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INDONESIA'S NEW ANTI-TERRORISM REGULATIONS

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Almost a week after the October 12 Bali bombings, the Indonesian government has responded by issuing two anti-terrorism regulations generally modelled on Canada's anti-terrorism legislation bill C-36. In view of the Bali atrocities, Indonesians support their government's initiative but such perspectives are tempered by concerns that the authorities will abuse the regulations in the same way as the Suharto regime treated the subversion and state emergency laws before these draconian laws were scrapped in 1998. Similarly, the 1999 State Security Law issued during President Habibie's tenure was never enforced due to strong public opposition.

What do the regulations contain?

The anti-terrorism legislation is not an emergency decree as commonly stated by the popular press but a government regulation in lieu of a law (*Perpu, Peraturan Pemerintah Penganti Undang Undang*). Taking into account that the House of Representatives (DPR) is still debating the anti-terrorism bill, President Megawati has the authority to issue government regulations in lieu of laws during a state of emergency based on article 22 of the 1945 Constitution. The new laws provide a legal basis for the security agencies to investigate and prevent acts of terrorism and are consistent with UN Security Council Resolution No. 1373 (2001).

From a legal perspective, the new regulations should serve as an important building block in strengthening the rule of law in Indonesia. They clearly demarcate various categories of terrorist acts; broader powers for law enforcers and intelligence agencies to take specific measures; and include a retroactive principle. The Indonesian Criminal Code and the Criminal Code procedure does not classify and label terrorist acts and therefore gives limited powers to law enforcement and intelligence agencies to take action. The new regulations, in the short-term, cover the loopholes existing in the Indonesian legal system providing the government with the measures necessary to combat terrorism until deliberations in the DPR for a formal anti-terrorism bill are concluded.

The regulations allow for the death penalty for those convicted of committing or threatening to commit acts of terrorism resulting in mass destruction and deaths. The strength of the regulations is that unlike the withdrawn anti-terrorism bill, it does not define terrorism as a political crime based on political motives.

Suspicious of terrorism are based on individual actions and not as a consequence of group membership. The laws also provide important protection for the rights of the suspect and the accused through the involvement of the judiciary. More important, the regulations could not be used to arrest someone who articulates different views or supports a different ideology.

Who will implement it?

The regulations enable the Police to detain those suspected of terrorist activities for three days on a lower threshold of evidence than required in other cases. It enables the government to form anti-terror teams consisting of various departments, including the Indonesian military (TNI) and Police, in an attempt to conduct wide-ranging intelligence operations. The results of intelligence operations could be used as *prima facie* legal evidence after being approved by a court of law with the approval process taking no longer than three days.

While a certain degree of coherence is emerging within the government apparatus now that a legal basis has been established to fight terrorism, the principal concern is whether this momentum can be sustained. The biggest question mark remains the implementation of the regulations. Indonesia's Achilles heel will be its weak intelligence mechanism riven with internal rivalries and its corrupt and politically influenced judiciary.

Even if the law enforcement agencies can assemble credible evidence, usually all the good work is undone during court proceedings owing to the fact that either the prosecutors involved in the trial are unable to prove any indictments or worse, do not have a professional commitment to upholding the law. A repetition of the situation similar to the East Timor tribunals where the state lost most of the cases would further compromise the credibility of an already dysfunctional legal system.

Anomalies

While the new regulations are comprehensive, they contain loopholes that raise complicated questions. Article 46 of the regulation stipulates that articles in this ruling may be implemented retroactively for particular cases prior to the endorsement of the ruling. However, in the amended 1945 Constitution, Article 28I, paragraph 1, stipulates that the right of citizens not to be prosecuted retroactively is a human right that shall not be diminished under any circumstances.

Legal experts, citing the Constitution, have expressed their opposition to the retroactive principle in the new regulations fearing its use to prosecute individuals arbitrarily for terrorism. They argue that the only exceptions for the retroactive principle should be crimes against humanity; including widespread and systematic killing and slavery.

Other legal experts acknowledge the need for a retroactive principle to specifically tackle the Bali bombing attack, they remain unclear whether the retroactive provision could be used to try perpetrators of various unresolved acts of terror in the country. Human rights activists will point that victims of such atrocities also need justice. There were a number of terror attacks during the tenure of former president Suharto directed against the state or against the general public by the military. The Istiqlal Mosque bombing in 1978 and Gedung

Seminari Alkitab in Malang in 1984 are cases that remain unresolved, as well as widespread abductions and terror tactics directed at anti-Suharto activists.

The Government is in a conundrum. Does the retroactive principle go against the amended 1945 Constitution? If so, should the Constitution be amended to overcome this anomaly? Could the retroactive principle be seen as a breakthrough that should be implemented to try perpetrators of previous terror attacks during the rule of former president Suharto? Expect a protracted debate to ensue between human rights activists and Constitutional law experts when the DPR convenes.

Public concerns

Despite the government's assurances, hard-line Muslim leaders have warned that the authorities would misuse the powers granted them under the new regulations. As evidence, they have pointed to the arrest of militant cleric Abu Bakar Ba'asyir. At this moment, such concerns are unwarranted. Mr Ba'asyir has been arrested for offences under the Criminal Code.

Another critical concern is how much power should be conceded to the government and the Police (with the military as the supporting force) in fighting terrorism. Would such a situation empower the government to use the regulations to justify anything in the name of security? NGO groups argue the point that terrorism allegations, which derive from U.S. sources, could be used by the military for its own benefit to pave the way for either a better relationship with the U.S., or worse, as an opportunity to reinforce its political role. Such a dilemma should be seen in the context of Soeharto's authoritarian rule and the challenge of instituting democratic norms.

However, such concerns for the time being remain unfounded. During the New Order era, the security institutions had an absolute authority to act against those found or suspected of disturbing security and order. A special and powerful institution called *Kopkamtib* (Operational Command for the Restoration of Security and Order) was set up to back up the law. However, the new anti-terrorism regulations deal with terrorism-related issues only. The security institutions will not be granted any extra powers or authority to enforce the regulations.

Is the DPR handing the government a blank cheque in the fight against terrorism? No, even if the regulations are perceived to have many flaws, they can be repealed when the government passes the anti-terrorist law. Under the amended 1945 Constitution a government regulations in lieu of law issued by the government can come into effect immediately upon its issuance, however the House is required to approve it in the following session. Herein lies the challenge for President Megawati. Constitutionally, the issuance of such regulations is a risky move as the president's credibility is at stake. It could be a costly move if the regulations fail to gain DPR approval to become law.

Conclusion

The new anti-terrorism regulations attempts to balance Indonesia's desire to respect international law with its quest to protect its fledgling democracy. Indonesia's belated entry in the war on terror will come as a relief to the rest of the region enduring an immense challenge as the proponents of global terrorism open a second front in Southeast Asia.

Appendix

Crucial points of the Government Regulation in lieu of Law No.1/2002 on fighting terrorism:

- The new regulation defines terrorism as any violent act that could create terror or insecurity among the public, violate the public's freedom, cause the death of other people or cause the destruction of vital or strategic objects.
- These crimes are then broken down into detailed acts, ranging from petty acts such as the issuing of bogus threats to major crimes such as using a nuclear weapon to create terror.
- A corporation involved in a terrorist act can be fined up to Rp 1 trillion and have its operational license revoked.
- Unlike the Criminal Code, the antiterrorism regulation allows intelligence reports to be used as legal evidence.
- Based on prima facie evidence, suspected terrorists can be arrested for seven days and detained for a period of six months for questioning and prosecution.
- Investigators also have the authority to go through personal mail and parcels, and to tap telephone conversations or other forms of communication, with the actual tapping being permissible for a period of up to one year.
- Investigators, prosecutors and judges are given the power under this regulation to block any bank account belonging to suspected terrorists or those allegedly funding terrorist activities.
- The state also has the obligation to pay compensation and restitution to the victims of terrorist acts.

The Government Regulation in lieu of Law No. 2/2002 allows retroactively bringing the perpetrators of the Bali bombing attack to justice.

Source: *The Jakarta Post*, 21 October 2002.

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