

Ref: TG ASA 21/2009/45
AI Index: ASA 21/022/2009

Dr Benny Kabur Harman
Chair, Parliamentary Commission III
House of People's Representatives
Jalan Gatot Subroto
Tanahabang 10270
Indonesia

5 November 2009

Dear Dr Benny Kabur Harman,

OPEN LETTER TO THE HOUSE OF PEOPLE'S REPRESENTATIVES ON THE REVIEWING AND PASSING OF A NEW CRIMINAL CODE

On behalf of Amnesty International and LBH Masyarakat (Lembaga Bantuan Hukum Masyarakat), we would like to welcome you in your new position as chairperson of the parliamentary commission specializing in legal matters. It is our hope that we will be able to develop a productive relationship with your committee and work towards strengthening the rule of law in Indonesia, in accordance with international human rights law and standards.

In your first few months in office, we hope that you will give the upmost priority to the review and passing of a new Criminal Code respectful of the National Constitution and the Law on Human Rights (No39/1999). Furthermore the new Code should ensure the incorporation of implementing legislation related to the international human rights treaties Indonesia has ratified in recent years, including the UN Convention on Torture and Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

As you are aware, the current Criminal Code (KUHP, Kitab Undang-undang Hukum Pidana) has been under revision for many years; however so far the old version of the code is still in place, although many of its provisions fail to meet international human rights law and standards or conform with the provisions set out in the Indonesian Constitution.

During the review of the Criminal Code, Amnesty International and LBH Masyarakat recommend that your Commission pays particular attention to the following areas:

ENSURE CRIMINALIZATION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

In accordance with recommendations of the UN Committee on Torture in 2001 and 2008, Indonesia's Criminal Code should be amended so as to include a comprehensive definition of torture as provided for in Article 1 of the UNCAT. The Code must also ensure that at least some acts constituting cruel, inhuman or degrading treatment or punishment as defined under Article 16 of the UNCAT are criminalised. For example, offences must include, but not be limited to the following acts (when not amounting to torture): unnecessary or excessive use of force, assaults, threats, and wilful neglect and exploitation of detainees and prisoners, and cruel, inhuman or degrading punishments. Such provisions and appropriate penalties for those who commit acts of torture and other ill-treatment would be a significant step towards protecting Indonesian citizens from torture and other ill-treatment by members of the security forces or with their instigation, consent or acquiescence. It would ensure that

an adequate framework is in place to deter future human rights violations and ensure that victims can bring perpetrators to justice.

REPEAL PROVISIONS CRIMINALIZING FREEDOM OF EXPRESSION

Amnesty International has long expressed concerns that the Criminal Code still contains provisions which violate the right to freedom of expression. In past years, the organization has documented the arrest and imprisonment of tens of peaceful political activists in Maluku and Papua under provisions from the Criminal Code, and in particular Article 106.¹ Amnesty International and LBH Masyarakat recommend that these provisions be reviewed, amended and in some cases repealed to ensure that the new Criminal Code conforms with international standards on freedom of expression, and in particular Article 19 of the ICCPR which Indonesia ratified in 2006. In the review, particular attention should be paid to Chapter 1 on “Crimes against the Security of the state”, Chapter 2 “Crimes against the dignity of the President and Vice President”, Chapter 3 “Crimes against friendly states and against head and representatives of friendly states”, and Chapter 5 “Crimes against the public order”.

Furthermore, Amnesty International and LBH Masyarakat are concerned by legal provisions which criminalize defamation acts (Chapter XVI on “Defamation”), and in particular Articles 310, 311 and 316 which have been used in recent months in an apparent move to silence human rights defenders while they conduct their legitimate work on behalf of the human rights of others. Amnesty International is aware of at least seven human rights defenders who have been charged with criminal defamation, which carries formally a punishment of over five years’ imprisonment.²

REPEAL PROVISIONS FOR THE DEATH PENALTY

It is to be welcomed that no one has been executed in Indonesia so far in 2009. However, Amnesty International and LBH Masyarakat remain concerned that Indonesia continues to retain the death penalty as a punishment under the Criminal Code and in other laws. As you may be aware, there is a global trend towards the abolition of the death penalty. One of the most recent countries to abolish capital punishment is the Philippines. In 2006, the Philippines abolished the death penalty for all crimes. Currently 139 countries have abolished the death penalty in law or practice. Amnesty International and LBH Masyarakat hope that Indonesia will soon follow this trend and join the Philippines in showing human rights based leadership on this issue by abolishing the death penalty. The role of the death penalty as a deterrent for future crimes has not been proven. Recent UN sponsored scientific studies in 1998 and 2002 concluded: "... it is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment."³ Furthermore, its use carries the irrevocable weight of miscarriages of justice.

So far death penalty as a punishment is contained in many articles of the Criminal Code for crimes such as premeditated murder (Article 340) and attacks on the President or Vice-President (Article 104).⁴ All these provisions should be removed in respect of the right to life as enshrined in Indonesia’s national constitution and other international human rights law and standards.

¹ See Amnesty International, “Jailed for raising a flag – Prisoners of Conscience in Maluku”, March 2009, AI Index: ASA 21/008/2009. Weblink: <http://www.amnesty.org/en/library/asset/ASA21/008/2009/en/83bb8344-a4d3-425d-95d2-d36eb886e307/asa210082009en.pdf>, accessed on 29 October 2009.

² See Articles 311.1: “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 charges has been made against his better judgment, being guilty of calumny, be punished by a maximum imprisonment of four years” and Article 316: “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.” That means criminal defamation carries formally the possibly of up to five years and a few months’ imprisonment (four years enhanced by one third).

³ Roger Hood, *The Death Penalty: A World-wide Perspective*, Oxford, Clarendon Press, third edition, 2002, p. 230.

⁴ Other articles which provide provisions allowing for the use of capital punishment include Articles 111, 124, 140, 365 and 444.

COMBATING VIOLENCE AGAINST WOMEN AND GENDER BASED DISCRIMINATION IN ALL ITS FORMS

Amnesty International has welcomed the passage of the Law regarding the Elimination of Violence in the Household (Law No23/2004) which criminalizes a number of acts of gender-based violence in the context of the family.⁵ However we remain concerned that some acts of violence against women are yet to be criminalized under Indonesian law. For example sexual harassment outside the domestic sphere and rape in the context of marriage are yet to be criminalized. Amnesty International and LBH Masyarakat recommend that specific provisions in the new Criminal Code incorporate provisions prohibiting sexual harassment in all its forms, and prohibit rape inside and outside the context of marriage.

Amnesty International and LBH Masyarakat note that definitions of rape and sexual assaults in domestic criminal law should provide effective protection to individuals' right to physical and mental integrity. Therefore definitions of rape should reflect the fact that these crimes are committed, not just through force or threat of force, but also through coercion, or taking advantage of someone who is unable to make a genuine choice (for example, because they are unconscious, asleep, or unable to make a decision because of incapacity).

Further Amnesty International and LBH Masyarakat are concerned that currently the Criminal Code contains provisions criminalizing adultery in contravention with international human rights standards (Article 284). Such provisions violate international law and standards relating to physical and mental integrity, and their implementation tends to violate equality before the law, as women tend to be prosecuted disproportionately.

REPEAL PROVISIONS CRIMINALIZING ABORTION AND ACCESS TO EDUCATION ABOUT SEXUALITY AND REPRODUCTION

With one of the highest rates of maternal mortality in the East Asia and Pacific region, Indonesia is still a long way away from meeting its Millennium Development Goals targets of reducing by three-quarters maternal mortality ratios between 1990 and 2015. Unsafe abortions and unwanted pregnancies are among the underlying causes of the current high rates of maternal mortality in Indonesia.⁶

Decriminalizing abortion (see Articles 346, 347, 348, and 349) would be a positive step towards combating maternal mortality by ensuring that women who have had an abortion and face medical complications are able to access life-saving treatment. It would lift fears amongst women and medical practitioners that they may be facing criminal prosecutions and imprisonment if they seek care or provide medical assistance. Amnesty International campaigns worldwide for the decriminalization of laws on abortion to ensure that victims of rape and incest, and women who may be experiencing life-threatening complications due to pregnancy, can have access to abortion-related services. Amnesty International campaigns for any woman who suffers complications from an abortion to have access to the medical services she needs, whether she obtained the abortion legally or illegally.

Access to information on sexual and reproductive rights without discrimination is also vital to combat unwanted pregnancies. Articles 534 and 535 of the Criminal Code currently criminalize supplying information to young people relating to the prevention of pregnancy. Such a provision is in violation of the right to seek, receive and impart information relating to sexuality and reproduction and should be eliminated from the criminal law.

⁵ See in particular "Exploitation and abuse: the plight of women domestic workers in Indonesia", AI Index: AI Index: ASA 21/001/2007. Weblink: <http://www.amnesty.org/en/library/asset/ASA21/001/2007/en/404b2f23-d3c5-11dd-8743-d305bea2b2c7/asa210012007en.pdf>, accessed on 29 October 2009.

⁶ It is estimated that 11% of maternal deaths in Indonesia are due to unsafe abortions and that 7% of births are unwanted. In Indonesia's Progress Report on the Millenium Development Goals, 2004. Weblink: http://www.undp.or.id/pubs/img2004/English/MDG-IDN_English_Goal5.pdf, accessed on 29 October 2009.

CRIMINALISE CRIMES UNDER INTERNATIONAL LAW

The new Criminal Code should provide for trials in Indonesia's courts of crimes under international law. These include genocide, crimes against humanity and the war crimes listed in the Rome Statute of the International Criminal Court, as well as war crimes not listed in the Statute (such as certain grave breaches and other serious violations of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict - Protocol I - and certain violations of international humanitarian law in non-international armed conflict) and torture, extrajudicial executions and enforced disappearances as discrete acts. The definitions should be as broad as the definitions in the Rome Statute, but whenever international treaties (such as Protocol I) or customary law contains stronger definitions than those in the Statute, these definitions should be incorporated into national law.

Please do let us know if you have any questions. We would be pleased to discuss with you the reform of the Criminal Code and other areas of mutual concern.

Yours sincerely,

Isabelle Arradon

Researcher on Indonesia and Timor-Leste

Ricky Gunawan

LBH Masyarakat Director