

Alternative Report of Indonesia's ICCPR State Report 2013

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TABLE OF CONTENT

	Paragraphs	Page
1. Introduction		3
2. Implementation of the Covenant		
Article 2 Constitutional and Legal Framework, and Access to Remedies	1-16	4-10
Article 6 Right to Life	17-25	10-13
Article 7 Prohibition of Torture	26-35	14-17
Article 9 Prohibition of Arbitrary Detention	36-46	17-21
Article 10 Conditions of Detention	47-58	27-28
Article 12 Freedom of Movement and Article 13	59-68	28-29
Article 14 Rights to Equality before Courts and Tribunal and to Fair Trial	69-76	30-32
Article 16 Recognition as a Person before the Law	77-82	32-34
Article 17 Right to Privacy	83-105	34-40
Article 19 Freedom of Expression	106-115	40-44
Article 20: Religious Hatred	116-125	44-47
Article 21: Freedom of Assembly	126-132	47-48
Article 22 Freedom of Association	133-146	48-52
Article 24 Rights of the Child	147-158	52-55
Article 25 Electoral Rights	159-168	56-58
Article 27 Rights of Minorities	169-173	58-59
Article 18 Freedom of Religion	174-189	59-63

I. Introduction

The human rights situation in Indonesia in the mid-2006 to 2012 is characterized by different dynamics of human rights both positive and negative. In this positive context, there is some progress in particular international human rights instruments ratified policy. But the context of the positive progress in practice, cannot be felt the most by people in Indonesia, it is because of the negative dynamics of the human rights situation in Indonesia is more dominant.

On the negative side, there are some notifications: *First*, Legal and the policy of development. The legal conditions in Indonesia are marked by the rise of legal products that threaten the rights of minorities, especially religious and gender-based. Laws and policies of development occurred in both national and local level. Both of those various laws are contrary to a number of human rights principles and the Indonesian constitution. *Second*, the widespread practice of religion based violence, intolerance, and other discriminatory measures. In the period 2006-2012, the violence greatly increased mainly based on religious freedom. Increasing intolerance and discrimination more systematically through a variety of national and regional policies, in this context, the condition is even worse when law enforcement failed to do. The role of the police to ensure the security and law enforcement failed, especially violence against minorities. Various cases have occurred, such as the case of Ahmadiyah, attacks on Shia, attacks on the GKI Yasmin church and the Church of Philadelphia is not resolved, resulting in impunity practices. *Third*, the draft regulations that potentially violate to human rights.

Another negative thing in the dynamics of the human rights situation in Indonesia is the product / draft law that could potentially violate human rights, such as the draft bill on the organization of mass. The conditions described above we have presented in this alternative report, including the legal framework and conditions / practices of human rights that occurred.

This report is prepared by a numbers of Indonesian NGOs working on issues of human rights, such as minorities, religious freedom and believes human rights defender, security sector reform, legal aid, the environment, children, LGBTI, and democracy. Those NGOs are HRWG, LBH Jakarta, ILRC, Imparsial, Elsam, Gaya Nusantara, Wahid Institute, YPHA, Kontra S, YLBHI, ICJR, CMARs.

This alternative report is consolidated by HRWG (*Indonesia's NGO Coalition for International Human Rights Advocacy*) the number of members by 45 institutions in Indonesia. Alternative report was prepared with the involvement of members of the coalition and network in Indonesia. Alternative reports have been in consult with the civil societies in Indonesia in a national workshop held in Jakarta, December 2012. National workshop also followed by various NGOs from various thematic issues.

II. The Implementation of Covenant

Article 2 Constitutional and Legal Framework, and Access to Remedies

Introduction

1. The resignation of the former President Soeharto on 21 May 1998 marked a drastic change in the political structure of the New Order Regime. This change, which is known by its famous term “Reformation”, is evident from the enactment of various legal products and institutional reforms which previously were the main sources of many human rights violations.

2. In regard to legislation, human rights discourse is embodied in the Second Amendment to the 1945 Constitution in 2000. Chapter XA (Articles 28A-28J on Human Rights) includes various categories of human rights that cover most of rights guaranteed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Positively, the provisions of human rights in the Second Amendment to the 1945 Constitution can be used to test the provisions of a law through judicial review before the Constitutional Court.¹

3. Meanwhile, the People’s Consultative Assembly (*Majelis Permusyawaratan Rakyat, MPR*) (post the New Order Regime) has also issued a number of decrees (MPR’s decree is second highest legal product after the Constitution) that embrace human rights norms. TAP MPR XVII/1998 on Human Rights was the first MPR’s decree that includes (and recognizes) human rights norms.² This decree provides a formal recognition of the respect for human rights (including the applicable universal standards of human rights) and a legal basis for the ratification of international human rights instruments³ (Article 2) and the establishment of “*a national human rights commission established by Law*” with the functions of “*counseling, study, monitoring, research and mediation of human rights*” (Article 4). The House of Representatives (*Dewan Perwakilan Rakyat, DPR*) also adopted Law No. 39 Year 1999 on Human Rights to reaffirm Indonesia’s formal recognition of its commitment to the promotion, protection and fulfillment of human rights for all of its citizens. Regrettably, Law No. 39 Year 1999 does not address the issues of human rights enforcement mechanism and effective remedy for those whose rights have been violated. The long-delayed process of revising the Criminal Code (KUHP) has posted another serious problem to the protection of human rights as it is no longer compatible with various human rights instruments.

¹ The creation of the Constitutional Court was based on the Third Amendment to the 1945 Constitution, Articles 24(2) and 24C in 2001. Further, the House of Representatives (DPR) issued Law No. 24 Year 2003 on the Constitutional Court. In various decisions related to judicial reviews on human rights issues, the Court has yet to accommodate international human rights standards.

² MPR’s Decree TAP MPR XVII/1998 was adopted by the last elected MPR under the New Order Regime through a controversial mechanism of a Special Session. Protests against the holding of the Special Session had resulted in a number of casualties and wounded protesters, who were mostly students. This incident became known as the Semanggi I Tragedy on 13 November 1998.

³ Prior to the issuance of TAP MPR XVII/1998, the Government of Indonesia has only ratified three core international human rights treaties: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified in 1984 (through Law No. 7 Year 1984), the Convention on the Rights of the Child (CRC), ratified in 1990 (through Presidential Decree No. 36 Year 1990), and the Convention against Torture (CAT), ratified in 1998 (through Law No. 5 Year 1998).

4. The main positive aspect of Law No. 39 Year 1999 is the legal basis for the establishment of a more independent (politically and financially) National Commission on Human Rights (Komnas HAM) with a greater power than the previous institutional mandate as provided for by the Presidential Decree No. 50 Year 1993⁴. The key power of Komnas HAM according to Law No. 39 Year 1999 is the ability to receive complaints from victims, conduct on-site visit to the place of the alleged violations, and subpoena those who fail to appear or refuse to give a statement⁵. Furthermore, after the entry into force of Law No. 26 Year 2000 on Human Rights Court, Komnas HAM was endowed with an additional power to conduct inquiries into the allegations of gross human rights violations.⁶

5. Another key decree of MPR in the context of “transitional justice” is TAP MPR-RI No. V/MPR/2000 on the Stabilization of National Unity and Integrity. The MPR decree states the need to establish a National Truth and Reconciliation Commission as an “extra-judicial body” to “*uphold the truth by revealing the abuse of power and human rights violations in the past*”⁷. Furthermore, the revelation of the truth will be followed by “*acknowledgement of wrongs, apologies and forgiveness, peace, law enforcement, amnesty, rehabilitation, or other meaningful alternatives to uphold national unity and integrity with the utmost attention to the sense of justice in society*”. Regrettably, the enthusiasm to settle past human rights violations then stopped. It took about four years to finally get the House of Representatives passed Law No. 27 Year 2004 on the Truth and Reconciliation Commission. However, before the selection process of the commissioners completed, the Constitutional Court annulled the entire Law.⁸ The annulment of the Law had stalled the establishment of local truth commissions in Aceh and Papua, which explicitly refers to the annulled Law.

Legislation to Address Human Rights Issues in Conflict Areas

6. After the resignation of Soeharto, human rights violations which occurred in some parts of Indonesia came under the spotlight, including Aceh, Papua, East Timor and Maluku which just experienced communal conflicts (religious). Not to mention, legislation products issued by MPR and DPR.

7. TAP MPR RI No. IV/MPR/1999 on Broad Guidelines of State Policy also takes into consideration human rights problems which occurred in several conflict areas in Indonesia, such as in Aceh, Papua (Irian Jaya), and Maluku.⁹ In order to settle human rights violations in Aceh “in a fair and dignified manner”, TAP MPR RI No. IV/MPR/1999 calls for “*an investigation and a fair trial for human rights perpetrators, both during and post military operations*”. In addition, DPR also adopted Law No. 18 Year 2001 on Special Autonomy for

⁴ The Law confirms the Commission as an independent institution, of an equal level to other state institutions and which holds the functions of carrying out research and study, education, monitoring and mediation of human rights.

⁵ Law No. 39 Year 1999 on Human Rights, art. 95.

⁶ Law No. 26 Year 2000 on Human Rights Court, art. 18(1).

⁷ TAP MPR-RI No. V/MPR/2000 on the Stabilization of National Unity and Integrity, Chapter V, Implementation Rule (3).

⁸ Initially, a group of human rights NGOs and victims organisations filed a judicial review on several articles that were considered to be contrary to international human rights principles, but the Court then annulled the entire law.

⁹ TAP MPR RI No. IV/MPR/1999 on Broad Guidelines of State Policy, Chapter IV G(2) on Special Policy Direction.

Aceh Province.¹⁰ Regrettably, both MPR's Decree and the Law fail to serve as a tool for victims to claim justice and a preventive instrument to combat the recurrence of violations in Aceh. Following the issuance of TAP MPR RI No. IV/MPR/1999, massive violence continued to occur which reached its peak during the Military Emergency in May 2003-May 2004. The violence declined during the tsunami disaster in December 2004 and the signing of the Helsinki Peace Accord on 15 August 2005. The Peace Agreement signed by the representatives of the Government of Indonesia and the Free Aceh Movement (GAM) reaffirms the need to settle past human rights violations in Aceh through Human Rights Court (pursuant to Law No. 26 Year 2000) and the Truth and Reconciliation Commission (Law No. 27 Year 2004).¹¹ However, to date, both mechanisms have not been held, not to mention, Law 27 Year 2004 has been annulled by the Constitutional Court in December 2006 (Decision No. 006/PUU-4/2006).

8. In order to deal with the problems in Papua (Irian Jaya), TAP MPR RI No. IV/MPR/1999 suggests holding *"a fair and dignified trial"*. This proposal is reaffirmed by Law No. 21 Year 2001 on Special Autonomy for Papua Province, which calls for the establishment of a Human Rights Court and a Truth and Reconciliation Commission in Papua (Article 45). Again, this Law is not implemented. In Papua, human rights violations remain endemic.¹²

9. Meanwhile, in order to address inter-religious conflict in Maluku, TAP MPR RI No. IV/MPR/ 1999 *"assigns the Government to immediately settle the prolonged social conflict in a fair, genuine and thorough manner and encourage the conflicting parties to pro-actively reconcile to maintain and strengthen national integration"*. To date, no one has been held accountable for the prolonged social conflict. However, the horizontal conflict has gradually stopped, although the area remains a potential conflict area.

10. In regard to Timor Leste, in early January 1999, the policy of the new regime under President Habibie proposed a solution for Timor Leste, namely popular consultation to decide on whether to extend special autonomy with or secede from Indonesia. Following the popular consultation result showing that the majority of the East Timorese people wanted to secede from Indonesia, MPR issued TAP MPR RI No. V/MPR/1999 on the Referendum in East Timor. In the Decree, MPR recognizes the referendum result of 30 August 1999 and states that *"Regional Integration of East Timor (based on MPR Decree No. VI/MPR/1978) into the Unitary State of the Republic of Indonesia does not apply anymore"*.¹³ Although the referendum was held, cases of gross human rights violations occurred in various regions in East Timor where military personnel (TNI) and its militia proxies were the main perpetrators. In this context, Law No. 26 Year 2000 on Human Rights Court was adopted. In regard to accountability issue, the Governments of Indonesia and Timor Leste established the bilateral Commission for Truth and Friendship (CTF).

The Role of the Constitutional Court in regard to Human Rights Issues

11. Another key institution created following the fall down of the New Order Regime is

¹⁰ This law was then replaced by Law No. 11 Year 2006 on Aceh Governance which is a derivative of the Helsinki Peace Agreement on 15 August 2005.

¹¹ Both mechanisms are also included in Law No. 11 Year 2006 on Aceh Governance, arts. 228 and 229.

¹² Human Rights Watch, "Out of Sight; Endemic Abuse and Impunity in Papua's Central Highlands", 2007, Vol. 19, No. 10(C).

¹³ TAP MPR RI No. V/MPR/1999 on the Referendum in East Timor, arts. 1 and 2.

the Constitutional Court.¹⁴ Based on Law No. 24 Year 2003, Article 10, the Court is mandated “to review laws against the 1945 Constitution; to adjudicate disputes over the powers of state institutions whose authorities are mandated by the 1945 Constitution; to decide on the dissolution of political parties; and to adjudicate disputes on the results of the general election”. Looking at its mandate, the Constitutional Court has a strategic position in the promotion and enforcement of human rights noting that it can be used to annul laws¹⁵ that are contrary to universal human rights standards as stipulated in the Second Amendment to the 1945 Constitution.¹⁶

12. The decisions of the Court on matters related to human rights are often unclear. In some cases, the Court accommodates universal human rights standards, but in some other cases, the Court fails to accommodate such standards.

First, the judicial review of Article 60(g) of Law No. 12 Year 2003 on the Election of Members of House of Representatives, Regional Representatives Council, and Regional House of Representatives.¹⁷ The judicial review was filed by the victims of the 1965 tragedy who are accused as “former members members of banned organizations of the Indonesian Communist Party (Partai Komunis Indonesia or PKI), including its mass organizations, or being directly or indirectly involved in the September 30, 1965 Movement by Indonesian Communist Party (G30S/PKI) or other banned organizations”. This means that those who are considered to be members of PKI do not have the right to be elected (cannot be members of the legislature) at all levels of the general election. This provision is a form of discrimination and deprivation of the right to political participation. The Constitutional Court declared Article 60(g) of Law No. 12 Year 2003 to be unconstitutional and to have no binding legal effect.¹⁸ Regrettably, the decision only represents a small victory for the victims of the 1965 tragedy. To date, there are many laws that perpetuate discrimination against them.¹⁹

Second, the Constitutional Court made a breakthrough in the legal system in Indonesia, notably in its Decision on Case No. 065/PUU-II/2004. The Court rejected the claims of Abilio Jose Osorio Soares, Former Governor of East Timor, who, at the time of filing the case, was in prison for gross human rights violations in East Timor in 1999.²⁰ Abilio filed a judicial review of Article 43(1) of Law No. 26 Year 2000 concerning the retroactive principle (*nulla poena sine lege*) which is applicable to Ad Hoc Human Rights Court. According to Abilio, the retroactive principle is contrary to the right not to be prosecuted on the basis of a

¹⁴ The creation of the Constitutional Court was based on the Third Amendment to the 1945 Constitution, Articles 24(2) and 24C in 2001. Further, the House of Representatives (DPR) issued Law No. 24 Year 2003 on the Constitutional Court. In various decisions related to judicial reviews on human rights issues, the Court has yet to accommodate international human rights standards.

¹⁵ The power to review over legislations lower than the law (such as Presidential Decree, Government Regulation, or Bylaw) is vested in the Supreme Court, as stipulated by Law No. 5 Year 2004 on the Amendment to Law No. 14 Year 1985 on the Supreme Court (art. 31).

¹⁶ Initially, the Constitutional Court can only decide on judicial review of laws adopted following the entry into force Law No. 24 Year 2003. But then the Court stated that they can review all applicable laws (Case No. 066/PUU-II/2004).

¹⁷ Case No. 011-017/PUU-I/2003.

¹⁸ *Ibid*, p. 58.

¹⁹ Mudzayin, “Dibebaskan tanpa Kebebasan: Beragam Peraturan Diskriminatif yang Melilit Tahanan Politik, Tragedi 1965-1966”, KontraS, Jakarta, 2008.

²⁰ At the time of the court hearing, Abilio Soares has been acquitted by the Supreme Court through the judicial review (*Peninjauan Kembali or PK*) mechanism.

retroactive law that cannot be reduced under any circumstances (*non-derogable right*), as guaranteed by Article 28(1) of the Second Amendment to the 1945 Constitution. In the consideration of its decision, the Court even refers to the Universal Declaration of Human Rights (Article 29(2)), ICCPR (Articles 15(1) and (2)), and the European Convention on Human Rights (Article 7).²¹ Both the ICCPR and the European Convention clearly state that the principle of non-retroactivity cannot be justified to prevent the prosecution of serious crimes under international law. The Court also took into consideration the experience of the ad hoc international tribunals (ICTY and ICTR) and the International Criminal Court (ICC) which is considered as part of customary international law.²²

Third, in regard to the settlement of gross violations of human rights (Law No. 26 Year 2000), the Court also made a breakthrough. The judicial review of Article 43(2) of Law No. 26 Year 2000 and its elucidation was filed by Eurico Guterres.²³ The article stipulates the role and power of the House of Representatives as a legislative body to recommend the establishment of an ad hoc human rights court in regard to gross human rights violations that occurred prior to the enactment of Law No. 26 Year 2000. In its decision the Court declares Article 43(2) remains valid and notes the importance of the involvement of political institution as it mirrors the representation of the people. However, DPR should consider the results of preliminary investigation and investigation by the authorized institutions according to Law No. 26 Year 2000, namely the National Commission on Human Rights (Komnas HAM) and the Attorney General's Office. In regard to the elucidation of Article 43(2), the Court aborts the word "assumption" in the elucidation.²⁴ The Court was of the opinion that the word "assumption" is contrary to the 1945 Constitution as it can create legal uncertainty. This should be interpreted positively that the Attorney General is supposed to carry out investigation based on the results of preliminary investigation by Komnas HAM. So far, the Attorney General always refused to carry out investigations into gross violations of human rights²⁵ on the grounds that there is yet any political decision from DPR recommending the establishment of an ad hoc human rights court.

Fourth, another important decision of the Constitutional Court in regard to accountability issue is the annulment of Law No. 27 Year 2004 on the Truth and Reconciliation Commission (TRC).²⁶ The petitioners of the judicial review of Law No. 27 Year 2004 comprised of victims of human rights violations and human rights NGOs. Interestingly, the petitioners only requested the review of several problematic articles of Law No. 27 Year

²¹ Decision on Case No.. 065 / PUU-II/2004, pp. 34-35.

²² *Ibid*, pp. 36-37.

²³ Article 43(2) of Law No. 26 Year 2000 states: "*An ad hoc human rights court as referred to in paragraph (1) shall be formed on the recommendation of the House of Representatives of the Republic of Indonesia for particular incidents upon the issue of a Presidential Decree*". Meanwhile, the elucidation of Article 43(2) states: "*In the case that the House of Representatives of the Republic of Indonesia recommends the establishment of an ad hoc Human Rights Court, it shall be based on the House of Representatives of the Republic of Indonesia's assumption that a gross human rights violation has occurred which is restricted to specific locus and tempus delicti that happened prior to the enactment of this law*". See Constitutional Court, Case No. 18/PUU-V/2007.

²⁴ The elucidation of Article 43(2) of Law No. 26 Year 2000 following the decision of the Court reads: "*In the case that the House of Representatives of the Republic of Indonesia recommends the establishment of an ad hoc Human Rights Court, the House of Representatives of the Republic of Indonesia shall base its recommendation on the occurrence of a gross human rights violation which is restricted to specific locus and tempus delicti that happened prior to the enactment of this law*".

²⁵ This excuse has been used by the Attorney General to refuse the investigations into Trisakti, Semanggi I and II (TSS) Cases, May 1998 Tragedy, and the 1998 Disappearance Case.

²⁶ Court Decision No. 006/PUU-IV/2006, 04 December 2006.

2004, but the Court annulled the entire law (*ultra-petita*). The problematic articles requested to be reviewed are Article 27 (discrimination against the victims),²⁷ Article 44 (TRC as a substitution of an ad hoc Human Rights Court)²⁸ and Article 1(9) (amnesty for perpetrators of gross human rights violations)²⁹. Therefore, in order to establish a Truth and Reconciliation Commission, DPR has to pass a new law.³⁰ The annulment of the Law had stalled the establishment of local truth commissions in Aceh³¹ and Papua³².

Establishing Special Mechanisms for the Settlement of Gross Violations of Human Rights: Human Rights Court and the Witness and Victim Protection Agency

13. Indonesia has a specific law that deals with gross violations of human rights, namely Law No. 26 Year 2000 on Human Rights Court. There are some important aspects that can be explored in Law No. 26 Year 2000.

First, there are two types of ‘gross violations of human rights’ according to the Law: crime of genocide and crimes against humanity. Crime of genocide according to Article 8 of Law No. 26 Year 2000 is:

“Any acts intended to destroy or exterminate in whole or in part a national group, race, ethnic group, or religious group by:

- a. killing members of a group;*
- b. causing serious bodily or mental harm to members of a group;*
- c. creating conditions of life that would lead to the physical extermination of a group in whole or in part;*
- d. imposing measures intended to prevent births within a group; or*
- e. transferring children of a particular group to another group by force.”³³*

Meanwhile, crimes against humanity defined by Article 9 as:

“Any acts committed as a part of a widespread or systematic attack directed against any civilian population, such as:

- a. murder;*
- b. extermination;*
- c. slavery;*
- d. expulsion or forcible transfer of population;*

²⁷ Art. 27 of Law No. 27 Year 2004 states: “Compensation and rehabilitation as referred to in Article 19 shall be given if the request of amnesty is granted”.

²⁸ The article reads: “The case of gross violations of human right that has been resolved by the commission cannot be brought before the Ad Hoc Court of Human Rights”.

²⁹ The article states: “Amnesty is the clemency bestowed by the President as the Head of State upon the perpetrator of gross violations of human rights, taking into account the consideration of the House of Representative.”

³⁰ The establishment of the TRC is mandated by TAP MPR-RI No. V/MPR/2000 on the Stabilization of National Unity and Integrity, which is hierarchically higher than the law; thus, the establishment of the TRC by DPR is a necessity.

³¹ Law No. 11 Year 2006 on Aceh Governance, which calls for the establishment of a TRC for Aceh (art. 229), was derived from the Peace Agreement between the Government of Indonesia and the Free Aceh Movement (MOU Helsinki, 15 August 2005).

³² The TRC for Papua ought to be established according to Law No. 21 Year 2001 on Special Autonomy for Papua Province (art. 46).

³³ The formulation is similar to the Rome Statute of the International Criminal Court (Rome Statute), art. 6 and the Convention on the Prevention and Punishment of the Crime of Genocide, art. II.

- e. *deprivation of liberty or deprivation of physical liberty in other arbitrarily in violation of (the principles of) basic provisions of international law;*
- f. *torture;*
- g. *rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or sterilization or other forms of sexual violence are equal;*
- h. *torture of a particular group or association that is based on equal political beliefs, race, nationality, ethnicity, culture, religion, gender or other grounds that are universally recognized as impermissible under international law;*
- i. *enforced disappearances, or*
- j. *the crime of apartheid.*³⁴

Regrettably, Law No. 26 Year 2000 does not include two other types of crimes provided for in the Rome Statute, namely war crimes and crimes of aggression.

Second, although it does not have its own procedural law, Law No. 26 Year 2000 has its own judicial mechanism. The Law stipulates the power of Komnas HAM to conduct inquiries into gross violations of human rights and to form an ad hoc team to carry out such inquiries³⁵ and the power of the Attorney General to conduct investigations³⁶. Gross violations of human rights that occurred prior to the enactment of the Law (before 2000) will be heard and ruled on by an ad hoc human rights court established at the recommendation of the House of Representatives (DPR) and for particular cases, upon the a Presidential Decree³⁷. The unclear relation between these institutions has halted the prosecution of cases of gross violations of human rights.

Third, Law No. 26 Year 2000 provides for reparations (compensation, restitution and rehabilitation) for victims. Chapter VI on Compensation, Restitution, and Rehabilitation, notably Article 35 states:

- (1) *Every victim of a gross violation of human rights and/or his or her beneficiaries **may** receive compensation, restitution and rehabilitation.*
- (2) *Compensation, restitution and rehabilitation as referred to in paragraph (1) shall be included in the decision of the Human Rights Court.*

14. The word ‘may’ in Article 35(1) makes reparation not part of the right of victims of gross human rights violations. The right to reparation is an imperative and an integral (inalienable) right of a victim of human rights violations. The word ‘may’ in the legal definition means that compensation, restitution and rehabilitation are not required to be given to the victim. Furthermore, Article 35(2) describes on how compensation, restitution and rehabilitation ‘may’ be obtained by the victims of human rights violations, namely if reparation is integrated in the ‘decision of the Human Rights Court’. This means that reparation for the victims depends on the judicial mechanism. Reparation should not depend on Court's decision given that the definition of ‘victim’ is determined by the suffering he or she experienced as a result of human rights violations, and is not determined by the relation

³⁴ Law No. 26 Year 2000 has many similarities to the Rome Statute, notably art. 9; however, the Law does not include the following element of crime for this category, namely: (k) *‘other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health’*.

³⁵ Arts. 18(1) and (2) of Law No. 26 Year 2000. An ad hoc team of investigators can comprise of public constituents (non-state) to maintain the principle of independence and impartiality.

³⁶ Art. 21(1) of Law No. 26 Year 2000.

³⁷ Arts. 43 (1) and (2) of Law No. 26 Year 2000. In March 2008, the Constitutional Court (Case No. 18/PUU-V/2007) delete the word “assumption” in art. 43(2), which thus can be interpreted as to no longer require any political decisions from the House of Representatives.

between the victim and the perpetrator.³⁸

15. In August 2008, the President established the Witness and Victim Protection Agency (*Lembaga Perlindungan Saksi dan Korban, LPSK*) by Law No. 13 Year 2006. This institution has the power to “provide protection to witnesses and victims at all stages of criminal proceedings in the courts”³⁹ for “crime in specific cases”⁴⁰. However, the elucidation of Article 5(2) states that “specific cases” include “among others, corruption, drugs, terrorism, and other crimes that can put victims and witnesses in a life-threatening situation”. There is no mention about gross violations of human rights whereas this institution is expected to complement the current efforts of human rights enforcement through Human Rights Court (Law No. 26 Year 2000).

16. Interestingly, Law No. 13 Year 2006 provides special efforts for victims of gross violations of human rights, notably in the form of medical and psycho-social rehabilitation assistance.⁴¹ In addition, victims of gross violations of human rights, through the Agency, “are entitled to submit a request to the Court to obtain: a. the right to compensation in cases of gross violations of human rights b. the right to restitution or compensation which is the responsibility of the perpetrators”.⁴² However, there is no relation between the reparation mechanism under Law No. 13 Year 2006 and Human Rights Court mechanism under Law No. 26 Year 2000.

Article 6 Right to Life

17. Consistent with the development of democracy and human rights in Indonesia, the process of amending the Constitution of the Republic of Indonesia that have started in 1999 to 2002 yielded in a much more sturdy Constitution that guarantees a wide range of human rights principles, including a series of human rights that cannot be derogated under any circumstances. In Article 28I paragraph (1), 7 (seven) non-derogable rights are affirmed, namely, the right to life, the right to freedom from torture, the right to freedom of thought and conscience, freedom of religion, the right to freedom from enslavement, the right to be recognized as a person before the law, and the right not to be tried under a law with retrospective effect. Article 28A of the Constitution expressly states that “Every person shall have the right to live and to defend his/her life and existence.” In addition, article 4 of Act No. 39 of 1999 on human rights also guarantees that right to life is a non derogable right under any circumstances.

18. Nevertheless, the law reform in Indonesia is not in line with the abovementioned Constitution, a number of laws and regulations still apply capital punishment for various criminal acts, i.e.:

Table 1

The Death Penalty in Legislations

NO	THE LEGISLATION	ARTICLE
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³⁸ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, para. 9.

³⁹ Art. 2 of Law No. 13 Year 2006 on Witnesses and Victims Protection.

⁴⁰ Art. 5(2) of Law No. 13 Year 2006.

⁴¹ Art. 6 of Law No. 13 Year 2006.

⁴² Art. 7(1) of Law No. 13 Year 2006.

1	Penal Code (KUHP)	Article 104, Article 111 paragraph (2), Article 124 paragraph (3), Article 140, Article 340, Article 365 paragraph (4), Article 444, Article 368 paragraph (2).
2	Military Penal Code (KUHPM)	Article 64, Article 65, Article 67, Article 68, Article 73 Ke1, Ke2, Ke3 and Ke4, Article 74 Ke1 and Ke2, Article 76 (1), Article 82, Article 89 Ke1 and Ke2, Article 109 Ke1 and Ke2, Article 114 paragraph (1), Article 133 paragraph (1) and (2), Article 135 paragraph (1) ke1 and ke2, paragraph (2), Article 137 paragraph (1) and (2), Article 138 paragraph (1) and (2), and Article 142 paragraph (2).
3	Law No. 12 of 1951 concerning Firearms	Article 1 paragraph (1).
4	Presidential Decree no 5/1959 on the Authority of the Attorney General/Military Attorney General in Increasing the Punishment over a Crime which Endangers the Distribution of Food and Clothing Equipments.	Article 2.
5	Government Regulation in lieu of Law no. 21/1959 that increased the punishment over crimes against economy.	Article 1 paragraph (1) and paragraph (2)
6	Law No. 31/PNPS/1964 on Basic Regulations on Atomic Energy.	Article 23.
7	Law No. 4/1976 on the Ratification and Addition of Several Articles in the Criminal Code in Relation to the Extension of the Implementation of Law on Aviation Crimes and Crimes against the Facilities /Infrastructures of Aviation.	Article 479 k paragraph (2) and 479o paragraph (2).
8	Law No, 5/1997 on Psychotropic	Article 59 paragraph (2).
9	Law No. 22/1997 on Drugs.	Article 80 paragraph (1), paragraph (2), paragraph (3) Article 81 paragraph (3), Article 82 paragraph (1), paragraph (2), and paragraph (3), Article 83.
10	Law No. 31/1999 on Anti Corruption	Article 2 paragraph (2).
11	Law No. 26 / 2000 on Human Rights Court	Article 36, Article 37, Article 41, Article 42 paragraph (3).
12	Law No. 15 / 2003 on Counter Terrorism	Article 6, Article 8, Article 9, Article 10, Article 14, Article 15, Article 16.

19. Attempts to the abolition of death penalty had been submitted to the Constitutional Court by some convicted persons sentenced to death in narcotics cases, namely Edith Yunita

Sianturi, Rani Andriani, Myuran Sukumaran (citizen of Australia), and Andrew Chan (citizen of Australia), with the basic argument that the death penalty is contrary to the right to life as guaranteed in the Constitution. But unfortunately, the Constitutional Court in their decision number 2-3/PUU-V/2007 dated on 30 October 2007, rejected the petition by arguing that the death penalty does not conflict with the Constitution. However, 4 of 9 Constitutional Court Justices gave different opinion (dissenting opinions), where Constitutional Judge H. Harjono stated that an applicant who is a foreign citizen has an equal legal status (legal standing) as citizen of Indonesia, while Judge Achmad Roestand, judge H.M. Laica Marzuki and Judge Maruarar Siahaan argued that the Constitutional Court ought to grant the petition.⁴³

20. In Indonesia, based on Law No. 2/PNPS/1964 concerning the Procedures for the Execution of Death Penalty Determined by Courts within the Civil and Military Court Jurisdiction, the execution is carried out using gunshot by a squad of Riflemen from the Mobile Brigade (Brimob) with the firing distance must not exceed 10 meters and must not be less than 5 meters.⁴⁴ If after the shooting the convicted person still shows signs of life (not dead yet), then the Commander of the Squad immediately instructs an NCO (non-commissioned officer/Bintara) of the Shooter Squad to discharge final shot by pressing his end of rifle on the convict's head just above the ears.⁴⁵

21. A monitoring conducted by *Imparsial* recorded that since 1998 up to December 2010, the death row inmates who have been executed are as many as 21 individuals. Top three cases that caused capital punishment are murder (13 cases), drugs/psychotropic drugs (5 cases) and terrorism (3 cases). 2008 was the year that implemented the largest number of death penalty executions, which were the executions of 10 people, by descending order, in the cases of murder (5 people), drug/psychotropic drugs (2 people), and terrorism (3 people).

22. When observed from the determination of death penalty verdict, 120 convicted persons received death verdict from Court authorities, started from the District Court to the Supreme Court, consisting of drug/psychotropic drugs (73 cases), murder (38 cases), and terrorism (9 cases). While the year with the most decisions of death penalty was in 2001 (17 people), in 2006 and 2008 (15 people), in 2003 (14 people), and in 2000, 2004, and 2007 with 10 people each, and the least is the year of 2010 with 4 people.⁴⁶

23. In 2012, the Attorney General's Office recorded as much as 126 death row inmates,⁴⁷ and this year the Attorney General – soon – executes 20 death row inmates, whose case has been declared as bearing permanent legal status (*inkracht*). Some of those 20 death inmates in average are associated with cases of narcotics, and the rest of them with murder and terrorism.

24. The Constitution gives the authority to the President to grant clemency and rehabilitation with attention to the consideration of the Supreme Court, in addition he is

⁴³ Constitutional Court Decision No. 2-3/PUU-V/2007 dated on 30 October 2007, page 434-471, the decision of Constitutional Court can be accessed on http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_Putusan%202-3%20PUUV2007tugPidana%20Mati30Oktober2007.pdf

⁴⁴ Law No.2/PNPS/1964 Article 13 paragraph (2)

⁴⁵ Ibid, Article 14 paragraph (4)

⁴⁶ Imparsial “Inveighing against Death Penalty in Indonesia” page 45-47, 2010

⁴⁷ Media Seputar Indonesia “Kejaksaan Agung Segera Eksekusi Terpidana Mati” Wednesday 21st November 2012, <http://m.sindonews.com/read/2012/11/21/13/690340/kejagung-segera-eksekusi-terpidana-mati>

authorized to grant amnesty and abolition having regard to consideration of the legislature.⁴⁸ So far, there have been 126 clemency petitions and 19 of them have been granted by President Susilo Bambang Yudhoyono. Out of those 19, 10 of them are juvenile convicts⁴⁹ and a convict who is blind. As for the other eight, they consist of five Indonesia citizens and three foreign nationals.

25. It is certain that the practice of capital punishment in Indonesia continued to take place, let alone that its own Constitutional Court has ruled that the death penalty does not conflict with the Constitution. It is also reflected in the revision of the Penal Code that still applies death penalty in specific articles such as narcotics, terrorism, treason, etc. The death penalty in Article 66 of the Draft Bill on Penal Code is referred to as a special consequential criminal and carried out alternately. On the basis of Article 89 paragraph (3) the execution of the death sentence can be postponed with probation period for 10 years amid certain conditions, namely: (i) the public reaction is not too large; (ii) the convicted person shows a sense of regret and there is hope for repair; (iii) the position of the convicted person in the inclusion of the crime is not very important; and (iv) there are reasons that relieve.

Article 7 Prohibition of Torture

26. Indonesia has ratified and has been member to the Convention against torture since 1998, through the Law no 5/1998 on the ratification of Convention against Torture. Additionally, some other international conventions have been ratified to support the elimination of torture such as CEDAW (adopted through law no 7/1984), CRC (adopted through Presidential Decree no 36/1990) CERD (adopted through Law no 29/1999 and further stipulated as the law on the eradication of racial discrimination through Law no 40/2009) and ICCPR (adopted through law no 12/2005). The protection against torture also is provided in 1945 Constitution, article 28 G (2) and 28 I (1) which explicitly contained wording on the protection against torture. At national level a number of laws and regulations have set the prohibition/anti torture such as the Constitution, Act No. 39 of 1999 on Human Rights, Law No. 26 of 2000 on Human Rights Courts, Act No. 23 of 2004 on Domestic Violence, and Law No. 23 of 2002 on Child Protection.

27. To respond to the numerous cases of torture that occurred hitherto, the institutions of Police and National Army (TNI) have issued internal rules such as Regulation of the Chief of National Police No. 8 of 2009 on the Implementation of Human Rights Principles. In essence, the Chief of Police's regulation includes several provisions aimed at anticipating policemen from committing act of torture. But unfortunately the internal regulation, which is quite advanced, has not effective yet if not supported by a mechanism of punishment for the perpetrator beyond disciplinary action.

28. Despite the above normative legal frameworks, torture has continued to be practiced, systematically against most of the times, people belong to the disadvantaged groups, such as petty criminals, ordinary people who have no social and economical privilege. In most cases,

⁴⁸ Article 14 of the Constitution

⁴⁹ Statement of Deputy Minister of Justice and Human Rights, Deny Indrayana, in Ministry Justice and Human Rights monthly discussion, Thursday 18/10/2012. Quoted from national media, Kompas entitled "Grasi untuk Terpidana Hukuman Mati", 18 October 2012, source <http://nasional.kompas.com/read/2012/10/18/21360628/Grasi.untuk.Terpidana.Hukuman.Mati>

torture and degrading treatment happened during the legal process or legal investigation in pre-trial detention. Many allegation of torture also were allegedly committed or by consent of police personnel and detention guards. Important cases of torture to be mentioned would include torture against Charles Mali in Belu East Nusa Tenggara in March 2011, Faisal Akbar (14) and Budri M Zain (17) in Padang, West Sumatera in December 2011,⁵⁰ and Erik Alamsyah⁵¹ in Padang West Sumatera in March 2012.

29. The cases show persistent and re-occurrence of practice of torture by police personnel, military officers, and detention guards, despite a number of capacity building program and awareness programs conducted by the National Police, Military and Detention Service institution.

30. The problem of wide practice of torture has stemmed from two aspects; first, torture has failed to be considered as a crime under the national law. There has not been any reform of the Penal Code up to today, and the absent of such provision in the penal code had made it almost impossible to prosecute those committed torture. Adverse impact on this was, in most cases were tried under the allegation of assault which significantly had different element of crimes compare to torture. Consequently most suspects received very light sentences. Second, most victims and witnesses were silent due to minimum protection scheme applicable for avoiding any possible retaliation from the suspects, especially if the suspects were member of the National Police. More over, witnesses are very difficult to be found, most police members who are witness in many cases refuse to present their accounts which may risk their colleagues to criminal charges. As witnesses who are detainees in most cases were afraid to provide statement due to possible retaliation during their time in prison.

31. To date, Indonesia's Criminal Code has yet to incorporate torture as defined in Article 1.1 of the UN Convention against Torture as a punishable crime. The long-awaited amendment process of the Criminal Code remains delayed as the Criminal Code draft has been bouncing back and forth between the executive and legislative. As indicated in its 2011 report of the situation of torture practice in Indonesia, KontraS noted that, during the period of July 2010-June 2011, there have been 28 incidents of torture committed by the TNI and

⁵⁰Faisal Akbar and Budri M Zain, two brothers were found dead in custody of Sub-Precinct Police Station (Polsekta) of Sijunjung, West Sumatra. Faisal and Budri were arrested for allegedly stealing charity box in a Mosque.

⁵¹ Eric Alamsyah was arrested on March 30, 2012 and detained in Criminal Investigation Unit (Reskrim) of Sub-Precinct Police Station (Polsekta) of Bukit Tinggi, West Sumatera. The Police of Padang City arrested Eric Alamsyah and Setiawan Nasution. After the arrest, at around 12: 55 P.M.; Erik Alamsyah and Nasution Setiawan were brought into the room of Operational Sub-Unit of Criminal Investigation Unit (OPSNAL RESKRIM) of Sub-Precinct Police Station of Bukit Tinggi. In the room, they were multiple times received violent treatments, using large lumber by the size of approximately 4 cm X 6 cm wide, broom, belt/ buckle, big bamboo beam; they were pinned with pens, even Nasution Setiawan was hit with a hammer on his knee. Both were in the room for about 10 minutes until they were finally separated. Based on the testimony of Nasution Setiawan, from separate room, he repeatedly heard the Erik's cries. This (testimony) is confirmed by the Komnas HAM. In fact, in the report, it is mentioned that Nasution saw Erik had been beaten by investigators of Polsekta Bukittinggi. At around 4 PM Nasution Setiawan and Marjoni were reunited with Erik Alamsyah in Sub-unit of Opsnal Reskrim office. They were in that room for approximately 10 minutes, when they looked at the body of Erik, there were many wounds and there was blood scattered on the floor. Both saw Erik Alamsyah was laid face-down and groaned that his stomach was in pain. According to the police, Erik Alamsyah then unconscious and was taken to the Ahmad Muchtar Hospital. Upon arrival at the hospital, Erik was declared dead. More information can be seen in the Resume of Trial Monitoring Report on the Case of Torture against Erik Alamsyah, compiled by ELSAM and the Legal Aid Foundation (LBH), the report can be accessed at http://www.elsam.or.id/downloads/1348457213_Resume_LaporanPemantauanSidangErik_I.pdf

police in Indonesia, which include beatings, assaults with electric batons, hitting with a wrench, to name but a few examples.⁵² Taken into account the persistent practice of torture, the existence of a legal vacuum with respect to torture would make prosecution for torture impossible; thus fostering a climate of impunity. In order to fill such a legal vacuum, civil society has proposed two feasible alternatives: making a partial amendment to the current Criminal Code⁵³ or enacting a specific law that criminalizes torture in accordance with the Convention, taking into consideration the principle of *lex specialis*.

32. At least six out of twenty-eight aforementioned cases have drawn public attention to the persistent practice of torture in Indonesia, namely torture case of RMS activists in Ambon; torture case of Hermanus in Maluku; torture case of Charles Mali in NTT; torture case of Aan Susandhi at Artha Graha office; practice of flogging in Aceh; and the disclosure of torture videos (*YouTube*) in Papua.

33. In regard to torture case of RMS activists in Ambon, 13 people were tortured by the Special Detachment 88 Anti-Terror. Victims were physically and psychologically tortured and given a very limited access to their family, legal counsel, healthcare.⁵⁴ In the case of Hermanus, victim was subjected to multiple torture sessions at Perigi Lima Resort Police Headquarter and Tulehu Maluku Sector Police station. Hermanus was sentenced to 16 years' imprisonment in Ambon prison for a murder he did not commit.⁵⁵ Moreover, Charles Mali was tortured to death on 13 March 2011 by members of 744th Infantry (TNI Yonif 744).⁵⁶ Aan Susandhi was tortured by two police officers of Maluku Regional Police due to the disclosure of corruption scandals related to Artha Graha's owner, Tommy Winata.⁵⁷ There have been 61 (sixty-one) cases of flogging in Aceh (up to 2011) after the enactment of *Qanun Jinayat* which includes stoning for adultery acts.⁵⁸ Members of 753rd Infantry (TNI Yonif 753), whose acts of torture recorded and circulated on *YouTube* in 2010, were prosecuted using the Military Criminal Code and received a light sentence.⁵⁹

34. Indonesia as a country that has ratified the Convention of CAT has not fully taken the harmonization measures or administrative and judicial procedures to prevent the occurrence of torture. Currently, there are a number of laws and regulations that have not been harmonized with the provisions of the Convention on Anti Torture, for example provisions on extraditing perpetrators of torture as mandated in article 8 UNCAT. Act No. 1 of 1979 on Extradition can be ensured that it does not include "torture" as one of criminal acts that can be extradited. Similar with the Criminal Code, Law No. 1/1979 only recognizes the term "persecution". Formulation of persecution in this Act is: "The persecution that results in severe injuries or death of person, the planned persecution and gross persecution"⁶⁰ Because of

⁵² KontraS, "*Torture: A Heinous Act which is not Seriously Addressed: Report on Torture Practice in Indonesia for the International Day of Support for Victims of Torture*", 2011, pp. 5-6 <http://kontras.org/data/torture%20english.pdf>

⁵³ In the 2010 draft of the Criminal Code, torture is incorporated in Article 404

⁵⁴ *Ibid*, page 7

⁵⁵ *Ibid*, page 14

⁵⁶ *Ibid*, page 14

⁵⁷ *Ibid*, page 15

⁵⁸ *Ibid*, page 16

⁵⁹ *Ibid*, page 18

⁶⁰ Annex to Law No.1/1979 on Extradition

this, some extradition treaties made between Indonesia and other countries⁶¹ have not yet incorporated the criminal act of torture as a crime that can be extradited.

35. With regard to the application of the non-refoulement principle, as specified in article 3 of the UN CAT, both the Constitution and Act No. 1 of 1979 have not unequivocally accommodated this principle, although the Extradition Act specifies several reasons to refuse extraditing someone i.e. If: First, he is liable to a death penalty according to the law of the state requesting extradition, while under the law of the Republic of Indonesia the crime is not threatened with capital punishment or the death penalty is not always carried out, unless the requesting State gives guarantees so as to satisfactorily convincing that the death penalty will not be implemented. Second, the extradition request is rejected when the individual to be prosecuted is liable or subject to any other act by reason of his religion, political belief, or nationality, or because he belongs to a specific ethnic or population group. Third, the extradition request is rejected; if he will be handed over to a third country for crimes committed before he was requested for the extradition.⁶² So far, only extradition treaty between Indonesia-Australia that passed through the Act No. 8/1994, which lists the conditions of not extraditing a person when there is allegation that he will become a victim of torture.⁶³

Recommendations

- Accelerating the harmonization of legislations, especially the Penal Code that specifically related to the definition of torture to be in accordance with the UN CAT
- Accelerating the revision of the Code of Criminal Procedure by specifying precautionary measures against acts of torture, such as reduction of detention, access to legal aid, mechanisms of complaint and monitoring, inspection procedures in investigation, as well as provisions that invalidate evidence gained from torture.
- Ensuring the implementation of non-refoulement principle especially for asylum seekers who entered Indonesia.
- Revising local regulations that implement physical punishments, such as whipping that applies in Aceh.
- Accelerating the ratification of OP-CAT as determined in the Human Rights Plan of Actions.

Article 9: Prohibition of Arbitrary Detention

36. Indonesia's Constitution after the amendments has ensured the rights of every individual to have feeling of security, protection from threats of terrorism, including the guarantee from arbitrary detention. Indonesia's Constitution and Law No. 39 of 1999 on Human Rights (article 34) has guaranteed the majority of civil and political rights as set in the covenant, although in some set of circumstances police's brutal acts still happen, also kidnapping and arrest as well as arbitrary detention committed by police in cases of conflicts involving local community.

⁶¹ Presently Indonesia has extradition treaties with Malaysia, Philippines, Thailand, Republic of Korea, Australia, and Hong Kong.

⁶² Article 13, 14 and Article 15 Law No.1/1979 on Extradition

⁶³ Article 9 (1) letter E Law No. 8/1994

37. In criminal case, the laws and regulations in Indonesia, particularly the KUHAP (Code of Criminal Procedure) does not clearly regulate about reasons of arrest. KUHAP only states that the arrest is made based on 'sufficient initial evidence'.⁶⁴ The KUHAP itself does not regulate further details on sufficient initial evidence criteria, except only mentioning that the sufficient initial evidence is an initial evidence to suspect a criminal act.⁶⁵

38. Regarding the stipulations of detention, Criminal Code (KUHP) specifies two criteria or conditions to execute an arrest, namely, *first*; against a suspect or defendant who commits a criminal offence and/or attempts to as well as provides assistance in a criminal offence is liable to imprisonment for five years or more (juridical/objectivity reason).⁶⁶ *Secondly*, detention based on subjective reasons, namely, an apprehension that suspect or the accused will run away, destroy or remove evidence, or is feared of repeating the criminal act.⁶⁷ Code of Criminal Procedure, as the main regulation in criminal acts, determines the period of detention and extended detention, which is relatively long and variable according to the stages of the investigation process, as specified in the table as follows:

Table of Detention Period Based on Code of Criminal Procedure (KUHAP)

Stages of Investigation Process	Detention/Extended by	Maximum Period	Legal Basis
Investigation	Investigators	20 days	Article 24 paragraph (1) KUHAP
	Extended by the Attorney	40 days	Article 24 paragraph (2) KUHAP
The Prosecution	The Public Prosecutor	20 days	Article 25 paragraph (1) KUHAP
	Extended by Chairman Of District Court (PN)	30 days	Article 25 paragraph (2) KUHAP
Examination in court	District Court Judge	30 days	Article 26 paragraph (1) KUHAP
	Extended by Chairman Of District Court (PN)	60 days	Article 26 paragraph (2) KUHAP
The examination of appeal	High Court Judge (PT)	30 days	Article 27 paragraph (1) KUHAP
	Extended by Chairman Of High Court (PT)	60 days	Article 27 paragraph (2) KUHAP
Examination of cassation	Supreme Court Judge (MA)	50 days	Article 28 paragraph (1) KUHAP
	Extended by Chairman Of Supreme Court	60 days	Article 28 paragraph (2) KUHAP
		400ys	

⁶⁴ Article 17 of Code of Criminal Procedure

⁶⁵ *Ibid*, Explanation to article 17 *jo* article 1 point 14 of Code of Criminal Procedure

⁶⁶ Article 21 paragraph (4) of Code of Criminal Procedure

⁶⁷ *Ibid* Article 21 paragraph (1)

39. In addition to the "normal" provision above, the Code of Criminal Procedure also determines about the state of exception to detention, as provided for in Article 29. On the basis of article 29, detaining institution can apply extended detention in excess of the provisions of Articles 24, 25, 26, 27 and 28 of the Code of Criminal Procedure (KUHAP).

Article 29 establishes that for the interest of examination, the detention of suspect or the accused can be extended based on proper reasons and cannot be avoided because: the suspect or accused is suffering from a physical or mental disorder as evidenced by (medical) description, or the case under examination is threatened with nine years of imprisonment or more.⁶⁸

Table of State of Exceptions to Extended Detention

Stages Of Examination Process	Requested by	Decided by	Duration	Legal Basis
Investigation	Prosecutor's Investigator	Chairman of District Court (PN)	30 days	Article 29 paragraph (2) KUHAP
	Prosecutor's Investigator	Extended by Chairman of District Court (PN)	30 days	Article 29 paragraph (2) KUHAP
The Prosecution		Chairman of District Court (PN)	30 days	Article 29 paragraph (2) KUHAP
		Extended by Chairman of District Court (PN)	30 days	Article 29 paragraph (2) KUHAP
Examination of District Court	Chairman of District Court (PN)	Chairman of High Court (PT)	30 days	Article 29 paragraph (2) KUHAP
	Extended by Chairman of High Court (PT)	Extended by Chairman of High Court (PT)	30 days	Article 29 paragraph (2) KUHAP
Examination of Appeal	Supreme Court Judge	Supreme Court Judge	30 days	Article 29 paragraph (2) KUHAP
	Extended by Supreme Court Judge	Extended by Supreme Court Judge	30 days	Article 29 paragraph (2) KUHAP
Examination of cassation	Chairman of Supreme Court	Chairman of Supreme Court	30 days	Article 29 paragraph (2) KUHAP
	Extended by Chairman of	Extended by Chairman of	30 days	Article 29 paragraph (2)

⁶⁸ Article 29 paragraph 1 letter (a) and (b)

	Supreme Court	Supreme Court		KUHAP
			300 days	

Based on the provisions of detention period at such length, it can be said that a suspect will not be easily brought before court straight away. At investigation level, an investigator/police is authorized to detain (suspect) for 20 days and has authority to extend the detention for 40 days, while at prosecution level, a Prosecutor is authorized to make detention for 20 days and can extend it for 30 days more.

Weak Mechanisms of Monitoring and Reparation for Victims of Arbitrary Arrest and Detention

40. Code of Criminal Procedure does provide a mechanism for annulment of arbitrary arrest or detention through pre-judicial mechanisms (habeas corpus). However, the application of this mechanism is still minimal and limited to use by the suspects. The lack of utilization of pre-trial mechanism can be seen from some factors. Such as the lack of people's comprehension over pretrial appeal, compounded by lacking availability of advocates, as well as unwillingness to use this mechanism as it is considered to be ineffective mechanism of complaint, since courts often merely examine its formality, without testing its essence.⁶⁹

41. Research carried out by ICJR in 2012 mentioned that during 2005-2010, out of 2,830 criminal cases, District Court in Kupang, East Nusa Tenggara, only received 12 pre-trial of case appeal. While in South Jakarta, the number of advocates reached 1,860, however for the period of 2005-2010 South Jakarta District Courts only received pre-trial appeals as much as 211 cases, 75 of which were related to detention issue.⁷⁰

42. ICJR listed some issues in pre-trial mechanisms such as timeliness in pre-trial proceedings. Article 82 paragraph (1) Letter c of Code of Criminal Procedure states that pre-trial examination to be carried out quickly and no later than 7 days the judge should have already made a ruling. However, in practice the pre-trial takes an average of 19 working days, beginning from the filed appeal up to the ruling or decision made by the judge. The fastest takes 12 working days and the longest 33 working days. This situation occurs because the courts apply the principles in civil law, so that the calling to the investigator/prosecutor must pay attention to formal requirements of summon. One of the causes that slowed down pre-trial process is the position of officials summoned by the Court. Although the Code of Criminal Procedure does not recognize the terms of Appellee/Respondent (Termohon) and the obligation to hear the explanation of authorized official, but in practice the Appellee term is deployed, therefore the court also seems to have an obligation to hear the Appellee's justification.⁷¹

43. In addition to the aforementioned, investigators and prosecutors are often resistant to the use of pre-trial mechanism. When a case is identified as filing a pre-trial hearing, usually the investigators speed up the investigation process and immediately assign it to Court, so that the pre-trial attempt is aborted. The lack of goodwill from investigators in utilizing pre-trial mechanism is also indicated by investigator's lack of enthusiasm to attend the pre-trial

⁶⁹ Institute for Criminal Justice Reform (ICJR) "Potret Penahanan Pra Persidangan di Indonesia, Studi tentang Kebijakan Penahanan Pra Persidangan dalam Teori dan Praktek", page 255, 2012

⁷⁰ Ibid, page 255

⁷¹ Ibid, page 256

hearing, thereby resulting in the slowness of pre-trial case's handling, which has a very short phase.⁷²

44. December 2012, the Government has already submitted the Draft Code of Criminal Procedure Law (RKUHAP) to the House of Representatives to be deliberated in the national legislative program of 2013. However, the terms and procedures of arrest and detention have not changed much in the RKUHAP, so does the period of detention, which is still lengthy. The RKUHAP even states that a suspect who doesn't have permanent domicile can still be detained though he/she does not meet the subjective and objective terms. The most observable change is the existence of Preliminary Judges/Pre-Trial (Commissioner Judges) mechanism that actively examine the process of arrest and detention and give approval to determine whether detention can be extended or not.

45. Specifically for foreigners who illegally enter or reside in the territory of Indonesia, Law No. 6 of 2011 on Immigration gives authority to immigration officials to put the strangers⁷³ in the Immigration Detention House (Rudenim)⁷⁴ However, the legislation does not specify certain period of confinement for a stranger in the Immigration Detention House. The uncertainty of the time period can be seen from the provisions of Article 85 paragraph (1), which only stating that the detention of foreigner is finished until deportation of the person.⁷⁵ Furthermore, otherwise article 85 paragraph (2) of this Act determines that stranger may be detained for a period of 10 (ten) years if deportation cannot be accomplished.⁷⁶ After that the Minister or immigration officer may release them from Immigration Detention House after exceeding a period of 10 years and allows foreigners to reside outside the Immigration Detention House with the obligation to report periodically.⁷⁷

46. Since Indonesia has no regulations regarding Refugee and Asylum Seekers, it is certain the foregoing stipulation also applies to refugees and asylum seekers. In practice, refugee or asylum seekers who enter the territory of Indonesia are automatically placed in the Immigration Detention House, except under certain circumstances such as women and children, or part of them already had refugee status from UNHCR -Jakarta. However, asylum seekers who have been granted refugee of the UNHCR-Jakarta, also potentially placed in the Immigration Detention House waiting for the next resettlement process. To date, there is no legislation that gives the certainty of detention period at Immigration Detention House as abovementioned.

Recommendations;

- The revision of the Code of Criminal Procedure which will be discussed in the House of Representatives should pay attention to detention period to be in accordance with the standards and principles of human rights
- Revising the laws and regulations related to the duration of detention, in particular Act No. 6/2011 concerning Immigration.

⁷² Ibid, page 257

⁷³ Article 1 point 9 Law No.6 of 2011 on Immigration defines strangers are people who are not citizens of Indonesia

⁷⁴ Article 83 paragraph (1) Law No.6 of 2011 on Immigration

⁷⁵ Ibid, Article 85 paragraph (1)

⁷⁶ Ibid, Article 85 paragraph (2)

⁷⁷ Ibid, Article 85 paragraph (3)

Article 10 Conditions of Detention

47. Law No. 39 of 1999 concerning Human Rights, Article 66 states that every child has his right not to be deprived of his freedom when against the law.⁷⁸ Specifically, Law No. 23 of 2002 on Child Protection, in Article 17 subsection (1), subparagraph (a) mentions that a child who is deprived of his freedom has the right to be treated in a humane way and his placement are separated from adults. The Constitution as well as Law No. 39 of 1999 on Human Rights do not mention these rights specific only to the child.

The biggest challenge which has not been resolved yet, as presented in the government report, is addressing the overcapacity problem in custodies which have an impact on treatment both in the police department and in correctional institutions.

48. Data comparison between the number of *Warga Binaan* or prisoners by Correctional Institutions & detention house (Rumah Tahanan/Rutan) in Indonesia displays a fairly high overcapacity each year, which is in 2004 the number of prisoners is 31.306 people and the number of detainees is 55.144, in total there are 86,450 people, while the capacity is for 66.891 people. In 2005, there are 40.764 detainees and 56,907 prisoners, in total there are 97,671 people for a capacity of 68,141 people. Moreover, in 2006 the number of detainees is as much as 47.496 people, while the number of prisoners is 69.192; the total number is 116.688 people for a capacity of 70.241 people. In 2007, there are 54.307 detainees, whereas the number of prisoners is as much as 76.525 people, the total is 130,832 people for a capacity of 81,384 people. Then, up to March 2008, the number of detainees is 55.930 and 74.490 prisoners, so the total is 130.420 people for a capacity of 81,384 people. These data indicate 45% overcapacity.⁷⁹

49. Several researches which have been conducted reveal that overcapacity is approximately 54.73% of the required capacity.⁸⁰ This overcapacity in prisons is due to several factors which are: First, an increase in the number of crimes each year, particularly for drug cases, the number of both dealers and users reaches approximately 23% of the total inhabitants in prisons.⁸¹ Minister of Law and Human Rights' Regulation No. M.HH-OT.02.02/2009 on the Blue Print of Correctional System Reform states that overcapacity issue is one obvious symptom of the lack of synergy in the working of the criminal justice system, particularly those which are related to cases of Narcotics and Psychotropic Substances. Secondly, to date the national criminal system does not acknowledge any alternative forms of punishment for convicts other than confinement or the death penalty for

⁷⁸ Later in this article mentions a child deprived of his liberty is entitled to humane treatment and legal assistance. Article 66, paragraph 5, 6 and 7.

⁷⁹ A presentation by Director General of Corrections "Praktik-praktik Penyiksaan dan Perlakuan yang Tidak Menyenangkan di dalam Lapas/Rutan" presented in the National Workshop on Human Rights, National Human Rights Commission, 2008. Can be accessed at www.komnasham.go.id/.../Suaeb_Praktik%20Penyiksaan%20di%20LAPAS.ppt.

⁸⁰ This study stated that in the year 2003 the number of inhabitants LP (Detainees and Prisoners) is 71.586 people for a capacity of 64.345 people. Look "Menunggu Perubahan dari Balik Jeruji: Studi Awal Penerapan Konsep Pemasyarakatan", Asfinawati Research Team (et al), pg. 32, Kemitraan, 2007.

⁸¹ Ibid, pg. 33.

certain crimes. Thirdly, no parole provision goes to inmates who have fulfilled the criteria.⁸² As a matter of fact, parole can be one of the main solutions to reduce overcapacity in prisons. However, the procedure to obtain parole is very difficult; in fact a prisoner who has undergone 2/3 of his prison sentence run get difficulties to get his parole. An estimated 20-30 percent of prisoners who have fulfilled the time criteria of undergoing 2/3 of the sentence can not be freed.⁸³ Those difficulties are very possible to occur looking at the parole provisions which must meet the requirements in terms of substantive and administrative.

50. In addition, the mechanism of granting parole also takes a long time and the procedure is quite long and very centralistic. In granting parole, the Minister of Justice and Human Rights is the only authorized official to grant parole approval.⁸⁴ One of the obstacles to get a parole is a fairly lengthy submission process from to prisons to the Director General and further requesting an approval to the Minister. It would be different otherwise, if a parole application can be submitted to the judge in the District Court, thus it can accelerate the examination process. Centralized mechanism of a parole indicates poor governance in prisons and is believed to provide a possibility of corruption/bribery when an inmate filing a parole.

The Condition of Prisons

51. Research conducted in 2012 by the Center for Detention Studies (CDS), cooperated with the Directorate General of Corrections, Ministry of Justice and Human Rights, described the situation and condition of prisons in Jakarta. The research is conducted in several prisons/correctional facilities in Jakarta, such as Class II A Prison, East Jakarta (Pondok Bambu), Class I Cipinang Detention House, Class I State Cipinang Prison, and Class I Detention House in Central Jakarta (Salemba), providing information and an overview of the condition and situation of prisons and detentions in particular the fulfillment of the rights of detainees or prisoners in accordance with the Standard Minimum Rules for the treatment of the Prisoners (SMR), such as the rights to worship, have accommodation, clothing and bedding, food and beverage, health care, sanitation, vocational training, exercise and sports, reading education, relations with the outside world, complaint mechanisms, classification and separation. The results of this research revealed that some rights of prisoners/detainees, such as rights to worship, have been are fulfilled, however some other prisons/detentions have not met the right to submit a complaint.

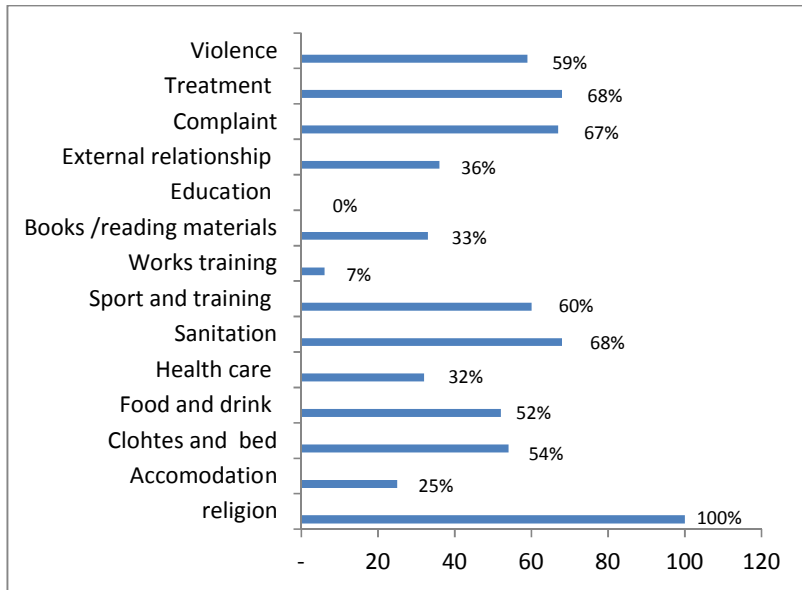
52. Class II A Detention, East Jakarta, or better known as Pondok Bambu Prison is established in 1974 by the Local Government (LG) DKI Jakarta. The coverage of Class II A Detention, East Jakarta includes Central Jakarta, East Jakarta, North Jakarta, South Jakarta, West Jakarta, Cikarang and Bekasi which specifically accommodates women and boys under the age of 18. After the renovation, the capacity of the prison is 619 people. When the monitoring was conducted, the total occupant of Pondok Bambu Prison is 1.114 people.

⁸² Transkrip Focus Group Discussion with Correctional Institutions Officials conducted by the Partnership and the Jakarta Legal Aid, June 2 2010.

⁸³ Ibid, Transkrip Focus Group Discussion.

⁸⁴ Ibid, Article 11. The provisions of Article 12 mentions "If the Directorate General of Corrections agreed with the Head of Corrections Prisons, then the proposal will be forwarded to the Minister of Justice for approval."

The research conducted in Pondok Bambu displays the following results: ⁸⁵



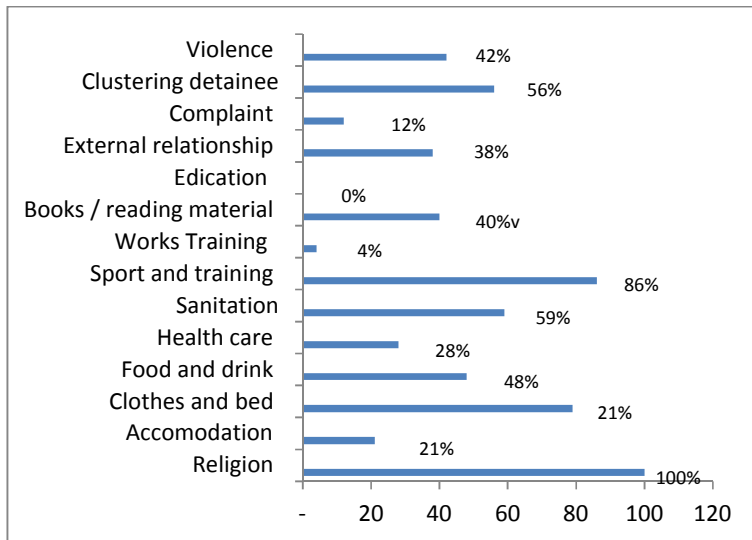
53. Based on the matrix illustrated above, it shows a lower percentage of the fulfillment of the right to education and job training compared to other fulfillment of other rights. Moreover, the fulfillment of the right to get medical care and accommodation is still at 25%. On the other hand, the fulfillment of other rights, such as the rights to worship and to make a complaint shows a fairly high rate of 67%. Especially with regard to the complaint, as much as 14% of respondents declare it has not been fulfilled, while 19% do not answer the question about the fulfillment of the complaint. ⁸⁶ Similarly, in terms of acts of violence, 59% claims it is free of violence; though by 25% of respondents do not give an answer.

54. The following is the result of research by CDS in Class I Detention House Cipinang: ⁸⁷

⁸⁵ Center for Detention Studies (CDS) “Laporan Pelaksanaan Pengawasan Eksternal Pada Lapa/Rutan di DKI Jakarta”, pg. 15, 2012.

⁸⁶ Ibid, pg. 22 - 23

⁸⁷ Ibid pg. 25



The study result by CDS in Class I Detention House Cipinang shows high percentage of fulfillment of the right to worship. On the other hand, the lowest percentage is at 0% in the fulfillment of the right to education and the second lowest is at 4% in the fulfillment of the right to works training. As for the fulfillment of accommodation, clothing and bedding, and sanitation are still below 30%. On the other hand, the fulfillment of the right to make a complaint is still very low at 12%. This research also shows that 67% of respondents claim to never convey any complaints due to several reasons like not knowing the procedure and not wanting to find any problems with the officer. While 21% of respondents think that the handling of complaints is not good enough since there is not any follow-up.⁸⁸

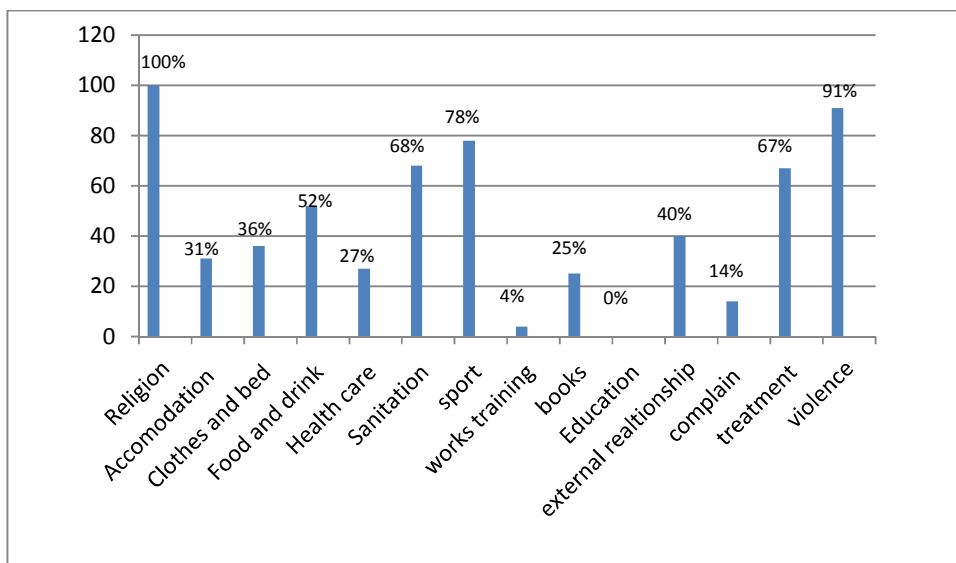
Similarly in terms of acts of violence, 24% of respondents claim to have experienced physical violence and verbal abuse from prison officers. Meanwhile, 34% of respondents do not answer this question.⁸⁹

55. The following is the result of study conducted by CDS in Class I Detention Center in Central Jakarta (Salemba):⁹⁰

⁸⁸ Ibid, pg. 32

⁸⁹ Ibid, pg. 33

⁹⁰ Ibid, pg. 34



The result above reveals that the situation in Salemba Detention is also not much different as the other prisons. The fulfillment of the right to worship/religion, sports, eating and drinking, etc., is very high compared to the others. On the other hand, the fulfillment of the right to education, job training, and health is still quite low.

As for the fulfillment of the right to accommodation, this result displays that 31% state it has been fulfilled, while 19% of respondents think that the cell/room they inhabit is too dense and lack of ventilation. However, the number of respondents who do not answer to this question is also very high at 50%.⁹¹

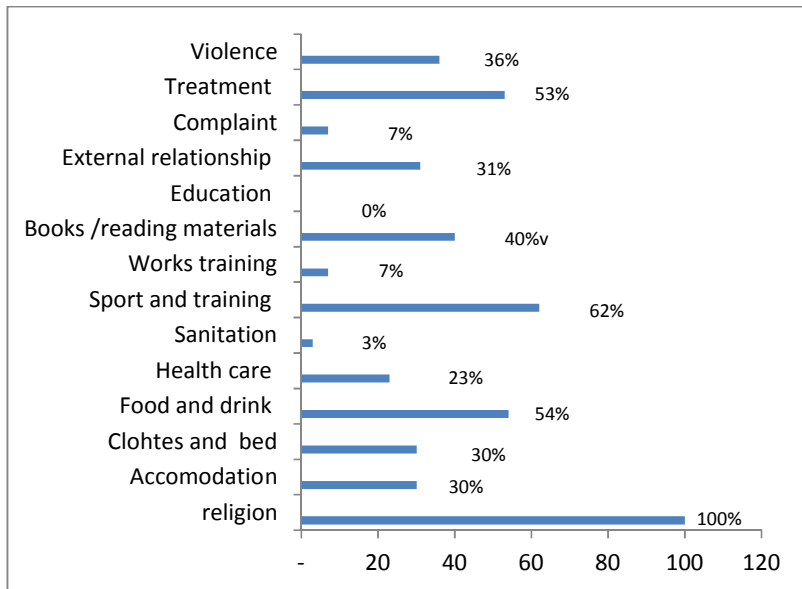
Regarding to complaints, the majority of respondents seldom express their complaints since they feel reluctant. Thus, in this category, 57% of prisoners/detainees do not answer this question. Then, 14% of respondents are satisfied with the fulfillment of the right to complain in the form of suggestion box in Salemba Prison. However, 29% of responses state this right has not been fulfilled due to no follow-up.⁹²

56. The study result in Class I Cipinang Prison is as follow: ⁹³

⁹¹ Ibid, pg. 35

⁹² Ibid, pg. 41

⁹³ Ibid, pg. 43



The data shows that the fulfillment of religious right is very high, whereas the fulfillment to sanitation, education, and right to complain is still low at 3%, 0%, and 7% respectively.

Regarding to the right to submit complaints, a majority of respondents which is 79% of respondents do not answer this question. This is because they never express any complaints since they are reluctant and do not want to find any problems. Only 5 responses from a total of 70 responses express the need to make a complaint and this right is adequately fulfilled by the availability of complaint boxes in Cipinang Prison.⁹⁴

As for violence in prisons, 36% of respondents state that they have never been a victim of violence in Cipinang Prison, while 58% of respondents do not answer this question, and the remaining 6% say that there had been violence in prison.⁹⁵

57. In principle, the Law no. 12 of 1995 on Correctional Institution states that every prisoner has the right to make a complaint to the head of prisons for the treatment from officers or fellow inmate of his.⁹⁶ Similarly, a prisoner has the right to file a complaint when receiving treatment or disruption from officers or other inmates.⁹⁷ It is unfortunate that there is a high number of respondents who have never filed a complaint. Based on the survey results above, it is shown that at Class I State Cipinang Prison the fulfillment of the right to file a complaint is only at 12%, 14% at Class I Central Jakarta Prison, and only 7% at Cipinang Prison. On the other hand, Class II A East Jakarta Prison has a fairly high percentage in the fulfillment of the right to complaint at 67%.

⁹⁴ Ibid pg. 49

⁹⁵ Ibid, pg. 50

⁹⁶ Article 14 paragraph (1) letter (e) of the Law No.12/1995 Article 25 of Government Regulation no. 32/1999 on Terms and Procedures on the Implementation of Prisoners' Rights in Prisons.

⁹⁷ Article 34 of Government Regulation No. 58/1999 on the Terms and Procedures on the Implementation of Authority, Task and Responsibility of the Officers in Prison.

58. Research conducted by the CDS in collaboration with the Directorate General of Corrections in 2012 mentions several reasons for the low percentage of prisoners' filing a complaint which are: First, prisoners/detainees are not familiar with the procedure to file a complaint. Some of them admit to not knowing that they have the right to file complaints. Filing complaints may be facilitated by the prisons in the form of suggestion box. Nonetheless, respondents state that the box is rarely checked by officers. Secondly, prisoners/detainees do not want to find any problems with officers. Lastly, they are ignorant because they think that their complaints will not have much effect on the changing of conditions in prisons.⁹⁸

Under the existing provisions, particularly Article 26 of Government Regulation No. 32/1999 on Terms and Procedures on the Implementation of Prisoners' Rights in Prisons, and the procedure for submission of complaints resolution further stipulated by the Ministerial Decision. It was unfortunate that there has been no decision by the Minister of Law and Human Rights to govern the complaint mechanisms.

Normatively, Chief of Correctional Institutions is responsible to report to police if there are any prisoners who die unnatural⁹⁹ to be investigated and carried out visum et revertum. Nonetheless, in many cases the Chief of Correctional Institutions often denies if there are any inmates who die unnaturally or are tortured by prison guards.¹⁰⁰

Recommendation:

- Increasing any efforts to address overcapacity in prisons by creating a parole mechanism which is accessible to all prisoners.
- Recommending the Indonesian government to immediately ratify the OP CAT.
- Recommending the Government of Indonesia to immediately discuss the revision of the Criminal Code and Criminal Procedure Code to meet human rights standards.

Article 12 (Freedom of Movement) and Article 13

59. Indonesia has long been a transit country for those hoping to seek asylum or refugee, especially to Australia. As recorded, Indonesia had received refugee since 1979, where hundred thousands of Vietnamese were facilitated in Galang Island Indonesia, that they finally resettled or repatriated. The number is increasing year after year. Until May 2012, around 4,552 asylum seekers and 1,180 refugees were registered in UNHCR Indonesia.

Indonesia Legal Framework on Asylum Seeker and Refugee

⁹⁸ CDS, pg. 86

⁹⁹ Article 25 paragraph 2 of Government Regulation No. 58/1999

¹⁰⁰ Gap Analysis Study Report of the UN-CAT and the Legal System, legislation and policy in Indonesia " Jalan Panjang Penghapusan Penyiksaan ", page 24, 2010. In the report, it is stated that two prisoners, Henry and Ben (25 years old) died after being tortured by five prison guards because of being caught using mobile phones. However, Chief Security Penitentiary Tangerang Class I denied the inmates died after being tortured in prison wardens.

60. Since 1956 Indonesia has been recognizing the protection of political asylum seeker under the Circular of Prime Minister. And it has been continue regulated within Indonesia current legal frameworks. The Indonesia Constitution of 1945 stipulates that *“everyone has the right to obtain political asylum from another country”*. As well as the Law No. 39 of 1999 on Human Rights which also stipulate that *“everyone has the right to seek asylum to have political protection from another country, and that does not apply to those who commit a non political crime or something that contradict to the purpose and principle of the united nations”*.

61. Nevertheless, Indonesian Legal Frameworks doesn't fully recognize refugee in accordance with the 1951 Convention on Status of Refugee. According to Indonesian Immigration law No. 9 of 1992 as amended by Law No. 6 of 2011, any immigrant who enter Indonesia jurisdiction without proper documentation, will be regarded as illegal immigrant, despite the fact that they are asylum seeker or refugee. Therefore, the immigration measures: immigration detention, fine, and/or deportation, are imposed to those considered as illegal immigrant, including asylum seeker and refugee. The Immigration Law of 2011 only regulates victim of people smuggling that will be treated differently.

62. The Law No. 37 of 1999 on Foreign Relation has mandated the government to draft presidential decree on Asylum Seeker and Refugee. However, it has been 13 years since the law came into force without any sign of progress.

63. The only operational regulation available to be used in this particular field is The Director of Immigration Regulation of 2010 that allow those who claim asylum or refugee may remain staying in Indonesia territory without fear of being deported. Under this regulation, they will be referred to UNHCR for under taking Refugee Status Determination Process. Deportation can only be imposed to those whose claim have been rejected by UNHCR. Detention can also not to be imposed limited to families, children, pregnant women, and people with illness. But for single male or female, they still have to spend their time in the immigration detention center, until their refugee statuses are granted.

64. Indonesian government has actually planned to accede the 1951 convention by 2009, but it was not realized on time. In the government next human right action plan, the convention is considered to be acceded in 2013. Although Indonesia is not a state party to the 1951 convention, however some rights of the refugee that are guaranteed under the convention can also be found in Indonesian domestic law, therefore Indonesian government is still bound to its obligation to protect the rights of asylum seeker and refugee. Some of the rights such as Right for non refolement, Right for non discrimination, Freedom of religion, Right attaching to marriage, Right of association, Access to court and legal assistance, right to engage in wage-earning employment, Housing Right, Right to public education, Freedom of Movement, and Right to naturalization. These rights are all guaranteed under the Indonesian Constitution of 1945, The Law No. 39 of 1999 on Human Rights, and several international human rights instruments that have been adopted into domestic law i.e. the ICCPR, ICESCR, and the CRC.

Situation of Asylum Seeker and Refugee

65. Despite the fact that Indonesia is obliged to protect everyone's right, asylum seeker and refugee are still experiencing violation in various of human rights field. Asylum seekers or refugees practically don't have access to their civil rights as well as their economic, social, and cultural rights.

66. As result of being regarded as illegal immigrant, asylum seeker or refugee in most cases are put in detention without any rights for due process of law. Approximately there are 13 immigration detention center (IDC) and more immigration cells in regular immigration offices with capacity 10 - 80 people, where the asylum seeker or refugee spend most of their time waiting for refugee status and/or resettlement. The biggest IDC in Indonesia, so-called Tanjung Pinang IDC, can accommodate 400-600 people. In practice, detention can be exempted limited to families, children, pregnant women, and people with illness. But for single male or female, they still have to spend their time in the immigration detention center, until their refugee statuses are determined. There are only 4 Places for Asylum Seekers and refugees outside the detention fully accommodated by IOM or UNHCR.

67. The children of asylum seeker or refugee do not have access to Indonesian public school due to administrative requirement or language barrier. Most of Indonesian public school only accept Indonesian children who fulfil administrative requirement, such as birth certificate and other administrative requirements. In result, many children of asylum seeker or refugee remain uneducated and can only access informal education.

68. Asylum seeker and refugee also do not have access to health care. They need to pay much in order to get a proper health care. Without ability to pay, asylum seeker or refugee are prone to suffer violation of their right to health while they are in Indonesia. Asylum seekers or refugees are also not allowed to work formally, regardless their capability to work. The government only allow them to work informally without any legal protection on their rights to work. They don't even have access to legal counsel as some NGOs who once tried to provide them on 2010 are refused to provide such access by the Indonesian authority.

Article 14 The Right to Equality before Courts and Tribunal and to a Fair Trial

69. Recognition and guarantee of a fair trial can be found in the Constitution, notably in Article 28D(1).¹⁰¹ The Constitutional Court has affirmed that the right to a fair trial is an inherent part of the rule of law principle.¹⁰² In addition, Law No. 39 Year 1999 on Human Rights also affirms that every person has the right to recognition, guarantee, protection and fair treatment of law and obtain legal certainty and equal treatment before the law.¹⁰³

¹⁰¹ Article 28D(1) states "Every person shall have the rights of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law".

¹⁰² Constitutional Court Decision in the judicial review of Article 31 of Law No. 18 Year 2003 on Advocate.

¹⁰³ Arts. 5 and 7 of Law No. 39 Year 1999 on Human Rights.

Law No. 8 Year 1981 on Criminal Procedure Code (KUHAP) has adopted several principles such as the principle of legality, the presumption of innocence, compensation and rehabilitation, a simple, fast, and low-cost judicial process and the principle of an open justice. KUHAP also guarantees the rights of the suspect, such as the right to be immediately examined, brought to court and tried, the right to know the charges, the right to freely provide information to investigators and judges, the right to an interpreter, the right to receive legal assistance at every level of examination, the right to call a doctor for the suspect or defendant.¹⁰⁴

70. In addition, KUHAP also guarantees a set of principles such as the right to be promptly informed of the reasons for the arrest and detention. In practice, this right is yet to be implemented. In many cases, a suspect is not informed of the reasons for the arrest or detention, notably in cases involving poor people or drugs. *Jaringan Pemantau Pelanggaran HAM Korban Napza (JP2HAM)* records that in 2012, there are 112 unlawful arrests.¹⁰⁵ The Indonesian Legal Aid and Human Rights Association (PBHI) also records that from December 2011 to February 2012, 18 complaints received in regard to unlawful arrests and 68 cases noted that the police failed to provide arrest warrants at the time of the arrest and notification to the family. In general, the police will provide ‘back-date’ arrest warrant and extension of detention.¹⁰⁶

71. In regard to the right to legal assistance, KUHAP also specifies that every suspect or accused has the right to obtain legal assistance from one or more legal counsels¹⁰⁷ and has the right to make his or her own choice of legal counsel.¹⁰⁸ KUHAP also determines that prior to the examination by an investigator, the investigator is obliged to notify the suspect or defendant his or her right to obtain legal assistance.¹⁰⁹ KUHAP also requires the authority to assign legal counsel free of charge to the suspect or defendant who (economically) cannot afford a legal counsel and is accused of having committed an offence which is punishable with imprisonment of five years or more.¹¹⁰ The language “economically cannot afford a legal counsel” raises its own problems, notably for indigent who is accused of having committed an offence which is punishable with imprisonment of less than five years. In practice, the right to legal aid is yet to be implemented properly. The constraints in implementing the right to legal aid are partly related to technical implementation of legal aid or the absence of legal consequences for not providing this right such as sanctions for the investigator who does not provide legal counsel during the examination.

72. In 2011, the Government of Indonesia enacted Law No. 16 Year 2011 on Legal Aid. Similar to KUHAP, in regard to providing legal counsel to the suspect or defendant the Law also limits itself merely to economic incapability. Access of vulnerable groups such as women, children disabled people and indigenous groups to legal aid is yet to be considered. In order to obtain legal assistance, indigents should get a letter issued by a state official

¹⁰⁴ The rights of suspects are regulated in arts. 50-68 KUHAP.

¹⁰⁵ Report on the Documentation of Police Violence against Drug Users, JP2HAM, 2012.

¹⁰⁶ Report on the Violations of the Rights of the Accused, “Hentikan Praktik Sewenang-Wenang dan Kejam”, PBHI, 2012.

¹⁰⁷ Art. 54 KUHAP.

¹⁰⁸ Art. 55 KUHAP.

¹⁰⁹ Art. 114 KUHAP.

¹¹⁰ Arts. 56(1) and (2) KUHAP.

stating their economic incapability. The process of obtaining such a letter will take time as it needs to undergo various administrative procedures.

73. The Draft KUHAP is expected to overcome the existing problems such as communication access between lawyers and clients since the initial stage of examination, including the right to obtain the dossier. Regrettably, the Draft KUHAP stipulates that the copy of the dossier shall be given upon “request”¹¹¹. Obtaining the dossier is not part of the privilege of the legal counsel. In practice, lawyers often face difficulties in obtaining the dossiers.

74. The Draft KUHAP offers a new mechanism (*habeas corpus*), namely Commissioner Judge (*Hakim Komisaris*) who specifically deals with matters relating to pre-trial issues, such as the issue of lawful or unlawful arrest, detention and investigation. This is a positive development, notably in relation to the presence of a Commissioner Judge¹¹² in detention houses to provide access to the suspect or defendant. The Draft KUHAP guarantees the right of the suspect who is arrested and detained to review the legality of the arrest and the necessity of his or her detention before a Commissioner Judge. The Commissioner Judge is also empowered to review the legality and necessity of the detention on his or her own initiative following the receipt of the arrest or detention warrant.

75. KUHAP guarantees the right of the suspect or defendant to freely provide information to the investigator or judge.¹¹³ KUHAP also determines that any information given by a suspect or a witness to an investigator shall be given without any pressure from anyone whomsoever and/ or in any form whatsoever.¹¹⁴ Regrettably, KUHAP and the Draft KUHAP have no provision on information or statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings as provided for in Article 15 of UNCAT.

76. In the development, KUHAP which is the principal rule in criminal proceedings – enacted in 1981 – is considered to be no longer relevant to the development of international law principles, among others, in regard to torture prevention during the investigation process. Regrettably, attempts to revise KUHAP which has been scheduled for revision since 1999, has yet to be discussed by the Parliament.

Article 16 Recognition as a Person before the Law

¹¹¹ Art. 106 Draft KUHAP.

¹¹² In the Draft KUHAP, the Commissioner Judge is authorized to determine or decide on: (a) the legality of the arrest, detention, search, seizure, or tapping, (b) the annulment or suspension of detention; (c) that the statement made by the suspect or defendant violates the right not to incriminate oneself; (d) evidence or statements obtained illegally cannot be invoked as evidence, (e) compensation and/ or rehabilitation for a person who is unlawfully arrested or detained or damages to any property that is illegally confiscated; (f) a suspect or a defendant is entitled to or required to be accompanied by a legal counsel, (g) the investigation or prosecution has been carried out for unlawful purposes; (h) termination of an investigation or prosecution which is not based on the principles of opportunity; (i) whether or not a case can be prosecuted before a court; (j) violation of the rights of a suspect during investigation.

¹¹³ Art. 52 KUHAP.

¹¹⁴ Art. 117 KUHAP.

77. As it has been adopted from the ICCPR, the 1945 Constitution of the Republic of Indonesia on Article 28D has acknowledged every person as a subject of law and guaranteed to get the same treatment before the law. Furthermore, it is also stipulated in Law no. 39 of 1999 on Human Rights which asserts that every person has the right to recognition, security, protection and fair treatment of law and guarantees of legal certainty and treatment before the law. However, the realities of discriminatory actions taken by the Government of the Republic of Indonesia shows that not every citizen can gain the recognition of their rights.

78. In access to civil registration, every citizen is required to register births and obtain a birth certificate (even made free by some local governments) for a maximum period of 60 days based on Law no. 23 of 2006 Article 27 (1). However, in Article 32 in the same law states that recording beyond 60 days up to one year must obtain the approval of the local chief executive agencies, and for people who have not done the registration must be obtained through a court order that often the cost are not covered by the public whose not able to.

79. Population administration policy in Indonesia is requires the inclusion of religion on identity cards. But the column of religion on identity cards has only six religions/beliefs which by Act No.23 of 2006 acknowledge as state-recognized religions are: Islam, Catholicism, Protestantism, Buddhism, Hinduism, and Confucianism. According to Article 8 of the Law No.23/2006, the religion/belief beyond six religions/beliefs that recognized the country such as the local belief, belief in God Almighty, Baha'i, Kaharingan, etc., are not directly have to choose one of six religious/faith-recognized country if they want to have an ID card. Due to the unfilled column of religion on identity cards, certain religious/belief family which not recognized by the state is not able to process their identities such as civil marriage certificate, family card, a birth certificate for her child and other civil records. Due to the absence of civil identity, the children of religious believers or religious beliefs outside the six aforementioned have difficulties in accessing education, job, passport and others.

80. The current development of the Government of the Republic of Indonesia has issued a policy of E-KTP. To obtain E-IDCard, the disciples of faiths and religions outside the six religions recognized by the state cannot put their faith in the religion column in E-IDCard because of the computerized system is not having the option beyond the six recognized religions. Although the government provides a special form to indicate the confidence of other faiths or religions, at E-IDCard they had to choose one of the six religions acknowledged by the State.

81. Discrimination in the context of Article 16 can also be seen from the case of unwillingness of KUA¹¹⁵ to register the marriage in some areas toward the followers of Ahmadiyah in Indonesia¹¹⁶ and also to process ID Card transition into E-IDCard for displaced Ahmadiyah followers in Lombok. The reason provided by the government officials

¹¹⁵ KUA; Kantor Urusan Agama (Office of Religious Affairs). This is the office under the supervision of Ministry of Religion which has a function to record issues which overlaps with religion matters.

¹¹⁶ Up to 240 cases; 5 in Sukabumi, 15 in Tasikmalaya, 220 in Kuningan. All of the cases are in West Java Province.

is because there are MUI *fatwa* which stating that Ahmadis are not Muslims and SKB¹¹⁷ 3 Ministers (Joint Ministerial Decree) that limits activities of Ahmadiyah as an organization. But unfortunately, both backrests are not in the sort order of legislation, so that MUI fatwa and SKB should not be a barrier of a citizen to get their rights as citizens.

82. Referring to the General Comment 28 (Article 3 - the equality of rights between men and women), many discriminatory laws put the citizens not equal before the law. Women also highlighted in this regard, especially in areas that have special autonomy to put Sharia as local regulations such as those in Aceh. Single interpretation of the term 'Sharia' endangers vulnerable groups in Aceh, especially women. Women in Aceh cannot ruling their property and transactions must be with the consent of her husband or guardian of women that men or guardianship of the husband. Another thing also happens in some parts of Aceh, one of which is in the area of North Aceh where GAM widow, Rs, in 2004 in the village of MC. He deprived inheritance by his late husband despite having Rs boy alone entitled to the estate of his late father. Women are also much ruled by the local government, from the way the women should dressed until the compulsion to do the religious activity.

Recommendations;

- a. Revise or remove discriminatory policies such as Law no. 23 of 2006,
- b. Increasing the capacity of the State apparatus that has a human rights perspective
- c. Mainstreaming human rights in any resulting policy
- d. Strengthening the rule of law back

Article 17 Right to Privacy

83. The Constitution of Indonesia specifically set up in it the protection guarantee of the right to citizens' privacy. It is affirmed in Article 28 G, paragraph (1) of the Constitution, which says, "Every person shall have the right to protection of his/herself, family, honor, dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right"

84. Although it is part of constitutional protection, but the regulation on privacy in Indonesia is weak, owing to the absence of legislation that specifically guarantees the right to privacy, such as Law regarding wiretapping and its procedure, as well as legislation concerning protection of personal data.

85. In addition to the abovementioned constitutional guarantees, some other laws and regulations also provide a similar assertion about the importance of protection of right to

¹¹⁷ SKB; Surat Keputusan bersama (Joint Decree Letter). This type of decree is not including in the hierarchy of Law in Indonesia. SKB is only the statement made by particular authorities which has no legal basis and cannot legally enforceable.

citizens' privacy. Stipulation of Article 32 Law No. 39 of 1999 on Human Rights that provides guarantee of right to feel secure against fear says, "No one shall be subject to arbitrary interference with his correspondence, including electronic communications, except upon the order of a court or other legitimate authority according to prevailing legislation".

86. In Indonesia, the emerging debate on wiretapping of communication and protection of personal data is getting warmer lately. Specifically regarding the issue of tapping, it is a consequence of the increasingly frequent use of intercepting mechanism by law enforcement officers in exposing various crimes, especially crimes that have organized and transnational natures. While for issues related to protection of personal data, the debate continues to strengthen with the growing number of cases of personal data abuse, in particular by the telecommunication providers, as well as the E-KTP (E-ID card) program rolled out by Government recently.

The lack of centralized legislation on wiretapping

87. The debate over tapping is strengthened after Indonesia's Government issued the Law No. 17 of 2011 regarding Intelligence of the State and Law No. 18 of 2011 regarding Changes to the Law No. 22 of 2004 concerning Judicial Commission. Discourses to perform restructuring of wiretapping laws disorder become increasingly intensified, after the Constitutional Court gave a verdict of an examination lawsuit on the Article 31 paragraph (4) of Law No. 11 of 2008 concerning Information and Electronic Transactions. Since then, the public began to progressively often talk about the need for a centralized and rigid wiretapping regulation.

"Specifically related to tapping, Indonesia's national legislation also has given the assertion regarding the prohibition of intercepting against the law, as expressed in the provisions of Article 40 of Law No. 36 of 1999 regarding Telecommunications. That provision states that, "Everyone is forbidden to perform the activities of wiretapping on the information transmitted via telecommunications networks in any form".

88. However, the material of this Act does not regulate in detail the procedures for intercepting and the mechanisms of complaint that corresponding to the protection of human rights, because the formation of this legislation is not specifically aimed to regulate wiretapping.

89. A similar assertion appeared in the provisions of Article 31, paragraph (1) of Law No. 11 of 2008 concerning Information and Electronic Transactions that states "Any person who intentionally and without rights or against the law intercepts or wiretaps on electronic information and/or electronic documents in a computer and/or a specific electronic systems, which belonging to others". The Act even provides penal threats to anyone who commits the act of wiretapping against the law, as mentioned in Article 31 paragraph (2). This provision says:

Any person that intentionally and without right or against the law intercepts over transmission of Electronic Information and/or Electronic Documents, which are not

meant for public in nature, from, to, and inside a computer and/or a specific electronic systems belonging to others, neither of which does not cause any changes or causes any changes, omissions, and/or terminations of the Electronic Information and/or Electronic Documents being transmitted.

90. The question subsequently emerged, since the Information and Electronic Transaction Law, in the provisions of Article 31 paragraph (4) delegates the control regarding procedures for wiretapping by using Government Regulation. Whereas, a procedure that is intended to limit the rights of a person, shall be authorized by a law, as defined in the international Human Rights Law principles and the Constitution of Indonesia itself.

91. Legal settings confusion regarding wiretapping in Indonesia appears from the number of provisions of legislation that providing authority to state institutions to execute the tapping, with restrictions that are frequently different from one another. A list of regulations regarding wiretapping at least can be found in a number of statutory provisions of the following:

1. Chapter XXVII Criminal Code (KUHP) on Malversation, from Article 430 to Article 434.
2. Law number 5 of 1997 concerning Psychotropic Drugs.
3. Law number 31 of 1999 concerning The Eradication of Corruption.
4. Law number 36 of 1999 concerning Telecommunications.
5. Government Regulation in Lieu of Law number 1 of 2002 concerning The Eradication of Terrorism.
6. Law number 30 of 2002 concerning The Commission for the Eradication of Corruption.
7. Law number 18 of 2003 concerning Advocate.
8. Law number 21 of 2007 concerning The Eradication of Trafficking.
9. Law number 11 of 2008 concerning Information and Electronic Transactions.
10. Law number 35 of 2009 concerning Narcotics.
11. Law number 17 of 2011 concerning State Intelligence.
12. Law number 18 of 2011 concerning changes of the Law number 18 of 2004 concerning the Judicial Commission.
13. Government Regulation number 19 of 2000 concerning Joint Team for the Eradication of Corruption.
14. Government Regulation number 52 of 2000 concerning Provision of Telecommunication Operation.
15. Regulation of the Minister of Information and Communication number 11 of 2006 concerning Technical Intercepting to Information.
16. Regulation of the Minister of information and communication No 1 of 2008 concerning Information Recording for the National Defense and Security.

92. The various regulations governing wiretapping unfortunately have fundamental weaknesses where a rule may very well contradict or is inconsistent with other rules. Even a tapping procedure in a Law might very likely differ from the procedure in another Law. The absence of single regulation concerning procedural law and/or procedures for wiretapping in Indonesia has made Indonesian society as the most threatened people for the right to privacy among other societies of the modern law and democratic countries in the world. This situation is possible, because the State apparatus could easily use various ways to intervene against the privacy rights of its citizens.

93. In Indonesia, disordered wiretapping legislations can be noticed from the number of authorities who give authorization to execute the tapping. Psychotropic Law allows phone tapping and recording of conversation with the permission of the Chief of the National Police.¹¹⁸ Narcotics Law (Law No. 35 of 2009) permits the National Anti-narcotics Agency (BNN) to intercept with the approval of the Chairman of District Court, but in an urgent condition they can also apply it without authorization.¹¹⁹ The Eradication of Terrorism Law (Government Regulation in Lieu of Law No. 1 of 2002) also allows investigators to wiretap telephone calls and record conversations only on approval of the Chairman of District Court.¹²⁰ Corruption Eradication Commission (KPK) Law (Law No. 30 of 2002) allows intercepting phone calls and recording conversations in exposing allegations of a corruption case based on decisions of the KPK.¹²¹ Information and Electronic Transaction Law permits wiretapping at the request of law enforcement's investigation based on legislation, as well as the Telecommunications Law; while the State Intelligence Law (Law No. 17 of 2011) authorizes wiretapping in the function of organizing State intelligence, based on the order of the Chief of the State Intelligence Agency, in addition to the establishment of the Chairman of District Court.¹²²

94. The abovementioned shows that the authorities who authorize wiretapping in Indonesia are very diverse and vary depending on the target. Whereas in other countries, generally tapping permit is only possessed by single authority. Several countries use a model that the permission is given by the Government (executive authorization); some others apply a procedure where authorization is obtained from the Court (judicial authorization); and those who have version of authorizing intercepting by Justice Commissioner's order (investigating magistrate). Indonesia, instead, adopts all of them in mixtures, in the absence of a definite control mechanism.

95. Various permission granting institutions is what makes each institution scrambling to use its authority. By implication, there is no standardized mechanism of monitoring and control for institutions that perform wiretapping. And this will open up to opportunities of mutual claims based on the interests of each institution; as a result, the Human Rights that include the right to privacy of family life as well as communication and correspondence become vulnerable to be violated.

96. In addition, the rules concerning tapping period also vary. If we notice from the duration of wiretapping, the Psychotropic Law permits wiretapping to be carried out within

¹¹⁸ Explanatory Note of Article 55 Law No. 5 of 1997 concerning Psychotropic Drugs says, "*The implementation of investigation on monitored delivery techniques and undercover purchase techniques as well as wiretapping of conversation via telephone and/or other electronic telecommunication equipments can only be carried out on the written orders of the Chief of National Police of the Republic of Indonesia or officials designated by him*".

¹¹⁹ See Article 77 paragraph (2), and Article 78 paragraph (1) Law No. 35 of 2009 concerning Narcotics

¹²⁰ See Article 31 paragraph (2) Government Regulation in Lieu of Law No 1 of 2002 concerning The Eradication of Terrorism, that was enacted into the Law No. 15 of 2003.

¹²¹ See Article 12 paragraph (1) letter a Law No. 30 of 2002 concerning Corruption Eradication Commission (KPK).

¹²² See Article 32 paragraph (2) and (3) Law No. 17 of 2011 concerning State Intelligence.

30 days.¹²³ The Narcotic Law permits tapping to be executed within a period of 3 months and can be extended up to three months later.¹²⁴ While in the State Intelligence Law, state intelligence organizer can intercept for a maximum of 6 months and can be extended according to needs. It means there is no definite time limit for State intelligence organizers in executing wiretapping. This rule is undoubtedly potential to violate the protection of citizens' rights to privacy, because it allows the Organizer of State intelligence to perform acts of wiretapping incessantly.¹²⁵

97. Law on Eradication of Terrorism allows wiretapping within one year.¹²⁶ Law on Corruption Eradication Commission (KPK) authorizes tapping without any definite time limit.¹²⁷ The issue of different time period is vulnerable to be infringed when there is no monitoring and control from objective institutions.

98. The absence of legislation regarding the use of wiretapping material results will also give rise to abuse. The rule of the utilization of wiretapping material results actually includes several issues in essence: (1) the existence of restrictions on who can access the wiretapping materials and tapping's retention period; (2) wiretapping procedure; (3) regulation concerning relevant tapping materials; (4) the procedure for generating the tapping material as a means of evidence in court; and (5) destroying the results of tapping that have been irrelevant for the sake of public interest and the right to privacy of citizens.

99. Lack of rules regarding the use of the intercepting material results has caused the tapping material results become accessible by anyone either in secret or in public. In addition, the tapping material results also can be played or cited in various media without going through a rigorous selection. This can open to abuse of wiretapping material. The absence of mechanism of legally saving as well as destroying the recording material may threaten the privacy rights of anyone who has been subjected to tapping.

100. The most important thing was the absence of complaint mechanism in Indonesia, which is provided exclusively from citizens and as objective control on the use of wiretapping or bugging material that was made without procedures, unauthorized or committed by the abuse of power. A lack of such mechanism will fertilize the practices that violate Human Rights in implementing wiretapping. The formulation of tapping authorization in Indonesia thus has been developed in the legal settings of each sectoral institution, obviously based on the interest and paradigm of respective institution; the formulation of these regulation can also be confirmed as not transparent and lack of public participation.

¹²³ See Article 55 letter c Law No. 5 of 1997 concerning Psychotropic Drugs.

¹²⁴ See Article 77 paragraph (1) and paragraph (3) Law No. 35 of 2009 concerning Narcotics.

¹²⁵ See Article 32 paragraph (2) letter c Law No. 17 of 2011 concerning State Intelligence.

¹²⁶ See Article 31 paragraph (2) Government Regulation in Lieu of Law No 1 of 2002 concerning the Eradication of Terrorism, which was passed into the Law No. 15 of 2003.

¹²⁷ There is no provision in the Law No. 30 of 2002 concerning the Corruption Eradication Commission (KPK) that explicitly mentions the time limit for KPK in executing acts of wiretapping.

101. Seeing the situation, in consideration of the law on judicial matters, on examination of case No. 5/PUU-VIII/2010, the Constitutional Court stated, due to the absence of single legal ruling as to a procedural law and/or procedure of wiretapping, it has threatened the right to privacy of citizens of modern law Nations in the world. Therefore, it is important that a specific Law should exist to regulate wiretapping in general up to the procedures of tapping for each authorized institution.¹²⁸

Inadequacy guarantees of personal data protection

102. In February 2011, the Government of Indonesia launched the electronic ID CARD (e-KTP), as the implementation of the Population Identification Number (NIK) program. NIK is the single identity number of every resident and valid for a lifetime, each citizen possesses one Government-issued ID card, which therein contains NIK. To implement this program the Government so therefore conducted data recording of population, containing all personal information of a citizen, including his/her physical characteristics. The recording of the physical characteristics was applied by the scanning of fingerprints and retina of the eyes, which will be used to validate or clarify the biometric of ID card holder. The result of the recording of such data will subsequently be planted in the ID card, which is initially encrypted with particular cryptographic algorithms. According to regulation issued by the Government, a security system (biometric validation) that is applied in the e-ID Card will only use fingerprint scanning,¹²⁹ however in reality, retinal scan was implemented as well.

103. The biggest threat against the protection of right to citizens' privacy after data recording through the e-ID Card program is the lack of rules and mechanisms for adequate protection of personal data. To this day, Indonesia does not have any rule and regulation specifically governing the protection of personal data, so that the personal data of every citizen are particularly vulnerable to abuse and transferable illegally. The provisions concerning the protection of personal data is only regulated to a limited extent in Article 26 of Law No. 11 of 2008 concerning Information and Electronic Transactions; even then, it is only to the extent of electronic data criteria, in full the provision says:

- (1) Unless specified otherwise by the Rules and Regulations, the use of any information through electronic media regarding somebody's personal data must be made on the approval of the person concerned.
- (2) Any person whose right is violated as referred to in paragraph (1) might file a lawsuit for the inflicted losses derived from this Law.

104. However, in fact the transfer of personal data of an individual without the consent of data owner remains flared up, in particular 'allegedly' performed by telecommunications service providers. Hitherto, in Indonesia indeed appears a mistaken paradigm, which states

¹²⁸ The case was filed by Anggara, Supriyadi, W.E., and Wahyudi Djafar, who assess the provisions of Article 31 paragraph (4) of Law No. 11 of 2008, stating "Further provisions concerning the procedures for interception as referred to in paragraph (3) is subject to Government Regulation". Petitioners argued that tapping regulation in Government Regulation will not be able to sufficiently accommodate articulation regarding the regulation of wiretapping; in addition to that it is contrary to Human Rights Law for conducting the limitation of Human Rights without going through the rule of Law. For more information, see the ruling of the Constitutional Court No. 5/PUU-VIII/2010.

¹²⁹ See Presidential Regulation No. 67 of 2011 concerning Second Amendment regarding Presidential Regulation No. 26 of 2009 concerning the Application of KTP on the Basis of NIK Nationwide. Regulations are accessible on http://www.depdagri.go.id/media/documents/2011/10/28/p/e/perpres_no.67-2011.pdf.

that personal data is not part of private property and a human right that must be protected. These paradigm errors have resulted in occurrence of abuse of data and takeover (conversion) of the right to ownership and the arbitrary use of it. The data provided by the consumer as part of supply process of goods and services shall be deemed as proprietary of service provider so that it can be used without the permission or consent of the owner of data source.

105. Further impact of this arbitrary data takeover is that subsequently many citizens are disadvantaged by the emergence of innumerable credit offers, insurance products, and a wide range of product sales sent out to the number of phone users. Oddly, the mobile phone user has never previously provided personal data to the manufacturer of the goods or services that offer such products. Surprising information was coming from one of sellers of text message (short message service/SMS) product broadcast, which stated that it has a database of 25 million subscribers. This statement then gave rise to allegations that there had been a leak of 25 million telecommunication customers' data in Indonesia. The statement itself came after complaints and protests from consumers about the huge number of broadcasted SMS containing specific product offers. The unidentified perpetrator of the leakage or personal data selling as well as the ambiguity of legal mechanisms provided by Law, making it difficult for the phone users (citizens) to complain over the annoyance they suffered. Detailed rules regarding the use of personal data of consumers recently was established in the world of banking, as set forth in the Regulation of Bank Indonesia No. 7/2/PBI/2005 concerning Transparency of Banking Product Information and the Use of Customer's Personal Data.¹³⁰

Article 19 Freedom of Expression

106. Laws and regulations in Indonesia has been delivering guarantee of protection, which is quite decisively to the enjoyment of rights to freedom of expression. It is, as reflected in the Constitution, especially of article 28, article 28 E paragraph (3), and article 28F. However, Indonesia still has a number of laws and regulations, wherein their materials restrict the freedom of expression arbitrarily or at any rate are frequently abused in implementation. The provisions of the regulations, among other things:

- a. Law No. 1 of 1946 on Criminal Code (KUHP) particularly Chapter XVI on Humiliation, specifically: Article 310 paragraph (1),¹³¹ Article 310 paragraph (2),¹³² Article 311 paragraph (1),¹³³ Article 315 concerning insignificant insult,¹³⁴ and

¹³⁰ It can be accessed on <http://www.bi.go.id/NR/rdonlyres/2C5737BD-5BE2-4B69-BD81-2F1CBD9C042B/11844/pbi7605.pdf>.

¹³¹ Article 310 paragraph (1) of Penal Code (KUHP) that says: "*The person who intentionally harms someone's honor or reputation by charging him with a certain fact, with the obvious intent to give publicly thereof, shall, being guilty of slander, be punished by a maximum imprisonment of nine months or a maximum fine of four thousand five hundred rupiahs*".

¹³² Article 310 paragraph (2) says: "*If this takes place by means of writings or portraits disseminated, openly demonstrated or put up, the principal shall, being guilty of libel, be punished by a maximum imprisonment of one year and four months or a maximum fine of four thousand five hundred rupiahs*".

¹³³ Article 311 paragraph (1) says: "*Any person who commits the crime of slander or libel in case proof of the truth of the charged fact is permitted, shall, if he does not produce said proof and the charge has been made against his better judgment, being guilty of calumny, be punished by a maximum imprisonment of four years*".

¹³⁴ Article 315 says: A defamation committed with deliberate intent which does not bear the character of slander or libel, against a person either in public orally or in writing, or in his presence orally or by battery, or by a writing delivered or handed over, shall as simple, be punished by a maximum imprisonment of four months and two weeks or a maximum fine of four thousand five hundred rupiahs.

- Article 316 about additional penalty if the insulted individual is Government official.¹³⁵
- b. Law No. 11 of 2008 about Information and Electronic Transactions, especially Chapter VII on outlawed acts, in particular Article 27 paragraph (3)¹³⁶ jo Article 45 paragraph (1).¹³⁷
 - c. Law No. 44 of 2008 concerning Anti Pornography, specifically on some of the articles which govern about the definition and scope of pornography, because it is too extensive and flexible so it shall be easily abused.¹³⁸
 - d. Law No. 17 of 2011 on State Intelligence mainly on the provisions governing the intelligence about the 'intelligence secret', specially on Article 1 number 6,¹³⁹ Article 25 paragraph (2),¹⁴⁰ Article 26,¹⁴¹ Article 44,¹⁴² and Article 45.¹⁴³

Practices of violations against freedom of expression

107. Not only problem in the norms, but on the implementation in reality cases of violation against the right to freedom of expression have also been encountered, particularly continuation of the application of the abovementioned rules and regulations. Articles regarding libel in Criminal Code actually are still frequently implemented. The use of this article, for example in the case of Risang Bima Wijaya, reporter of Radar daily who was convicted guilty by the Supreme Court in January 2006 and sentenced to 6 months in jail, because his writing was considered to be defaming the good name of a local media leader in Yogyakarta. The District Court, High Court and Supreme Court declared Risang had violated

¹³⁵ Article 316 says: The punishments laid down in the foregoing articles of this chapter may be enhanced with one third, if the defamation is committed against an official during or on the subject of the legal exercise of his office.

¹³⁶ Article 27 paragraph (3) Law on ITE says: "Any Person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of affronts and/or defamation."

¹³⁷ Article 45 paragraph (1) Law on ITE says: "Any Person who satisfies the elements as intended by Article 27 section (1), section (2), section (3), or section (4) shall be sentenced to imprisonment not exceeding 6 (six) years and/or a fine not exceeding Rp1,000,000,000 (one billion rupiah)."

¹³⁸ Including among these, Article 1 number 1 on the definition of pornography: "Pornography is picture, sketch, illustration, photograph, text, voice, sound, motion picture, animation, cartoon, conversation, gesture, or any other form of messaging through various forms of media communication and/or performing in public, which contains obscenity or sexual exploitation that violates the norms of decency in society"

¹³⁹ Article 1 paragraph (6) Law on State Intelligence says: "Intelligence secret is the information, objects, personnel, and/or effort, work, intelligence activities that are protected in strict confidence so as not to be accessible, cannot be known, and cannot be owned by party that is not entitled to";

¹⁴⁰ Article 25 paragraph (2) Law on State Intelligence states: "(2) The intelligence secret as referred to in paragraph (1) is categorized as can: a. endanger National security and defense; b. disclose the natural resource of Indonesia that belongs to the category of protected confidential; c. be detrimental to the resilience of the national economy; d. be detrimental to the interests of foreign policy and international relationship; e. disclose a memorandum or letter that by their nature need to be kept confidential; f. endanger State Intelligence system; g. endanger access, agent, and resources related to the implementation of the Intelligence function; h. endanger the safety of State intelligence personnel; or i. reveal the plan and implementation relating to organizing the Intelligence function".

¹⁴¹ Article 26 Law on State Intelligence says: "Any person is prohibited from opening and/or disclosing Intelligence Secret".

¹⁴² Article 44 Law on State Intelligence says: "Any person who intentionally steals, opens, and/or discloses Intelligence Secret as referred to in Article 26 is liable to a maximum imprisonment of 10 (ten) years and/or a maximum fine of Rp500.000.000,00 (five hundred million rupiah)".

¹⁴³ Article 45 Law on State Intelligence states: "Every person who because of his negligence resulting in the leakage of Intelligence Secret as stipulated in Article 26 is liable to maximum imprisonment of 7 (seven) years and/or a maximum fine of Rp 300,000,000 (three hundred million rupiah)".

Article 310 paragraph (2) Jo Article 64 paragraph (1) of the Criminal Code (KUHP). Judicial Review appealed by Risang to the Supreme Court was also rejected, by the verdict of the Supreme Court No.14 PK/Pid/2008, issued on 24 June 2009.¹⁴⁴

108. In relation to the libel, which is regulated in the Law No. 11 of 2008 concerning Information and Electronic Transactions (Article 27 paragraph (3)), in 2009 a number of civil society organizations in Indonesia have filed for judicial review of this provision to the Constitutional Court. However, the Constitutional Court refused the petition; one of the considerations expressed by Constitutional Court was that the contempt regulated in the Criminal Code (off-line insult) could not reach offense of insult and defamation which is committed in the cyber world (on-line insult).

109. Some cases concerning the use of these provisions, among others: (1) the case of Prita Mulyasari in 2009 at the District Court of Tangerang, who was arrested after sending an email containing the complaint for the services of a private hospital in Tangerang, the email she had sent to some of her fellows and then forwarded to some mailing lists;¹⁴⁵ (2) the case of Diki Chandra in 2011 at Tangerang District Court, he was imprisoned for creating a blog that contains information about the results of investigation against a public figure. Diki then requested the help of others to terminate the blog, but the case still continued and he was convicted and sentenced to 6 months in jail;¹⁴⁶ and (3) Musni Umar case in 2011 who was reported to the police after writing on his blog about alleged misappropriation of funds by officials of a school, until recently the case is still being processed.

110. In addition, the high pressure of intolerant groups has made freedom of expression and opinion in cyberspace, especially in facebook to be criminalized. The case of Alexander Aan who claimed to be an atheist and made a statement "God Does Not Exist" or "There is no God, in the Facebook group account of Minang Atheist in early 2012 was liable to charges of blaspheming Islam and spreading hatred through electronic media. The judge said that Aan is guilty for violating Article 28 (2) of Information and Electronic Transaction Law (ITE) about the spreading of hostility in the context of religion and sentenced with imprisonment of 2 years and 6 months.¹⁴⁷ A similar case was imposed on Mirza Alfath in 2012, which criticized the implementation of Sharia law in Aceh, his partiality to Israel, and his thinking that was to put forward rationality. Mirza was accused of insult/desecration of Islam. Mirza's house became a target of stoned by rioting mob. Ulema Consultative Assembly (MPU) of Aceh put him on trial and required Mirza to apologize, say his confession of faith (Syahadat) and repeat his marriage. While the Rector of Malikussaleh University (Unimal) of North Aceh banned Mirza from teaching and guiding thesis until an unspecified time limit. He was also dismissed from his post as Secretary of State Administration Law (HTN) division in his faculty.

¹⁴⁴ The verdict in question can be accessed through <http://putusan.mahkamahagung.go.id/putusan/e4bdc8de460ba3b5c6ac56de24a6f5d>. Similar cases also repeatedly experienced by the general public, such as the case of Laura Cecilia and Gunawan Wijaya in Ciamis District Court of 2008 (PN Decision No. 150/Pid. B/2008/PB.Cms, November 20, 2008); Ajimuddin case in Kendari District Court's ruling in 2010 (PN Kendari Decision No. 30/Pid.R/2010/PN.Pky, September 30, 2010); and the case of Lilik Supriyadi in Tuban District Court ruling in 2010 (PN Tuban Decision No.172/PID.B/2010/PN.TBN, July 27, 2010); for more information on the decisions of libel case trial can be accessed at <http://putusan.mahkamahagung.go.id/main/pencarian/?q=pencemaran+nama+baik>.

¹⁴⁵ See Decision of Tangerang District Court No. 1269/PID.B/2009/PN.TNG dated on 29 December 2009.

¹⁴⁶ See the Decision of Tangerang District Court No. 1190/Pid.B/2010/PN.TNG, dated on 18 February 2011.

¹⁴⁷ See the Decision of Muaro District Court No. 45/PID/B/2012/PN.MR, dated on 14 June 2012.

111. Cases, which utilizing article of hate speech in the Information and Electronic Transaction Law (ITE), show that the purpose of the article has aimed wrong target. This Article is used effectively to muzzle the freedom to expression and opinion through cyberspace, while statements of hate that have incited violence, discrimination and hostility, which have been uploaded and managed by intolerant groups are not subjected to the application of this article.¹⁴⁸

112. Still linked with the threat to freedom of expression on the internet, intimidations emerging lately are the practices of arbitrary blocking and content filtering for certain sites, under the pretext of containing pornography and terrorism allegation. But the Government itself has not yet imparted adequate regulations as provided for by the Covenant, to commit the restriction and prohibition of freedom of expression. In addition, Indonesia also lacks independent specialized agency to conduct restrictions and content filtering, and during this time the activity also is not carried out by the Court. The Government even gives up restrictions and content filtering to the private sector, meaning that there have been illegal restrictions and content filtering. As a result, many sites that later become victims of this policy, including the site of The International Lesbian and Gay Association (<http://ilga.org>) that cannot be accessed in Indonesia, owing to the blocked access by telecommunication service provider, *by reason of containing pornography element*.

113. Forms of silencing the freedom of expression, among others, were documented in the acts of dissolving Irshad Manji's book discussion event in May 2012 in Jakarta and Yogyakarta. Even in Yogyakarta, the discussion that has been planned to be held at Gadjah Mada University, as an institution of academic, was also canceled, due to the pressure from intolerant mass. Law enforcement officers did not follow up the report on the existence of forced dissolution of the discussion activity and overlooked it without any legal process. Other restraint of expressions was the prohibition against the event of Q-film festival, which was considered as campaigning LGBT. Even in this case, the organizers have been reported to the police by the intolerant groups with the allegation of violating the Law on Information and Electronic Transaction as well as Law on Pornography. In the form of local level regulations, National Commission on Anti Violence against Women (Komnas Perempuan) noted the existence of 282 Local Regulations (Peraturan Daerah / Perda) in 100 regencies/cities, scattered in 28 provinces, they contain restrictions of freedom to expression, especially against women. The forms of restriction are such as imposing religious expression and way of outfits, criminalizing women through prostitution setting and limiting women's space of motion by passing rules of curfew to oblige women to be accompanied when travelling.

114. Other cases that emerge in relation to the protection of right to freedom of expression are still the large number of violence acts suffered by journalists. Other forms of violence against journalists and journalistic activities are diverse, ranging from censorship, web hacking attack, expulsion and prohibition of coverage, the destruction and appropriation of journalistic tools, demonstrations and mass mobilization, threats and terror, and up to physical attacks. According to Alliance of Independent Journalists (AJI) Indonesia, during

¹⁴⁸ Article 28 paragraph (2) says: "Any Person who knowingly and without authority disseminates information aimed at inflicting hatred or dissension on individuals and/or certain groups of community based on ethnic groups, religions, races, and intergroup (SARA)". Subsequently Article 45 paragraph (2) says: "Any Person who satisfies the elements as intended by Article 28 section (1) or section (2) shall be sentenced to imprisonment not exceeding 6 (six) years and/or a fine not exceeding Rp1,000,000,000,- (one billion rupiah)".

the period of January to November 2012 at least 51 cases of violence was experienced by journalists; most cases occurred in the form of physical assaults (17 cases), threats and terror (13 cases), as well as the appropriation and destruction of journalistic tools (9 cases). Perpetrators of violence against journalists are: the highest number was committed by government authorities (12 cases), second was mostly occupied by the police (10 cases), and the third was most widely performed by National Army/TNI (8 cases).

115. The cases of journalist murder still occur, for example the case of Prabangsa, a journalist for Radar Bali, which was found dead on February 11, 2009 off the coast of Padang Bai, Karangasem, Bali. Originally, the case was considered as regular murder unrelated to Prabangsa's profession as a journalist. After three months in oblivion, encouragement from various parties made the police discovered the fact that the murder was related to news coverage of corruption allegations in the Office of Education Department of Bangli Regency. But unfortunately, not all murder cases against journalists can be revealed. In the documentation made by AJI Indonesia until 2012 at the very least there are still 8 homicide cases against journalists, which the perpetrators have not been brought before court or even brought to legal process, the perpetrators were released for the lack of seriousness in the process. Impunities on murder case against journalist include: (1) the murder of Fuad Muhammad Syarifuddin, alias Udin, journalist of Bernas Daily in Yogyakarta. Attacked by unidentified person on August 13, 1996, died on August 16, 1996; (2) the case of the murder of Naimullah, a journalist for Sinar Pagi, on July 25, 1997 he was found dead with stabbed neck wound in his car that was parked on the coast of Penimbangan, West Kalimantan; (3) the case of the murder of Agus Mulyawan, journalist of Asia Press who was killed on 25 September 1999 in East Timor. Agus was killed in a shooting case in the port of Qom, Los Palos, East Timor, that killed two nuns, three fraters, two young women, and Agus Mulyawan; (4) the case of Muhammad Jamaluddin, TVRI cameraman who worked in Aceh who has been missing since May 20, 2003, and was found dead in a river in Lamnyong on 17 June 2003; (5) the case of Ersia Siregar, RCTI journalist who died on December 29, 2003 in Aceh; he was killed in the cross fire between GAM and the National forces in the village of Alue Matang Aron, District of Simpang Ulim, East Aceh Regency. Chief of Staff of the Indonesian Army (KSAD) General Ryamizard Ryacudu acknowledged the bullet that killed Ersia Siregar was TNI's. But there is no legal process over the case of Ersia Siregar; (6) the case of Herliyanto, freelance journalist of Delta Pos tabloid in Sidoarjo, he was found killed at a teak forest in Tarokan village, Banyuwangi, Probolinggo on April 29, 2006 in East Java. Police arrested three people as suspects. District Court of Kraksaan Probolinggo released those defendants and never sought a new suspect; (7) case of Adriansyah Matra'is Wibisono in Merauke, Papua, a local TV journalist in Merauke, who was found dead in a charcoal warehouse area, Sungai Maro, Merauke on 29 July 2010; and (8) the case of Alfred Mirulewan from Pelangi tabloid, who was found dead on December 18th 2010 in Southwest Maluku. Four people was set by the police as suspects and convicted guilty by the Court. However, the National Human Rights Commission received a complaint that the accusation for suspects was fabricated, and the actual perpetrator has not been arrested and processed by the law.

Article 20: Religious Hatred

116. The 1945 Constitution and Pancasila as the foundation of the State guarantee the principle of equivalence/equality, non-discrimination, social justice and diversity, as well as the nation philosophy Unity in Diversity (Bhineka Tunggal Ika). This is elaborated in article

28 D paragraph (1) of 1945 Constitution which guarantees every person the right to the recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law. And article 28I paragraph (2) describes that every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment. The principles of equivalence/equality, non-discrimination, social justice and diversity are cornerstones for prohibiting acts of hate speech on the basis of religion and race.

117. At legislation level, there are a number of Laws that forbid hate speech based on race and ethnicity, as set forth in Law No. 40 of 2007 on the Elimination of Racial and Ethnic Discrimination. In this Act the dissemination of hatred based on race and ethnicity might be punished to a maximum imprisonment of 5 years and/or a maximum fine of 500 million Rupiah.¹⁴⁹

118. Act No. 11 of 2008 regarding Electronic Information and Transactions (ITE), also regulates the ban on hate speech based on ethnic origin, religion, race and group.¹⁵⁰ Based on this legislation, the dissemination of hatred through electronic transactions shall be punished to a maximum imprisonment of 6 (six) years and/or a maximum fine of one billion rupiah. But on the other hand, this law generally threatens freedom of expression of every individual, as we have informed before in the implementation of article 19.

119. Fundamentally, the Article 156 of Penal Code (KUHP) prohibits the spreading of hatred based on race, religion, etc. with imprisonment threat to a maximum of four years.¹⁵¹ The provisions of this article can become legal foundation for criminalizing practices of hate speech that occurring a lot recently, in particular the dissemination of hatred based on religion/belief. However, the regulation in article 156 of the Criminal Code (KUHP) has not yet been sufficient as a legal instrument that prohibits the spreading of hatred on the grounds of religion/belief, because: (1) its regulation is too extensive by incorporating elements of contempt, and the word "hostility", which poses a very wide-ranging interpretation. (2) It has not formulated the words "incitement which led to discrimination and violence" as a result of expression of religious hatred in accordance with article 20 paragraph (2) of the International Covenant on Civil and Political Rights. (3) The maximum penal threat of four years causes the suspect to be not required for mandatory detention by investigators, which is in accordance with the rules of Code of Criminal Procedure (KUHAP). Therefore, the perpetrators of hate speech crimes on the basis of religion are not detained and shall potentially commit the same crime elsewhere.

120. In practice, the dissemination of hate speech based on religion/belief that gives rise to violence, discrimination and hostility, is blatantly committed continuously by intolerant groups against religious minorities like Ahmadiyya,¹⁵² Shiite and the Christians.¹⁵³ Hate

¹⁴⁹ Article 4 letter b Jo Article 16 Law No.40/2008

¹⁵⁰ Article 28 paragraph (2) Law No. 11 of 2008

¹⁵¹ Article 156 Penal Code (KUHP) "Whomever publicly expresses feelings of hostility, hatred or contempt against one or more groups of the population of Indonesia, shall be punished by a maximum imprisonment of four years of a maximum fine of four thousand and five hundreds Rupiahs. By group in this and in the following article shall be understood each part of the population of Indonesia that distinguishes itself from one or more other parts of that population by race, country of origin, religion, place of origin, descent, nationality or constitutional condition".

¹⁵² See The Indonesia Legal Resources Centre (ILRC), Work Paper "Menyebarkan Kebencian atas Dasar Agama adalah Kejahatan (Spreading Religious Based Hatred is a Crime)", page 9, May 2012. In 2008, the

speech that has been delivered on an ongoing basis have contributed to the rise of violence in opposition to minority groups, particularly against the Ahmadiyya congregation. The Wahid Institute, in its annual report of 2011 stated that of all violence based on religion/belief that occurred in the year of 2011, 50% of the victims of such violence are Ahmadis.¹⁵⁴ This report also identified various acts of intolerance that occurred each year, in 2011 the largest number of intolerance acts was intimidation and threats of violence by 25%; followed with practices of hate speech in opposition to other groups by 14%; arson and destruction of property by 14%; discrimination on the basis of religion or belief by 14%.¹⁵⁵ Meanwhile in 2010, acts of intimidation and threats of violence were as much as 25%, and hate speech practices amounted to 13%.¹⁵⁶

121. In practice, groups or individuals who spreading hatred based on religion/belief are not processed by law even though they might be snared by article 156 of the Criminal Code (KUHP). Law reinforcement should become an effective mechanism to prevent the occurrence of wide-spreading escalation of violence; however Police officials are fretful in processing the practices of hate speech committed by intolerant groups. Instead, police officials thus make the victims as suspects with charges of blasphemy or unpleasant act. Another significant issue at the moment is the weak role of State in providing access to the victims to obtain effective reparations (remedies) through formal mechanisms in Court.

122. Hate speech was not only declared by intolerant groups, but by government officials, as well as members of Parliament through their statements containing hatred against minority groups. For instance, plans to dissolve Ahmadiyya,¹⁵⁷ or the idea to relocate the Ahmadis of Lombok to an island.¹⁵⁸ Statements like these illustrate that public officials condone the incidence of hate speech practices, which led to the acts of intolerance and violence based on religion. A result of this condoning is the rejection of marriage registration in Religious Affairs Office (KUA) of Tasikmalaya, by reason that Ahmadiyya is not Islam,¹⁵⁹ as once stated by Minister of Religious Affairs.

123. This happens because so far there is no internal policies developed by government agencies or law enforcement agencies that prohibit or prevent public officials to issue hateful statement against certain groups of minority religions/beliefs. The importance of this internal policy is to make sure that Government officials do not take any action that can be categorized as dissemination of hatred on the basis of religion. Such internal policies can become reference for providing fair and non-discriminative services.

leader of a people's organization in West Java, in a Tablig Akbar (an open grand meeting of message propagation), delivered a speech that invites others to fight and kill Ahmadiyya group anywhere.

¹⁵³ Hate speech was also suffered by the Church of HKBP Filadelfia, in Bekasi, West Java, such as a threat to kill Reverend Palti Panjaitan. ILRC, Ibid p. 10

¹⁵⁴ The Wahid Institute, Annual Report 2011, page 46

¹⁵⁵ The Wahid Institute, Ibid, p 48

¹⁵⁶ The Wahid Institute, "Executive Summary. 2010 Report on Religious Freedom and Tolerance", p 9

¹⁵⁷ R.I. Minister of Religious Affairs once has declared a statement that Ahmadiyya should be dissolved. Koran Tempo "Menteri Agama: Ahmadiyah Harus Dibubarkan" 30 August 2010,

<http://www.tempo.co/read/news/2010/08/30/173275156/Menteri-Agama-Ahmadiyah-Harus-Dibubarkan>

¹⁵⁸ Government of West Lombok Regency once has planned to relocate approximately 20 families of Ahmadiyya Congregation to an island from the evacuation site in Transito Dormitory in Mataram, Lombok.

http://www.bbc.co.uk/indonesia/majalah/2010/10/101011_ahmadiyahrelocation.shtml

¹⁵⁹ Religious Affairs Office (KUA) of Tasikmalaya Reject Marriage Registration of Ahmadiyya followers, <http://www.mukminun.com/2012/12/kua-tasikmalaya-tolak-pendaftaran-nikah.html>

124. These internal regulations are highly feasible to be issued by the President, Ministries, or Chief of National Police, as what have been done for the eradication of corruption, or similar to Regulation of the Chief of National Police No. 8 of 2009 regarding the Implementation of Human Rights Principles and Standards in Carrying Out Police Tasks. With various flaws and criticism over the effectiveness of this Regulation, on the other hand it is one of administrative measures in the police institution in implementing human rights principles to exercise their duties.

125. Though some legislation contains prohibition on spreading hatred against any religion/race, as mentioned in the Initial Report of the Government of Indonesia paragraphs 278-279, nevertheless it can be said that the regulations are not applied in numerous practices of hate speech based on religion. Even, on the other hand substances or other articles from the regulations were used to criminalize freedom of expression and opinion as aforementioned.

Article 21: Freedom of assembly

State guarantees

126. The Indonesian Constitution guarantees the freedom of assembly as stated in Article 28E: “Each person has the right to association, assembly and to express one’s opinion”. Article 28 further mention that “the freedom of association, assembly and expression of opinion, both verbally and in writing, will be regulated by the law”.

127. The guarantee to the right to assembly is also mentioned in the Human Rights Act (No. 39/1999; Article 24 paragraph 1): “Every person has the right to assembly, to meet and organize for peaceful purposes. Article 24 paragraph 2 states: “Every citizen or civic group has the right to establish a political party, non-governmental institutes or other forms of organisations in line with the need to protect and promote human rights according to the law”.

Problems encountered

128. Despite these constitutional and legal guarantees, in practice, many civil society groups have experienced harassments and disturbances by intolerant groups when they try to exercise their right to peaceful assembly. The police which is supposed to uphold the law in guaranteeing freedom of assembly, instead, tend to side with the agitators. In the past couple of years, intolerant groups have used intimidation and brute force to block and disband various gatherings and meetings of civil society groups and LGBT communities.

129. In 2010, there have been several incidents where meetings had been disbanded, such as the ILGA-Asia (International Lesbian, Gay, Bisexual, Trans and Intersex Association) in Surabaya (26-29 March 2010) was assaulted and blocked by the United Front of the Islamic Society (FPUI); the human rights training for transgender persons, organized by the National Commission on Human Rights and Arus Pelangi, was invaded and disturbed by the Defenders of Islam Front (FPI) on 30 April 2010; the venues of the Q! Film Festival were

repeatedly disturbed by various intolerant groups during its screening period. This happened not only in Jakarta, but also in Yogyakarta, Surabaya, and Makassar.

130. Aside from LGBT related events, those intolerant groups also assaulted other meetings which promote religious tolerance and the eradication of discrimination. A public discussion, organized by Setara Institute in Surabaya on 11 January 2011 was forcefully disbanded by the FPI in cooperation of the local Police. Before this, a similar event by Setara Institute, in Bandung on 6 January 2011 was threatened. Such kinds of assaults continue in 2012. Irshad Manji, a Canadian feminist writer, who came to Indonesia to launch her book entitled “Allah, Liberty and Love” got harassed during her entire stay. Her lecture in Salihara Café, Jakarta, was disbanded by the police upon instigation of the FPI. Whereas her lecture in Yogyakarta, at LKIS building, was violently disrupted and the place ransacked by a group named the Indonesian Mujahedin Council (MMI).

131. As late as 4 December 2012, intolerant groups tried to prevent a transgender beauty contest, organized by the Indonesian Transgender Communication Forum (FKWI), from taking place in Jakarta, by putting pressure on the local police. While the original venue was blocked, the event eventually took place in another, undisclosed place.

132. In most of these cases, the role of the Police has come under the limelight. The Police Force has become known to openly side with the agitators. In such cases, the police would typically argue the organizers of such events did not have a permit from the police and that the police would not be obliged to protect the event. By this, they do not have to admit that, in fact, they have been under pressure by the intolerant groups. In trying to explain its position a spokesperson of the Police Force even admitted that their primary concern was not upholding the law, but simply diffusing a potential flashpoint in the easiest way. The fact that such an attitude creates the impression of siding with lawbreakers is of no concern to them. A typical reason to disband a meeting was that no request for permit had been submitted to the local police. While the organizers insisted that no such permit was required according to the law.¹⁶⁰

Recommendations

The Indonesian government should enforce its commitment to freedom of assembly by instructing the police that no permit whatsoever is required for civil society groups to hold events as long as it is indoors.

Article 22 Freedom of Association

133. In line with the guarantee of the right to assembly, Article 28 E of the Constitution also guarantees the right to association. In addition, Article 24 of Law No. 39 of 1999 on Human Rights also guarantees it as an integral part of human rights.

¹⁶⁰ <http://www.merdeka.com/peristiwa/pembubaran-diskusi-irshad-manji-polri-bantah-takut-ormas.html>, also <http://www.thejakartaglobe.com/home/police-chiefs-reported-for-quashing-book-discussion/517123>

134. Since 1985 Indonesia had a rule of law which regulates about Societal Organization i.e. Act No. 8 of 1985. The law technically sets about the establishment of organization, organization's finances, as well as freezing and dissolution of an organization. The Law determines that the Government can freeze the administrator of community organization when (a) undertaking activities which disrupt security and public order; (b) accepting aid from foreign parties without the consent of Government; (c) providing assistance to foreigners that is detrimental to the interests of the nation and the State.¹⁶¹ And then the Government can dissolve the organization when its administrator continues to carry out activities.¹⁶²

135. In history, this Act was the creation of the New Order administration that seeks to control the dynamics of community organizations. It can be seen from the financial control mechanisms which require the approval of the Central Government in receiving financial assistance from abroad.¹⁶³ In addition, the mechanism of freezing or dissolution of an organization does not apply judicial mechanisms, but through the full authority of the Government. This is regulated in article 22 of Government Regulation No. 18 of 1986 on the Implementation of Law No. 8 of 1985 concerning Societal Organizations that states the freezing and dissolution procedures upon organization, i.e.:

- a) Issuing written reprimand,
- b) Summoning the Organization's officials to hear their explanation,
- c) For national scope organizations, the Central Government shall ask the Supreme Court (MA) to for their consideration. While regional scope organization, Head of Region shall ask for consideration of relevant authorities of the area and instructions of Minister of Home Affairs,
- d) Government shall execute the Freezing by notifying the Board of organization under consideration,
- e) If the organization in question is still doing their activities that are contrary to Law, then the Government can dissolve such organization.

136. Currently, the Government and the House of Representatives are currently discussing revision of Law No. 8 of 1985 regarding Societal Organization that potential to increasingly restrict the right to freedom of Association. In essence, the form of "Community Organization" is not recognized in the legal system of Indonesia. Lawfully, the rule concerning organization that engaged in social field in Indonesia is divided into two types, namely, organization without member (non-membership organization) in the form of a legal entity called Foundation and is regulated through the Law concerning Foundation. While for organization that based on membership (membership-based organization), known as Association form is still provided for in the regulation the Stb. 1870-64

¹⁶¹ Article 13 Law No.8 of 1985

¹⁶² Article 14 Law No.8 of 1985 Based on the provisions of Article 16 the Government can also dissolve Community Organization that embraces, develops, and spreads the doctrine or teaching of communism/Marxism-Leninism as well as ideology, doctrine, or other teaching that contradicts with Pancasila and the 1945 Constitution in all of its forms and manifestations.

¹⁶³ Government Regulation No. 18 of 1986 on the Implementation of Law No. 8 of 1985 regarding Community Organization.

(Rechtspersoonlijkheid van Verenigingen). The Draft Bill on Association has been scheduled in the National Legislation Program (Prolegnas) of 2010-2014, nevertheless the Draft on Association thus swept aside by the Draft Bill on Community Organization.

137. In situations of emerging democracy presently, the Government and the House of Representatives should revoke the Community Organization Law and restore the settings of community organizations into the existing legal frameworks, i.e. the Law regarding Foundation or Association. But unfortunately, the Government and the House of Representatives thus making revision of legislation that is contrary to the spirit of democracy and the Constitution. For example, the revision of this Act states that definition of community organization covers all forms of organization in all field of activity, ranging from religious, faith, legal, social, economic, health, education, sports, hobby, profession, and cultural and arts and other areas of activity.¹⁶⁴ These organizations must apply for registration to the Ministry of Home Affairs, or the Governor, or Mayor/Regent, and must meet the other requirements such as an affidavit stating that it's not affiliated with any political party, having an Affidavit (Notary Act), statute of Association, and activity reporting certificate. This should be completed to meet the requirements to obtain a Certificate of Registration (Surat Keterangan Terdaftar/SKT).¹⁶⁵

138. Accordingly, every individual who wants to assemble, have in common goals, interests and talents, must meet a number of requirements and register them selves. The revision of this Law also regulates a number of sanctions ranging from reprimand, freezing, dissolution, to penalty in a maximum of 5 years and a maximum fine of 5 billion rupiah.¹⁶⁶ Some forms of breach that would be penalized are such as: unregistered and having no Certificate of Registration (SKT), not reporting the development and activities of the Organization, or using the name, flag, and symbol resembling to organization of separatist movement or prohibited organization. Through the revision of this law, the Government also wants to control the entire organization through funding sources by obligating to report or obtain Government's consent if the Organization is about to receive funding from any source.¹⁶⁷

139. At first the Parliament or the Government argued that the revision of this law was to dissolve organizations that frequently commit various acts of violence. However, if we examine further that existing legal instruments such as the Criminal Code could be applied to punish the perpetrators of violence, or the organizations and individuals who spread hostility or hatred based on race, belief or inter-group.¹⁶⁸ Government Regulation No. 18 of 1986 on the Implementation of Law No. 8 of 1985 about Societal Organizations even has also categorized many actions that disturbing public order and security, i.e.:

- a. Disseminating hostility among ethnic, religious, racial, and inter-group
- b. Dividing national unity and unitariness
- c. Undermining the authority and/or discrediting the Government
- d. Impeding the implementation of development programs
- e. Other activities that disrupting political stability and security

¹⁶⁴ Article 7 Draft Bill on Community Organization

¹⁶⁵ Article 16

¹⁶⁶ Article 54 - 63

¹⁶⁷ Article 34 paragraph (2)

¹⁶⁸ Article 156 KUHP, Jo Law No. 8 of 1998 concerning the Ratification of Convention on Elimination of Racial Discrimination

Nevertheless, the rule of law does not run consistently against organizations that actively perpetrate various acts of violence, especially organizations that stating them selves on behalf of particular religion.

140. As part of the right to Association, normatively workers are supposed to be facilitated to create or join a Trade Union. Law No. 13 of 2003 on Manpower has determined that every worker has the right to form and become member of trade union¹⁶⁹ and has the right to manage the organization finances including strike fund.¹⁷⁰ Indonesian Government also has ratified a number of ILO conventions. Specifically, the right to Assembly is guaranteed in the Act No. 21 of 2000 concerning Trade Unions. This Act regulates provision to facilitate any worker to form union by only a minimum of 10 people,¹⁷¹ and the formation of the Federation of Workers Union/Trade Union of at least 5 (five) unions/trade unions.¹⁷²

141. This Act also regulates the protection of right to freedom of Association by prohibiting everyone from preventing or forcing a worker/ laborer from forming or not forming a trade union/labor union, becoming union official or not becoming union official, becoming union member or not becoming union member and or carrying out or not carrying out trade/labor union activities by: (a) Terminating his employment, temporarily suspending his employment, demoting him, or transferring him; (b) Not paying or reducing the amount of the worker/ laborer's wage; (c) Intimidating him or subjecting him to any other forms of intimidation; (d) Campaigning against the establishment of trade unions/labor unions.¹⁷³

142. The Act also specify criminal sanctions for everybody who bars others to form union, which is subjected to a sentence of at least 1(one) year and no longer than 5 (five) years in prison and or a fine of at least Rp100,000,000 (one hundred million Rupiahs) and no more than Rp500,000,000 (five hundred million Rupiahs).¹⁷⁴

143. Normatively the existing national legal instruments open opportunities for any worker for association, nevertheless in practice the threats or restrictions from forming unions still continue to happen, not only against factory workers but they have spread to several industrial sectors such as manufacturing, media companies and even State-owned enterprises. In 2011, Legal Aid Institute (LBH) Jakarta received 11 complaints of union busting practices such as conducted by PT.Lemond, PT.Carrefour Indonesia, Bank Swadesi, British International School, PT. Dok dan Perkapalan Kojah Bahari, PT. Daya Cipta Kemasindo, PT. Londre Indonesia, PT. Mayora Cibitung Bekasi, PT.Asiatex, and PT. Indofood Sukses Makmur.¹⁷⁵

144. In the media sector, in 2012, there were at least two cases of union busting practices, namely, the dismissal of 13 union officials of PT Indonesia Finanindo Media, and the dismissal of a journalist, Luviana, by the management of Metro TV. Luviana, a Metro TV journalist who has worked for almost 10 years, with two of her colleagues took the initiative

¹⁶⁹ Article 104 paragraph (1) Law No.13 of 2003 on Manpower

¹⁷⁰ Ibid Article 104 paragraph (2)

¹⁷¹ Article 5 Law No.21 of 2000

¹⁷² Article 6 Law No.21 of 2000

¹⁷³ Article 28 Law No.21 of 2000

¹⁷⁴ Article 43 Law No.21 of 2000

¹⁷⁵ <http://www.republika.co.id/berita/nasional/umum/12/04/30/m3a7u5-jelang-mayday-union-busting-meningkat-di-indonesia>

to form a union of Metro TV to solve some problems such as the scoring system of work for employees that has impact to the level of career and welfare. Oddly enough, Metro TV management requested Luviana and her two colleagues to resign. Her two colleagues ultimately chose to resign and received severance payments, while Luviana stayed at her decisiveness, let alone the management could not prove if there's any mistake made by Luviana. Up to early April 2012, Metro TV stayed on their decision not to employ Luviana though the management could not prove her fault. Its peak, since 13 April 2012, Luviana was not allowed to enter office area.¹⁷⁶

145. The rise of union busting phenomenon currently due to several factors. First, the weak supervising function, which becomes responsibility of manpower supervisor officials. Second, the existence of dualism in handling union busting between the police and Labor Department Officers. In principle, the Law No. 20 of 2001, particularly Article 28, has already regulated the protection of freedom of association, which prohibits any person from preventing the formation and implementation of right to freedom of unions, and categorizes the acts as crime. However, essentially dualism of investigation into the matter has become particular concern in both institutions; whether it becomes the Police's or PNPS' (Civil Servant Officials) authority.¹⁷⁷ In anticipation of this dualism, it is required other technical rules, such as Regulation of the Minister of Manpower or Memorandum of Understanding between the Minister of Manpower with the Chief of Police, which set up the mechanisms or procedures for conducting investigation of union busting.¹⁷⁸

146. Despite the Constitutional guarantee of freedom of association, assembly and expression of opinion, LGBT organizations face many hurdles to obtain legal recognition of their organization. Civic associations are by law required to register their notary act at the Ministry of Justice and Human Rights, but they are systematically refused when organization's name contain words 'gay', 'lesbian', 'transgender', and 'transsexual'. Furthermore, even the term 'sexuality' cannot be mentioned in the Vision, Mission and Goals of the organization. The alleged reasoning is that those terms are morally not acceptable in the Indonesian society. This is the clearest proof that the Indonesian government does not want to recognize LGBT persons or groups as a minority. Cases to date: the national HIV/AIDS network GWL-INA (Gay, Waria and MSM-Indonesia) was established in 2007 but has not been able to register itself under its original name. Instead, as a compromise, it was forced to change its name into a meaningless Gaya Warna Lentera before it could be registered. Then, a transgender (waria) organization "PERWAKOS" (Transgender Association of the City of Surabaya) had to drop the words 'waria' from its Vision and Mission. While the oldest LGBT organization GAYa NUSANTARA had to drop the word 'sexuality' from its Vision and Mission.

Article 24 Right of the Child

147. A number of laws and regulations in Indonesia have guaranteed that every child is entitled to protection and freedom from act of discrimination. The Constitution, Article 28B

¹⁷⁶ Position Statements of Federation of Independent Media Union (Federasi Serikat Pekerja Media Independen /FSPMI) number: 25/FSPMI-Ext/IV/2012, <http://fspmindependen.wordpress.com/2012/04/17/fspmi-mengecam-pembebastugasan-luviana-oleh-metro-tv/>

¹⁷⁷ Article 41 Law No.21 of 2000 determines PNPS and the Police as investigators

¹⁷⁸ Trade Unions in Indonesia actively urged Minister of Manpower to issue regulation on Union Busting handling. Source <http://www.hukumonline.com/berita/baca/lt4b9c976297a8f/menakertrans-diminta-keluarkan-aturan-soal-penanganan-union-busting-i>

paragraph (2) states that every child shall have the right to live, to grow and to develop, and shall have the right to protection from violence and discrimination. Other legislation such as Law No. 39/1999 on Human Rights increasingly strengthens the protection of children; even now children's rights are guaranteed in a special legislation, namely Law No. 23 of 2002 on Child Protection.

148. Although a number of laws and regulations have sufficiently guaranteed the rights of child, however some provisions of legislations are still discriminatory; or worst practices are still happened upon children. Specifically for women, the Government of Indonesia continues to legalize the practice of female circumcision (female genital mutilation) by the Regulation of Minister of Health of the Republic of Indonesia number 1636/Menkes/XI/Per/2010 concerning Female Circumcision. In addition, Act No. 1 of 1974 regarding Marriage is an example of law that does not protect young women in particular. This law defines the minimum age of marriage for a woman is 16 years old and for is men 19 years old.¹⁷⁹

149. Results of research made by Plan Indonesia in eight regencies all over Indonesia from January to April 2011 show a high number of early marriages. The results of this research uncover facts that 33.5 per cent of children aged 13-18 years have been married, and on average they were married at the age of 15-16 years old. The research includes the Regencies of Indramayu (West Java), Grobogan, Rembang (Middle Java), Tabanan (Bali), Dompu (NTB), South Central Timor, Sikka and Lembata (NTT).¹⁸⁰ Although this study does not represent the entire population in Indonesia, but these findings could become a depiction of early marriage cases generally speaking in Indonesia.

150. In addition, violence against children also tends to escalating, in particular the sexual violence. According to the Commission for Child Protection, in 2011 there were a total of 2509 cases of violence against children and 62 percent were sexual violence, the rest are physical violence. While in 2012, in the 1st semester there were 1,876 cases and 68 percent of them is sexual abuse and the rest is physical violence.¹⁸¹

151. Law No. 23 of 2002 on Child Protection, especially article 16 paragraph (1) ensures that every child is to be entitled to protection from abuse, torture, or inhuman punishment under the law. Research carried out by the Legal Aid Institute (LBH) Jakarta concluded that law enforcement agencies (mainly police) are the main perpetrator of violation against the rights of Child Dealing with Law. The violation occurred since the process of arrest, verbal examination, to detention. A breach that frequently happens is torture of children.

152. A research carried out by LBH Jakarta in 2011 at Pondok Bambu Prison, Tangerang Juvenile Penitentiary for Boys and Tangerang Juvenile Penitentiary for Girls show that the number of children who were not accompanied by legal counsel during the process of arrest as much as 91 percent, while in search reaches 95 percent. In addition, 90 percent of them were not accompanied in the process of examination at police station and 51 percent were not accompanied by a lawyer during the trial proceedings.¹⁸²

¹⁷⁹ Article 7 paragraph (1) of Law No. 1 of 1974 concerning Marriage

¹⁸⁰ Press release of Plan Indonesia as quoted by Kompas "Marriage Act Does Not Protect Women?" 27 September 2011, <http://female.kompas.com/read/2011/09/27/14583631/UU.Perkawinan.Tak.Melindungi.Perempuan#>

¹⁸¹ Chairman of the Commission of Child Protection's statement, as covered by Viva News, 30 November 2012 <http://nasional.news.viva.co.id/news/read/371471-komnas-pa--angka-kekerasan-seksual-anak-meningkat>

¹⁸² LBH Jakarta "Fading Limit between Crime and Reinforcement of Law" p.42, April 2012

153. The research conducted in 2010 in Pondok Bambu Prison in Jakarta showed that of the 39 Children Dealing with Law (ABH), 82% of them did not obtain legal assistance from advocate and out of 39 persons as much as 82% of them has suffered violence (physical and/or psychological) committed by the police during examination. 69% of the violence was aimed at gaining confession and 26% intended to collect information. This research also shows that 82% of children subjected to torture when they were arrested.¹⁸³

154. Besides, condition in detention has not yet guaranteed the rights of child starting from the issue over capacity as well as acts of violence or torture, which resulted in the death of juvenile inmates. In 2012, record shows some cases of children died during detention, such as DF (15) died in Correctional Institution class II B in Tulungagung, East Java, 13 January 2012. DF allegedly was killed due to beatings by fellow prisoners.¹⁸⁴ Isn (15) was found dead in Detention Center of Jepara, 13 April 2012. At the end of December 2011, two brothers G (17) and FS (14), prisoners of Sub-Precinct Police Station of Sijunjung, West Sumatra, were found dead hanging in the bathroom of detention facility. The police claimed they both died of suicide, but the families suspect that there were discrepancies in their death.¹⁸⁵

155. Until recently the situation of Children Dealing with Law (ABH) still shows relatively high-level quantity. All the way through 2011, the National Commission on Child Protection, a civil society institution in Jakarta, received a total of 1,851 reports on Children Dealing with Law (child as offender) that were brought before Courts. This figure increased dramatically compared to reports in 2010: 730 case. This agency also noted that nearly 52% of them is cases of burglary, drug abuse, rape, gambling and persecution. This agency also noted that almost 89, 8% of cases involving Children Dealing with Law subjected to criminal sanctions/prison.¹⁸⁶ In reference to the data base managed by the Directorate-General of Correctional Facilities of the Ministry of Justice and Human Rights, recorded throughout the year of 2011 as much as 3.528 juvenile inmates were in correctional institutions located all over Indonesia.¹⁸⁷ This number is certainly an impact to the over capacity of correctional facilities or detention houses in Indonesia.

¹⁸³ Press release LBH Jakarta No. 47/SK/I/LBH/2012 Addressing the Deliberation of Draft Bill on Court of Child, 2012. Accessed on <http://www.bantuanhukum.or.id/index.php/id/berita/press-release/585-bantuan-hukum-terhadap-anak-berhadapan-dengan-hukum-kebijakan-setengah-hati-panitia-kerja-ruu-sppa-dpr-ri>

¹⁸⁴Media Seputar Indonesia "Child Inmates Killed in Tulungagung Prison" <http://www.seputar-indonesia.com/ediscetak/content/view/460367/38/> accessed on 25 December 2012

¹⁸⁵The death of two brothers was getting serious attention from various media, the House of Representatives and the National Commission of Human Rights. News coverage of this issue can be seen in Viva News "Tragedy of 2 Children killed in Custody of Sijunjung" January 5, 2011 <http://nasional.news.viva.co.id/news/read/277515-tragedi-2-anak-tewas-di-tahanan-sijunjung>, or

<http://www.tempo.co/read/news/2012/01/11/063376642/Komnas-HAM-Gali--Kematian-Tahanan-Anak-di-Sijunjung> or <http://www.tempo.co/read/news/2012/01/14/063377274/DPR-Harus-Pantau-Kasus-Anak-Tewas-di-Sijunjung>

¹⁸⁶ Press Release Endnotes of 2011 Commission of Child Protection; can be accessed via <http://komnasp.wordpress.com/2011/12/21/catatan-akhir-tahun-2011-komisi-nasional-perlindungan-anak/>

¹⁸⁷ This Data is quoted from the Data Base of Correctional System, managed by the Directorate-General of Correctional Institutions, the Ministry of Justice and Human Rights of the Republic of Indonesia. The data base can be accessed through <http://smlap.ditjenpas.go.id/public/arl/current/monthly/year/2011/month/12>. Downloaded on 25 December 2012; note; none / number of inmates throughout the year of 2012 at the time this site was accessed.

156. The Act on the Child Protection has determined that a child is entitled to citizenship,¹⁸⁸ to a name and nationality status, which should be given since birth,¹⁸⁹ and free of charge.¹⁹⁰ It suggests that the fulfillment of birth certificate for child is State's duty. However, the Act concerning Civic Administration has not yet been fully in line with the Child Protection Act. In Act No. 23 of 2006 regarding Civic Administration, instead it creates mechanism of reporting every birth to authorized officials within a period of 60 days since the birth to obtain a quote of birth certificate.¹⁹¹ If it has exceeded the time limit of 60 days they will be sanctioned with administrative fines of 1 million rupiah.¹⁹²

157. The aforementioned provisions will progressively undermine a child's access to obtain certificate of birth and increase the number of Indonesian children that do not have birth certificate. Currently, Plan Indonesia records as many as 45 million children of Indonesia not having their birth registered or even having birth certificate.¹⁹³ Data from the Ministry of Women Empowerment and Child Protection, as shown by the Commission of Child Protection cited in the Endnotes of 2011, mentioning that approximately 50 million out of 78 million Indonesia children under the age of 18 years do not have birth certificates. A Survey conducted by the State University of Jakarta (UNJ) in some areas of Jakarta, reveals several factors that have caused children in Indonesia to not having birth certificate are, first, the complexity of procedures to obtain a birth certificate. Second, the expensive cost that must be incurred to apply for a birth certificate and the lack of public awareness in obtaining a birth certificate, because there are many people who think that it is not that important. Next, the factor of location in applying for birth certificate, which is quite afar, as well as the terms for achieving birth certificate are felt burdensome.¹⁹⁴

158. If traced from the existing legal instruments, this problem is caused by provisions in making the birth certificate as provided for in Act No. 23 of 2006. Even article 32 paragraph (2) determines that the registration of birth that goes beyond the time limit of one year is applied on the basis of District Court's Directive. In practice, everyone's access to the court has not been evenly spread, some residents, particularly the underprivileged, consider applying to the Court is aggravating.

¹⁸⁸ Article 28 D paragraph 1 1945 Constitution

¹⁸⁹ Article 5 and Article 27 Law No. 23/2002 on Child Protection

¹⁹⁰ Ibid, Article 28 paragraph (3)

¹⁹¹ Article 27 paragraph 1 and 2 Law No. 23 of 2006 on Civic Administration

¹⁹² Ibid Article 90 paragraph (1) and paragraph (2)

¹⁹³ As covered by Tempo media "45 million Indonesian do not have birth certificate" 25 March 2012. Accessed on <http://www.tempo.co/read/news/2012/03/25/177392388/45-Juta-Anak-Indonesia-Tak-Punya-Akta-Kelahiran>

¹⁹⁴ Quoted from the Endnotes of 2012 Legal Aid Institute Jakarta, p.142

Article 25 Electoral Rights

159. Article 25 ICCPR strongly guarantee the right of every citizen to actively participate in the Government and elections. Provisions on electoral rights are issued specifically in Article 22E subsection (1), (2), (3), (4), and subsection (5) of the Constitution of Indonesia.

160. Indonesia has some specific laws on elections, organizers and political parties. Recent legislation is Law No. 8/2012 on the Election of Members of DPR and DPD and Law No. 15/2011 on Election Organizers (Law No.15/2011). In the General Election of President and Vice President specifically stipulated in Law No. 42/2008 on the Presidential Election. Besides, Indonesia has had its own election management bodies which are the General Elections Commission (KPU) as the elections organizer and the Election Supervisory Board (Bawaslu) as a superintendent of the election. Both of these institutions are national, permanent and independent.

Despite showing significant progress, there are still some problems in the practice of holding elections. Some problems encountered in terms of both setting and implementation are as follows:

Undermining Independence of Election Organizers

161. Independent election organizers are needed to ensure the election is free and fair. Organizers are expected to facilitate the political parties fairly and to serve voters in giving their political options. From 1999 general elections until 2008 general election, they continue to refine by sterilizing any members/officers of the political parties in the election organizers. This policy is made due to the past experience of the 1999 elections in which the existence of political parties in the election organizers make them unable to show their independence and neutrality.

162. The independence of election organizers is guaranteed in Article 22E Paragraph (3) of the 1945 Constitution. Nonetheless, this independence is undermined by some conditions for membership of election organizers as stipulated in Law 15/2011. This new law allows an opportunity for members of a political party to be a member of election organizers. However, this provision is annulled by the Constitutional Court upon request of a civil society coalition. Upon this request, the Constitutional Court states that the requirement which annulled the independence of election organizers as unconstitutional rules so that it do not have any binding force.

Law Equality Among Election Candidates

163. Law 8/2012 contains several provisions considered discriminatory. Some of the provisions related to terms and conditions as participants of the election and some terms of the election threshold. The regulation to verify as a requirement for political parties is applied only to a political party which has no seats in parliament. This provision does not apply to political parties who own parliamentary seats which means they are free from the obligation to verify.

164. Discrimination in the election organizers is also evident from the provisions on the election threshold of 3.5% imposed nationally. National threshold means that political parties which will gain seats in the House of Representative, Provincial Parliament and City Parliament are those which have seats in the House of Representatives. This provision means that political party which has great votes will eventually lose its votes.. Consequently they not only will lose the right of political parties, but also the right of voters to political representation. Citizens' right to vote will be meaningless if the party they choose can not pass the election threshold imposed unfairly.

Regarding the two provisions mentioned above, the Constitutional Court then assesses these provisions to be unconstitutional because they do not have binding legal force.

Loss of Citizen Political Representation

165. The use of right to vote in elections is also correlated to the citizens' right to political representation. This political representation should be determined based on the number of population rather than mere political interests. It can be apparent in the division of electoral districts that should be arranged proportionally based on the population. However, Attachment Law No. 8/2012 says differently, the constituencies are not allocated proportionally and based on inaccurate population. There are some areas which have under-representation and some over-representation.

Loss of Citizen Political Representation also occurs in previous elections. There was unequal treatment between Indonesia citizens in domestic and those who are abroad. Political rights of Indonesian citizens abroad given to prospective members of the House of Representatives in Jakarta instead. It is supposed to have its own representation, knowing the quite many number of citizens who live abroad which are 4.457.743 people.

The Protection of Voting Rights

166. The problem that always comes up during elections in Indonesia is voter registration. Related to this issue, Law 8/2012 has provided a guarantee for those who are not registered to use their right to vote by using their ID/Passport. This provision is a progress in the fulfillment of citizens' right to vote. When they are not registered as voters, they can still vote by showing their ID/Passport. However, this provision is not adopted in the regulation of the use of ID/Passport as an alternative if the voter is not registered in the local elections.

Fulfillment of Right to Vote for the Disabled

167. **Election Regulations:** Election Regulation in Indonesia has to accommodate and regulate political rights of the disabled; it is issued in the Election law and the Election Commission Regulations. Some provisions that have been set are:

- a. **The right to vote:** set the aids for the visually impaired, the freedom to choose a companion, and there is an entry form must be filled by those who accompany the disabled into the voting booth, polling location that is accessible, a guarantee of

confidentiality voter options, fines and criminal penalties for companions who violates the principle of confidentiality.

- b. **The right to be selected:** there have been additions to the explanation of the articles in the Legislative Election Law and the Law on Elections Organizers which are crucial to be misinterpreted and may limit or even eliminate the rights for the disabled in the election or to be an election organizer, which is: physically and mentally healthy; it is added as well in the explanation that the term of “physically and mentally healthy” is not intended to restrict the political rights for the disabled.
- c. **Education requirements:** graduates from *Sekolah Menengah Luar Biasa* (Extraordinary High School) are recognized as equal and the same as graduates from regular high school.

168. **Care and treatment of election organizers:** looking from the Regulations, it appears that Election Law and the Law on Elections Organizers has been accommodated, the weakness is at the implementation process which is the lack of understanding in the issues of political rights to the disabled. Central election organizers are very cooperative in accommodating the disabled’s political rights, but local elections organizers do not have the commitment and concern for the disabled.

Recommendation:

Urging the government to ensure that elections will be carried out independently, openly and responsibly by ensuring that every citizen has the right to vote, and ensuring the elections accessibility for the disabled, and ensuring no loss of vote due to electoral mechanisms.

Article 27 Rights of Minorities

169. Indonesia Constitution clearly stated that ‘every person are entitled to be free from the discriminatory treatment on any grounds and entitled to be protected against discriminative treatment’.¹⁹⁵ Eventhough this Article is clearly ensure to guarantee to not be discriminate on any grounds, on the Article 18b par. (2) 1945 Indonesia Constitution also clearly stated:

“The states shall recognize and respect, to be regulated by law, the homogeneity of societies with customary law along with their traditional rights for as long as they remain in existence and in agreement with social development and with the principles of the Unitary State of the Republic of Indonesia.”

The sentence “for as long as.....” in article 18b threatens the existence of indigenious people because it is considered to run counter to development. Referring to this Article, the assessment of Indigenous People’s existence in highly depends on the subjectivity of the people surround, not based on the particular criteria which are the international standard.

170. Indonesia has a population of around 237 million. The government recognizes 365 ethnic and sub-ethnic groups as Komunitas Adat Terpencil (geographical-isolated customary law communities). According to the Ministry of Social Affairs data,¹⁹⁶ they number about

¹⁹⁵ Article 28i par. (2) 1945 Indonesia Constitution.

¹⁹⁶ <http://database.depsos.go.id/modules.php?name=Kat>

11.490 families. However, the national indigenous peoples' organization, Aliansi Masyarakat Adat Nusantara (AMAN)¹⁹⁷, which uses the term *masyarakat adat* to refer to indigenous peoples, estimate a conservative number of indigenous peoples in Indonesia amounts to between 30 and 40 million people.

171. The Constitution clearly said that the state have obligation to guarantee the freedom of all people to hold their religion and beliefs. In fact, the government only admits six majority religions in citizen administration such as national identity card (KTP), birth certificate and marriage certificate. The discriminations also happen mostly in education, health, jobs and other public services. There are still discriminations against indigenous peoples' traditional beliefs including the following: Sunda Wiwitan beliefs of the Kanekes in Banten and Cireundeu Community of Cimahi, West Java; Kaharingan beliefs of the Dayaks in Kalimantan, Aluktodolo beliefs of the Toraya, South Sulawesi, Parmalin beliefs in North Sumatera, Kejawen beliefs in Central and East Java, Marapu beliefs in Sumba.

172. Some cases appear against indigenous peoples about intolerance towards local religions, such as Sunda Wiwitan in Baduy Banten. Since January 2011 Baduys are not allowed to put Sunda Wiwitan as religion on their identity card, although this had been possible before. Baduys protested at the provincial Registration Office but did not receive a positive answer. They thus decided not to issue or renew their identity card anymore or to demand that the space for religion is left blank. The traditional leader of the Baduy committed to advocate for the recognition of Sunda Wiwitan as religion to be included in identity cards. They still wait for a response from a government official in the Ministry of Religious Affairs who supports their cause.

173. The second case concerns in Samin local religion in indigenous community of Sedulur Sikep in Central Java. On 23 December 2011, a Sedulur Sikep's Budi Santoso reported that his children had been forced to attend religion class in SMPN 2 (junior high state school) Udaan, Kudus, Central Java. Also other Sedulur Sikep's children who had same experiences. They were forced to choose one of five religion class. Those five are being put into national examine. But then the problems came when those children were also forced to practising the religion's rituals they'd chosen. The people of Sedulur Sikep dare to contest and forbid their children to attend religion classes – out of the reason that Sedulur Sikep follow their own doctrine/religion inherited by their ancestors. But those who do not have the courage are forced to attend.¹⁹⁸ Third case happens in Dayak Meratus community in South Kalimantan, who held local religion of Kaharingan. They are estimate 50 thousand people accros Meratus Mountains of South Kalimantan. Beside the discrimination happens mostly in education, health, jobs and other public services, they are also oblige to have permit letters from local police in order to practising their Kaharingan rituals.

Article 18 Freedom of Religion

A. PROTECTION OF RIGHTS TO FREEDOM OF RELIGION OR BELIEF

174. Article 29(2) of the 1945 Constitution of the Republic of Indonesia states: "*State guarantees all persons the freedom of worship, each according to his or her religion or belief*". Article 28E of the Constitution recognizes the freedom of every person to choose a religion and to practice according to his or her religion, to choose one's education and

¹⁹⁷ AMAN is the umbrella organization of indigenous peoples from across Indonesia. The organization has 1,993 member indigenous communities.

¹⁹⁸ Indigenous World 2012. IWGIA, 2012

teaching, as well as the right to freedom to believe his or her faith, express his or her views and thoughts in accordance with his or her conscience. The Constitution includes the right to freedom of religion or belief as a “human right that cannot be reduced under any circumstances” (Article 28I of the Constitution).

175. Law No. 39 Year 1999 on Human Rights states that the freedom of religion or belief is part of human rights that cannot be reduced under any circumstances (Article 4). The guarantees of the right to freedom of religion are enshrined in Articles 12 and 22 of the Human Rights Law. Law No. 23 Year 2003 Child Protection also guarantees every child the right to freedom of religion and belief. Every child has the right to practice his or her religion under the guidance of the parents and the State or Government is obliged and responsible to respect and ensure the rights of every child regardless of any background (Articles 6 and 21).

176. In particular, several articles in the Criminal Code (KUHP) imply the protection of freedom of religion or belief, among others, Article 156 in conjunction with Article 157 on the prohibition of the spread of hatred against a group of people (*race, country of origin, religion, place of origin, descent, nationality or constitutional condition*) and Article 176 that prohibits any person to obstruct religious meetings or activities.

Limitations of Rights

177. The Constitution still provides **limitations** associated with the freedom of thoughts and religion as stipulated in Article 28J of the Constitution that freedom can be restricted “*in accordance with considerations of morality, religious values, security and public order in a democratic society*”. Article 28J is often used by the Government to restrict the right to freedom of religion and belief as found in the legal arguments of the Constitutional Court that rejected the judicial review of Law No. 1/PNPS/1965 (blasphemy and defamation law). The ground of maintaining public order has triggered the birth of bylaws prohibiting the activities and spread of Ahmadiyya in Indonesia.

178. Indonesia still imposes Law No. 1/PNPS/1965 on the Prevention of Religious Abuse and/or Defamation. This Law contains provisions prohibiting any deviant interpretations of the six official religions in Indonesia. The Law also authorizes the Government to disband religious organizations considered harmful to public order. One of the provisions of the Law contains an instruction to add the offense of blasphemy under Article 156a of the Criminal Code.¹⁹⁹

Article 156a of the Criminal Code states: “*Every person is prohibited from deliberately in public publicize, encourage or seek public support for a different interpretation of a religion practiced in Indonesia or to hold religious activities resembling that of another religion, interpretations and activities which deviate from the core of that religion’s teachings*”.

¹⁹⁹ In December 2009, a number of NGOs and individuals filed a judicial review of Law No. 1/PNPS/1965 to the Constitutional Court. They considered that the Law is contrary to the Constitution that guarantees the freedom of religion or belief. For that reason, they requested the revocation of the Law. However, on 19 April 2010, the Court ruled that the Law is not contrary to the Constitution and thus, the Law remains applicable as a valid legal basis in Indonesia. Strong pressure from vigilante groups was one of the reasons why the Court did not accept the request of the CSOs. The Court merely ordered the Parliament to make revisions and adjustments to the Law. To date, there has been no follow-up to the Court decision.

179. Law No. 23 Year 2006 on Population Administration, notably Articles 8(2), 61(4), and 64(2) also affirm the recognition of the six official religions in Indonesia as an identity of the citizen, which discriminates against other religious groups.²⁰⁰

180. Several regulations and policies issued by the Government both at the central or regional levels are considered violating the freedom of religion or belief, such as the 2008 Joint Decree of two Ministries and the Attorney General's Office that prohibits the activities and spread of Ahmadiyya in Indonesia, bylaws and decision letters (at the provincial and district levels) that prohibit the activities and spread of Ahmadiyya²⁰¹ as well as policies that violate national and international human rights standards, such as the decision letter on the prohibition of establishing places of worship. The Joint Decree was issued based on the assessment of the Government, notably the Attorney General's Office that the presence of Ahmadiyya in Indonesia has upset the community and become a threat to peace and public order.²⁰²

181. From the aforementioned legislation, in practice:

a. State or the Government tends to use provisions that violate religious freedom than those guarantee the freedom of religion. For example, the provisions on hate speech as provided for in Article 156 in conjunction with Article 157 KUHP have never been used to criminalize the perpetrators, even in some cases the Government is actively involved in the practice of hate speech. Hate speech delivered by political or religious figures has been used by vigilante groups to justify violent acts against religious and faith minority groups such as Ahmadiyya.

b. According to the limitation clause in the Constitution (Article 28J), the Government tends to restrict the activities of religious and faith minority groups, either through regulations or policies, at the central and local levels, and in some cases the Government extends tacit approval to the pressure of radical Islamist groups (vigilante).

c. The Government always uses Law No. 1/PNPS/1965 to prohibit, restrict and criminalize religious and faith groups that are determined to be contrary to the six official religions or considered as deviant groups.

d. Based on Law No. 1/PNPS/1965 and Population Administration Law, the Government limits the personal identity of religion or faith or belief of the citizens to the six official religions. Therefore, minority groups outside the six official religions do not have their personal identity. This condition has prevented the minority groups from enjoying their rights to the administration of marriage, child registration, and their economic and social rights.

B. IMPLEMENTATION AND CASES

The Practice of blasphemy in Indonesia

182. Under Law No. 1/PNPS/1965, the Attorney General created the Supervisory Coordination Team for Streams of Society's Belief (*Tim Koordinasi Pengawasan Aliran Kepercayaan Masyarakat or TIM PAKEM*), from central to district levels. At the central level, this Team consists of elements of the Ministry of Interior, Ministry of Education and Culture, the Attorney General's Office, the Ministry of Religious Affairs, Ministry of Justice,

²⁰⁰ For example, the adherents of traditional beliefs (*penganut kepercayaan*) are not under the auspices of the Ministry of Religious Affairs but still under the auspices of the Ministry of Culture and Tourism since Indonesia has yet to recognize them as part of the official religions.

²⁰¹ Up to 2012, there are 30 bylaws and decrees prohibiting the activities of Ahmadiyya community.

²⁰² Joint Decree of the Minister of Religious Affairs, the Attorney General and Minister of Home Affairs No. 3 Year 2008, No. 033/A/JA/06/2008 and No. 199 Year 2008 (9 June 2008).

military, intelligence agency, and the National Police Headquarters. **In practice, TIM PAKEM monitors and bans religious and faith streams considered potentially causing unrest among the society and disturbing public order.**

183. Decisions issued relating to the monitoring and banning of religious and faith streams including the banning of *Darul Hadits*, *Jemaah Qur'an and Hadith*, *Islamic Jamaah*, *JIPD*, *Yappenas*, and similar organizations: the association of Bible Students or Jehovah Witnesses; religious teaching developed by Abdul Rahman and his followers or *Inkarussunah*; religious teaching of *Jowo Sanyoto* of *Ki Kere Klaten*; and the teaching of *Sidang Jemaat Kritus*.

184. Law No. 1/PNPS/1965 has proven to be a tool to judge one's belief, impede the freedom of religion and criminalize religious minority groups. In some cases, Article 156a KUHP has been used to criminalize people with blasphemy, insulting the prophet, making interpretations or deviant teachings which considered as blasphemy. Those who have been criminalized by this Law in conjunction with Article 156a KUHP are HB Jassin (1968), sentenced to one year's imprisonment with two years' probation; Arswendo Atmowiloto (1990), sentenced to 5 years' imprisonment; Saleh (1996), sentenced to five years' imprisonment; Lia Eden & Abdurrahman Eden (2006 and 2008); Ardi Hussein (2005), Sumardin Tapayya (2005), and Drs. FX Marjana (2009).

Discrimination, Persecution and Violence against Minority Groups

185. Discrimination and violence against Ahmadiyya has increased since the Indonesia Ulema Council (*Majelis Ulama Indonesia* or *MUI*) (in 1980 and 2005) issued a fatwa declaring Ahmadiyya as a deviant group. The fatwa also urges the Government to ban the spread of Ahmadiyya's teaching in Indonesia and freeze the organization and its place of activities.²⁰³ In 2008, the Minister of Home Affairs, the Minister of Religious Affairs, and the Attorney General issued a Joint Decree prohibiting religious activities of Ahmadiyya and the spread of its teaching in Indonesia. The Joint Decree has increased the persecution of Ahmadiyya followers as it has constantly used by vigilante groups or state apparatus to carry out persecution. According to Setara Institute, in 2008-2010 there were 271 cases of violent acts against Ahmadiyya.²⁰⁴

186. Over the last five years, Ahmadiyya followers in Indonesia have experienced various violent and discriminatory acts. Ahmadiyya women have been verbally harassed and became the victims of hate speech, intimidation, terror, humiliation, and harassment by vigilante groups and even state apparatus. Physically, they have experienced the destruction of properties or houses, closure and burning of mosques, forced evictions to murder. Violence occurred in almost all regions in Indonesia.²⁰⁵

187. Shi'a community in Madura, East Java, also experienced various acts of violence. In April 2011, the National Gathering of Madurese Ulema (BSUM) forced the Shi'a community in Nengkraneng Village, Sampang Madura, to return to the Sunnis. On 29 December 2011, a mob set fire to Shi'a boarding school *Misbahul Huda* and three Shi'a houses. 253 of 400

²⁰³ Fatwa MUI No. 2005: 11/MUNAS VII/MUI/15/2005 concerning Ahmadiyya.

²⁰⁴ Setara Institute, 2007-2009 Report, "Negara Harus Bersikap: Tiga Tahun Kondisi Kebebasan Beragama atau Berkeyakinan di Indonesia", (Jakarta: Pustaka Masyarakat Setara, 2010), p. 14; Setara Institute, 2010 Report, "Negara Menyangkal: Kondisi Kebebasan Beragama Tahun 2010", (Jakarta: Pustaka Masyarakat Setara, 2011), p. 25.

²⁰⁵ Among these are in Lombok, West Nusa Tenggara; Bogor, Tasikmalaya, Ciamis, Depok (all in West Java); Makassar and in Cikeusik-Banten case, 3 people died due to the attack.

Shi'a followers in Karang Gayam village were evacuated to *Wijaya Kusuma* sport building in Sampang. The burning of Shi'a houses occurred for the second time in August 2012. To date, approximately 150 people remain displaced in sport building in Sampang.

188. The police criminalized Shi'a Leader in Sampang, Madura, Tajul Muluk, with blasphemy and the Sampang Court found him guilty.

189. In almost all cases of violence by vigilante groups, police have been aware of the attack, but they did nothing to prevent such violent acts and remained silent to the persecution and attack. In some cases, they were actively involved in active in persecution and attack. The police did not prosecute the perpetrators. On the contrary, in Cikeusik-Banten case, the police criminalized victims.