

State Secrecy Bill: The future threat for Indonesia's young democracy¹

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"Poor Governance is often midwife of authoritarian reversals, and while Indonesia has yet to produce its Albert Fujimori, Thaksin Shinawatra or Vladimir Putin, Indonesia democracy is not yet out of danger zone" (Edward Aspinall, *Irony of Success, Journal of Democracy*, April 2010)

Right to Access Information and State Secrecy Bill

The people's right to access information as guaranteed in Law No. 14/2008 (FOI Law) is an entitlement that the government of Indonesia finds hard to fulfill. Two years have elapsed since its entry into force in 2010, yet not all public bodies at the national and sub-national level have established the required information and documentation unit and information officer. Furthermore, the Information Commission has only been set up in 17 out of the country's 33 provinces, and not to mention the upward trend in public information disputes largely over periodic and mandatory information that should be available at all times, and less cases on sensitive information that the public has the right to know.

| Public Body | Number | % |
|-----------------------------|--|-------|
| Ministry | 27 out of 33 | 79,41 |
| Non Ministerial Institution | 32 out of 129 | 24,81 |
| Provincial Office | 15 out of 33 | 45,45 |
| Kabupaten Office | 55 out of 399 | 13,78 |
| City Office | 18 out of 98 | 18,37 |
| Provincial Commission | 17 out of 33 (8 province having secretariat) | 51 |

Source: Ministry of Informatics and Communication (April 2010)

In the security sector following the enforcement of the FOI Law, the police force is the earliest to issue a regulation in support of the law through National Police Chief Regulation No. 16/2010 that lays out standard procedures for determining exempt information and on information delivery mechanisms. In practice however the Police Chief Regulation has yet to be consistently implemented.

With support from Tifa, Kontras (Commission for Missing Persons and Victims of Violence) conducted a monitoring of 10 regional police departments and found that from the 115 information requests submitted to 68 Polri (Indonesian National Police Force) information

¹ This paper is prepared for presentation at the workshop on "Fighting the ghosts of the past in new democracies: information rights and transitional legacies", 10 November 2012 as part of a series of events for the 15th International Anti-Corruption Conference in Brasilia, Brazil on 7 – 10 November 2012.

units, only 28 were responded to, while 60 percent of requests were met with mute refusals. With regard to information published at Polri website, on a 1-10 scale the highest score was only 4 for the availability of basic information on Polri's profile, budget and programs. Polri has also refused to release information on suspicious large bank accounts owned by police officers as requested by ICW although the Information Commission had declared such information as public information.

Despite already having the necessary FOI Law implementing regulations, both TNI (military institution) and BIN (National Intelligence Agency) have failed to perform as expected. Based on the rating and assessment of information published by public bodies in their websites, the Information Commission in 2012 ranked TNI at 25th position and BIN at 40th place from among 68 national public agencies equivalent to the ministerial level.

It is most unfortunate that the desire to enhance police performance with regard to information access is often undermined by the government's ill-timed show of appreciation among others through the Open Government Initiative. On 10 August 2012, when the simulator corruption case was exposed by KPK, implicating the National Police Traffic Corps (Korlantas), the government had instead bestowed the police force with the OGP award of appreciation for outstanding public service delivery. Although the Traffic Corps has indeed provided satisfactory NTMC services, it was politically incorrect to grant the award at the time when Polri was embroiled in a corruption case. The government has also failed to adequately set targets for increasing information access within the police force with regard to OGP commitments, expecting only minimal achievement from the police prior to the introduction of the OGP initiative. As a consequence, OGP's noble intention of promoting transparency and accountability in public bodies has instead given the impression that it has only managed to boost Indonesia's image internationally and that of President SBY's leadership in Indonesia through negligible outcomes in terms of transparency and information access.

Government's lack of commitment towards the implementation of the FOI Law is evident since early deliberations of the law which involved a protracted debate before it was finally passed. From its parliamentary deliberations in 2000 to its passage in 2008, the FOI Law has persistently been overshadowed by the central government's intention to impose the State Secrecy Law. In 2009, parliamentary discussions on the State Secrecy Bill nearly ended in its passage. At the time, the FOI Law was only recently approved but has not come into force, and the State Secrecy Bill was seen to pose a threat to civil liberties and the freedom of information.

The civil society coalition has detected several weaknesses in the State Secrecy Bill. *First*, the term state secret is too broadly defined that covers information, objects and activities. This is also related to the disregarding of the Johannesburg Principles from which one of its internationally recognized principle concerns freedom of information and national security. The principle states: "A restriction sought to be justified on the grounds of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government."

Second, state secrets are largely under the management and supervision of executive bodies. Obviously there is cause for concern over being executive heavy and the difficulties that parliament will face in ensuring the checks and balances of executive bodies. The government can easily hamper public oversight under the pretext of protecting state secrets.

Third, there is tendency towards the criminalization of the public. Apart from being liable to heavy sanction of 5 years imprisonment to the death penalty, this criminalization issue also involves an excessively broad definition that can be manipulated as an 'instrument' to criminalize the public, primarily the mass media. This is because the mass media serves as an entity directly associated with information gathering to be widely made known to the public. Hence, it is not surprising if the Press Council and journalists also reject the passing of this Bill.

The inclination to govern security issues with the potential of obstructing civil liberties and freedom of information has intensified particularly during the 2010 – 2014 legislative period. During this time span, deliberations will cover a policy package regulating security and defense issues, among others the State Intelligence Law, Strategic Reserve Component Law, National Security Bill and State Secrecy Bill. With regard to the newly approved State Intelligence Law for example, civil society organizations and the public following its enactment, have filed a petition for its judicial review to the Constitutional Court. Below is fully excerpts of the news from Jakarta Post that Constitutional Court has rejected a request to review State Intelligence Law.

On 10 October 2012, the Constitutional Court has rejected a request to review Law No. 17/2011 on state intelligence, stating that the law provides a clearer and stricter legal basis on how intelligence units should operate.²The applicants' reasons are based on trauma from the past authoritarian regime. Now, we are heading into a more democratic and open government," said judges Anwar Usman. With the ruling, BIN now has the legal basis to wiretap conversations, a privilege that was previously solely held by the Corruption Eradication Commission (KPK). "Other intelligence agencies in foreign countries also have such authority. It is needed for them to acquire and verify information that is hard to obtain," Anwar said.

The applicants also considered some articles in the law to be open to multiple interpretations and could be used to curtail basic human rights. Among the 13 articles submitted for review was Article 1, which contains a loose definition of "threats" against national security. The applicants suggested a more specific definition of "threat" be used to keep the law from being abused by irresponsible parties. However, the court disagreed with the applicants. "If the law only details specific threats, BIN will have no authority to respond to types of potential dangers that are not listed," Anwar said.

² See: <http://www.thejakartapost.com/news/2012/10/11/court-rejects-request-intelligence-law-review.html>

Further, he said the law actually gave a clearer framework and boundaries for how BIN should operate. Before the passage of the law, BIN had the authority to arrest people. But, Anwar said, the agency now had no such authority as the law required BIN to cooperate with other law enforcement authorities to apprehend people.

In spite of the discouraging response level of information requests in the Police, civil society organizations have learned that information access can be effectively used to demand for police accountability. From Tifa's program support for Kontras, a recent case that emerged relates to information requests submitted to 10 regional police departments, one of which concerns information on police deployment at PT Freeport Indonesia, Papua. Information was sought on the number of police personnel deployed and on whether the police force as a state institution had received monetary assistance from the mining company.³

In a response letter, the Papua regional police officially informed that it has stationed 635 police officers, in addition to 160 TNI (Indonesian National Armed Forces) personnel. Freeport on the other hand had paid Rp 1,250,000 per deployed officer directly to the police department for security purposes. The response letter was entirely unexpected. On one hand, it reflects the transparency of Papua regional police operations bureau, while on the other hand the information confirms that the police department had indeed accepted money from external parties.

This fairly sensitive information was brought to public attention when it was used by Kontras for its advocacy of the Freeport labor strike in protest of wage differences between foreign and domestic workers. The strike further intensified when on 28 October thousands of workers blockaded the road leading to Freeport. The police attempted to dispel the crowd of demonstrators that could have easily escalated into rampant shootings. Kontras used the information to illustrate on how the police force had failed to remain neutral in securing Freeport because it readily accepts money from the company on a monthly basis.

The demonstration may not have ended in violence, but Polri and TNI were now under public scrutiny, particularly when other NGOs, such as ICW and Imparsial, began to examine documents published at Freeport's website. Inspector General Bekto Suprpto had indeed responded accordingly for releasing public information. Polri however thought otherwise and transferred him to the Polri headquarters since July 2011. Despite emerging public opinion that sees Polri's acceptance of Freeport money as a breach of law, Polri defended itself by claiming that it was an accepted practice because Freeport has been designated a national vital object that warrants police protection. The Metal Workers Union of Freeport Mac Moran in the United States had even lodged a complaint against Freeport to the U.S. Ministry of Law and Human Rights for resorting to the dirty practice of giving money to local security forces, which U.S. mining companies are not allowed to engage in. Although there was no follow-up action to the

³ For more information, see "*Silenced on the Pretext of Security: Observations on the Right to Information on National Security Issues in Indonesia in 2011*", IDSPS, Tifa Foundation, Open Society Foundation, Forum Asia, Jakarta, February 2012.

case, it was enough to convince human rights NGOs that the FOI Law can indeed be utilized as an advocacy tool for promoting the accountability of public bodies in the security sector.



As workers at the Freeport mine in Papua strike for better wages, the company is paying police and military forces for security. (Reuters Photo)

State Secrecy Bill: legacy of the past and future threat

The emergence of draconian bills – State Secrecy Bill – or other national security arrangements still imbued with authoritarianism reflect the quality of democracy in Indonesia. This is deeply associated with developments in the country’s fledgling democracy that was only set in motion fourteen years ago since the demise of Indonesia’s former authoritarian regime under the leadership of Suharto who ruled for 32 years. Still relatively in its infant stage, democracy in Indonesia continues to accommodate political forces that reigned supreme during Suharto’s regime into the existing political system. Consequentially, progress achieved during the wave of reform in 1998 in the form of the expansion of civil liberties, media freedom and freedom of expression is now under serious threat from authoritarian political forces sustained in the new democratic system. To further elaborate on this matter, I have drawn from the analysis made by Edward Aspinall, a leading scholar on democracy who has conducted numerous studies on democratic development and socio-political changes in Indonesia, to describe the dynamics of recent developments in the country’s democratic process.

Borrowing from Edward Aspinall’s thoughts presented in *Irony of Success* (2010), Indonesia as a new democratic state is not truly out of danger zone given the return of authoritarian forces following the fall of Suharto’s dictatorial rule. This is because Indonesia’s ongoing democratic transition has instead preserved the residual presence of anti-democracy powers – military groups, local elites and Islamist militant groups – a legacy left behind by the Suharto regime. These three groups that have benefited from Suharto’s dictatorship, in today’s democratic era have not been entirely uprooted but are instead absorbed into the new system. This results in a trade-off between democratic success and democratic quality.

According to Aspinall, only a few democratic achievements actually show a definite boundary between the former New Order regime and today’s democratic administration. The democratic transition in Indonesia now resembles the process experienced by Brazil that Guillermo

O'Donnell describes as being "*appeared to be the work of a coalition of anyone and everyone*". Patronage and corruption accommodates the political interests of all political forces. Cabinet representation from all four post-Suharto presidential successors remains the same as that under Suharto's rule characterized by broad coalition comprising of leading parties with former high-ranking military officials and civilian bureaucrats occupying parliamentary seats. Ministers and their respective parties time and again would take advantage of their cabinet position as a source of patronage. Parliamentary members at the national and sub-national level collude to divide payoffs obtained from state budget and business lobbyists. Political observers would then refer to Indonesia as "collusive democratic" or "patrimonial democratic".

Aspinall also mentioned on several other democratic accomplishments, including the retreat of military leaders from the country's political system. An example is the separation between police and military forces as the keepers of domestic security, and seats in DPR and DPRD (national and local parliament) are no longer reserved for the military after 2004. The country also ushered in a "new paradigm" with the military's disengagement from practical politics. Civilian bureaucrats' fear of being at an antagonistic stance with the military was however not taken into account. As a consequence, the military was not forcibly removed and the civilian bureaucracy ultimately had to accommodate the interests of the military group with regard to military reform. Two failures are evident as important implications in military reform: 1) the perpetuation of a culture of impunity in favor of military generals and high-ranking officials involved in human rights violation committed during the Suharto regime where the perpetrators go unpunished, 2) institutional reform failures that should eliminate residual military power, among others military involvement in businesses that remains widespread, and withdraw territorial commands. The first failure can bring serious short-term implications, while the latter pose a potential threat for the country's future.

These groups that only seek to profit from the situation have the potential to undermine Indonesia's democratic quality from within and more worrying they can bring patronage and corruption into play by incorporating them into the system. The trade-off between democratic quality and democratic success, according to Aspinall, has not only managed to curtail social violence during the transition period, but unfortunately also afforded these groups with the opportunity to crush the new democracy. Indonesia has only succeeded in building a procedural democracy lauded at the international level. The country's political system however is judged to be transparent and plural with a regulatory framework that guarantees the adoption of democratic principles. And under SBY's presidency, the Corruption Eradication Commission and the Constitutional Court were established.

Aspinall contends that the State Secrecy Bill reflects the emergence of a conservative force within the central government and parliament that periodically proposes for the passage of the Bill that can significantly undermine Indonesia's new-found freedom; a situation which only civil society and the mass media can reverse through protests and pressures for the cancellation of the Bill in 2009.

It can be concluded that the State Secrecy Bill proposed by the government within the context of democratic transition has the potential to reinforce the two failures mentioned by Aspinall –

impunity for human rights abusers and setbacks in security reform. These failures in turn will undermine other civil liberties, including the people's right to information.

Lessons drawn from the advocacy of State Secrecy Bill 2009 for monitoring state secrecy legislation in the future

In 2009, when the government-proposed State Secrecy Bill was about to be passed, the civil society coalition monitoring the legislative process to ensure that the Bill did not contradict with the FOI Law had come up with several initiatives. First, after conducting an article-by-article analysis, the coalition lobbied several key NGO figures to assist in convincing lawmakers through a public hearing to postpone the passage of the State Secrecy Bill until the entry into force of the FOI Law in 2010. The coalition also advised lawmakers to exercise caution during the postponement period and engage the public in formulating provisions consistent with civil liberties and freedom of information as guaranteed by the FOI Law.

The meeting however was unsuccessful because attending parliamentarians were adamant that it was time for Indonesia to have its own State Secrecy Bill to complement Article 17 of FOI Law on exempt information. Several more progressive members of parliament mentioned that public hearings will not sway their opinions, but that it should be done through lobbying and assistance in going through the Bill article by article or through parliamentary faction meetings.

Second, several coalition members working on security sector issues subsequently prepared a counter draft to be communicated directly to legislators. Coalition members handling media issues on the other hand collaborated with the media to raise the issue to priority status in news coverage and create TV programs that thrust this issue forward for public debate. Towards the end of parliamentary Commission I hearings prior to the passage of the State Secrecy Bill, coalition members have involved 100 leading figures representing activists, lawyers and academics to prepare a statement urging DPR (House of Representatives) to defer deliberations of the State Secrecy Bill and reject principles that inhibit civil liberties and freedom of information, and make it publicly known through the mass media. This resulted in the President requesting the government to withdraw the State Secrecy Bill and put deliberations on hold. The President also instructed the Ministry of Defense to hold dialogues with the 100 prominent figures and civil society organizations who have called for the postponement of deliberations on the State Secrecy Bill in order to accommodate their aspirations by improving the Bill before its re-submission to the government for the national legislation program (*prolegnas*) of 2010 – 2014.

In 2013, there are plans set forth in *prolegnas* to resume deliberations of the State Secrecy Bill in parliament. The revised draft submitted by the government meanwhile still contains clauses that can hinder access to public information. The civil society coalition is currently preparing a counter draft.

A major challenge in 2013 concerns the forthcoming presidential elections in 2014 where Indonesia will elect a new head of state. Rivalry among political parties is predicted to intensify and a more rigorous and well-defined State Secrecy Bill that adheres to democratic principles

may allow civilian forces to demand for transparency for the full disclosure of involvement in past human rights violations. Two of the strongest presidential candidates based on a survey are Prabowo Subianto, a former military general involved in human rights abuse prior to the fall of the Suharto regime and Aburizal Bakrie, a wealthy businessman who in 2007 was responsible for the Lapindo mudflow disaster in Sidoarjo that caused thousands of people to suffer the loss of their homes and livelihood.⁴

From the two diverging interests, it is predicted that both presidential hopefuls will make all efforts to be involved in the legislative process to however much possible prevent the disclosure of cases which may implicate them and that might remind the public of their wrongdoings. For the government and parliament, the revelation of corruption cases involving government officials and parliament members compels them to hide behind a shroud of secrecy. Advocacy work on the legislative process of the State Secrecy Bill may therefore take a different turn and become far more intricate.

Conclusion and Recommendation

There is an ambiguity in Indonesia young democracy to implement the principles of democracy in national legislation and in the same time apply the authoritarian principles in legislation on security sector. It reflects the spirit of anti-transparency is higher than openness in the government. In this situation creates difficulties to regulate the secrecy or national security because the scope of classification will be too broadly defined. International claim that Indonesia is democratic country also have the negative side in less pressure on security sector accountability that reinforce two failures mentioned by Aspinall: impunity of human rights violators and setback security reform.

In this kind of situation, we needs international collaboration that force Indonesia to practice FOI law and other legislation which apply more democratic principles, not just as an global image. At the same time I call for the higher demands by civil society across sectors on monitor this democratic transition through exercise the right to information. Civil society organizations from different sectors will fight for a common issue which will normally ease friction among them, further encouraging them to consolidate and surmount emerging challenges. Recent case related conflict between KPK (Eradication Corruption Commission) and Police on big corruption on simulator in National Police, when Police wanted to use the violence to take the KPK prosecutor whose former as a police by using the older case, the civil society across sectors including the media fought and safe the KPK until the President announce his decision to command the Police to give the case on KPK hands. Aspinall's prediction of dangers to Indonesia's democracy can hopefully be proven wrong with a formidable civilian force where authoritarian rule is no longer welcomed in Indonesia.

⁴ (See: <http://www.thejakartaglobe.com/home/will-joko-eclipse-prabowo-in-the-2014election/546132>)