



## EU-Indonesia Human Rights Dialogue: 8 November 2019

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### Policy briefing

1 November 2019

In this policy briefing the Institute for Criminal Justice Reform (ICJR)<sup>1</sup> and Penal Reform International (PRI)<sup>2</sup> detail key concerns on the interlinking issues on the agenda for the European Union-Indonesia Human Rights Dialogue in Brussels on 8 November 2019, and the EU-Indonesia Civil Society Seminar Forum on 7 November 2019: Access to justice and penal policy; Rights of minorities/vulnerable groups and non-discrimination; Freedom of Expression or Assembly.

The key issues and recommendations contained in this policy brief are **not exhaustive** but represent some of the most urgent pressing human rights issues relating to penal reform in Indonesia, as follows:

- 1) Draft Criminal Code
- 2) Imposition and implementation of the death penalty
- 3) Overuse of imprisonment and poor detention conditions
- 4) Recommendations

### 1) Draft Criminal Code

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PRI and ICJR note that in addition to the issues raised below, that relate to criminal justice systems, there are problematic provisions in regard to freedom of expression or assembly, the rights of Indigenous People, and the rights of children and reproductive healthcare.

#### a) Lack of transparency in process to drafting revised Criminal Code

The ICJR and PRI are gravely concerned at the lack of transparency in the revision of the current Criminal Code. The draft has not been made publicly available, and furthermore no

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<sup>1</sup> The Institute for Criminal Justice Reform (ICJR) is an independent research institute established in 2007. ICJR focuses on criminal law and justice reform, and general law reform in Indonesia. ICJR takes initiative by providing support in the context of establishing respect for the Rule of Law and at the same time establishing a fervent human rights culture in criminal justice system. <https://icjr.or.id>

<sup>2</sup> Penal Reform International (PRI) is an independent non-governmental organisation that develops and promotes fair, effective and proportionate responses to criminal justice problems worldwide. We promote alternatives to prison that support the rehabilitation of offenders and promote the right of detainees to fair and humane treatment. We campaign for the prevention of torture and the abolition of the death penalty, and we work to ensure just and appropriate responses to children and women who come into contact with the law. [www.penalreform.org](http://www.penalreform.org)

progress report has been issued on the decision-making or policy-making processes, including with regard to how the draft has been discussed by the drafting teams. In fact, the draft has been intensively discussed since 21 January 2015 and thus many significant changes have been made during the process. There has been neither explanation, nor consideration of any substantial changes made on the provisions on the draft.

Similar concerns were seen with a previous process involving legal amendments. During the revision process of the law on the Corruption Eradication Commission (KPK), the draft was passed within only 13 days of discussion in the Parliament. There was no ability for the public to observe or participate in the debates/ discussions on the draft law and there was an overall absence of adequate involvement on the side of relevant stakeholders during the process.

### **b) Rights of women who are survivors of rape to perform safe and legal abortions**

Under the draft Criminal Code, performing abortions will become effectively illegal. The only exception applicable would be where doctors perform an abortion as the life of the woman is in danger (a life-threatening situation). No further exceptions are given, including where a rape survivor wishes to abort their pregnancy. The draconian and discriminatory draft Criminal Code stipulates that a woman who has undergone an abortion could be sentenced to up to four years in prison. It will violate international human rights standards, including:

- The right to health: criminalising abortions, which is a reproductive health-related activity, leads to underground abortions which are dangerous. It also prevents the provision of effective health services; contributing to preventable illness and death. We also note that according to Amnesty International criminalising abortion does not stop abortions, rather it makes abortion less safe, even with fatal consequences. Furthermore, the UN Committee on the Elimination of Discrimination against Women, (note Indonesia is a State Party to the Convention this Committee monitors implementation of), has reiterated the World Health Organization's finding that unsafe abortion is a leading cause of maternal mortality and morbidity. The Committee called on States to legalise abortion, *at the very least* in 'cases of rape, incest, threats to the life and/or health of the mother, or severe foetal impairment'.<sup>3</sup>
- Non-discrimination: the draft Criminal Code in criminalising reproductive decisions is a form of gender-based discrimination as it explicitly targets women, and particularly those who belong to vulnerable groups. In other countries where abortion is criminalised, 'the individuals facing punishment tend to be members of poor, marginalised and vulnerable groups, as opposed to wealthy individuals engaging in the same behaviour'.<sup>4</sup>

### **c) Criminalisation of extramarital sex, effectively criminalising same-sex conduct**

Extramarital sex, which will in effect include all same-sex conduct (since same-sex relationships are not legally recognised in Indonesia) will be punishable under the draft Criminal Code, with up to one year's imprisonment. The same provision will make all sex workers liable to criminal prosecution. Also, unmarried persons living together could be sentenced to six months in prison. Meanwhile, a number of violent and discriminatory attacks, as well as numerous acts of harassment against LGBTI people, with anti-LGBTI statements,

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<sup>3</sup>Committee on the Elimination of Discrimination against Women Fifty-seventh session 10 – 28 February 2014, Statement of the Committee,

<https://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/SRHR26Feb2014.pdf>

<sup>4</sup> Amnesty International, Body Politics: Criminalization of sexuality and reproduction,

are still on the rise. Therefore, such discriminatory provisions will only lead to further violation of rights of minorities/vulnerable groups.

The proposed changes to the Criminal Code are an explicit violation of the right to be free from discrimination, and other rights. The UN Office of the High Commissioner for Human Rights explains:

*Laws that criminalize homosexuality give rise to a number of separate but interrelated violations. Such laws violate an individual's right to be free from discrimination, which is enshrined in article 2 of the Universal Declaration of Human Rights and core international human rights treaties, as well as the rights to be protected against unreasonable interference with privacy and arbitrary detention, protected by articles 12 and 9 of the Universal Declaration and articles 17 and 9 of the International Covenant on Civil and Political Rights.<sup>5</sup>*

Criminalisation of extramarital sex, or adultery, also leads to discrimination of and violence against women. While such laws are ostensibly gender neutral, analysis – including by the UN – has found that such laws are ‘both in concept and practice overwhelmingly directed against women and girls’, leading to punishments being imposed almost exclusively on women and girls.<sup>6</sup>

#### **d) Criminal liability for persons with mental health disorders**

The ICJR and PRI are concerned that the draft Criminal Code will lead to rights violations of persons with mental health disorders or disabilities. The draft fails to distinguish between the terms of “no criminal liability” and “no criminal sanction” while these two terms carry different fundamental principles. The provision ruling criminal liability for persons with mental health disorders on the draft of Criminal Code is stated as follows:

*“Everyone who at the time of committing a crime suffers mental disability that is in a state of acute exacerbations and accompanied by psychotic symptoms and/or suffers intellectual disability at the stage of moderate up to severe degree **cannot be punished with criminal sanction, but can be subject to treatment.**” (Article 39)*

The term appropriately used under such provision is that the accused **cannot be held responsible** for their criminal acts and thus no further action should be imposed on them (i.e. the case may be closed at the earliest stage possible). In fact, this problem has been taking place the whole time under the current Criminal Code as the term “cannot be punished with criminal sanction” is used rather than the original terms under the Dutch Criminal Code, that is “cannot be held responsible”.

The situation is worsened in practice as the Indonesian criminal justice system does not recognise any form of judicial scrutiny at first stages of criminal proceedings (e.g. pre-trial hearings where the mental health status of an accused is examined). Consequently, an accused with a mental health disorder(s) may unnecessarily come into contact with the processes of the criminal justice system (including being held in pre-trial detention, standing trial, and being examined as a witness). Meanwhile, their healthcare status is neglected during any trial until the judge(s) considers their condition in the verdict at the end of the trial. Arguably, when the proposed Criminal Code applies the concept of “no criminal liability” properly by using the terms “cannot be held responsible” in its provision, then it becomes the

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<sup>5</sup> OHCHR, Born Equal and Free: Sexual Orientation and Gender Identity in International Human Rights Law, 2012, [www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf](http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf).

<sup>6</sup> <https://www.ohchr.org/Documents/Issues/Women/WG/AdulteryCriminalOffenceViolatesWomenHR.pdf>

norm that any person with mental health disorders or disabilities who has committed a crime will not be placed under the criminal justice system.

## 2) Death penalty, including access to justice

As of 9 October 2019, there were at least 273 individuals on death row, including at least seven women. Data indicates that the number of death sentences handed down is increasing, despite commitments made by the Indonesian Government within the Universal Periodic Review process in 2017.

International human rights mechanisms, and more recently international drug control bodies, such as the UN Office on Drugs and Crime, agree that **drug-related offences do not constitute the “most serious crimes” for which the death penalty may be imposed**. The type of cases that are attracting the death sentence in the country include narcotic-related offences (drug-related offences) therefore violates international law. For example, between October 2017 and October 2018 of the 46 cases monitored by ICJR, more than 50 per cent of death sentences received were for drug-related offences.

The **right to a fair trial** is one of the cornerstones of democracy and the rule of law, and is enshrined in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) as well as specifically in Safeguard 5 of the 1984 Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty which makes provisions for fair trial standards in capital cases. A fair trial is particularly important when the outcome could result in the state taking an individual’s life. In Indonesia, those facing a possible death sentence are being denied the right to a fair trial through failure of the state to meet key requirements to this right, namely:

- The **right to adequate legal assistance** of the defendant’s own choosing at every stage of the proceedings<sup>7</sup>: In death penalty cases many defendants are denied effective legal aid and access to a lawyer after the first stage of trial.
- The **right to have adequate time and facilities for the preparation of a defence**<sup>8</sup>: As a consequence of the denial of legal assistance, the right to appeal were not effectively used and the defendants are unable to prepare their defense properly.

## 3) Overuse of imprisonment and prison conditions

### a) Overuse of imprisonment

As of 30 September 2019, there were over a quarter of a million people in prison, including pre-trial detainees, across Indonesia (a total of 264,573). **25 per cent of the prison population are on remand**. Over the past 20 years the prison population has risen dramatically; in the year 2000 there were just over 53,000 people in prison, representing 26 per 100,000 of the national population. Now there are 96 people in prison per 100,000 of the national population.

<sup>7</sup> (Article 14(3)(d) ICCPR, Safeguard 5, UN ECOSOC Resolution 1989/64 (24 May 1989), Legal Aid Principles 3 and 6, Detained Persons Principle 17, Lawyers Principle 1)

<sup>8</sup> UN ECOSOC Resolution 1989/64 (24 May 1989), Detained Persons Principle 18, SMR Rule 93

The prison overcrowding rates have reached crisis level, with the **occupancy levels reaching 204.6 per cent in 2019**. For instance, in Kerobokan prison there are more than 1,700 people held in a facility designed for 323 people.

*Table: Comparison of Overcrowding Situations of Detention Centres and Correctional Institutions in All Provinces of Indonesia by Category of Occupancy Rate<sup>9</sup>*

Overcrowding Situation of Provincial Detention Centres/Correctional Institutions di Indonesia	Number	Percentage
No Overcrowding (<100%)	5 Provinces	15.15%
Overcrowded (≥100%)	2 Provinces	6.06%
Critical Overcrowding (≥120%)	5 Provinces	15.15%
Extreme Overcrowding (≥150%)	21 Provinces	63.64%
Total	33 Provinces	100%

Source: Corrections Database System (SDP), Directorate General of Corrections, Ministry of Justice and Human Rights, as of January 2018, accessed on 12 March 2018, processed by the authors

There are several contributors to this prison overcrowding crisis but the most significant is Indonesia's harsh drug policies. **Around half of people in prison are accused or convicted of drug-related offences.** According to the Directorate General of Correctional, of the more than 127,000 people in prison under drug legislation, 75,000 are dealers and 51,000 are users. The criminalisation of people who use drugs has had little effect on the overall prevalence of drug use worldwide, while it has driven people away from health-based interventions in the community.<sup>10</sup>

Other contributing factors that have led to the rising prison population is the **automatic use of prison as a sanction for minor offences** (e.g. unnecessary one year prison sentences are handed down frequently), failure to use non-custodial community sanctions for people convicted (such as fines, probation or community service) and excessive use of pre-trial detention. The UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) call on states to use alternative measures to imprisonment more widely, taking into account the political, economic, social and cultural conditions of each country, as well as the goals and objectives of its criminal justice system. Alternative measures enable offenders to avoid the negative consequences of imprisonment.

The ICJR and PRI note that the Government's focus on addressing the prison overcrowding crisis through **constructing new Correctional Institutions and Detention Centres will only provide short term relief** as such a strategy is unsustainable and pointless as the prison population continues to soar. A comprehensive strategy is required which would see reforms to drug policies and an increase in the use of non-custodial alternatives at the pre-trial and post-conviction as priorities.

## b) Prison conditions

The impact of prison overcrowding on the lives, and human rights, of people in prison (and their families) is enormous in Indonesia. It has led to insanitary and violent conditions. Staff

<sup>9</sup> <http://icjr.or.id/data/wp-content/uploads/2019/03/Strategies-to-Reduce-Overcrowding-in-Indonesia.pdf>

<sup>10</sup> PRI and IDPC, Reforming criminal justice responses to drugs, 2016, [www.penalreform.org/resource/ten-point-plan-reforming-criminal-justice-responses-drugs/](http://www.penalreform.org/resource/ten-point-plan-reforming-criminal-justice-responses-drugs/)



are required to work in overcrowded, under-resourced facilities, facing potential violence and struggle to provide even the most basic necessities for those they are supervising, let alone rehabilitation activities.

Poor conditions in prisons caused by overcrowding situation contributes to the difficulties in ensuring safety of people in prison at risk. The poor quality of correctional services in some cases has led to human rights violations, including severe mental health impacts. The latter is contributing to unrest among the prison population, and some prisoners have caused serious disruption, or even prison riots.<sup>11</sup>

In addition, correctional facilities have been experiencing serious understaffing levels, and many prison officers are under-skilled and incompetent. These factors are another contributing factor to recent prison riots and escapes. Lack of training and understaffing levels mean that the treatment of prisoners are below minimum standards set out in the UN Nelson Mandela Rules and the UN Bangkok Rules, including with regard to the right to dignity.

Discriminatory treatment towards certain minority prison population also occurs. Corrupt practices have seen some prisoners enjoying luxury facilities and more relaxed supervision.<sup>12</sup> It is undeniable that prison overcrowding resulting in poor and extremely indecent condition of cells has played a significant role in the rising levels of corruption in correctional facilities. Other cases have seen bribery, where prison officers smuggle in prohibited items, such as cellphones or illegal substances, for prisoners or improving their cell facilities.

## 4) Recommendations

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Penal Reform International and the Institute for Criminal Justice Reform make the following recommendations in view of the concerns detailed in this policy brief.

The ICJR and PRI welcome the European Parliament's call to the Indonesian Parliament to substantially revise the proposed criminal code to make it meet international human rights standards, and to remove all discriminatory provisions.<sup>13</sup>

### **We urge the EU and its member states to:**

1. Build on current forms of dialogue to expand space for real engagement on the proposed Criminal Code beyond statements so that meaningful and specific improvements on the human rights situation vis-à-vis the draft Criminal Code can be achieved, building on the European Parliament's resolution.
2. Publicly and privately step up efforts to hold Indonesia to their commitments to work towards abolition of the death penalty and ensure that the alternative is proportionate and does not include life imprisonment without parole. In line with the EU Guidelines on Death Penalty, concrete steps to ensure fair trials for those faced with a death sentence should be sought.

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<sup>11</sup> <http://icjr.or.id/data/wp-content/uploads/2019/03/Strategies-to-Reduce-Overcrowding-in-Indonesia.pdf>

<sup>12</sup> <https://www.thejakartapost.com/news/2019/06/15/setya-novanto-transferred-to-high-security-prison-after-hanging-out-in-bandung.html>

<sup>13</sup> European Parliament resolution of 24 October 2019 on the proposed new criminal code of Indonesia (2019/2881(RSP))

3. Incorporate penal reform into external action in Indonesia, calling for reforms to address the overuse of imprisonment, particularly in regard to drug-related offences, and reducing the use of pre-trial detention in line with the UN Tokyo Rules on non-custodial measures and Paragraph 4(j) of the 2016 UNGASS Outcome Document.<sup>14</sup>
4. Stress the human rights violations stemming from prison overcrowding. Make recommendations, based on best practice and Rules 74 and 75 of the UN Nelson Mandela Rules) with regard to the recruitment, training and remuneration of prison staff as an essential requirement to the humane treatment of people in prison in Indonesia. As part of this, engage to tackle the corrupt practices within penitentiary system of Indonesia, in line with the European Parliament resolution of 13 September 2017 on corruption and human rights in third countries (2017/2028(INI)).<sup>15</sup>
5. Engage with civil society in Indonesia, and elsewhere, to ensure proper consultation on EU action and better protection from human rights violations.

**We urge the Indonesian Government to:**

1. Review all of the relevant provisions of the draft of the Criminal Code which are discriminatory, violate human rights and civil liberties, or those that will be in practice counter-productive in tackling the problem of prison overcrowding. Adopt a consultative, transparent and evidence-based approach to further revisions, including by conducting an evaluation study on the implementation of the current Criminal Code to identify key aspects that urgently need to be addressed through revision.
2. Implement commitments made at the Universal Periodic Review to abolish the use of the death penalty by implementing a proportionate sentence that does not include life imprisonment without parole. As immediate steps reduce the number of offences that the capital punishment can attract and provide fair trial guarantees for persons faced with a death sentence.
3. Reduce the use of imprisonment for minor drug offences, including drug use, through use of alternative non-custodial measures, in line with the UN Tokyo Rules on non-custodial measures, the UN Bangkok Rules on women offenders, and the 2016 UN General Assembly Special Session on the world drug problem's Outcome Document.
4. Implement the UN Nelson Mandela Rules on the treatment of prisoners and the UN Bangkok Rules on women prisoners, specifically Rules 74 and 75 on prison staff of the former. In the short-term, develop a strategy to enhance the skills and capabilities of prison officers, tackle corruption within prisons. Initiate institutional reform of the organisational structure and governance of the correctional agencies to address the inadequacies stemming from dysfunctional and large institutions.
5. Accommodate and encourage public participation, particularly from civil society groups during the process of policy making, working in synergy to conduct more transparent, democratic, and evidence-based criminal policy reform.

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<sup>14</sup> Paragraph 4(j) of the 2016 UN General Assembly Special Session on the world drug problem's Outcome Document, states: "Encourage the development, adoption and implementation, with due regard for national, constitutional, legal and administrative systems, of alternative or additional measures with regard to conviction or punishment in cases of an appropriate nature, in accordance with the three international drug control conventions and taking into account, as appropriate, relevant United Nations standards and rules, such as the United Nations Standard Minimum Rules for Noncustodial Measures (the Tokyo Rules)".

<sup>15</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0346&rid=7>

**For more information please contact:**

Olivia Rope  
Director of Policy and International Advocacy  
Penal Reform International  
[orope@penalreform.org](mailto:orope@penalreform.org)

Iftitahsari  
Researcher  
Institute for Criminal Justice Reform  
[tita@icjr.or.id](mailto:tita@icjr.or.id)

