ASIA-PACIFIC

Indonesia's new Pornography Law: Reform does not necessarily lead to more liberal attitudes to morality and censorship

HELEN PAUSACKER

Soeharto's New Order era in Indonesia ended in May 1998, heralding what has been called the '*reformasi*' (reform) era. The *reformasi* era has been marked by greater community participation in the political process and greater press freedom. As this analysis of the new Indonesian Pornography Law shows, however, freedom of speech does not necessarily go hand-in-hand with more 'liberal' attitudes to censorship, particularly on issues of morality.

The Pornography Law, which was passed on 30 October 2008, was widely, hotly and openly debated in the press and in the general community, particularly among middle-class intellectuals. Demonstrations both for and against the Bill attracted thousands of participants.

Those in favour of the Bill included radical groups and members of the two mainstream Islamic groups, Nahdlatul Ulama and Muhammadiyah. These two groups are estimated to have about 25 to 30 million members each.

A number of disparate groups — including liberal Muslims, feminists and artists — formed a coalition against the Pornography Bill. Liberal Muslims argued that religion and morality were matters of personal conscience and should not be ruled by the State. Feminist groups argued that the Pornography Law could curtail women's freedom of dress and movement, rather than protect women. Artists argued that it could limit artistic freedom. Regions such as predominantly-Christian Papua and predominantly-Hindu Bali were concerned that the legislation signalled an 'Islamisation' of the country and argued, as will be discussed here, that the Law could negatively affect their traditional, regional dress and customs.

Many critics also argued that there was no need for a Pornography Law, as there were adequate provisions in the Criminal Code. Despite this, hard-core pornography is widely available on the black market. They argued the problem was law enforcement rather than inadequate legislation.

Due to the heat of the debate, the 2005–06 Bill was withdrawn for further revision, and a new, equally-controversial Bill was produced in September 2008.[1] Following minor revisions, this gained sufficient support for the Bill to be passed in October 2008 and it was ratified by the President on 26 November as Law No 44 of 2008 on Pornography.[2] This article focuses on the content of the final Law, indicating problematic areas.

Definition of pornography

Earlier drafts of the Pornography Law, including the 2005–06 version, were named the Pornography and 'Pornoaksi' (porno-action) Bill and included a wide range of 'pornoaksi' offences.[3] The more extreme of these included kissing on the lips in public, 'erotic dancing' and the public display of 'sensual body parts'. Sentences were harsh: people kissing on the lips in public, for example, could incur prison sentences of one to five years or fines of between Rp 100 million (A$13 692) and Rp 500 million (A$68 460).[4]

These 'pornoaksi' offences have been omitted from the final Law. However, the final definition of 'pornography' is vague, and could still be read as banning some of these activities formerly listed under 'pornoaksi'. Article 1 states:

> ... pornography is pictures, sketches, illustrations, photos, writing, voice, sound, moving pictures, animation, cartoons, conversations, movements of the body, or other forms through a variety of communication media and/or performances in public which contain obscenity or sexual exploitation which violates the moral norms in society.

The specific 'movements of the body' and 'performances in public', while clearly falling in the area of 'pornoaksi', are not stated, and the interpretation of these will be left to the courts, if/when charges are laid under the Pornography Law.

Cultural and artistic freedom

As indicated above, one of the key objections to the earlier versions of the Pornography Bill was that it may prohibit the practice of regional customs and traditional dress. The latter included the wearing of the *kebaya* (a woman's lace top with a low neckline) in Bali and Java or the practice in some parts of Papua of men being naked except for a penis gourd.

However, the final Law only included a rather vague statement: 'This Law aims to: [...] respect, protect and preserve the artistic and cultural values, [regional] cultural practices and religious rituals of the pluralistic Indonesian society' (Art 3b). There is no clear indication that exceptions will be made for regional practices, but rather the suggestion is that these have *already* been taken into account in the drafting of the law. The only specific exceptions are found in the Elucidation (Art 13(1)), which states that what is considered pornographic also depends on the context and that a photo of a model wearing a bikini, bathers or beachwear would not be seen as pornographic.

REFERENCES

1. Stephen Sherlock, 'Parties and Decision-Making in the Indonesian Parliament: A Case Study of the Anti-Pornography Bill' (forthcoming) 10(2) *Australian Journal of Asian Law*.

2. Helen Pausacker, 'Hot Debates: A Law on Pornography Still Divides the Community' (2008) 94 *Inside Indonesia* <insideindonesia.org> at 26 March 2009.

3. Arskal Salim, 'Muslim Politics in Indonesia's Democratisation: The Religious Majority and the Rights of Minorities in the Post-New Order Era' in Ross H McLeod and Andrew MacIntyre (eds) *Indonesia: Democracy and the Promise of Good Governance* (2007) 115–137.

4. Pam Allen, 'Challenging Diversity? Indonesia's Anti-Pornography Bill' (2007) 31 *Asian Studies Review* 101–115.

It would appear that the legislators revising the Bill did not sufficiently address concerns about protection of traditional customs within the Law.

Concern about vigilante groups

The Pornography Law states that the 'community' has a role in enforcing the law. It is to conduct 'socialisation' of the law and instruct people about the 'dangers and consequences' of pornography. Members of the community have the right to report infringements of the law (Art 21).

The limitations of the community's role are outlined in Art 21(1) of the Elucidation which states that 'the community is not to perform acts which take the law into their own hands, acts of violence, raids (sweeping), or other illegal acts'. Buried in the Elucidation, this statement obviously has less prominence than the invitation to report infringements. After the Law was passed, police officers did make statements, reminding the public to report violations to the authorities, not to take action themselves. However, because regular, annual and violent raids by vigilante groups on bars or brothels in the fasting month have already gone unchecked by police for years, critics of this aspect of the Law remain concerned.

The Law also implicitly assumes that the 'community' is united in its support of the law and its role is therefore limited to enforcement and education. There is no suggestion that the community should play a role in debating what constitutes pornography.

Unclear division between regional and national responsibilities

The Pornography Law is a national law, however the division of power between the regional and national governments is unclear. *Both* national and regional governments are responsible for monitoring and preventing pornography, including blocking pornography through the internet (Arts 18 and 19). Each region is to develop its own communication and education systems (Art 19(d)). The national government is to coordinate the prevention of pornography, including with overseas bodies (Art 18(c)). This lack of clear division of responsibility could potentially lead to conflict between the national and regional governments in the implementation of the law.

In addition, the enforcement of the national law could differ in the various provinces. Provinces like Bali might interpret the law liberally, while provinces with more strictly observant Muslims, such as West Java or South Sulawesi, may interpret the law conservatively.

Protecting children from pornography?

One of the aims of the Pornography Law, as stated in the Introduction to the Elucidation is 'to protect all citizens, particularly women, children and the young generation from the bad influence and [from becoming] victims of pornography'.

Earlier versions of the Pornography Bill had defined a child as under the age of 12, although the sale of and access to pornography was restricted to people over 18 years of age. The final Law, however, defines 'child' as someone under 18 years of age.

As with other aspects, this aspect of the Law is unclear and therefore open to wide interpretation. The final Law states '[e]veryone has the responsibility to protect children from the influence of pornography and to prevent children's access to pornographic information' (Art 15). The phrase 'pornographic information' is vaguer than the more specific word 'pornography'. It is uncertain, for example, whether 'pornographic information' could cover such activities as sex education within the family or at school. Combined with the increase in age in the definition of 'child' to 18 years, this could be very restrictive for adolescents. It will depend on the courts' interpretation, if cases are prosecuted.

Article 16 offers education, support and social recovery of physical and mental health for every child who becomes a victim of or participant in pornography. This Article could be positive in assisting children forced into prostitution or child pornography. But, depending on the definition of 'participating in pornography', it could also be oppressive for teenagers, at an age where sexual curiosity and experimentation is common.

Finally, Art 39 prohibits 'inviting, persuading, facilitating, allowing, misusing power or forcing children in the use of pornography'. Although most of this Article is uncontroversial, the term 'allowing' could, if it and the term 'pornography' are interpreted broadly, place some parents in difficult situations, if their children are found to have sexually-explicit material at home.

Heavy sanctions

With the category of 'pornoaksi' being dropped from the final Law, sanctions for specific actions, such as kissing on the lips, have been abandoned. Yet sanctions in the final Law remain high, as the following examples show.

- Funding or facilitating pornographic activities may incur a maximum prison sentence of 15 years, and/or a fine of between Rp1 billion (A$136 920) and Rp7.5 billion (A$1 026 900) (Art 33).
- Modelling for pornography may incur a prison sentence of up to ten years and/or a fine of up to Rp5 billion (A$684 600) (Art 34). Given that women are more likely to be models for pornography than men, and often out of economic necessity, this last example seems to be likely to penalise the victims of pornography more heavily than the male consumers.

Reactions to the final Pornography Law

During the discussion of the Pornography Bill, a few concessions — such as the dropping of the section 'pornoaksi' — were made to people and regions that opposed the Pornography Bill, but these changes did not necessarily make the law less draconian. In most cases, definitions simply became less specific, leaving the final interpretations to the courts.

As a result, supporters of the Pornography Law were satisfied, but those who criticised the earlier Pornography Bills remained critical. In a stinging editorial on 31 October 2008, the respected English-language newspaper, *The Jakarta Post*, commented

that there are 'ways in which we can target the porn industry without violating the rights and freedoms of the individual. We must never forget that censorship only ultimately creates a society unable of exercising real discretion.'

In its final draft, two provincial legislatures (DPRDs) — the Bali and the predominantly Christian North Sulawesi — discussed and issued statements against the Pornography Bill. Since the passing of the Law, officials from other provinces, such as Yogyakarta and Papua, have stated their objections. One group in Bali has stated that it will file a judicial review with the Constitutional Court.

The interpretation of the courts is also still to be seen. In an earlier court case, charges of pornography were brought against the Indonesian version of the *Playboy* magazine (which does not contain images of nude people) under the Criminal Code. Judges ruled that the state prosecutors should have brought the case under the Press Law (which emphasises press freedom) rather than the Criminal Code, but added that under the Press Law, they would not have considered *Playboy* pornographic. It is as yet unclear whether judges would similarly decide that the Press Law rather than the Pornography Law should be used in making charges of pornography against a publication.

While the open, frank and at times heated discussions over the draft Bills demonstrated that freedom of speech is much greater in the reformasi period, the final Law was not an example of legislators choosing the middle-ground or of a liberal approach to censorship and public morality. In addition, the lack of clarity in the drafting of the Law leaves much interpretation to judges in the courts.

HELEN PAUSACKER is a PhD student at the University of Melbourne's Law School. She is also a research assistant with Professor Tim Lindsey's Federation Fellowship project, 'Islam and Modernity' in the same faculty.

email: h.pausacker@unimelb.edu.au

'*Is Asio a Good Judge of Character?*' continued from page 106

(d) ASIO did not act improperly in the course of speaking to Mr Parkin about the possibility of an interview with him.[41]

This finding by the IGIS suggests an uncertain outcome for the applicants. The Commonwealth will not be compelled to give them visas even in the situation that they are successful in seeing the adverse ASIO reports and in proving jurisdictional error. Under section 501 of the Migration Act, the Immigration Minister has complete discretion to refuse a person a visa on character grounds.

Conclusion: the need for accountability

This article has argued that, despite ASIO's disavowal, the ASIO assessment regime involves character issues and the process therefore requires greater transparency as to its operation. A more serious issue is the denial of natural justice when a person challenges an adverse assessment. Although the number of cases of adverse ASIO assessments is low, the impact on individuals so assessed is severe, as shown by the cases of Mr Parkin and the Iraqi refugees on Nauru.

There is a need, even if the final decision in the Parkin case is positive, to ensure that adverse ASIO assessments are made reviewable in substance not just in form, with a minimum requirement being that the affected person is given some indication of the basis of the adverse assessment by the tribunal or court. Measures to improve the review process could include: that the Inspector-General of Intelligence and Security (IGIS), assisted by the Administrative Review Council, hold an inquiry into the internal administrative processes by which ASIO assessments are made; that the IGIS is further empowered to review the propriety of ASIO assessments and the evidence on which they are based; and that as a minimum refugee applicants be allowed to access the Administrative Appeals Tribunal (AAT) to challenge a character finding.

SUSAN HARRIS RIMMER is an ARC-funded researcher with the Centre for International Governance and Justice, The Australian National University, and is President of national NGO Australian Lawyers for Human Rights.

41. Inspector-General of Intelligence and Security, 'Unclassified Report, IGIS inquiry into ASIO's treatment of Mr Scott Parkin, 29 November 2005'.