

# NATIONAL SECURITY, TERRORISM, AND HUMAN RIGHTS IN INDONESIA ♦

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## 1. INTRODUCTION

Conference on Constitution and Human Rights last year in the same place highlighted the importance of national security laws in certain countries in Asia. Although for Indonesia this law was not the issue discussed in last year's conference, development in international politics since 11 September 2001 brought about deeper discourse on this type of law in the country.

Terrorist attack on the United States ("US") has started war against terrorism. Though not admitted, this war has been broadened to a war against Islamic community across the globe. This issue is important for Asia, as many of the Asian countries are the population.

Many measures have been taken to deal with war against terrorism in the international level. One important measure is the imposition to initiate a set of legal instruments to smoothen legal procedures against international terrorist organisations through, among others, the establishment of new national security laws related to international terrorist and multilateral and bilateral agreement on the investigation of international terrorist organisations.

Indonesia is not an exception in this development, especially because it is a country with the biggest Moslem population in the world and the socio-political instability across the country. The US stated its allegation of the existence of Al Qaeda-related terrorist organisation in Indonesia.<sup>1</sup> An Indonesian citizen was also investigated by the US for the allegation of being a member of Al Qaeda.

The draft law on Anti-Terrorism is discussed in Indonesia at this moment and shortly will be presented before the *Dewan Perwakilan Rakyat* ("DPR", Indonesian parliament) by the government. This draft law contains special measures on "terrorism" as is underscored after 11 September 2001, different with "national security" law which Indonesia does not have until now due to the protest against the draft law on the State of Emergency (*Undang-Undang tentang Penanggulangan Keadaan Bahaya*, "UU PKB") in 1999.

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<sup>1</sup> "Confession of an Al-Qaeda Terrorist," *Time Magazine*, September 23, 2002/Vol. 160 No. 13.

As indicated in the program of this workshop, the aim of the workshop is to compare changes in security laws in several countries of the region and to discuss the implications of these changes for constitutions and human rights. Therefore, this paper will not only discuss the draft law on Anti-Terrorism, but also will briefly discuss the previous laws related to national security in order to observe the special measures which put aside human rights under the name of “national security,” as a basis to further discuss the issue in the workshop.

## **2. LAW ON THE STATE OF EMERGENCY: INDONESIA’S NATIONAL SECURITY LAW**

There are several revoked laws and draft law related to “national security” in Indonesia. *First*, the Dutch-inherited Law on State of Emergency (known as “UU SOB,” *De Regeling op de staat van Oorlog en Beled*), which was revoked in 1959. *Second*, Law on the State of Emergency 1959 (*Perpu No. 23/Prp/1959 tentang Keadaan Bahaya*) replacing the UU SOB and was revoked during Habibie’s government. *Third*, Subversion Law (*Undang-Undang No. 11/Pnps/1963 tentang Pemberantasan Tindakan Subversi*), which was also revoked during Habibie’s government. *Fourth*, Draft Law on State of Emergency proposed in 1999, which has not been ratified until now. *Finally*, there is also draft law on Anti-Terrorism, which soon will be submitted to the DPR by the government. While the draft law on Anti-Terrorism will be discussed specifically as it is directly connected with the international war against terrorism, the three revoked law and unratified law mentioned above will be discussed altogether in this section.

### **2.1. The Dutch-inherited Law on the State of Emergency**

It was noted in the history that the first use of state of emergency was when former president Soekarno declared the state of emergency in 14 March 1957.<sup>2</sup> This declaration was based on article 12 of the 1945 Constitution saying that the president declares the state of emergency under a law that shall be drafted. As Indonesia did not have such law, Soekarno’s government applied the Dutch-inherited law on state of emergency. There is not much information about this law as it was soon replaced by Law on the State of Emergency drafted by the Indonesian government.

### **2.2. Law on the State of Emergency No. 23/Prp/1959**

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<sup>2</sup> “Perjalanan RUU PKB Fenomena RUU Paling Berdarah dalam Sejarah Indonesia,” <[http://www.hukumonline.com/artikel\\_detail.asp?id=943](http://www.hukumonline.com/artikel_detail.asp?id=943)>, cited on 7 September 2002.

Because of the lack of such law apart from the one inherited from the Dutch colonisation, in 1957, former president Soekarno and General A.H. Nasution drafted Law on State of Emergency in 1957, which then became Law No. 23/Prp/1959.

It was said by the law that the president may declare that a part, some parts or the whole region of Indonesia is under the state of emergency on three reasons:<sup>3</sup>

1. There are unusual circumstances caused by rebellion, turmoil, or natural disaster.
2. War or the risk of war.
3. The state is in danger or there are unusual circumstances that lead to the conclusion that the state might be in danger.

This Law basically outlined three types of the state of emergency: civilian state of emergency, military state of emergency, and war. The main differences between the three were (1) the person in command in the region declared to be in the state of emergency; and (2) the level of severity that may be imposed by the person in command, with the highest level in the state of war and followed consecutively by military state of emergency and civilian state of emergency.

In sum, if the region is declared to be in the state of emergency, the person in command may:<sup>4</sup>

- Issue regulations that are considered necessary for the purpose of the public order or security in the region.
- Give orders to police force and other state apparatus to search every place regardless the will of the owner.
- Give orders to police force and other state apparatus to search and confiscate goods that is considered to be dangerous for the security and to ban or to limit the selling of such goods.

The person in command also has the right to:

- Know every conversation in radio, telephone, and other tools of communication and to ban them.
- Ban the use of codes, publication and other sources of publication.
- Limit or prohibit meetings or mass gatherings.

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<sup>3</sup> Indonesia, *Law No. 23/Prp/1959*, article 1.

<sup>4</sup> *Id.*

Although the Law is important for a country and required by the Constitution, in practice, this law was implemented by the regime to eliminate its opponents. Until the state of emergency was ended on 1 May 1963, there were a lot of damages done on the ground that there was the state of emergency, which required the government to undertake “necessary” measures. Several political parties were banned because they were in opposition with Soekarno as the president and the Great Leader of Revolution, such as *Masyumi*, *Partai Sosialis Indonesia* and *Murba*.<sup>5</sup>

In December 1959, the Chief of the Army (*Kepala Staf Angkatan Darat*) took over all Dutch companies operated in Indonesia. The basis for this is article 31 of Law No. 23/Prp/1959 saying that the person in command in the military state of emergency may conduct “militarisation” (to make put something under the authority of the military; in the original language: *mengadakan militerisasi*) upon enterprises or companies or plantation. A year after, the taking over was legalised through Law on Nationalisation.<sup>6</sup> The press was also affected by the state of emergency declared under this law. Using the power to ban any type of publications, the government banned 33 newspapers and magazines in 1957.<sup>7</sup>

The declared state of emergency ended on 1 May 1963, but the government issued another law with similar repressive characteristics, namely Subversion Law (*Undang-Undang No. 11/Pnps/1963 tentang Pemberantasan Tindakan Subversi*). This law got a lot of criticisms as it was implemented by the state to impose repressive actions without considering human rights in the procedure.

### 2.3. Subversion Law

There were two main criticisms against the Subversion Law: (1) the definition of the subversion; and (2) the procedure for the alleged person that puts aside the rights of the fair trial.

According to this law the act of “subversion” includes:<sup>8</sup>

1. All actions against *Pancasila* as the state ideology
2. All actions that are considered to create insecurity of the state power, government, or state apparatuses.
3. Spreading the feeling of enmity, disintegration, and instability amongst the society or between Indonesia and other country.

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<sup>5</sup> “Perjalanan...,” *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Indonesia, *Law No. 11/Pnps/1963*, article 1.

4. Disrupt and hamper industry, production, distribution, trade, co-operatives, or transportation conducted by the government.
5. State the sympathy towards countries that are considered to be enemies for Indonesia.
6. Mass destruction of the public buildings or personally owned buildings.
7. The act of espionage
8. The act of sabotage

For the purpose of investigation, the government apparatus may enter and search all places and confiscate goods, including letters that are suspected to be related to the acts of subversion.<sup>9</sup>

This law was implemented by Soeharto's government to penalise whoever considered challenging the government, as the definition on subversion was very broad and vague.<sup>10</sup> Due to the strong criticisms against it and the dramatic political change after the resignation of former president Soeharto, Habibie's government nullified the law with Law No. 26 of 1999 regarding the Nullification of Law No. 11/Pnps/1963.

#### **2.4. Habibie's Draft Law on State of Emergency**

The spirit of reform in 1999 was also resulted in the nullification of the Law on State of Emergency. However, in 7 September 1999, Habibie's government re-implemented the Law on State of Emergency to declare state of emergency in Dili, East Timor, due to the critical situation after the opinion poll on the independence. This state of emergency then was abolished by Habibie through Presidential decree No. 112 of 1999.

Nevertheless, the story about national security was not ended at that time. On 19 July 1999 Habibie's government proposed the draft law concerning State's Security (*Undang-Undang tentang Keselamatan dan Keamanan Negara*). Afterwards, in 6 September 1999, DPR changed the title of the law into "Law concerning State of Emergency" (*Undang-Undang tentang Keadaan Bahaya*).

The draft law was approved by the parliament on the 6 September 1999 and the masses were reacted strongly against this. As a result, it was noted that at least six people died and many people were injured from 24 September to 5 October 1999 in Jakarta, Lampung, Surabaya, Makassar, and

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<sup>9</sup> *Id.*, article 4. Note that the next articles give further limitation for such actions.

<sup>10</sup> For further discussion about this law, see, inter *alia*, Loebby Loqman, *Delik Politik di Indonesia* (Jakarta: Ind-Hill-Co, 1993).

Palembang because of the demonstrations against this law, which makes it the most bloody law in Indonesia's history.<sup>11</sup>

By reason of the extreme demonstrations, the draft law, which was approved by the parliament and supposed to be sent to the president to be ratified, was suspended on 24 September 1999. This postponement was announced by General Sudrajat of the Ministry of Defence and Security. After the second amendment to the 1945 Constitution in 2000, it was provided in the amended article 20 of the 1945 Constitution that if the President fails to sign an approved draft law within 30 days following such approval, that draft law shall legally become a law and must be promulgated.

The substance of the draft law was similar to the Law No. 23/Prp/1959. Many people at that time feared that this law would be the basis for abused of power by the government as happened in 1957-1963. Moreover, the political power of the military was (and still is) considerably significant so that there was concern that the military would make use of this law to legally hold the power of the state.

### **3. ANTI-TERRORISM LAW AND HUMAN RIGHTS IN INDONESIA: THE DEBATE**

Without being known by many people in the country, the government of Indonesia has drafted Anti-Terrorism Law. As happened to the previous laws, this draft law has gotten many criticisms. Most critics address the possibility of external interest in having the law instead of the national interest. Unclear definition on "terrorist" is also one of the important issues. The fact that many "terrors" to the citizens in Indonesia were alleged to be done by the state in the name of "stability" and the interest of the certain people has created criticisms that the definition of "terror" must include state terror. Moreover, the unclear definition is feared to be abused by the state for its own purpose to repress the citizens. This fear is also fuelled by the experiences of the abusive implementations of the previous laws related to national security as elaborated above.

On the other hand, Romli Atmasasmita, the chair of the drafting committee said that such law is needed to protect national interest, that is to anticipate the situation in which there is an international terrorist cooperates with national organisation.<sup>12</sup>

#### **3.1. Unclear Definition of Terrorism**

Article 1 of the draft law defines terrorism as actions using violence with the political background or objective, in the forms of:<sup>13</sup>

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<sup>11</sup> "Perjalanan...", *supra* note 2.

1. Actions that create danger for other people's life;
2. Destruction of goods;
3. Elimination of personal freedom; or
4. Actions that create fear in the society

There is no further explanation about “political background” or “political objective” in the elucidation, while these vague phrases may be implemented according to the government's interests. If a group of students organises a rally to protest against a draft law on Freedom of Information, which in fact will hamper the flow of information; can the government categorise this action as “terrorism” as the rally has made a group of white-collar workers in the area afraid and there is a political objective behind this rally? Undeniably, a clear definition is significant to guard the implementation of this draft law.

### 3.2. The Principle of fair trial

The principle of fair trial is very important in the procedural law. Based on the idea that a person is assumed to be conducting a crime, s/he may lose some of her/his rights. Therefore, there should be a legal procedure to ensure that the human rights “violation” upon the suspect is still considerably “fair”.

The United Nation's (“UN”) Universal Declaration of Human Rights has stated a set of agreed points on this matter. Article 10 of the Declaration, for example, provides that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”<sup>14</sup> Further, there are also protection of the rights of privacy and the principle of the presumption of innocent.<sup>15</sup>

In Indonesia, these rights are also recognised in the Constitution. It is stated in article 28D of the 1945 Constitution, “every person shall have the right to recognition, guarantees, protection and certainty before a just law, and to equal treatment before the law.”<sup>16</sup>

Nevertheless, the standard criminal procedural law is disregarded in the draft law on Anti-Terrorism. Article 17 of the draft law provides that the investigator may keep a suspect in custody for the maximum of 90 days, which may be prolonged until the maximum of 3 times 90 days. Under this

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<sup>12</sup> “UU Pemberantasan Terorisme, untuk Kepentingan Siapa?” <[http://www.hukumonline.com/artikel\\_detail.asp?id=4393](http://www.hukumonline.com/artikel_detail.asp?id=4393)>, cited 7 September 2002.

<sup>13</sup> Indonesia, Ministry of Justice and Human Rights, *Draft Law on Anti-Terrorism*, article 1.

<sup>14</sup> United Nations, *Universal Declaration of Human Rights*, article 10.

<sup>15</sup> *Id.*, article 11 paragraph (1) and article 12.

<sup>16</sup> Indonesia, *the Constitution of 1945*, article 28D.

provision, a person who is suspected with even an insignificant evident and is supposed to be presumed innocent may be kept in jail for 9 months, without any trial! In contrast, Indonesian criminal procedural law regulates that the order to detain a suspect can only be done for the maximum of 20 days and may be prolonged until the maximum of 50 days under the order of the district attorney or 60 days under the order of the judge.<sup>17</sup>

Further, article 18 of the draft law states that an investigator may tap and keep a suspect under surveillance. Even more, article 19 and 20 clearly violates the right of fair trial and due process of law. They read:

#### Article 19

During the investigation process, a suspect **does not have** the rights:

- a. to be accompanied by a lawyer
- b. to refuse to answer any questions from the investigator
- c. of the suspension of detainment with bail
- d. to have contact with any external parties, including his/her family

#### Article 20

- (1) An investigator has the rights to trespass private ground, building, house, transportation facility or state-owned vital projects
- (2) The rights as mentioned in paragraph (1) **do not need authorisation** from the Chair of the District Court.<sup>18</sup>

Article 2 of the draft law provides that combat against terrorism shall be based on the principles of:

1. human rights
2. national welfare
3. the well being of the society
4. the unity of the state's region; and
5. universality.

Thus, article 2 may be used as an argument that this draft law does respect human rights, but on the other hand, blatant violations of human rights are clearly provided in other articles. No doubt that debate regarding measures against terrorism *vis a vis* human rights exists everywhere across the world after 11 September 2001. How far can the state violate the rights of fair trial and due process of law upon a suspect terrorist? Is being a "terrorist" provides sufficient justification to violate a person's rights?

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<sup>17</sup> Indonesia, *Law No. 8 year 1981 concerning Criminal Procedural Law*, article 24 and 25. Emphasis added.

<sup>18</sup> Draft Law on Anti-Terrorism, *supra* note 13, article 19 and 20.

The case of Indonesia also shows these problems. The elucidation of the draft law does not provide sufficient argument for this defiance except “considering that terrorism is a special criminal action...”<sup>19</sup> What is “special criminal action”? If this draft law wants to disregard the principles of fair trial, due process of law, and presumption of innocence, which are important in human rights, it needs justifiable reasons according to morality and the principle of justice.

Is there any guarantee that this insolence of human rights will not be abused? Who can control the implementing institutions of the draft law? These problems are particularly important for Indonesia as a country that undeniably has a corrupted legal system and weak democracy.

In answering criticisms from the participants of the seminar, Atmasasmita replied that terrorism is considered to be an unusual criminal, therefore, comparable to the Court of Human Rights, the rights of a suspect can also be disregarded. Further he says:

"Human Rights Court also disregards those rights. The existence of the Law on Human Rights Court is an evident that the government and society accept the defiance for the wider benefit. Other countries, such as the UK and the US, apply similar article and it does not contravene international norm."<sup>20</sup>

### 3.3. State Terror

A specific and important problem related to terrorism in Indonesia is the fact that, if terror can be defined as actions that create fear for political purpose, many terrors in the past were done by the state. During Soeharto's government, the military and police force terrorised certain groups of people for the purpose of maintaining the regime's power or for the interest of the elites. To obtain a land for the benefit of a big plantation company, for instance, the military did not (**does not?**) have doubt to terrorise the people occupying the land.

It is worth noting Abdul Hakim Garuda Nusantara's saying in addressing this issue, as follows:

Before criticising articles in the Draft Law on Anti-Terrorism, it needs to be revealed that legal approach, especially penal code, can never solve the problem of terrorism. Secondly, political facts show that it is not only a civilian or a group of civilians who can conduct terrorism, but it can also be done by the state.... Terrorism conducted by non-state actors is, in fact, rooted in the problems of injustice in the fields of social, economy, and law. When the legal and political system cannot respond these problems, the demand of justice from the society cannot be avoided. ... Terrorism conducted by the state or its apparatuses is done for and by the name of power, political stability, and economic interest of the elites. In the name of those, the state believes that it is legitimate to use violence in all forms to repress and tranquillise critical groups in the society.<sup>21</sup>

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<sup>19</sup> *Id.*, elucidation.

<sup>20</sup> "UU Pemberantasan Terorisme...", *supra* note 12.

<sup>21</sup> Abdul Hakim G. Nusantara, "Mengkritisi RUU Pemberantasan Terorisme," Paper presented in Seminar on Draft Law on Anti-Terrorism, Jakarta, 3 December 2001.

Further, Nusantara says that if it is unavoidable to have the law, Indonesia has to refer to the UN approach, that is through the International Court of Justice, as there is difference in defining terror between the UN and the US. Moreover, in the UN conception, terrorism is not only about non-state actor, but also state actors.<sup>22</sup>

In contrast, Atmasasmita replied that he does not share Nusantara's concern about state terrorism and the possibility of the abuse of power, as long as there are clear limitations and strong sanction for the apparatus who abuses his/her power.<sup>23</sup>

#### 4. WHOSE INTEREST?

The issue of terrorism in Indonesia has become headlines on the newspapers within this past month. This is due to the US allegation that Indonesia is one of the most important headquarters of terrorist organisations, especially that of Jama'ah Islamiyah, an affiliate of Al-Qaeda.<sup>24</sup> This allegation is also supported by the fact that as the biggest Moslem population in the world, many people in Indonesia react against the US after the US government declared its plan to attack Iraq.

The US government attitude towards Indonesian government also changed rapidly because of this circumstance. When President Megawati Soekarnoputri visited the US a week after the 11 September 2001 attack, Bush government immediately pledged to withdraw embargo on weapons upon Indonesia.<sup>25</sup>

According to a press release published by the US Foreign Affairs through the US Embassy in Jakarta, the US offered fund for security and counter-terrorism program in the amount of more than 50 million US\$. The fund would be used for the training for police force, the establishment of special counter-terrorism unit, and regional counter-terrorism scholarship.<sup>26</sup>

In the version of Indonesian police force and military, the bombings and other terrors within these two years were done by The Free Aceh Movement ("GAM," *Gerakan Aceh Merdeka*). Obviously, there is a different perception on "terrorist" between the US government and Indonesian government in this context. Therefore, it is understandable that many people are worried that the counter-terrorism aid will not be used for the purpose of the international terrorism; instead, people's movements, despite of

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<sup>22</sup> "UU Pemberantasan Terorisme...," *supra* note 12

<sup>23</sup> *Id.*

<sup>24</sup> See "Taking the Hard Road," *Time Magazine*, September 30, 2002/Vol. 160 No. 12.

<sup>25</sup> "Bantuan Militer AS: Untuk Apa?" *Kompas Daily*, 15 Agustus 2002.

<sup>26</sup> *Id.*

the purpose, will be the target of this operation. Accordingly, the fear about the abuse of anti-terrorism law exists.

## 5. CONCLUSION

*Internationalised* war against terrorism only gives two options as declared by the US president Bush after 11 September 2001: either we are *with* or *against* the US in the war against terrorism. This statement, indeed, sounds like a rhetoric statement for countries like Indonesia - there is only one option left, that is to support the war. The questions then: to what extent does Indonesia have to support this war? This is a politically heavy issue, as the government has to be diplomatic in addressing this issue while at the same time it has to win the sympathy of its own constituents - the biggest Moslem population in the world.

What is “terrorism” and who defines “terrorism”? Can internal struggles against the government be defined as “terrorism”? Can the special measures putting aside human rights be justified in the name of anti-terrorism while the definition of “terrorism” itself is not clear?

There are many problems need to be addressed. The situation may not allow Indonesia to reject the existence of the anti-terrorism law, but it is hoped that criticisms mentioned above as well as bad yet valuable experiences gained from the past laws will make the government deals with this issues more carefully.

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