

# MORALITY ON TRIAL: EVALUATING THE ORIGINS AND CONSEQUENCES OF THE MORALITY PROVISIONS IN INDONESIA'S NEW CRIMINAL CODE

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*If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion . . . .* – Justice William J. Brennan<sup>1</sup>

## I. INTRODUCTION

There is trouble in paradise.<sup>2</sup> On December 6, 2022, the Indonesian Parliament officially passed a New Criminal Code,<sup>3</sup> replacing the long-standing laws from the Dutch colonial period.<sup>4</sup>

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1. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

2. The concept of Indonesia as an island paradise is reflected in vacation magazines and popular culture. See Alexa Wang, *5 Incredible Places to Visit in Indonesia*, FLUX, <https://www.fluxmagazine.com/5-incredible-places-to-visit-in-indonesia/> (last visited Oct. 26, 2024). See generally *TICKET TO PARADISE* (Universal Pictures 2022) (a recent film that portrays Bali, Indonesia, as an ideal location for romance and weddings).

3. Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana [DRAFT CRIM. CODE] [DRAFT CRIMINAL CODE BILL] (Indon.); Jennifer Tangka & Songrat Ratanaprayul, *Indonesia's New Criminal Code and Intellectual Property*, TILLEKE & GIBBINS (Jan. 17, 2023), <https://www.tilleke.com/insights/indonesias-new-criminal-code-and-intellectual-property/>.

4. Chad De Guzman, *Sex Outside Marriage Will Be Illegal Under Indonesia's Sweeping New Criminal Code*, TIME (Dec. 6, 2022, 4:44 AM), <https://time.com/6238952/indonesia-criminal-code-to-ban-sex-outside-marriage/>; Masrur Jamaluddin, *Indonesia Bans Sex Outside Marriage as Parliament Passes Sweeping New Criminal Code*, CNN,

The New Code, Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (the “New Code,” “Code,” “New Criminal Code”), and its controversial provisions were met with widespread domestic and international criticisms.<sup>5</sup> Controversial provisions of the New Code include: (1) banning the promotion of certain political ideologies; (2) prohibiting public criticism of the president; (3) expanding the current prohibitions against blasphemy; (4) strengthening anti-abortion laws; and (5) expanding the provisions related to public decency and morality, such as prohibiting extramarital sex and cohabitation between unmarried partners.<sup>6</sup> Passed unanimously by the Indonesian Parliament, the New Code was lauded by its supporters as a necessary development from the obsolete colonial laws of Indonesia’s past and purportedly reflects the common interests of all relevant stakeholders.<sup>7</sup> However, notable human rights groups have criticized the New Code as violating international human rights standards.<sup>8</sup> The New Code is also accused of being derived from conservative religious ideology rather than popular consensus.<sup>9</sup> Critics believe that the New Code will infringe on the rights of Indonesian minority groups, such as

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<https://www.cnn.com/2022/12/05/asia/indonesia-new-code-passed-sex-cohabitation-intl-hnk/index.html> (Dec. 6, 2022, 2:09 PM).

5. Kate Lamb, *Thousands Protest Against New Criminal Code in Indonesia*, GUARDIAN (Sept. 24, 2019, 11:41 AM), <https://www.theguardian.com/world/2019/sep/24/thousands-protest-against-new-criminal-code-across-indonesia>. As a former Indonesian citizen, the adoption of the New Criminal Code is a topic of personal interest that was further emphasized by my recent trip to Indonesia where I observed and gathered anecdotal evidence. To maintain the objective tone of the Article, these anecdotes will be placed in the footnotes to provide personal elaboration on the Article’s stated assertions and arguments.

6. Kelly Buchanan, *Indonesia: New Criminal Code Passed by Parliament*, LIBR. CONG. (Dec. 12, 2022), <https://www.loc.gov/item/global-legal-monitor/2022-12-11/indonesia-new-criminal-code-passed-by-parliament/>. The morality provisions were selected as the Article’s main focus because they have the best potential to be a relevant issue to U.S. citizens. Sadaf Hasan, *Indonesia Outlaws Sex Outside Marriage in New Criminal Code*, TRANSCON. TIMES (Dec. 6, 2022), <https://www.transcontinentaltimes.com/indonesia-sex-marriage-criminal-code/>. For example, in 2019, American tourists comprised the greatest increase of visitors to Indonesia. *American Tourists Were the Fastest Growing Market in Indonesia up 14% in 2019*, BALI SUN (Feb. 4, 2020), <https://thebalisun.com/american-tourists-were-the-fastest-growing-market-in-indonesia-up-14-in-2019/>.

7. Buchanan, *supra* note 6.

8. *Indonesia: New Criminal Code Assaults Rights*, HUM. RTS. WATCH (Jan. 12, 2023, 12:00 AM), <https://www.hrw.org/news/2023/01/12/indonesia-new-criminal-code-assaults-rights>. See generally *Indonesia 2023*, AMNESTY INT’L, <https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/indonesia/report-indonesia/> (last visited Oct. 26, 2024).

9. P.K. Balachandran, *Indonesia’s Proposed Criminal Code Reflects the Power of Islamic Radicals – Analysis*, EURASIA REV. (Dec. 5, 2022), <https://www.eurasiareview.com/05122022-indonesias-proposed-criminal-code-reflects-the-power-of-islamic-radicals-analysis/>.

certain religious groups, political organizations, and the LGBTQ+ population.<sup>10</sup>

The New Code, which is scheduled to be fully implemented by 2026, will apply to both Indonesian citizens and foreign visitors.<sup>11</sup> There is concern that the Code's universal application on foreign travelers may negatively affect Indonesia's still-recovering tourism industry.<sup>12</sup> The New Code's morality provisions, including the prohibition against the cohabitation of unmarried partners and the prohibition against extramarital sex, may discourage international visitors from traveling to Indonesia.<sup>13</sup> This issue is therefore relevant and timely as American tourists could face potential criminal liability for violating the morality provisions of the New Criminal Code.<sup>14</sup> While the Code could adversely impact Indonesia's economy, its potential impact on the nation's democratic aspirations presents a more concerning development.<sup>15</sup>

The morality provisions in Indonesia's New Criminal Code indicate the growth of conservative religious influence within the Indonesian government and legal system. Generally, nations can establish their own legal systems. However, as a party to various

10. *Indonesia: New Criminal Code Assaults Rights*, *supra* note 8.

11. The Associated Press, *Indonesia Criminalizes Adultery, but the Law May Take Up to 3 Years to Take Effect*, NPR, <https://www.npr.org/2022/12/06/1140889660/indonesia-criminalizes-adultery-but-the-law-may-take-up-to-3-years-to-take-effect> (Dec. 6, 2022, 12:39 PM).

12. Mietta Adams & Toby Mann, *What Will Indonesia's New Laws Mean for Tourists and Visitors, and Why Are There Concerns Around Its Unmarried Sex Ban?*, ABC NEWS (Dec. 8, 2022, 11:11 PM), <https://www.abc.net.au/news/2022-12-09/indonesia-criminal-code-revisions-travel-and-tourism-bali/101748820>.

13. *Id.*

14. *Tourists 'Think Twice' About Indonesia Following Criminal Code Revisions*, REUTERS (Dec. 7, 2022, 7:15 AM), <https://www.reuters.com/world/asia-pacific/tourists-think-twice-about-indonesia-following-criminal-code-revisions-2022-12-07/> [hereinafter *Tourists 'Think Twice'*]; Heather Chen & Masrur Jamaluddin, *How Indonesia's New Sex Laws Will Affect Tourists*, CNN (Dec. 7, 2022, 5:59 AM), <https://www.cnn.com/travel/article/indonesia-criminal-code-tourists-intl-hnk/index.html>. Additionally, the Code's controversy could complicate relationships between foreign businesses, who may have different value systems, and the Indonesian government. *Explained: Why Is Indonesia's New Criminal Code So Controversial*, MINT (Dec. 6, 2022, 2:51 PM), <https://www.livemint.com/news/world/explained-why-is-indonesia-s-new-criminal-code-so-controversial-11670315660676.html>.

15. Nurul Fitri Ramadhani & Robby Irfany Maqoma, *Expert Panel: Indonesia's New Criminal Code Crosses Private Boundaries, Is Anti-Democratic, and Can Easily Jail People*, CONVERSATION (Dec. 8, 2022, 1:28 AM), <https://theconversation.com/expert-panel-indonesias-new-criminal-code-crosses-private-boundaries-is-anti-democratic-and-can-easily-jail-people-196133>; Resty Woro Yuniar, *Indonesian Groups Decry 'Destruction of Democracy' as New Criminal Code Curbs Sex, Free Speech*, S. CHINA MORNING POST (Dec. 7, 2022, 3:32 PM), <https://www.scmp.com/print/week-asia/politics/article/3202300/indonesian-activists-decry-authoritarian-criminal-law-amid-curbs-sex-and-free-speech>.

international human right protocols and treaties, Indonesia may breach these international agreements by adopting the morality provisions.

Indonesian officials have stated that non-citizens of Indonesia are unlikely to be affected by the morality provisions despite their nationwide application.<sup>16</sup> However, factors such as discretionary enforcement, corruption, and potential for extortion present tangible risks to foreign visitors. Furthermore, the strong international response against the morality provisions, combined with the potential for severe economic repercussions, provides compelling arguments to amend the morality provisions.

Part II of this Article will provide a detailed overview of Indonesia's New Criminal Code and its morality provisions. Part III will discuss the relevant historical and recent developments of Indonesia's legal system. Part IV of this Article will critically analyze the morality provisions, including the risks related to the enforcement of the provisions, a discussion of the domestic and international reactions, and an evaluation of the economic effects of the rules on the recovering Indonesian tourism industry. Finally, Part V will evaluate the morality provisions' effect on U.S. visitors and how visitors can navigate the requirements of the new laws.

## II. THE NEW CRIMINAL CODE: CONTROVERSIAL PROVISIONS

The stated legislative purpose of the New Criminal Code is to "Indonesianize" the criminal legal system from its Dutch origins.<sup>17</sup> Indonesian politicians claim that the New Code will better represent current Indonesian values, morals, and ethics to match the nation's socioeconomic developments.<sup>18</sup> This Part will provide

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16. Adams & Mann, *supra* note 12.

17. *Indonesia's House of Representatives (DPR) Passes Revised Criminal Code Bill into Law*, INDON. INV. (Dec. 16, 2022), <https://www.indonesia-investments.com/news/todays-headlines/indonesia-s-house-of-representatives-dpr-passes-revised-criminal-code-bill-into-law/item9580> [hereinafter *Indonesia Investments*].

18. See DW News, "A Step Back Towards Authoritarian Rule" *Indonesia Passes Controversial Criminal Code*, YOUTUBE (Dec. 7, 2022), [https://www.youtube.com/watch?v=zRt\\_bkr8tjM](https://www.youtube.com/watch?v=zRt_bkr8tjM); *Indonesia Investments*, *supra* note 17.

an overview of Indonesia's New Criminal Code, including a discussion of the controversial provisions.<sup>19</sup>

A. Controversial Criminal Provisions on Reproductive Rights,  
Religious Freedoms, and Political Discourse

Article 2 of the New Code recognizes “any living law” in Indonesia.<sup>20</sup> This provision would include *adat*, or customary law,<sup>21</sup> and *Sharia*, or Islamic law,<sup>22</sup> at the local level.<sup>23</sup> It is reported that local Indonesian municipalities have hundreds of *Sharia*-inspired ordinances and other regulations that discriminate against women, religious minorities, and LGBTQ+ groups.<sup>24</sup> Because of the lack of an official list of *adat* in Indonesia, this provision could be used to prosecute people under these discriminatory regulations.<sup>25</sup>

Articles 218, 219, and 220 criminalize anyone who criticizes the president or the vice president, with punishment of up to three years in prison.<sup>26</sup> It is believed that the articles' vagueness will result in a chilling effect on political discourse and has considerable potential for political abuse.<sup>27</sup>

Articles 300 through 305 expand the 1965 blasphemy law to protect the six officially recognized religions in Indonesia: Islam, Protestantism, Catholicism, Hinduism, Buddhism, and

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19. While the main focus of the Article is on the morality provisions, a discussion of the other controversial provisions of the New Code will assist with the overall understanding of the main criticisms of the New Code.

20. DRAFT CRIM. CODE art. 2; *Indonesia: New Criminal Code Disastrous for Rights*, HUM. RTS. WATCH (Dec. 8, 2022, 8:00 AM), <https://www.hrw.org/news/2022/12/08/indonesia-new-criminal-code-disastrous-rights>.

21. Customary law is defined as “[l]aw consisting of customs that are accepted as legal requirements or obligatory rules of conduct.” *Customary Law*, BLACK’S LAW DICTIONARY (11th ed. 2019). The existence of *adat* within the Indonesian legal system has resulted in some controversial court decisions including a case where the court applied a customary punishment to sexual assault by having the defendant buy a buffalo and cloth for the victim. *MA Setuju Pemerkosa Tidak Dipenjara, Tapi Bayar Seekor Kerbau* [Supreme Court Agrees Rapist Should Not Be Jailed, but Pay a Buffalo], DETIKNEWS (Oct. 12, 2012, 6:40 AM), <https://news.detik.com/berita/d-2060783/ma-setuju-pemerkosa-tidak-dipenjara-tapi-bayar-seekor-kerbau>.

22. Within Indonesia, the autonomous province of Aceh is the only Indonesian province authorized to implement *Sharia* or Islamic law. SIMON BUTT & TIM LINDSEY, *INDONESIAN LAW 205* (2018). A major component of *Sharia* law in Aceh pertains to sexual acts and gender relations. *Id.* at 206.

23. *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

24. *Id.*

25. *Id.*

26. DRAFT CRIM. CODE art. 218–20.

27. *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

Confucianism.<sup>28</sup> The New Code provisions expand the original law's coverage by adding the word *kepercayaan*, or belief, to what is covered under the 1965 law.<sup>29</sup> The new anti-blasphemy provisions could restrict the ability of individuals to engage in discourse regarding religious issues. Article 302 criminalizes persuading a believer to become a non-believer.<sup>30</sup> For example, Indonesian teachers and professors could be accused of violating the anti-blasphemy provisions if they are reported to have turned their students into non-believers.

Articles 463 and 464 generally ban abortions in Indonesia.<sup>31</sup> A woman who aborts her pregnancy can be sentenced to up to four years in prison with exceptions for victims of rape or sexual violence or as a matter of medical emergency.<sup>32</sup> Anyone who assists a pregnant woman in having an abortion can be sentenced to up to five years in prison.<sup>33</sup> This has sparked concern that the anti-abortion provisions may lead to the prosecution of individuals consuming or selling morning-after pills as an abortion tool.<sup>34</sup>

#### B. Morality Provisions Prohibiting Pre-Marital Sex and Cohabitation Between Unmarried Couples

As previously discussed, the main focus of this Article is the morality provisions of the New Criminal Code. These provisions exist to regulate the freedoms and rights of individuals to conform with the proclaimed values of modern Indonesian society.<sup>35</sup> However, as future Parts will argue, the morality provisions likely reflect the values of a vocal religious conservative movement and a direct response of the current political administration to gather political support.<sup>36</sup>

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28. See Penetapan Presiden Republik Indonesia Nomor 1 Tahun 1965 tentang Pencegahan Penyalahgunaan Dan/Atu Penodaan Agama [Determination of the President of the Republic of Indonesia Number 1 of 1965 about Prevention of Religious Abuse and/or Blasphemy] art. 1 (Indon.); DRAFT CRIM. CODE art. 300–05.

29. DRAFT CRIM. CODE art. 300–05.

30. *Id.*; *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

31. DRAFT CRIM. CODE art. 463–64.

32. *Id.*

33. *Id.*

34. *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

35. Ananda Teresia & Kate Lamb, *Indonesia Bans Sex Outside Marriage in New Criminal Code*, REUTERS (Dec. 6, 2022, 4:09 PM), <https://www.reuters.com/world/asia-pacific/indonesias-parliament-passes-controversial-new-criminal-code-2022-12-06/>.

36. See *infra* pt. III.

Article 411 of the New Code prohibits extramarital sex and violators can face a prison sentence of up to one year.<sup>37</sup> The previous criminal Code provided that only married couples could be prosecuted for extramarital sex based on police complaints by their spouse or children.<sup>38</sup> The New Code expands the reporting powers to allow parents, children, or spouses to file a police report against married or unmarried individuals.<sup>39</sup> While this may seemingly limit the enforcement of the criminal Code, the existence of the provision itself can lead to false reports from bad actors. False reporting can be further exacerbated by Indonesia's high corruption levels and potential for discretionary enforcement.<sup>40</sup> Furthermore, while Article 411 does not explicitly reference same-sex relationships, Indonesia has maintained a general prohibition against same-sex relationships, so this provision effectively criminalizes all same-sex conduct.<sup>41</sup> The provision also subjects sex workers to criminal prosecution.<sup>42</sup>

Article 412 provides that couples who live together “as husband and wife” without being legally married can be sentenced to six months in prison.<sup>43</sup> This provision can be used to target Indonesian religious minorities.<sup>44</sup> Similar to Article 411, Article 412 could also be enforced against LGBTQ+ community members who are not permitted to marry under current Indonesian law.<sup>45</sup>

The New Criminal Code, including the morality provisions, will apply to both Indonesian nationals and foreigners alike.<sup>46</sup> As the Code is now constructed, the morality provisions can only be

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37. DRAFT CRIM. CODE art. 411; *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

38. Penal Code of Indonesia art. 284 (1999) (Indon.); *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

39. DRAFT CRIM. CODE art. 411; *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

40. *See infra* pt. IV.

41. DRAFT CRIM. CODE art. 411; *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

42. DRAFT CRIM. CODE art. 411.

43. *Id.* art. 412; *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

44. These minority groups include members of hundreds of unrecognized religions, including Baha'i, Ahmadi, and local religions, as well as people in remote regencies and islands. *See* CNA, *How Far Can Indonesia Really Enforce Its New Extra-Marital Sex Laws?*, YOUTUBE (Dec. 9, 2022), <https://www.youtube.com/watch?v=zY8xpjBtlQ>; *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

45. *See* S. China Morning Post, *Indonesia Passes Law Banning Premarital and Extramarital Sex*, YOUTUBE (Dec. 6, 2022), <https://www.youtube.com/watch?v=bvAEqbQXnVc>; *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

46. CNA, *supra* note 44.

enforced when reported by close household members, such as children, parents, or siblings.<sup>47</sup> Additionally, some Indonesian government officials have maintained that the marital status of foreign visitors will not be checked.<sup>48</sup> This presents a unique dilemma between the Code's clear purpose of regulating sexual and marital relationships and the economic realities of Indonesia's tourism industry. Furthermore, potential corruption in Indonesia may present harmful opportunities for extortion or abuses of power on both Indonesian citizens and foreign visitors. With an overview of the New Criminal Code concluded, the next Part will provide the relevant historical developments of Indonesian jurisprudence and its contributions to the controversial morality provisions.

### III. HISTORICAL DEVELOPMENTS: THE ORIGINS OF THE NEW CODE AND THE MORALITY PROVISIONS

As the world's third largest democracy and the fourth most populous nation, the new developments of Indonesia's Criminal Code present a legitimate challenge to the continued health and stability of its democratic systems.<sup>49</sup> When the Code was proposed in 2019, Indonesia witnessed its largest protest to date, with many academics and students calling for the revision of the proposed Code.<sup>50</sup> These protests stopped due to the COVID-19 pandemic and government suppression, but weaker protests continued when the Code was passed in December 2022.<sup>51</sup>

Currently, the Indonesian legislature has not indicated that they will repeal or amend any provisions from the New Code.<sup>52</sup>

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47. DRAFT CRIM. CODE art. 411–12.

48. *Bali Sex Ban: Indonesia Tourists Won't Be Charged Under Law*, BBC NEWS (Dec. 12, 2022), <https://www.bbc.com/news/world-asia-63948740>.

49. *See Information on U.S. & Indonesia*, USINDO, <https://usindo.org/information-on-u-s-and-indonesia/about-indonesia/> (last visited Oct. 26, 2024).

50. *What's Driving the Latest Protests in Indonesia?*, AL JAZEERA (Oct. 1, 2019), <https://www.aljazeera.com/news/2019/10/1/whats-driving-the-latest-protests-in-indonesia>; Lamb, *supra* note 5.

51. *See* BBC News, *Indonesia Passes Law Banning Sex Outside Marriage*, YOUTUBE (Dec. 6, 2022), [https://www.youtube.com/watch?v=sa7y2f1TA\\_0](https://www.youtube.com/watch?v=sa7y2f1TA_0) [hereinafter *Indonesia Passes Law Banning Sex Outside Marriage*].

52. *See* Putra Ananda, *MK Tolak Seluruh Permohonan Uji Materi UU KUHP* [Constitutional Court Rejects All Requests for Judicial Review of Criminal Code Law], MEDIA INDON. (Feb. 28, 2023, 4:22 PM), <https://mediaindonesia.com/politik-dan-hukum/561704/mk-tolak-seluruh-permohonan-uji-materi-uu-kuhp>. It is likely that any challenges to the New Criminal Code must be processed through the Indonesian Supreme Court or Constitutional Court system. The Indonesian Constitutional Court has stated that it will not hear any challenges to the New Code until 2026. *Id.*



Indonesia is, therefore, faced with a potential crossroads in history. The government's actions in the next three years to enforce the New Code will be critical to the continued stability of Indonesia's democratic aspirations, political relationships, and economic health. The following Parts will provide an overview of Indonesia's legal systems, including the Dutch colonial influence, relevant constitutional provisions, and the rise of religious conservatism.

### A. An Overview of Indonesia's Legal System

Indonesia's current legal system is a civil law system based on the Dutch model with influences of customary law.<sup>53</sup> Under the Dutch colonial administration, "the law was a mixture of Dutch law and local customary law" or *adat*.<sup>54</sup> Indonesia has mostly codified its criminal law since independence.<sup>55</sup> Civil law, however, continued to be based on *adat*, which can vary between each region and ethnic group.<sup>56</sup>

The current judicial structure of Indonesian courts is comprised of a multi-level court system. Indonesia's two highest courts are the Supreme Court, or *Mahkamah Agung*, and the Constitutional Court, or *Mahkamah Konstitusi*.<sup>57</sup> Below the two highest courts are several subordinate courts, including High Courts of Appeal, district courts, and religious courts.<sup>58</sup>

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53. *Indonesia*, CIA WORLD FACT BOOK, <https://www.cia.gov/the-world-factbook/countries/indonesia> (Dec. 18, 2024).

54. James F. McDivitt et al., *Justice of Indonesia*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Indonesia/Justice> (Dec. 20, 2024).

55. *Id.*

56. *Id.* Indonesia has four judicial divisions: general, religious, military, and administrative matters, each with their own courts. *Id.* The general courts handle civil and criminal cases while the religious, military, and administrative courts handle specialized issues and parties. *Id.* ("Muslims may choose to use Islamic law in some civil cases; since the mid-1970s religious law has applied to all civil matters dealing with marriage.")

57. *Indonesia*, *supra* note 53. Although the Constitutional Court has no authority in enforcing criminal law, if the morality provisions are challenged under constitutional grounds, then the case will likely fall under the jurisdiction of the Constitutional Court. See Irfan Ardiansyah & Duwi Handoko, *Comparison Between the Supreme Court and the Constitutional Court as Part of the Actors of Judicial Power in Indonesia*, 175 IOP CONF. SER., <https://iopscience.iop.org/article/10.1088/1755-1315/175/1/012077/pdf> (last visited Nov. 1, 2024).

58. McDivitt et al., *supra* note 54. Regarding judicial selection and terms of office, Supreme Court Judges are nominated by the Judicial Commission and appointed by the President with concurrence of parliament. *Indonesia*, *supra* note 53. Supreme Court Judges serve until mandatory retirement at age 65. *Id.* Constitutional Court Judges are nominated by the President, Supreme Court, and the Indonesia Parliament, who each hold three nominations. *Id.* The Constitutional Court Judges will serve until mandatory retirement at age 70. *Id.*

Judicial power in Indonesia is regulated under Article 24 of the Constitution which stipulates that the judiciary power shall be implemented by the Supreme Court and a Constitutional Court.<sup>59</sup> Additionally, Article 24B(1) of the Constitution stipulates the presence of a Judicial Commission which is independent in nature, has authority to nominate Supreme Court Justices, and has the regulatory powers to uphold the honor, dignity, and conduct of Indonesian judges.<sup>60</sup> There is concern that the Indonesian Court system is no longer an independent government entity.<sup>61</sup> If the court's independence is compromised, then any legal challenges to the New Code are unlikely to be successful.

### *1. The Dutch Legacy: Shedding the Shackles of the Past*

Adopting the New Criminal Code is the latest iteration of Indonesia separating itself from its Dutch colonial legacy.<sup>62</sup> As a former Dutch colony, Indonesia is heavily influenced by the Dutch legal system.<sup>63</sup> Supporters of the New Criminal Code claim the primary reason for adopting the New Criminal Code was to eliminate Dutch colonial influences, including laws and practices, from the Indonesian legal system.<sup>64</sup> This argument holds some merit. Despite the stated purpose to maintain peace and order

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59. UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA [UUD] [CONSTITUTION] Aug. 18, 1945, ch. VIIIA, art. 24(2).

60. *Id.* ch. VIIIA, art. 24B(1). The court system itself is divided into four different types of courts: (1) the general court; (2) religious court; (3) state administrative court; and (4) military court. McDivitt et al., *supra* note 54. The Court of General Jurisdiction has authority over general criminal and civil matters, including family law for non-Muslim people. *Id.* In the Aceh province, criminal matters belong to *Sharia* or religious court, which in other regions only have authority over civil matters. BUTT & LINDSEY, *supra* note 22, at 205. "Each court jurisdiction consists of first instance and appellate court." *Overview of Indonesian Judiciary*, COUNCIL OF ASEAN CHIEF JUSTS., <https://cacj-ajp.org/indonesia/judiciary/overview-of-indonesian-judiciary/> (last visited Oct. 15, 2024). "[The] Court of First Instance sits in every capital of city/regency, while appellate court sits in the capital of provinces." *Id.*

61. Jimly Asshiddiqie, *The DPR Attacks the Constitutional Court – and Judicial Independence*, INDON. MELBOURNE (Oct. 10, 2022), <https://indonesiaatmelbourne.unimelb.edu.au/the-dpr-attacks-the-constitutional-court-and-judicial-independence/>.

62. *Indonesia Investments*, *supra* note 17.

63. *Chapter II: Legal System*, ASEAN L. ASS'N 23 (Sept. 12, 2019), <https://www.aseanlawassociation.org/wp-content/uploads/2019/11/ALA-INDO-legal-system-Part-2.pdf>.

64. See S. China Morning Post, *supra* note 45.

within the newly formed nation, under the old Dutch-based laws, Dutch nationals received preferential treatment.<sup>65</sup>

As with many independence movements, Indonesia desired to distance itself from its former colonial rulers.<sup>66</sup> However, Indonesia adopted much of the Dutch legal and political systems as a matter of practicality and political stability.<sup>67</sup> For example, the Transitional Provisions within Articles I and II of the Indonesian Constitution explicitly state “that all existing institutions and regulations valid at the date of Independence shall continue to be valid pending the enactment of new legislation complying with the Constitution to the contrary.”<sup>68</sup> While any adopted Dutch law in the Indonesian legal codes is “clearly contrary to the tenets of the Indonesian Revolution,” the revocation of all “Dutch influenced Indonesian law” would lead to political instability due to the lack of a uniform and codified Indonesian body of law.<sup>69</sup> Therefore, to avoid the legal vacuum caused by a universal revocation of the Dutch system, all laws and institutions valid at the time of Indonesian independence remained in effect until they were revoked or replaced.<sup>70</sup>

Further complicating the situation is the manner in which the Dutch-inspired laws are reviewed for their validity and continued enforcement.<sup>71</sup> Under Government Regulation No. 2 of 1945, a Dutch law is considered invalid if it does not comply with the Indonesian Constitution.<sup>72</sup> However, similar to the United States’ system of judicial review, the Dutch laws can only be challenged through the Indonesian courts.<sup>73</sup> Therefore, until the Dutch laws are declared unconstitutional, they remain enforceable. Supporters of the New Criminal Code argue that a complete overhaul of the Indonesian legal system will avoid the lengthy

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65. See *Chapter II: Legal System*, *supra* note 63, at 23.

66. See *S. China Morning Post*, *supra* note 45.

67. See *Chapter II: Legal System*, *supra* note 63, at 23. Soon after Indonesia gained its independence, it was faced with establishing a stable government over a multiethnic population—each group with their own diverse beliefs and legal customs—while simultaneously fighting the Dutch who desired to maintain control of their former colony. See *id.* at 34; *Netherlands/Dutch East Indies (1927-1949)*, UNIV. CENT. ARK., <https://uca.edu/politicalscience/home/research-projects/dadm-project/asiapacific-region/netherlandsdutch-east-indies-1927-1949/> (last visited Oct. 23, 2024).

68. *Chapter II: Legal System*, *supra* note 63, at 23.

69. *Id.*

70. *Id.*

71. *Id.* at 24.

72. *Id.*

73. *Id.*

judicial review process and further establish Indonesia's own legal identity.<sup>74</sup>

The Dutch introduced its Criminal Code to its Indonesian colony in 1918.<sup>75</sup> After achieving independence in 1945, Indonesia spent two decades creating its own Code.<sup>76</sup> However, the initial Indonesian Criminal Code was more of a direct adoption of the Dutch Criminal Code rather than an original legal Code.<sup>77</sup>

## *2. The Indonesian Constitution: Protections on Privacy and Human Rights*

There is potential conflict between the New Criminal Code and the Indonesian Constitution, especially in the articles related to human rights protection.<sup>78</sup> The Indonesian Constitution contains a provision that restricts individual rights and freedoms for the purpose of promoting "morality, religious values, security and public order in a democratic society."<sup>79</sup> This provision would therefore provide the Indonesian government with a legal justification to pass and enforce the New Criminal Code.<sup>80</sup> The issue remains whether the considerations used to justify the New Code are sufficient to overcome individual rights and freedoms.<sup>81</sup> The following Parts will provide an overview of relevant provisions of the Indonesian Constitution for the purpose of evaluating the constitutional validity of the New Code.

As with many nations' governing documents, the Indonesian Constitution has a preamble which contains the core ideals and values of the nation. The Preamble states:

[T]o form a government of the state of Indonesia which shall protect all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice, therefore the independence

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74. *Indonesia Investments*, *supra* note 17.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

79. Cekli Setya Pratiwi, *Rethinking the Constitutionality of Indonesia's Flawed Anti-Blasphemy Law*, 7 CONST. REV. 273, 275 (2021).

80. UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA [UUD] Aug. 18, 1945, pmb.

81. *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

of Indonesia shall be formulated into a constitution of the Republic of Indonesia which shall be built into a sovereign state based on a belief in the One and Only God, just and civili[z]ed humanity, the unity of Indonesia, and democratic life led by wisdom of thoughts in deliberation amongst representatives of the people, and achieving social justice for all the people of Indonesia.<sup>82</sup>

Several of the provisions of the New Code appear to contradict the values presented in the Preamble. For example, the New Code's anti-blasphemy and anti-slander provisions seemingly run against the nation's stated mission of creating a society based on freedom and social justice.<sup>83</sup> Furthermore, the Preamble's claim of protecting and achieving social justice for all people is arguably contradicted by the morality provisions of the New Code.<sup>84</sup> By preventing unmarried couples from living together, the Indonesian government is restricting the freedoms of a significant section of its population.<sup>85</sup>

In addition to the Preamble, other provisions of the Indonesian Constitution provide protections for individuals. Article 27, for example, provides a general guarantee of equality for Indonesian citizens before the law.<sup>86</sup> Article 28D further gives every person the "right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law."<sup>87</sup> The Constitution also provides explicit protections regarding human dignity where each person has the right to protect themselves, as well as their honor, dignity, and property.<sup>88</sup> Article 25 pertains to the right of individuals to live in a healthy environment conducive to physical and spiritual growth.<sup>89</sup> These Constitutional provisions

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82. UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA [UUD] Aug. 18, 1945, pmbl.

83. See *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

84. See *id.*; UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA [UUD] Aug. 18, 1945, pmbl.

85. As noted earlier, nearly half of the Indonesian couples are not legally married. See *Indonesia: New Criminal Code Disastrous for Rights*, *supra* note 20.

86. UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA [UUD] Aug. 18, 1945, ch. X, art. 27(1) ("All citizens shall be equal before the law and the government and shall be required to respect the law and the government, with no exceptions.").

87. *Id.* ch. XA, art. 28D(1).

88. *Id.* art. 28G(1) ("Every person shall have the right to protection of his/herself, family, honor[], dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right.").

89. *Id.* art. 28H(1)–(2) ("Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care. Every person shall have the right to receive

addressing morality provide specific protections to individuals, and such protections are infringed on by the provisions set out in the New Criminal Code.<sup>90</sup> Regarding the constitutional validity of the morality provisions, although the Indonesian Constitution does not have an explicit right to privacy, Article 28G can be interpreted to provide an implied right to privacy.<sup>91</sup> Article 28G grants protection for the individual's family, dignity, and property, while also affirming the right for individuals to be protected from threats to their human rights.<sup>92</sup> The Indonesian Constitutional Court has further affirmed the recognition of the right to privacy under Article 28G.<sup>93</sup> With the legal acknowledgement of the right to privacy, there is a strong argument that the morality provisions violate the constitutional protections of Article 28G.

In addition to the previously discussed constitutional protections, the Indonesian Constitution specifically lists human rights provisions.<sup>94</sup> These include:

(1)The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.

(2)Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever

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facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness.”).

90. One can argue that the provisions of the Constitution should be interpreted as suggestions rather than enforced as legal mandate. While this argument may apply to the Preamble, the legislative purpose and construction of the Constitutional Articles that give rise to the protections on individual rights and liberties lends more credibility to their status as legal requirements rather than aspirational suggestions.

91. *Id.* art. 28G.

92. Akarshi Narain & Apoorv Vats, *Indonesia's New Criminal Code and Article 411: A Step Backwards for Individual Liberties*, JURIST (Jan. 30, 2023, 8:07 AM), <https://www.jurist.org/commentary/2023/01/akarshi-narain-and-apoorv-vats-indonesia-criminal-code/>.

93. *See id.*; Decision, Reviewing the Law No. 11 of 2008 on Information and Electronic Transactions, No. 5/PUU-VII/2010 (Constitutional Court February 24, 2011). In its decision, the Constitutional Court emphasized the importance of limiting the government's communication surveillance powers to protect against abuse of power and violations of the right to privacy. Decision, Reviewing the Law No. 11 of 2008 on Information and Electronic Transactions, No. 5/PUU-VII/2010 (Constitutional Court February 24, 2011).

94. UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA [UUD] Aug. 18, 1945, ch. XA, art. 28I.

and shall have the right to protection from such discriminative treatment.

(3) The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilizations[].

(4) The protection, advancement, upholding and fulfillment of human rights are the responsibility of the state, especially the government.

(5) For the purpose of upholding and protecting human rights in accordance with the principle of a democratic and law-based state, the implementation of human rights shall be guaranteed, regulated, and set forth in laws and regulations.<sup>95</sup>

Despite the explicit human rights protections, the New Code appears to infringe on several listed protections, including freedom of thought and conscience, freedom from discrimination, and the guarantee of state protection of these listed rights. The blatant violation of the constitutional human rights protections can be attributed to an exculpatory provision contained in the same section.<sup>96</sup>

According to Article 28J, individuals are required to respect the human rights of others as it relates to the order and stability of the community and nation.<sup>97</sup> Furthermore, by exercising their own rights, individuals have a duty to respect others' rights and freedoms.<sup>98</sup> This means that Article 28J restricts individuals in their ability to exercise their rights and freedoms in consideration of "morality, religious values, security and public order in a democratic society."<sup>99</sup> For example, the Indonesian Constitutional Court has previously used Article 28J to uphold the validity of criminal statutes related to defamation because the statutes "protect the constitutional rights to honor and reputation."<sup>100</sup> Article 28J therefore provides a basis for a constitutional argument in support of the New Criminal Code. However, the Constitutional

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95. *Id.*

96. *Id.* art. 28J.

97. *Id.* art. 28J(1).

98. *Id.* art. 28J(2).

99. *Id.*

100. SIMON BUTT, THE CONSTITUTIONAL COURT AND DEMOCRACY IN INDONESIA 85 (2015); *see* Decision, Reviewing the Law No. 42 of 2008 on the General Election of the President and Vice President, No. 22/PUU-XII/2014 (Constitutional Court May 28, 2014).

Court emphasized that the legislature should use Article 28J to pass laws that are “proportional and not excessive” with consideration of the “moral consideration, religious values, security and public order in a democratic community.”<sup>101</sup>

Indonesian officials who support the New Code have stated that the Code reflects the overall values of the Indonesian people and serves the interest of the majority.<sup>102</sup> However, there remains a tangible tension between Article 28J’s limitation provision and the human rights protections within the Indonesian Constitution. The limitation provision’s construction provides Indonesian legislatures with the ability to enact provisions that would normally violate human rights and other constitutional protections. This ability, if abused, would render the explicit human rights protections moot so long as the enacted laws are justified as protecting the overall interest of a democratic society.

The last aspect of the Indonesian Constitution to discuss is the relationship between domestic law and international law within the Indonesian legal system. Currently, the Indonesian President is required to consult the Indonesian Legislature (“DPR”) before signing any international agreements that would create a fundamental impact on the people and create a financial burden on the state.<sup>103</sup> The legislature also has the power to pass laws that further regulate the applicability and effect of international treaties and agreements.<sup>104</sup>

Under international customs, each nation has the right to determine its own laws and customs.<sup>105</sup> However, nations relinquish some of those law-making rights when signing international treaties and agreements. For example, as a member of the United Nations (“U.N.”), Indonesia is expected to follow the

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101. BUTT, *supra* note 100, at 177–78 (quoting The Indonesian Constitutional Court Decision No. 011-017/PUU-I/2003, reviewing the Law No. 12 of 2003 on the Election of National and Regional Parliament); Decision, Reviewing the Law No. 12 of 2003 on General Election of Members of the People’s Representative Council, Regional Representative Council, and the Regional People’s Representative Council, No. 011-017/PUU-I/2003 (Constitutional Court February 24, 2004).

102. S. China Morning Post, *supra* note 45.

103. UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA [UUD] Aug. 18, 1945, ch. III, art. 11(2).

104. *Id.*

105. *See id.* art. 11; U.N. Charter art. 1, ¶ 2 (stating the purpose of the U.N. includes developing “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”).



provisions of universal human rights.<sup>106</sup> The issue then becomes whether the New Criminal Code violates the various international provisions on human rights. If the New Code does violate the international human rights provisions, the question then turns to whether Indonesia's sovereign right to determine its own affairs supersedes the U.N. mandates.<sup>107</sup>

The Indonesian government could also utilize its discretion in applying international law. In doing so, the government could elect to only follow international law provisions that support Indonesia's domestic agenda.<sup>108</sup> Similar to the domestic issue regarding the discretionary enforcement of the human rights protections, Indonesian legislatures could elect to follow international treaties so long as it suits their interests. This "pick and choose" approach regarding international treaties could decrease the legitimacy of Indonesia's foreign relations and influence on other nations. The controversial provisions of the New Criminal Code therefore present both international and domestic issues regarding the Code's validity and appropriateness.

#### B. Recent Developments in Indonesian Jurisprudence—Rise of Religious Conservatism<sup>109</sup>

Critics of the New Code argue that the controversial provisions reflect the beliefs of minor, but vocal, religious conservative groups rather than reflecting the overall values of the

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106. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. ¶ 6 (Dec. 10, 1948) ("Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.").

107. A detailed inquiry into this legal relationship, while valid and important, is beyond the scope of this Article.

108. Simon Butt, *The Position of International Law Within the Indonesian Legal System*, 28 EMORY INT'L L. REV. 1, 1 (2014) (explaining how the vagueness and uncertainty of the application of international treaties allows the Indonesian government to "leave the international community to believe that ratified treaties have automatic application, but on the other hand, to refuse to grant any rights to citizens that those international treaties seek to provide, claiming that treaties have no domestic application until incorporated by an Indonesian legal instrument").

109. Alfitri, *Expanding a Formal Role for Islamic Law in the Indonesian Legal System: The Case of Mu'Amalat*, 23 J.L. & RELIGION 249, 250–51 (2007); Alfitri, *Whose Authority? Contesting and Negotiating the Idea of a Legitimate Interpretation of Islamic Law in Indonesia*, 10 ASIAN J. COMPAR. L. 191 (2016); Howard Federspiel, *Islamic Values, Law and Expectations in Contemporary Indonesia*, 5 ISLAMIC L. & SOC'Y 90 (1998).

majority of Indonesians.<sup>110</sup> While the Indonesian government attempted to maintain a secular and religiously diverse nation, there is an apparent rise in Islamic conservatism affecting Indonesian politics.<sup>111</sup>

The current iteration of Islamic conservative development is the *Hijrah* movement, which, characterized by the use of social media to spread its beliefs, is popular with the younger generation.<sup>112</sup> The movement's popularity has caused concern among government and more liberal religious officials.<sup>113</sup> A 2019 survey of millennials and Generation Z youths showed that sixty percent of respondents surveyed across thirty-four Indonesian provinces identified as "puritan and ultraconservative."<sup>114</sup> Social media's influence is apparent, as indicated by twelve of Indonesia's most prominent *Hijrah* preachers collectively having 45.8 million Instagram followers.<sup>115</sup>

Adherents to the *Hijrah* movement desire to live a more Islamic life.<sup>116</sup> This could include requiring women to wear the hijab and other forms of coverings or having men wear religious attire and grow beards.<sup>117</sup> A 2021 report showed that there were at least fifty Indonesian local laws that compelled women to wear hijabs and coverings in schools and other public places.<sup>118</sup> Preachers of the *Hijrah* movement reject anything that might be considered *haram*, or forbidden under Islamic law, such as dating or even secular music.<sup>119</sup>

However, the Indonesian government is concerned about some of these *Hijrah* practices because of their potential to destabilize the nation's multireligious society.<sup>120</sup> The Indonesian government

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110. CNA, *supra* note 44; see Asia Society, *Talk at the Library: The Spread of Morality Laws in Democratizing Indonesia*, YOUTUBE (Apr. 20, 2023), <https://www.youtube.com/watch?v=bHYLDzawD9A>.

111. Sui-Lee Wee, *The Young Muslims Challenging Islam's Status Quo*, N.Y. TIMES (Apr. 12, 2023), <https://www.nytimes.com/2023/04/12/world/asia/indonesia-muslim-hijrah-youth.html>.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Tito Ambyo, *Indonesia's New Criminal Code: Scaling Up Conservatism and Watering Down Protections for Critics and Minorities*, AUS. INST. INT'L AFFAIRS (Jan. 11, 2023), <https://www.internationalaffairs.org.au/australianoutlook/indonesias-new-criminal-code-scaling-up-conservatism-and-watering-down-protections-for-critics-and-minorities/>.

119. Wee, *supra* note 111.

120. *Id.*

also faces challenges from Islamic radicalism, despite the current presidential administration's attempts to control such groups.<sup>121</sup>

The *Hijrah* movement, along with other conservative Islamic movements, is not likely to be challenged by moderate Muslims in Indonesia for two primary reasons. "First, moderates are losing ground when competing against popular Islamist preachers" who "promote their ideas on social media and other outlets."<sup>122</sup> "Second, many moderate intellectuals" who become advisers to Indonesia's government are more likely to defend the government policies "instead of speaking out against them."<sup>123</sup>

The *Hijrah* conservative movement's growth, combined with the Muslim moderates' lack of willingness to present a relevant challenge, forced the Indonesian government to adopt policies and laws that will placate its most vocal groups. Currently, the most vocal political groups are conservative Muslims, and their beliefs are clearly reflected in the morality provisions of the New Criminal Code. The morality provisions represent the political pragmatism of Indonesian politicians who will use their support of the new laws to gather political approval during the election cycle and to weaken their opponents who may support more liberal legislation.<sup>124</sup>

#### IV. CRITICAL ANALYSIS: EVALUATING THE CURRENT AND POTENTIAL CONSEQUENCES OF THE MORALITY PROVISIONS

The New Code's morality provisions contain several issues both in their construction and enforcement. Furthermore, the negative international response to the morality provisions, combined with the potential for severe economic repercussions, provides strong arguments for the modification or outright removal of the morality provisions. The following Sections will

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121. *Id.* ("The rise of Islamic radicalism in Indonesia has compounded the government's concerns. In recent years, President Joko Widodo's government has banned groups like Hizbut Tahrir and the Islamic Defenders Front, which have called for a Muslim caliphate in Indonesia.").

122. Alexander Arifianto, *Moderate Islam Faces an Uncertain Future in Indonesia*, E. ASIA F. (Dec. 30, 2022), <https://www.eastasiaforum.org/2022/12/30/moderate-islam-faces-an-uncertain-future-in-indonesia/>.

123. *Id.*

124. Simon Butt, *Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?*, 32 GRIFFITH L. REV. 190, 208–09 (2023) [hereinafter *Indonesia's New Criminal Code*]. For a more detailed discussion on the historical trend of morality laws in Indonesia and its political implications, see Asia Society, *supra* note 110.

evaluate the morality provisions from three different perspectives: (1) issues related to the interpretation and enforcement of the provisions; (2) the domestic and international criticism; and (3) the potential negative economic consequences. These perspectives support the argument that the controversial morality provisions should be amended or removed entirely from the New Criminal Code.

A. Corruption, Enforcement, and Extortion: Issues with the  
Application of Morality Provisions on Indonesian Citizens and  
Foreign Travelers

Although the morality provisions contain written limitations on who may report alleged violations, these protections are not sufficient to shield individuals from the potential risks of corruption, uneven enforcement, or extortion by bad actors.

1. Systemic Corruption

According to Transparency International, Indonesia ranks 115 out of 180 countries on the corruption index and only scored thirty-four points out of a possible one hundred total points.<sup>125</sup> The score reflects a recent drop in rankings where Indonesia fell fourteen spots, which is attributed to the Indonesian government bringing its anti-corruption apparatus under the control of the executive branch.<sup>126</sup> This development resulted in nationwide protests accusing the Indonesian government of weakening the independent agency's ability to combat corruption.<sup>127</sup> With this recent drop in rankings, Indonesia is at its highest corruption level since 2014.<sup>128</sup> Indonesia's high corruption levels provide the potential for the government to abuse the morality provisions.<sup>129</sup>

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125. *Indonesian Country Data*, TRANSPARENCY INT'L, <https://www.transparency.org/en/countries/indonesia> (last visited Oct. 28, 2024). A country's score reflects "the perceived level of public sector corruption" with a score of zero being highly corrupt and a score of one hundred reflecting non-existent corruption. See Tria Dianti & Arie Firdaus, *Indonesia Drops 14 Spots on Worldwide Corruption Rankings*, BENAR NEWS (Jan. 31, 2023), <https://www.benarnews.org/english/news/indonesian/indonesia-corruption-index-01312023132902.html>.

126. Dianti & Firdaus, *supra* note 125.

127. *Id.*

128. *Id.*

129. See Purwanto Fatriansyah dan Kailani, *Review Juridical Gratification as One of the Follow Offense Corruption in Perspective Criminal Law Indonesia*, 52 J.L. POL'Y &

Corruption occurs within both the Indonesian police and the judiciary, with bribes often used by individuals to pay officials to avoid arrests or remove evidence from an investigation.<sup>130</sup> Indonesian prosecutors have also been accused of accepting bribes in exchange for pursuing lesser charges or, in some serious cases, attempting to intimidate individuals with threats of more serious criminal charges.<sup>131</sup> The fact that Indonesian police, judges, and prosecutors have historically accepted bribes poses a risk to both domestic and international individuals.<sup>132</sup> For example, if the morality provisions are strictly enforced, unmarried couples charged with violating the provisions may be encouraged to bribe the prosecutor.

## 2. Discretionary Enforcement of the Provisions

The universal application of the morality provisions presents the possibility of uneven enforcement. With nearly half of Indonesian couples not officially married, it is impossible for the Indonesian criminal system to timely investigate, formally charge, and efficiently adjudicate every case of extramarital sex or cohabitation of unmarried couples.<sup>133</sup> To have nationwide application of the morality provision would put a severe strain on the Indonesian criminal system. Therefore, the impracticality of universal application of the morality provisions provides Indonesian officials with the opportunity for discretionary enforcement.<sup>134</sup> Discretionary enforcement could contribute to other risks such as corruption and extortion, as officials are less likely to enforce the morality provisions as a legal mandate but rather seek enforcement opportunities for personal or financial gain.<sup>135</sup>

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GLOBALIZATION 45, 45 (2016); see also Safi et al., *Law Politics of Authority Separation of Judicial Review by Judiciary in Indonesia*, 47 J.L. POL'Y & GLOBALIZATION 77, 79 (2016).

130. SIMON BUTT, CORRUPTION AND LAW IN INDONESIA 23–24 (2012) [hereinafter CORRUPTION AND LAW IN INDONESIA].

131. *Id.* at 23. In one notable anecdote, while visiting the capital city of Jakarta, a police officer accused my family of littering, which carries a hefty fine. The officer agreed to drop the matter for a small “donation” of 100,000 rupiah, roughly equal to ten U.S. dollars.

132. See *Indonesia's New Criminal Code*, *supra* note 124, at 204–05.

133. See CNA, *supra* note 44.

134. See Gusti Kade Budhi Harryarsana, *The Authority of Police Discretion in Actualizing the Repressively Fair Law Enforcement in Indonesia*, 82 J.L. POL'Y & GLOBALIZATION 125, 125 (2019).

135. See CORRUPTION AND LAW IN INDONESIA, *supra* note 130, at 23–24.

### 3. Extortion by Bad Actors

The third risk, the extortion of individuals by bad actors, is related to the two risks previously discussed.<sup>136</sup> Corruption and uneven enforcement can contribute to the potential extortion of individuals by bad actors.<sup>137</sup> The practical impossibility of nationwide enforcement and the reporting mechanism of the morality provisions still provide an opportunity for extortion.<sup>138</sup> For example, there is the risk of parents with LGBTQ+ children using the morality provisions to control the actions of their children.<sup>139</sup> By approving the morality provisions, the Indonesian government is involving itself in the personal, and often messy, affairs of domestic relationships. The potential for increased criminal liability regarding an individual's private affairs further diverts critical physical and administrative resources from other matters of national concern including environmental issues, geopolitics, and rapid population growth.

#### B. Domestic and International Response: Criticizing the New Code

In addition to the three risk factors related to the enforcement of the morality provisions, strong domestic and international criticism further support the argument that the Indonesian legislature should amend or remove the controversial provisions.

##### 1. Domestic Response: National Protest and Government Suppression

When the New Criminal Code was first introduced in late 2019, many Indonesians participated in national mass protests opposing the controversial provisions with many protesters

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136. Financial extortion by the Indonesian police is so common that the public perception is that the police exist to "tax and harass the public." *Id.* at 23 (quoting WORLD BANK, COMBATING CORRUPTION IN INDONESIA: ENHANCING ACCOUNTABILITY FOR DEVELOPMENT 82 (2003), <https://documents1.worldbank.org/curated/en/548131468774967556/pdf/272460IND.pdf>). Extortion is not limited to financial gain and there is the potential for bad actors to force individuals to act or not act in a certain manner.

137. See Rudepel Petrus Leo, *Trigger Factors of Nonlegitimized Discretion [sic] Practices in the Criminal Law Enforcement by Police Department in Indonesia*, 65 J.L. POL'Y & GLOBALIZATION 114 (2017).

138. See CNA, *supra* note 44.

139. *Id.*

claiming the proposed provisions violate human rights and will result in a democratic regression.<sup>140</sup> These protests turned violent as Indonesian police forces used tear gas and water cannons to control the protesters.<sup>141</sup> Regarding the morality provisions, protesters argued that the government should not concern itself with the private lives of individuals.<sup>142</sup> With the strong domestic opposition to the proposed Criminal Code, the Indonesian Parliament paused the vote on the bill.<sup>143</sup>

However, the COVID-19 pandemic and the resulting public shutdown provided supporters of the New Criminal Code the opportunity to push for its official passage.<sup>144</sup> Due to social distancing mandates and quarantine rules, the Indonesian legislature was able to pass the law with little opposition.<sup>145</sup> With Indonesian society still recovering from the pandemic, the country did not experience the level of protest against the New Code in 2022 that it did in 2019.<sup>146</sup> Protesters who organized or participated in public demonstrations without the proper permits risked punishment, further limiting the level of public opposition to the New Code.<sup>147</sup> Therefore, the current level of domestic opposition to the Code is likely insufficient to result in any changes to the morality provisions.

## 2. International Response: Universal Criticism

When the New Code was passed, the U.N. released a statement expressing its concern regarding several articles

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140. ABC News (Australia), *Thousands Protest in Indonesia Over New Morality Laws*, YOUTUBE (Sept. 25, 2019), <https://www.youtube.com/watch?v=GKIghsLR7DA&list=PLPiynzC8-6V-UypS4VqvgG0IyN6IX49J5&index=1>.

141. The protesters, a majority of them students, suffered head injuries, broken bones, and respiratory issues due to the violence. *Id.*

142. *Id.*

143. *Id.*

144. *Indonesia Passes Law Banning Sex Outside Marriage*, *supra* note 51.

145. *Id.* Critics have accused the Indonesian Parliament of sneaking the Code through the process. *Id.*

146. *Id.*

147. CNA, *Here's What You Need to Know About Indonesia's New Law That Bans Premarital Sex*, YOUTUBE (Dec. 9, 2022), <https://www.youtube.com/watch?v=xZurDTJBTzE>; see Usman Hamid & Ary Hermawan, *Indonesia's Shrinking Civic Space for Protest and Digital Activism*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Nov. 17, 2020), <https://carnegieendowment.org/2020/11/17/indonesia-s-shrinking-civic-space-for-protests-and-digital-activism-pub-83250> (explaining that the crackdown on protests is a general trend of the Widodo presidency, with the regime using more repressive measures such as the nation's security apparatus to put down protesters).

discussed previously, especially as they relate to Indonesia's legal obligations on human rights.<sup>148</sup> In response, Indonesian officials have summoned U.N. officials to appear before them to answer for their criticism of the Code, claiming that the U.N. should have consulted Indonesia first before publicizing any criticism.<sup>149</sup>

In regard to international human rights law, Indonesia has ratified six of the major human rights conventions:

1. International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD," 1999);
2. International Covenant on Civil and Political Rights ("ICCPR," 2006);
3. International Covenant on Economic, Social and Cultural Rights ("ICESCR," 2006);
4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT," 1998);
5. Convention on the Rights of the Child ("CRC," 1990); and
6. Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW," 1984).<sup>150</sup>

Indonesia is also a signatory of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>151</sup> Indonesian laws, including the Constitution itself, are silent on the role of international law within Indonesia's legal system.<sup>152</sup> Domestic laws concerning treaties are equally

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148. Kate Lamb & Ananda Teresia, *Indonesia's New Laws a Threat to Privacy, Press and Human Rights, Says UN*, REUTERS (Dec. 9, 2022, 2:46 AM), <https://www.reuters.com/world/asia-pacific/indonesias-new-laws-threat-privacy-press-human-rights-says-un-2022-12-09/>. The international response section will mostly be limited to the U.N., Europe, and the United States because of the readily available materials and the relevance of such analysis to this Article's intended audience.

149. *Indonesia Summons U.N. Official After Criticism of New Laws*, REUTERS (Dec. 12, 2022, 7:44 AM), <https://www.reuters.com/world/asia-pacific/bali-governor-says-new-indonesia-laws-pose-no-risk-tourists-2022-12-12/>. Indonesian Foreign Ministry official Teuku Faizasyah stated that the U.N. "should have come to consult, just like other international representatives [and] . . . hope they do not hasten to express views, or when there's not enough information." *Id.*

150. *Status of Ratification Interactive Dashboard: Ratification of 18 International Human Rights Treaties*, U.N. HUM. RTS. OFF. HIGH COMM'R, <https://indicators.ohchr.org/> (last visited Oct. 29, 2024).

151. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 2131 U.N.T.S. 83, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8-b&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&clang=_en).

152. See *Southeast Asian Region Countries Law*, UNIV. MELBOURNE, <https://unimelb.libguides.com/c.php?g=930183&p=6721979> (last visited Oct. 29, 2024).



silent on the incorporation of treaty provisions into domestic law, focusing almost entirely on the processes of entering into and negotiating treaties.<sup>153</sup> The lack of clear procedures on how to implement treaties creates a possible loophole for Indonesian officials to exploit when advocating for the validity of the morality provisions.

According to many international agreements and treaties, the right to privacy is a fundamental human right because it is critical to protecting human dignity while simultaneously supporting other human rights, including freedom of expression and association.<sup>154</sup> In 2006, Indonesia explicitly acceded to the International Covenant on Civil and Political Rights (“ICCPR”).<sup>155</sup> Article 17 of the ICCPR, which reinforces Article 12 of the Universal Declaration of Human Rights (“UDHR”), states that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”<sup>156</sup> ICCPR signatories have a positive obligation to “adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right [to privacy].”<sup>157</sup> Furthermore, in 2012, Indonesia signed the Association of South

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153. *Id.*

154. The relevant agreements and international treaties on the right to privacy include the: (1) Universal Declaration of Human Rights: Article 12; (2) International Convention on the Protection of All Migrant Workers and Members of Their Families: Article 14; (3) Convention on the Rights of the Child: Article 16; and (4) International Covenant on Civil and Political Rights: Article 17. *Special Rapporteur on the Right to Privacy*, U.N. HUM. RTS. OFF. HIGH COMM’R, <https://www.ohchr.org/en/special-procedures/sr-privacy/international-standards> (last visited Oct. 29, 2024). Other agreements protecting the right to privacy include: (1) Article 19 of the African Charter on the Rights and Welfare of the Child; (2) Article 11 of the American Convention on Human Rights; (3) the African Commission on Human and People’s Rights Declaration on Freedom of Expression; (4) Articles 16 and 21 of the Arab Charter on Human Rights; and (5) Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Id.* The preceding list is not all-inclusive, as additional agreements safeguarding the right to privacy have been adopted. See, e.g., American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Ninth International Conference of American States (1948).

155. *Ratification Status for Indonesia*, U.N. HUM. RTS. TREATY BODIES, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN) (last visited Oct. 29, 2024).

156. International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>.

157. Human Rights Comm., *Compilation of General Comments and General Recommendation Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, at 21 (1994), <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=HRI/GEN/1/Rev.1&Lang=E>.

East Asian Nations (“ASEAN”) Human Rights Declaration.<sup>158</sup> Article 10 of the ASEAN Human Rights Declaration affirms all civil and political rights in the UDHR and Article 21 closely resembles the language on the right to privacy found in the UDHR.<sup>159</sup> In signing these international agreements, Indonesia agreed to all of the relevant privacy rights provisions. By allowing Indonesian authorities to inquire about the personal relationships and family status of individuals, the morality provisions likely violate the right to privacy protections contained within these international agreements. This argument is further supported by Western nations’ negative reactions against the Code and its morality provisions.

On October 24, 2019, the European Parliament passed a resolution regarding the proposed New Criminal Code of Indonesia which calls for the repeal of all the legal provisions that restrict fundamental rights and freedoms.<sup>160</sup> The European Parliament’s resolution contained grave concerns regarding several provisions of the revised draft of the Criminal Code.<sup>161</sup> These concerns include the potential for discrimination on the basis of gender, religion, and sexual orientation, as well as discrimination against minorities.<sup>162</sup> The resolution further urges the Indonesian Parliament to substantially revise the Criminal Code to meet the international human rights standards and to remove the discriminatory provisions.<sup>163</sup>

Several U.S. Senators also sent an official correspondence to then-current Indonesian President Widodo regarding the New Code.<sup>164</sup> The Senators wrote that they were deeply concerned to

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158. See Constance Johnson, *ASEAN: Leaders Adopt Human Rights Declaration*, LIBR. CONG. (Nov. 21, 2012), <https://www.loc.gov/item/global-legal-monitor/2012-11-21/asean-leaders-adopt-human-rights-declaration/>.

159. *ASEAN Human Rights Declaration*, ASEAN (Nov. 19, 2012), <https://asean.org/asean-human-rights-declaration/>. Article 21 states, “Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon that person’s honour and reputation. Every person has the right to the protection of the law against such interference or attacks.” *Id.*

160. European Parliament Resolution of 24 October 2019 on the Proposed New Criminal Code of Indonesia, EUR. PARL. DOC. P9\_TA(2019)0044 (2019), [https://www.europarl.europa.eu/doceo/document/TA-9-2019-0044\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2019-0044_EN.html).

161. *Id.*

162. *Id.*

163. *Id.*

164. Letter from Edward Markey et al., Senator, U.S. Senate, to Joko Widodo, President, Indonesia, U.S. SENATE (Feb. 1, 2023), <https://www.markey.senate.gov/imo/media/doc/2123indonesianewpenalcodeletterfinal.pdf>.

see several provisions that could negatively impact civil society and the protection of human rights, including the right to freedom of expression, the operation of a free press, and access to healthcare.<sup>165</sup> Similar to the European Parliament resolution, the Senate letter urged the Indonesian government to reconsider adopting the provisions and ensure any articles included in a revised Criminal Code are consistent with Indonesia's international human rights obligations and its own constitutional principles.<sup>166</sup>

The Senators also expressed concerns over the morality provisions, specifically those that criminalize consensual sexual activity outside of marriage.<sup>167</sup> The Senators argued that the prohibition against extra-marital sex will “disproportionately impact already marginalized and vulnerable people, including women, members of Indigenous groups, and those targeted on the basis of disability status, sexual orientation, gender identity or expression, or sex characteristics.”<sup>168</sup> The Senators believe that the enforcement of these morality provisions inherently violates millions of people's right to privacy.<sup>169</sup> This is especially concerning because of the Code's universal application to foreigners, including U.S. citizens. The Senators therefore have a vested interest in ensuring that the rights of American citizens visiting or living abroad are not infringed by laws that are conclusively discriminatory or grossly violate an individual's right to privacy.

There is also concern that the New Code could decrease foreign investment in Indonesia. The Senators strongly encouraged the Indonesian government to “consider the massive economic impacts to Indonesia that will occur if major financial institutions curtail their investments in Indonesia because of the new penal code.”<sup>170</sup>

The U.S. State Department has also released official communications regarding the New Code.<sup>171</sup> The U.S. Ambassador to Indonesia at the time, Sung Kim, stated at the recent American Chamber of Commerce in Indonesia investment summit, that

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165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. See U.S. Embassy Jakarta, *Remarks by Ambassador Kim at AmCham Investment Summit*, U.S. EMBASSY & CONSULATES INDON. (Dec. 7, 2022), <https://id.usembassy.gov/remarks-by-ambassador-kim-at-amcham-investment-summit>.

“[c]riminalizing the personal decisions of individuals would loom large within the decision matrix of many companies determining whether to invest in Indonesia [and] . . . [t]he outcome could well result in less foreign investment, tourism, and travel.”<sup>172</sup> In a call with Indonesian Foreign Minister Retno Marsudi, Secretary of State Anthony Blinken conveyed U.S. concerns regarding the controversial provisions of the New Criminal Code.<sup>173</sup> Additionally, the State Department has expressed concerns that “the law could impact . . . U.S. citizens visiting and living in Indonesia as well as the investment climate for U.S. companies.”<sup>174</sup>

The strong negative reaction from the West provides support for the argument that the controversial provisions of the New Criminal Code, including the morality provisions, should be amended or removed. While much of the previously discussed reactions and responses from the West are not legally binding on the Indonesian government, these reactions provide clear evidence that the groups within the U.N., Europe, and the United States are not in favor of the morality provisions. Such strong negative reactions can result in strained relationships between Indonesia and the West, especially if the new morality provisions begin to adversely affect international travelers.

However, similar to the weak domestic protests after the Code’s official passage, the international responses from the West, without additional legal force, are unlikely to result in any credible change to the morality provisions.<sup>175</sup> Furthermore, any drastic measures such as economic sanctions or political embargoes from the West are not likely to occur without a comparative abuse of human rights related to the morality provisions’ enforcement. Even if human rights abuses do occur because of the morality

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172. *Id.*

173. Ned Price, *Secretary Blinken’s Call with Indonesian Foreign Minister Marsudi*, U.S. EMBASSY & CONSULATES INDON. (Feb. 16, 2023), <https://id.usembassy.gov/secretary-blinkens-call-with-indonesian-foreign-minister-marsudi-2/>.

174. Teresia & Lamb, *supra* note 35.

175. Counterreactions towards the international criticism from Indonesian religious officials have been largely negative. See Paul Marshall, *Indonesia’s New Criminal Code Leads to Conflict with U.S.*, PROVIDENCE (Dec. 19, 2022), <https://providencemag.com/2022/12/indonesias-new-criminal-code-leads-to-conflict-with-u-s/>. For example, Deputy Chair of the Indonesian Ulema Council, Anwar Abbas, stated that Secretary Kim’s statements were threatening and showed that the United States is trying to impose its beliefs on Indonesia and that the U.S. government should respect Indonesia’s religious and cultural traditions. *Id.*

provisions, such abuses must be so gross that the West would have no choice but to react accordingly with sanctions or embargoes.

### C. Economic Effects: Potential Impact on Indonesian Tourism

Perhaps the factor that will determine the validity of the New Code's provisions is the potential negative effects that the provisions will have on the Indonesian economy. This Section will focus on the Indonesian tourism industry because it will likely be the economic sector that is most impacted by the morality provisions. This Section will first briefly discuss the current state of the Indonesian tourism industry since the advent of the COVID-19 pandemic.<sup>176</sup> This Section will then evaluate the responses from international tourists and domestic officials to the morality provisions.

The COVID-19 pandemic has negatively impacted Indonesia's tourism industry.<sup>177</sup> Prior to the pandemic, over 16 million international visitors traveled to Indonesia in 2019.<sup>178</sup> However, in 2020, the number of international visitors dropped to only 4 million visitors.<sup>179</sup> Tourism related income fell by eighty-one percent from \$16.9 billion in 2019 to \$3.2 billion in 2020.<sup>180</sup> The industry is showing signs of recovery with 2.24 million tourists visiting Indonesia in the first quarter of 2023.<sup>181</sup> Despite the signs of recovery, it is predicted that it will take years before the Indonesian tourism industry returns to pre-pandemic levels.<sup>182</sup>

With the current state of Indonesia's tourism industry established, the analysis then turns to the reactions of

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176. A detailed analysis of the economic impact of the COVID-19 pandemic, while important and timely, is beyond the scope of this Article. This Part will discuss the effects of the pandemic to the extent that it establishes a weakened industry and the basis of why the morality provisions would stifle the recovery of the Indonesian tourism industry.

177. *International Tourism, Number of Arrivals – Indonesia*, WORLD BANK GRP., <https://data.worldbank.org/indicator/ST.INT.ARVL?end=2020&locations=ID&start=1995&view=chart> (last visited Oct. 29, 2024).

178. *Id.*

179. *Id.*

180. Aninda Restikadewi et al., *The Impact of COVID-19 on the Tourism Sector in Indonesia*, 6 SEBELAS MARET BUS. REV. 47, 53 (2021).

181. *International Arrivals in Indonesia Rise by 508.87 Pct in Q1*, JAKARTA GLOBE (May 3, 2023, 11:44 AM), <https://jakartaglobe.id/business/international-arrivals-in-indonesia-rise-by-50887-pct-in-q1>.

182. *Indonesia's 2022 Foreign Visitor Arrivals Target Met; May Still Need Years to Fully Recover*, INDON. INV. (Feb. 6, 2023), <https://www.indonesia-investments.com/news/news-columns/indonesia-s-2022-foreign-visitor-arrivals-target-met-may-still-need-years-to-fully-recover/item9600>.

international travelers and domestic officials to the morality provisions of the New Criminal Code. Tourists are already expressing reservations about traveling because of the morality provisions, with some unmarried couples reevaluating whether they should visit popular destinations like Bali.<sup>183</sup> Other visitors have expressed that they will no longer visit Indonesia because of the punishment risk associated with violating the morality provisions.<sup>184</sup> Travelers are not the only ones expressing concerns over the morality provisions, with some notable Indonesian business associations expressing concerns about the potential economic impact.<sup>185</sup> Indonesian tourism board deputy chief, Maulana Yusran, has stated that the provisions are “totally counter-productive” to the post-COVID recovery of the tourism industry.<sup>186</sup> Businesses in Bali, one of the most popular travel destinations, are expressing concern that the restrictions will cause some of them to lose revenue.<sup>187</sup>

Other officials, including Bali’s own governor, stated that the marital status of tourists would not be checked at “any tourism accommodation, such as hotels, villas, apartments, guest houses, lodges and spas.”<sup>188</sup> However, even if this non-checking policy remains in place, it only applies to the jurisdiction of Bali rather than the entire nation. Furthermore, the Indonesian government has yet to pass any implementing regulations for the morality

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183. S. China Morning Post, *Tourists Reconsider Bali Travel After Indonesia Bans Sex Outside Marriage*, YOUTUBE (Dec. 8, 2022), <https://www.youtube.com/watch?v=xQ713VkleMQ>; *Tourists ‘Think Twice’*, *supra* note 14. There are some travelers and foreign citizens who believe that the concerns regarding the morality provisions are being sensationalized by the media and the laws will not adversely affect travelers. Charlotte Elton, *Here’s What Bali’s Digital Nomads Think of New Law Banning Sex Before Marriage*, EURONEWS (Sept. 12, 2022), <https://www.euronews.com/travel/2022/12/09/heres-what-balis-digital-nomads-think-of-new-law-banning-sex-before-marriage>.

184. 10 News First, *‘Bonk Ban’ In Bali Sparks Aussie Tourist Reactions*, YOUTUBE (Dec. 7, 2022), <https://www.youtube.com/watch?v=U0bvJNmhg1A>. The general concern is the lack of clarity associated with the morality provisions and how the laws will actually apply to the various situations that an international traveler may face. *Id.*; WION, *WION Fineprint - New Indonesian Sex Law Worries Tourists*, YOUTUBE (Dec. 8, 2022), <https://www.youtube.com/watch?v=fscXl4xm5wQ>.

185. S. China Morning Post, *supra* note 183.

186. Teresia & Lamb, *supra* note 35.

187. S. China Morning Post, *supra* note 183.

188. Reuters, *Bali’s Governor Says Indonesia’s Ban on Sex Outside Marriage Poses No Risk to Tourists*, GUARDIAN (Dec. 12, 2022), <https://www.theguardian.com/world/2022/dec/12/balis-governor-says-indonesias-ban-on-sex-outside-marriage-poses-no-risk-to-tourists>. Anecdotal evidence indicates that this non-checking policy is currently practiced in Bali. In August 2023, I personally visited a reputable Bali hotel and the hotel did not inquire on the relationship dynamics of my travel party.

provisions.<sup>189</sup> These future implementing regulations could preempt any existing policies in Bali and force the tourism industry to check the marital status of travelers. It remains to be seen whether the morality provisions will have any direct effect on Indonesia's tourism industry. However, it is clear that many tourists are considering the morality provisions when deciding whether to visit Indonesia. Once the implementing regulations are passed, the extent of the morality provisions' application and effect can be more readily understood.

The issues of corruption, uneven enforcement, and extortion relating to the morality provisions' enforcement, the negative domestic and international reactions, and the potential negative effects on the recovering Indonesian tourism industry provide strong support for the amendment or removal of the morality provisions. While Indonesia has the right to decide its own laws and customs, the morality provisions expose Indonesia to domestic and international risks that may ultimately outweigh any tangible benefits that the controversial provisions may provide.

#### V. THE MORALITY PROVISIONS' APPLICATION ON AMERICAN CITIZENS

According to official U.S. Embassy correspondence, American citizens "traveling or living in Indonesia are subject to the Indonesian laws."<sup>190</sup> The U.S. Embassy further warns that failure to comply with local Indonesian laws can result in fines, deportation, or imprisonment.<sup>191</sup> Therefore, U.S. citizens are required to follow all the provisions of the New Criminal Code, including the morality provisions. American travelers should be aware of their rights and legal options if they happen to encounter legal issues related to the morality provisions.<sup>192</sup>

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189. Teresia & Lamb, *supra* note 35.

190. *Arrest of a U.S. Citizen*, U.S. EMBASSY & CONSULATES INDON., <https://web.archive.org/web/20240529010934/https://id.usembassy.gov/u-s-citizen-services/arrest-of-a-u-s-citizen/> (last visited Sept. 10, 2024).

191. *Consular Agency Bali*, U.S. EMBASSY & CONSULATES INDON., <https://web.archive.org/web/20240520064133/https://id.usembassy.gov/embassy-consulates/consular-agency-bali/> (last visited Sept. 10, 2024).

192. A 2019 report estimates that there are seventeen million unmarried couples living together in the United States. See Benjamin Gurrentz, *Cohabiting Partners Older, More Racially Diverse, More Educated, Higher Earners*, U.S. CENSUS BUREAU (Sept. 23, 2019), <https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html>. This number only accounts for official reports of cohabitation and does not

The best protection against criminal liability for a U.S. citizen traveling to Indonesia is to be familiar with the new morality provisions. Being educated on the extent and limitations of the morality provisions will help U.S. citizens navigate the complex situations they may face during their travels. U.S. travelers should also take notice of any future implemented procedures regarding the morality provisions. These implemented procedures should provide more detailed legal guidelines on how the morality provisions will be applied at the ground level.

Due to the complexities of the underlying laws, the U.S. Embassy should provide a travel advisory or publish materials on the New Criminal Code. However, as of the writing of this Article, neither the U.S. Embassy nor the U.S. State Department has released any official materials that detail the application of the morality provisions on U.S. travelers.<sup>193</sup> Current travelers, therefore, must rely on news outlets<sup>194</sup> to inform them of the developments related to the Indonesian morality provisions.

If the Indonesian government charges a U.S. citizen with violating a morality provision, the U.S. Embassy can only provide limited protection and assistance. According to its information page, the U.S. Embassy cannot provide any legal advice or represent a U.S. citizen in an Indonesian legal proceeding.<sup>195</sup> Additionally, the Embassy cannot financially support U.S. citizens or remove citizens from an Indonesian jail.<sup>196</sup> With the limited protections from the U.S. Embassy in the event of an official

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account for the greater number of unmarried couples in a romantic relationship that do not cohabitate. *Id.* Any number of these unmarried couples could vacation to Indonesia which emphasizes the importance of evaluating the extent of the Indonesian morality provisions applications on U.S. travelers. *Id.*

193. A July 24, 2023, notice on the U.S. State Department's website reveals the following language regarding the New Criminal Code: "Indonesia's revised criminal code, which takes effect January 2026, includes penalties for defamation, blasphemy, cohabitation, and sex outside of marriage. It is unclear how Indonesian authorities will implement the revised criminal code." *Indonesia Travel Advisory*, U.S. DEP'T STATE, BUREAU CONSULAR AFFS. (July 24, 2023), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/indonesia-travel-advisory.html>.

194. Or possibly this Article.

195. *Arrest of a U.S. Citizen*, *supra* note 190. This limitation is not limited to Indonesia but rather applies to all foreign nations. *See id.*

196. *Id.* Other Embassy prohibitions include stating to an Indonesian court that the U.S. defendant is guilty or innocent, serving as official interpreters or translators, and providing any guaranteed letter. *Id.*



criminal charge, U.S. citizens will likely have to rely on local attorneys to represent their defense.<sup>197</sup>

Other actions to mitigate criminal liability under the morality provisions may include traveling to recognized tourist destinations like Bali, which, as previously discussed, have declared that the marital status of tourists will not be checked. While Bali is a well-known tourist destination, limiting travel plans to this island prevents travelers from visiting other potential destinations including the rainforests of Borneo or the Borobudur temple complex in Java. This illustrates the potential that the morality provisions may not only limit the total amount of tourism revenue but also limit *where* the majority of the tourism revenue is allocated. In 2019, Bali tourism accounted for forty percent of Indonesia's 16.1 million international visitors, and the island accounted for nearly half of Indonesia's foreign reserves.<sup>198</sup> While the Indonesian government has taken steps to promote other vacation locations to tourists,<sup>199</sup> Bali's more liberal interpretation of the provisions may result in Indonesia's tourism revenue being concentrated on the island. This potential development would further strain the local economies outside of Bali as fewer tourists will visit these locations due to the uncertain enforcement of the morality provisions.

Ultimately, unmarried American couples visiting Indonesia are traveling at their own risk. While the morality provisions do contain limitations on who may report violations, the fact that *someone* can still report a violation presents a standing risk for unmarried couples.<sup>200</sup>

## VI. CONCLUSION

In conclusion, Indonesia's morality provisions should be amended or removed. While theoretically limited in their application, the provisions still present a risk of criminal liability

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197. The U.S. Embassy does provide a list of local attorneys, but the embassy does not guarantee the efficacy of the local legal assistance. *See id.*; *Legal Assistance*, U.S. EMBASSY & CONSULATES INDON., <https://web.archive.org/web/20240529011329/https://id.usembassy.gov/u-s-citizen-services/attorneys/> (last visited Sept. 10, 2024).

198. Sayan Ghosh, *Indonesia Tourism Sector Looks to Diversify Beyond Bali*, ASIA FUND MANAGERS (Apr. 11, 2023), <https://www.asiafundmanagers.com/us/indonesia-tourism-sector-looks-to-diversify-beyond-bali/>.

199. *Id.*

200. More risk adverse travelers will reconsider any travel plans to Indonesia to avoid any potential legal problems related to the morality provisions.

to domestic and foreign individuals. These risks include corruption, uneven enforcement, and the potential for extortion. Additionally, the negative reactions from domestic and international groups combined with the prospect of adverse economic effects further supports the argument for the amendment or removal of the morality provisions. While Indonesia does have the ability to govern its own affairs by passing laws, its status as a party to multiple international agreements with provisions on the right to privacy limits how those laws may affect the right to privacy. As the introductory quote from Justice Brennan shows, the right to privacy should protect individuals, both married and not, from unwanted government intrusion. There are some human rights that transcend the boundaries of nations, cultures, and religions. The right to privacy, including the ability to associate with one another without government interference, is one of those transcended rights.