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Decolonization, Inter-Regionalism, and Islam

Indonesia's New Criminal Code as Inter-Asian Law

Theodora Putri and Veronica L. Taylor

I INTRODUCTION

Indonesia gained independence in 1945 and transitioned from decades of postwar autocratic rule to democratic political and legal reforms in 1998 ("the *reformasi* period"). Nearly thirty years later, the Indonesian Parliament passed a new Criminal Code (Law No. 1 of 2023 or the new *Kitab Undang-Undang Hukum Pidana* (KUHP)) on December 6, 2023. Creating a new Code in any civil law system is a historic milestone. For Indonesia, it also marks a further divestiture from its colonial legacy. The new KUHP, which comes into effect in 2026, replaces the colonial Penal Code (the existing KUHP), which has been in effect in Indonesia since 1918.

Criminal law in any society is profoundly normative: It defines and imposes sanctions on the most socially unacceptable and harmful behaviors. Social norms, however, are neither static nor homogeneous. This is particularly true for Indonesia, where profoundly diverse ethnic, linguistic, and geographic differences are governed by a highly pluralist legal system in which state secular, Islamic, and customary sources of law overlap and collide.[1] What has been less well analyzed is how the norms informing Indonesia's legal system are influenced by actors within and beyond Asia.[2] This chapter examines the morality provisions in Indonesia's new Criminal Code (the new KUHP) as an arena of contestation among state, secular, and religious reform actors.

[1] Ratno Lukito, *Legal Pluralism in Indonesia: Bridging the Unbridgeable* (Routledge 2013).

[2] For the political history of transregional influence on Indonesia, see Joshua Snyder, "'Arabisation' Death of a Concept?: Gulf States, the Malay-Indonesian World, and the Quest for Post-Sectarian Engagement" (2023) 19(1) JIOR 72–87. For a discussion of external influences on legal education in Indonesia, see Veronica L Taylor, "Asian Legal Education's Engagement with Policy" in Bryant Garth and Gregory Shaffer (eds), *The Globalization of Legal Education* (OUP 2022) 213–237.

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In an early and excellent analysis of the new KUHP, Simon Butt argued that:

> Some have suggested the morality provisions [in the new KUHP] reflect Indonesia's recent conservative (mostly Islamic) turn. There may be some truth to this. But equally likely is that national legislators enacted the Code for more pragmatic reasons. These include that they expected that the morality provisions and the democratisation and decolonisation rhetoric would be publicly popular in the leadup to the 2024 elections.[3]

We do not dismiss the political self-interest argument, but in this chapter, we seek to surface some of the sources of influence in this and other legal reform processes in Indonesia that originate in the Middle East, most visibly from Saudi Arabia.[4] These are foreign state projections of soft power[5] that compete with interventions in Indonesia by donors from the Global North as well as newer international development actors, which we discuss below. Using the KUHP reform as an Indonesian case study, we highlight an understudied dimension of Inter-Asian Law (IAL): the transnational and transregional nature of Islamic law, legal institutions, actors, and networks; how these become conduits for transmitting legal norms (whether independent of or in the service of foreign states); and the tension between the global heterogeneity of Islamic law and the efforts of foreign Islamic states to project more absolutist interpretations of Islamic norms into pluralist states such as Indonesia through a range of proxies.

Taking this perspective adds some nuance to the intense and confusing domestic debates about significant legal reforms in Indonesia and critique of these by Western commentators. We argue that inter-regional influences traversing the Middle East–Southeast Asia nexus are already well-established and likely to continue in Indonesia. This invites consideration of IAL as being not only the product of mobile legal concepts and practices conveyed through epistemic communities or processes of harmonization with regional or global standards, but also as a project animated by political and religious ideologies in the service of geopolitical competition.

[3] Simon Butt, "Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?" (2023) 32(2) GLR 190, 208–209.

[4] In an otherwise excellent piece of scholarship on the reform of the KUHP, Butt (n 3) dismisses this argument in favor of analysis such as: Tito Ambyo, "Indonesia's New Criminal Code: Scaling Up Conservatism and Watering Down Protections for Critics and Minorities" (Australian Institute of International Affairs, January 11, 2023), www.internationalaffairs.org.au/australianoutlook/indonesias-new-criminal-code-scaling-up-conservatism-and-watering-down-protections-for-critics-and-minorities/, accessed May 26, 2025.

[5] For some of the historical background to this, see, for example, Jonathan Benthall, "The Rise and Decline of Saudi Overseas Humanitarian Charities" (CIRS Occasional Paper No. 20, September 12, 2018), https://ssrn.com/abstract=3248344, accessed May 26, 2025.

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II INDONESIA'S EXISTING CRIMINAL CODE

Before considering which external actors compete to influence legal reform in Indonesia, we should define the competition. At the heart of this case study in contestation is the Indonesian Criminal Code, the existing KUHP, which originated with the Dutch Penal Code (*Wetboek van Strafrecht* or WvS) of 1881.[6] Upon independence in 1945, the Indonesian government retained that Code,[7] the *Wetboek van Strafrecht voor Nederlandsch-Indie (WvS NI)*.[8] A year later, it was officially restated as Indonesia's Criminal Code.[9] However, it remained in Dutch with no official Indonesian translation until the Code reform of 2023.[10] This was a full twenty-five years after the intense constitutional and legal reforms that followed Indonesia's democratization in 1998 and nearly eighty years after its independence.

It is important to note that neither the existing nor the new KUHP represents the totality of criminal law in Indonesia. As with other codified civil law systems, the general provisions in the KUHP apply to criminal acts in the Code and to separate statutes that supplement the Code by covering specific crimes, such as money laundering, corruption, terrorism, and sexual violence. A significant number of administrative statutes also contain criminal sanctions, such as the laws on education, natural resources, broadcasting, and intellectual property.[11]

The new KUHP has been designed to resolve inconsistencies and ambiguities in the language of the Code, while achieving three fundamental policy goals: decolonization, democratization, and harmonization.[12] Decolonization signifies a move away from the Code's Dutch colonial roots. Democratization expresses the aspiration that the new KUHP will reflect democratic principles and the will of Indonesia's people. Harmonization stands for the alignment of the new KUHP with other Indonesian laws and international standards. Looking at continuities between the existing and the new KUHP, Butt argues persuasively that none of these policy goals was fully achieved.[13] While the new KUHP is a milestone for Indonesia as a

[6] The Dutch used the principle of "*concordance*" to adapt and apply the Dutch law, including the Penal Code, to their colony: Topo Santoso, *Principles of Indonesian Criminal Law* (Bloomsbury 2023) 23.

[7] 1945 Constitution Transitional Rules, Article II.

[8] Through Staatsblaad 1915 No 732.

[9] Law No. 1 of 1946 on Criminal Law Regulations, with some wording from the WvS NI adjusted and updated. Initially, the KUHP only applied to Java and Madura. In 1958, the Indonesian government issued Law No. 73 of 1958, stating that Law No. 1 of 1946 (as amended) would apply to all regions of Indonesia.

[10] In the meantime, legal practitioners have relied on unofficial translations by prominent law scholars like R. Soesilo and Prof. Moeljatno. While widely used, these translations have differences that sometimes lead to confusion and uncertainty.

[11] Books 1 and 2 of the existing KUHP are the main references for Indonesian criminal law. Book 1 is general provisions; Book 2 regulates acts categorized as crimes (Articles 104 to 488); and Book 3 covers minor offenses (historic content which is rarely used).

[12] Law No. 1 of 2023, Elucidation 1.

[13] Butt (n 3).

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new industrialized economy in Asia and marks a new level of maturity for its political and legal systems, it has been the focus of criticism nationally and internationally.[14]

III "DECOLONIZING" AND "DEMOCRATIZING" THE CRIMINAL CODE

The KUHP has always been accused of being a colonial legacy – neither aligning with Indonesian society's values nor conforming to international norms, including the many international conventions that Indonesia has ratified. Between 1946 and 2022, the KUHP was partially amended more than ten times. As early as 1961, Indonesian scholars started initiatives to fully replace the "colonial" KUHP with a "national" KUHP.[15] However, the Code's complexity, the pluralist nature of Indonesian society and a lack of political will stymied progress.

The sixty years that it took to draft the new KUHP was an extended time frame, even for Code reform in a civil law system. The new KUHP emerged from at least fifteen drafts, led by teams under five prominent criminal law professors who served under thirteen Ministers of Law and Human Rights and six Presidents. The product of those efforts, Law No. 1 of 2023 on the Criminal Code, comes into force in 2026.[16]

The reform process initially focused on decolonization. Many Indonesians saw the existing KUHP as inconsistent with Indonesia's sovereignty, full of articles designed to create public order for the colonists, and not reflecting Indonesian values. Indonesia is a multiethnic, multicultural archipelago of over 17,500 islands with over 1,300 recognized ethnic groups and more than 700 living languages. Legal pluralism is an inevitable consequence: *adat* (or customary law), Islamic law, and state law are intertwined in Indonesia,[17] although the political and cultural dominance of central Java is also a constant thread in Indonesian political and social history.

Although it gained its independence in 1945, Indonesia was an authoritarian state until the democratic reforms that followed President Suharto's fall in 1998. In the period that followed independence, an unspoken dimension of "Indonesian values" was their relationship to religion. Indonesia is a majority Muslim country with 275 million people, 87 percent of whom comprise the world's largest Muslim population. Within Indonesian Islam, 99 percent of those who identify as Muslim

[14] Ibid.

[15] Muladi, "Beberapa Catatan Berkaitan Dengan RUU KUHP Baru" ["Several Notes Relating to the New Criminal Code Bill"] (National Seminar on the Draft Criminal Code at Universitas Internasional Batam, January 17, 2004).

[16] Law No. 1 of 2023, Article 622, which repeals the existing KUHP and its amending laws and criminal provisions in twenty-nine other laws and recodifies several sectoral laws containing criminal provisions.

[17] Lukito (n 1).

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are Sunni, with the balance being Shi'a or belonging to other smaller groups such as Ahmadi Muslims (or *Ahmahdiyah*). Post-1945 nation-building efforts by Presidents Sukarno (1945–1967) and Suharto (1968–1998) were avowedly secular – pro-development, pro-modernization, and anti-competing normative forces such as Islam and communism. This was expressed in the nationalist philosophy of *Pancasila* (which recognizes six formal religions), the outlawing of Marxism and communism and the subordination of Islamic law and Islamic courts to state law. The new Criminal Code (KUHP) retains provisions prohibiting the public "spread or development" through any media, of communist and Marxist-Leninist teachings or "other understandings that conflict with Pancasila" (Article 188(1)).[18]

Indonesia today is not an Islamic state; Islamic law covers family relations for Muslims and Islamic banking, finance, and dispute resolution for those who choose them.[19] Only the province of Aceh has an Islamic criminal jurisdiction.[20] Islamic family law in Indonesia is codified as state law and generally interpreted through the lens of Shafi'i jurisprudence.

A. *The Changing Islamic Landscape in Post-Democracy Indonesia*

Despite the secular nature of the state, Islamic political parties and mass organizations within Indonesia are diverse and have played an important role in Indonesian political history and contemporary politics. A full analysis is beyond the scope of this chapter, but political and legal scholars of Indonesia agree that the post-1998 democratic reforms opened the door for a range of Islamic – and Islamist – political actors, as well as progressive democratic, political forces in Indonesia.[21]

Indonesia's two largest mass Islamic organizations, Nahdlatul Ulama (NU) and Muhammadiyah, together account for about 60 percent of Indonesian Muslims and operate extensive social welfare and education networks, including leading Islamic universities. Both have been characterized as moderate and socially progressive, but this view has been challenged.[22]

[18] Butt (n 3) 197.

[19] Islamic family law is itself codified as state law. See, e.g., M B Hooker, *Indonesian Syariah: Defining a National School of Islamic Law* (Institute of Southeast Asian Studies, 2008); Kerstin Steiner, "Branding Islam: Islam, Law, and Bureaucracies in Southeast Asia" (2018) 37(1) J Curr SEAsia Aff 27.

[20] As part of the quasi-autonomy under a Special Autonomy Law of 2001, replaced with the 2006 Law on Aceh that was the basis for settlement of a long-running secessionist conflict.

[21] Suzanne Brenner, "Private Moralities in the Public Sphere: Democratization, Islam, and Gender in Indonesia" (2011) 113(3) American Anthropologist 478, 480. On the backlash against that opening up, see, e.g., Greg Fealy, "Jokowi's Repressive Pluralism" (*East Asia Forum*, September 27, 2020), https://eastasiaforum.org/2020/09/27/jokowis-repressive-pluralism/, accessed May 26, 2025.

[22] Marcus Mietzner and Burhanuddin Muhtadi, "The Myth of Pluralism: Nahdlatul Ulama and the Politics of Religious Tolerance in Indonesia" (2020) 42(1) Contemp SEAsia 58–84.

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Other Islamic organizations occupy opposite (and controversial) ends of the political and religious spectrum: The Islam Liberal Network, for example, aims to promote a pluralist and liberal interpretation of Islamic thinking, while other groups openly advocate for disruption of the current legal order and the transformation of Indonesia into an Islamic state. Hizut Tahrir Indonesia, for example, advocates for a pan-Islamic caliphate and the full implementation of *shari'a*, the Indonesian Mujahadeen Council advocates for full implementation of *shari'a* as a precursor to an Islamic state, and the Islamic Defenders Front (*Forum Pembela Islam*, FPI) advocated violent persecution of non-Muslims until it was banned as a terrorist organization in 2020.[23] Closer to the middle of the spectrum is the Muslim Brotherhood-inspired Prosperous Justice Party (*Partai Keadilan Sejahtera*, PKS), which has been registered as a political party since 1998 and has frequently been part of governing coalitions since the *reformasi* period.

Significantly, many of these institutions receive financial support from the Middle East on a scale that has now displaced the official development assistance that donors in the Global North provided as post-1998 rule of law and democratization support to Indonesian government agencies and liberal legal reform non-governmental organizations.

Two of the most prominent conduits are the Indonesian Islamic Propagation Institute (LDII) and the Islamic and Arabic College of Indonesia (LIPIA), which are both Saudi-funded. LDII is an evangelical organization that, to date, has built more than 750 Saudi-oriented mosques in Indonesia. It also provides university-level *shari'a* education and training for preachers in Saudi orthodoxy. LIPIA is a branch of the Imam Muhammad ibn Saud Islamic University in Riyadh and one of the largest Saudi-funded universities in Indonesia. It is a major center for Saudi proselytization and teaches Wahhabi Islamic jurisprudence, exclusively in Arabic. The normative position of both LDII and LIPIA is anti-Shi'a, anti-Christian, anti-Ahmadiyah coupled with a "scripturally rigid" position on Islamic jurisprudence.[24] This is significant because Islamic law in Indonesia has to date been interpreted through a Shafi'i jurisprudential lens which – unlike Middle Eastern Hanbali or Wahabi schools of jurisprudence – recognizes judicial interpretation and community norms as legitimate bases from which to derive Islamic law and thus adapt it to local and contemporary circumstances.

At the same time, Iran is an ideological and financial supporter of the Shi'a minority in Indonesia, primarily through the Jakarta Islamic Center, a hub for translations of Iranian texts and other religious studies, and a provider of scholarships for Indonesian Shi'a to study in Iran.

[23] See, e.g., Fred R von der Mehden, "Saudi Religious Influence in Indonesia" (*Middle East Institute*, December 1, 2014), www.mei.edu/publications/saudi-religious-influence-indonesia, accessed May 26, 2025.

[24] Theodore Friend, *Indonesian Destinies* (Harvard University Press 2009) 383.

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Institutions such as these overtly seek to more fully Islamicize all aspects of Indonesian life, including the legal system and so are in direct conflict with progressive Indonesian Muslims for whom a secular legal system that allows for legal pluralism (including the rights of indigenous groups) is inextricably linked to democracy. Political scientists now generally concur that secular democracy in Indonesia declined precipitously during the decade of President Joko Widodo's ("Jokowi") administration (2014–2024).[25] Although Jokowi was wary of political Islamists and sought to shore up statist *Pancasila* ideology, he also strengthened ties with Saudi Arabia in a bid to attract increased Saudi investment.[26] This included historic reciprocal visits by each head of state and agreements on policing and security exchanges, military and counter-terrorism cooperation, and trade agreements that[27] enhanced existing ties through migrant labor from Indonesia and Saudi control of quotas for Indonesians making different kinds of pilgrimages to Mecca and Medina.[28]

At the same time, Saudi-financed institutions in Indonesia sought to place supporters in influential institutional positions. As Varagur puts it:

> "Saudi alumni" are now visible in many arenas of Indonesian public life, holding positions in Muhammadiyah, the Prosperous Justice Party, and the Cabinet. Some have also become preachers and religious teachers, spreading Salafism across the archipelago.[29]

As we discuss below, the final stages of the long road to reforming the Criminal Code in Indonesia were marked by intense competition between progressives seeking to align criminal law with international human rights standards and help make Indonesia's criminal justice system more transparent and responsive and those seeking to entrench moral and sexual norms grounded in conservative Islam within the legal framework.

[25] Tom Power and Eve Warburton (eds), *Democracy in Indonesia: From Stagnation to Regression?* (ISEAS-Yusof Ishak Institute 2020); Edward Aspinall, and Marcus Mietzner, "Southeast Asia's Troubling Elections: Nondemocratic Pluralism in Indonesia" (2019) 30(4) J Democracy 104–118.

[26] Haeril Halim, "Jokowi to welcome Saudi Arabia's King Salman, investment" (*The Jakarta Post*, February 22, 2017), www.thejakartapost.com/news/2017/02/22/jokowi-welcome-saudi-arabia-s-king-salman-investment.html, accessed May 26, 2025.

[27] Ibid.

[28] For a pre-Jokowi synopsis of Saudi–Indonesia relations, see Timothy J Bettis, "Inter-Arab Competition in Southeast Asia: A comparative Analysis of Gulf State Foreign Policies" (*Naval Postgraduate School*, September 2021), https://calhoun.nps.edu/server/api/core/bitstreams/a4e00120-c487-443e-ba51-1e257a5b20a0/content, accessed May 26, 2025.

[29] Kritika Varagur, "Saudi Arabia Quietly Spreads Its Brand of Puritanical Islam in Indonesia" (*Voice of America*, January 17, 2017), www.voanews.com/a/saudi-arabia-quietly-spreads-its-brand-of-puritanical-islam-in-indonesia-/3679287.html, accessed May 26, 2025.

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B. *The Long Road to a Final Draft*

Indonesia officially agreed to create a "national" Criminal Code at the First National Law Seminar in 1963. A drafting team of Indonesian legal experts, led by prominent criminal law professors, was formed under the National Legal Development Institute in 1964. The team submitted the first draft of the new KUHP to the Minister of Justice in 1993. However, it was not until 1998, under President Habibie, that the new KUHP was sent to the House of Representatives. In 2004, the new KUHP became part of the national legislation priority program (the legislative agenda, *Prolegnas*), but the intensive review of the draft in the House did not start until 2013 and then not until the end of the parliamentary term.

In 2015, Joko Widodo became the first president to commit to finishing the new KUHP. He released a Presidential Letter outlining the government's commitment to discussing the new KUHP. This was followed by the agreement between the government and the House of Representatives to complete the discussion by the end of 2017. However, that discussion was postponed, extended, and delayed throughout 2018–2019. The delays largely flowed from the complete lack of consensus about the substantive content of the Code provisions.

In 2018, a coalition of Indonesian civil society organizations (CSOs)[30] tried to slow down the process by filing a lawsuit in the Jakarta Pusat District Court against the government for failing to create an official KUHP translation. They aimed to force the government to step back from completing the new KUHP because of the lack of consensus on its content. The court rejected the case, and the Minister of Law characterized it as "a joke."[31]

In September 2019, tensions rose in the final month of the 2014–2019 House of Representatives term. Rumors spread that Members had agreed to a bill, except for articles related to decency. This led to protests in over twelve Indonesian cities, with students and organizations opposing specific articles in the draft Code and demanding revisions. They criticized the government and Parliament for prioritizing politics over public interest and the lack of transparency and public participation in the KUHP reform discussions.[32]

Eventually, Jokowi intervened, asking the House of Representatives to postpone the Bill's passage and instructing the Minister of Law and Human Rights to gather input from community groups to complete the Bill. The President acknowledged

[30] The organizations that filed the lawsuit include the Institute for Criminal Justice Reform, the Jakarta Legal Aid Institute (LBH Jakarta), and the Indonesian Legal Aid Foundation (YLBHI).

[31] Zulfikar Fazli, "Yasonna Anggap Gugatan KUHP Lucu-lucuan" [Yasonna Considers the KUHP Lawsuit a Joke] (*Medcom.id*, June 8, 2018), www.medcom.id/nasional/politik/RkjZeAWk-yasonna-anggap-gugatan-kuhp-lucu-lucuan, accessed June 18, 2024.

[32] Callistasia Wijaya, "RKUHP: Masih ada pasal 'ngawur' yang 'memperparah' nasib korban perkosaan yang hamil" [RKUHP: "Confusing" Articles That "Worsen" the Fate of Rape Victims Who Become Pregnant] (*BBC.com*, September 17, 2019), www.bbc.com/indonesia/indonesia-49712137, accessed June 19, 2024.

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that at least fourteen topics in the Bill needed further in-depth study and public hearings. Those related to:

1. living law
2. the death penalty
3. defamation of the President and Vice President
4. possessing supernatural powers
5. damage from poultry and livestock
6. contempt of court
7. blasphemy
8. animal abuse
9. homelessness
10. preventing pregnancy and abortion
11. abortion
12. adultery
13. cohabitation
14. rape

By contrast, the National Alliance for Criminal Code Reform (*Aliansi Nasional Reformasi KUHP*), a coalition of at least forty CSOs that had followed and engaged with the new KUHP process since 2005, stressed that the problems with the Bill extended to at least twenty-four topics.[33]

IV REGULATING MORALITY UNDER INDONESIAN LAW

The new KUHP was not the first post-democratic legal reform in Indonesia in which Islamic morality, gender equality, and democratization have been contested: The 2008 Pornography Law and the 2022 Sexual Violence Law were also arenas in which transregional influences – particularly through proxies for Saudi Arabia – were visible.

In Indonesia, marriage between men and women to have children and build a family is widely understood to be the only proper concept of sexuality.[34] Both state and community see this as a "traditional value,"[35] despite the lived reality of other

[33] See https://reformasikuhp.org and Pemetaan Analisis Aliansi Nasional Reformasi KUHP Terhadap Draft RKUHP Full September 2019 [Mapping and Analysis by the National Alliance for Criminal Code Reform on the Full Draft of RKUHP as of September 2019] (*Reformasi KUHP*, November 7, 2020), https://reformasikuhp.org/pemetaan-dan-analisis-aliansi-nasional-reformasi-kuhp-terhadap-draft-rkuhp-full-september-2019-sebelum-penundaan-oleh-presiden/, accessed May 26, 2025.

[34] Evelyn Blackwood, "Regulation of Sexuality in Indonesian Discourse: Normative Gender, Criminal Law and Shifting Strategies of Control" (2007) 9(3) Cult Health Sex 293, 296; Tom Boellstorff, "The Emergence of Political Homophobia in Indonesia: Masculinity and National Belonging" (2004) 69(4) Ethnos 465, 470.

[35] Ibid 296.

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expressions of sexual identity among Indonesians.[36] It also reflects the Islamic approach of regulating life through marriage and the belief that a good family is the foundation of a good society.[37] Women are idealized as mothers and faithful wives and "belong" to the family and household; men are the breadwinners and "belong" to the state and community.[38]

The Suharto regime (1968–1998) used these beliefs to promote its preferred view of national development. Gender and family ideology blurred the boundaries between public and private, strengthened state power, and allowed the state to assert the right to govern the family.[39] This helped to combat competing forces within society, such as religion or ethnic allegiances.[40] When Suharto fell in May 1998, political actors were newly able to assert moral authority that did not originate with the state.[41]

The *reformasi* period following Suharto was an intense decade of replacing authoritarian laws and institutions with democratic ones, including human rights. At the same time, new social freedoms allowed Indonesian Muslims to express their piety publicly[42] – part of the "Islamic revival" in Southeast Asia.[43] Many who believed in Suharto's prescriptive ideals saw social norms weakening.[44] They demanded that the state enforce Islamic morality more actively, giving Islamic groups and parties an increased voice in Indonesian politics,[45] including opportunist politicians, who used Islamic narratives to gain votes.[46]

[36] Boellstorff (n 34).

[37] Sayyid Muhammad, *Fiqih Keluarga: Seni Berkeluarga Islami* [Family Fiqh and the Art of the Islamic Family] (Bina Media, Yogyakarta 2005) 10.

[38] Blackwood (n 34) 295; Kathy Robinson, "Masculinity, Sexuality and Islam: The Gender Politics of Regime Change in Indonesia" in Linda Rae Bennett and Sharyn Graham Davies (eds), *Sex and Sexualities in Contemporary Indonesia* (Taylor & Francis 2015) 55. See also Law No. 1 of 1974 on Marriage, Chap IV Art 31 Para (3).

[39] Brenner (n 21) 480.

[40] Ibid.

[41] Ibid.

[42] David M Bourchier, "Two Decades of Ideological Contestation in Indonesia: From Democratic Cosmopolitanism to Religious Nationalism" (2019) 49(5) J Contemp Asia 713.

[43] Vincent J H Houben, "Southeast Asia and Islam" (2003) 588(1) Annals Am Acad Pol & Soc Sci 149.

[44] Sharyn Graham Davies, "How a Populist Morality Movement is Blocking a Law against Sexual Violence in Indonesia" (*The Conversation*, September 19, 2019), https://theconversation.com/how-a-populist-morality-movement-is-blocking-a-law-against-sexual-violence-in-indonesia-analysis-123448, accessed June 16, 2024.

[45] Bourchier (n 25); Maria Platt, Sharyn Graham Davies and Linda Rae Bennett, "Contestations of Gender, Sexuality and Morality in Contemporary Indonesia" (2018) 42(1) Asian Stud Rev 1.

[46] Qurrata A'yun, "Politicising Blasphemy in Indonesia: How Islamic Alliances Are Established" (2020) 4 Melbourne Asia Review, https://minerva-access.unimelb.edu.au/items/7a2901bf-96aa-548d-9459-1c86ac6277fa, accessed May 26, 2025; Michael Buehler, *The Politics of Shari'a Law: Islamist Activists and the State in Democratizing Indonesia* (CUP 2016).

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A. *The 2008 Pornography Law*

Law Number 44 of 2008 on Pornography was passed in October 2008, having started as an Anti-pornography Bill in 2003.[47] The catalyst was the relaxation of strict censorship and new press freedoms under Law No. 40 of 1999, which saw a mushrooming of magazines and tabloids with pictures of scantily dressed women.[48]

In 2004 the word "pornoaction" (*pornoaksi*) was coined, defined as "an action in public that exploits sex, obscenity and/or erotica." The title of the Bill was changed to the Draft Law on Anti-pornography and Pornoaction (*Rancangan Undang-Undang Anti Pornografi dan Pornoaksi*, RUU APP). The impetus was concerns about popular entertainers (*dangdut* singers) dancing "erotically."[49] New provisions in the Bill prohibited, among other things, revealing certain sensual body parts (defined as genitals, thighs, buttocks, navel, and any part of a woman's breasts)[50] and engaging in erotic dancing in public areas.[51] Protest erupted in response, particularly from women activists, who saw it as a state restriction on women's appearance in public.[52] Saudi-supported organizations in Indonesia, by contrast, particularly those adhering to what the Indonesian Ministry of Religious Affairs calls "puritanical Islam," teach that women should be fully veiled, with face and body completely covered.

The debate heated up again in 2006 when Playboy, the American men's adult magazine, published an Indonesian version.[53] Playboy Indonesia folded, and its Editor-in-Chief Erwin Arnada was prosecuted under Article 282 KUHP for disseminating content or portraits that offend decency.[54] Although acquitted by the District Court, the Supreme Court found Arnada guilty, and he was jailed for two years.

[47] Law No. 44 of 2008 defined pornography as "pictures, sketches, illustrations, photos, writing, sounds, moving images, animations, cartoons, conversations, gestures, or other forms of messages through various forms of communication media and/or public performances, which contain obscenity or exploitation sexual activity that violates the norms of decency in the society."

[48] Stephen Sherlock, "Parties and Decision-Making in the Indonesian Parliament: A Case Study of RUU APP, the Anti-Pornography Bill" (2009) 10(2) Austl J Asian L 159, 163.

[49] Inul Iri Obral Bokong [Inul is Jealous of Discounted Buttocks] (*Detik Hot*, December 8, 2005), https://hot.detik.com/music/d-494264/inul-iri-obral-bokong, accessed May 26, 2025.

[50] Draft law on Anti-pornography and Pornoaction (RUU APP) Article 4.

[51] Ibid Article 28.

[52] Pam Allen, "Women, Gendered Activism and Indonesia's Anti-Pornography Bill" (February 2009) (19) in *Intersections: Gender and Sexuality in Asia and the Pacific*, http://intersections.anu.edu.au/issue19/allen.htm, accessed June 16, 2024.

[53] "Playboy Indonesia 'not pornography," (*Al Jazeera*, April 5, 2007), www.aljazeera.com/news/2007/4/5/playboy-indonesia-not-pornography, accessed May 26, 2025.

[54] See interviews with a number of important national figures in "Kasus Playboy Indonesia Dari Terbit Hingga Tutup Kontroversial" [The Case of Playboy Indonesia from Publication to Close is Controversial] (*Tempo*, August 27, 2010), https://nasional.tempo.co/read/274387/kasus-playboy-indonesia-dari-terbit-hingga-tutup-kontroversial, accessed May 26, 2025.

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Many commentators speculate that this decision was made under pressure from mobilized protests, particularly from the FPI, which at the time was led by Muhammad Rizieq Shihab.[55] The FPI was founded as a hardline Islamist organization in 1998 and grew to a membership of millions that undertook mass protests and rallies against ethnic Chinese and Christian minority figures and liberal and reformist politicians. These included the Chinese-Indonesian Governor of Jakarta, Basuki Tjahaja Purnama (or "Ahok"),[56] resulting in him losing his 2017 re-election bid, being prosecuted for blasphemy on flimsy grounds and jailed, while FPI was banned by the Indonesian government in 2020. Its former leader, Rizieq Shihab, fled to Saudi Arabia, where he had long-standing ties.[57]

The Indonesian Council of Ulema (*Majelis Ulama Indonesia* or MUI) also emerged as one of the strongest supporters of the draft law. The MUI is a peak body of Islamic groups in Indonesia, including Saudi-supported institutions such as the LDII. In this debate, despite public protest, MUI was adamant in its efforts, urging the Parliament to pass the Bill.[58] The Saudi-funded pressure group, National Movement to Safeguard the Fatwas of the Indonesian Ulemas Council (not a subset of the MUI as such), was also vocal,[59] and one MUI member representative argued that, "People's culture is contaminated with Western culture that knows no boundaries of porn, so people live immoral and undignified lives."[60] Contamination by the decadent (non-Muslim) West is a common trope in Islamist discourse in Indonesia, but it is at odds with the MUI's stated collective claim to represent "moderate Islam."[61]

Islamic parties and Islamist organizations were not the only groups in Parliament pushing for the Bill. It was heavily supported by nationalist parties, such as *Golkar*

[55] Institute for Criminal Justice Reform, "Putusan MA soal 'Playboy' Diprotes" [The Supreme Court Decision on Playboy was protested] (January 20, 2011), https://icjr.or.id/putusan-ma-soal-playboy-diprotes/, accessed May 26, 2025.

[56] Russell Dunn, "Ahok, the FOE and PilPres2029" (*New Mandala*, November 16, 2016), www.newmandala.org/ahok-fpi-pilpres-2019/, accessed May 26, 2025.

[57] Krithika Varagur, "The World's Largest Muslim-Majority Country Was Long Considered a Tolerant Place. But Thanks to Saudi Money and Influence, It Has Taken a Sharply Conservative Turn" (*The Guardian*, April 16, 2020), www.theguardian.com/news/2020/apr/16/how-saudi-arabia-religious-project-transformed-indonesia-islam, accessed May 26, 2025.

[58] Kabupaten Sumenep [Regency of Sumenep, Madura], "MUI akan Gelar Demo Besar-Besaran Jika RUU APP Tidak Disahkan" [MUI will hold a massive demonstration if the RUU-APP (Anti-Pornography and Pornographic Acts Bill) is not ratified] (April 11, 2006), www.sumenepkab.go.id/berita/baca/mui-akan-gelar-demo-besar-besaran-jika-ruu-app-tidak-disahkan, accessed May 26, 2025.

[59] Syafiq Hasyim, "Indonesia's MUI Today: Truly Moderate or Merely Pragmatic?" (*ISEAS Perspective*, January 20, 2021), www.iseas.edu.sg/articles-commentaries/iseas-perspective/iseas-perspective-2020-3-indonesias-mui-today-truly-moderate-or-merely-pragmatic-by-syafiq-hasyim/, accessed May 26, 2025.

[60] Statement by Prof Dr KH Umar Shihab, the head of Ukhuwah Islamiyah (Islamic Brotherhood) Commission MUI for 1998–2015, before he became a Member of Parliament of the Golkar Party in Sumenep (n 58).

[61] Hasyim (n 59).

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(Functional Groups Party) and the Democratic Party. They used the Bill to improve ties with Islamic organizations.[62] Eventually, an agreement between eight of ten factions in the Parliament (*Dewan Perwakilan Rakyat*, DPR)[63] allowed it to pass without the pornoaction content.

The MUI as Legal Reform Actor

The role of the MUI as a political and legal actor in Indonesia is beyond the scope of this chapter, but it is significant that the (then) MUI chairman, Ma'ruf Amin, was recruited by Jokowi to serve as his Vice-Presidential running mate after the FPI succeeded in running Jakarta Governor Ahok out of office on blasphemy charges. Ma'ruf became Vice President in the second Jokowi administration (2019–2024).

MUI was established as a peak body of Islamic scholars to advise the government and issue *fatawa* (advisory opinions) about the conformity of laws, regulations, and social practices with Islamic law and to interface between government and mass Islamic organizations. In 2001, MUI issued *fatwa* No 287/2001, stating that depicting erotic behavior that can arouse lust through print and electronic media is *haram* (forbidden), as are cohabitation and wearing revealing, tight-fitting, or see-through clothing.[64] Hasyim argues that, although not gender specific, the real target of the *fatwa* is women.[65] MUI's view is that to maintain public morality in Indonesia requires limiting the flow of immorality in Muslims' bodies and minds, particularly those of women, as the source of *fitna* (immorality).[66] These negative perceptions originate from the concept that Eve was a follower of the Devil and that women's bodies are the abode of Satan. This is reinforced by the famous depiction of women in Prophet Muhammad's words: "Whenever a man and a woman meet together, the third party is Satan."[67]

MUI works against a background of deepening institutional and interpersonal ties between Saudi Arabia and Indonesia and what some commentators have in the past pointed to as the "Arabisation" of Indonesian society.[68] Some scholars now argue that Indonesia is in a "post-Arabisation" period, where Saudi-inspired expressions of

[62] Sherlock (n 48).

[63] The Indonesian Democratic Party of Struggle (PDI Perjuangan) and Prosperous Peace Party (Partai Damai Sejahtera) continue to reject this law as vague and endangering the public; see "RUU Pornografi Disahkan Dalam Suasana Kontroversial" [Pornography Law Passed in Controversial Atmosphere] (*Hukumonline*, October 3, 2008), www.hukumonline.com/berita/a/ruu-pornografi-disahkan-dalam-suasana-kontroversial-hol20405, accessed May 26, 2025.

[64] Ibid.

[65] Syafiq Hasyim, *The Shariatisation of Indonesia: The Politics of the Council of Indonesian Ulama (Majelis Ulama Indonesia, MUI)* (Brill 2023) 310.

[66] Ibid 307.

[67] Hasyim (n 65) 308, citing the work of the renowned Islamic feminist, Nawal El Saadawi, *The Hidden Face of Eve: Women in the Arab World* (Zed Books 2007) 203.

[68] Asmiati Malik and Scott Edwards, "Saudi Arabia's Influence in Southeast Asia: Too Embedded to Be Disrupted?" (*The Conversation*, November 9, 2018), theconversation.com/saudi-arabias-influence-in-southeast-asia-too-embedded-to-be-disrupted-106543, accessed May 26, 2025.

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piety have become mainstream.[69] In the 1990s, few urban women in Indonesia wore *hijab* (headscarves). The estimate is that 75 percent do so today,[70] and more than fifty local administrative decrees compel this, in apparent violation of national human rights guarantees.[71] An increasingly visible minority of women wear full veils or black *chador*, previously unknown in Indonesia.[72] Another important indicator is the mainstreaming of Saudi-supported television, radio, and social media content, including YouTube channels and the rise of young, urban Salafist influencers.[73]

B. *The 2022 Sexual Violence Law*

The Indonesian Parliament passed Law Number 12 of 2022 on Sexual Violence (*Undang-Undang Tindak Pidana Kekerasan Seksual* or UUTPKS) after it was first proposed by the National Commission on Violence against Women (*Komnas Perempuan*) in 2012. In 2016, the (then) Draft Law of the Elimination of Sexual Violence (*Rancangan Undang-Undang Penghapusan Kekerasan Seksual* or RUU PKS) was submitted to Parliament, and in 2020 the Parliament adopted the Bill, before finally passing it in 2022.

The reform was prompted by dissatisfaction with how criminal justice handled sexual violence. The KUHP had a very limited definition of sexual violence, and existing laws, including the Code of Criminal Procedure and Law No. 31 of 2014 on Victim and Witness Protection, failed to provide necessary protection and services for victims. In the KUHP, sexual violence was categorized under "crimes against decency" (*tindak pidana kesusilaan*) and limited to adultery (Article 284); rape (Article 285 – defined as a man who uses physical force or threat of force toward a woman to have penetration of the penis into the vagina – outside marriage); aggravated rape (Articles 286-289); intercourse with underage women; indecent activities with minors; and obscene acts (Article 290). Locating sexually related crimes under "crimes against decency" contributes to the view of many Indonesians that sexual violence is a matter of morality in which the victim is blameworthy rather than a form of criminal violence.

[69] Joshua Snyder, "'Arabisation' Death of a Concept?: Gulf States, the Malay-Indonesian World, and the Quest for Post-Sectarian Engagement"(2023) 19(1) J Indian Ocean Region 72–87.

[70] See also Diego Fossati and Yew-Foong Hui, "The Indonesia National Survey Project: Economy, Society and Politics" in Diego Fossati, Yew-Foong Hui and Siwage Dharma Negara (eds), *The Indonesia National Survey Project: Economy, Society and Politics* (ISEAS Publishing 2017) 19–20.

[71] Ambyo (n 4).

[72] Yuyun Sunesti, "Riset Ungkap 3 Hal Baru tentang Perempuan Muda Bercadar di Indonesia" [Research Reveals 3 New Things about Young Women with Veils in Indonesia], (*The Conversation*, December 17, 2020), https://theconversation.com/riset-ungkap-3-hal-baru-tentang-perempuan-muda-bercadar-di-indonesia-152006, accessed May 26, 2025.

[73] Fachri Aidulsyah, "The Rise of Urban Salafism in Indonesia: The Social-Media and Pop Culture of New Indonesian Islamic Youth" (2023) 51 AJSS 252–259.

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Formalizing the RUU PKS took a decade due to resistance from political parties and the community but mainly from conservative Islamic groups and from within the Parliament itself. The PKS openly rejected the Bill until the end.[74] In their view, it conflicted with Islamic values, promoted sex outside marriage, and supported LGBT relationships. PKS also objected to the Bill using "sexual consent" – in their view, consensual sexual relations are strictly prohibited for those not officially married. They feared that a broader concept of consent would condone *zina* (illegal sexual intercourse in Islamic law). A nuanced debate about this is difficult in a climate where conservative religious views have become populist. Commentators suggest that the PKS rejected the Bill not only based on Islamic values, but also to gain votes in the 2019 election.[75] In response, the Draft Law on Sexual Violence Crimes (*Rancangan Undang-Undang Tindak Pidana Kekerasan Seksual*, RUU TPKS)[76] working committee revised the Bill to exclude the phrase "sexual consent."[77]

The Family Love Alliance (*Aliansi Cinta Keluarga*, or AILA) also consistently opposed the RUU TPKS. AILA is an inter-institutional alliance concerned with strengthening the family by following Islamic teachings. They saw the Bill as a Western product that did not reflect Indonesian values or *Pancasila* and ignored the real sexual crimes – free sex and deviant sexual behavior. AILA argued, "The philosophy of the RUU TPKS is 'sexual freedom' under the guise of protecting victims."[78]

Law No. 12 of 2022 on Sexual Violence represents a decade of sustained advocacy by the National Commission on Violence against Women in collaboration with a coalition of women's crisis center organizations and law reform and women's rights CSOs throughout Indonesia. It also secured the full support of the Ministry of

[74] UU TPKS was approved by eight factions in the House of Representatives: The Indonesian Democratic Party of Struggle (PDI Perjuangan), Functional Groups (Golkar), the Great Indonesia Movement Party (Gerindra), the National Democratic Party (NasDem), the National Awakening Party (Partai Kebangkitan Bangsa, PKB), the National Mandate Party (Partai Amanat National, PAN), the Democratic Party (Party Demokrat), and the United Development Party (Partai Persatuan Pembangunan, PPP). The PKS rejected it.

[75] Balawyn Jones and Max Walden, "Conservative Rejection of Indonesia's Anti-Sexual Violence Bill Misplaced" (*The Conversation*, February 26, 2019), https://theconversation.com/conservative-rejection-of-indonesias-anti-sexual-violence-bill-misplaced-111683, accessed May 26, 2025.

[76] Note that there are no authorized official translations of Indonesian draft or final legislation, so this Bill has also been translated as "the Bill on Sexual Violence Eradication" and the "Sexual Violence Bill."

[77] "Panja Klaim RUU TPKS Tak Muat Frasa Sexual Consent" [Panja Claims RUU TPKS Does Not Include the Phrase Sexual Consent] (*CNN Indonesia*, November 17, 2021), https://www.cnnindonesia.com/nasional/20211117130747-32-722365/panja-klaim-ruu-tpks-tak-muat-frasa-sexual-consent, accessed May 26, 2025.

[78] Fida A, "AILA Indonesia Kembali Suarakan Penolakan terhadap RUU TPKS" [AILA Indonesia Voices Opposition against the RUU TPKS] (*Hidayatullah*, April 12, 2022), https://hidayatullah.com/berita/nasional/2022/04/12/228580/jelang-disahkan-aila-indonesia-kembali-suarakan-penolakan-terhadap-ruu-tpks.html, accessed May 26, 2025.

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Women and Children, the Ministry of Law and Human Rights, and the DPR, including moderate Islamic parties, most notably Indonesia's National Awakening Party (*Partai Kebangkitan Bangsa*, PKB) and its main constituent organization, Nahdlatul Ulama (NU), which is Indonesia's largest Islamic organization.[79]

AILA as a Legal Reform Actor

AILA's rejection of the Sexual Violence Law was also part of a long-standing campaign. In 2016–2017, it challenged provisions of the KUHP in the Constitutional Court based on non-conformity with (their view of) Islamic values. They asked the Court, among other things, to expand the definition of adultery (Article 284, currently defined as unfaithfulness to one's marriage partner) and expand the definition of indecent acts in Article 292 to include the same sex.[80]

By a narrow majority of five to four, the Constitutional Court rejected the petition.[81] The majority held that the Court should exercise judicial restraint and avoid being a "positive legislator" by extending the scope of acts in the Code.[82] The dissenters argued that the Constitution should not allow absolute freedom for each person to act merely according to their own will and that this applies more so if that behavior confines and contradicts religious values and Divine light, as well as the living law which lives and develops among Indonesian people.[83] That argument was carried into the debate about the new KUHP.

V PASSAGE OF LAW NO. 1 OF 2023 ON THE CRIMINAL CODE (THE NEW KUHP)

The new KUHP was passed by Parliament in December 2022 and promulgated as Law No. 1 of 2023 with some controversial articles intact. Those attracting the most concern related to "living law," freedom of expression (including provisions related to demonstrations, insults to the President, Vice President and the government), and the articles related to *zina* and cohabitation.

[79] M Iqbal Machmudi, "NU dan Muhammadiyah Dukung RUU PKS dengan Catatan" [NU and Muhammadiyah Support the PKS Bill with Notes] (*Media Indonesia*, March 6, 2020), https://mediaindonesia.com/humaniora/294764/nu-dan-muhammadiyah-dukung-ruu-pks-dengan-catatan#google_vignette, accessed May 26, 2025; Kristian Erdianto and Inggried Dwi Wedhaswary, "Fraksi PKB Dukung RUU Penghapusan Kekerasan Seksual Segera Disahkan" [PKB Faction Supports the Elimination of Sexual Violence Bill Will Be Passed Immediately] (*Kompas*, February 8, 2019), https://nasional.kompas.com/read/2019/02/08/18095021/fraksi-pkb-dukung-ruu-penghapusan-kekerasan-seksual-segera-disahkan, accessed May 26, 2025.

[80] Constitutional Court of the Republic of Indonesia, Case 46/PUU-XIV/2016, 6–7, https://www.mkri.id/index.php?page=web.Putusan&id=1&kat=1&cari=81, accessed June 18, 2024.

[81] The Court's decision is analyzed in detail by Butt (n 3) 204. See also Simon Butt, "Religious Conservatism, Islamic Criminal Law and the Judiciary in Indonesia: A Tale of Three Courts" (2018) 50(3) J Leg Plur Unoff Law 402.

[82] Ibid 453.

[83] Ibid 465.

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Critique of the new KUHP came predominantly from the community, law reform actors and human rights organizations rather than religious organizations. In the months preceding its passage, the Criminal Code Drafting Team, particularly the Deputy Minister of Law and Human Rights, approached stakeholders to discuss and build support for the Bill. Those consulted ranged from the MUI and Islamic organizations to academics, CSOs, and activists. The result was several changes to the draft of the new KUHP often referred to as a "middle way" or compromise among the diversity of views, which had emerged over the long period of its drafting.

A. *The Drafting History of the New Criminal Code*

Between 1981 and 1993, a drafting team led by Mardjono Reskodiputro[84] used the term "recodification" to describe revising the KUHP. The team reviewed the existing KUHP and reformulated it into a more understandable Indonesian language. It took twelve years to finalize a complete draft, which was submitted in 1993. However, the draft remained stuck in the Ministry of Justice for years. The discussion resumed in 1998 when Muladi became Justice Minister, and continued under the next Minister of Justice, Yusril Izha Mahendra, who formed a new drafting team, appointing Muladi and Barda Nawawi to lead it.

The new team worked for another ten years before they handed a refreshed draft to (then) President Yudhoyono, who submitted it to the House of Representatives in 2012. The Muladi team used a "total codification" approach, inserting criminal acts from various laws not covered by the KUHP[85] to prevent "dualism" (criminal offenses being regulated within and outside the KUHP). They built on the reform ideas in the 1993 draft, as did the next drafting team, led by Harkristuti Harkrisnowo.[86] The new features included in the final draft of Law No. 1 of 2023 were:[87]

[84] Mardjono Reksodiputro chaired the third Drafting Committee for the new KUHP (1987–1993). The first Committee chair was Prof. Soedarto (1963–1986) followed by Prof. Roeslan Saleh (1986–1987). Under Mardjono's leadership, on March 13, 1993, the new KUHP was first submitted to the Minister of Justice, Ismail Saleh: "Setengah Abad Lebih Melahirkan RKUHP" [More than half a century of giving birth to the RKUHP] (*Tempo*, February 6, 2018), https://hukum.tempo.co/read/1057807/setengah-abad-lebih-melahirkan-rkuhp, accessed May 26, 2025.

[85] Bernhard Ruben Fritz Sumigar, "Kodifikasi dalam RKUHP dan Implikasi terhadap Hukum Pidana Indonesia" [The Codification of the Draft of KUHP and its implications for Indonesia's Criminal Law] (Institute for Criminal Justice Reform, 2015), https://icjr.or.id/wp-content/uploads/2015/09/Implikasi-kodifikasi-dalam-R-KUHP_Final.pdf, accessed May 26, 2025.

[86] Prof. Harkristuti Harkrisnowo led the Drafting Committee after Professor Muladi passed away in 2020. She successfully steered the RKUHP to become Law No. 1 of 2023.

[87] Mardjono Reksodiputro, "Meletakkan (kembali) Proses Pembaruan Hukum Pidana Dalam Konteks Pembangunan Hukum Nasional" [(Re)laying the Criminal Law Reform Process In the Context of National Legal Development] (the National Consultation Meeting ELSAM Initiative and National Alliance R-KUHP in Jakarta, May 2–3, 2018), https://reformasikuhp.org/merancang-arah-pembaruan-hukum-pidana-indonesia/, accessed June 18, 2024.

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- An updated approach to qualifying crimes no longer distinguishes between crimes (Book 2) and violations (Book 3) and is now linked to types of penalties, including principal penalties, additional penalties, and special penalties (such as the death penalty);[88]
- The principal penalties include new penalties, such as supervision and community service. These serve as alternatives to short-term imprisonment, allowing judges to choose the appropriate punishment based on the purpose of sentencing;[89]
- The type of fine penalty is formulated using fine categories;[90]
- *sentencing guidelines for judges*;[91]
- Acknowledgement of the role of customary law in defining offenses and imposing criminal sanctions, while maintaining the principle of legality;[92] and
- Expanding criminal liability beyond individuals to include corporate criminal liability.[93]

The attitude to the normative content of the Code evolved with the design and mechanics of the drafting process. Mardjono comments that from about 2000, the drafting team sought to create a law that truly reflected Indonesian culture and Islamic teaching.[94] The addition of "Islamic teaching" as a drafting criterion is difficult to substantiate, but it coincides with the post-*reformasi* rise in public discourse about Islamic morality and an uptick in local government regulations on women's dress and personal conduct.[95]

The scholars leading and participating in the drafting team over different periods of its history were highly educated and globally connected, with extensive experience in serving government and balancing competing interests. Without an empirical study, we do not know how they considered and filtered influences from abroad. We do know what those vectors of influence were likely to have been. We have considered influences from the Middle East earlier in this chapter and the debates across political and popular Islam that played out in the lead-up to the introduction of the new KUHP.

[88] Law No. 1 of 2023, Article 64.
[89] Ibid Article 65 and its elucidation, Article 51.
[90] Ibid Article 79.
[91] Ibid Articles 53–54.
[92] Ibid Article 2.
[93] Ibid Articles 45–50.
[94] Mardjono Reksodiputro, "Sejarah Singkat Konsep KUHP Nasional" [A Brief History of the Concept of the National Criminal Code] (paper presented at the National Seminar on the Draft Criminal Code, Faculty of Law, University of Indonesia, June 12, 2014), https://mardjonoreksodiputro.blogspot.com/2013/12/sejarah-singkat-konsep-kuhp-nasional.html, accessed May 26, 2025.
[95] Luviana, "Women's Bodies Are Controlled through Discriminatory Local Regulations" (*Konde*, July 25, 2022), www.konde.co/2022/07/busana-dan-tubuh-perempuan-dikontrol-lewat-perda-diskriminatif-38-tahun-peringatan-cedaw.html/, accessed May 26, 2025.

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Western legal reform influence tends to be less overt and less well-funded than it was in the immediate post-1998 *reformasi* period. It includes long-standing personal and institutional ties with the legal systems in which many Indonesian legal elites are educated: the Netherlands, the United States, and Australia. Each of these countries maintains official development assistance-funded legal reform projects in Indonesia of many decades' standing that directly or indirectly connect to criminal justice reform. Although the strategic priorities and projects have changed over time, in the aggregate these tend to promote practices that enhance rule of law and build Indonesian capacity to participate in bilateral and multilateral agreements.[96] In the case of Australia, the approach is to fund Indonesian CSOs to engage with and persuade government and parliamentary actors.

From Asia, influential legal systems tend to be those of economies that Indonesia aspires to emulate, including Singapore, South Korea, and Taiwan. Singapore and Indonesia are linked through their mutual membership of ASEAN and Singapore's role as a de facto commercial dispute and arbitration hub for Indonesia. They concluded an extradition treaty in 2024.[97] South Korea has been particularly active in providing advice on regulatory reform and modernizing legislative capacity,[98] which is an important indirect support to South Korean foreign investment in Indonesia. Neighboring Malaysia is deliberately omitted from this list, even though it is an ASEAN member, a diverse and majority Muslim country, a neighbor that shares a border with Indonesia, and a more highly ranked economy.[99] Indonesian policymakers are generally allergic to the suggestion the Malaysia is a helpful model, for complex historical and cultural reasons and for the legitimate (but also convenient) reason that Malaysia's common law heritage and constitutional monarchy make its legal institutions unlike Indonesia's.

[96] See, for example, the Australian Indonesia Partnership for Justice (AIPJ), which has "Implementing Justice Reforms in Law Enforcement, Courts, and Corrections Institutions that Support the Rule of Law" as one of its strategic priorities: www.aipj.or.id. USAID, which indirectly influences criminal justice through programming on governance and anti-corruption: www.usaid.gov/indonesia/democracy-human-rights-and-governance, and the Netherlands through its universities and Centre for International Legal Development, which have been actively engaged in criminal justice reform support, including the adoption of restorative justice approaches through alternative sanction, e.g.: www.cilc.nl/indonesia-is-restorative-justice-the-solution-for-overcrowding-in-indonesias-prisons/#:~:text=Indonesia%20and%20the%20Netherlands%20share,support%20legal%20and%20judicial%20reforms, accessed November 1, 2024.

[97] "Indonesia-Singapore extradition agreement is progressive: Minister" (*Antara*, March 29, 2024), https://en.antaranews.com/news/309582/indonesia-singapore-extradition-agreement-is-progressive-minister, accessed May 26, 2025.

[98] Cabinet Secretariat, Republic of Indonesia, "Cabinet Secretariat South Korea's MOLEG Holds Seminar on Statutory Interpretation" (May 28, 2021), https://setkab.go.id/en/cabinet-secretariat-south-koreas-moleg-holds-seminar-on-statutory-interpretation/, accessed May 26, 2025.

[99] Although Indonesia's is the larger economy by size, Malaysia's income per capita is three times larger than Indonesia's. See current World Bank data comparisons: https://data.worldbank.org/?locations=TH-MY-ID-SG-PH-VN, accessed November 1, 2024.

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B. *Adultery in the New KUHP*

Conservative Islamic critics were active in pressing for reframing adultery as a more broadly defined crime under the existing KUHP. Article 284 hinges on the definition of marriage in Article 27 of the Civil Code, which states that a man can only be married to one woman and a woman to only one man, and prosecution relies on a complaint (*delik aduan*) from the respective spouse. The concept of *zina* in Islam refers to illegal sexual intercourse and encompasses both adultery and fornication, including unmarried sex.[100] The PKS Party demanded that the new KUHP use this expanded definition. The MUI also strongly supported this expansion. The (then) Minister of Law and Human Rights, Patrialis Akbar, who came from the National Mandate Party (Partai Amanat Nasional or PAN), an Islamic nationalist party, promised to ensure that the expanded article was included in the new KUHP.[101]

Around this time, the sensational results of a survey of university students were publicly reported in Indonesia. The authors claimed that 97.05 percent of 1,660 respondents from sixteen universities in Yogyakarta were losing their virginity in consensual sexual relations during their time at university. While the authors and results lacked credibility,[102] the results were widely quoted, reinforcing perceptions of moral decline.

During the Yudhoyono administration (2004–2008), two significant provisions were added to the 2005 draft. However, as the debate progressed, these provisions were scaled back. The 2005 draft covered *zina* (adultery) in Article 484, paragraphs 1 (a) to (d), reproducing the existing definition of adultery. It also included paragraph 1(e) to criminalize sexual intercourse between unmarried men and women. This draft also expanded the range of third parties who could file a complaint to initiate criminal prosecution and increased the maximum penalty from nine months (as per Law No. 1 of 1946) to five years.[103] The 2008[104] and 2012[105] versions retained this *zina*

[100] Ziba Mir-Hosseini, "Criminalising Sexuality: Zina Laws as Violence against Women in Muslim Contexts" (2011) 8(15) SUR International Journal on Human Rights 7, accessed May 26, 2025.

[101] Ali, "Definisi Zina dalam KUHP Akan Direvisi" [Definition of Adultery in the Criminal Code to be Revised] (*Hukumonline*, July 5, 2011), www.hukumonline.com/berita/a/definisi-zina-dalam-kuhp-akan-direvisi-lt4e11c8adcccd4/, accessed May 26, 2025.

[102] The survey was conducted by the Institute for Love and Humanitarian Studies (Lembaga Studi Cinta dan Kemanusiaan) and the Center for Business and Humanities Training (Pusat Pelatihan Bisnis dan Humaniora, LSCK PUSBIH). Neither has any Internet presence beyond the survey results and the citations of their survey results. See Winanti Praptiningsih, "Tes Keperawanan dan Isu Moralitas Publik" [Virginity Testing and Public Morality Issues] (*Jurnal Perempuan*, January 2, 2015), www.jurnalperempuan.org/wacana-feminis/tes-keperawanan-dan-isu-moralitas-publik?locale=en, accessed May 26, 2025.

[103] Draft Penal Code 2005, Article 484.

[104] Draft Penal Code 2008, Article 485.

[105] Draft Penal Code 2012, Article 483.

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definition and higher penalty, perhaps for the deterrent effect and to symbolize the moral intention rooted in Islamic teachings.

In 2019 version,[106] the criminal sanction for adultery was reduced to a maximum imprisonment of one year or a fine, which is still heavier than the penalty in the existing KUHP. Additionally, the parties able to make a criminal complaint about adultery were narrowed from "harmed third party" to parents or children. In the 2022 version,[107] eligibility to file a criminal complaint about adultery was further restricted to only the husband or wife for married individuals and parents or children for unmarried individuals. The drafters also modified the scope of *zina* by moving the provision about sexual intercourse between unmarried men and women from the main body of the article to the elucidation section. This move appeared to address objections from those opposing the broader definition of zina while still accommodating those advocating for its expansion. This wider scope of zina beyond marital relationships was finalized in Article 411 of Law No. 1 of 2023.

C. *Cohabitation in the New Criminal Code*

Provisions on cohabitation were also adjusted while drafting the new KUHP. The cohabitation provision in the 2005 version stated: "Any person who lives together as husband and wife outside of *legal marriage* shall be imprisoned for a maximum of 5 (five) years or a maximum fine of Category IV."[108]

This made cohabitation per se illegal, not an offense triggered by a complaint. The 2019 draft[109] revised this to require a complaint by the husband, wife, parents, or children, or by the village head in the absence of complaints from the husband, wife, parents, or children. Moreover, in the 2022 version,[110] the part about the village head making a complaint was eventually removed. The complaints were narrowed to apply only to a spouse for married individuals and to parents or their children for unmarried individuals, making cohabitation an "absolute complaint" offense, like adultery.

The next issue was the "legal marriage" element, criticized as being Java-centric. Outside Java, many people do not have access to government services or the resources to conduct a legal marriage, or they mark their married status based on *adat* law or religious rites. In the draft 2019 of the Code, the word "legal" was removed to acknowledge this plurality. This was a prudent choice but may be difficult to implement in practice. For the sanctioned, a maximum of five years' imprisonment was reduced to one year, and the draft 2019 until Law No. 1 of 2023,

[106] Draft Penal Code 2019, Article 417.
[107] Draft Penal Code 2022, Article 411.
[108] Draft Penal Code 2005, Article 486.
[109] Draft Penal Code 2019, Article 418.
[110] Draft Penal Code 2022, Article 412.

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it's agreed on a maximum of six months' imprisonment or a fine of up to 10 million IDR (equal to 650 USD).

VI IMPLICATIONS OF THE NEW CRIMINAL CODE'S TREATMENT OF MORALITY

The new Criminal Code broadened the definition of adultery to include unmarried individuals and allowed parents or children over sixteen to file complaints about adultery. It also criminalized the offense of cohabitation while acknowledging that marriage exists in various customary and religious forms, though it does not recognize de facto or same-sex relationships. The lengthy drafting process for the new KUHP reflects a government trying to navigate between the expectations of very different parties and interests.

Some people see the criminalization of sexual relations between consenting adults as government interference with both individual privacy and individual rights and freedoms.[111] The secular nationalist parties with a majority in the legislature were against stricter laws on morality but did not want to openly oppose the idea because it could lead to them being painted as supportive of adultery and free sex in a climate of increasing social and Islamic conservatism. Using the limiting techniques in the drafting kept them safe from that accusation.

One technique the government used to steer to the middle ground was "absolute complaints." Both the *zina* (adultery) and cohabitation provisions are absolute criminal complaints: Prosecution requires a complaint from the parties named in the law. This is intended to prevent moral policing by unrelated individuals or groups. It tries to balance state interference in private matters by limiting prosecution to instances where people who are harmed (the husband, wife, parents, or their children) make a complaint to the police.

On the other hand, groups such as the MUI and conservative Islamic parties saw these provisions as bulwarks against moral decline. Although Islamic conservatives were not satisfied with the light sentences in the final version of the Code, they succeeded in shaping provisions reflecting Indonesia's values and identity in more Islamic rather than pluralist terms. The advantage for the government was that Law No. 1 of 2023, as national law, eliminates the possibility of regulating these offenses at the regional level (beyond Aceh) and so is a structural barrier to vigilantism and arbitrary actions.[112]

[111] Because it contravenes Article 17 of the International Convention on Civil and Political Rights which Indonesia ratified in 2005.

[112] Normand Edwin Elnizar, "Seminar KUHP Baru, Kohabitasi Hingga Hukuman Mati" [Seminar to Review New Criminal Code, Cohabitation to Death Penalty] (*Hukumonline*, February 22, 2023), www.hukumonline.com/berita/a/immh-ui-gelar-seminar-mengkaji-kuhp-baru–bahas-kohabitasi-hingga-hukuman-mati-lt63f5e94f6128a/?page = 2, accessed May 26, 2025.

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The new KUHP also has unresolved challenges. One is realizing gender equality. On their face, the *zina* and cohabitation provisions suggest that two persons commit the crime. This means both the man and woman involved should be prosecuted, but it relies on the *morality* articles not being manipulated to punish women.

Another challenge is the social reality of underage sexual activity and child marriage in Indonesia. Parents often address the "problem" of sexually active children by using religious celebrants or local officials to perform early marriages.[113] This avoids *zina* and upholds religious and social norms, although economic pressure and other motives also play a role. Because a parent can file a complaint and withdraw it at any time before trial, there is a risk that parents might use this to coerce their children into marriage, even though this is an offense under the Sexual Violence Law.

VII CONCLUSION

These compromises are unlikely to satisfy international critics of the new KUHP (including the Western providers of legal technical assistance through official development assistance), who see it as part of the slippage in Indonesia's commitment to the rule of law and international human rights obligations post-*reformasi*. However, they represent the political reality of a secular democracy in which religion (particularly Islam) remains an important factor in the foundation and politics of the state[114] and where legal reform is a domestic and international battleground for conflicting worldviews. Until the law is implemented in 2026 and until the Code of Criminal Procedure is revised, it will be difficult to ascertain with confidence whether the new KUHP is simply a symbolic marker of Islamic virtue or has the intended effect of shaping Indonesian behavior in practice, and how justice actors such as the police, prosecutors, and courts will enforce and interpret it.

[113] AIPJ2, "Analysis of Marriage Dispensation Decision in Indonesia" (November 19, 2019), https://aipj.or.id/pages/publication/analisis-putusan-dispensasi-kawin-di-indonesia, accessed May 26, 2025.

[114] Nadirsyah Hosen, "The Politics of Shari'a Law: Islamist Activists and the State in Democratizing Indonesia" (2018) 91 Pacific Affairs 428.

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