



Permanent Mission
of the Republic of Indonesia to the UN, WTO,
and Other International Organizations
in Geneva

No.: 29 /Pol-II/II/2023

Dear Madame/Sir

With reference to your letter Ref. OL IDN 2/2022 of 25 November 2022, I have the honour to transmit herewith, my Government's response to the Joint Communication of Special Procedures on the proposed amendments to the Indonesian Criminal Code, *Revisi Kitab Undang-undang Hukum Pidana* (RKHUP).

We deeply regret the approach of Special Procedures and Mandate Holders for issuing the Joint Communication to the media prior to the relevant government's response. Such prejudgement devoid the public from fully comprehending the situation and only leads to the promotion of one-sided perspective.

As you may have been aware, on 11 December 2022, the Indonesian Parliament has enacted the New Criminal Code, *Revisi Kitab Undang-undang Hukum Pidana* (RKHUP). This New Criminal Code is the first Criminal Code that Indonesia produced since our independence in 1945. The previous one was a product of colonial-era that has been in effect since 1918.

As you have noted, the process to draft this New Criminal Code was a result of an inclusive democratic process. The new Code went through a carefully and meticulous drafting and consultation process that started in 1963. During this consultative process, the opinions of a number stakeholders were heard including legal experts, lawyers, local governments and the civil societies.

This new Code strikes a balance between the interest of individuals and the broader public, taking into account the great diversity within the Indonesian society. The new Code also took into consideration various Indonesia's international obligations and the universal values of human rights.

Ms. Dorothy Estrada-Tanck, Chair Rapporteur of the Working Group on discrimination against women and girls

Ms. Alexandra Xanthaki, Special Rapporteur in the field of cultural rights

Ms. Tlaleng Mofokeng, Special Rapporteur on the right of everyone of the highest attainable standard of physical and mental health

Ms. Nazila Ghanea, Special Rapporteur on freedom of religion or belief

Mr. Victor Madrigal-Borloz, Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

Ms Reem Alsalem, Special Rapporteur on violence against women and girls, its causes and consequences

CC: Coordinating Committee SPMH

The new Code will only take into effect 3 years since its promulgation, to ensure a suitable transition period. During this period, the Indonesian Government will undertake a systematic and extensive dissemination to avoid problems in the implementation of the Code.

Through this letter, I would like once again take the opportunity to reiterate my commitment for a constructive dialogue and cooperation between mandate holders and States and our commitment in advancing the promotion and protection of human rights.

Please accept, Special Procedures Mandate Holders, the assurances of my highest consideration.

Yours sincerely,



Grata E. Werdaningtyas
Ambassador/ Charge d'Affaires a.i.

**Reply of the Government of Indonesia
to the Joint Communication of the Special Procedures Mandate Holders
Ref.: OL IDN 2/2022 of 25 November 2022**

A. Article 2 on “Living Law”

Article 2 of the new Criminal Code (“KUHP”) does not diminish legal certainty and cannot be utilized to arbitrarily execute vulnerable and minority groups; on the contrary it provides the long awaited protection for the local/adat communities

1. Indonesia is a country with thousands of ethnicities, tribes, and many other forms of local community (Adat Community)¹. Apart from the laws enacted by the national/provincial government, each Adat Community has their own unique set of unwritten laws. The existence of these set of unwritten laws has been recognised by the national government as Customary Law/Living Law/*Hukum Adat*. This recognition is crystallized in Article 18B (2) of the 1945 Constitution as evidence of the status of these *Hukum Adat* as an integral part of Indonesia’s society.
2. However, there are repeated cases where different approaches on *Hukum Adat* between law enforcement officer and the Adat Communities resulted in clashes between the two parties. Hence, a guarantee for the Adat Communities to enforce and create *Hukum Adat* is important to maintain harmony, stability, and peace for the people within the community, between different communities, and within the national framework in a broader sense.
3. Article 2 of KUHP provides the mentioned safeguard for the Adat Communities. For the first time in Indonesian history, the status of *Hukum Adat* is manifested at the national level and law enforcement officers all over Indonesia are obliged to respect the local communities’ *Hukum Adat*. By recognising the existence and the enforceability of Living Law/*Hukum Adat* through KUHP, its further implementation will be consolidated and hence is expected to prevent conflicts or clashes between law enforcement officers and local communities.
4. To ensure that the principle of legality is not contravened, the provisions on the recognition of *Hukum Adat* provide three important safeguards. First, *Hukum Adat* may only be applied towards matters not provided by the KUHP. This ensures that there will be no dualism of stipulation under the KUHP and *Hukum Adat* and the KUHP will prevail over *Hukum Adat* in the event that the two have competing provisions. Second, *Hukum Adat* which is recognized by the KUHP is limited to those which are in line with Pancasila, the 1945 Constitution, human rights, and general principles of law recognized by community of nations. This prevents arbitrary or discriminative provisions of *Hukum Adat* from being recognized as positive law. Third, implementing regulations (in the form of Government Regulations/*Peraturan Pemerintah*) that will further clarify what constitutes as Living Law will be developed before the recognition takes full effect. The implementing regulations will serve as guidelines as well as a specific threshold for the provincial/local governments in establishing Regional Regulations (*Peraturan Daerah*) related to living law/*Hukum Adat*, preventing any unilateral interpretation and implementation of *Hukum Adat*.
5. The recognition of Living Law is essentially an acknowledgment of the existence of the Adat Community in Indonesia, a nation with a pluralistic society. While respecting the

¹ In Indonesia the terminology used for native community is “Adat Community”.

traditional values of our societies, the Gol commits to ensure that the application of such provision will not contravene the principle of legality and in line with Pancasila, the Constitution, human rights, and general legal principles that are recognized by the international community.

B. Right to Access Safe and Legal Abortion

The new KUHP reinforces the efforts to provide and safeguard access to sexual and reproductive health for women and girls, as well as for sexual crime victims.

6. The Gol recognizes the importance of access to sexual and reproductive health services and is committed to fulfilling the right to access quality services.
7. At the outset, it is important to note that **contrary** to the conclusion reached by the SPMH, **there are no “international standards” which are violated because the KUHP “...continue to criminalize abortion...”**. ICCPR General Comments no. 36 recognizes that “...State parties may adopt measures designed to regulate voluntary termination of pregnancy...” and in doing so, the Gol recognizes that the States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk and where the pregnancy is the result of rape or sexual abuse.² At the same time, CEDAW articles do not specifically prescribes on whether countries should ban or not ban the abortion.
8. **Against that backdrop, the Gol views the provisions regarding abortion in KUHP as part of an effort to protect women from unsafe practices of abortion.** Provisions regarding abortion can be found in Articles 463, 464 and 465 of KUHP. However, it is important to emphasize that similar provisions also exist in Articles 346-348 of the previous Criminal Code and in Article 75 of Law No. 36/2009 on Health.
9. Moreover, provisions regarding abortion under KUHP are one of the Gol’s efforts in ensuring women's health during pregnancy. **Abortion is still permissible under specific emergency conditions, as enacted in Law No. 36/2009 on Health and the Government Regulation No. 61/2014 on Reproductive Health in line with the applicable norms under the ICCPR**, under two health emergency conditions which are:
 - a. When the pregnancy threatens the life of the mother and fetus, resulting in an irreversible disease or genetic defect affecting the life of the baby after birth; and
 - b. For rape victims who are at risks to psychological trauma.
10. It is also important to highlight that the provisions in Article 463 (2) of KUHP reinforce the efforts of sexual crime survivors in seeking justice, by providing a longer abortable gestational age period.
11. Before, Article 76 of the Law No. 36/2009 on Health stipulates that an abortion can only be performed if the age of pregnancy is still within a 6 week of the victim’s first day of last menstruation period. Meanwhile the new Criminal Code/KUHP stipulates that survivors of sexual crimes can have an abortion for pregnancies that do not exceed 14 weeks.

C. Right to Access Contraception

² ICCPR General Comments no. 36.

12. Provisions regarding the crime of showing pregnancy prevention devices to children regulated in Articles 408-410 of the Criminal Code **are not new**. Similar provisions have also been found in Articles 534 and 535 of the Criminal Code. The rationale behind these provisions hinges on the necessity to protect children from premature exposure to sexual activities which is in itself a manifestation of the State's obligation to "...take all appropriate legislative...measures to protect the child from ... sexual abuse...".³ Unlimited access to contraception for children would exacerbate the means for sexual exploitation and sexual abuse, hence these provisions have a paramount role in the protection of children.
13. Apart from the Criminal Code, similar provisions can also be found in **Article 28 of Law no. 52/2009 concerning Population Development & Family Development** which indeed limits the delivery of information and/or demonstrations of contraceptive methods. Contraceptive drugs and methods can only be delivered by health workers and other personnel who are trained and carried out in an appropriate place and manner.
14. The GoI continues strengthening the supply and distribution program of contraceptive devices, medicine, and services for reproductive health facilities. Moreover, the GoI continues to improve infrastructure to ensure unhindered access to health facilities in remote areas.
15. The capacity of family planning field workers to provide information, education, and communication and maintain participation in family planning has also been strengthened. Social and economic backgrounds often influence the understanding and practice of family planning. Thus, a more comprehensive intervention at the village levels is one of the main targets.
16. In the 30 years since the adoption of the Convention on the Rights of the Child, Indonesia has enacted various policies and programs that focus on strengthening three pillars on policy such as legal framework, institutional capacity, and implementation mechanism to realize children's rights and improve their lives. Progressive efforts in providing sexual and reproductive healthcare services across the nation have been made, with particular attention to improving maternal and child health. One of Indonesia's many efforts in protecting the rights of the child is by regulating, implementing, and providing age-appropriate sexual and reproductive health education.

D. Criminalization of sex outside the wedlock/cohabitation/adultery

17. The allegation against regulations on extra-marital sex, adultery and cohabitation as a violation of the right to privacy were made without considering the nature of the article as an **absolute complaint-based offense**. Prosecution shall only be initiated on the basis of a complaint made exclusively by the **immediate family members**.
18. These regulations are also in the context of **respecting the institution of marriage as stipulated in Law No. 1 of 1974 concerning Marriages in Indonesia**, as well as social, cultural and religious values that live in the midst of society. The status of these offences as absolute complaint-based offense means that the State cannot interfere into an individual's private matters without him/her personal request. In this regard, the State serves merely as a facilitator to those who wish to preserve the sanctity of marriage and

³ Article 19 (1) of the Convention on the Rights of the Child.

their own cultural and religious values while at the same time respecting the right to privacy of individuals.

19. Moreover, cases in Indonesia related to vigilante acts on unmarried couples who live or stay together or to people who are under suspicion of adultery are high and concerning. By putting the limit of eligibility only to immediate family members, unrelated parties or even law enforcement officer cannot conduct vigilante and unlawful actions related to alleged cohabitation and adultery cases anymore. In addition, nothing in this provision singles out any group or minorities.
20. Moreover, **these provisions do not violate the right to privacy**, as argued by the SPMH. By observing **the ICCPR General Comments No. 16 on Right to Privacy** as barometer, the Gol must clarify that these provisions do not violate the right to privacy because:
 - a. The State cannot actively monitor or collect information related to the private lives of citizens, since it is a complaint-based offense limited to intermediate family members;
 - b. Thus, the State does not intervene directly to the private space of its citizens, since criminal proceedings are only carried out based on complaints from immediate family members; and
 - c. KUHP has established a set of clear benchmarks regarding the elements of the crime of adultery and cohabitation, so that it cannot be considered arbitrary.

E. Other discriminatory provisions

21. Indonesia reaffirms its unwavering commitments on upholding the protection and promotion of human rights as firmly guaranteed in our Constitution. Our Constitutions, as well as prevailing laws and regulations, always emphasize equality before the law for all citizens. As a democratic society, our national legal frameworks always correspond to the consideration of social and religious values and norms.
22. Also, as a state party to 8 out of 9 international human rights instruments, **Indonesia upholds the principles of non-discrimination based on races, sex, religion, language, political background, origins, nationality as well as other social status.** These principles also provide protection for all individuals from discrimination and violence, including to LGBT persons.
23. Obscene acts are considered a crime if they are done in public, done with violence or threats, or if it is publicized as contents of pornography. The purpose of this provision is to protect the public from possible forms of sexual crime or abuse, aside from rape which has been stipulated within other articles of KUHP. The purpose of the provision on obscene acts is in no way intended to target minority groups.

F. Right to Freedom of Religion or Belief

24. The provisions on blasphemy are also intended **to prevent discrimination based on religion or beliefs.** The scope of the crime is confined with the prohibition of expression of hatred and acts of hostilities against certain religious groups. The provision is actually meant to prevent horizontal conflicts and discrimination against specific groups.

25. History has proven that Indonesia is prone to religion or faith related conflicts. Hundreds of thousands have died because of such conflicts. For example, the series of sectarian conflict in Maluku during 1999-2002, where at least 5,000 people died.
26. The focus of these provisions is **to prevent the spread of hatred and hostility, a manifestation of the state's obligation to protect citizens from discrimination as stipulated in Article 20 of the ICCPR.**
27. **The blasphemy articles also provide clear definitions and prescriptions, mainly on incitement to commit hostility, hatred violence, or discrimination against other people's religions and beliefs.** Such clear prescriptions would prevent unreasonable interpretations that may cause legal uncertainty against non-theistic and atheistic groups in Indonesia.
- G. Rights to freedom of opinion and expression, association and to take part in cultural life**
28. **Based on Article 19 (3) of the ICCPR, the right to freedom of expression is a right that carries with it special duties and responsibilities.** It may therefore be subject to certain restrictions, through laws and regulations to i) respect the rights or reputation of others, or ii) protect national security or public order. So it is not an absolute right.
29. **Article 218 and 240 of KUHP is a manifestation of the said restrictions** recognized by the ICCPR. These articles, alongside their respective elucidation which serve as an integral part of the KUHP itself, fulfil the first criteria of the restriction under Article 19 (3) of the ICCPR, namely the restriction **is proscribed by law.** The norms provided are sufficiently clear to enable an individual to regulate his or her conduct accordingly and it provides sufficient guidance to ascertain what sorts of expression are properly restricted and what sorts are not.
30. **These provisions exist as a *lex specialis* to defamation articles under the KUHP** (e.g. Article 433) because of the special circumstances surrounding heads of state and state institutions who are prone to misinformation and disinformation put forward for political motives. **As recognized by the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, "...disinformation online can have serious consequences for democracy and human rights..." and that "...it is politically polarizing, hinders people from meaningfully exercising their human rights and destroys their trust in Governments and institutions."**⁴
31. These provisions, therefore, serve to protect the institution of democracy from misinformation and disinformation in whatever form and manifestations which may damage the public trust towards Governments and institutions which potentially lead to public disorder. This is a fulfillment of the second and third restriction criteria, i.e. necessity and legitimate aim.

⁴ Disinformation and freedom of opinion and expression, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, A/HRC/47/25, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/085/64/PDF/G2108564.pdf?OpenElement>

32. To ensure the proportionality requirement of the restriction, **the articles provide for two important limitations. First**, there will be no legal process without a valid complaint from the rightful party, namely the President or Vice President (Article 218) and the heads of state institutions (Article 240). This closes any possibility for complaints coming from sympathizers, political alliances, or any other groups which may misuse the provisions. **Second**, the Articles explicitly exclude any kind of critics and public demonstration from the scope of the offense, thus maintaining the sanctity of the freedom of expression and the values of democracy.
33. As such, offenses against the dignity of the President and Vice President and articles related to insulting the Government constitute a form of restrictions in line with the ICCPR. **They are not intended to derogate the rights, but to protect public order.** It is important to note that similar provisions are also found in many criminal laws of other countries, e.g. Denmark, Germany, Sweden, and the Netherlands, to name a few.⁵

Closing

- The new criminal code took years of drafting and almost two years of public consultation before it was passed by the parliament. It strikes a balance between individual rights and broader public interests, taking into account international norms and laws to which Indonesia is a party as well as the various domestic values.
- It will be fully enacted within three years since the date of its adoption, to allow the government to produce implementing laws and regulations. The transitional period will also allow the government to improve public and other stakeholders' understanding of the new criminal code, so as to prevent misinterpretation.
- Indonesian legal system provides avenues for public to challenge the prevailing regulations.
- The Government of Indonesia appreciates the attention given by many parties to the new Criminal Code as has been officially issued as UU No. 1/2023. The Government of Indonesia encourages the SPMH to further carefully read the afore-mentioned Code in detail, in order to build a better and appropriate understanding.

⁵ See generally Chapter 13 and 14, Danish Criminal Code; Section 90, German Criminal Code; Chapter 18, Swedish Criminal Code; and Article 11, Netherlands Penal Code.