

# DESIGNING A COUNTER-TERRORISM LEGAL POLICY COMPLYING WITH HUMAN RIGHTS AND DEMOCRACY IN INDONESIA

Mardenis, Andalas University  
Hilaire Tegnan, Andalas University

## ABSTRACT

*No country in world can be said to be free from the deadly scourge of terrorism and Indonesia, the world's largest Muslim country is no exception to this reality. Over the past 13 years, Indonesia has made significant progress in becoming a stable, democratic country with a strong civil society and independent media. However, serious human rights concerns remain, especially in the fight against terrorism, which really began in 2000 with the bombing of the Jakarta Stock Exchange, followed by the deadly Bali Bombing in 2002. These two attacks constitute the threshold of the fight against terrorism in Indonesia as the government passed Regulation No. 1/2002 on Combating Terrorism, which was followed by Law No. 33/2003 on Terrorism Eradication. However, this fight against terrorism has not only raised human rights concerns but it has not also been very successful in tackling terrorism, as there has been over 25 major terrorist attacks since its initiation in early 2002. This is a socio-legal research seeking to address the question as to how to design a proper counter-terrorism legal policy without compromising human rights and democracy in Indonesia. The study reveals that besides being ambiguous, provisions of the counter-terrorism law are also in contradiction with some provisions of the Indonesian Criminal Code. The study also shows that the enforcement of these provisions not only violates some human rights principles such as equality and non-discrimination. This is harmful to the unity and stability of Indonesia as a multiethnic and multicultural nation.*

**Keywords:** Counter-Terrorism, Legal Policy, Human Rights, Democracy and Rule of Law.

## INTRODUCTION

Terrorism is defined by the United Nations as criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes (Laws and Regulations, 1994). These criminal acts, are committed with the intent to cause death or serious bodily injury or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or abstain from doing any act (Laws and Regulations, 2004). Terrorist attacks in Indonesia date as far back as on March 28, 1981 when flight 206 of the national airlines *Garuda Indonesia*, leaving at 8 AM from Jakarta to Medan, was hijacked by five terrorists armed with machine guns and grenades. They claimed to be members of *Komando Jihad*. One cabin crew, one soldier and 3 terrorists were killed during the attack. It was not until 2002 that another act of terror occurred in Indonesia with the explosion of a nightclub at Kuta, Bali on October 12, 2002, which took the lives of 300 people, mostly foreign nationals and injured 180 others. As argued at the outset of this paper,

after the attack, the UN Security Council adopted the resolution No. 1438, which condemned the act of terror and requested all UN member states to help Indonesia bring anyone involved in the attack to court (Tunggal, 2003). The enactment of the government regulation No. 1 and 2/2002 on Combating Terrorism backed by the passing of Law No. 15 and 16/2003 on the Eradication of Terrorism and Law No. 9/2013 on the Prevention and Eradication of terrorism financing, proves that terrorism is real in Indonesia. However, the enforcement of these laws has raised human rights and the rule of law concerns. In the quest to distance herself from other war-torn muslim countries, Indonesia must ensure its citizens as well as the international community that its terrorism eradication policies and laws comply with these principles. The first part of this paper discusses terrorism eradication legal politics in Indonesia while part two presents the difficulties in terrorism eradication legislations. Part three focuses on how to design a proper terrorism eradication legal politics in Indonesia.

### **The Existence of Counter-Terrorism Legal Policy in Indonesia**

The achievement of security, justice, prosperity and social welfare, etc., depends very much on the legal policies of the government. In most Civil Law countries law is the product of politics. The balance of power or the political configuration affects legislation (Abdussalam, 2011). The fight against terrorism in Indonesia intensified after the Bali bombing in 2002, as argued earlier. The debate surrounding this tragedy is similar with that of 9/11 in the United States of America as many Indonesians believed that actual terrorists were behind the attack while a great number thinks it was an “inside job planned by the then Indonesian government to hand over Abubakar Ba'asyir, an alleged Al-Qaeda militant in Indonesia, to the American government”. Whether or not these allegations hold true remains hard to prove. The confusion surrounding this tragedy, to this day, is due to the lack of transparency in handling terrorism cases. As a result, the war on terrorism, so far, has only been able to apprehend and prosecute a handful of low-level suspects while actual terror masterminds remain on the loose. This further strengthens the hypothesis that the legal policy lying behind the fight against terrorism is influenced by short-term political interests. Besides the influence of domestic politics, the Indonesian counter-terrorism legal policy is also influenced by the development of international affairs, as shall be discussed later on. Although the fights against terrorism really began to intensify after the Bali bombing, it is important to note that this attack was preceded by several others namely: 1) The jihad-motivated terrorist attack on January 21, 1985 at Brobudur Temple, a World Wonder in Yogyakarta; 2) The bombing of the embassy of the Philippines in Jakarta on August 1, 2000 that killed two persons and injured 21 including the Ambassador Leonides T. Canai; 3) The explosion at the Malaysian Embassy in Jakarta on August 4 & 27, 2000, which fortunately, did not cause any casualties; 4) The explosion at Jakarta Stock Exchange Building on September 13, 2000 which killed 10 people, injured 90 others and seriously damaged hundred vehicles; 5) The bomb explosion in several cities on December 24, 2000 which injured 96 individuals and killed 16 other while they were celebrating Christmas; 6) The bombing of the Santa Anna Church on July 22, 2001 which claimed 5 lives; 7) The explosion at Plaza Atrium Senen on September 23, 2001 that injured 6 persons; 8) The bomb explosion at the fast food restaurant KFC Napier on October 12, 2001 and 9) The bomb explosion at the Australian International School on November 6, 2001. No casualties were reported in both attacks; 10) the explosion on 2002 New Year's Eve at a restaurant in Jakarta and four other explosions at several churches in Palu, Central Sulawesi. Of all these terrorist attacks, only the Bali bombing received

a wider attention and condemnation from the international community, thus making it the threshold of the war on terror in Indonesia.

## HUMAN RIGHTS LEGISLATION

Although Terrorism has long been taking place in Indonesia, the legal instruments to combat it only started to take form after the October 12, 2002 Bali bombing where more than 120 people were killed and 300 were wounded. Only three days after the tragedy, the United Nations Security Council (UNSC) issued resolution No. 1438, which condemned the attack and requested all UN member states to help the Indonesian government arrest and bring the perpetrators, organizers and sponsors of the attack to court. In response to the resolution, the Indonesian government issued two regulations in lieu of law on October 18, 2002 i.e., Regulation No. 1/2002 on Combating Terrorism and Regulation No. 2/2002 related to the Application of Regulation No. 1/2002. Subsequently, to back these two regulations, Law No. 15 and 16/2003 on Combating Terrorism in Indonesia was passed on April 4, 2003 and recently, the enactment of Law No. 9/2013 on the Prevention and Eradication of terrorism financing. This shows the Indonesian government's determination to stop terrorism in Indonesia. On the ground however, the issuance of these laws and regulations has raised controversy among academics, legal practitioners, politicians and other legal experts. Some of these parties denounce the ambiguity of these regulations and warn that this could lead to several abuses of power by the law enforcement or whoever has specific authority. Whereas the rest believe that existing laws such as Law No. 12/1951 which was repealed by Law No. 1/1991 on Firearms, Law No. 39/1999 on Human Rights, Law No. 26/2000 on Human Rights Court and the Penal Code, can best deal with terrorism and therefore there is no need for an additional law. There are indications of weakness in the government regulation No 1 and 2/2002 on Terrorism, which was then backed by Law No. 15/2003. Though this law emanates from the Parliament, it puts the authority to decide over terrorist matters in the hands of politicians. The Counter-Terrorism Law, as a special law, stipulates that to resolve cases of terrorism, the law applicable is Law No. 8/1981 on Criminal Procedural. This means that a special law should not contradict the existing general principles of the Criminal Law and Criminal Procedure Code. However, there are several articles of this special law that not only violate this rule but are in contradiction with human right principles. Such articles are: Articles 25(2), 28, 35(5) and 46.

### Problems in the Indonesian Counter-Terrorism Legal Policy

#### Cantradiciting and Ambiguous Laws

The ambiguity of the law on terrorism eradication can be seen in Articles 6 and 7 the Government Regulation No. 1/2002, which defines terrorism as "an act of violence or threat of violence that creates an atmosphere of terror or widespread fear or inflict mass casualties". The ambiguity lies in the phrase "an atmosphere of terror or widespread fear" as it does not tell what qualifies as an atmosphere of terror or widespread fear. The article does not really categorize the consequences of such deed as terrorism. Likewise, Article 7 of the same law formulates the word "intend" as one of the main defining elements of terrorism. As a general rule in Criminal Law, criminal liability is not established unless the two elements of liability are proven i.e., *actus reus* (the guilty act) and *men rea* (the guilty mind). Exceptions are known as strict liability crimes. However, on the ground of "intend" alone, chances are this law paves the way for arbitrary

arrests as well as all kinds of abuses of power by law enforcement officials. Article 25 (1) of the same law says that the investigation and prosecution before the court in an act of terrorism is carried out in accordance with the valid procedural law, unless otherwise provided in this regulation itself. This article implies the enforcement of the principle of *lex specialis derogat lex generalis* i.e., the Government Regulation as *lex specialist derogate* and the Criminal Procedure Code as *lex generalis*. Article 25 (2) of Government Regulation No. 1/2002 along with Law No. 15/2003 on the Eradication of Terrorism give authority to investigators to detain suspects for a period no longer than 6 months consisting of 4 months of investigation and 2 months of prosecution. Whereas the Indonesian Criminal Procedure Code only gives 20 up to 40 days for suspect detention (Article 24 sections 1 and 2 of the Criminal Code) and a period of prosecution no longer than 20 days extendable up to 30 days by the chairman of the competent court (Article 25 section 1 and 2 of the Criminal Procedure Code). This contradiction between counter-terrorism law/regulation and the Indonesian Criminal Procedure Code along with many other elements such the lack of arrest warrant, leads to unlawful arrests. The key human rights principles that must guide the lawful application of the powers to arrest and detain as set by the United Nations as follows (Abdussalam, 2011):

- The arrest and the detention must be lawful and not arbitrary;
- The arrest and detention must be in accordance with procedures established by law;
- Individuals who have been arrested or are being detained must be treated in accordance with the principle of presumption of innocence and should be detained separately from convicted persons;
- Specific and precise time limits should be set by law for the prompt appearance of the arrested/detained person before a judicial authority;
- The arrested/detained person must have access to legal counsel and must be able to communicate with counsel in full confidentiality;
- The arrested/detained person must be informed of the reasons for the arrest/detention, the charges against him/her, in a language that he or she can understand;
- The arrested/detained person must be informed of his/her rights, including the right to legal counsel;
- The date, time and reason for the arrest, the identity of the person arrested or detained, the identity of the person(s) who performed the arrest and the time and date of the person's first appearance before a judicial authority must all be duly recorded;
- The arrested/detained person has the right to access to the outside world; and
- The arrested/detained person has the right to take proceedings before a court, in order for the court to decide on the lawfulness of the arrest and/or the detention (habeas corpus).

Many of the arrests and killings in the cases mentioned earlier do not comply with these human rights principles set by the United Nations.

### **Human Rights Violations**

Human rights are guaranteed and preserved in the constitution of nearly every democratic and rule of law country. They cover various aspects of human life i.e., the right to life, liberty, happiness, education and health, etc. Unfortunately, these basics human rights have been under threat by various acts of terror in the world including Indonesia. Not only does terrorism jeopardize the security, the peace and the unity of the nation as a whole but it also damages cultural and religious norms. Today however, the fight against terrorism seems to be

compromising human rights principles, as many of the terrorist suspects are executed on the spot without due process of the law. In fact, on November 9, 2005, a terrorist suspect named Azhary was hunted down and killed by the Indonesian Counter-terrorism police unit called *Special Detachment 88* (or *Detasemen Khusus 88 Polri*) during a raid at his residence in Batu, East Java (Ambaranie, 2018). Additionally, on January 2, 2007, a policeman, 9 civilians and 19 terrorist suspects died during a shoot-out between the police (the Detachment 88) and 29 terrorist suspects in the District of Poso Kota. The *Detachment 88* also raided a house in Jati Asih, Bekasi, Java and killed two suspects on August 8, 2009. If the presumption of innocence during the arrest, detention and prosecution is mostly respected in any other crime, then should the same principle not apply in the war on terror? The terrorist suspects must also be given the presumption of innocence until proved guilty in a court of law, as specified in the United Nations's Handbook of Criminal Justice (United Nations Office ON Drugs and Crimes, 2009). Only then will the suspect either lose their life or their liberty. This has been criticized by Rakyat Hajriyanto Thohari, a former Vice Chairman of the Indonesian People's Consultative Assembly or *Majelis Permusyawaratan Rakyat* (MPR) in January 2014 (BBC Website, 2014). It seems as if the fact that an individual is a terrorist suspect suffices to take away their life when they should be brought to justice. Hundreds of residents of Solo, a city located in Central Java and surrounding areas held a protest against the Special Detachment 88, in response to the killing of a terrorist suspect named Siyono. Organizers of the protest claim that the suspect was killed unlawfully as the police did not have any warrant, plausible explanation and tangible evidence (BBC Website, 2016). The killing of this suspects as well those mentioned earlier, violates the principle of necessity of the investigation methods set by the United Nations (United Nations Office ON Drugs and Crimes, 2009). Because some community members protested does not mean the suspect is innocent. But protest are sign of community's disappointment in the law enforcement, which is very detrimental to the fight against terrorism in Indonesia. To win the war on terror, law enforcement officers must inevitably rely on community's trust and cooperation, as mentioned in the UNODC book on criminal justice responses to terrorism.

### **Designing a more Preventive Legislation**

Counter-terrorism Law No. 1/2002 along with a few other related laws/regulations mentioned earlier, has not really been successful in stopping terrorism in Indonesia due to not only human rights concerns but also and more important because it is only oriented toward fighting terrorism, instead of preventing it. Prevention is very crucial in the attempt to eradicate terrorism. Counter-terrorism means promoting and supporting activities and programs that are designed to prevent or stop terrorism. Of all the 47 articles of the counter-terrorism law, the word prevention is only mentioned in article 43, which only refers to international collaboration in counter-terrorism. Much as international collaboration is a vital, preventing terrorism at home certainly contribute significantly in its eradication. Since experience has showed that most terrorists are radicalized, fighting terrorism could begin with preventing radical ideologies from spreading within the community. Radicalization is not a threat to society if it is not connected to violence or other unlawful acts, such as incitement to hatred (Organization for Security and Cooperation, 2014). A proper counter-terrorism legal policy in Indonesia must be oriented toward the deradicalization of those who have embraced radical Islam. There is a distinction between prevention and deradicalization as the former focuses on the anticipation acts of terror while the latter is more concerned with the mental transformation of the individual. A terrorism eradication effort focusing on anticipation might succeed in bringing about security within the community

for a short period of time, but a deradicalization process would best work in a long run. Making conventional education accessible to everyone may have great impact. In fact, the lack of education and poverty makes many individuals unable to follow rational processes. This can sometimes lead them to take shortcuts to advancing their political/religious causes by means of force and terror. The misunderstanding of the teachings of Islam is also one of the factors of terrorism in Indonesia and possibly in many other Muslim countries. The work of preventing terrorism must also begin by supporting people who are at risk of being drawn into terrorism or extremist activities, working with and supporting community groups and social enterprise projects who provide services and support to vulnerable people, supporting local schools, local industry and partner agencies through engagement, advice and training, working with faith groups and institutions to assist them in providing support and guidance to people who may be vulnerable. Creating well paying jobs, promoting social justice and equality could help tackle terrorism. Radical Islam expands in communities facing high socio-economic inequality. Nevertheless, economic solutions alone are not enough to overcome the complexity of radicalism. Promoting democracy and the rule of law, too, could undoubtedly help address the phenomenon. Democracy, to some extent, discourages terrorism by reducing the appeal of violence as a means to pursue political objectives. Democracy might be imperfect but its absence can contribute to the spread of Islamic radicalization and terrorism. The prospects for democracy and free expression may help to reduce some of the sources of anger and frustration felt by certain individuals in the community. Without basic democratic freedoms, citizens lack peaceful and constructive means to express their grievances and are thus more likely to resort to violence. Hate and extremism are likely to grow in societies where young people are deprived of opportunities for education and a brighter future (Alan and Jitka, 2003).

## CONCLUSION

For the fight against terrorism cannot be effective and sustainable, unless it is conducted at all times in accordance with the rule of law and international human rights standards. The state's response to the threat of terrorism should be evidence-based and proportionate to avoid losing the trust and support of the public; it cannot be limited to repressive actions focused on pursuing terrorists (Organization for Security and Co-operation, 2014). Counter-terrorism work of lawenforcement and intelligence agencies needs to be accompanied with prevention efforts to address conditions that are conducive to the spread of terrorism, disrupt terrorist radicalization and stem recruitment. In its fight against terrorism, the Indonesian government issued counter-terrorism laws whose implementation violates the principles of human rights, democracy and the rule of law. The respect for human rights and the rule of law requires that suspects must be treated with dignity by guaranteeing the same rights to everyone regardless of their ethnic or religious background. Powers given to the police and other forces should not be unlimited and unchecked. Terrorism is a challenge which has to be met with innovative ideas and approaches. Any long-term strategy must take into account evidence which shows that the lack of education and democracy can be a key predictor of terrorism.

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### CORRESPONDING AUTHOR:

Mardenis, Faculty of Law Andalas University Padang. E-mail:  
mardenis@law.unand.ac.id

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