

Assignment

(for training)

This assignment serves to prepare for and accompany my lectures. Please just prepare a short answer for yourself in keywords for the discussion. Please prepare an answer to questions I.1 to I.3 for the lecture on 8 March and an answer for questions I.4 and II. for the lecture on 15 March.

Questions & Answers:

I. The prohibition of extra-marital sex in the controversial art. 411 of the Indonesian Law No. 1 of 2023 on the Criminal Code¹ is an assault on freedom and a serious violation of universal human rights.

1. Why? Which rights are violated? What is the idea behind these rights (in the given context)?

Please give reasons. If possible, name the relevant article in the relevant human rights treaty that is violated. If you are of the opinion that art. 411 does not constitute a human rights violations, please substantiate your opinion with *legal*, not political, moral or religious reasoning.

1.1. *Sexual freedom and self-determination* (the right to practice or not practice consensual sexual intercourse between adults, according to one's own decision and one's own sexual orientation) is an essential universal human right. As all universal rights, it applies everywhere on the planet, regardless of the local culture, traditions and religious and ideological backgrounds. Sexual freedom and self-determination is closely linked to the free development of personality and thus an important aspect of *human dignity*, which is proclaimed politically as a universal human right in art. 1 UDHR and emphasized in the preamble of the ICCPR. It is, however, *not explicitly guaranteed as a distinct human right* in global human rights law, although it is generally recognised in documents of intern. human rights experts and civil society organisations,² statements of UN human rights institutions and treaty bodies and for the geo-regional human rights law in decisions of the ECtHR and the IACtHR. On the global level, sexual freedom and self-determination is anchored as binding law in the *right to privacy* under art. 17 ICCPR. Respect for privacy is one of the great demands of human dignity and also a precondition for a free, non-authoritarian society committed to human rights. Privacy ensures that individuals have the freedom and autonomy to make their own personal choices without being harassed by the state. The *state*, even the legislator, is *not legitimised to interfere with the private life of the citizen*, unless the limits of the right to privacy apply, i.e. it is necessary to protect the rights of others, public health or security etc. Consequently, since free consensual sex between adults does not harm or threaten anyone, it cannot be restricted by the law, even if the persons involved are not married, neither heterosexual nor homosexual sex. As long as it happens in the secluded private sphere and thus does not affect the public in any way, it can also not be restricted on grounds of "morals". Such "morals" can anyway only apply if they comply themselves with the universal human rights standards, and must be seen in the global context. If each state was free to impose and enforce particular "morals" in the private sphere according to its own traditional cultural or religious norms, there would not be much left of the human rights on the planet in practice. So it is not a surprise that the Human Rights Committee (the treaty body under the ICCPR) stated already in 1994 in a case on the criminalisation of homosexual practices, that "in as much as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy' ", and that it also showed reluctance to accept reasons of morality as a justification.³ What has been said about homosexual intercourse also applies to heterosexual intercourse: It cannot be criminalised across the board under art. 17 ICPP.

¹ Underlined text passages indicate links to relevant internet resources. Just click on the link in the pdf file!

² See in particular the Yogyakarta Principles (Principles on the application of international human rights law in relation to sexual orientation and gender identity of 2007, adopted at a meeting of intern. h.r. groups and experts in Yogyakarta in 2006), and the Declaration of Sexual Rights of the General Assembly of the World Association for Sexual Health of 1999. Note that these are political documents and thus not legally binding!

³ HRC.488/1992.25. Toonen v. Australia, no. 8.2.

1.2. Moreover, according to intern. human rights experts, the criminalisation of extra-marital sex, though gender-neutral in theory, *in practice disproportionately affects women* and is often abused for practices that discriminate women or put them under pressure, de facto depriving them of their personal freedom. This would constitute a *violation of the prohibition of discrimination against women* under [art. 2 CEDAW](#).⁴

2. Why does it not make a difference that the "offence" will only be prosecuted if the family files a criminal complaint?

2.1. It does not make a difference because from the perspective of the right to privacy as a universal human right that guarantees the freedom to shape and live one's life according to one's own personal ideas and plan, it is the individual who is responsible to decide about his/her lifestyle and the *family must respect the individual's autonomous decision*. This also applies to the question whether to have or not to have sex before marriage. Parents, sisters or children are free to express their opinion about it, but the human right to privacy does not allow the state to grant them a legal or quasi-legal power to impose their will on this question to an adult family member. Making criminal prosecution dependent on a criminal complaint by the family practically amounts to such a power. Under art. 17 ICCPR, the influence of the family must be limited to *social sanctions*, e.g. to exclude the "offender" from family life, disinherit him/her or stop financing his/her studies at university.

2.2. Concerns with regards to human rights also arise because of the *high risk of abuse*: Family members can use the threat of a criminal charge for violating art. 411 Criminal Code as a *lever of power to force unfair advantages* of their own. For example, conservative parents who cannot accept that their children have chosen a modern lifestyle, may use it to force them to return to traditional "morals". Children who cannot accept that their mother has inherited their father's home or business after his death many years ago, may try to force her to transfer it to them when they learn that she has a new boyfriend. Moreover, there may be political abuse. For example, parents working in the public sector may be approached by government officials threatening them that they may lose their position if they do not file a criminal complaint against their son who has organised student protests against the President, while his class mates at university who are leaders of the youth organisation of the President's party can continue their sexual life freely. Such abuses can and will happen and may result in the violation not only of Art. 17 ICCPR but also of other human rights.

3. Apparently it is not totally clear if art. 411 also criminalises sex between homosexuals, who cannot marry in Indonesia. What additional human rights problem exists if this is the case or not?

Under [art. 2\(1\) ICCPR](#), each state must respect and ensure the rights recognized in the ICCPR without distinction of any kind, such as race, colour or religion but also sex or "other status". Under [art. 26 ICCPR](#), all persons are equal before the law and the law shall guarantee equal and effective protection against any discrimination on the forbidden grounds. This prohibits restrictions of freedom that only apply to a part of the population determined by these criteria. As the Human Rights Committee has already stated in 1994, the term "sex" also includes sexual orientation.⁵ The Committee has confirmed this view in constant praxis.⁶

Thus, any restriction of consensual sex according to one's own sexual orientation that targets only homosexuals or only heterosexuals constitutes a discrimination violating art. 2(1) and 26 ICCPR. If art. 411 is interpreted to mean that it also applies to homosexual intercourse, it practically amounts to a lifetime total ban on sex for homosexuals, who cannot marry in Indonesia, whereas heterosexuals, after marriage, can live a fulfilled sexual life. This would constitute an extreme discrimination of homosexual citizens. However, if art. 411 is interpreted in such a way that it does not apply to homosexuals, it allows them to live a free sexual life without restrictions while heterosexuals are banned from sex until marriage. This would amount to a serious discrimination of heterosexual citizens. So in both cases art. 411 of the new Indonesian Criminal Code discriminates a part of the population and thus constitutes a human rights violation under art. 2(1) and 26 ICCPR. Only bisexuals, who enjoy sexual intercourse with both sexes, will be neither discriminated in the first nor in the second case. This result derives from logic: There cannot be a non-discriminatory restriction of sex before marriage if it does not apply to everyone and marriage is not open to everyone without regard to his or her sexual orientation.

4. By which means could the international community support Indonesian citizens in their fight against this human rights violation?

4.1. Since the new Indonesian Criminal Code will not be applied immediately but first go through a transition period of up to three years, the international community (foreign states and international organisations) may use this time for a *critical-*

⁴ See on this problem the [joint statement of the Working Group on discrimination against women and girls and several Special Rapporteurs of 25.11.2022](#), Ref.: OL IDN 2/2022, p. 6 ff.

⁵ [HRC. 488/1992, 25. Toonen v. Australia](#), no. 8.7. According to the HRC, the discrimination on grounds of sexual orientation falls under the prohibition of discrimination on the ground of "sex", not of "other status".

⁶ See, for example, [HRC. 941/2000, Young v. Australia](#), and [1361/2005, X v. Colombia](#).

constructive human rights dialogue, not only concerning art. 411 but also other controversial clauses in the new Criminal Code. These clauses and their application should in particular be subject to *thorough scrutiny in the next Universal Periodic Review* by the UN Human Rights Council. Unfortunately, the 4th cycle UPR of Indonesia is just being finalised now, and there have been warnings and recommendations not to restrict fundamental rights and to take into account the concerns of the civil society,⁷ but the legislation process for the new Criminal Code has been (deliberately?) timed in a manner that does not allow anymore to scrutinise its outcome in the 4th cycle UPR. However, the violation of art. 17, 2(1) and 26 ICCPR may also be an *important topic in the next state reporting procedure before the Human Rights Committee* (the treaty body under the ICCPR) and result in specific recommendations in the Committee's concluding observations.

States and international organisations may also criticise the human rights-hostile approach of the new Indonesian Criminal Code in the global political discourse. They may even criticise specifically responsible Indonesian politicians, including the President who has not vigorously tried to prevent the controversial clauses. They may also exclude Indonesian politicians temporarily from international summits and other important political meetings. If the new Criminal Code had been passed before the G20 summit in Bali, an appropriate reaction would have been to cancel the summit or shift it spontaneously to another, more human rights-friendly country. However, such reactions must be proportionate, also with regard to the reactions to human rights violations in other countries. Otherwise, they will be misunderstood as a pretext for Western countries to put pressure on developing states in order to advance their own imperialistic interests - a common stereotype with which governments try to stifle foreign criticism of human rights violations in their country.

The critical-constructive human rights dialogue can also be conducted by Indonesia's foreign partners within the country, e.g. by *supporting* conferences, seminars and other events with high profile international human rights experts or *the work of civil society organisations* that fight for the respect for sexual freedom and self-determination. Since systematic human rights violations are not an internal affair but a potential threat to peace and an issue for all mankind, such foreign support of the critical discussion in Indonesia would not violate the principle of non-interference.

4.2. Although the criminalisation of extra-marital sex as such is already a human rights violation, the problem only becomes seriously acute when art. 411 is applied on a large scale in practice. In the unlikely case that hundreds or thousands of young unmarried couples, or divorcees, widowers, and widows who enter into new relationships, are eventually sentenced to prison, the international community could take all of the *actions discussed in Lecture 2, part IV*. Since in the world order of sovereign states every state is free to decide with whom it will or will not trade, cooperate or maintain close relations and there is no right of the individual state to be accepted by others as a partner, the *foreign partners* of a state who systematically violates human rights are *free to suspend, terminate or alter all kinds of cooperation* with this state, and even to take personal sanctions against responsible officials and influential citizens (e.g. to deny them entry, transit and travel on national airlines), until the systematic human rights violations stop. The foreign partners may in particular reduce development cooperation and scientific cooperation, cancel important projects or insist on intensive human rights mainstreaming as an important part of them. Again, these reactions must be proportionate with regard to those on human rights violations in other countries, to avoid that they are misunderstood as a pretext to push foreign interests. Moreover, the reasons need to be explained thoroughly in the critical-constructive human rights dialogue - not only to officials but also to the people.

4.3. Foreign states and international organisations can also *make the respect for sexual freedom and self-determination a precondition for international trade and economic cooperation*. For this purpose, they may use the options and instruments discussed in Lecture 3, part III.4. Contrary obligations under free trade agreements or the WTO agreements may first need to be cancelled by termination or withdrawal from them. Foreign partners may, for example, temporarily *ban the import of Indonesian palm oil*. They may make a new free trade agreement dependent on the ratification of the Optional Protocol to the ICCPR, which would allow Indonesian citizens to file an individual complaint for violation of their right to privacy before the Human Rights Committee, or on a special human rights clause, which expressly obliges Indonesia to respect sexual freedom. The most effective response to art. 411 of the new Criminal Code would probably be a temporary *ban on flight services to Bali*, combined with a ban on booking offers for accommodation and other touristic services in Bali. This would move the discussion in Indonesia, also in the parliament, in another direction. A step to be expected soon are *travel warnings* of foreign governments urging tourists and expats to be aware of the risk of criminal prosecution in case of entering into a relationship with an Indonesian citizen.

The international community is not only entitled but even obliged to intervene against the violation of art. 17, 2(1) and 26 ICCPR by art. 411 of the new Indonesian Criminal Code. This obligation of any international partner, foreign states and international organisations, including ASEAN, results from their *responsibility to protect ("R2P")*. However, this is not a legal but political obligation, since the concept of "responsibility to protect" is only based on a resolution of the UN General Assembly, which is not legally binding.⁸

⁷ See the recommendations no. 140.47 and 147.50 of Germany and Australia in the Report of the Working Group on the Universal Periodic Review - Indonesia of 21.12.2022, A/HRC/52/8.

⁸ Cf. General Assembly Resolution 60/1 of 16.09.2005, no. 138 f.

II. Case study: In the state S (not Indonesia), homosexual intercourse and sexual intercourse between citizens belonging to different religions is punishable by death under the national criminal code. Unlike in other states, the death penalty for this "offence" is indeed often imposed and also executed, so that an enormous number of citizens are killed. How can the international community intervene to stop this violation of human rights?

In this unlikely case, the human rights violation is of a different dimension than in question I. Not only the right to privacy and the prohibition of discrimination on grounds of sex are at stake but also the *right to life* (art. 6 ICCPR). Large-scale gross violations of elementary human rights, such as the right to life, violate the absolute minimum human rights standards under mandatory customary public international law. Such activities are a priori excluded from the sovereignty of the state under international law and nowadays considered a *threat to peace* in the sense of art. 39 UN Charter. This cannot only entail all measures discussed above (cf. I.4) but also *measures of the UN Security Council under Chapters VI and VII UN Charter*, in particular recommendations and investigations (art. 34, 36), a formal determination of the existence of a threat to peace (art. 39), provisional measures to prevent the aggravation of the situation (art. 40), measures not yet involving the use of armed force, such as sanctions, arms embargos, the creation of international tribunals etc. (art. 41) and even, as a last resort, the use of military force to protect the human rights of the endangered "offenders", in particular a *humanitarian intervention* on the territory of state S. While a humanitarian intervention is usually authorised by the UN Security Council, it is controversially discussed whether a group of states may carry out this measure as ultima ratio in exceptional, urgent cases even without authorisation by the Security Council (cf. Lecture 2, part II.3).

Further Reading:

- Civicus Lens (editor): Indonesia's New Criminal Code: A Turn for the Worse, 16.12.2022, <https://lens.civicus.org/indonesias-new-criminal-code-a-turn-for-the-worse>
- Dillon, Mahareksha S.; Hendrik, Joseph; Leonetta, Eugenia; Winarto, Alda: Indonesia: Key Provisions Of Indonesia's New Criminal Code, 09.01.2023, www.mondaq.com/crime/1268552/key-provisions-of-indonesias-new-criminal-code
- International Commission of Jurists: Indonesia: New Penal Code is a major human rights setback and must be repealed or substantially amended, 09.12.2022, <https://www.icj.org/indonesia-new-penal-code-is-a-major-human-rights-setback-and-must-be-repealed-or-substantially-amended> (press release also available in Bahasa Indonesia)
- Llewellyn, Aisyah: Indonesia's controversial new criminal code: 7 things to know. Critics say 'authoritarian' legislation taints Jokowi's legacy, Nikkei Asia 10.12.2022, <https://asia.nikkei.com/Politics/Indonesia-s-controversial-new-criminal-code-7-things-to-know>
- Narain, Akarshi; Vats, Apporv: Indonesia's New Criminal Code and Article 411: A Step Backwards for Individual Liberties, Jurist 30.01.2023, www.jurist.org/commentary/2023/01/akarshi-narain-and-apoorv-vats-indonesia-criminal-code
- Nugraha, Ignatius Jordan: 'Inherently Repugnant'? Indonesia and the Criminalisation of Sex Outside Marriage, Verfassungsblog 07.12.2022, <https://verfassungsblog.de/inherently-repugnant>
- Miller, Alice M.; Kismödi, Eszter; Cottingham, Jane Cottingham; Gruskind, Sofia: Sexual rights as human rights: a guide to authoritative sources and principles for applying human rights to sexuality and sexual health, 2015, doi.org/10.1016/j.rhm.2015.11.007
- Valentiner, Dana-Sophia: The Human Right to Sexual Autonomy, German Law Journal 22 (2021), p. 703 ff., doi.org/10.1017/glj.2021.35
- Wikipedia (editor): Right to sexuality last visited 06.03.2023, https://en.wikipedia.org/wiki/Right_to_sexuality

More information on this course contribution at www.thomas-schmitz-yogyakarta.id. For any questions, suggestions and criticism please contact me via e-mail (tschmit1@gwdg.de) or WhatsApp (+62 852 1402 9884).