



Criminalization of Adultery under New Criminal Code: Morality and the Protection of Citizens' Private Rights



Taun^{1✉}, Fareed Mohd Hassan²

¹ Faculty of Law, Universitas Singaperbangsa Karawang, Indonesia

² Faculty of Syariah and Law, Universiti Sains Islam Malaysia, Malaysia

Corresponding: taun@fh.unsika.ac.id

Received: 2025-07-16 | Accepted: 2026-06-14 | Published: 2026-07-23

Abstract

The enactment of Criminal Code Number 1 of 2023 has sparked new controversy in society, particularly regarding the criminalization of adultery, regulated in Articles 411 and 412. These articles stipulate that adultery is a complaint-based offense that can only be prosecuted if a complaint is filed by the husband, wife, or parents of unmarried parties. This policy has drawn criticism for its perceived intrusion into citizens' private sphere, although the government argues that the regulation is intended to protect the family institution and public morality. This article aims to examine the criminalization of adultery from the perspective of balancing the protection of morality with respect for private rights in a democratic state governed by the rule of law. The approach used is normative juridical, with analysis of legislation, legal literature, and comparative studies. The results of the study indicate that the criminalization of adultery must be treated with caution to prevent it from becoming a tool to legitimize state intervention in the private sphere, while still upholding the principles of proportionality and human rights.

Keywords: Criminalization; Morality; Privacy

I. Introduction

The state and morality have long been two entities that are difficult to separate in the realm of criminal law. Criminal law is not only a tool of state oppression in tackling crime, but also reflects the social, moral, and cultural values of a society. The change in the criminal law paradigm in Indonesia, brought about by the ratification of the new Criminal Code in December 2022, has had a wide-ranging impact, both from a normative and social perspective. One of the most controversial issues is the re-regulation of moral crimes, especially adultery.¹ In Indonesia, morality derived from religious values and customs still plays an essential role in the formation of legal norms, including in regulating sexual behavior outside of the marriage bond,² the National Criminal Code which was passed through Law Number 1 of 2023 is the first codification of criminal law drafted by the Indonesian nation after almost a century of using the Criminal Code from colonial heritage. One of the controversial provisions in the new Criminal Code is the criminalisation of adultery as stipulated in Articles 411 and 412. This issue has caused public debate because it is considered to interfere with the personal realm of citizens and has the

¹ Satjipto Rahardjo, *Legal Science*, (Bandung: Citra Aditya Bakti, 2000), p. 86.

² Andi Hamzah, *Principles of Criminal Law*, (Jakarta: Rineka Cipta, 2008), pp. 5-6.

potential to violate Human Rights (HAM).³ This provision emphasises that sexual relations outside of marriage are punishable acts, even if they are absolute complaints. The state restricts anyone who has the right to report, namely, legal spouses (husband/wife) or parents of unmarried perpetrators. On the one hand, this article is seen as a form of state protection against the institution of marriage, the moral values of society, and religious norms. On the other hand, there are sharp criticisms that highlight that the criminalisation of adultery has the potential to harm the basic rights of citizens, in particular the rights to privacy, bodily autonomy, and personal moral freedom. This provision expands the definition of adultery and opens up gaps in reporting by family members such as husbands, wives, or children, creating a potential conflict between collective moral values and individual rights to privacy and personal freedom.

This creates a sharp debate between two basic principles in a democratic state of law: the protection of public morality and respect for the personal rights of individuals.⁴ The state does have the legitimacy to regulate social life in order to maintain public order and social ethics, but the boundaries become blurred when the state begins to enter the private space of its citizens, that do not interfere with the interests of others. Moreover, in a pluralistic society like Indonesia, moral standards are not something singular and absolute, but are diverse according to each individual's religion, culture, and outlook on life. In the midst of this spirit of morality, critical questions arise from various circles of academics, legal practitioners, and civil society. The State needs to be critically examined, whether it really has the legitimacy to regulate the sexual life of individuals carried out voluntarily and in the private sphere. The criminalisation of adultery can be seen as a form of violation of the basic principles of the rule of law and human rights, especially in terms of the protection of the right to privacy and moral freedom of every citizen. These concerns are justified. Within the framework of a democratic state of law, there is a strict separation between public and private spaces. The state does have the authority to regulate social life to protect public order and collective interests, but when such interventions touch on private areas such as personal relationships, sexual orientation, and individual morality, there must be clear and proportionate boundaries. Otherwise, the criminal law can easily turn into a tool of moral and social oppression that silences the freedom of citizens. In addition, the criminalisation of adultery risks opening up space for abuse of the law and even tends to be considered overcriminalization. In a society that is still full of stigma against sexuality and control over women's bodies, articles like this can be a weapon to silence, intimidate, or take revenge, especially against vulnerable groups. At the same time, the practice of adultery that occurs in certain social classes can escape the snare of the law due to access to power and influence. Furthermore, in the context of Indonesian pluralism, moral standards are not singular. What is considered immoral by one group is not necessarily considered the same by another group. Therefore, making morality the sole basis of criminalisation requires extra caution so that there is no imposition of values by the majority on the minority, or by the state on the individual.

Several studies that discuss the criminalisation of adultery offences have argued that the reason for the criminalisation of adultery offences must be based on its orientation on the basic idea of Pancasila, focusing on the use of criminal law as a means of combating crime.⁵ Meanwhile, in another article on the Juridical Analysis of Adultery Delinquency Against Couples Outside Marriage Who Conduct Hotel Check-in, the results of his research are that Article 411 of the Criminal Code and Article 412 of the Criminal Code regulate the delinquency of adultery and cohabitation, causing debate in the community. The impact of punishment for extramarital perpetrators who check into hotels is currently considered by the state to interfere too much in the issue of public privacy. However, this arrangement is able to cause regret for the perpetrator, and the victim can obtain justice.⁶ Another research that also has a connection with Human Rights

³ Luhut M.P. Pangaribuan, "Human Rights and the Criminal Justice System," *Journal of Law & Development*, Vol. 32, No. 2 (2002): 165-180.

⁴ Jimly Asshiddiqie, *Introduction to Constitutional Law*, (Jakarta: Constitution Press, 2006), p. 137.

⁵ Lade Sirjon, Kriminalisasi Delik Perzinahan dalam Undang-Undang Nomor 1 Tahun 2023 tentang Kita Undang-Undang Hukum Pidana, *Jurnal Hukum Pidana dan Politik Hukum*, Vol 12, No. 1, 2023

⁶ I Made Ananda, dkk, Juridical Analysis of Adultery Delik Against Extramarital Couples Who Perform Hotel Check-In, *Jurnal Preferensi Hukum*, Vol. 5, No. 1, 2024.

(HAM) in the Crime of Adultery from the perspective of National Law and Islamic Law, states that the context of Article 411 of the Criminal Code is not considered a violation of human rights, because the regulation of adultery in Article 411 of the Criminal Code is a form of protection for the right to live in peace. The right to a sense of security, as well as the right of honour, is not only the personal rights of the perpetrator or the personal rights of others. In Islamic Law, human rights are a guarantee for the protection of the soul, intellect, honour and posterity as well as the protection of property. Human rights in Islam cannot be separated from the rights of Allah, which are the rights of the wider community. Therefore, the application of criminal punishment in Islam cannot be based on human rights, but rather on the fulfilment of Allah's rights, which is the most important because there are greater benefits.⁷

Criminalisation of adultery in the Criminal Code Number 1 of 2023, especially in the tension between the enforcement of public morality and the protection of citizens' personal rights. This research does not intend to negate the moral values embraced by the Indonesian nation, but to ensure that criminal law is applied proportionately, fairly, and does not violate constitutional principles.⁸ This paper also aims to explore how the state should behave in regulating moral relations in society without neglecting individual liberty as part of human dignity protected by law. This is to deny that arrangements that intersect with the private sphere and have an orientation related to sexuality do not become a tool of the state or power to interfere too much with the rights of every citizen

II. Research Problems

Based on the Background above, it can be formulated as follows:

1. What is the juridical and philosophical basis for the adultery delict in the Criminal Code Number 1 of 2023?
2. How are Morality and Private Rights in the Perspective of Criminal Law?

III. Research Methods

This research uses a normative juridical method that focuses on a legal, conceptual, and futuristic approach in the context of adultery listed in the Criminal Code with the perspective of morality and personal rights of citizens. The research is primarily based on secondary data, including laws and regulations, international human rights conventions ratified by Indonesia, customary law texts, academic books, and peer-reviewed journal articles discussing the criminalisation of adultery. The legal approach referred to in this study looks at the existence of a law on adultery that is associated with relevant morality and personal rights. The conceptual approach explores adultery with a theoretical foundation that is the basis for the argument in criminalising adultery, especially in relation to personal rights. In addition, the futuristic approach explores legal reform and policy recommendations by considering Indonesia's evolving criminal law landscape to prevent overcriminalization of criminal acts, with the aim of prevention

The collected legal materials will be analysed using descriptive analysis. This approach involves interpreting the substance and structure of the applied legal system. The analysed data were used to identify that adultery has a relationship between morality and personal rights.

IV. Results and Discussion

1. The Juridical and Philosophical Basis of the Adultery Delict in the Criminal Code Number 1 of 2023

A. The Juridical Basis of the Adultery Delict

The criminalization of adultery under Article 411 of the Criminal Code Number 1 of 2023 must be first understood through the framework of criminalization policy in criminal law. From the perspective of criminalization policy, such conduct cannot be

⁷ Anissa Djuarni Siti N, *The Existence of Human Rights in the Crime of Adultery from the Perspective of National Law and Islamic Law*, Skripsi, Fakultas Syariah dan Hukum, Univ. Islam Negeri Syarif Hidayyatullah, Jakarta, 2024.

⁸ Muladi, *Democracy, Human Rights, and Legal Reform in Indonesia*, (Semarang: Undip Publishing Agency, 2002), p. 98.

classified as a criminal offense solely because it is considered immoral or inconsistent with prevailing social values. Criminalization should be justified only when the conduct causes, or has the potential to cause, harm to legally protected interests that are regarded as significant to individuals, society, or the state. Accordingly, criminal law traditionally serves as an instrument for maintaining and safeguarding fundamental norm⁹, that underpin social life and maintaining public order and social stability.

According to Sudarto, criminalization refers to the process by which certain conduct is designated as a criminal offense. This process ultimately results in the enactment of legal provisions that impose criminal sanctions on such conduct.¹⁰ The criminalization process should be grounded in rational and proportionate considerations to prevent overcriminalization, which may have detrimental consequences for society. Sudarto proposed that several considerations should be taken into account in addressing the issue of criminalization :

- 1) the use of criminal law must be aligned with the objectives of national development, namely the realization of a just and prosperous society, both materially and spiritually, based on the principles of Pancasila. In this regard, criminal law serves as an instrument to combat crime while supporting efforts to promote public welfare and social protection.
- 2) Conduct that is intended to be prevented or addressed through criminal law must constitute undesirable behavior, namely conduct that causes harm or loss, whether material or immaterial, to members of society.
- 3) The application of criminal law should take into account the cost-benefit principle, ensuring that the benefits of criminalization outweigh its associated costs.
- 4) The use of criminal law must also consider the capacity and operational capabilities of law enforcement agencies so as to avoid excessive burdens on their performance and resources (*overbelasting*).

According to Moeljatno, there are three criteria that should be considered in the process of criminalization as part of criminal law reform. First, the designation of an act as a criminal offense should be consistent with the legal values and legal consciousness prevailing within society. Second, it must be assessed whether the imposition of criminal sanctions and punishment constitutes the most effective means of preventing violations of the prohibited conduct. Third, consideration should be given to whether the government, through the relevant state institutions and law enforcement agencies, possesses the necessary capacity to effectively enforce and implement criminal sanctions against those who violate the prohibition.¹¹ Therefore, criminalization cannot be carried out arbitrarily, rather, it must be based on rational and proportionate justifications that provide a legitimate basis for the imposition of criminal liability.

The adultery delict in the Criminal Code (KUHP) Number 1 of 2023 is explicitly regulated in Articles 411 and 412, which replace similar provisions in the old Criminal Code (*Wetboek van Strafrecht*). Article 411 reads that:

- (1) Any person who engages in sexual intercourse with a person who is not his or her husband or wife shall be punished for adultery with imprisonment for a maximum term of 1 (one) year or a fine not exceeding Category II.
- (2) No prosecution shall be initiated for the Criminal Offense as referred to in paragraph (1), except upon a complaint by:

⁹ Sudaryono, Natangsa Surbakti, *Hukum Pidana: Dasar-Dasar Hukum Pidana Berdasarkan KUHP dan RUU KUHP*, Surakarta: Muhammadiyah University Press, 207, p. 4.

¹⁰ Sudarto, *Hukum dan Hukum Pidana*, Alumni, Bandung, 1983, p. 39-40.

¹¹ Moeljatno, *Azas-Azas Hukum Pidana*, Jakarta: PT Bina Cipta, 1985, p. 5.

- (3) The provisions referred to in Article 25, Article 26, and Article 30 shall not apply to complaints as referred to in paragraph (2).
- (4) A complaint may be withdrawn as long as the examination at the court hearing has not yet commenced.¹²

This is different from the old Criminal Code, which was narrower in scope. In addition, this new provision not only targets perpetrators who are bound in marriage, but also unmarried parties, as long as one of the parties is bound by marriage or a marital relationship.

This provision is based on several legal norms and provisions of laws and regulations that are the basis for juridical law, including :

- 1) Article 2 paragraph (1) and Article 5 paragraph (1) of the 2023 Criminal Code which states that criminal law in Indonesia adheres to the principle of legality, namely that an act cannot be punished unless it has been determined in advance in the law.
- 2) Article 28J of the 1945 Constitution of the Republic of Indonesia, which provides space for restrictions on human rights (including private freedoms) in order to respect the rights of others as well as moral values, public order, and state security¹³.
- 3) Law Number 39 of 1999 concerning Human Rights, especially Article 70, which states that human rights must be respected by paying attention to religious, moral, ethical, and cultural values.

Under Article 411 of Law Number 1 of 2023, the criminalization of adultery is not merely intended to regulate sexual morality but also aims to protect the institution of marriage and the family as fundamental pillars of social and national life. This approach is further reinforced by the principles of national criminal law, which emphasize restorative and preventive functions in preserving social harmony and family order. In this regard, the legislature appears to view adultery as conduct whose consequences extend beyond the private relationship between the individuals involved. As it may lead to violate moral norms, undermine the institution of marriage, and has the potential to disrupt family order as the smallest social unit in the country.¹⁴ The existence of Article 411 of the Criminal Code also reflects the legislature's deliberate choice to preserve the connection between law, morality, and social life, which has long been a defining characteristic of the Indonesian legal system.

Nevertheless, the criminalization of adultery under the Criminal Code is not absolute. The legislature has classified adultery as an absolute complaint-based offense (*delik aduan absolut*), meaning that prosecution may only be initiated upon a complaint by certain parties who possess a legal relationship with the offender. This approach demonstrates that the state does not intend to actively intervene in the private lives of its citizens, rather, it provides a legal protection mechanism that may be invoked only when a party directly affected by the conduct considers themselves harmed. Furthermore, it is a form of compromise between the protection of moral values and respect for private space.

In the context of material criminal law, the basis for criminalising adultery also refers to the function of criminal law as *the ultimate remedium*, that is, as the last resort of the state to regulate social behaviour that ordinary social norms cannot control.¹⁵

¹² Criminal Code Number 1 of 2023, Article 411 paragraph (1).

¹³ Constitution of the Republic of Indonesia of 1945, Article 28J paragraph (2).

¹⁴ R. Soesilo, *The Criminal Code and its Complete Commentaries Article by Article*, (Bogor: Politeia, 1996), p. 288.

¹⁵ Barda Nawawi Arief, *Bunga Potpourri Criminal Law Policy: The Development of the Drafting of the New Criminal Code Concept*, (Jakarta: Kencana, 2010), p. 42.

B. The Philosophical Basis of the Criminalisation of Adultery

Philosophically, the criminalisation of adultery in the 2023 Criminal Code is based on several fundamental values in the life of the nation and state:

1. The Value of Divinity and Religious Morality, namely Indonesia as a country based on Pancasila, especially the first precept of "The One Godhead". As the *staatsfundamentalnorm* and the source of all sources of law, Pancasila serves not only as a constitutional foundation but also as a moral and philosophical framework guiding the formulation of national criminal law. It contains religious moral values that are a reference in the formation of laws. In many religions practised by Indonesian society, adultery is a despicable act and violates religious norms¹⁶. Therefore, the criminalization of adultery under Article 411 of the Criminal Code may be regarded as a manifestation of criminal law policy that seeks to protect moral values and the institution of the family, which are universally recognized and upheld by the various religions practiced and developed within Indonesian society.
2. The protection of family institutions, namely the criminalisation of adultery, also aims to protect the integrity of the family as a basic unit of society. Adultery is often a trigger for domestic conflicts, divorce, domestic violence, and even psychological losses for children¹⁷. In this context, the state acts as a protector of the values of the family institution.
3. Maintaining Public Order and Social Norms in many regions in Indonesia, customary values and social norms still uphold the prohibition against adultery. The criminalisation of adultery is considered an effort by the state to maintain social harmony and prevent horizontal conflicts, especially in areas with strong customary norms, such as Aceh, West Sumatra, and parts of Java¹⁸.
4. Humanist Approach and Complaint Delik Although criminalised, adultery in the 2023 Criminal Code is an absolute complaint offence, which means that prosecution can only be carried out if there is a report from a husband, wife, parents, or child. This shows a humanist and privatistic approach from the state, namely, not interfering in the private affairs of citizens without any objection from the directly harmed parties.¹⁹

The formulation of adultery norms as a violation or denial of marriage is motivated by the philosophy of the Indonesian nation, which is guided by moral values and norms. In addition, the law cannot be separated from moral principles, because the formation of an orderly society is derived from good moral behaviour. In accordance with the opinion of Thomas Aquinas, moral commands contain good moral values to be carried out and avoid bad behaviour.²⁰ So that the form of good moral values needs to be realised, which is concrete with efforts to formulate norms in laws and regulations.

2. Morality and Private Rights in a Criminal Law Perspective

Criminal law, as part of the national legal system, has the main function of maintaining order and protecting the public interest. However, in carrying out this function, criminal law often intersects with two major concepts that are mutually attractive, namely morality and private

¹⁶ Simanjuntak, J.E. *Criminal Law and Religious Values in a Multicultural Society*. Jakarta: Prenadamedia Group. Year 2023.

¹⁷ Nasution, A.H. *Philosophy of Criminal Law: Morality and Family Protection*. Bandung: Refika Aditama. 2023.

¹⁸ Department of Law and Human Rights. Academic Manuscript of the National Criminal Code. Jakarta: The Government of the Republic of Indonesia. 2022. https://bphn.go.id/data/documents/naskah_akademik_tentang_kuhp_dengan_lampiran.pdf, accessed on July 13, 2025 at 22.00 WIB.

¹⁹ Official Report of the Government and the New Criminal Code Drafting Team in the Socialization of the National Criminal Code, 2022. <https://jakarta.kemerkum.go.id/berita-utama/sosialisasi-kuhp-baru-upaya-perkuat-pemahaman-hukum-pidana-nasional>, accessed on July 13, 2025 at 22.30 WIB.

²⁰ Fithriatus dan Oksep Adhayanto Shilalahi, *Law, Morals, and Power in Study*, Fiat Justisia Jurnal Ilmu Hukum, Vol. 10, No. 4 Tahun 2016, p 676.

rights. Both are important considerations in the formation and application of criminal norms, but they are also often in philosophical and practical tension. The application of criminal law as a tool of social engineering often relies on the moral values of society. In a pluralistic society, the boundaries between public morality and private rights become blurred. According to Herbert Hart's theory, the law should not absolutely follow the morality of the majority, especially if it sacrifices individual freedom²¹. The criminalisation of adultery reflects conservative moral impulses, but it can run counter to the principle of state non-intervention in the private sphere.

A. Morality As a Protected Legal Interest

One of the enduring debates in criminal law concerns the extent to which the state is justified in utilizing criminal law as a means of safeguarding societal morality. Within this framework, the theory of legal moralism asserts that certain moral values may be regarded as legally protected interests (legal interests) and, therefore, may legitimately warrant protection through criminal law. According to Arthur Kuflik, legal moralism particularly in its purest or most extreme form, is the view that what is morally required should also be legally required, and that the proper function of law is to enforce morality as such.²² Another definition of legal moralism proposed by Carl Cranor, is the immorality of a particular type of conduct may provide a reason for criminalization, but it does not constitute a sufficient or necessary basis for rendering such conduct illegal.²³ From the perspective of legal moralism, morality is not regarded merely as an individual matter confined to the private sphere, but rather as a collective value that serves an important social function.

Morality as the Basis of Criminal Law. Historically, criminal law is often based on the moral values of society. This is reflected in the view of natural law, where positive law is considered valid if it is in accordance with universal moral values such as justice and decency²⁴. In this context, criminal law is seen as an instrument to uphold public morality, maintain morality, and maintain noble values believed by society. For example, the articles in the criminal law that regulate adultery, pornography, or cohabitation cannot be separated from the spirit to uphold moral values, especially in a society that is religious and upholds moral norms.

Therefore, the criminalization of adultery should not be understood as an attempt to impose state-sanctioned moral standards on individuals, but rather as a measure aimed at safeguarding social values deemed fundamental to the maintenance of social order and communal life. However, in order to avoid degenerating into a form of moral authoritarianism, the use of criminal law to protect morality must be constrained by the principles of proportionality, respect for human rights, and the protection of individual privacy.

B. Private Rights and Individual Autonomy

Alongside the legal moralist perspective that justifies the protection of morality through criminal law, an alternative approach places greater emphasis on individual autonomy and the protection of personal privacy. Within the framework of a modern rule-of-law state, individuals are recognized as autonomous legal subjects entitled to determine their own life choices, so long as such choices do not inflict actual harm upon the rights and interests of others. This approach is grounded in the principle that every human being possesses inherent dignity and liberty that the state is obligated to respect and protect, including the freedom to make decisions concerning personal relationships, lifestyle preferences, beliefs, and other aspects of private life.

Private Rights as a Limitation of State Intervention, on the other hand, there is an important principle in the modern legal state, namely, the recognition and protection

²¹ Hart, H.L.A. *The Concept of Law*. Oxford: Oxford University Press, 1961.

²² Arthur Kuflik, "Liberalism, Legal Moralism and Moral Disagreement", *Journal of Applied Philosophy*, 2005, p. 185.

²³ Thomas Sobirk Petersen, *What is Legal Moralism?*, University of Roskilde, p. 83.

²⁴ Lon L. Fuller, *The Morality of Law*, New Haven: Yale University Press, 1969, hlm 122.

of private rights. Private rights include the freedom of individuals to make their own life choices, including in aspects of personal relationships, sexual orientation, beliefs, and lifestyle, as long as they do not directly harm others. In a democratic legal system, the state is restricted from interfering in the private affairs of its citizens except to protect the public interest in a concrete way. This principle reflects the recognition of human dignity and individual autonomy, which are among the defining features of a modern constitutional state governed by the rule of law.

The protection of the private sphere has likewise been acknowledged and safeguarded under both national and international legal instruments. As stated in Article 28G paragraph (1) of the 1945 Constitution, which states that: "*Everyone has the right to the protection of personal self, family, honour, dignity, and property...*".²⁵ The right to privacy is also part of the human rights recognised in the International Covenant on Civil and Political Rights (ICCPR), which Indonesia has ratified through Law Number 12 of 2005²⁶. This recognition reflects the principle that an individual's private life belongs to a protected sphere that should be respected and safeguarded against undue interference by the state.

The tension between morality and privacy rights becomes increasingly evident when the state employs criminal law to regulate conduct occurring within the private sphere, as reflected in the provisions concerning adultery and cohabitation outside marriage under the National Criminal Code. The state uses criminal law to prevent actions that are perceived to undermine the collective moral order²⁷. However, the use of morality as the basis for the formation of criminal law raises serious questions in a pluralistic society. What is considered moral by one group does not necessarily apply to another. Thus, if morality is used absolutely in criminal law, there will be a risk of the moral dominance of the majority over minorities, and it can even give birth to criminalisation on the basis of the morality of certain individuals or groups²⁸.

In a liberal view, the state should have no authority to regulate the private affairs of citizens if no real casualties or public harm are ²⁹caused. This perspective is closely associated with the harm principle advanced by John Stuart Mill. In his seminal work *On Liberty*, Mill argued that the only justification for state interference with individual liberty is the prevention of harm to others (harm principle).³⁰ Accordingly, conduct should not be criminalized merely because it is considered immoral when it concerns personal choices and does not cause actual harm to other individuals. From this standpoint, the criminalization of adultery is often regarded as an extension of state authority into a sphere that should properly remain within the domain of individual privacy and personal autonomy. In other words, morality is not enough to be the basis for criminalisation if the act concerns only personal choice without public repercussions. However, in reality, many legal systems still incorporate moral norms as a basis for criminal law, on the grounds of maintaining social harmony or preventing cultural decay. This raises a debate between the paternalistic approach (which considers the state necessary to "educate" the morality of its citizens) and the libertarian approach (which prioritises individual autonomy).

C. Complaint Offence as a Balancing Mechanism

The debate between the protection of morality and respect for privacy rights highlights the need for a mechanism capable of balancing these competing interests. One of the compromises adopted by the legislature in Law Number 1 of 2023 is the

²⁵ Constitution of the Republic of Indonesia of 1945, Article 28G paragraph (1).

²⁶ Law of the Republic of Indonesia Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights.

²⁷ Ediwarman, *Indonesian Criminal Law: An Introduction*, Medan: Pustaka Bangsa Press, 2023, p. 104.

²⁸ Andi Hamzah, *Principles of Criminal Law*, Jakarta: Rineka Cipta, 2008, p. 9.

²⁹ Muladi and Barda Nawawi Arief, *Criminal Theories and Policies*, Jakarta: Prenada Media, 2010, p. 72.

³⁰ John Stuart Mill, *On Liberty*, London: Penguin Classics, 1982, hlm 68.

classification of adultery as an absolute complaint-based offense (*delik aduan absolut*). Under this mechanism, the state is not authorized to actively seek out, investigate, or prosecute every alleged act of adultery occurring within society. Law enforcement proceedings may only be initiated upon a complaint filed by a party who possesses a direct legal interest and considers themselves harmed by the conduct in question.

The complaint-based nature of Article 411 of the Criminal Code demonstrates that the legislature recognizes the private dimension inherent in the offense of adultery. Accordingly, the state does not position itself as a moral guardian that continuously intervenes in the personal lives of its citizens. Rather, it merely provides a legal mechanism that may be invoked by certain parties when the resulting conflict affects family interests protected by law. In this respect, the complaint-based offense serves as a juridical limitation on the exercise of state power while simultaneously functioning as a safeguard for individual privacy rights.

To bridge the tension between morality and private rights, many criminal law experts encourage the application of the principle of proportionality and criminal law as the ultimate remedium. This means that criminal law should only be used if it is necessary and there is no other lighter way to solve social problems³¹. Therefore, the criminalization of adultery cannot be viewed as a mechanism through which the state seeks to sanction all forms of immoral conduct. Instead, it constitutes a legal instrument employed in a restricted and carefully circumscribed manner to safeguard important legal interests, most notably the institutions of marriage and the family. The state is also encouraged to separate personal morality from criminal law and prioritise an educational or administrative approach in matters of personal ethics, rather than a repressive approach. Thus, criminal law is not used as a tool to punish differences in lifestyle or personal choices, but rather focuses on protecting the rights of others and promoting concrete public interests.

Law, in Fuller's view, is a process that has direction, influences each other, and takes place continuously. So, law is interpreted as an effort that is directed at regulating human behaviour under norms that have the power to achieve certain goals.³² In line with the principle of proportionality, morality has a close relationship in the law. Nevertheless, the existence of such a relationship does not necessarily justify the criminalization of every moral norm. According to the author's analysis, the designation of Article 411 as a complaint-based offense reflects the legislature's attempt to reconcile the protection of societal moral values with the preservation of individual privacy rights. Consequently, the criminalization of adultery under the National Criminal Code should not be interpreted as the complete predominance of morality over individual liberty, nor as the prioritization of individual freedom at the expense of moral values. Instead, it represents a legal compromise designed to balance and accommodate these competing interests in a proportionate and measured manner. Still, morality is essential to be the basis of legal formulation, because if the law does not reflect the moral aspect, then it is not appropriate to be called a law.³³ So that the criminalisation of adultery becomes a reflection that contains morality, which is realised in the form of norms in the 2023 Criminal Code.

V. Conclusion

The criminalisation of adultery in the Criminal Code Number 1 of 2023 reflects the dynamics between the state's efforts to uphold public moral values and the demand for the protection of citizens' private rights. Juridically, this provision has a strong legal basis, ranging from Articles 411 and 412 of the Criminal Code to the principle of legality, as well as restrictions

³¹ Barda Nawawi Arief, *Bunga Potpourri Criminal Law Policy*, Jakarta: Prenada Media, 2013, p. 15.

³² Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, Harvard Law Review 71, No. 4 Tahun 1958), p 363

³³ Issak Done, *The Epistemological Foundation of Law*, North Carolina, Academic Press, 2007, p 499

on human rights based on moral values and public order as contained in the 1945 Constitution and the Human Rights Law. Meanwhile, philosophically, the criminalisation is based on divine values, the protection of family institutions, and the maintenance of social norms that live in a pluralistic society like Indonesia. However, the application of criminal law in the private sphere, such as adultery, presents a dilemma that is not simple. On the one hand, the state has an obligation to maintain collective social and moral harmony; on the other hand, the state is also limited by the principle of non-interference with individual rights, including the right to privacy and moral autonomy. This tension between morality and private rights is a challenge in designing a fair, proportionate, and non-discriminatory criminal law policy.

In a pluralistic society, the use of morality as the sole basis for criminalisation risks causing the dominance of the majority's values over minorities and potentially nourishing criminalisation based on specific moral preferences. Therefore, the state must prioritise a proportionality approach and ultimum remedium in using criminal law, as well as consider an educative or preventive approach in responding to ethical and personal morality issues. The entire policy of criminalisation must be directed at protecting the public interest in real terms, not at regulating personal choices that do not cause harm to others. Criminal law should remain a tool of public protection, rather than a means of controlling the moral freedom of individuals. Thus, criminal law can function fairly, respect human dignity, and remain relevant in the context of democratic state life and in upholding human rights.

References

- Andi Hamzah, *Principles of Criminal Law*, Jakarta: Rineka Cipta, 2008.
- Anissa Djuarni Siti N, *The Existence of Human Rights in the Crime of Adultery from the Perspective of National Law and Islamic Law*, Skripsi, Fakultas Syariah dan Hukum, Univ. Islam Negeri Syarif Hidayyatullah, Jakarta, 2024.
- Arthur Kuflik, "Liberalism, Legal Moralism and Moral Disagreement", *Journal of Applied Philosophy*, 2005.
- Barda Nawawi Arief, *Bunga Potpourri Criminal Law Policy*, Jakarta: Prenada Media, 2013.
- Department of Law and Human Rights. Academic Manuscript of the National Criminal Code. Jakarta: The Government of the Republic of Indonesia. 2022. https://bphn.go.id/data/documents/naskah_akademik_tentang_kuhp_dengan_lampiran.pdf, accessed on July 13, 2025 at 22.00 WIB.
- Ediwarman, *Indonesian Criminal Law: An Introduction*, Medan: Pustaka Bangsa Press, 2023.
- Fithriatus dan Oksep Adhayanto Shilalahi, *Law, Morals, and Power in Study*, Fiat Justisia Jurnal Ilmu Hukum, Vol. 10, No. 4 Tahun 2016
- Hart, H.L.A. *The Concept of Law*. Oxford: Oxford University Press. 1961.
- I Made Ananda, dkk, *Juridical Analysis of Adultery Delik Against Extramarital Couples Who Perform Hotel Check-In*, Jurnal Preferensi Hukum, Vol. 5, No. 1 Maret 2024.
- Jimly Asshiddiqie, *Introduction to Constitutional Law*, (Jakarta: Constitution Press, 2006).
- Official Report of the Government and the New Criminal Code Drafting Team in the Socialization of the National Criminal Code, 2022. <https://jakarta.kemenum.go.id/berita-utama/sosialisasi-kuhp-baru-upaya-perkuat-pemahaman-hukum-pidana-nasional>, accessed on July 13, 2025 at 22.30 WIB.

- Luhut M.P. Pangaribuan, "Human Rights and the Criminal Justice System," *Journal of Law & Development*, Vol. 32, No. 2 (2002).
- Lon L. Fuller, *The Morality of Law*, New Haven: Yale University Press, 1969.
- Muladi, Barda Nawawi Arief, *Criminal Theories and Policies*, Jakarta: Prenada Media, 2010.
- Nasution, A.H. *Philosophy of Criminal Law: Morality and Family Protection*. Bandung: Refika Aditama. 2023.
- Muladi, *Democracy, Human Rights, and Legal Reform in Indonesia*, (Semarang: Undip Publishing Agency, 2002).
- Moeljatno, *Azas-Azas Hukum Pidana*, Jakarta: PT Bina Cipta, 1985.
- R. Soesilo, *The Criminal Code and its Complete Commentaries Article by Article*, (Bogor: Politeia, 1996).
- Satjipto Rahardjo, *Legal Sciences*, (Bandung: Citra Aditya Bakti, 2000).
- Simanjuntak, J.E. *Criminal Law and Religious Values in a Multicultural Society*. Jakarta: Prenadamedia Group. 2023.
- Sudaryono, Natangsa Surbakti, *Hukum Pidana: Dasar-Dasar Hukum Pidana Berdasarkan KUHP dan RUU KUHP*, Surakarta: Muhammadiyah University Press, 2007.
- Sudarto, *Hukum dan Hukum Pidana*, Alumni, Bandung, 1983.
- Thomas Sobirk Petersen, *What is Legal Moralism?*, University of Roskilde