Tearing Down Sexual Freedom in Indonesia: Ban on Any Form of Sex Outside Marriage

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On 6 December 2022, the Parliament of Indonesia passed the country's new criminal code (NCC), outlawing sex and cohabitation outside of marriage. Under the new law, extramarital sex carries a jail sentence of one year, while cohabitation of unmarried couples carries a jail term of six months. In a statement given to *Reuters*, a spokesperson for the Indonesian justice ministry justified the law on the grounds that it aimed to "protect the institution of marriage and Indonesian values."

The law was passed despite widespread outrage, with thousands taking to the streets in protest, as well as a coalition of Indonesian civil society organizations petitioning the country's president to delay the law's passage. Regardless of the government's claims that the law is designed to protect "Indonesian values," the new criminal code flagrantly violates Indonesia's obligations under international human rights law (IHRL).

In order to get a sense of Indonesia's IHRL obligations, it is essential to examine the relevant treaty to which Indonesia is a party—namely, the International Covenant on Civil and Political Rights (ICCPR). Article 17 of the ICCPR places a responsibility upon State Parties to uphold the right to privacy using the language, "no one shall be subjected to arbitrary or unlawful interference with his privacy," which includes the right to freedom of association and the right against arbitrary or unlawful interference with privacy.

The right to sexual freedom is woven within the tapestry of the right to privacy. For instance, in *Toonen v. Australia* at the United National Human Rights Council (UNHRC), the major issue was the prohibition of homosexual intercourse in Tasmania (one of Australia's six constitutive states). The UNHRC concluded that a prohibition on adult consensual homosexual intercourse constituted "arbitrary interference" with Mr. Toonen's right to privacy (para. 11), thus violating Article 17 of the ICCPR. Indonesia's NCC, by criminalizing sex outside marriage, constitutes severe and arbitrary interference on individuals' rights to privacy and association in the same manner as Tasmania's ban on homosexual intercourse. Thus, the NCC violates Indonesia's commitments under IHRL.

To qualify as a legitimate restriction on the rights in the ICCPR, a measure must meet *two tests* as set out in the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR and General Comment No. 18 (para. 13) (For UNHRC jurisprudence see here). First, the differentiation must be reasonable and objective. Second, it must be to achieve a legitimate purpose under the ICCPR. While examining the applicability of the

legitimate restriction exception in such cases, Fellmeth writes that it is essential to look at the degree of state interference into sexuality (p. 890). Such an exception was created to protect laws that aim to combat child abuse or actions demeaning women. However, countries like Indonesia are trying to misuse it to legitimise the oppressive NCC.

For example, in *Fedotova v Russia Federation* at the UNHRC, Russia argued that a restriction on dissemination of "homosexual propaganda" amongst minors was based on the reasonable and objective purpose of avoiding harming their development by forming perverted views about family values. The UNHRC refused Russia's arguments and concluded that the State could not restrict Fedotova's right to freedom of expression about her homosexuality to protect "traditional family values." Additionally, in *Toonen v. Australia,* Tasmanian authorities had argued that the ban on homosexual intercourse was based on the reasonable and objective purpose of public health to prevent the spread of HIV/AIDS in Tasmania (para. 6.5). However, the UNHRC and even Australia itself denied the assertion that criminalization of homosexual activity would prevent the spread of HIV/AIDS (para. 8.4). Thus, Tasmania's defence of their law working within the ambit of legitimate exceptions was denied by the UNHRC (para. 8.4) In an extremely similar manner as in *Fedotova v Russian Federation*, Indonesia has based their restriction on the right to privacy on "protecting the institution of marriage and Indonesian values." This does not meet the reasonable and objective criteria as depicted by UNHRC jurisprudence in *Fedotova*. Further, Indonesia has provided no argument towards the legitimate purpose test. Thus, the NCC would not qualify for the legitimate restriction exception.

The NCC poses a legitimate threat to the members of the LGBTQ community living in Indonesia and constitutes an arbitrary interference to their right to privacy. Such a law combined with a political climate which systematically targets members of the LGBTQ community has stifled hope for the community in Indonesia. The former Defense Minister of Indonesia, Ryamizard Ryacudu, had stated that the existence of LGBTQ activists is "more dangerous than nuclear warfare" and that they have "declared a proxy war on the State." As per a report by the Human Rights Watch, the LGBTQ community in Indonesia is under constant threat and there also have been instances of militants attacking LGBTQ activists. The circumstances in Indonesia illustrate how sexual and moral panics may construct certain subjects as dangers to the existing social order and try to propagate the regressive idea that the "moral," righteous people must be safeguarded from the "deviant." Further, the NCC effectively criminalises the existence of the LGBTQ community within Indonesia and has a disproportionate impact on them.

The New Criminal Code recently introduced by Indonesia's Parliament poses a clear and present danger to the basic right of sexual freedom in the country, violating Indonesia's obligations under international human rights law. The international community must come together to swiftly condemn this act, and support the advocacy of Indonesian citizens and civil society groups who are protesting this attack on basic freedoms.