

Freedom in Danger

Policy Brief for EU - Indonesia Human Rights Dialogue

Brussels, 8 November 2019

European Union – Indonesia Human Rights Dialogue

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Institute for Criminal Justice Reform (ICJR) established in 2007 is an independent research institution focusing on criminal law reform, criminal justice system reform, and legal reform in general in Indonesia. ICJR has conducted three major programs: research and advocacy, training, and strategic litigation. ICJR actively has a major role in the reformation of criminal policy in Indonesia by regularly providing policy recommendations for both government and parliament.

A number of challenges apparently appear during the process of any policy reform. In the present policy brief, ICJR will try to highlight some issues under these four aspects: (a) criminal policy and criminal justice reform, (b) access to justice, (c) freedom of expression, and (d) rights of minority. Lastly, some points of recommendations to address the problems will be outlined.

Criminal Policy and Criminal Justice Reform

a. Criminal Policy Reform

Criminal policy reform shall be carried out with the spirit and more initiatives to respect, fulfill, and protect civil liberties and human rights. More protection on civil liberties including the right to private life, right to freedom of expression, the right to fair trial are expected to be seriously considered in dealing with overcriminalization issues on the draft of Penal Code. In addition, any punitive policy which entails penal populism should be hindered by promoting more alternatives to imprisonment particularly for victimless

crimes such as possession of drugs or gambling related crimes.¹ Enhancing due process and promoting restorative justice should be the priority in establishing a fair and well-grounded criminal policy.²

Furthermore, ICJR also gravely concerns with the death penalty policy surrounded with the problems of unfair trial and death row phenomenon where the convicts have been detained for up to more than 20 years.³ Evaluation on the current death penalty cases should be performed to review the implementation of fair trial principles. Moreover, commutation of sentence is strongly urged and properly defined on the proposed Penal Code so that the convicts sentenced to death are no longer living under uncertainty whether they will be executed or not in such a long period of time. However, the provisions under the current draft of Penal Code arguably will not help solving the problem of death row phenomenon. This is because the commutation, which may be conducted in 10 years after the judgment, will not be applied automatically; The mechanism of commutation needs to be addressed beforehand by the judge on their verdict.

b. Criminal Justice Reform

With regards to criminal justice reform, it is desirable that the reform is directed towards the aims to establish a criminal justice system that reflects the integration and synergy between law enforcement agencies/institutions in accordance with the authority assigned by the law while also focusing more attention to the fulfilment of the rights of accused and enhance victim protection measures.⁴ The main problem on this issue is that judicial process are regulated under number of laws and regulations such as that sometimes are incompatible each other.⁵ For instance, duties and responsibility of prosecutors stipulated under Prosecutor Law is inconsistent with the duties of prosecutors under Criminal Procedure Code.⁶ As a consequence, independence and

¹ Zainal Abidin, *et. al.*, Kertas Kerja: Rekomendasi Arah Reformasi Kebijakan Pidana 2019-2024, Institute for Criminal Justice Reform, Jakarta, 2019, page 27-30.

² *Ibid.*, page 23-24.

³ Erasmus, *et. al.*, Laporan Situasi Kebijakan Hukuman Mati di Indonesia 2019: "Mempermainkan Takdir", revised Edition, Institute for Criminal Justice Reform, Jakarta, 2019, page 23-25.

⁴ *Ibid.*, page 42.

⁵ *Ibid.*, page 43.

⁶ *Ibid.*, page 43-44.

impartiality of the law enforcement officers (i.e. prosecutors) may be undermined in some situations.⁷

On the other hand, the present criminal justice system does not provide a rigor mechanism to protect victim of crimes and seriously consider their significant role during judicial process.⁸ Besides, key witnesses sometimes also experience “counter-attack” when the accused report them back for defamation to the police.⁹ Meanwhile, there is no mechanism to make a case priority on such scenario. The absent of systems which are able to adopt a rigor witness and victim protection as well as the problematic law and regulations have become true challenges in carrying out criminal justice reform.

Access to Justice

a. Access to legal information

Access to information plays an important role in granting access to justice. In the context of judicial process, it is impossible to build up proper defense without having provided with case files. Similarly, access to justice in the context of policy making heavily relies on the access to information, particularly where the policy provides the authority with immense control over society such as by imposing various criminal sanctions.

The discussions on the proposed Penal Code in Indonesia shall be open for public scrutiny and involve various stakeholders, including academics and experts from all related fields, such as social welfare, economy, public health, as well as civil society. However, it seems that the government and the parliament wish to rush the bill that they conducted any discussions on formulating the draft in a closed manner to avoid public debate. A member of the House of Representative made a statement couple days ago saying that the proposed Penal Code will be enacted by the end of this year.¹⁰ Meanwhile, a number of

⁷ *Ibid.*, page 44.

⁸ *Ibid.*, page 45.

⁹ *Ibid.*

¹⁰ CNN Indonesia, Komisi Hukum DPR Targetkan RKUHP Disahkan pada Desember, <https://www.cnnindonesia.com/nasional/20191104162853-32-445518/komisi-hukum-dpr-targetkan-rkuhp-disahkan-pada-desember>, accessed on 5 November 2019.

problematic provisions are incompatible with the principle of human rights (i.e. entails serious intrusion into private life and criminalizes acts hindering the freedom of expression), and therefore pose a serious threat to democracy. On the other hand, both the government and the parliament have made the draft undisclosed. It requires enormous effort to find any latest version of the draft, not to mention the record of any discussions conducted, while they should have been made easily accessible for public.

b. Access to legal aid

Access to legal aid remains a challenge in Indonesia. The problems are ranging from a limited number of legal aid organizations to a serious issue on the absent of adequate and effective legal assistance.

It is true that the number of legal aid organizations increased from 405 organizations on the previous year (2016-2018) to 524 organizations with a percentage increase of around 30 percent. They can be found in all of provinces across the nation except North Kalimantan. Nonetheless, the number of legal aid organizations arguably are not equally distributed as they are mainly concentrated on the Java islands (245 out of 524 organizations).

From **Table 1** below, it can be clearly seen that there is striking gap in the numbers of legal aid organizations based in Java island compared to those in Sulawesi island or Sumatera island, not to mention in Papua. In Java island consisting of Special Capital Region of Jakarta, Special Region of Yogyakarta, East Java, Central Java, West Java, and Banten, the total number of legal aid organizations is made up of 245 organizations. Meanwhile, 134 legal aid organizations (only around half that of the numbers in Java) are found in Sumatera island which includes all provinces listed on the left column (excluding Bali). The provinces in Sulawesi island only have 63 legal aid organizations available on their territory whilst Papua barely has 7 organizations in total.

Table 1. The number of legal aid organizations in each province

Province	Total	Province	Total	Province	Total
North Sumatera	32	Special Capital Region of Jakarta	41	East Nusa Tenggara	7

South Sumatera	10	Special Region of Yogyakarta	22	North Maluku	7
West Sumatera	8	East Java	61	Maluku	5
Riau	10	Central Java	57	Gorontalo	7
Lampung	17	West Java	47	Southeast Sulawesi	14
Riau Islands	6	Banten	17	North Sulawesi	6
Bangka Belitung Islands	6	East Kalimantan	17	Central Sulawesi	12
Aceh	21	West Kalimantan	5	South Sulawesi	20
Bengkulu	10	Central Kalimantan	6	West Sulawesi	4
Jambi	14	South Kalimantan	2	Papua	2
Bali	6	West Nusa Tenggara	20	West Papua	5

Source: Decree of the Minister of Law and Human Rights 2018 No: M.HH-01.HN.07.02 on the List of Verified and Accredited Legal Aid Organizations Terms Dates 2019-2021

In addition to the problem of inequal distribution and limited number of legal aid organizations across the nation, there has been also a serious issue where adequate and effective legal assistance has been neglected in almost every part of judicial process. According to the ICJR's study on the cases of death penalty in Indonesia, there were at least 9 out of 118 suspects found to be denied access to lawyer during police interrogation.¹¹ Then, whereas almost all defendants have assisted by lawyer during the trial at the first instance, there were still 11 defendants who were unable to provide a proper defense in written.¹² Meanwhile, more than half of defendants during appeal and nearly half of convicts during retrial at the Supreme Court were not assisted by lawyer and therefore it is not surprising that they barely managed to submit sound argumentations.¹³

¹¹ Zainal Abidin, et al., *Menyelidik Keadilan yang Rentan: Hukuman Mati dan Penerapan Fair Trial di Indonesia*, Institute for Criminal Justice Reform, Jakarta, 2019, page 162.

¹² *Ibid.*, page 152 and page 162.

¹³ *Ibid.*

It is noted that adequate and effective legal assistance has not become an important aspect to be addressed during judicial process even for the people facing capital punishment. A number of factors hindering the access to legal assistance may include: (a) suspects who are poorly informed regarding the rights they are entitled to (e.g. the right to legal assistance, the right to interpreter, the right to appeal, the right to prepare defense, access to information and case files, etc), (b) limited state budget provided on legal aid services, and (c) paradigm of the law enforcement officers that perceives granting access to legal assistance to the suspect/defendant as a formal obligation or just to fulfill statutory obligations.¹⁴

Freedom of Expression

A number of problematic provisions leading to serious threats to freedom of expression are regulated under the proposed Penal Code. The draft of Penal Code includes provisions for defamation against the president/vice president and against the legitimate government, which had previously been revoked by the Constitutional Court. Furthermore, the draft defines the act of treason (Makar) as “an intention to commit an act which has been realized by the beginning of the action”, instead of referring it to the origin term of Makar in Dutch that is “*anslaag*”, meaning “to attack”. Besides, the provisions pertaining to the blasphemy law and hate speech are also poorly formulated since the aim of propaganda is not explicitly stated. This is important because without the phrase “incitement to discrimination, hatred, or violence”, the law originally intended to protect marginalized groups will only lead to violation of the rights to freedom of expression instead.

In fact, a serious violation of the rights to freedom of expression has been occurred since many vague articles on the EIT Law (Electronic Information and Transaction Law) are applied towards dubious cases which may harm innocents. In terms of pattern and characterization, the law has been widely enforced for private matters among citizens, some of which are even being enforced in the context of revenge or surrounded by various political issues. A latest case happened to an activist and film maker Dandhy Laksono who was arrested on 27 September 2019 for posting some comments on his social media Twitter, expressing his

¹⁴ *Ibid.*, page 167.

thought about critical situations in Papua.¹⁵ He was released on the next morning following unfavorable public sentiment and his case fortunately did not continue to prosecution though. However, it is noteworthy to mention that the rights to freedom of expression guaranteed by the constitution has not been fully respected in practice. Obviously, the proposed Penal Code will only worsen the situation.

Rights of Minority

Rights of minority such as rights to indigenous people are deemed being compromised under the proposed Penal Code. In similar, the children's rights particularly with regards to education and healthcare have been put on the risk.

As a matter of fact, in some parts of the country, indigenous people do exist and live in accordance with values they believe in (i.e. called *adat*). Such values have become unwritten law in practice and therefore become living law. The proposed Penal Code is intended to adopt living law (*adat law*) which are exclusively implemented by Indigenous people. However, the demarcation line between the state law and the *adat law* then becomes blurred. This way, such adoption will lead to the degradation of *adat law's* value, which in the long run also threaten the existence of Indigenous people.

The draft of Penal Code also restricts the provision of information about contraception and the facilitation of contraception to anyone under 18. The law will clearly impede any government programs on providing proper and affordable sexual and reproductive healthcare, including sexual education and information, family planning, as well as contraceptive methods, which are important for preventing sexually transmitted diseases, including HIV/AIDS.

¹⁵ Arya Dipa, Filmmaker Dandhy Laksono named 'hate speech' suspect for tweeting about clashes in Papua, <https://www.thejakartapost.com/news/2019/09/27/filmmaker-dandhy-laksono-named-hate-speech-suspect-for-tweeting-about-clashes-in-papua.html>, accessed on 4 November 2019.

Recommendations

- 1) General aims of the criminal law reform are to promote more protection on human rights, civil and political liberties, humanity, and democracy. This aim may be pursued by:
 - a) Conducting criminal law reform, including in determining list of offences, with regards to protection of human rights;
 - b) Ensuring any provision on the draft of Penal Code to have clear aims and formulation, complies with fundamental principle in Criminal Law, and indiscriminative;
 - c) Reducing the duplication of criminal offences to ensure legal certainty and to avoid double jeopardy;
 - d) Harmonizing criminal sanction patterns with the gravity of crimes and adopting more alternatives to imprisonment;
 - e) Conducting criminal law reform pertaining to victimless crime offences, among them changing the approach in dealing with drug users, gambling, and offences related to private life.
- 2) General aims of criminal justice policy reform are to push accountable, transparent, integrated criminal justice system and to ensure the fulfillment of the rights of accused, witness, as well as victim of crime.
- 3) Criminal justice system reform has to be directed to create a criminal justice system based on legal principles that protect human rights and to establish harmony between law enforcement officers and its agencies in accordance with its authority given by the law to preserve balance in protecting interest of the State, the society, or individuals, including the interest of the accused and the victim of crime. In order to do so, measures as follows should be taken:
 - a) Strengthening regulations related to law enforcement institutions and ensuring synchronization and consistency between the regulations;
 - b) Enhancing the fulfilment of the rights to fair trial;
 - c) Building up regulations pertaining to the rights of victim of crime and its implementation mechanism.

Profile of Authors

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Iftitahsari, graduated from Faculty of Law, Universitas Gadjah Mada. She later obtained her master's degree on Crime and Criminal Justice from Leiden University, the Netherlands. She currently works as a researcher at ICJR.

Profile of Organizations

Institute for Criminal Justice Reform or ICJR, is an independent research institution on criminal law reform, criminal justice reform, and general law reform in Indonesia.

One of the crucial challenges that Indonesia has to encounter during its transition era is reforming the law and criminal justice in line with the democratic direction of the nation. In the past, criminal law and criminal justice had been the supporting tools of authoritarian rule, and also utilized in the interest of social engineering. Now, it is time to change the orientation and instrument of criminal law as tools of authoritarian power, to supporting tools for the democratic political system and for the protection of fundamental human rights. These are the challenges in reforming the criminal law and criminal justice during the current transition stage.

Therefore, to respond to the aforementioned challenges, Indonesia needs well-planned and systematic reform efforts. A grand design of reform in criminal justice and law in general should be initiated. The criminal justice system has been a strategic key point in establishing the Rule of Law framework and respect for human rights. Furthermore, to have a proper functioning democracy, the concept of the Rule of Law must be institutionalized. Thus, the reform of criminal justice system to orient it towards human rights protection is the “conditio sine quo non” along with the process of institutionalized democratic reform of the transition era.

Steps in transforming law and criminal justice system to be more effective is currently in progress. However, such measure must be supported with wider involvement. Institute for Criminal Justice Reform (ICJR) is taking the initiative to support those measures. Provide support to establish a recognition towards Rule of Law and simultaneously preserve the human rights culture within the criminal justice system. These are the reasons of existence of ICJR.

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