he was beaten and threatened at gun point before he finally decided to confess. In Aan's case, even though the beating was committed by a civilian (non stage agents), still it meets the definition of torture according to article 1 of Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) as it was committed with the consent of three police officers who were also at the location.

Another human rights issue pertinent to the practice of framing is the issue of adequate compensation for victims. Kemat, David, and Maman

Not only a violation to a persons right to liberty and security, almost all framing cases also violate ones right to freedom from torture. An innocent person is unlikely to confess to crimes that they did not commit. Therefore, it is likely that in a framing case police will manipulate and coerce the witnesses and force the suspect to admit to crimes fabricated by police.

Sugianto were eventually convicted not guilty and acquitted by a Supreme Court's judicial review on the back of an intense media storm. The trio also received a police apology and a small amount of compensation. Kemat and David received 20 million Rupiah (US\$ 2200) while Maman Sugianto received 10 million Rupiah (US\$ 1100). The amount of compensation they received is very little in comparison to the torture, defamation and humiliation they suffered at the hands of the police. Fortunately they are the 'lucky' ones. Kemat, David and Maman Sugianto were able to walk free, unlike most framing victims who tend to end up behind bars.

INEFFECTIVE MONITORING MECHANISM

As with any other kind of police misconduct, the burgeoning practice of framing is supported by the weakness of internal monitoring mechanisms. In Indonesia, the authority to conduct internal police investigations are granted to the General Oversight Inspectorate (*Irwasum*) and *Propam*. Complaints of police misconduct

should be submitted either to *Irwasum* or *Propram*. Unfortunately, as reported by Amnesty International, those who lodged complaints of police misconduct often faced difficulties. Additionally, *Propram* has proved to be inadequate in terms of investigating the complaints independently, impartially, and promptly. An *esprit de corps* issue is raised as to whether these problems are unavoidable given that *Propram* itself is a part of the police institution.

The poor internal monitoring mechanism is aggravated by the fact that there is no external mechanism powerful enough to conduct effective monitoring of the police force. The National Police Commission (*Kompolnas*) is often misinterpreted as a body which has the authority and duty to conduct the external oversight of police. However, according to Article 3 of Government Regulation No. 17, 2005 regarding the National Police Commission, the commission only has two functions: to assist the President in setting the policy direction for the National Police Institution and to provide advice to the President about possible reform actions within the institution.

National Human Rights Commission (*Komnas HAM*) and the National Ombudsman may be the alternatives but still, their powers are very limited. In human rights violations cases which are not categorized as 'gross violations on human rights', the best thing that can be done by *Komnas HAM* is to give recommendations. Similarly, although according to Law No. 37, 2008 the National Ombudsman has the authority to investigate and to summon people while it is exercising its' duty to oversee the implementation of public services (including service provided by police), the investigation will also only result recommendations, which are most likely to be ignored by the supervisor of the accused party as the disobedience to the Ombudsman's recommendations won't bring any serious legal consequences.

Based on the Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials which was

adopted in 1989 by the United Nations Economic and Social Council, an effective mechanism shall be established to ensure the internal discipline and external control as well as the supervision of law enforcement officials. According to the code important principles and prerequisites for the humane performance of law institutions are, '*that every law enforcement agency, in fulfilment of the first premise of every profession, should be held to the duty of disciplining itself in complete conformity with the principles and standards herein provided and that the actions of law enforcement officials should be responsive to public scrutiny, whether exercised by a review board, a ministry, a procuracy, the judiciary, an ombudsman, a citizens' committee or any combination thereof, or any other reviewing agency*'. According to this belief an effective external mechanism to conduct monitoring over police institutions is necessary to ensure a fair and just police force. Establishing a new agency equipped with the proper power and authority whose main task is to monitor police conduct may be one option, but it will be a very costly alternative. The most realistic step to be taken is to add greater powers and authority to existing agencies *Kompolnas*, *Komnas HAM*, or *Ombudsman*.

A NEW FRAME FOR FRAMING?

When discussing the practice framing, people may argue that the police are human and can make mistakes in terms of exercising their powers and authority. Police may claim to have tried to do their best but, as humans, errors are sometimes unavoidable. If this is really the case – that they have tried to exercise their duties and authorities carefully but later the suspect they arrested, detained, and investigated turns out to be innocent then it's not framing thus it doesn't have to be criminalized. There is a

The poor internal monitoring mechanism is aggravated by the fact that there is no external mechanism powerful enough to conduct effective monitoring of the police force.

significant difference between framing and the failure of police to do their job well. Framing is not only about police's failure to arrest the real perpetrators of real crimes; it is about arresting innocent people to be processed by the law intentionally and fabricating evidence. The intention to penalize innocent people results in the violation of their basic rights. This is the reason why framing is should not be categorized as a mere violation of the police code of conduct but rather as a serious crime. Moreover, framing should be widely recognized as a human rights violation of which perpetrators should be tried and made to serve an adequate punishment.

However, categorizing framing as punishable crime is only half the battle. A transparent, external and authoritative body is needed to which victims of framing can report their grievances. Facts and experience have shown us that in most cases, investigation of crimes involving police officers won't be conducted promptly and independently by internal bodies. Thus, widespread police reform is needed.

--

Framing is not only about police's failure to arrest the real perpetrators of real crimes; it is about arresting innocent people to be processed by the law intentionally and fabricating evidence. The intention to penalize innocent people results in the violation of their basic rights. This is the reason why framing is should not be categorized as a mere violation of the police code of conduct but rather as a serious crime. Moreover, framing should be widely recognized as a human rights violation of which perpetrators should be tried and made to serve an adequate punishment

ADDITIONAL FEATURE

Judicial Mafia within the National Police?

Over the past year the Indonesian National Police Force has come under fire for a number of reasons, the most recent of which is claims by former head detective Susno Duadji of case-brokering, rampant corruption more akin to a mafia organization than a National Police Force.

Former detective Susno first came to prominence during the 2009-2010 Corruption Eradication Committee (KPK) scandal. The scandal and subsequent developments have exposed a number of high profile figures and organizations as corrupt power-brokers undermining Indonesia's law enforcement and corruption monitoring bodies. In the trials that have followed more evidence has come to light revealing the National Police Force and the Attorney General's Office to be corrupt and outdated institutions in dire need of drastic overhaul and reform. President Susilo Bambang Yudhoyono was elected in July of last year at least partly due to his assurance that he would tackle the endemic corruption that has become synonymous with the Indonesian judicial and law enforcement system.

THE BACKGROUND: SUSNO'S CIRCUS

In October 2009 two senior KPK officials, Chandra M Hamzah and Bibit Samad Rianto were arrested on charges of extortion and abuse of power, specifically related to an ongoing investigation against businessman Anggoro Widjojo. The accused, Bibit and Chandra both immediately challenged the allegations, leveling their own accusation at the National Police Force and Attorney General's Office (AGO) whom they claimed had set the two up in a plot to weaken the powerful anti corruption body.

The charges were eventually dropped. During the trial the court aired taped conversations between senior law enforcement officials that revealed an organized plot to damage the reputation of the KPK. What transpired, instead, was an even larger hit to the reputation of the police force.

News of the scandal was covered by a number of international media organizations and has been seen as the biggest test the Yudhoyono administration as faced so far. Indonesia's continuing reputation as a breeding ground of corruption has hurt its international profile and ability to lure much needed international investors. President SBY's failure to immediately step in and fire the top tier police and court officials involved has shown his lack of understanding as to the reaction of the people and the international community.

News of the scandal was covered by a number of international media organizations and has been seen as the biggest test the Yudhoyono administration as faced so far. Indonesia's continuing reputation as a breeding ground of corruption has hurt its international profile and ability to lure much needed international investors. President SBY's failure to immediately step in and fire the top tier police and court officials involved has shown his lack of understanding as to the reaction of the people and the international community

Following the allegations of police involvement in the Bibit and Chandra set up, former head detective Susno Duadji has emerged as a polarizing figure in Indonesian political life. Since Bibit and Chandra were acquitted, Susno been removed from his head detective position in a reshuffle that National Police Chief Gen. Bambang Hendarso Danuri claimed was unrelated to the KPK scandal. Although still technically employed by the National Police Force, this month Susno further damaged the institution by claiming that a number of high ranking officers were involved corrupt activities during the investigation of an IDR 25 billion (\$2.75 million) tax case. The claims, made to the media implicated two senior officers; Raja

Erizman and Edmon Ilyas. Allegedly, the duo engaged in case-brokering activities that resulted in no sentence for the accused, Gayus Tambunan. The former detective described the National Police Force as a 'judicial mafia' and made clear that case-brokering is regular outcome in money laundering and tax evasion cases.

Susno's revelations have earned him supporters amongst anti-corruption activists, the very people who tore him down last year. Predictably the disclosures have not been met with the support from within the police ranks. Several days after his accusations were made public Susno was named in a defamation suit by the men that he accused, one even going so far as to claim that Susno himself had pocketed the money. The police have called the investigation an 'internal matter', however they have not made clear at this time what internal mechanisms are in place to deal with such allegations. The fact that the preoccupation of the police force seems to lie with the defamation suit against Susno rather than the internal investigation of the officers and situation involved is worrying.

The widespread knowledge of case-brokering practices does not instill respect within the community towards the Police Force and as such undermines the institutions ability to function as upholders of the law. The public is unlikely to report corrupt activities to an institution that has proved to be itself corrupt. A judicial system that openly seems to work for the wealthy and entitled sets a bad example for the wider population, especially in a country that is supposedly waging a war on corruption.

QUESTIONING THE POLICE REFORM

Susno's testimony has highlighted one of the many areas that the National Police Force needs to address to start repairing their reputation in the eyes of the community. Officers found to have taken part in case-

brokering should be held accountable. A thorough investigation into the reasons for officers to routinely undertake case-brokering also needs to be commissioned and education for current and prospective officers on transparency and avoiding corrupt behaviors must be stepped up. In short, the root of the problem must be addressed; more specifically what are the pre-existing conditions that have allowed practices like case brokering to take root. Possible explanations include a lack of education, inadequate salary or a long tradition of 'that's just the way it is'.

If the last year has taught SBY anything, it should be the need to investigate, overhaul and reform the National Police Force as well as the AGO. The embarrassing public claims of setting up anti-corruption officials have morphed into an even more public cat-fight amongst senior police officials. While law enforcers continue to flout regulations and sentences are up for sale, Indonesia will never be able to transition into a fully fledged democracy. SBY's failure to get involved in KPK and Bank Century scandals early enough has weakened the administration. The President cannot afford to ignore the indiscretions of the National Police Force while continuing to profess of a corruption crackdown. The 'rule of law' that is the ability for organized public service institutions to hold citizens accountable for their actions and provide a fair and transparent trial, is the most important tool in overcoming corruption and in its current state has proved to support corruptions cause rather than oppose it. At present, the public's perception of the Police Force is at an all time low, and as such is a perfect time to implement reform. President SBY is in a unique position to strike a lasting blow against judicial corruption in Indonesia, an opportunity he must seize with both hands.

--

OPINION

Protecting Foreigners' Rights in Indonesia

By: Answer C. Styannes*

Jakarta, Indonesia — Three foreign citizens who were sentenced to death by an Indonesian court – three of the “Bali Nine” convicted in Indonesia of drug trafficking in 2005 – filed a constitutional review two years after their conviction. After exhausting other appeals processes, Australian citizens Myuran Sukumaran, Andrew Chan and Scott Anthony Rush requested the Indonesian Constitutional Court to revoke the death sentence from the Narcotics Law on the grounds that it was inconsistent with the Constitution’s guarantee of the right to life. But the court rejected their request because they were not Indonesian citizens.

This raises the question: What legal avenue can be pursued to protect their right to life, a fundamental human right that applies to all human beings regardless of nationality?

Law No. 24/2003 regarding the Constitutional Court clearly states that the complainant in constitutional review cases must be an Indonesian citizen. If the rights of a foreign citizen living in Indonesia are violated by a prevailing law, he or she cannot request the Constitutional Court to declare the law unconstitutional and legally annulled.

This provision was strengthened by the Constitutional Court’s verdict in 2007, which ruled that three of five complainants on death row under the Narcotics Laws have no right to file a complaint before the Constitutional Court, based on the argument that the Constitution only provides protection to Indonesian citizens.

It is often deemed that a state and its constitution can only provide protection to

citizens, as they are party to the social contract. Although it is true that an ideal and modern constitution must guarantee protection of the rights of a state’s citizens, this does not mean that the constitution cannot also protect third parties of the social contract, such as foreign citizens who live within the territory of the state.

Many states in the world provide protection not only to their own citizens but also to foreigners under their constitutions. This can be either implicit, as in South Africa and Croatia, or explicit, as in many former Soviet states such as Georgia, the Czech Republic and Russia.

By using grammatical and historical interpretations, we can actually conclude that the amended Indonesian Constitution

implicitly provides protection for foreign citizens. Instead of using “every citizen” as in article 28D paragraph (3) of the Constitution, regarding the right to take part in government, other human rights provisions in the Constitution use the term “everyone.”

Historically, intense and thorough discussions never took place as to who was actually protected under human rights provisions in the Constitution. During discussions on the amendment of the Constitution, however, some political

Law No. 24/2003 regarding the Constitutional Court clearly states that the complainant in constitutional review cases must be an Indonesian citizen. If the rights of a foreign citizen living in Indonesia are violated by a prevailing law, he or she cannot request the Constitutional Court to declare the law unconstitutional and legally annulled.

parties proposed to use the phrase “every citizen” in all human rights provisions. This proposal was later dropped, and the Indonesian People’s Consultative Assembly deliberately chose to use “everyone” – which again shows that the Constitution was intended to protect the rights of every individual within Indonesia’s territory.

Given that the Constitution provides protection for the rights of foreign citizens, it is logical that the laws and regulations under the Constitution would provide legal avenues for them to pursue when their rights are violated. The article that restricts foreigners from filing complaints with the Constitutional Court therefore violates their right to be recognized as persons before the law.

Further, it also meets the criteria of “discrimination” as determined by the International Convention on the Elimination of All Forms of Racial Discrimination, since it excludes persons from filing a constitutional review solely on the basis of their nationality.

This issue brings up the question of a state’s sovereignty, and of whether persons should be allowed to challenge the policy of a state that is not theirs. This concern is understandable, as a decision by the Constitutional Court applies not only to the complainant but to everyone in Indonesia’s territory.

For this reason it is important to place some limitations if foreign citizens are permitted to file complaints with the Constitutional Court. First, they should be allowed to challenge a law only if they believe it has infringed on their rights guaranteed by the Constitution. Foreign citizens should not be allowed to contest a law that is irrelevant to their rights.

Second, complaints should be filed only by individuals, not legal entities, as human rights are inherent to human beings. Another important aspect that the Constitutional Court must bear in mind in examining a case filed by a foreign citizen is that the national interest should be

prioritized. It is important to protect the rights of foreign citizens in the context of the universal value of human rights, but this should not be upheld if it harms the national interest, as the country’s citizens are first party to the social contract.

There are some possible ways Indonesia could accommodate foreigners’ right to file a complaint for constitutional review. The first is by revising the Constitutional Court Law. This may take a long period of time, however. While waiting for Parliament to revise the law, the Constitutional Court actually could set aside the relevant article of the law if a foreigner filed a complaint. The Constitutional Court could then decide whether it wants to declare the article unconstitutional, or conditionally unconstitutional.

One thing is sure: laws and regulations should never restrict a person’s human rights, as these rights apply to the worst of us as well as to the best.

(Answer C. Styannes is a research associate at the Community Legal Aid Institute (LBH Masyarakat) in Jakarta, Indonesia. She holds a law degree from the Faculty of Law at the University of Indonesia. Her work focuses on the issues of constitutional law, judicial and legislative reforms, labor laws, and civil and political rights.)

--

This article was originally published on 4 February 2010 at:

http://www.upiasia.com/Human_Rights/2010/02/04/protecting_foreigners_rights_in_indonesia/7122/

RIGHTS IN ASIA

Information contained in this column is provided by the Asia Human Rights Commission (AHRC).

INDIA: Corruption deprives the tribal community of right to food

On paper, India has all the tools to guarantee the food security of all. However, in practice, rampant corruption and default of governance and transparency have seriously hampered the functioning of food security programmes and undoubtedly weakened their impact on the food security of the poor, despite the general international assertion that corruption and human rights are strongly linked.

Corruption in Orissa state, for instance, ranges from bribes to general and systematic deductions, diverting essential resources from the public programmes and thus directly or indirectly jeopardizing the realization of the right to food of the poorest households. In a village of Balangir district, five persons from the same family died of hunger and malnutrition because some benefits never reached the entitled households in the village.

Bad access to independent legal redress procedures, lack of information, as well as discrimination and violence against tribal or Dalit victims who dare complaining, are further violations of vulnerable peoples' rights and contribute to impunity.

SRI LANKA: Undermining of the judiciary and weakening of the Sri Lankan society

Former commander of the Sri Lankan army and defeated candidate for the presidential elections, retired general Sarath Fonseka is now under military detention like tens of thousands of Sri Lankans in the recent decades. Fonseka's detention, as well as large scale forced disappearances, extrajudicial killings, torture and deprivation of liberties throughout the country show that the capacity of the judiciary to protect the individual has been lost.

In Sri Lanka the question of sovereignty is more admired than the issue of liberty. Democracy and liberty have been sacrificed to state security and economic development. In this constant attack of the state against the liberties of the people, the independence of the judiciary has been undermined, leading to the incapacity of the latter to effectively protect individuals against the power of the executive and the legislature.

PAKISTAN: Women's International Day – Pakistan is the worst for gender based disparities in Asian countries

Despite the Pakistani government's few efforts to improve the women's situation, physical and sexual violence, honour killings, forced marriages and structural inequalities within the society still make Pakistan one of the worst countries in the world in terms of gender gap according to the World Economic Forum's *Global Gender Gap Report 2009*.

The Protection of Women Act, 2006, the Criminal Law Act, 2009 or the bill passed on January 26, 2010 regarding acid violence attempted to protect women from violence and inequalities but still fail to do so. Violence against women is a common feature in Pakistan and undocumented and unreported killings in the name of honour are often bolstered by governmental indifference, discriminatory laws and negligence on the part of Pakistan's police force and judiciary.

These examples show how women are not considered as human beings in some regions and how it can be dangerous, just being a woman. It also shows that discrimination against women is not only a legal problem, but also a societal problem, as it is deeply entrenched in the mindsets. Laws are not sufficient to protect women against centuries-old traditions. This can be changed only through an in-depth evolution.

REPORTAGE

HIV-related Legal Service for People Living with HIV/AIDS

March 1 -- People Living with HIV/AIDS (PLHAs) are often stigmatized and subject to discrimination and human rights abuses, solely because of their HIV positive status. The stigma and discrimination has evolved in the community because of the notion that HIV/AIDS is a 'cursed' illness derived from so-called deviant behavior that PLHAs take part in such as, illicit drug use, homosexuality, and premarital/extramarital sex. Derived from their status, PLHAs have been forcibly told to leave jobs/school/university/homes, in some cases rejected by family and friends, denied access to health services, and some have even been killed. As a result, PLHAs often find it difficult to access HIV prevention and treatment services.

Motivated by the aforementioned issues, LBH Masyarakat believes that there should be legal intervention to help PLHAs receive the care and support that they need. Since HIV-related legal services contribute directly to building an enabling environment for HIV prevention, care, support and treatment programs, HIV-related legal services is expected to aid in overcoming all of these problems. This is as legal services are a vital part of the continuum of HIV prevention, treatment, care and support services because they help ensure access to these much needed services.

LBH Masyarakat, with support from the International Development Law Organization (IDLO), initiates a HIV-legal service aimed at empowering PLHA communities and key populations, such as lesbian, gay, bisexual, transgender (LBGT), injecting drug users (IDU), and sex worker communities in Jakarta. LBH Masyarakat is seeking to generate community paralegals to assist LBH Masyarakat in providing legal services. This activity kicks-off on March 2010. Currently LBH Masyarakat is conducting community consultations with other NGOs working in the HIV/AIDS field

and preparing materials for a series of community education workshops.

LBH Masyarakat - Voice Human Rights march radio show

March 1 -- Conducting law and human rights education has been one of the main programmes of LBH Masyarakat since our establishment in 2007. Besides disseminating the issues by going from one community to another, LBH Masyarakat also cooperates with Voice of Human Rights (VHR) to broadcast a law and human rights radio show every Wednesday. During March 2010, we raised three hot topics to be discussed: (1) unregistered marriages - with an emphasis on the government's plan to introduce a new bill which may sentence couples who 'commit' unregistered marriage-, (2) an issue on freedom of expression regarding the draft of Minister Regulation on Multimedia Content and book banning in Indonesia, and (3) National Exams. "We want people to understand that law and human rights are not really 'heavy topics', that's why we use the radio show as one of our campaign strategies," said Ricky Gunawan, the Programme Director of LBH Masyarakat. "For this very reason, we are delighted to be able to cooperate with Voice of Human Rights."

On the radio broadcasts, LBH Masyarakat discusses current topics and analyses them from the perspective of law and human rights. On the subject of the plan to criminalize unregistered marriage, for example, LBH Masyarakat highlighted that even though we disagree with the concept of unregistered marriage - from a protection of women's rights - we think that criminalizing it will not be the best solution. Moreover, we believe that marriage is a non-government issue and thus it is not right to imprison couples who did not / will not register their marriage.

The LBH Masyarakat - VHR radio show cooperation is broadcasted every Wednesday at 1 PM and can be accessed on www.vhrmedia.com.

ABOUT US

Born from the idea that all members of society have the potential to actively participate in forging a just and democratic nation, a group of human rights lawyers, scholars and democrats established a non-profit civil society organization named the Community Legal Aid Institute (LBH Masyarakat)

LBH Masyarakat is an open-membership organisation seeking to recruit those wanting to play a key role in contributing to the empowerment of society. The members of LBH Masyarakat believe in the values of democracy and ethical human rights principals that strive against discrimination, corruption and violence against women, among others.

LBH Masyarakat aims for a future where everyone in society has access to legal assistance through participating in and defending *probono* legal aid, upholding justice and fulfilling human rights. Additionally, LBH Masyarakat strives to empower people to independently run a legal aid movement as well as build social awareness about the rights of an individual within, from and for their society.

LBH Masyarakat runs a number of programs, the main three of which are as follows: (1) Community legal empowerment through legal counselling, legal education, legal clinics, human rights education, awareness building in regard to basic rights, and providing legal information and legal aid for social programs; (2) Public case and public policy advocacy; (3) Conducting research concerning public predicaments, international human rights campaigns and advocacy.

These programs are conducted entirely in cooperation with society itself. LBH Masyarakat strongly believes that by enhancing legal and human rights awareness among social groups, an independent advocacy approach can be adopted by individuals within their local areas.

By providing a wide range of opportunities, LBH Masyarakat is able to join forces with those concerned about upholding justice and human rights to collectively participate and contribute to the overall improvement of human rights in Indonesia.

Lembaga Bantuan Hukum Masyarakat

Tebet Timur Dalam III B, No. 10

Jakarta 12820

INDONESIA

P. +62 21 830 54 50

F. +62 21 829 80 67

E. contact@lbhmasyarakat.org

W. <http://www.lbhmasyarakat.org>