

VAN ZORGE REPORT

ON INDONESIA

Behind the Headlines

VOL. XI NO. 8—SEPT 17, 2009

FROM THE EDITOR

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IN BRIEF

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EXPERT INTERVIEW

Bima Arya Sugiarto, Executive Director, Charta Politica Indonesia



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FROM THE EDITOR...

Listen to Ben Franklin

An explosion, a burst of media coverage, promises of swift justice and exacting punishment. Then comes the reactionary legislation.

In the aftermath of July 17th terrorist attack, the Indonesian government has prepared to sacrifice civil liberties in the name of counterterrorism. Under current law, suspects may be held for only seven days without charges. The Yudhoyono government is now proposing to allow suspected terrorists to be detained without charges for two years. Other proposed measures include re-opening the anti-terror desk in the Indonesian military, and increasing the role of the special forces (Kopassus) in fighting terrorism.

Such reactionary lawmaking is common among states faced with the threat of terrorism. Over the past ten years, a remarkably clear pattern has emerged in Indonesia, the United States, Australia, and elsewhere. First, after a major attack, governments are under pressure to appear strong in the face of public fear. Second, in order to provide the appearance of security for its citizens, states invoke ill-conceived laws that expand the power of law enforcement with little thought given to the consequences. Third, after the initial panic subsides, the public comes to regret the far-reaching consequences of reactionary legislation.

In the United States the attacks of September 11th, 2001 gave rise to a plethora of reactionary laws and policy; the Patriot Act that included warrant-less wiretapping, the creation of a legal black hole in Guantanamo Bay, where prisoners were classified as 'enemy combatants' and left without recourse to legal proceedings, and the 'torture memos,' a series of documents produced by the Justice Department that classified waterboarding and other forms of torture as permissible interrogation techniques.

Following the first Bali bombings, Australia too passed counterterrorism legislation that has become very controversial. The 2005 Antiterrorism Act included a 'shoot-to-kill' clause that has been criticized and opposed by Australian civil rights organizations as well as many in the government and judiciary. The same is true for Australia's policies that allow suspect's detention without charges for two weeks.

Proponents of such laws argue that exceptional circumstances demand exceptional legislation. The classic example of this is the Roman senate's appointment of a dictator to protect the republic under extraordinary threat. There is no guarantee, however, that the dictator will relinquish his power even once that the threat has subsided. The disregard for democratic principles like the rule of law may pose as great a threat to democracy as terrorism itself. The costs of these exceptions outweigh any benefits.

Proponents of reactionary legislation ignore the unintended consequences of granting the state broad powers to detain its citizens. The government may brand any opponent a suspected terrorist. The suspect is then imprisoned without any contact with his family and without basic legal rights. As the Indonesian National Human Rights Commission argues, such a policy is fundamental violation of an individual's human rights.

The Indonesian government's proposed policy of two year detention is similar to—and undoubtedly modeled after—that of Singapore and Malaysia. In Malaysia, dozens of suspected Jemaah Islamiyah members are currently being held alongside human rights activists, journalists and bloggers. This detention period may be extended in two year increments indefinitely, meaning that individuals may be held without charges ever being filed.

Reactionary laws may actually damage the fight against terrorism by giving the Indonesian government a reputation of not upholding the rule of the law: the very principle it is purportedly defending against terrorism. In doing, Indonesia may be repeating the mistakes of the United States, which is only now beginning to recover from the harm to its reputation caused by the actions and policies created in the aftermath of September 11th.

Such damage to the United States' public image has assuredly helped terrorists' recruitment efforts. Because while locking up terror suspects prevents those individuals from committing act of terror themselves, it does not prevent others from taking up the cause. Nor does it prevent imprisoned terrorists from maintaining their influence in the organizations. Currently some

members of Jemaah Islamiyah imprisoned in Indonesia are able to hold court with their followers in their prison cell, safe from prosecution because they are already under lock and key.

Fighting terror is not as easy as throwing away that key. Democracy is endangered not only by terror attacks, but by the anti-terror legislation passed in their aftermath. As Benjamin Franklin's said, "Those who would give up Essential Liberty to purchase a little Temporary Safety deserve neither Liberty nor Safety." President Yudhoyono must remember Franklin's wisdom by resisting the temptation to use counterterrorism to expand the role of military in domestic affairs, and avoid passing laws that turn back the progress made during *Reformasi*. □

IN BRIEF

Government well prepared, but H1N1 may still wreak havoc

As of 14 September, there were 1097 confirmed cases of the H1N1 virus spreading over 25 of Indonesia's 33 provinces. Most are concentrated in the greater Jakarta area, and 10 deaths have been linked to the virus. Cases of the virus, popularly—but inaccurately—known as swine flu, are on the rise, and the World Health Organization (WHO) has declared it a pandemic, which by definition means it is unstoppable.

Now that H1N1 is in Indonesia, certain questions arise: How bad could it get? Whose responsibility is it to respond? And, are they ready?

Early missteps

Early on in the H1N1 influenza outbreak, Health Minister Siti Fadilah Supari indicated that Indonesia would not be struck by the virus. She explained that Indonesia's climate would protect it from H1N1, and that Indonesians were less susceptible to the virus than other populations.

These claims were quickly proven to be nonsense. By mid July, the government had reported the first confirmed case of H1N1 in Indonesia and the first fatality was reported on 22 July.

The messages sent early on by the Health Minister may have lead to dangerous complacency among other ministries and the public. Estimates vary widely, but some scientists predict that between 10 percent and 30 percent of Indonesians will become infected with H1N1 in the first wave that reaches the country. Even if only 2-4 percent of those infected are hospitalized, the government may be overwhelmed by the need. And if millions of productive workers in their 20s and 30s fall ill, the repercussions will be felt far beyond the hospitals.

Potential dangers

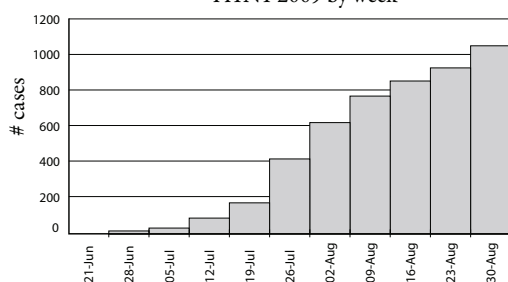
There are a couple of factors unique to Indonesia that have the attention of health experts both here and abroad.

Indonesia was not hit by the first wave of H1N1, which was concentrated in the Americas. As the first wave dies off, the second wave is hitting tropical and southern countries. For countries like Indonesia, whose rainy season is just a couple of months away, there is a fear that the common flu season may occur simultaneously with the coming of H1N1. The common flu, occurrences of which increase during rainy season, may lower the immunity of individuals who catch it, making them more susceptible to H1N1. Many feared this would be the case with the SARS virus, however, and those predications did not come to pass.

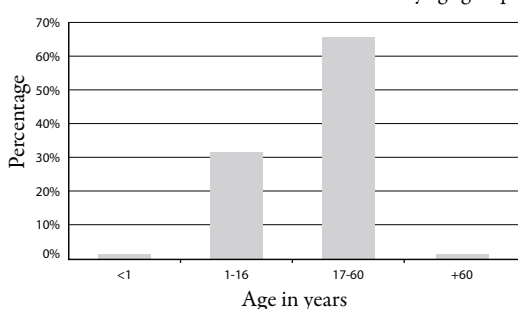
The second danger is that H1N1 may 'recombine' with H5N1 (avian flu) to produce a 'superbug.' Viruses are able to mutate either on their own or in

Indonesia:

Cumulative Confirmed Cases of Pandemic H1N1 2009 by week



Confirmed Cases of Pandemic H1N1 by age group



Source: World Health Organization

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combination with another virus. The tropics in general are increasingly being recognized as the zone where influenza mutations occur, as flu is active year-round rather than only seasonally.

Avian flu has not been fully contained in Indonesia, and continues to take victims. To date, there have been 141 cases and 115 deaths from avian flu in Indonesia.

The possibility of a recombination of H1N1 and avian flu is remote, but the threat it poses is great. The potential danger lies in a recombination of the two: a virus as virulent as avian flu and as infectious as H1N1. Avian flu does not spread quickly, but has a high percentage of fatalities for those who do contract it. Over 80 percent of avian flu cases in Indonesia—and over 60 percent worldwide—are fatal. H1N1 is incredibly infectious, but most individuals (around 90 percent) are able to recover without even a visit to the doctor.

In order to track possible mutations, scientists monitor how the virus spreads among humans and animals and take samples of the virus to track its profile. Worldwide, there have been four cases of the H1N1 virus being transmitted from humans to pigs and poultry, including a case in Argentina where a turkey contracted H1N1.

The Agriculture Ministry is monitoring pig farms in Indonesia for cases of H1N1, as it continues to monitor for avian flu. To date, only one pig infected with H1N1 has been found in Indonesia, and it was imported from Singapore. Surveillance, however, remains limited and many experts argue it would need to be increased substantially to be of real value.

Thus far, all cases of transmission in Indonesian have been human to human and, according to the Health Ministry and the WHO, the H1N1 virus has the same profile and has not mutated. The Health Ministry, however, continues to make it difficult—though not impossible—for scientists to access samples of the virus. This policy was borne out of the Minister's desire to see that countries that share samples would have a fair share of the vaccinations produced. Without such samples, however, surveillance is impossible.

Government response

The structures and systems set up in the wake of the avian flu outbreak may serve Indonesia well in the H1N1 pandemic. In particular, the Indonesian National Committee for Avian Influenza Control and Pandemic Influenza Preparedness (Komnas FBPI) is working closely with the Health Ministry to respond to H1N1. According to one official, they are taking exactly the same steps as they did with avian flu.

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The Ministry of Health is charged with monitoring ports of entry, diagnosing cases, organizing health logistics—including stockpiles of Tamiflu— along with communication with the public.

As a result of avian flu, the government has also put together two phonebook-sized Pandemic Preparedness Plans: one for the health sector, and one for the non-health sectors. Based on the level of outbreak, different plans will go into effect, culminating, if necessary, in the isolation of an area.

The Health Ministry has also undertaken two large scale simulations of flu outbreaks in 2008 in Bali and earlier this year in Makassar, as well as several smaller scale simulations. In addition, they have hosted workshops for business communities.

More minor steps under the Pandemic Preparedness Plan include allowing employees who are confirmed to have the virus to take a three day sick leave. Businesses leaders who attended the workshop have been instructed to tell their employees to stay home if they are sick.

Steps like these may be effective for those who work in the formal economy, but for the two thirds of Indonesian who find employment in the informal sector, three days off work—and without pay—may prove too costly.

The structures and systems in place at the Health Ministry and Komnas FBPI illustrate a good level of preparedness, but that picture may be misleading. When it comes to a pandemic, the role of the non-health public sectors as well as private sectors becomes paramount.



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Given the necessary involvement of other ministries, many countries coordinate their response to the pandemic from the ministry that oversees domestic affairs. For example, in the United States, the Department of Homeland Security coordinates the response from the relevant departments and agencies, including the Department of Health and Human Services.

In the Pandemic Preparedness Plan, much of the responsibility falls to the districts heads. As yet no messages have been conveyed that they should make any preparations. And so while the Indonesian government has detailed plans to minimize the damage of the H1N1 pandemic, it must now get on to implementing those plans.

The New Regional Taxation Law: an end to predatory taxation?*

By eliminating predatory tax regimes in the provinces and districts, a new regional taxation bill (RU PDRD-Rancangan Undang Undang Pajak Daerah dan Retribusi Daerah) passed by the House of Representatives in August may encourage investment in the regions. The new law is an attempt to undo the damage created by the plethora of local taxes and user charges that were issued by regional government following devolution of powers in 2001. Many of these taxes and user charges were unrelated to the fiscal needs of the governments concerned, and were nothing more than a money grab. The new law contains two major changes regarding taxes (pajak) and user charges (retribusi), the two types of regional taxation in Indonesia.

- Provincial governments are allowed to impose taxes on vehicle ownership and vehicle registration, fuel, groundwater and cigarettes. No other taxes can be issued by the provincial level any longer. Likewise, district governments are now limited to a specified list of 11 taxes that they can charge, ranging from swallows' nests to street lightning. Finally, RU DPRD stipulates that district governments can impose a maximum of 30 different types of user charges, while the provincial level can no longer issue user charges. The old Regional Taxation Law No. 34/2000 did not stipulate such limits.
- The RU PDRD sets minimum and maximum rates for each type of tax. Previously both provincial and district governments were able to set tax rates as high as they wished.

** This part of the brief was provided by Michael Buehler, Postdoctoral Fellow in Modern Southeast Asian Studies at Columbia University in New York. He can be reached at mb3120@columbia.edu.*

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Two new taxes are worth mentioning:

- The RU PDRD pays special attention is paid to vehicle taxation. The annual vehicle tax has been increased from 1.5 % of a car's resale value to 2 percent for the first vehicle. Vehicle owners will have to pay an annual tax rate between 2-10% for any additional vehicle, including cars, motorbikes, trucks and boats, excluding cars for public transport. The level of the tax is calculated by the multiplication between the vehicles sale value and a coefficient that relates to the regions road conditions.
- Regional governments can impose new taxes on cigarettes, hotels, entertainment and advertising under the RU PDRD

Soon after the adoption of the new law, automotive distributors such as PT Astra International Tbk and PT Indomobil Sukses International Tbk, as well as automotive financing firms such as PT Adira Finance Tbk saw their shares decline significantly as investors feared that the new law could dampen demand for new cars, motorbikes and trucks due to higher tax rates for a second vehicle purchases. Likewise, cigarette producers were warning about a negative impact of the new law. The Indonesian Association of Cigarette Producers (GAPPRI) said that the RU PDRD would be an extra burden for the industry and most likely exacerbate the illegal production of cigarettes.

Balance of power

The law will dramatically rebalance powers of taxation between the central and regional governments. Legislation passed in 1997 specifically limited the number of taxes and levies that regional governments could impose, but this changed dramatically after the decentralization law of 2001 provided sub-national governments with the authority to introduce taxes and levies. Regional governments issued more than 6000 different taxes and levies from 2001 until mid-2005 alone. Most of them targeted the primary sector, as is shown in Table 1.

Table 1
Authorised new taxes and charges by type,
Fiscal year 2000-2001

	Province	District/ Municipality
Primary sector	42%	41%
Service sector	20%	21%
Distribution	18%	12%
Government administration	11%	11%
Secondary Sector	--	11%
Others	9%	4%

Source: Data collected by the *Report*

Regional governments claimed to issue new taxes and user charges because of a lack of fiscal capacity. Yet in practice there was no correlation between the numbers of regional taxes issued and expected per capita expenditure or revenue of a certain government unit. Most sub-national taxes and user charges were predatory in nature.

The central government had insufficient powers to revoke such taxes. The previous law required regional governments to submit their newly established taxes and charges to the Ministry of Home Affairs for formal review within 15 days. Some taxes and charges were indeed rejected on the grounds of harm to the regional economy. However, due to the low capacity of the Ministry of

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Home Affairs, it managed to review just over 40 percent of the new taxes and charges submitted. Many regional governments implemented the bulk of the new revenue instruments unilaterally and illegally.

The newly adopted regional taxation law aims to put a stop to such excessive tax regimes by introducing a so-called ‘closed list’ that stipulates the type of taxes and levies that may be imposed by regional governments. Consequently, the 6000 double taxes, illegal duties and levies will be abolished. The new law allows the central government to punish regions violating the closed-list of taxes and levies.

The price of progress: Tax bill introduces an earmarking mechanism for development spending

According to a Ministry of Finance spokesperson, the government wants to ensure that revenues from regional taxes and levies imposed under the new law will be used for the benefit of taxpayers. Therefore, the revised regional taxation law rules that revenues generated must be used to finance related activities. Vehicle tax proceeds, for example, will now be earmarked to develop and maintain roads. Likewise, at least 50 percent of revenue from cigarette tax will have to be allocated for healthcare services and facilities.

The success of these laudable earmarking mechanisms could be put in jeopardy, however, by endemic corruption within Indonesia’s bureaucracy. Recent investigations by the Corruption Eradication Commission have exposed widespread practices of arbitrary and predatory tax collection at the sub-national level. In a report published in January 2009, the Indonesian State Audit Agency pointed out that it is common practice among regional officials to divert tax revenues for personal use.

Governors, district- and sub-district government heads seem to be the main beneficiaries of such practices, while the Ministry of Home Affairs is also alleged to have profited. In a report from February 2009, the Corruption Eradication Commission estimated the total amount of embezzled tax proceeds to have reached 1.3 trillion rupiah (1 billion USD) in 2005-2007 alone.

In short, while the revised regional taxation law will improve legal certainty for investors, it remains doubtful that the revenues generated will be used to the benefit of the Indonesian people. □

SPECIAL FEATURE:

Two at the top: the Constitutional Court and the Supreme Court*

*As the public awaited the results of the April legislative elections, Indonesia's top judicial bodies, the Constitutional Court and the Supreme Court deliberated and delivered separate — and different — decisions. This issue's special feature takes an in-depth look at the two courts.**

The Constitutional Court (Mahkamah Konstitusi or MK) was established in 2003 to be the court of review for legislation. Its main tasks are, firstly, to determine whether laws are consistent with the Constitution – striking down those that are not – and, secondly to decide whether votes in elections have been counted properly.

This job might appear straightforward, but nothing could be further from the truth. Quite apart from difficult legal issues, virtually all disputes the MK hears have strong political dimensions and ramifications. When assessing whether national laws comply with the Constitution, the MK is often required, in effect, to pass judgment on matters of government policy. This can often include determining the content and scope of contested human rights. In election cases, through reallocation of seats, the MK can reconfigure the political constellation of national and regional parliaments.

The MK has proved itself to be Indonesia's most professional judicial institution. Led for its first four years by the shrewd and formidable constitutional law scholar, Professor Jimly Assiddique, it has built a deserved reputation for being competent and reliable in its decision-making and its independence from government. Now with a new Chief Justice, Professor Muhammad Mahfud, all indications point towards the MK remaining a model for Indonesian judicial reform.

The MK's main limitation is that it only has the authority to rule on laws passed by the national parliament. It cannot hear cases regarding legislation passed by regional parliaments or regulations created by national or regional governments. Because of this gap in its authority, the MK has had to apply various 'tempering techniques' to make its decisions effective.

The MK's legitimacy has often been called into question. MK judges are not elected, so opponents often point to a lack of democratic credentials to thwart the majority decisions of elected House of Representative members. Some claim also that the MK has inadequate resources, expertise and experience to stand in judgement on delicately-balanced economic and social policy choices.

* The following special feature was prepared by Simon Butt, senior lecturer at the University of Sydney. He can be reached at s.butt@usyd.edu.au.

Critics have also attacked many of the MK's rulings as weak, poorly-reasoned or inconsistent with previous decisions. Although there is truth to some of these claims, most of the MK's controversial rulings conceal carefully-considered and pragmatic compromises, many of which do not strictly following of the letter of the law. These compromises, the MK learnt from its very first case, are necessary to preserve its credibility and perhaps even for its very survival. The MK's judges, many of whom are former politicians, are well accustomed to the gulf that often exists between what the law on paper requires and what will 'stick' in the cut and thrust of politics.

An early lesson for the Constitutional Court : The Electricity Law case

The MK learnt early on that it needs to incorporate a measure of flexibility into its decision-making from its very first case. In 2002 parliament passed a new Electricity Law (20/2002) in response to conditions that were tied to the provision of financial assistance to Indonesia by the International Monetary Fund (IMF) following the financial crisis of 1997. The Law sought to break down state monopolies in the provision of electricity.

Soon after the law's passage, however, the MK was asked by a number of parties, including employees and former employees of Indonesia's State Electricity Company, to assess whether the Electricity Law was consistent with Article 33 of the Constitution. Article 33 was inspired by leftist and nationalist ideals popular in the lead-up to the declaration of Indonesia's independence. It requires that the economy be structured as a 'common endeavour' and that the state control natural resources and sectors which provide the necessities of life.

The MK concluded that parliament's attempt at breaking down state control over the electricity sector fell foul of Article 33. But rather than just invalidating the offending sections or parts of the law, the MK, perhaps over-enthusiastically, struck down the entire statute, claiming that it violated the 'spirit' of Article 33.

The decision was strongly criticised by members of the legislature and the executive. Criticisms included that the MK had insufficient expertise to make decisions about matters of economic policy; that nine judges lacked the democratic legitimacy to invalidate Acts of Parliament; that the MK had prevented the government from complying with IMF conditionalities without considering the consequences; and that privatisation was critical to ensuring Indonesia would have sufficient electricity to meet demand.

The government's response was swift and decisive. Within two months it issued a regulation which, in effect, reinstated the thrust of the invalidated

Electricity Law, albeit in different legal form. Government regulations, usually drafted by government departments and then signed by the President, have less legal weight than a statute (a law passed by parliament). But they are still ‘law’, despite bypassing parliamentary scrutiny, and there are no enforced limits as to what regulations can cover, provided that their content is consistent with ‘higher’ laws, such as a statute or the Constitution.

Because the content of the regulation is similar to the content of the Electricity Law, it is likely that the regulation also breaches Article 33 of the Constitution. But the Court has no power to investigate government regulations – its powers are limited to assessing statutes. Only the Supreme Court (Mahkamah Agung or MA) can review government regulations, but then only for compliance with statutes, not the Constitution. In any event, the Supreme Court has shown itself to be reluctant to strike them down. In short, the Constitutional Court can do nothing about the regulation, even though the regulation stands as a blatant derogation of its authority.

This case exposed two large holes in the design of the Constitutional Court and was a lesson for the judges that they had to exercise caution in the application of their authority. The MK lacks jurisdiction over the bulk of Indonesian law contained in executive-level regulations and it has no power to enforce its decisions against the government.

Similar shortcomings are faced also by constitutional courts in other countries, but many governments tend to comply as a matter of respect for the separation of powers and the judiciary. This case showed that in Indonesia, however, politicians were hostile to having their decisions (as reflected in their laws) scrutinised, let alone invalidated; and that the government would ignore MK rulings if doing so suited its purposes.

From the earliest days of its existence, then, it was clear that the MK needed to find ways to make its decisions more politically palatable. If the MK failed to accommodate the environment in which it operated and continued to make decisions which the government ignored or circumvented it faced irrelevance and disrespect. There was even the possibility that it could be disbanded if powerful politicians became irritated by the MK and its decisions.

Tempering techniques

After the heady initial muscle-flexing in Electricity Law case, the MK, quite necessarily, adopted several ‘tempering techniques.’ These methods could soften negative effects of its decisions on other arms of government, but they might arguably require the MK to diverge from the letter of the law.

It has adopted at least four tempering techniques. In so doing, it has drawn on strategies employed by constitutional courts in continental Europe and

elsewhere that are also caught between enforcing the constitution and political reality.

Technique 1. The MK has declared that its decisions operate only into the future. In other words, even if it finds that a law is inconsistent with the Constitution, the law will be invalid only from the date the it hands down its decision invalidating the law. Anything done under the law before the MK invalidated the law remains legal and does not need be to ‘undone’.

This self-imposed limitation was brought into stark relief in the aftermath of a Constitutional Court case involving some of those involved in the Bali bombings in Kuta in 2002. The Court had, by bare majority, decided that one of the laws under which the Bali bombers were convicted was unconstitutional because it was enacted after the bombings took place. The law was retroactive in effect, and the Constitution prohibits retroactive laws. The decision could not, however, be used to undo the action taken under the law that the MK held was unconstitutional. In other words, the Bali bombers did not need to be set free or retried. Because they had been convicted under the law before the MK had invalidated the law, their convictions stood.

Two further cases illustrate some of the ramifications of this technique. In one case, three Australians convicted and sentenced to death for attempting to smuggle heroin out of Indonesia asked the MK to consider whether imposing the death penalty in narcotics cases contradicted the Constitution’s right to life. In another, some of the Bali bombers approached the MK, asking it to assess whether the way the death penalty is carried out in Indonesia – by firing squad – was cruel and inhumane punishment, prohibited by the Constitution.

The MK turned down both requests. Even if it had agreed with the Bali 9 and declared the death penalty unconstitutional, the executions would probably have gone ahead because the death penalty had already been imposed under the law. By contrast, if the Bali bombers had succeeded in their second case, they might have been able to avoid the death penalty, at least by firing squad, because the law under which they were to be executed had not yet been applied to them – that is, they had not yet been executed.

Technique 2. In several cases, the MK has declared that a law is not consistent with the Constitution but, because the consequences of invalidating the law would be too great, has refused to strike down the law, preferring instead to ask the government to make further attempts at compliance.

A series of cases in which it was asked to review the national state budget provide instructive examples of the use of this technique. The Indonesian

Constitution requires that the national parliament allocate at least 20% of the state budget to education. The Indonesian Teacher's Association, and others, asked the MK, in cases filed almost annually from 2004, to invalidate state budgets that have failed to meet this target.

These cases are about as straightforward as legal cases can be: the constitutional target appears clear; the budget does not meet the target; therefore, the budget does not comply with the Constitution. Realising, however, that budgets are hotly political and usually delicately balanced, the MK, each year, has declined to invalidate it, citing the likelihood of ensuing financial chaos. Instead, it has urged the government to increase the budget allocation for education from year to year.

Technique 3. Using this strategy, the MK has decided that a law breaches the Constitution but refuses to strike it off the books immediately, choosing instead to set a deadline for the national parliament to pass a new, constitutional, law.

This approach was adopted in the Anti-Corruption Court case of 2006, in which the MK decided that the law which established the Anti-Corruption Court was unconstitutional. But, admitting that the Anti-Corruption Court was making significant dents in corruption levels in Indonesia and realising that it would be shut down if the law was invalidated with immediate effect, the MK gave parliament until 19 December 2009. At time of writing, however, it was unclear whether the DPR would meet this deadline.

Technique 4. In several decisions, the MK has decided that a law is 'conditionally constitutional' – that is that it is constitutional and can stay 'on the books' provided that it is implemented in a way which it thinks is constitutional.

Ruling on the election

This technique was adopted in a recent Constitutional Court judgement, issued on 7 August 2009, after the MK was asked to pass judgement on the method the Electoral Commission (KPU) used to allocate seats from the 2009 election. Under Indonesia's electoral laws, the number of votes required for each parliamentary seat is determined by dividing the number of registered voters in a particular electoral district by the number of seats in that district. Once a party's votes meet the quota, it obtains a seat. Of course, not all seats can be filled in this first phase: some parties will not receive enough votes to obtain a seat; others obtain seats, but their 'left over' votes are insufficient to obtain a further seat. Known as "remainders", these votes and seats need to be allocated in some way. Different countries use different methods to do this.

The method of allocating the surplus seats and votes to parties under Indonesian electoral law (10/2008) is very complicated and open to wide interpretation, as has been discussed in the *Report* of 31 August, 2009. The KPU issued an internal regulation which applied an interpretation that attempted to apply the surplus more or less proportionally.

But several Democratic Party members who missed out on a seat under this allocation method decided to challenge the KPU Regulation. Since this was a regulation and not a law it was outside the jurisdiction of the MK and was taken instead to the Supreme Court which has the power to rule on regulations issued by government agencies.

The Supreme Court ruled that the KPU Regulation had not complied with the electoral law. According to the MA's interpretation, votes for the major parties would, in effect, be counted twice: once to determine whether they had met the quota for a seat in the first phase, and again, to determine how many of the 'remainder' seats they would obtain.

The significance of the Supreme Court's decision was clear: 66 seats would need to be reallocated in the DPR, and around 1,300 in regional parliaments. Major parties were the clear winners, with SBY's Democratic Party gaining an additional 31 seats, and PDI-P and Golkar gaining between 16 to 19 seats each.

Small parties, such the United Development Party (PPP) and Prosperous Justice Party (PKS), Gerindra and Hanura would all lose seats. These parties therefore mounted a case with the Constitutional Court, asking that it reverse the effect of the Supreme Court judgement. A preliminary matter was whether the Constitutional Court could, in fact, hear the case at all. The MK lacks power to either review Supreme Court decisions or to determine whether a KPU Regulation is consistent with law. In its judgement, the Constitutional Court admitted these limitations and, instead, focussed on whether the Election Law, which the disputed KPU regulation had sought to implement, itself complied with the Constitution.

The Constitutional Court found that the provisions of the law were so unclear that they violated the Constitution's guarantee of 'legal certainty.' Instead of invalidating the provisions, however, the MK held them to be 'conditionally constitutional' – that is, valid, provided that they are applied in line with the MK's own interpretation of them. And this interpretation effectively supported the KPU Regulation that the Supreme Court had struck down. Without explicitly saying so, the Constitutional Court overthrew the decision of the Supreme Court and returned the seat count in parliament to the status quo.

Implications of tempering techniques

It seems reasonable to speculate that MK's longevity thus far can be attributed, at least in part, to its flexible approach to legal principle and interpretation, as reflected in these techniques, thereby minimising political resistance to its function as it exists. Other new institutions established to embark upon legal reforms have not treaded so carefully, prompting a political backlash strong enough to threaten their efficacy – in some cases, even their very existence.

The Judicial Commission, for instance, was initially established to investigate judicial (mis)conduct and to propose appointments to the Supreme Court. Within only a few years of its establishment, the Commission was hobbled after it publicly targeted previously 'untouchable' senior members of the Supreme Court in its investigations. The Court responded fiercely, asking the Constitutional Court to prohibit the Judicial Commission from investigating judges on the basis that such scrutiny might affect the independence of judges when deciding cases. The Constitutional Court agreed, in effect prohibiting the Judicial Commission from examining the decisions of any Indonesian judge. This left the Commission with the sole and rather toothless function of proposing names of judges to fill vacancies on the Supreme Court – advice which the Supreme Court almost routinely ignores.

The Anti-Corruption Commission (KPK) and the Anti-Corruption Court, also, have perhaps performed too well. Although both institutions began slowly, they incrementally built up an extraordinary track record of success in their investigations, prosecutions and convictions in their corruption cases, albeit involving lower-ranked public officials, including provincial governors. In so doing, they faced little overt political resistance.

From this base, the KPK began targeting more senior and prominent officials – even national parliamentarians and a relative of President SBY. Pursuing big fish is clearly necessary if Indonesia is to reduce its very high corruption levels, but the KPK's timing lacked political nous. The move provoked senior politicians to launch a full-blown attack on both institutions and the legislation on the Anti-Corruption Court currently being debated in the parliament may greatly reduce the Court's effectiveness. Although the tempering techniques used by the Constitutional Court are arguably necessary for the MK's survival, they may themselves be unconstitutional or otherwise illegal, raising significant questions about the MK and its role. The Constitution requires the MK to ensure that the DPR follows the Constitution. When it fails to do so, but the MK chooses not to intervene, it is failing to perform this task. The MK is allowing laws to continue in force which, the MK has determined, are beyond the DPR's lawmaking power.

There are concerns about the MK's decision to give only prospective effect to its decisions. If an applicant cannot use a favourable MK decision to force the government to undo action that it took on the basis of an unconstitutional law, there seems little to be gained in approaching it. Only people to whom the unconstitutional law were to be applied in the future gain from the MK's ruling, not the applicant that launched the case.

Meanwhile, the government can pass a law which contains the most egregious breach of human rights and apply it with impunity until someone asks the MK to strike it down. Even if it eventually does strike it down, any action taken under the law before it was struck down will be considered 'legal'. As mentioned, the MK made a general exception to this stance in the vote allocation case. But this is problematic in itself; the MK did not justify why it made the exception and gave no guidelines as to the circumstances in which the exception might be applied in the future.

The decision on the Electoral Law is also problematic in a number of ways. The first is that, as mentioned, the MK lacks power to review Supreme Court and KPU decisions, yet it managed to deprive a Supreme Court decision of legal effect. It did this by arguing that the law had caused legal uncertainty (as evidenced by the diverging interpretations of the KPU and Supreme Court) which is prohibited under the Constitution. Yet surely this is stretching the concept of legal uncertainty which, if taken to its logical conclusion, could be used as a ground to invalidate almost any Indonesian statute.

In addition, noting that its past practice had been to give only prospective operation to its decisions, the MK decided that an exception was justified in this case because correct 'democratic' seat allocation in national elections was of particular importance. The decision smacks of 'legal norm shopping' – finding a legal argument, albeit weak, to support the desired decision, in this case to circumvent limitations on its jurisdiction and to diverge from its usual practices.

Perhaps though, criticisms such as these should be reserved for constitutional courts which, although operating in political systems in which judicial review and accountability mechanisms are well accepted, persist with similar tempering techniques. It may be unfair to judge the Indonesian Constitutional Court using standards developed in countries which have more compliant and respectful governments, and where political considerations are not so overwhelming.

Because the MK has shown many enduring signs of promise, expectations of what it can achieve in Indonesia's political environment are simply unreasonably high. It seems that to have any chance of making the

government follow the letter of the Constitution in the future, the MK must itself deviate from the Constitution, at least for now.

It cannot decide its cases in a vacuum, devoid of their political contexts and ramifications. If the MK always strictly applied the letter of the law in its cases, then it even might not have thrived or even survived thus far.

Successes

We also should not forget the MK's significant successes. Firstly, without using tempering techniques, it has struck down provisions of several problematic statutes which it declared were not consistent with Indonesia's world-class bill of rights. These include laws which damaged freedom of expression and discriminated on the basis of political persuasion.

Second, some of its 'tempered' decisions have, it seemed eventually prompted a government response. For instance, largely due to annual prodding by the MK, the DPR, eventually, allocated 20% of the state budget to education from 2009.

Third, by all accounts, decisions of the MK are forcing some DPR members to at least flick through the Constitution before they sign off on laws; and they are said to be making legislators more careful about what they attempt in DPR and say in DPR debates, lest the MK ask for a transcript of the debates and reveal it at trial for all to see.

Finally, the MK provides a very public forum in which legal issues are openly explored and grievances between citizens and the government can be fully aired, if not always satisfactorily resolved. It's apparent legal norm shopping and flexibility does not seem to deter citizens, organisations and institutions from using it – they still flock to it to put their cases. Perhaps the MK's provision of this forum – in which the government is held to account to citizens for the laws it makes – is its greatest achievement thus far. It remains to be seen, though, whether the MK will build for itself authority built on reputation and popular support from which it can compel the government and the DPR to comply with its decisions. ▣

EXPERT INTERVIEW:

Bima Arya Sugiarto



Bima Arya Sugiarto is Executive Director of Charta Politika Indonesia. The scholar, analyst, and consultant received his PhD from Australian National University and was a moderator on MetroTV's program Democrazy. The Report said down with Bima to get his take on the top issues of the day: from relations with Malaysia, to the KPK, and the possible resurrection of Tommy Suharto.

Van Zorge Report: Tommy Suharto officially announced his candidacy for Golkar chairman on 9 September. What are the implications of the race for the office and the Golkar chairmanship?

The most important issue facing Golkar is the direction of the party after the chairmanship election. Bakrie would lead Golkar to SBY [Susilo Bambang Yudhoyono]; Paloh would lead Golkar in another direction. For Golkar activists at the regional level, it is important for them to know which candidate will provide more benefits, not just with strong political connections, but also in term of income, business, opportunities, etc. This is an old habit of Golkar. It is difficult for Paloh to get political support since he hopes to take Golkar into the opposition.

As for Tommy, there are two common interpretations for his entering the race. The first is that Yuddy Chrisnandi [also vying for the chairman position] invited Tommy to do so with the idea that with Tommy as chair, Yuddy might then be chosen as Secretary General. The other possibility is that Tommy joined in order to split the

vote, siphoning off votes that would have gone to Bakrie and thereby allowing Surya Paloh to win.

More important than the question of whether Golkar will be in the government or in the opposition is the ability of the chairman of Golkar to provide party leadership. He has to cultivate a new generation of leaders and a new image of the party as well. The problem inside Golkar is that there is a culture of vote-buying: as long as that culture is maintained, only entrepreneurs, businessmen, or those who are rich can take over the chairmanship.

VZR: There are reports that the House of Representatives is looking to strip wiretapping authority of the Anti Corruption Commission (KPK) and place its prosecutorial authority under the Attorney General's Office. Is this a systematic attack?

We can interpret the phenomenon of the weakening of KPK from two perspectives. First, there have been

tensions between KPK and other institutions, such as the National Police, over overlapping jurisdictions. Second, the problem is related to the perception of personal threats felt by politicians. There is an ongoing systematic move to weaken the KPK

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VZR: Where is President Yudhoyono? Why hasn't he spoken out?

SBY will not make statements critical of particular institutions. It is not his style to take the side of one institution over another, in this case either the Police or the KPK. He prefers to make broad normative statements, like those affirming his political commitment to deal with corruption. He does not want to create conflict by issuing statements that could be misinterpreted.

It is, however, clear from his previous statement that he believes the KPK should not have unlimited powers.

Perhaps he sees this as a check on the KPK's powers.

VZR: Do you think the new House of Representatives [DPR] will be more successful than its predecessor?

In 1999, PDI-P won the majority of votes but it failed to gain any momentum in political contests. The problem was that most of the members had low levels of education.

Now, the Democrat Party has the majority in the DPR and

I have observed something interesting. The percentage of legislators with high levels of education has risen dramatically [in all parties].

I also see a declining number of legislators who are party activists. Increasingly, entrepreneurs are overtaking the activists. Take PAN [National Mandate Party], for example. In the 1999- 2004 DPR, most members of PAN were intellectuals and party activists, but now they are mostly entrepreneurs.

There are two sides to this increase in entrepreneurs.

On the one hand, they will be better at responding to and communicating with their constituency. On the other hand, there is potential for conflicts of interest. Members may seek legislation that would benefit their companies.

VZR: Will SBY choose a good cabinet?

SBY has begun to demonstrate the courage to act more like a president 'in a presidential system.' We saw this in his choice of Boediono as his vice president. This shows that SBY learned from his past experience when he had to deal with political parties. He realized especially as the election drew closer that it was not good to have too many party interests. At the time, he had to accommodate a lot of politicians in his cabinet. It became unpredictable.

Now, with Boediono, a professional as vice president, SBY should be able to accommodate more professionals in his cabinet, and overall, his cabinet will be composed based on three factors: competency, representation (diverse backgrounds in terms of parties,

demographics, and geography) and his own promise that he will recruit young leaders for his cabinet.

VZR: Aceh's provincial legislature is scheduled to pass a new and stricter form

of Shariah, one that calls for caning and stoning as punishment for 'moral crimes,' like consuming alcohol or committing adultery. Are we likely to see similar laws in the future?

I have visited Aceh several times and believe that the Islamic influence there is weakening, especially compared to the initial era of autonomy. There are other forces competing for influence like capitalism. My concern about Aceh now is not with the implementation of Sharia, but how the Acehnese people are dealing with the exodus of

aid and development workers. Without the funding and expertise from abroad, can the Acehnese people manage Aceh?

Acehnese are distrustful of outsiders and there is political fragmentation within Aceh. An important part of this is the government's cooptation of former GAM [Free Aceh Movement] activists. We see that ex-Acehnese militias members have become entrepreneurs and government officials.

Post reconstruction, Aceh needs to be more open. They need to attract investors both from Indonesia and internationally.

VZR: Will there be political fallout from the Bank Century case?

"SBY PREFERS TO MAKE BROAD, NORMATIVE STATEMENTS."

"WE ARE LOOKING FOR SOMETHING THAT CAN UNITE US."

In case of Bank Century, in the public view, someone will need to be held responsible. That's what the public want to see, a legal process.

There is a growing opinion that SBY could be the next target after Sri Mulyani and Boediono, two officials responsible for monetary and financial affairs. Boediono and Sri Mulyani need to explain to the public what happened. They can provide data and present the argument the bailout was necessary to prevent further problems.

VZR: Have they done that so far?

Well, it's just a matter of public relations. The issue is becoming increasingly politicized; it is not really an economic issue at all.

VZR: Do you see any parallels between the Bank Century case and the Bank Bali case?

Yes, but I don't think it will bring about the downfall of SBY. We have direct presidential election now, which require a lot of money. It is very expensive. That's the way the public's logic works.

VZR: What to you make of the move to reactivate the Indonesian military's anti-terror desk and to have the military take a larger role in counterterrorism?

I don't think it's a very relevant policy. To begin with, I think what they need to do is to form one solid professional institution, a kind of task force to deal with terrorism. Currently, it's under the Coordinating Ministry of Political and Security Affairs, and there's the DPT (Anti Terror Desk). But an anti-terror agency shouldn't be subordinate. It needs to be an independent institution with the power and authority to fight terrorism.

VZR: There has been some preliminary findings released by the World Bank that suggest that perhaps several thousand extra judicial killings happen each year in Indonesia. How would you characterize the rule of law?

If we are looking at the broader level, the national level, in terms of fighting corruption, you can see progress. But if you see the daily lives, people remain suspect of the police and the judiciary. They do not believe that they will be treated fairly. They will have to pay bribes. Certainly, limited budget provided by the government to the legal institutions is another problem.

Until there are enough instances of justice done through the law, they will continue to choose vigilante justice.

“THE INDONESIAN-AUSTRALIAN RELATIONSHIP IS A LOVE-HATE RELATIONSHIP.”

VZR: How should we interpret the current spat between some in Indonesia and Malaysia? What is this actually about?

I think we are looking for something that can unite us.

The concept of common enemy, to some extent, is relevant. If we believe that a neighboring country has stolen from us, we have a sense that we are united.

There has been an interesting change in the direction of discussion. There is a good essay written by a noted Indonesian writer, Remy Silado, which says that many Indonesians are also committing a kind of plagiarism, songs that are actually Malay, for example. So we should not overreact to the accusation that Malaysia was using part of our culture for their tourist promotions.

VZR: Federal Police in Australia are reopening the case of the Balibo 5. Will this strain relations between Indonesia and Australia?

I have been studying the relationship between Australia and Indonesia for years. The Indonesian-Australian relationship is a love-hate relationship: a rollercoaster. Often it just comes down to a war between the media here and there, and the political elites. Often also you see the opposition in Australia using Indonesian issues to attack the Australian government.

But for many reasons, I don't believe this issue will become very serious. First, it is an old case which will make it difficult for the public to become attached to

the idea. We would see a bigger problem if someone in Australia criticized our current leaders. That would be a problem.

As the president of Indonesia, SBY has to show strong authority. The government should explain whether the case of murder of the Australian journalists (Balibo case) has been dealt with properly by the legal authorities. The government should also develop productive agreements with the relevant institutions in Australia to handle the case properly. Each country's foreign affairs ministries should be more active in developing common understanding in relation to the case. □

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