

CAVEAT

INDONESIA'S MONTHLY HUMAN RIGHTS ANALYSIS

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MAIN REPORT |

Rushed Process = Bad Laws

In the past few months, the Indonesian public has been shocked by the DPR's attempts to pass a number of laws previously recognized as still under debate. Three bills in particular, regarding Narcotics, Healthcare, and Film, were sped through the discussion process and passed in September. Two of the most controversial bills under discussion, one regarding the Corruption Court the other State Secrecy, are currently being postponed by the DPR. One is forced to wonder why the DPR decided to expedite certain laws in their last working month, and why they had not managed to do so at any other time throughout their term.

ADDITIONAL FEATURE |

Rewriting the Legal Aid Bill

For many poor and marginalized communities, being able to access legal aid equates to being able to access justice. For this reason, legal aid is considered a universal human right, one the state is therefore obligated to protect. With past legislation failing to adequately enforce this right to legal aid, the state failed in its responsibility to provide those in need with the legal assistance they required.

OPINION |

Counterterrorism Must Not Flout Human Rights

Terror attacks are a serious threat to Indonesia. Even as it tackles them, the government must remember its profound commitment to uphold the tenets of global counterterrorism strategy and protect human rights at all costs.

Terror attacks should not be countered by measures that attack human rights. The mentality that the end justifies the means, or that desperate times call for desperate measures, must not prevail. Otherwise Indonesia will end up desperately trying to remedy its own failures, as the United States is currently doing.

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CAVEAT:

Let her or him be aware

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THE EDITOR'S CUT

September is a busy month for Indonesia, as it is for other Muslim nations around the globe. With the Islamic holy month of Ramadan winding up, and the Idul Fitri celebrations beginning, Jakarta literally emptied overnight and the city ground to a halt as a week of public holidays ensued. With services interrupted or closed altogether, and the working week broken up by celebrations and fast-breaking events, it is with especially great pleasure that we can present this month's edition of CAVEAT right on time and to the same standard you have come to expect.

We were not the only ones rushing to meet deadlines this month. With the current House of Representatives nearing the end of its working term, and the deadline for passing certain crucial bills on the horizon, this edition focuses on the downfalls of the ongoing deliberation process and the key concerns we have with some of the key legislation. The main report will examine the problems with rushing unfinished bills through parliament, including the impact of ignoring public concerns surrounding the law making process.

Three bills passed into Indonesian law this month are given special attention in the main report. Despite widespread condemnation from many civil society groups, the laws on Narcotics, Health and Films were swept into law with a resounding vote of support. In the Narcotics and Health bills in particular, religious and moral values were drawn upon to justify some of the more controversial measures, sidelining human rights concerns and respect for democracy and the rule of law. We hope this trend of rushing through controversial laws without adequate deliberation or consideration of public concerns is not one that continues in the upcoming House. Indonesia's core values of pluralism and democracy could be in jeopardy otherwise.

Two draft laws still being considered – the law on the Corruption Court and the State

Secrecy Bill – are thankfully still being run through the legislative process. In this case, the government has answered the public appeal for these crucial laws to face tougher questioning to iron out any kinks, a move we strongly agree with.

The additional feature looks at the legislation process again, this time closely examining the Draft Law on Legal Aid. As a legal aid institute, this bill – if passed – will significantly impact on our operations and potentially threaten some of the initiatives we have launched nationwide. In particular, LBH Masyarakat has identified four aspects of this draft law that demand further investigation: the focus of the legislation itself, the definition of who or what is a legal aid provider and also a legal aid recipient, and the scope of legal aid overall. We are still urging the House to address our concerns regarding these particular elements of this bill.

The final article is an opinion piece titled "Counterterrorism must not flout human rights". In this article, Ricky Gunawan reiterates LBH Masyarakat's call to respect human rights even in the fight against terrorism, as discussed in last month's CAVEAT. The piece examines the revelations of alleged CIA torture against terrorism detainees in the United States and places it in the context of Indonesia.

As always, we welcome any constructive criticism. We would particularly like to thank our national and international partners as well as our UN colleagues who support CAVEAT in their own way, including distributing our publication to their networks. Their encouragement is profoundly appreciated. We firmly believe that their positive engagement with our work will ultimately contribute to the betterment of human rights, rule of law and democracy in Indonesia.

Thank you for your ongoing support!

- The Editor

MAIN REPORT

Rushed Process = Bad Laws: The Changing DPR and How This Affects Indonesia

INTRODUCTION

The main function of the Indonesian House of Representatives (DPR) is to produce laws in accordance with the aspirations of the Indonesian people. Its members are installed through direct general elections, often known as ‘representatives of the people, and are supposed to maintain an intimate understanding of the needs of the people to whom they are accountable.

In the interest of further maintaining and encouraging correct legislative process, the DPR, together with the Indonesian government, formulated the National Legislation Program (Prolegnas) which aimed to accomplish several goals: Improve the law-making process as a part of national law development; create laws and regulations as a ground for national development; actualize law as a social engineering tool; support the supremacy of law; and accommodate laws and regulations in line with people’s needs. Ultimately, Prolegnas mandated which laws are prioritized and passed within a certain period of time. On one hand, this priority scheme successfully quickened the pace in which important legislation in Indonesia is passed. On the other, it has created room for the DPR and the government to prioritize laws which are not fully ready to be enacted.

The main problems with this process were apparent from the start. Indeed, many bills passed by the DPR between 2004 and 2009 have generated mass criticism, mostly due to their incohesive structure and content, overlapping arguments, and the manner in which they contradict previous laws. In addition, the DPR and the government’s professed commitment to protecting human rights, supporting marginalized communities, and promoting gender equality, have not been mirrored in many of

these laws. Most importantly, throughout the entire process there has been almost no effort made to encourage wider public participation.

In the past few months, the Indonesian public has been shocked by the DPR’s attempts to pass a number of laws previously recognized as still under debate. Three bills in particular, regarding Narcotics, Healthcare, and Film, were sped through the discussion process and passed in September. Two of the most controversial bills under discussion, one regarding the Corruption Court the other State Secrecy, are currently being postponed by the DPR. One is forced to wonder why the DPR decided to expedite certain laws in their last working month, and why they had not managed to do so at any other time throughout their term.

LAW ON NARCOTICS

While it is undeniably necessary to combat illicit drug trafficking in Indonesia, global and domestic practices have shown that punitive drugs policies invariably result in flagrant human rights abuses. A Law on Narcotics, therefore, should include human rights norms to ensure that so-called ‘wars on drugs’ are not fought at the expense of fundamental rights.

The new Indonesian Law on Narcotics has been criticized by many rights groups, HIV/AIDS groups, and harm reduction NGOs, for being seriously flawed in its construction and unnecessarily severe in its implementation. More specifically, this Law is problematic as it:

1. Still identifies drug addicts as criminals and thus subject to imprisonment. This is a flawed conclusion as, from a health perspective, drug addiction is a brain

disease requiring treatment rather than punishment. It is commonly understood that the most effective and appropriate way in which to cure drug addiction is to treat the user rather than criminalize their actions. Drug users also form one of the most vulnerable groups in society, and are thus subject to torture and other police abuses, which further highlights the dangers of criminalizing their behavior.

2. Erroneously differentiates drug addicts from drug abusers, and only provides social rehabilitation for the former group. In reality, both conditions are interchangeable, and therefore both groups are victim of the same social stigma. Accordingly, both have the right to receive the same access to social rehabilitation.
3. Overly emphasizes the role of civil society in preventing and fighting illicit drug trafficking. This clause could dangerously nurture vigilante behavior or promote the formation of local militias. Drug trafficking involves serious criminal action by powerful cartels and therefore should be dealt by the police force, not ordinary citizens.
4. Lays responsibility onto parents if they do not report a child's addiction, and thus excessively and disproportionately criminalizes all parties, leaving none under protection of the state. A parent's responsibility to protect their children is commonly understood as a moral and social obligation. It is not a legal obligation and should not be regulated by the state.
5. Gives the National Narcotics Agency (BNN) broader authority to conduct investigations, but no clear guidance on how it should control this internal and external mechanism.
6. Stipulates the death penalty as a punishment for some offences. This is problematic because the death penalty:
 - a. Is a violation of fundamental human rights - the right to life, enshrined in the Indonesian Constitution, Universal Declaration of Human

Death penalty is irrevocable. A judicial system run by humans is susceptible to error, and thus implies a likelihood of innocent people being put to death.

Rights, and International Covenant on Civil and Political Rights (ICCPR) which was ratified by Indonesia in 2005;

- b. Is a cruel, inhuman, and degrading punishment;
- c. Contradicts the aim of modern penalization, which is to restore (rehabilitation) one's attitude, instead of enforcing retribution (revenge and punishment);
- d. Has no lucid scientific research which proves that it is effective in deterring criminal acts, including narcotic crimes; and
- e. Is irrevocable. A judicial system run by humans is susceptible to error, and thus implies a likelihood of innocent people being put to death.

LAW ON FILM

The recent revision of the Law on Film generated widespread dissent within the artistic community, and led many prominent actors and directors, including Christine Hakim, Slamet Rahardjo, Mira Lesmana, and Riri Riza, to voice their concerns. They criticized the bill as limiting freedom of expression and taking a far too authoritarian approach to censorship, and as such limiting the growth of Indonesia's budding film industry.

One of their major concerns relates to the proposal of a Film Censor Agency (LSF), which would have veto power over all films produced in Indonesia. While it is clear that the public should be protected from inappropriate films, and children in particular should be restricted from viewing content which contains overly violent or sexual material, giving complete censorship authority to an LSF is not a valid solution. Creating films is a manifestation of freedom of expression and thus should not be constrained. Therefore, the government, in shaping the LSF, should mandate it to classify (into All Age, Teen, Parental Guidance, 17+ etc), rather than censor, films, and ensure that people comply with these regulated classifications.

In addition to the issue of censorship, this law also obligates the cinema to regulate the viewer's age limit, when previously this responsibility fell on the cinema security agency. The cinema is now liable for a 500 million rupiahs (approximately 50,000 USD) fine for every unsuitable viewer found, which will dissuade some cinemas from showing films with extreme content.

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Essentially, this new law lacks the spirit of *reformasi*, and instead draws upon the style of the New Order, where film production and distribution was strictly regulated by the State. In particular, many of the articles in chapter "Film Development" stipulate that film development be conducted entirely by

the central and local government, beginning with planning, and running through to implementation and post production. The fear is that if everything is under government control the Indonesian film community will lose their sense of creativity and originality and, as a consequence, there would be little positive development in the quality of Indonesian film. Despite all these concerns, however, this law was still enacted by the DPR. It now remains to be seen to what extent and in what shape the law is implemented.

LAW ON HEALTH

The new Indonesian Law on Health raised protests from numerous civil society groups and human rights NGOs. Their major arguments revolved upon the following points:

1. This new revision does not make proper allowances for women's reproductive rights. For example, abortion is legal only when limited to medical danger to the mother and rape. Furthermore, it

stipulates that if a rape victim wants to have an abortion, she must first obtain the recommendation from both a religious leader and her family. The flaw in this is that the opinion of the religious leader may not take into account the health of the mother of the unborn fetus.

2. The new revision abolishes the government's obligations to provide health insurance for the underprivileged and very poor, effectively creating a culture of 'business-oriented' health care. The new revision obliges people to seek out their own health care solutions.
3. The new revision has far more obvious faults and weaknesses than its predecessor, with more loopholes and thus more opportunities for it to be wielded wrongly by those in power. For example:
 - a. Article 12 paragraph (1) of the law stipulates that all people have the obligation to take part in creating, maintaining, and increasing the level of the community's health. This article is in contrary with the previous Law on Health (Law Number 23 year 1992) which stated that it was the government's obligation to ensure the provision of health services (access) for all people;
 - b. Article 50 paragraph (4) demonstrates inconsistent and peculiar budget allocation, stating that the budget allocation for the health sector is 3% from the total budget on the national expense allocation. However, it also states in paragraph (2) and (3) that the central government and local government of each area shall provide a budget allocation at least 5% to the total budget for the health sector. This discrepancy opens up the opportunity for abuse and corruption. When questioned about this discrepancy by LBH Masyarakat, a representative of the DPR confirmed that the number had been mistyped. This clearly demonstrates a serious error which has arisen through rushing this law.

4. The process leading to the development of the new revision was not transparent and lacked public participation.

DRAFT LAW ON THE CORRUPTION COURT

Of all the laws passed or discussed over the past month, two were significantly more controversial than the others: The Draft Law on the Corruption Court and the Draft Law on State Secrecy. Advocates, campaigners, and prominent community figures all raised concerns over these two draft laws.

When investigating the Draft Law on the Corruption Court, one must first recognize the context within which the Corruption Eradication Commission (KPK) is currently operating. The Head of the KPK is currently being detained for charges of murder, while two of the Vice-Heads are being investigated by the National Police for abuse of authority. This leaves only two Vice-Heads left in charge. In these conditions, the KPK's leadership, and thus its authority, is significantly weakened.

A number of anti-corruption NGOs are protesting current efforts to weaken the KPK, loudly maintaining their fervent support for the institution. These groups are highlighting the fact that the Draft Law on the Corruption Court will further damage the KPK, diminishing its authority, and effectively jeopardizing the national initiative for eradicating corruption.

It is important to note that the DPR and the government are currently mandated by the Constitutional Court to revise the current Law on Corruption. A decision made by the Constitutional Court on 19 December 2006 declared the existence of the KPK unconstitutional under current law, and required it to be redefined under a new law within three years. This order is due at the end of this year.

The principle issue governing debates on this draft is that the current DPR finishes work on 30 September 2009, with the new representatives inaugurated on 1 October

2009. The current DPR is thus moving to rush the law, even though the draft is still imperfect. The new DPR, however, have been declared unready and unable to discuss the draft law, and unable to pass it in the time mandated. This poses a number of problems.

It is clear that the current DPR and the government should have managed to process this draft law long before the deadline if they had possessed a strong commitment to eradicate corruption. However, there is reason to believe that the DPR and the government have instead tried to reduce the KPK's authority as, if the KPK is able to maintain its current 'super body' authority by the time the revision is due, it may be also able to indict current DPR and government members for corruption.

Despite these issues, the current DPR has managed to finalize the draft law and will most likely meet the deadline. Brief observation of this draft law, however, reveals a number of fundamental issues. For example, the draft law aims to change the composition of the panel of judges at the Corruption Court by reducing the number of ad-hoc judges. This is problematic as Indonesia has a record of corrupt career judges, with many contributing to the release or acquittal of people charged with corruption. A key component of the Corruption Court's ability to successfully condemn and punish corrupt individuals is the presence of ad-hoc judges on its panel. Therefore if, in the near future, their existence is curtailed, it is feared that the Corruption Court's success rate will decrease and many of those under trial for corruption will be acquitted.

If the DPR fails to meet its deadline, the current Corruption Court will no longer be legally viable, and any cases currently before the Court will be discontinued due to lack of legal grounds. The DPR must therefore choose between quickly passing the faulty draft law in order to meet the deadline; leaving the deadline to pass and

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allowing the KPK to become redundant; or delaying the drafting process and re-discussing it again when appropriate. This last solution will only be valid if, when the DPR fails to pass the law in the set timeframe, the Indonesian President issues a Government Regulation in Lieu of Law (Perppu) to fill in the 'missing law' over the interim. This new law would allow the KPK to continue in an undiminished capacity, strengthen the Corruption Court's authority, and re-affirm government's pledge to eradicate corruption in the country.

DRAFT LAW ON STATE SECRECY

The Draft Law on State Secrecy poses a serious threat to democracy and human rights, as the spirit enshrined and substance contained in this draft is entirely contradictory to democratic principles and human rights values. Indeed, according to Leo Batubara from the Indonesian Press Council, the Draft Law on State Secrecy is undemocratic because it places the national leader as the regulator of all state secrecy, regardless of whether or not it is of interest to the public. In most democratic countries, regulation of state secrecy is held on the principle of maximum access and limited exemption, meaning that the vast majority of information can be accessed by the public, with only a small amount excluded on the basis of state secrecy. This Draft Law on State Secrecy, however, applies the principle of limited access and maximum exemption which, from a human rights perspective, limits people's right to information. It is believed that if this law is enacted, it will drive Indonesia backwards to authoritarian system echoing that of the New Order regime.

The vagueness of the definition of 'State Secrecy' in the Draft Law also makes it liable to misinterpretation. For example, the government could easily misuse this regulation by categorizing ordinary information as national secrets. This Draft

Law is indeed contradictory to the Law on Public Information Transparency (UU KIP).

One mandate within the Draft Law on State Secrecy is to form a National Secret Council, a body which could potentially trigger conflict between the state's commission and other legislative, executive, and judicative institutions. With the authority provided by the Draft Law, the National Secret Council will be able to negate the judicative body's decision or even the Supreme Court, as the council is authorized to decide what constitutes a state secret and what does not. Furthermore, the National Secret Council would have the authority to extend national secret retention, give approval or refusal to an investigator, prosecutor, and/or judge to access the national secrecy during the trial process, and authorize the publication of information leaks and appropriate reactions (article 27).

In addition to these issues, the media in its role as the fourth pillar of democracy will be highly compromised if the Draft Law is passed, as it runs in direct opposition to freedom of the press. It will greatly reduce the capacity of the press to access allegedly 'problematic' information, such as in cases of corruption and human rights violations.

It is therefore fortunate that, in mid September 2009, the President, through the Ministry of Defense, called upon the DPR not to rush the passage of this law, since debates still continue and protests are still being raised by civil society groups. Thus, on September 16th, the Ministry of Defense announced that the Government had decided to recall this draft.

RUSHED LAWS

The above issues and discussions indicate that the current DPR are working hard to rush through a number of important bills. As they near the end of their occupation

period, it might be safe to assume that in order to create the impression that they have been successful; they are now passing laws that should have been concluded months ago. However, this will not lead to better laws in Indonesia if the substance of the drafts is contradictory and not in accordance with the needs of the citizens.

In the case of last two laws to be enacted, Narcotics and Health, religion and moral values were heavily drawn upon, sidelining human rights norms and the respect for democracy and rule of law. If we see this trend continue through the next term of the DPR, Indonesia's deeply embedded pluralism values could be jeopardized.

Several controversial laws have been passed, one intensely debated draft law is currently being processed, and one potentially Draconian Law has thankfully, if begrudgingly, been recalled. What should Indonesians do with the laws which have now passed? There are a few recourses. Citizens still have the constitutional right to file a judicial review to the Constitutional Court, which in turn will examine the certain article (or law) and decide it whether it is still in accordance with the Constitution. Nevertheless, those drafts which are essentially flawed still need to be criticized and publicly condemned, to ensure that forthcoming laws remain in line with human rights standards and Indonesia's democratic ideals.

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ADDITIONAL FEATURE

Rewriting the Legal Aid Bill

INTRODUCTION

With the House of Representative's (DPR) working term coming to an end in December, lawmakers are rushing to meet the deadline and pass dozens of overdue bills into law. While much of the emphasis in the media has focused on the corruption court bill – an undeniably important piece of legislation – and the inability of the House to carry out its duties effectively, a number of other crucial bills look set to be rushed through deliberations without an appropriate amount of examination.

One important bill that has been drafted by the government is that regarding Legal Aid. While measures within the Indonesian Criminal Procedure Code already stipulate that certain individuals must be provided with pro bono legal assistance when required, in reality this article is never fully implemented.

For many poor and marginalized communities, being able to access legal aid equates to being able to access justice. For this reason, legal aid is considered a universal human right, one the state is therefore obligated to protect. With past legislation failing to adequately enforce this right to legal aid, the state failed in its responsibility to provide those in need with the legal assistance they required.

While the government has addressed this urgent requirement for stronger legislation on legal aid, LBH Masyarakat has identified several issues and weakness in the current proposal. The bill fails to institutionalize or even recognize the role paralegals could play in assisting poorer people with legal problems, or even acknowledge the gains made by community legal empowerment movements in negotiating legal problems. The only people officially protected under the bill are those living in poverty, not

traditionally marginalized communities such as gay and lesbian groups, women and children and even people living with HIV/AIDS.

Furthermore, as the Draft Law on Legal Aid does not recognize the international standard of legal aid as a key human right, the government does not consider providing such legal assistance as falling under its responsibility. This raises many important considerations about the interpretation and approach to legal aid. To what extent is the provision of legal aid part of the government's duties, or is pro bono work really the responsibility of lawyers?

THE HUMAN RIGHTS VERSUS PROFESSIONAL OBLIGATION APPROACH TO LEGAL AID

Under the Indonesian Criminal Procedure Code, legal counsel is supposed to be provided free of charge to individuals facing a number of particular situations. For those suspected or indicted of committing an offence which is liable to the death penalty of more than 15 years in prison, or individuals facing more than 5 years in prison who cannot afford their own legal counsel, officials at all stages of the judicial and criminal process are required – by law – to provide them with a lawyer.

In practice however, this clause has never really been properly implemented. Investigations by LBH Masyarakat and other NGO groups show that in most cases, impoverished people are simply denied legal aid, further hindering their ability to

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access justice. In certain cases, particularly involving drug users, police have been known to threaten the suspect with a harsher sentence if they request a lawyer during the investigation proceedings. Consequently, if lawyers are present acting on behalf of the suspect, they are often distrusted and suspects have been known to confess rather than go through a full trial process.

An article within another law overseeing the legal profession stipulates that lawyers are required to provide pro-bono legal assistance to clients in times of need. This article, however, has no meaning at all as there is no punishment outlined for those who do not follow through with this obligation and no culture of legal aid is thus established.

If the provision of legal aid is appropriately approached as an undeniable human right, then the state naturally has an obligation to protect this right on behalf of its people. The second way of examining legal aid is to look at its

provision as more of a charitable one based on the responsibility of the legal profession, though this is less likely to be able to cover the enormous scope and demand for free pro-bono legal counsel.

THE RELATIONSHIP BETWEEN LEGAL AID AND ACCESS TO JUSTICE

To support the basic tenet of legal aid as a human right, the Constitutional Court declared that if a citizen was unable to pay for legal counsel then the state was obliged to do so on their behalf. This raises questions about the relation between legal aid and access to justice.

Roger Smith claims there are ten principles surrounding access to justice:

1. Access to justice is every citizen's constitutional right;
2. When determining policies related with access to justice, the interest of the

society has to come before the legal aid provider;

3. The objectives of accessing justice are not just about procedural justice but substantial justice;
4. Every citizen has the right to legal aid both in criminal and civil cases;
5. To achieve substantial access to justice, all means of formal and material law reform, and laws on education, information and service, need to be addressed;
6. Policy of legal service by introducing legal aid which is funded by the state;
7. Limitation of legal aid resources is not something that ends access to justice, but a way to limit the delivery of legal aid;
8. Legal aid should ultimately be effective;
9. Technology should be incorporated to support legal aid;
10. The Constitutional basis of legal aid is a cardinal principle.

Based on the principles above, we can see that while legal aid is just a small part of accessing justice, it is an essential element to achieving that justice. Bearing this in mind, LBH Masyarakat applauds the government's initiative in preparing the bill on Legal Aid, but urges these principles to be incorporated into the terms and articles of the measure. Without these, the state is only formally acknowledging the problem, but not delivering satisfactorily on it.

INTERNATIONAL STANDARDS ON LEGAL AID

The International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and jurisprudence from the Human Rights Committee and the European Human Rights Court have emphasized several points regarding international standards of legal aid.

The ICCPR and the ECHR recognize at least two basic principles of legal aid:

1. For the interest of justice;
- Both the ICCPR and the ECHR do not elaborate further on the definition of 'for the interest of justice'. However, the

...while legal aid is just a small part of accessing justice, it is an essential element to achieving that justice. Bearing this in mind, LBH Masyarakat applauds the government's initiative in preparing the bill on Legal Aid, but urges these principles to be incorporated into the terms and articles of the measure.

Human Rights Committee and the European Human Rights Court define 'for the interest of justice' as follows:

- a. Legal aid can only be provided for suspects or defendants facing severe penalties or in situations of very serious crimes;
 - b. Legal aid is provided for suspects or defendants if his/her liberty is at stake;
 - c. It depends on the complexity of the law or case;
 - d. Suspect's/defendant's ability to defend him/herself.
2. Suspect or defendant does not have sufficient means to pay for an attorney.

The Human Rights Committee and the European Human Rights Court additionally identify several important elements of legal aid, *inter alia*:

1. Legal aid shall be provided effectively and the state has to ensure that suspects or defendants have the right to choose his/her legal counsel as well as to ensure that the legal counsel appointed is qualified;
2. Legal aid shall be provided from the first stage of police investigation;
3. Legal aid includes suspect's/defendant's right to communicate with family and lawyers without intervention;
4. Legal aid shall be given to cases involving those with mental disabilities;
5. Legal aid cannot be deferred, even in an emergency situation.

Indonesia's draft law on legal aid – which eventually will become law – should have been based on these essential principles. A comprehensive law also shows that the state is highly committed to protecting, promoting and fulfilling the rights of its people, and ensures the accused are aware of their legal rights to liberty, security and a fair trial. The biggest risk of denying somebody legal counsel is that the chance of them suffering rights abuses, torture and prolonged pre-trial detention is greatly increased.

THE INDONESIAN DRAFT LAW ON LEGAL AID

LBH Masyarakat has identified at least four important issues contained in the current Draft Law on Legal Aid that demand further investigation: perspective, legal aid providers, legal aid recipients and the scope of legal aid.

Perspective – the current draft lacks a human rights perspective. It does not clearly define the state obligation to provide legal aid for everyone, in particular those who are disadvantaged and marginalized. This draft law instead heavily regulates how the government will allocate budget funding from national and local income streams to the legal aid provider. Key international principles, such as legal aid 'for the interest of justice', non-deference and requirement of the state to provide an effective and qualified system of legal aid are not yet included in this draft law.

The draft law identifies five measures to be incorporated during the foundation of legal aid: non-discriminatory, transparency, accountability, and gender equality. This is commendable, yet other important criteria need to be incorporated to complete a human rights-based approach to legal aid: accessibility, availability, acceptability, and quality (credibility).

Legal aid provider – The bill only recognizes lawyers as being able to provide legal aid, and while the government's argument that even the poor require profession legal representation is understandable, it remains debatable. Given the small number of lawyers compared to those seeking representation, the remote nature of many locations in Indonesia and the social and customary values of each community, the law needs to allow for legal representatives other than lawyers to represent those needing assistance. In response to these three main challenges, paralegals should therefore be acknowledged as legitimate providers of legal aid.

The biggest risk of denying somebody legal counsel is that the chance of them suffering rights abuses, torture and prolonged pre-trial detention is greatly increased.

Black's Law Dictionary, Eighth Edition, defines a paralegal as a person who assists a lawyer in duties relating to the practice of law but who is not a licensed attorney. The third edition of *Paralegal Practice and Procedure: A Practical Guide for the Legal Assistant*, states that anyone can be a paralegal. Those trained appropriately in a paralegal course – whether housewives, retirees, or prison inmates still serving time – learn a basic understanding of human rights (particularly torture and nature of fair trial) and of law (procedure, criminal and civil).

Paralegal are, obviously, is not equal to second-class lawyers. LBH Masyarakat has recruited forty-one paralegals across Jakarta and some have helped document cases and assist suspects in cases where lawyers have been distrusted. In other situations, paralegals have been able to access information denied to lawyers. Essentially, their potential to assist in the implementation of legal aid should be recognized in the bill.

Legal aid receiver – Article 7 of the bill stipulates that only those living in poverty, meaning those determined by the National Statistic Bureau to be financially weak and without a stable income, may access legal aid. The government's argument that extending legal aid to anybody beyond the poor will be financially impossible is deplorable. There are a number of traditionally vulnerable groups in society that are constantly subjected to human rights abuses and require legal aid, regardless of the financial costs incurred by the government. This includes women and children, lesbian, gay, bisexual and transgender (LGBT) communities, and those living with HIV/AIDS (PLHA), who are too often forgotten. All are entitled to legal aid.

Scope of legal aid – Chapter III of the bill concerning the types/scope of legal aid only recognizes two types of legal aid: litigation and non-litigation, all in areas of criminal, civil, administrative and constitutional law. Non-litigation legal aid covers legal consultation, legal documentation and mediation. Methods of non-litigation

apparently seem to be overlooked by the government, as do alternative approaches for resolving conflict such as negotiation and conciliation. More importantly however, it does not regard community legal empowerment as a type of non-litigation legal aid.

LBH Masyarakat strongly believes that community legal empowerment is central to poverty reduction and achieving social justice. Community legal empowerment enables every individual to take part in legal aid movements and promote a wider access to justice for all. Once again, given the small number of lawyers and demand for their services, it is essential to empower individuals so they can represent themselves to the best of the ability without being overly reliant on expensive lawyers.

This draft law instead heavily regulates how the government will allocate budget funding from national and local income streams to the legal aid provider. Key international principles, such as legal aid 'for the interest of justice', non-deference and requirement of the state to provide an effective and qualified system of legal aid are not yet included in this draft law.

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OPINION

Counterterrorism Must Not Flout Human Rights

By: Ricky Gunawan *

Jakarta, Indonesia — The recent decision of U.S. Attorney General Eric Holder to appoint a prosecutor to investigate allegations of torture by the country's Central Intelligence Agency during its interrogations of terror suspects is commendable. This action demonstrates the strong commitment of U.S. President Barack Obama's administration to end the use of brutal interrogation techniques against prisoners and detainees, and to hold responsible those guilty of using such techniques.

It is also a step forward to ensure that such evil practices do not recur. On a global scale, hopefully this important measure will send the message that torture is a despicable crime that is morally wrong and clearly illegal.

The inspector general of the CIA wrote a report in 2004, kept secret until its recent release, describing the agency's inhuman treatment during interrogations. This included sleep deprivation, holding prisoners in a cold cell, and water boarding – all of which undoubtedly qualify as torture.

The use of torture by the United States in its so-called "war on terror," orchestrated by former U.S. President George W. Bush's administration, has been strongly condemned by human rights groups around the world. Rights groups worried that if the United States justified torture in its fight against terrorism, other countries would follow similar sordid actions, including Indonesia.

Ever since two near-simultaneous bomb explosions struck luxury hotels in Jakarta in mid-July, Indonesians have been at odds over how to implement counterterrorism

measures. No one questions the need for comprehensive and effective prevention measures and severe punishment for those responsible. However, the actions of the Indonesian military, police force and government have raised questions as to the toll such measures will take on the people's freedoms.

The government's counterterrorism actions have so far been excessive and disproportionate. This underscores the threat posed to Indonesians' civil rights as the crackdown on terrorism continues unchallenged.

Several recent cases – including the arrest of suspected bombing conspirator Muhammad Jibril and the police raid to capture alleged terrorist Noordin M. Top in a safe house in Central Java – have raised questions as to the state's commitment to protect human rights when conducting counterterrorism activities.

Was Jibril kidnapped by the police or legally arrested? What implications does the suspension of his rights have on justice? Indonesia's crack counterterrorist squad carried out the raid in Central Java, which involved an 18-hour siege and shootout. The operation was filmed live and generated superfluous hysteria when publicly broadcast.

In this atmosphere of fear, it is very easy for the public to wrongly justify the arbitrary arrest, detention, and – as some high-profile cases have shown – torture of people suspected of links to terrorism.

In the case of the U.S. war on terror, several reports have revealed secret detentions and clandestine interrogations through

rendition operations. Likewise in Indonesia, counterterrorism measures have not been conducted in a transparent manner. The Indonesian police have not adequately informed the public how detainees were arrested and their whereabouts.

Furthermore, how do the police gain information on terrorist networks in the country and their plans from detainees? Do they use so-called “enhanced interrogation techniques” – in other words, torture?

The issue of torture practiced by the police or its counter-terror unit is wide open to debate. Law enforcement agencies argue that to prevent future terror attacks the terrorists must be unearthed quickly, and the fastest method of gaining information is by torturing suspects. But is this logic acceptable?

For centuries, mankind has observed that people will tell their torturers what they want to hear so as to escape torture. Torture is not a reliable way to obtain accurate information.

In Indonesia, torture and ill treatment occur in both political and ordinary criminal cases as well as in other settings. If these petty criminals are tortured, it is hard to believe that terrorists would not be tortured to gain information, even though the techniques are not as sophisticated as those used by the CIA.

Sketchy evidence shows that torture is widespread, although it is not possible to document and report it systematically. The Jakarta-based Community Legal Aid Institute found that a thief’s ears are cut to differentiate between those that commit motor theft and others. Among drug users, those arrested or detained are sometimes given electric shocks to gain information about their dealers.

Terror attacks are a serious threat to Indonesia. Even as it tackles them, the government must remember its profound commitment to uphold the tenets of global counterterrorism strategy and protect human rights at all costs.

Terror attacks should not be countered by measures that attack human rights. The mentality that the end justifies the means, or that desperate times call for desperate measures, must not prevail. Otherwise Indonesia will end up desperately trying to remedy its own failures, as the United States is currently doing.

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About LBH Masyarakat

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.

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