

The Politics of Indonesia's New Criminal Code

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Since its founders declared their country's independence in August 1945, Indonesia's legal system has relied on a criminal code crafted in the second decade of the twentieth century by the country's former Dutch rulers. With their justifiably proud history of national struggle, Indonesian leaders since the 1950s have called for the crafting of a criminal code more reflective of Indonesian values and legacies. Efforts at legal reform were repeatedly put on hold, however, a casualty of political-infighting from 1955-1965 and the relative indifference of national politicians during all but the last years of the authoritarian 'New Order' regime (1966-1998).

With Indonesia's return to electoral democracy after 1998-1999, many in the legal and human-rights community again called for criminal code reform. After extensive legislative deliberation, a preliminary draft was initially released for public discussion in 2016.¹ However, this draft was withdrawn in the face of some of the most extensive student demonstrations of the post-Suharto era. Calling for greater input from religious, human rights, and civil society organizations, the legislative committee went back to work.² With much celebratory fanfare, a final draft of the revised Criminal Code was ratified on 6 December 2022 and promulgated on 2 January 2023.³ The law, *Kitab Undang-Undang Hukum Pidana* ('KUHP') will take effect on 2 January 2026.⁴ During this transition period, the provision provides for education and consultation on the development of regulations and guidelines around the articles in the KUHP. The government and society have three years to review and amend its provisions before the code comes into effect.

In the weeks since the final draft's release, what the government and the code's supporters had celebrated as a much needed 'decolonialization' of Indonesia's legal system has turned into what critics have described as one of the most serious challenges to democracy since the fall of President Suharto in May 1998.⁵ The full text of the KUHP contains some 624 articles. Most are not in the least controversial but reflect the careful work of the small army of lawyers, judges, legislators, religious leaders, and civil society activists who were drawn into consultations on the code over the past six years. Notwithstanding the seriousness of these efforts, several of the new criminal

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¹ See generally, Hal Tilemann, 'Indonesia's Long Wait for Its Own Criminal Code' *Indonesia at Melbourne* (Web Page, 10 November 2016) <<https://indonesiatmelbourne.unimelb.edu.au/indonesias-long-wait-for-its-own-criminal-code/>>.

² The drafts of the Criminal Code Law for consultation over this period are identified as versions of *Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana* ('RUU KUHP') and the final draft as *Revisi Kitab Undang-Undang Hukum Pidana* ('RKUHP').

³ Undang-Undang Republik Indonesia Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana [Law No 1 2023 on Criminal Code] (Indonesia) <<https://peraturan.bpk.go.id/Home/Details/234935/uu-no-1-tahun-2023>> ('KUHP').

⁴ Ibid art 623.

⁵ See generally Sana Jaffrey and Eve Warburton, 'Indonesia's New Criminal Code Turns Representatives into Rulers', *New Mandala* (Discussion Paper, 9 December 2022) <<https://www.newmandala.org/representatives-into-rulers/>>.

code's articles remain controversial. They have caught the eye not just of in-country advocates of democracy and legal reform, but of human rights agencies and news media around the world.

Three sets of issues have received the most consistently critical attention. The first has to do with articles dealing with sex and cohabitation outside of marriage.⁶ Customary law (*adat*) in some but not all regions in Indonesia stipulates that both premarital intimacy and adulterous sex may occasion punitive measures by village authorities.⁷ In this and other respects, sexuality in Indonesia has never been regarded as an entirely private matter between consenting adults. Inspired in part by unsuccessful efforts several years ago by the Islamist Prosperous Justice Party ('PKS') to provide a greater role for the State in the regulation of sexualities, the new criminal code adopts an even more deliberately non-liberal approach to sexuality. Among other things, the articles stipulate that sexual relations outside the confines of marriage are jailable offenses subject to one year's imprisonment. Importantly, however, prosecution of illicit sexualities is only supposed to be initiated where a spouse, parent, or child files a complaint with state authorities.

Although LGBTQ sexualities are not singled out for criminal prosecution, sexuality activists have observed that the draft code's identification of heterosexual marriage as the sole locus of non-criminal sexual intimacy puts all varieties of same-sex sexuality in legal limbo. This is an area of legal uncertainty that may well be clarified in public discussion over the next three years. However, in light of what the gay-rights activist Dede Oetomo has described as the 'LGBT panic' that has swept Indonesia since the 2010s,⁸ supporters of sexual liberalization worry that the draft code's criminalization of extramarital sex may be extended to include same-sex intimacies. Another fear is that, by drawing attention to sexual matters heretofore handled in a quiet or off-stage manner, the draft legislation may encourage acts of vigilantism to suppress and punish non-conforming sexualities, as has occurred in recent years in the province of Aceh in Sumatra.

The second array of issues that have generated controversy are articles 218, 219,⁹ 220,¹⁰ and 240,¹¹ which make defamation of the president, vice-president, and Indonesian political institutions subject to up to three years of imprisonment. In a similar spirit, Article 188 stipulates that anyone promoting Marxism-Leninism and/or opposition to the country's national ideology, the *Pancasila* ('five principles') is subject to a fine or up to five years in prison. In addition to human rights activists,¹² the country's well-respected association of journalists has spoken out against these articles, rightly noting that they put in peril the robust freedoms enjoyed by Indonesia's press since 1998-1999. Whereas the draft criminal code's articles dealing with extra-marital sexualities may well enjoy a significant measure of public support, many in the Indonesian public regard the protections of national politicians as an unjustified concession to establishment elites. Pressure may yet grow for these articles to be revised.

⁶ See, eg, TUHP (n 3) articles 411, 412 for sex outside of marriage and cohabitation between unmarried partners.

⁷ I have witnessed many such incidents over the course of my years of research in rural Java.

⁸ See Tim Mann, 'Dede Oetomo on the LGBT Panic', *Indonesia at Melbourne* (Blog, 17 March 2016) <<https://indonesiatmelbourne.unimelb.edu.au/interview-dede-oetomo-on-the-lgbt-panic/>>.

⁹ TUHP (n 3) arts 218 and 219, publicly attacking the honour or dignity of the president.

¹⁰ Prosecutions by complaint in writing from the president or vice president.

¹¹ Public verbal or written insults against government or state institutions.

¹² See 'Indonesia: New Criminal Code Disastrous for Rights', *Human Rights Watch* (Web Page, 8 December 2022) <<https://www.hrw.org/news/2022/12/08/indonesia-new-criminal-code-disastrous-rights>>.

The third and final set of issues on which the new criminal code touches are among the most legally complex. These are articles dealing with the defamation (*penodaan*) of recognized religions, matters referred to in international reporting as Indonesia's 'blasphemy' laws. The new criminal code does not revoke the existing blasphemy law.¹³ In keeping with the spirit of that earlier legislation, articles 300 and 302 of the new code forbid actors from promoting interpretations of a religion in a manner that 'deviates from the tenets' of Indonesia's six state-recognized religions (Islam, Protestant Christianity, Catholicism, Hinduism, Buddhism, and Confucianism). Article 302 of the new criminal code makes it a crime (subject to a maximum of four years' imprisonment) to attempt to convert someone already professing one of these religions. The new criminal code also retains Indonesia's legal prescription against atheism; the nation requires all its citizens to affiliate with a state-recognized religion.¹⁴

Notwithstanding what many human rights activists regard as a serious threat to rights of conscience, in one regard articles 300-305 of the new criminal code amount to a small but significant expansion of religious freedom. Whereas previous presidential edicts and national legislation have extended state-recognition only to six 'religions' (*agama*), the new criminal code extends those same protections to the long-marginalized practitioners of 'spiritual beliefs' (*kepercayaan*). The latter is a variety of religiosity associated both with local indigenous religions and with the country's varied mystical associations. Although in 2016 Indonesia's Constitutional Court surprised many observers by instructing the government to extend civil protections to spirituality groups, the new draft criminal code makes this inclusive recognition of *kepercayaan* even more explicit.¹⁵ This portion of the new criminal code represents a significant step toward a more inclusive practice of religious recognition, albeit within a thoroughly non-secular legal framework.

All three of these legal matters – extra-marital sexualities, defamation of national politicians and institutions, and state-recognition of religion and beliefs – are certain to be the subject of extensive public debate over the next three years. What is clear at this point is that the contests will generate intensified rivalries and mobilizations among Indonesia's three primary political currents: democracy activists, Islamist conservatives, and *Pancasila* nationalists of a broadly democratic but socially conservative variety. To judge by their broad support among mainstream Muslim organizations, articles dealing with sexuality may well not be among those subject to the greatest pressures for revision. But public discussion may yet soften some of the draft code's articles dealing with acts of defamation against political officials or national institutions. These arguably are among the new criminal code's articles most antithetical to post-Suharto Indonesia's significant but unfinished democratic achievement.

¹³ Regulation No 1/PNPS/1965, introduced by President Sukarno now in art 156a of KUPH.

¹⁴ I am grateful to Dr. Zainal Abidin Bagir of Gadjah Mada University for his personal communication on these details of the criminal code in January 2023.

¹⁵ See Samsul Maarif, et al, 'Merangkul Penghayat Kepercayaan Melalui Advokasi Inklusi Sosial: Belajar dari Pengalaman Pendampingan', *Centre for Religious and Cross Cultural Studies* (Web Site, July 2019) <Merangkul_Penghayat_Kepercayaan_melalui.pdf>.