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ARTICLE (REFEREED)

## Sexuality, Privacy, and Human Rights: Rethinking the Criminalisation of Consensual Relationships in Indonesia

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### Abstract

In Indonesia, the intersection of sexuality, privacy, and human rights has become an increasingly contentious issue, particularly regarding consensual relationships. The new Indonesian Criminal Code, which expands provisions on adultery, creates legal ambiguity that can be misused by authorities, potentially infringing on the right to privacy and personal liberty. While the previous law did not criminalise consensual sex, the new code allows prosecution based on complaints from close family members, such as spouses or parents, leading to potential violations of individual autonomy. Sexuality, as a fundamental human right, should be respected as part of personal dignity and bodily integrity, rather than being subjected to state moral policing. The state's role should focus on protecting individuals' rights, including sexual autonomy, within non-harmful boundaries. Decriminalising consensual sexual activities, provided they do not harm others, is essential to safeguarding personal freedom.

### Keywords

**Sexuality; Privacy Rights; Criminalisation; Indonesian Law; Human Rights**

## Introduction

Concerned with how social norms, law, and individual rights intersect in modern Indonesian society, this article examines how the regulation of consensual adult sexual relations reveals broader dynamics of state power, moral governance, and social cohesion. Sexuality – though deeply personal – becomes a stage where conflicts over morality, legal authority, and human rights are negotiated, exposing tensions between individual freedoms and collective expectations.

Law No. 1 of 2023 on the Criminal Code came into force on 2 January 2026, replacing the colonial-era *Wetboek van Strafrecht*. However, this transition has generated concern, particularly due to provisions restricting sexual freedom. One of the most controversial is the criminalisation of cohabitation (commonly referred to as *kumpul kebo*) under Article 412, which applies to unmarried couples engaging in sexual intercourse outside legally recognised marriage. The provision does not apply to married couples or sexual activity involving minors, which are regulated under separate criminal provisions. Prosecution may proceed only upon complaint by a spouse (in cases of adultery), parent, or child, so that neighbours, community groups, or law enforcement officers cannot initiate proceedings independently. Individuals found guilty (of cohabitation) under this provision may face up to six months' imprisonment or a Category II fine (10 million rupiah or approximately US\$590). Accordingly, although formally limited in procedural scope, the provision symbolically repositions consensual adult sexuality as a matter of penal concern.

The debate over sexual morality in Indonesian law is longstanding. The Partai Keadilan Sejahtera (PKS) faction in the Indonesian House of Representatives maintains its opposition to the Draft Law on Sexual Violence Crimes ('the Draft Law'), arguing that its ratification could legitimise adultery and LGBTQ behaviours, which they consider contrary to Pancasila and religious teachings. In the Ad Hoc Committee meeting held in December 2021, seven of the eight parliamentary factions supported further deliberation of the Bill, while PKS remained the sole faction rejecting it ([Albab et al. 2024](#)). PKS argues that the Bill may legitimise non-coercive sexual relationships that conflict with prevailing moral and religious norms ([CNN Indonesia 2021](#); [Luviana 2022](#)).

This view is contested by women's activists and the National Commission on Violence Against Women (*Komnas Perempuan*), who emphasise that the Draft Law focuses on protecting victims of sexual violence rather than addressing adultery or sexual orientation. Supporters argue that the Bill is necessary to strengthen legal protection amid increasing cases of sexual violence and the inadequate existing framework ([Bhagaskoro 2019](#)). These parliamentary debates illustrate that sexual relations have become a central site of normative contestation within Indonesian constitutional democracy.

In a related development, the Minister of Education, Culture, Research, and Technology has also issued Regulation No. 30 of 2021 on the Prevention and Handling of Sexual Violence in Higher Education Institutions. This regulation aims to address gaps in protecting victims of sexual violence within academic environments. While supporters view it as a necessary step toward of victim protection, critics argue that some provisions are legally ambiguous and could be misinterpreted as legitimising adultery ([Farisa & Patnistik 2021](#); [Tim Detikcom 2021](#)). This legal and policy background provides the context for the current discourse on consensual relationship outside of marriage and sexualities in Indonesia.

Sexuality has historically served as a contentious arena for power, morality, and law, which perpetually exert conflicting influences ([Foucault 1976](#)). As the most intimate aspect of humanity, sexuality is also frequently removed from the private domain and subjected to control, surveillance, and even criminalisation ([Hayes & Khan 2020](#)). The state's authority to regulate consensual sexual encounters between adults must be carefully limited, as excessive control infringes on individual autonomy and privacy. International human rights frameworks, including the 1948 Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) affirm the right to private life from

arbitrary interference. Consistent with [John Stuart Mill's \(1865, 1879\)](#) harm principle, state interference in consensual adult relationships should occur only when a clear harm to others is demonstrated.

Indonesian law historically did not criminalise consensual sex between unmarried adults ([Blackwood 2007](#); [Wieringa 2024](#)). Under the previous Criminal Code, adultery provisions applied only to married individuals, meaning unmarried partners could not be prosecuted. Law No. 1 of 2023 (the new Criminal Code) expands adultery provisions to include sexual relations outside of marriage, but the offence remains complaint-based (*delik aduan*), allowing prosecution only upon reports from legally recognised parties, such as a lawful spouse, parent, or child ([Butt 2023](#); [Januarsyah et al. 2023](#)).

Despite the legal framework, law enforcement has frequently exceeded legal boundaries ([Ostrowsky 2020](#)). Even prior to the new Criminal Code provisions, consensual adult relationships were sometimes targeted through moral policing without complaints from authorised parties ([Amnesty International 2018](#); [Blackwood 2007](#)).

Regional variation also exists. Aceh, for instance, which enjoys special autonomy, enforces Islamic regional regulations (*qanun*), which explicitly prohibit *khalwat* (an act of being alone together in a secluded place or out of sight of others between a man and a woman who are not related by marriage or blood) and intimacy outside marriage, providing the legal basis for sharia-based raids. In most other provinces, however, similar interventions have historically lacked clear statutory authority and were often justified through appeals to public order or local moral norms rather than the explicit criminal law No. 1 of 2023.

Incursions into couples' private areas exemplify the enforcement of law beyond its written normative framework, often driven by moral interpretations and public pressure. In many cases, authorities act as moral custodians despite the absence of a clear criminal offence under applicable national law, assuming that couples have violated religious standards ([Natalis, Purwanti & Asmara 2023](#)). However, the rule of law enforcement operates strictly within enacted legal provisions rather than prevailing majority morals.

Such raids may constitute human rights violations, particularly of the right to privacy, as consensual conduct between adults is inherently private but is forcibly exposed to public scrutiny ([Valentiner 2021](#)). Where valid laws are implemented selectively, the violation lies in discriminatory enforcement, which undermines equality before the law. In other instances, state actors intervene without any legal basis, relying on moral pressure, thereby exceeding their statutory authority and breaching the rule of law. Even where formal legal provisions exist, the criminalisation of consensual adult intimacy raises constitutional concerns if it restricts personal autonomy without demonstrating tangible harm ([Chadha 2025](#)).

A distinct situation arises when state actors conduct raids despite the absence of a relevant penal provision, relying solely on moral standards or public pressure. In such cases, infringement extends beyond rights limitation to unlawful executive action that exceeds statutory authority and contravenes the rule of law. Even where a formal legal provision exists, a further constitutional question remains: whether criminalising consensual adult intimacy without demonstrable harm exceeds the legitimate scope of criminal law. Such pseudo-criminalisation risks discriminatory enforcement, as similar conduct is not uniformly prosecuted. Consequently, human rights concern may arise from discriminatory implementation, actions without legal basis or the substantive overreach of the law itself. This suggests that the regulation of consensual intimacy, whether through unlawful enforcement or overboard legislation, risks subordinating constitutional guarantees of privacy and legal certainty to prevailing moral standards.

From a human rights standpoint, consensual sexual activity falls within the rights to privacy, personal autonomy, and sexual health. The UDHR and the ratified ICCPR ensure every individual's right to privacy and autonomy in determining their own life, free from arbitrary interference by any entity ([Lottes 2013](#); [Valentiner 2021](#)). Consequently, criminalising consensual relations therefore risks undermining both constitutional protections and Indonesia's commitment to international human rights standards.

The regulation of sexuality in Indonesia can also be understood through a Foucauldian perspective, in which legal, religious, educational, and medical institutions exercise power over bodies and sexual conduct. From a Foucauldian perspective, such interventions perpetuate broader power dynamics rather than merely maintaining public order. In *The History of Sexuality*, [Michael Foucault \(1976\)](#) argues that modern societies regulate sexuality through systems of knowledge and authority rather than merely repressing it. From this viewpoint, raids on consenting adults reflect broader power dynamics that discipline bodies according to prevailing moral norms rather than strictly enforcing positive law.

Indonesian legal documents exhibit ambiguity. The previous Criminal Code did not criminalise consensual sex among unmarried individuals, whereas the revised Criminal Code implements criminalisation via a restricted complaint system, as already stated. Two issues emerge from this development. First, enforcement authorities may interpret these provisions expansively or selectively, producing inconsistent application and undermining legal certainty ([Butt 2023](#); [Hafrida et al. 2024](#)). In such instances, the issue becomes institutional in nature, centring on whether law enforcement authorities implement the enacted legal norms with fidelity and without discriminatory application.

Second, a deeper normative question concerns whether criminal law should regulate consensual adult intimacy at all when non demonstrable harm occurs. This article adopts a ‘thick’ conception of the rule of law (ROL), which evaluates not only procedural legality but also the substantive compatibility of laws with constitutional principles such as privacy, autonomy, and the harm principle. Within this framework, the mere enactment of a statute does not preclude constitutional critique if the law unjustifiably criminalises consensual conduct. Accordingly, the argument advanced here transcends on two levels: it calls for consistent and non-discriminatory enforcement of existing laws while also questioning whether morality-based regulation of consensual adult intimacy exceeds the constitutionally permissible scope of criminal law.

Unlike the ‘thin’ conception, which emphasises formal legality and predictability, the thick ROL framework evaluates whether laws and their enforcement align with broader constitutional and ethical norms. This approach is not uncontentious philosophically, with some scholars cautioning that integrating moral or rights-based standards into legal assessment may introduce subjectivity, but it is particularly suitable for analysing the criminalisation of consensual adult sexual conduct in Indonesia. In this context, a thick ROL provides a robust lens to assess whether morality-based criminalisation is consistent with constitutional guarantees and human rights obligations, capturing the normative dimensions of legality that thin procedural approaches would overlook ([Raz 1979](#); [Tamanaha 2004](#)).

Current law enforcement practices reveal a pronounced moralistic orientation, where legal authority is used less to protect individual rights than to reinforce prevailing moral hierarchies. The constitutional argument advanced in this article therefore operates on two levels. First, it calls for the consistent and non-discriminatory application of enacted legal norms, recognising that selective or morally driven enforcement undermines the rule of law. Second, it questions whether morality-based regulation, particularly the criminalisation of consensual adult intimacy, exceeds the constitutional limits of criminal law and turns it into an instrument of moral governance.

The criminalisation of consensual sex also produces victims while offering little avenue for legal redress. Individuals subjected to raids or humiliation often cannot challenge these actions, which are justified in the name of ‘public interest’ or moral order. From a human rights perspective, the central concern is whether restrictions on rights such as privacy, dignity, and autonomy satisfy the principles of legality, legitimate aim, necessity, and proportionality. Contemporary human rights jurisprudence requires a structured and reasoned balancing exercise, yet when enforcement is driven primarily by majoritarian moral disapproval rather than demonstrable harm, this proportionality test is undermined. The permissibility of consensual sex cannot be definitively determined through a literal interpretation of the Criminal Code. The critical question, therefore, is whether restricting sexual autonomy represents a legitimate limitation of rights or an

unjustified prioritisation of abstract moral concerns over tangible personal freedoms. Recognising sexuality as a fundamental aspect of human rights is essential, while, as Foucault reminds us, any attempt to regulate sexuality must remain open to critical scrutiny, since it is intrinsically linked to power.

Sexuality should be recognised as a private concern and an inherent right, not a tool for repression or criminalisation. Moreover, the vagueness and inconsistencies in Indonesian law concerning consensual sexual interactions, along with the enforcement techniques that contravene the ideals of the rule of law, warrant criticism. This article advances a counter-discourse that frames sexual autonomy, the freedom to love, and consensual intimacy as essential components of human dignity rather than subjects of hegemonic morality.

## Analytical Framework and Structure of the Article

This article addresses three interrelated questions within a liberal constitutional framework. First, it examines whether Articles 411 and 412 of Law No. 1 of 2023 can be defended as constitutionally valid criminal norms when assessed through the principles of harm, proportionality, and constitutional liberty. Second, it evaluates whether enforcement practices surrounding consensual intimacy comply with the principle of legality and the rule of law. Third, it considers whether Indonesia's constitutional order and its international human rights obligations impose substantive limits on morality-based criminalisation. Distinguishing these levels avoids conflating doctrinal validity, institutional enforcement, and broader philosophical legitimacy.

The analysis is grounded primarily in [John Stuart Mill's \(1865, 1879\)](#) harm principle as the primary evaluative standard for determining whether the criminalisation of consensual adult sexual relations is defensible within a constitutional democracy. This framework is situated within the jurisprudential debate between legal moralism and liberal anti-moralism, particularly the contrasting positions of [H. L. A. Hart \(1963\)](#) and [Patrick Devlin \(1965\)](#), on whether public morality can justify criminal prohibition. [Michel Foucault's \(1976, 2023\)](#) concept of biopolitics provides an additional sociological lens, illuminating how state power operates through the regulation of sexuality. These theoretical approaches are applied hierarchically: the harm principle serves as the central constitutional benchmark, while legal moralism and biopolitics contextualise the Indonesian legal and socio-political environment.

The article proceeds as follows. The first part has introduced the constitutional controversy surrounding morality-based criminalisation in Indonesia. This second part elaborates the analytical framework described above and clarifies the methodological distinctions between constitutional doctrine, enforcement practice, and normative legitimacy. The third part, *Sexuality as a Right: Privacy or Luxury?* interrogates whether consensual sexual intimacy belongs within the protected domain of constitutional privacy, autonomy, and human dignity, or whether it is instead treated as a dispensable privilege subject to majoritarian moral judgment. The fourth part, *When the State Gets into Bed: Between Protection, Violence and Repression*, examines enforcement practices as forms of structural interference, exploring how state intervention oscillates between claims of protection and manifestations of coercive control. The fifth part, *Reassessing Sexual Freedom: The Conflict Between Morality, Law, and Bodily Autonomy in Indonesia*, offers a principled reconstruction of the legal framework grounded in constitutional liberty and proportionality, integrating Indonesia's international human rights obligations as normative constraints on punitive moral regulation. The article concludes by synthesising the doctrinal, institutional, and philosophical dimensions of the analysis and reaffirming the constitutional limits on the use of criminal law.

## Sexuality as a Right: Privacy or Luxury?

Indonesia, a country with an 87% Muslim-majority population, is characterised by cultural diversity and complex gender relations. Examples such as the Bugis people's recognition of five genders and studies on

queer sexualities reflect the diversity of gender relations across the archipelago. However, this diversity increasingly faces challenges from regulatory zeal—an aggressive push by policymakers, particularly since the reform era post-1998, to enforce strict sexual morality. The enactment of Law No. 22 of 1999 on regional autonomy empowered local governments to adopt restrictive bylaws, many targeting women through dress codes and behavioural regulations. In Aceh, for example, the introduction of Sharia law under the *Qanun Jinayat* in 2014 criminalised same-sex acts and imposed severe moral restrictions, illustrating the deepening influence of conservative Islamic forces ([Arnez 2024](#)).

This regulatory trend has intensified with key legislative debates surrounding the Sexual Violence Bill and the revision of the Criminal Code. Although the Sexual Violence Bill aims to protect victims of sexual violence, it has been criticised by conservative groups for not addressing adultery and homosexuality. Similarly, the revised Criminal Code, which criminalises sex outside marriage and cohabitation among unmarried couples, has raised concerns about personal freedoms and the reimposition of morality-based regulation. These developments illustrate ongoing contestations over gender, sexuality, and religious norms in Indonesia's evolving political landscape ([Arnez 2024](#)).

In many social discourses, sexuality is treated as a taboo and highly private matter ([Cameron & Kulick 2003](#)). Human rights discussions similarly recognise sexuality as part of the most intimate domain of an individual that ought to be free from state intervention ([Corrêa & Parker 2004](#); [Fellmeth 2008](#)). Simultaneously, sexuality is frequently situated within the domain of public morals, necessitating regulation by the state, perhaps leading to criminalisation in the name of order and decency ([Cohen 1991](#); [Craig 2009](#)). This tension raises a fundamental question: is sexuality a protected right associated with privacy, or a conditional privilege subject to moral oversight?

Indonesia's constitutional framework suggests the former. Article 28G (1) of the 1945 Constitution of the Republic of Indonesia asserts that every individual is entitled to the protection of their personal self, family, honour, dignity, and property. Article 28I (1) underscores that inviolability of rights related to human dignity. Criminalising consensual sexual acts and exposing individuals to public humiliation therefore risks violating constitutional protections ([Arnez 2024](#); [Natalis 2026](#)). Article 17 of the International Covenant on Civil and Political Rights (ICCPR) asserts that the right to privacy includes people's autonomy to govern their sexual life, provided it does not inflict harm on others ([Bronitt 1995](#); [Valentiner 2021](#)). Regarding criminalisation, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) protects women's right over their bodies and sexual life.

Legal practice in Indonesia exposes growing discrepancies in legal norms and enforcement. The previous Criminal Code did not criminalise consensual sexual interactions between unmarried individuals; morality provisions were limited to rape, molestation, and adultery within marriage. In this instance, it can be construed that sexual encounters between adults not restricted by marital status are not deemed a criminal offence. The new Criminal Code, established by Law No. 1 of 2023, broadens the provisions against adultery. Article 411 extends the definition of adultery to encompass all sexual encounters occurring outside of marriage, contingent upon a complaint from the spouse or parents. This expansion raises a central constitutional question: whether criminalising consensual adult behaviour without demonstrable harm is compatible with principles of privacy, personal autonomy, and proportionality.

In practice, numerous law enforcement personnel have misconstrued the legislation before the complete implementation of the new Criminal Code in 2026. Numerous raids or crackdowns have occurred on hotels, boarding houses, and private residences under the guise of preventing adultery, despite the absence of complaints from family members as mandated by Article 411 of the new Criminal Code. This practice raises two related concerns: whether legal provisions are interpreted beyond their statutory boundaries, and whether enforcement occurs without any legal basis. When raids are conducted without the complaint mechanism mandated by Article 411, the problem extends beyond questions of constitutional

proportionality to implicate the fundamental requirement of legality. In human rights terms, such practices circumvent the structured balancing process required when restricting rights to privacy and dignity, substituting it with discretionary, morality-driven enforcement.

Simultaneously, these raids represent a legal abuse, characterised by intimidation, stigmatisation, and even extortion, leading to infringements of personal dignity. From a public law perspective, such practices raise significant rule-of-law concerns, particularly with respect to the principles of legality, institutional accountability, and the separation of powers. Comparable tactics were observed in the apprehension of couples regarded as *kumpul kebo* (cohabiting), even before explicit legal prohibitions existed beyond complaints-based mechanisms. When enforcement action is undertaken in the absence of clear statutory authority, executive actors effectively assume a quasi-legislative role, broadening the scope of criminal liability beyond what the legislature has expressly enacted. Such practices undermine the constitutional distribution of powers and the foundational principle that coercive state action must be grounded in law.

Notably, every person apprehended during these raids on cohabitation was exonerated by the court, indicating misapplication of the law by enforcement officials. While these judicial decisions demonstrate the judiciary's corrective function within the separation-of-powers framework; however, such ex-post review cannot remedy the initial deprivation of liberty, reputational harm, or the intrusion into private life. This demonstrates that sexuality is not perceived as a personal affair intrinsic to each individual, but rather as a privilege allocated to those who are married or have attained societal moral legitimacy. Individuals who partake in consensual sexual relations, despite both being adults and not being married, are susceptible to criminalisation, stigmatisation, and discrimination, reflecting a departure from a rule-of-law order in which the exercise of state coercion must be both legally authorised and subject to effective institutional constraints.

The body and sexuality extend beyond just biological considerations and, in complex civilisation, often become instruments of power (Foucault 1976; Smith 1999). Rather than remaining within the private domain, they are increasingly regulated through legal and moral considerations. Criminal law practices in Indonesia exemplify the use of the body and sexuality as instruments of control, resulting in the owners of these bodies losing autonomy over their possessions; their bodies have been reconfigured into objects of the state's moral governance (Blackwood 2007; Wieringa 2024). This discrepancy is further highlighted when juxtaposed with Indonesia's obligations under the ICCPR and CEDAW, which mandate the protection of the right to privacy, freedom, and freedom from discrimination. By making sexual autonomy conditional on marriage, the new Criminal Code risks transforming the universal right to privacy into a conditional privilege dependent on moral and social criteria.

At the same time, Indonesia's reception of international law is institutionally complex. Although often described as monist in constitutional theory, Indonesia operates in a manner more closely aligned with dualism. Ratified treaties do not automatically acquire direct effect in domestic adjudication unless incorporated into statutory law, meaning that judges rarely treat treaty provisions as self-executing norms capable of directly invalidating conflicting legislation. Instead, international human rights instruments function primarily as interpretive guidance in constitutional reasoning. While this limits their immediate doctrinal force, they retain significant normative authority in shaping judicial interpretations of privacy, equality, and proportionality within a democratic legal order committed to human rights.

The Constitutional Court Decision No. 46/PUU-VIII/2010 represents a progressive development by recognising the civil connection of children born out of wedlock with their biological father (Kusmayanti et al. 2023). This verdict essentially asserts that the state must accept the repercussions of extramarital sexual encounters by safeguarding the rights of these children, rather than eradicating their existence through criminalisation. This verdict has been contested by the ethos of criminalisation introduced by the new Criminal Code, which curtails individual liberties and infringes on the right to privacy. Furthermore,

sexuality, once recognised as part of the private sphere, risks being redefined as a conditional privilege rather than an inherent right. Such a shift undermines the principles of human dignity and personal autonomy enshrined in the 1945 Constitution and international human rights norms.

Despite the Court's progressive ruling in 46/PUU-VIII/2010, neither the executive nor the legislature has enacted comprehensive implementing regulations. Consequently, uncertainty persists regarding inheritance procedures and civil registration for children born outside marriage. This gap reveals a recurring disconnect between constitutional recognition and administrative realisation, underscoring the fragility of rights that depend on executive action for effective enforcement.

These tensions also reflect broader political and socio-legal forces shaping Indonesia's contemporary regulatory landscape. The state's increasing intervention in matters of sexuality is not driven by doctrinal conservatism, but a convergence of political Islam, decentralised moral governance following regional autonomy reforms, and the instrumental use of sexual morality as a marker of national identity within a culturally plural society. In this context, the regulation of sexuality becomes a symbolic arena through which political actors assert moral guardianship and signal responsiveness to conservative constituencies. The expansion of adultery provisions introduced by the new Criminal Code must therefore be read not merely as a shift in legal doctrine, but as part of a wider project of moral consolidation that reinforces the framing of sexuality as a conditional privilege rather than an inherent constitutional right.

## When the State Gets into Bed: Between Protection, Violence and Repression

The criminalisation of consensual sex within Indonesian criminal law presents a significant contradiction. The state, via its legal mechanisms, frequently rationalises its interference under the guise of protection and public order, yet such intervention suppresses citizens' private rights. Sexual relationships, which ought to be recognised as a matter of individual autonomy, are instead framed as a potential threat to social order, despite consensual sex not causing harm to others. This reasoning not only undermines constitutional provisions aimed at safeguarding privacy rights but also contradicts widely recognised human rights principles.

Sexuality is framed as a luxury rather than an intrinsic private right, permitted only when it conforms a state-sanctioned moral standards. Consequently, different manifestations of unseen violence and repression arise. Johan Galtung identifies a pattern through the concept of structural violence, which highlights violence embedded within systems, institutions, and regulations that institutionalise the oppression and suffering of specific groups. In Indonesia, the legal framework surrounding consensual sex reveals a systemic presence of violence and repression, through legal structures, enforcement mechanisms, and societal narratives that restrict bodily autonomy.

An example, referred to above, occurred during a raid on boarding houses in Jalan Sigura-gura, Lowokwaru District, Malang. Local residents reported suspected cohabitation by unmarried male and female tenants. Although Article 284 of the old Criminal Code requires a complaint from a spouse, the report was nonetheless forwarded to the municipal Public Order Agency (*Satpol PP*), which proceeded to conduct a nighttime inspection. Officers entered private rooms, questioned occupants regarding their marital status, and detained several individuals for further examination. Unable to pursue adultery charges in the absence of the required complaint, the authorities reclassified the incident as a minor public order violation, thereby relying on administrative regulations to justify temporary detention and retrospective processing. Reports further indicate that female detainees were required to undergo follow-up monitoring, while no comparable obligations were imposed on male detainees, raising concerns about gender-differentiated enforcement. Taken together, the incident illustrates how executive actors, faced with statutory limits, resorted to administrative pathways to legitimise intrusive actions within the private sphere, despite the absence of the

procedural conditions explicitly mandated by statutory regulations. When enforcement proceeds without the complaint mechanism mandated by statute, the concern extends beyond proportionality to basic legality. Such practices contravene fundamental rule-of-law requirements, which stipulate that coercive state action must be clearly authorised, predictable, and constrained by established procedural safeguards. The example above represents one of several efforts by law enforcement officials to pursue criminalisation, with similar operations often increasing during the approach of Ramadan (Olong 2007). This represents a systematic effort to institutionalise punitive measures and impose the prevailing moral standards of society on individuals, thereby obscuring the constitutional boundary between democratically enacted law and the discretionary moral governance exercised by executive authorities.

This pattern of structural repression and oppression significantly influences the stigmatisation and marginalisation of victims. Unmarried couples cohabiting frequently face the label of *kumpul kebo*, which carries negative implications (Mahmood 2016). Women, in particular, are often subjected to judgments that characterise them as ‘cheap/easy’ or ‘sluts’. This situation clearly exemplifies discrimination that contradicts constitutional mandates and undermines the principles of human rights protection. Through raids and public scrutiny, law enforcement officials position themselves as protectors of public morality, yet these practices often involve misinterpretation of the law and violations of privacy rights. In this context, Foucault’s (1981) examination gains significance as state power shifts from formal legal mechanisms to practices that normalise interventions affecting the bodies of individuals. Under these circumstances, sexuality is perceived not as an aspect of personal liberty but rather as an entity that requires regulation and management.

The state frequently frames the criminalisation of consensual sex between unmarried adults as a form of ‘protection’, aimed at preserving public morals, safeguarding families, and upholding standards of decency. Yet this narrative highlights a significant irony: rather than protecting individuals, the state places them within a cycle of criminalisation that undermines dignity and infringes upon their human rights. Following Foucault, power operates not through overt physical repression but rather through nuanced mechanisms that aim to normalise and discipline – such as raids – and morality constrains the fundamental freedoms and individual autonomy that form the core of human rights.

The suppression of consensual conduct in the name of public interest can produce a cascading effect that restricts, or even eradicates, individuals’ social spaces. Prohibition of adultery and promiscuity carries profound implications, as such practices can lead to fractures in relationships between individuals, families, and society at large. Those accused frequently face strong social stigma, which may lead to psychological consequences, including depression, social isolation, and a diminished sense of self-worth (Nugraha & Arifin 2024). This phenomenon arises not from neutral legal norms, but from the use of law to advance a particular moral agenda. In enforcing such measures, the state risks becoming a significant source of their suffering rather than a guarantor of fundamental rights. The criminalisation of consensual sexual relations between adults, absent violence, therefore, raises serious concerns regarding violations of privacy, personal freedom, thereby undermining human dignity.

The Constitutional Court Decision No. 46/PUU-XIV/2016 rejected the petition seeking to expand the criminalisation of adultery and related morality provisions. The Court held that Articles 284, 285 and 292 of the Criminal Code were constitutional and that any expansion of criminal liability fell within the legislature’s policy domain (Butt 2018, 2023; Nugraha 2022). By declining to broaden the definition of adultery through judicial interpretation, the Court prevented the immediate extension of criminal sanctions to consensual sexual conduct beyond the statutory framework. In doing so, it reaffirmed that criminal policy (*kebijakan pidana*) must remain within the bounds of constitutionally circumscribed legislative discretion, rather than being shaped by judicially driven moral expansion.

However, the constitutional landscape has evolved. The current composition of the Constitutional Court differs markedly from the panel that decided 46/PUU-XIV/2016, and multiple petitions challenging Articles 411 and 412 of Law No. 1 of 2023 are already pending. It remains uncertain whether the Court will reproduce its earlier harm-oriented reasoning. In recent years, the Court has exhibited greater deference to legislative moral policy in cases evolving religious sensibilities or identity-based claims, indicating a possible shift in its interpretive posture. If the Court adopts a more majoritarian orientation, Article 412 may be upheld on the basis of broad legislative authority to regulate public morality. Conversely, if proportionality and demonstrable harm remain constitutional benchmarks, the provision could face invalidation. This doctrinal fluidity creates uncertainty regarding the constitutional viability of morality-based criminalisation under the new Criminal Code.

As observed by *Komnas Perempuan* (the National Commission on Violence Against Women), the decision operated as a safeguard against over-criminalisation, particularly for women, survivors of sexual violence, and individuals whose marriages could not be formally registered, such as people identifying as LGBT). The Court grounded its reasoning in Article 28G (1) of the 1945 Constitution, emphasising protection from fear and arbitrary interference. It also outlined four criteria relevant to criminalisation policy: demonstrable harm, proportionality between objectives and associated social costs, the institutional capacity to implement enforcement measures, and the compatibility of criminalisation with broader societal interests. These criteria closely align with the harm principle and proportionality analysis that lie at the core of contemporary human rights doctrine.

However, this stance was later reversed with the introduction of the new Criminal Code, which significantly broadened the criminalisation of adultery. This shift illustrates a contradiction between earlier constitutional reasoning and subsequent legislative policy, raising questions about the state's commitment to protecting fundamental rights.

More broadly, the extent to which the state may regulate the private affairs of its citizens lies at the centre of enduring debates in constitutional and public law. It reflects the complex interaction of legal, political, and socio-cultural factors, revealing a tension between human rights, state authority, and societal values. The regulation of sexuality exemplifies this tension as it directly concerns bodily autonomy. It raises critical questions about whether individuals possess complete control over their bodies or if the state holds the authority to evaluate, regulate, and potentially penalise individuals for their choices concerning their bodies, especially in relation to their sexuality.

From a human rights perspective, the state is not the owner of rights but their guarantor, responsible for protecting them through law and the rule of law ([Corrêa, Petchesky & Parker 2008](#)). Interference with rights without sufficient justification therefore constitutes a breach of this role. State intervention is legitimate only when conduct threatens the rights of others or is in the broader public interest ([Marauhn & Strobel 2022](#); [Natalis et al. 2023](#)), particularly when criminal law – intended as a last resort – is employed.

The criminalisation of consensual sex conflicts with the harm principle, a core justification for limiting individual liberty in liberal constitutional theory. Under this principle, state coercion is warranted only when conduct causes, or poses a serious risk of causing, harm to others. Private, consensual relations between competent adults do not meet this threshold. Accordingly, criminal sanction in such cases cannot be defended as harm prevention but instead rests on moral or paternalistic grounds. Where the state appeals to abstract 'public morality' without demonstrating concrete rights-based harm, the restriction of liberty exceeds the legitimate scope of criminal law.

By criminalising consensual intimacy, the state extends penal authority beyond its proper function and restricts individuals' ability to exercise their right to privacy without the apprehension of criminal consequences. Such criminalisation not only restricts individuals' physical freedom but also undermines dignity through public humiliation, consequently harming their social reputation.

This raises questions about the state's claim to act as protector of its citizens. Genuine protection requires preventing violence, exploitation, or discrimination. Conversely, the criminalisation of consensual sex instead produces new victims – individuals deprived of privacy, dignity, and autonomy. In this condition, the state functions less as a guardian of rights than as an agent of repression, intruding into the private lives of its citizens under the guise of protection.

## Reassessing Sexual Freedom: The Conflict Between Morality, Law, and Bodily Autonomy in Indonesia

Envisioning sexual freedom requires critically examining the relationship between the state, legal frameworks, and individual bodily autonomy, rather than endorsing all sexual conduct without regard to risks. Sexuality, ideally a personal and autonomous aspect of identity, has often been subjected to state control justified by morality and public order. The central issue therefore concerns the legitimate scope of state intervention in the private lives of citizens. Sexual freedom rests on the principle of bodily autonomy. [John Stuart Mill \(1865, 1879\)](#) articulates in the harm principle that the sole justification for state intervention in individual freedom is to avert genuine harm to others. In this scenario, consensual sex between two unmarried adults cannot be deemed as an act that inflicts genuine harm on the individuals involved, given that the consent provided encompasses both parties' awareness of all associated risks. Consequently, state regulation cannot be justified on the basis of contested moral disapproval, particularly where no demonstrable harm to others can be established. Consensual sex must also be distinguished from sexual violence or harassment; the perceived 'offence' often lies only its conflict with certain moral standards. Criminalisation on this basis represents an overreach into the sphere of personal autonomy identified by Mill.

As a measure of last resort, criminal law should be applied only when other responses are inadequate. Its focus should be on sexual violence, exploitation, or coercive sexual relations that evidently result in harm, rather than on consensual sexual activities. Using criminal law to govern private morality indicates a disregard for the principle of subsidiarity, which asserts that any limitation of rights should be both proportionate and necessary, ideally achieved through less severe measures.

Indonesian law contains notable ambiguity in regulating consensual sexual activity. The previous and current Criminal Code do not explicitly prohibit consensual sexual activity between two unmarried adults, except in complaint-based offences. Two issues arise: indeterminate legal drafting and enforcement practices that exceed statutory limits. In practice, law enforcement often conducts raids on private spaces with the aim of 'preventing adultery', even when complaints come from individuals without legal standing. When enforcement proceeds without the complaint mechanism required by statute, the problem is not merely one of interpretive ambiguity but of illegality, as executive actors exercise coercive power without any valid legal basis.

This suggests that the law either suffers from insufficient precision in drafting or is being applied in a manner inconsistent with its textual limits, creating risks to the principle of legality, *nullum crimen sine lege, lex certa*. Broad notions such as 'morality' or indecent behaviour' invite arbitrary interpretation. Even where statutory language is broad, constitutional principles require police powers to remain strictly within legislative boundaries. Court may later acquit those targeted by raids, but ex post review cannot undo the initial deprivation of liberty or the reputational harm, thereby weakening legal certainty and the protection of rights.

Debates on moral and law, reflected in H. L. A. Hart's and Lord Devlin's arguments, illuminate this tension. [Devlin \(1965\)](#) contended that society possesses the authority to maintain its moral standards via legal mechanisms, as the absence of such morality could lead to societal disintegration ([Dworkin 1999](#)). [Hart \(1963\)](#) rejected this view, warning that criminal law used to impose moral conformity

undermines individual liberty where no harm exists. In Indonesia, the criminalisation of consensual sex outside of marriage follows Devlin's approach to law and morality. However, this approach often produces discrimination, repression, and the criminalisation of conduct that does not generate genuine harm.

From a Kantian lens, the tension between moral enforcement and rights protection can be addressed by recognising the human body as an end in itself rather than as a means to uphold majority morality ([Buddeberg 2019](#)). Criminalising consensual sexual relations solely because they conflict with prevailing social norms effectively treats citizens' bodies as instruments of collective conformity. [Kant \(2013\)](#) posits that respect for human dignity entails allowing individuals to pursue their own life objectives, including sexual choices, so long as these choices do not harm others. This perspective aligns with [Ronald Dworkin's \(1977\)](#) concept of 'rights as a trump card', which posits that fundamental rights, such as privacy and sexual autonomy must be protected even when they conflict with majority moral preferences.

At the same time, the Indonesian context illustrates how law can function as an instrument for the perpetuation of power, particularly in regulating bodies and sexuality. [Foucault's \(1976, 2023\)](#) viewpoint on biopolitics illustrates how the state governs life through the normalisation and regulation of sexual behaviour. Practices such as raids, crackdowns, public humiliation, and even moral-based criminalisation demonstrate the state's role in policing private lives under the justification of protecting public morality. In practice, these measures often enforce conformity by defining legitimate sexuality exclusively within marriage. Such regulatory patterns can produce structural violence, which [Galtung \(1969\)](#) highlights as harm embedded in legal or institutional arrangements that systematically restrict rights without clear justification.

Women frequently bear the greatest impact of these practices. Evidence from Indonesia shows that women are often subjected to humiliation, surveillance, and coercion merely for being found in private settings with a partner. In light of this history, the National Commission on Violence Against Women (*Komnas Perempuan*) has repeatedly warned that morality laws are often exploited as instruments of repression against women. Rather than addressing underlying social issues, these laws reinforce gender inequality by casting women as bearers of moral, religious, and national purity. Consequently, women's bodies become politicised and regulated to serve broader political or religious agendas. This dynamic contributes to the normalisation of both state and societal control over women's autonomy. A 2009 report by *Komnas Perempuan* revealed that 63 out of 154 local regulations contained provisions directly discriminatory towards women, highlighting how deeply entrenched such practices are within legal and political systems, ultimately undermining women's constitutional rights and freedoms ([Rumadi & Fathurahman 2010](#)).

Sexual freedom does not imply deregulation; rather, it calls for the legal system to prioritise protection against tangible harms, including rape, sexual exploitation, human trafficking, and gender-based violence. The Siracusa Principles on the Limitation and Derogation Provisions of the International Covenant on Civil and Political Rights (1984) provide guidance on the imposition of restrictions on fundamental rights, particularly those concerning privacy, liberty, and dignity. They require that any limitation be prescribed by law, serving a legitimate aim recognised under international human rights law, such as public health or public order. Furthermore, the limitation must also employ the least intrusive means and remain proportionate to the interest protected, ensuring they do not operate arbitrarily or discriminatorily. These principles aim to protect individuals from undue state interference while allowing for justified limitations in specific, carefully defined circumstances ([American Association for the International Commission of Jurists 1985](#); [Shodunke 2024](#)).

Nonetheless, the criminalisation of consensual sex has not succeeded in aligning with these principles, as there is fundamentally no tangible harm that necessitates prevention. In the absence of harm to others, it becomes difficult to articulate a legitimate objective capable of meeting the Siracusa threshold. Invocations of 'public morality' must themselves remain compatible with the Covenant and cannot rest

solely on majoritarian disapproval or abstract moral preference ([American Association for the International Commission of Jurists 1985](#); [Nugraha 2021](#)). Furthermore, criminal sanctions, social stigma, and deprivation of liberty constitute serious intrusions into private life while the claimed public benefits remain speculative. Consequently, the criminalisation of consensual adult intimacy fails to satisfy the cumulative requirements of necessity and proportionality demanded by the Siracusa Principles.

How can societies balance moral norms with bodily autonomy? [John Rawls' \(1971\)](#) theory of public reason posits that in a pluralistic society, laws must be justified through reasons acceptable to all citizens regardless of their moral or religious beliefs. Claim such as 'sex outside marriage should be prohibited due to its inconsistency with religious teachings' fails this standard. On the other hand, prohibiting coercive sexual acts is justified because they violate bodily autonomy and cause harm. A balanced legal approach therefore requires refraining from criminalising consensual sexual conduct on purely moral grounds.

Additionally, drawing on [Marta Nussbaum's \(1997\)](#) capability theory, the state needs to ensure the fundamental capabilities of its citizens, including bodily integrity or autonomy. Individuals must be protected from any violence and free to make reproductive decisions and consensual sexual relationships. Criminalising consensual sex undermines these capabilities and reflects a failure of the state to uphold citizens' dignity.

The National Commission on Violence Against Women (*Komnas Perempuan*) has expressed significant concerns regarding the 'moral' articles in the Criminal Code, arguing that they are more detrimental than beneficial in safeguarding society. Reports of sexual violence frequently face dismissal and lack of serious follow-up by authorities, who seem to prioritise cases of adultery, which do not involve actual victims. This inconsistency highlights the contradictory aspects of the legal framework in Indonesia, where the government asserts its role in protecting while simultaneously engaging in repressive actions.

Addressing this paradox encompasses several critical parameters. First, broadly framed moral provisions that invite arbitrary interpretations should be reassessed. Second, legal protections against sexual violence must be strengthened to align with the Sexual Violence Crimes Law. Third, regulations must be formulated based on public reasoning and the harm inflicted, rather than prevailing moral standards.

Imagining sexual freedom parallels the conception of a legal framework that ceases to endorse societal structures or institutions as moral arbiters. Instead, it positions them as facilitators of secure environments where individuals can lead healthy and safe lives, encompassing their sexual experiences. Sexual relationships should not be regarded as a privilege reserved for those who conform to specific norms; instead, this must be recognised as a fundamental right that belongs to every individual from the moment of birth. Reintegrating sexuality into the domain of personal autonomy, while simultaneously ensuring strong protections against violence, represents the most equitable approach to harmonising collective needs with individual rights. In this sense, recognising consensual sexual relations as a matter of private autonomy affirms human dignity and limits unnecessary state intrusion into personal life. The right in question is essential and personal, warranting minimal state intervention in private matters that do not result in harm. Furthermore, acknowledging consensual sex as a fundamental right inherently involves upholding human dignity. Basic rights should not be regarded as a luxury that is inaccessible to some; instead, they are inherent entitlements that every citizen holds, provided they are exercised with consent.

## Conclusion

In consensual sexual encounters between adults, the state lacks legitimate authority to regulate private conduct. Sexuality ought to be acknowledged as a human right protected under Indonesia's constitutional framework. However, the new Criminal Code enhances the control of adultery by introducing a complaint-based mechanism limited to legal spouses or family members. This differs from the previous Criminal Code, which did not criminalise consensual sexual activity between unmarried individuals. In practice, this

provision generates legal uncertainty and invites subjective interpretation by law enforcement authorities, who may act based on prevailing social morality rather than statutory limits.

State interference is particularly evident in raids on consenting couples conducted without formal complaints from authorised parties. Such practices intrude upon the right to privacy and personal liberty, rights that the state is obligated to protect under human rights principles. As an element of privacy, individual freedom, and physical autonomy, consensual sexuality should not be criminalised only because it is in opposition to particular moralities.

Instead of serving as a means of reproducing the morality of the majority, the state ought to take on the role of a guardian of the rights of its citizens. This requires decriminalisation of consensual sexual activity and the repositioning of law as a mechanism for preventing harm. The state must ensure that individuals can make autonomous decisions regarding their sexual life without the fear of criminal sanction, provide that these choices do not harm others. In this sense, sexual freedom constitutes not only a personal liberty but also a dimension of human dignity that warrants legal recognition and protection.

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