Annex 6 (TORTURE)

Legal framework

The Government of Indonesia has been a party to the Convention against Torture (hereinafter, the Convention) since 1998 through Law No. 5/1998 on the Ratification of the United Nations Convention against Torture (UNCAT). However, it made a reservation under article 30 of the Convention on the jurisdiction of the International Court of Justice and a declaration under article 20 of the Convention on the inquiry that can be undertaken by the Committee with regard to the reliable information received. Additionally, the Government failed to make declaration under article 21 and 22 of the Convention on individual complaint mechanism. The declaration has not been revoked up to the present.

At the present, the Government has prepared for the ratification of the Optional Protocol to UNCAT (OPCAT), in line with the National Action Plan on Human Rights 2004-2009 scheduled for ratification in 2008.

As a party to the Convention, the Government binds with a number of obligations, such as to adjust its domestic legal framework on torture as to be in compliance with the Convention. This includes ensuring the criminalisation of torture and giving adequate sanctions for the aforementioned crimes under the domestic legal framework. It certainly implies substantial changes in the Penal Code and the Criminal Procedure Code as to be in conformity with the Convention.

Up to date, the Government has yet fully fulfilled these obligations, although a draft of the revised Penal Code has been issued. The draft has actually incorporated a limited version of the definition of torture as provided by the Convention. It does not include a key word as provided in the Convention, namely the **"consent"** of a public official. However, the draft of the penal code has not been scheduled to be deliberated in the parliament, therefore, it has no legal binding.

The only source that provides legal framework in criminalising torture is the current Penal Code, as provided by article 351 of the Penal Code that often used to criminalise torture cases, which stipulates:

(1) Maltreatment shall be punished by a maximum imprisonment of two years and eight months or maximum fine of three hundred rupiahs.
(2) If the act results in a serious physical injury, the offender shall be punished with a maximum imprisonment of five years.
(3) If the fact results in death, he shall be punished by a maximum imprisonment of seven years.
(4) With maltreatment shall be identified intentional injury to the health.
(5) Attempt to this crime shall not be punished.

Therefore, definition is not in compliance with the definition provided in article 1 of the Convention.

The present Penal Code provides safeguard measure in preventing the practice of torture in legal proceeding, as stipulated in article 422, *"Any official who in a criminal case makes use of means of coercion either to wrench off a confession or to provoke a statement, shall be punished by a maximum imprisonment of four years"*. However, this provision has substantial flaws which made it in conflict with the Convention. *First*, the term *'means of coercion'* shall be read as only cover physical injuries, while the Convention provides broader protection as to cover the mental suffering. *Secondly*, the sentence for those committed such crime is very light, especially looking at the absence of minimum punishment required.

Same consideration also applies to article 356 of the Penal Code, which states *"the punishments laid down in articles 351, 353, 354 and 355 may be enhanced with one third: First, in respect of the offender who commits the crime against his mother, his lawful father, his spouse or his child. Secondly, if the crime is committed against an official during or on account of the lawful exercise of his office. Thirdly, if the crime is committed by administering any substances injurious to life or to health."*

Besides, the Government is also planning to revise the Criminal Procedure Code. Amnesty International (AI) highlighted that the draft revised KUHAP lacks several fundamental safeguards needed to ensure that an individual is not unjustly punished, arbitrarily detained or subject to torture or ill-treatment. Among other things, AI suggests that the draft revised KUHAP be amended to require that any person who is arrested or detained must be promptly brought before a judge or other officer authorized to determine the legality of the arrest or detention. This should protect individuals from being detained illegally and reduce the risk of (torture and) "disappearances".

On the contrary, the Government has enacted regulation endorsing the use of torture as provided by the Law No. 15/2003 on the Eradication of Acts of Terrorism. Article 26(3) of this law stipulates that *"interrogation process as defined in paragraph (2) is carried out in a closed manner no longer than 3 days"*. Article 28 states that *"investigator is given the authority to arrest and detain suspects of terrorist acts based on the sufficient preliminary evidence as mentioned in Article 26(2) for the longest period of 7X 24 hours"*

In addition, Government Regulation No. 2/2002 on the Protection of Victim and Witnesses for Serious Human Rights Violations does not clearly stipulate complaint procedure up to the fulfilment of remedy. The Government has adopted Law No. 13 Year 2006 on Witnesses and Victims Protection. Yet, this Law has limited itself by only providing rights as mentioned in article 5(1) of the Law to specific cases, namely corruption, drugs, terrorism, and "other crimes that can put victim's and witness's lifes in a danger position". To date, the Law has not been implemented due to the fact that the Witnesses and Victims Protection Institution has not yet been established and two Government Regulations on Compensation and Restitution for Witnesses and Victims and on the Assistance and Feasibility for Witnesses and Victims have not yet been adopted either.

Institutions

One way to prevent torture practices is by undertaking regular visits to detention facilities, not limited to prisons, where persons are deprived of their liberty. The National Human Rights Institution (Komnas HAM) actually has the power to conduct inquiries over complaints of torture and send the recommendations to the police to further investigate the case. However, as the recommendation has no legal binding, they often are neglected which led to the delay in proceeding the case of torture.

In 2005, Komnas HAM has initiated a MoU with the Indonesian National Police to improve the criminal procedure related to the complaints of torture, especially those committed by the police personnel. As the recommendation is not legally binding, the MoU among others points out the commitment of the police to ensure transparency of legal proceeding over torture cases, as well as to ensure speedy process of the investigation. However, there has yet any substantial changes after the signing of the MoU; for example, up to the present general public has no access to the statistics and figures of cases being proceeded.

In addition, the Criminal Procedure Code has created a mechanism through a specially appointed judge in each district court called "Hakim Wasmat" (supervision and observation) who may receive complaints from inmates. In practice, the mechanism is not enforced because of the resistance among the judges and by the prison officials.

Recommendations

(1) To immediately adopt the Penal Code draft as to ensure the criminalisation of torture and to fully incorporate the definition of torture as provided n the article 1 of the Convention.
(2) To implement the National Action Plan on Human Rights, namely to immediately ratify the OPCAT due to the urgency in having an independent body to undertake regular visits to detention facilities.
(3) To provide an effective legal framework for torture victims to seek and obtain compensation and remedy.