



Proportionality and The Limits of Rights Claims: A Constitutional Analysis of The LGBT Discourse in Indonesia

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Keywords:	ABSTRACT
human rights; LGBT; proportionality test; public order; Pancasila.	Human rights claims are frequently invoked as an absolute justification for the legal recognition of same-sex relationships in Indonesia, despite the constitutional limitation clause contained in Article 28J(2) of the 1945 Constitution, which recognizes public morality, religious values, public order, and Pancasila as legitimate grounds for restricting rights. This study aims to examine the constitutional validity of LGBT-related rights claims through a structured proportionality framework and to formulate a more disciplined methodology for constitutional adjudication. The research employs normative legal research using statutory, conceptual, case, and comparative approaches. Secondary legal materials were analyzed through a qualitative doctrinal method based on the four-stage proportionality test consisting of legitimate aim, suitability, necessity, and proportionality <i>stricto sensu</i> . The findings demonstrate that the constitutional rights commonly invoked in LGBT-related claims are not classified as non-derogable rights under Article 28I(1) and therefore remain subject to limitation under Article 28J(2). The proportionality analysis further indicates that public morality, public order, and Pancasila constitute constitutionally legitimate objectives, although every restriction must still satisfy the sequential stages of proportionality review. The study concludes that adopting a structured proportionality test provides a more transparent, consistent, and constitutionally accountable framework for balancing individual rights and collective constitutional interests in future constitutional adjudication in Indonesia.

INTRODUCTION

In the tradition of modern constitutionalism, human rights have never been understood as absolute and unbounded entitlements, but rather as rights that may be limited so long as the limitation satisfies certain conditions established by law. Nearly every democratic constitution, together with international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), recognizes a limitation clause that permits the state to restrict the exercise of particular rights and freedoms for legitimate purposes, such as public morality, public order, and national security (Asshiddiqie, 2012). The central question of contemporary constitutional law, accordingly, is no longer whether rights may be restricted at all, but by what method the validity of a given restriction is to be tested.

Across different legal traditions, constitutional courts have increasingly converged on proportionality review as the principal method of answering that question. The structured four-stage model consisting of the tests of legitimate aim, suitability, necessity, and proportionality *stricto sensu*, developed in German jurisprudence and subsequently applied in Canadian and South Korean constitutional adjudication, has become a shared analytical grammar for resolving conflicts between individual rights and collective interests (Lailam et al., 2024). Contemporary scholarship nevertheless cautions that the analytical force of this model depends on the seriousness with which each of its stages is applied, particularly the necessity stage, whose distinct function is frequently overshadowed by the final balancing exercise (Da Silva, 2022), while critics of proportionality warn that staged analysis conducted without adequate empirical grounding may yield less determinacy than its proponents assume (Chang & Dai,

2021). Some constitutions embed that structure in the text of the limitation clause itself. Section 36 of the post-apartheid South African Constitution, for instance, expressly requires examination of the nature of the right restricted, the importance of the purpose of the restriction, the relationship between the restriction and its purpose, and the availability of less restrictive means of achieving the same purpose (Lailam et al., 2024). The comparative experience indicates that a limitation clause operates as a genuine constitutional safeguard only when it is accompanied by a disciplined method of testing; in the absence of such a method, the clause risks functioning as an open licence for restriction rather than as a constraint upon it.

Indonesia adopts a similar construction through Article 28J(2) of the 1945 Constitution of the Republic of Indonesia, which provides that in exercising his or her rights and freedoms, every person shall be subject to such limitations as are established by law, solely for the purpose of guaranteeing the recognition and respect of the rights and freedoms of others, and of satisfying just demands based on considerations of morality, religious values, security, and public order in a democratic society. Unlike Section 36 of the South African Constitution, however, Article 28J(2) provides scant textual guidance on how a restriction ought to be tested methodologically, leaving the task of filling that gap to the Constitutional Court through its adjudicative practice over time. It is precisely this methodological gap, rather than the existence of a limitation clause as such, that gives rise to the constitutional problem examined in this article. Studies mapping the Constitutional Court's treatment of Article 28J(2) reinforce this observation, finding that the Court has repeatedly assessed the constitutionality of rights limitations without settling a stable doctrinal standard against which such limitations are to be measured (Mujaddidi, 2022).

The discourse surrounding the rights of Lesbian, Gay, Bisexual, and Transgender (LGBT) persons in Indonesia has become one of the sharpest arenas in which two constitutional claims collide. On one side, those advocating recognition argue that the protection of privacy (Article 28G(1)), equality before the law (Article 28D(1)), and protection from discriminatory treatment (Article 28I(2)) are constitutional rights applicable to every citizen without exception, and that Indonesia's ratification of the ICCPR through Law No. 12 of 2005 reinforces the state's obligation to respect the right to privacy and the principle of non-discrimination. On the other side, those advocating restriction argue that same-sex conduct and relationships contradict public morality, religious values, and Pancasila, particularly its first principle, Belief in One Supreme God, and that the state is therefore constitutionally authorized to restrict them through legal instruments grounded in Article 28J(2) in conjunction with Articles 69, 70, and 73 of Law No. 39 of 1999 on Human Rights (Law No. 39 of 1999). Each position rests on constitutional text that is textually recognized; what neither position supplies on its own is the mechanism by which the two sets of interests are to be weighed against one another.

This constitutional tension reached its peak in Constitutional Court Decision No. 46/PUU-XIV/2016, filed by IPB Professor Euis Sunarti together with several other petitioners, who sought to have the Court expand the scope of Articles 284, 285, and 292 of the Penal Code concerning adultery, rape, and same-sex indecency. On 14 December 2017, the Court rejected the petition, holding that expanding the scope of a criminal offense amounted to formulating a new criminal provision, a matter falling within the open legal policy of the legislature rather than within the Court's authority to decide through constitutional interpretation (Constitutional

Court Decision No. 46/PUU-XIV/2016, 2017). The decision was not unanimous: 4 of the 9 justices dissented, taking the view that the petition to expand the scope of the indecency offenses should have been granted. The fact that nearly half of the constitutional justices favored expanding the offense of same-sex indecency demonstrates that arguments dismissing morality- and Pancasila-based restriction as “unconstitutional” or “outdated” rest on far less solid ground than is often claimed by LGBT-rights advocates; on the contrary, it confirms that the current of legal thought supporting restriction on grounds of public morality and religious values remains a serious and influential position, including within the highest court itself.

It is important to note from the outset that Decision No. 46/PUU-XIV/2016 is fundamentally a decision about the limits of the Constitutional Court's authority and the principle of legality in criminal law, not a substantive statement by the Court on the constitutionality of same-sex relationships as such (Kurnia, 2014). The widespread misreading of this decision in public discourse risks obscuring a far more fundamental constitutional question, namely how Article 28J(2) ought to be interpreted and applied when confronted with human-rights claims asserted by minority groups. Recent doctrinal scholarship on Article 28J(2) finds that the drafters of the constitutional amendments did not intend the phrase “just demands” to establish a strict, structured proportionality test in the German tradition, but rather framed it as a looser call to balance individual rights against collective interests, one that places the individual, rather than the legislature, as the principal addressee of the limitation, thereby weakening the provision's function as a constitutional safeguard against unjustified restriction (Dzadit, et al., 2025).

Public debate over LGBT issues in Indonesia is shaped by dynamics beyond the strictly legal, including the positions of major religious organizations, social-media discourse, and the varying responses of local governments across the country. Rather than producing legal certainty, this diversity of response risks generating inconsistent application of norms across regions and over time, further underscoring the need for a clear and consistently applicable constitutional analytical framework, rather than one that depends entirely on shifting political and social dynamics. This article deliberately confines itself to constitutional analysis and does not engage in depth with theological or sociological inquiry, both of which require distinct scholarly methodologies that fall outside the scope of this normative legal research.

Prior scholarship on LGBT issues and human rights in Indonesia has generally fallen into two equally problematic tendencies. Some studies treat Article 28J(2) as an automatic normative justification for restriction, or even criminalization, without rigorously testing whether the restriction is genuinely proportionate, while other studies treat human-rights claims as nearly immune from limitation, without giving adequate weight to legitimate public interests. A study on the application of the public-order principle in the sealing of the GKI Yasmin church in Bogor, for instance, found that the public-order principle, which ought to function as a safeguard of the basic tenets of the legal system, was instead frequently instrumentalized by administrative authorities to violate human rights rather than protect them (Damanik, 2018). Scholarship on the principle of legality, in turn, has examined the contradiction generated by the recognition of living law as a basis for criminal assessment (Hairi, 2017), while comparative studies have mapped the models of the proportionality test operating in civil-law and common-law systems and their implications for Indonesia (Lailam et al., 2024). Beyond the Indonesian literature, comparative work on jurisdictions that have

recently expanded restrictions on sexual minorities records that public-morality provisions may be mobilised against such groups even where same-sex conduct is not expressly criminalised, which indicates that the decisive constitutional question lies in how a morality-based purpose is tested rather than in whether it is asserted (Sun et al., 2024).

Read together, the existing literature has separately addressed the interpretation of human rights by the Constitutional Court (Kurnia, 2014), the drafting history and doctrinal structure of the limitation clause in Article 28J(2) (Dzadit, et al., 2025), the instrumentalization of the public-order concept in administrative practice (Damanik, 2018), the tension between living law and the principle of legality in criminal law (Hairi, 2017), and comparative models of proportionality review (Lailam et al., 2024). What remains largely unaddressed is the application of a structured proportionality test specifically to LGBT-related constitutional disputes within Indonesia's Pancasila-based constitutional framework. This is the research gap addressed here: the absence of a disciplined and even-handed analytical framework for assessing the constitutional validity of human-rights restrictions imposed in the name of public morality, public order, and Pancasila, without collapsing into the axiomatic assertion of either claim alone.

The novelty of this article lies in its application of a structured proportionality test, comprising the tests of legitimate aim, suitability, necessity, and proportionality *stricto sensu*, as developed in comparative scholarship on proportionality models across civil-law and common-law systems (Lailam et al., 2024), to specifically examine the tension between LGBT-related human-rights claims and their restriction on grounds of public morality, public order, and Pancasila values in Indonesia. The contribution intended here is not merely the application of an established framework to a new object of study, but a methodological one: the development of a constitutional balancing technique in which proportionality theory is adapted to a constitutional order that textually recognizes religious values and Pancasila as legitimate grounds of restriction, a structural feature distinguishing Indonesia from the secular jurisdictions in which proportionality doctrine was originally elaborated and from which comparative arguments are most frequently borrowed.

The urgency of this inquiry is further heightened by the enactment of Law No. 1 of 2023 on the Penal Code, whose Article 2 opens the door to recognizing “living law” as a basis for criminal assessment, a development that may expand the scope of morality- and custom-based restriction while simultaneously creating tension with the principle of legality, which demands legal certainty in criminal law (Hairi, 2017). Scholarship on the incorporation of customary norms into the penal system adds that constructing adat law as living law for the purpose of criminal conviction risks freezing its dynamic character while enlarging the state's discretionary reach (Utama, 2021), whereas studies of the National Penal Code as a whole read the reform as a deliberate shift toward substantive justice grounded in Indonesian socio-cultural values (Faisal et al., 2024). Work on morality- and religion-related offences within the same Code cautions, in turn, that indeterminately formulated provisions carry a risk of overcriminalisation that falls disproportionately on minority groups (Fernando et al., 2023).

That urgency is no longer merely prospective: the National Penal Code has been in force since 2 January 2026 (Law No. 1 of 2023, art. 624), and Article 414 now criminalizes same-sex indecent acts only where they are committed in public, accompanied by violence or the threat of violence, or disseminated as pornographic content (Law No. 1 of 2023, art. 414(1)), a

calibrated formulation whose constitutional evaluation requires precisely the kind of staged testing this article proposes. In practical terms, the absence of a clear proportionality standard renders constitutional adjudication difficult to predict, deprives legislative drafters of measurable criteria for formulating restrictions consistent with the principle of legality, and leaves citizens without a reliable basis for anticipating when their constitutional rights may lawfully be limited.

Against that background, this article addresses three research questions. The first concerns how the constitutional claim to human rights asserted by LGBT groups is constructed, and on what grounds it may be restricted through public morality, public order, and Pancasila values under the 1945 Constitution of the Republic of Indonesia. The second concerns how a proportionality test may be applied to assess the constitutional validity of restricting human rights in the name of public morality, public order, and Pancasila values. The third concerns how the methodology of constitutional adjudication might be reconstructed so that restrictions imposed in the name of public morality and Pancasila are neither applied arbitrarily nor dismissive of legitimate public interests.

Corresponding to those questions, this article aims to analyze the constitutional construction of LGBT-related human-rights claims and their grounds for restriction under the 1945 Constitution; to apply a structured proportionality test in order to assess the constitutional validity of such restrictions; and to formulate methodological recommendations for future constitutional adjudication. Theoretically, the article is intended to contribute to constitutional law scholarship by situating proportionality analysis within a Pancasila-based constitutional order, rather than transplanting it wholesale from secular jurisdictions. Practically, it offers the Constitutional Court a reasoning template that makes each stage of the balancing exercise explicit and traceable, and supplies the legislature with more measurable criteria for formulating restrictions on rights, including in operationalizing the living-law provision under Law No. 1 of 2023, so that public discourse on this issue may rest on verifiable constitutional argument rather than on unilateral normative assertion.

RESEARCH METHOD

This study employs normative legal research, which conceptualizes law as a system of norms examined through doctrinal legal analysis. The research applies four complementary approaches, namely the statutory approach, the conceptual approach, the case approach, and the comparative approach. The statutory approach is used to examine constitutional and legislative provisions governing human rights and constitutional limitations, while the conceptual approach analyzes legal doctrines relating to proportionality, constitutional rights, and constitutional interpretation. The case approach focuses on Constitutional Court Decision No. 46/PUU-XIV/2016 as the principal judicial reference, whereas the comparative approach reviews proportionality doctrines developed in foreign constitutional jurisprudence and the interpretations of the United Nations Human Rights Committee to provide comparative legal perspectives.

The study relies exclusively on secondary data obtained through library research. The legal materials consist of primary legal materials, including the 1945 Constitution of the Republic of Indonesia, statutory regulations, Constitutional Court decisions, and relevant quasi-judicial decisions; secondary legal materials, comprising books, scholarly journals, and

other academic publications discussing constitutional law, human rights, and proportionality; and tertiary legal materials, such as legal dictionaries and encyclopedias, which support the interpretation of legal terminology. The collection of legal materials was conducted systematically through literature review to ensure the relevance and consistency of the sources.

The collected legal materials were analyzed using a qualitative descriptive-analytical method. The analysis began with identifying and classifying relevant legal norms and constitutional principles, followed by interpreting and comparing those norms through the proportionality framework consisting of legitimate aim, suitability, necessity, and proportionality *stricto sensu*. The analysis was conducted objectively without presuming the superiority of either competing constitutional claim. Finally, deductive legal reasoning was employed to formulate conclusions addressing the research questions and to develop methodological recommendations for constitutional adjudication in the Indonesian legal system.

RESULTS AND DISCUSSION

Constitutional Construction: Human Rights Claims and the Limitation Clause of Article 28J of the 1945 Constitution

Human-rights claims asserted in Indonesia's LGBT discourse generally rest on three groups of constitutional rights. First, the right to protection of one's person, family, honor, dignity, and property under one's control, as guaranteed by Article 28G(1) of the 1945 Constitution, which has been interpreted by some constitutional scholars as encompassing protection of personal privacy. Second, the right to recognition, guarantee, protection, and equal treatment before the law under Article 28D(1). Third, the right to be free from discriminatory treatment under Article 28I(2). From this perspective, proponents of broader constitutional protection argue that these provisions collectively establish constitutional safeguards applicable to every individual regardless of personal characteristics and therefore require the state to justify any restriction through constitutionally acceptable reasoning. At the same time, another constitutional interpretation emphasizes that these rights are not expressly included among the non-derogable rights enumerated in Article 28I(1). Under this interpretation, because the rights relied upon in LGBT-related constitutional claims fall outside the exhaustive list of non-derogable rights, they remain constitutionally open to limitation through Article 28J(2), provided that any restriction satisfies constitutional requirements regarding legality, legitimate purpose, and proportionality.

The existence of these competing interpretations demonstrates that the constitutional issue cannot be resolved merely by invoking either human rights or constitutional limitation clauses in isolation. While one line of constitutional reasoning considers privacy, equality before the law, and non-discrimination as requiring heightened constitutional protection, another emphasizes the textual distinction established by Article 28I(1) and Article 28J(2), under which only a limited category of rights is immune from restriction. Consequently, the constitutional question is not whether either interpretation should automatically prevail, but how competing constitutional values should be balanced within the framework established by the 1945 Constitution. This article therefore proceeds on the premise that constitutional analysis requires a structured assessment of both rights protection and permissible limitation rather than reliance upon categorical constitutional assertions.

Against this background, Article 28J(2) becomes central not because it automatically validates every restriction imposed in the name of morality, religion, or public order, but because it establishes the constitutional basis upon which such restrictions must be evaluated. Recent doctrinal scholarship suggests that Article 28J(2) was drafted as a general balancing clause rather than as a fully structured proportionality provision. Consequently, the constitutional challenge lies not in determining whether limitations are permissible in principle, but in identifying an analytical method capable of assessing whether a particular restriction satisfies constitutional standards while preserving adequate protection for individual rights. This methodological concern provides the foundation for applying the proportionality framework developed in the following section.

Article 28J(2) of the 1945 Constitution is further elaborated in Articles 69, 70, and 73 of Law No. 39 of 1999 on Human Rights, which essentially restate that rights may only be restricted by law and solely for the purpose of guaranteeing the recognition and respect of the rights and freedoms of others, decency, public order, and the interests of the nation (Law No. 39 of 1999, arts. 69, 70, and 73). At the level of criminal law, this tension was concretely tested through the judicial review petition against Articles 284, 285, and 292 of the Penal Code in Constitutional Court Decision No. 46/PUU-XIV/2016, in which the Court declined to expand the scope of the indecency offenses on the ground that doing so amounted to open legal policy reserved for the legislature, not a matter within the Court's authority to decide by formulating new criminal offenses through adjudication (Constitutional Court Decision No. 46/PUU-XIV/2016, 2017). It bears emphasis that this reasoning rests on the principle of legality and on the limits of the Court's role as a negative legislator, not on any substantive assessment of the constitutionality of same-sex orientation or conduct as such. In other words, Decision No. 46/PUU-XIV/2016 should be read as a decision about who holds the authority to decide (the legislature, not the Court), not as a decision about what substantive outcome ought to be reached.

A recent development in positive law deserves attention here. Since 2 January 2026, the colonial-era Penal Code containing Articles 284, 285, and 292, the very provisions at issue in Decision No. 46/PUU-XIV/2016, has been fully replaced by the National Penal Code under Law No. 1 of 2023 (Law No. 1 of 2023, art. 624). The provision on same-sex indecency, formerly Article 292 of the old Penal Code and limited to acts committed against minors, has now been replaced by Article 414 of Law No. 1 of 2023, which specifically criminalizes same-sex indecent acts committed in public, accompanied by violence or the threat of violence, or disseminated as pornographic content (Law No. 1 of 2023, art. 414(1)). With this formulation, the legislature, in acting upon the open legal policy affirmed in Decision No. 46/PUU-XIV/2016, chose not to criminalize sexual orientation or private consensual conduct between adults of the same sex as such, but instead confined criminalization to conduct that genuinely disturbs public order, involves coercion, or exploits pornographic content. This legislative choice may be read as a concrete application of the suitability and necessity tests discussed in Section B: that the restriction necessary to protect public morality and public order need not take the form of blanket criminalization, but may instead be calibrated to conduct that genuinely affects the public interest, without thereby implying that the state recognizes or legitimizes same-sex relationships as a legally protected right.

The international dimension of this tension cannot be ignored. Indonesia ratified the ICCPR through Law No. 12 of 2005, which binds the state to respect the right to privacy (Article 17) and the principle of non-discrimination (Articles 2(1) and 26) as interpreted in the practice of the United Nations Human Rights Committee. This ratification carries the legal consequence that the interpretation of Article 28J(2) of the 1945 Constitution should ideally not be conducted in isolation from Indonesia's international obligations, even though the ICCPR itself recognizes a similar limitation clause for the sake of public morality and public order in a democratic society. In other words, both the national constitution and the international human-rights instruments Indonesia has ratified equally recognize that the rights to privacy and non-discrimination are not absolute, while both equally require that any restriction be tested for reasonableness rather than accepted merely on the basis of a stated purpose.

From a constitutional perspective, Indonesia's ratification of the ICCPR introduces an additional interpretative dimension. Supporters of broader rights protection often argue that constitutional provisions concerning equality, privacy, and non-discrimination should be interpreted consistently with Indonesia's international human-rights commitments. Conversely, constitutional scholars emphasizing Article 28J(2) maintain that international obligations must be implemented within the constitutional framework established by the 1945 Constitution, which expressly recognizes morality, religious values, and public order as legitimate grounds for limiting certain rights. These differing approaches illustrate that the constitutional debate concerns not only the existence of competing legal norms but also the methodology through which constitutional harmony between domestic constitutional provisions and international human-rights obligations should be achieved.

By way of comparison, a limitation clause of the kind found in Article 28J(2) of the 1945 Constitution is not unique to Indonesia. The post-apartheid South African Constitution, for instance, contains a similar limitation clause in Section 36, which explicitly requires examination of the nature of the right restricted, the importance of the purpose of the restriction, the relationship between the restriction and its purpose, and the availability of less restrictive means to achieve the same purpose, a formulation that adopts a far more explicit proportionality structure than Article 28J(2) of the 1945 Constitution (Lailam et al., 2024). This comparison reinforces the argument that the structural weakness of Article 28J(2) lies not in the existence of a limitation clause itself, commonly found in the constitutions of democratic states generally, but in the paucity of textual guidance on how such a restriction ought to be tested methodologically, leaving the task of filling that gap to the Constitutional Court through its adjudicative practice over time.

Proportionality as an Analytical Framework: Public Order, Public Morality, and Pancasila Values

To avoid an axiomatic and one-sided resolution of this tension, this article applies the structured proportionality framework commonly used in comparative constitutional adjudication, specifically the four-stage model applied in German, Canadian, and South Korean jurisprudence: the tests of legitimate aim, suitability, necessity, and proportionality *stricto sensu* (Lailam et al., 2024). That same comparative study finds that the Indonesian Constitutional Court's adjudicative practice concerning competing rights tends toward

unstructured balancing, rendering outcomes difficult to predict and prone to inconsistency across decisions, as illustrated by the Court's 2003 position that Article 28I(1) could not be restricted, contrasted with its 2007 position that the same article could be restricted under Article 28J(2).

At the **legitimate aim** stage, the question is whether public morality, public order, and Pancasila values constitute constitutionally legitimate purposes for restriction. In principle, the answer is affirmative: Article 28J(2) of the 1945 Constitution textually recognizes morality, religious values, and public order as legitimate purposes of restriction, consistent with similar recognition in international human-rights instruments such as the ICCPR, ratified by Indonesia through Law No. 12 of 2005. However, recognition of a legitimate purpose does not by itself justify every form of restriction invoked in its name. A study on the application of the public-order principle in the sealing of the GKI Yasmin church in Bogor found that the public-order principle, which ought to safeguard the basic tenets of the legal system, was instead instrumentalized by administrative authorities to violate human rights without adequate legal basis, thereby failing to serve its intended legal purpose (Damanik, 2018).

This finding offers an important methodological warning: constitutional recognition of a legitimate purpose must not end the inquiry at that stage alone, since abuse most often occurs at the stage of application, not at the stage of formulating the purpose. Research on religion-related restrictions in Indonesia points in the same direction, showing that constitutional review of morality- and religion-based limitations has tended to affirm the legitimacy of the stated objective without proceeding to examine, with comparable rigour, whether the measure adopted to pursue it was itself proportionate (Hasani & Halili, 2022).

The operation of this first stage may be illustrated through a hypothetical constitutional review. Suppose the legislature enacts a statute restricting certain forms of public conduct on the grounds of public morality and public order. At the legitimate aim stage, the Constitutional Court would first examine whether the objective relied upon by the legislature corresponds to one of the constitutionally recognized grounds enumerated in Article 28J(2). If the asserted objective falls outside those constitutionally recognized purposes, the restriction would fail at the outset. Conversely, where morality, religious values, or public order genuinely constitute the legislative objective, constitutional review proceeds to the next stage without presuming that the restriction is therefore automatically valid.

The GKI Yasmin case, however, cannot be treated as a direct analogy for concluding that every application of the public-order concept to LGBT issues is likewise arbitrary. A fundamental constitutional distinction separates the two cases: the freedom of worship at stake in the GKI Yasmin case is explicitly protected by Article 28E(1) and (2) of the 1945 Constitution and constitutes a direct manifestation of Pancasila's first principle itself, making its restriction against a religious community whose legal existence is recognized considerably harder to justify constitutionally. By contrast, claims to legal recognition of same-sex relationships lack an equivalent explicit textual anchor in the 1945 Constitution, and, as discussed in Section A, the rights underlying such claims are not classified as non-derogable rights. The concern over misuse of the public-order concept relevant to the GKI Yasmin case therefore cannot simply be generalized to conclude that restrictions imposed in the name of public morality and Pancasila on LGBT issues are likewise automatically invalid; the two cases proceed from different constitutional textual bases and require different tests.

At the suitability and necessity stage, the inquiry shifts to whether a given form of restriction, such as blanket criminalization of same-sex relationships or systematic exclusion from public life, is genuinely a suitable and necessary means of protecting public morality and public order, or whether a less restrictive alternative exists that achieves the same purpose. Comparative jurisprudence offers a relevant lesson here. At the suitability stage, constitutional review focuses on whether the chosen legal measure is capable of advancing the constitutional objective invoked by the legislature. For example, if a statutory restriction is intended to protect public order, the Court should examine whether the measure is logically connected with preventing concrete public disturbance rather than merely expressing moral disapproval.

At the necessity stage, the inquiry becomes more demanding by asking whether the same constitutional objective could reasonably be achieved through a less restrictive alternative. Where narrower regulatory measures are available and equally effective, broader restrictions would be difficult to justify under a structured proportionality analysis. Experimental research on judicial reasoning supports the weight placed here on the necessity stage, indicating that the level of protection a right receives differs materially according to whether review is anchored in a genuine search for less restrictive alternatives or proceeds directly to a final weighing of competing interests (Steiner et al., 2022).

In *Toonen v. Australia*, the United Nations Human Rights Committee found that Tasmania's criminal provision penalizing consensual same-sex conduct between adult men no longer satisfied the reasonableness test, partly because the provision had long gone unenforced, indicating that it was in fact no longer regarded as essential to the protection of morals in Tasmania itself, rendering the restriction arbitrary and in violation of the right to privacy and the principle of non-discrimination under the ICCPR (*Toonen v. Australia*, 1994, paras. 8.3–8.6). The methodological lesson from this case is not that criminalization can never be justified under any circumstances, but that constitutional review should explicitly examine whether the restriction remains suitable and necessary in light of its practical operation. In a structured proportionality analysis, a restriction that no longer contributes meaningfully to its stated constitutional objective, or where a less restrictive measure is equally capable of achieving that objective, would not satisfy constitutional review.

The *Toonen v. Australia* precedent, however, must be used with caution and cannot simply be transplanted into Indonesia's constitutional context, as is often done by LGBT-rights advocates in public discourse. First, the views of the Human Rights Committee issued through its individual-communication mechanism bind only states that have ratified the First Optional Protocol to the ICCPR; Indonesia, through Law No. 12 of 2005, ratified the ICCPR without ratifying that Optional Protocol, meaning such views carry no binding force on Indonesia and may serve only as comparative material, not as precedent Indonesia is obliged to follow.

Second, the Australian constitution and Tasmania's legal system contain no textual reference to religious values as a legitimate ground of restriction comparable to that explicitly set out in Article 28J(2) of the 1945 Constitution, so the reasonableness test applied by the Committee within that secular jurisdictional context cannot simply be equated with the test that ought to be applied within Indonesia's constitutional context, which deliberately places Belief in One Supreme God as Pancasila's first principle and recognizes religious values as one of the constitution's acknowledged grounds for restriction. Invoking foreign precedent without regard

to such differences in constitutional structure is a methodological error frequently found in the arguments of those advocating legal recognition of same-sex relationships in Indonesia.

At the **proportionality stricto sensu** stage, the question is whether the benefit obtained from the restriction is commensurate with the burden borne by the individual whose right is restricted. It is at this stage that Pancasila values are most often invoked as a weighty consideration in the balancing exercise. Comparative scholarship on proportionality practice in Indonesia notes that Pancasila values, the spirit of *Bhinneka Tunggal Ika*, mutual cooperation, and communal kinship inform the application of proportionality analysis in Indonesia, observing that the assessment of competing rights should not produce outcomes that prioritize individual-rights considerations contrary to the existence of religion as the foundation of society (Lailam et al., 2024).

This view is not merely one side of an argument carrying equal weight to any other, but an argument that is constitutionally more firmly grounded in the Indonesian context, given that the status of Belief in One Supreme God as Pancasila's first principle and the foundation of the state is not a mere collective preference on par with individual preference, but a *grundnorm* that animates the entire Indonesian legal system, including the interpretation of Article 28J(2) itself. In the *stricto sensu* balancing exercise, the burden borne by an individual as a result of a restriction consistent with religious values and public morality cannot simply be equated with an arbitrary human-rights violation, because such a restriction rests on a constitutional *grundnorm* collectively agreed upon as a nation, rather than on the unilateral will of a particular authority, as occurred in the GKI Yasmin case. At the same time, empirical work on religious attitudes in Indonesia indicates that firm religious conviction and the recognition of the freedoms of others coexist in more complex configurations than a simple opposition would suggest, which counsels against treating religious values and individual rights as inherently antagonistic at the balancing stage (Hakim et al., 2023).

Methodological caution remains necessary to ensure that concrete application does not exceed the bounds of lawful authority, but such caution does not alter the conclusion that Pancasila and public-morality values, as constitutional foundations in themselves, carry legitimate and significant weight in restricting rights grounded in derogable human-rights claims. From the foregoing four stages, it may be concluded that public morality, public order, and Pancasila values constitute constitutionally legitimate purposes worthy of consideration (satisfying the legitimate-aim test), but the validity of any concrete form of restriction, such as blanket criminalization, exclusion from public services, or unilateral dissolution of activities, cannot be automatically assumed from the legitimacy of that purpose alone, and must instead be further tested through the stages of suitability, necessity, and proportionality *stricto sensu*, which carefully account for the burden borne by the affected individuals or groups.

This four-stage framework deserves methodological emphasis because each stage performs a distinct checking function that cannot substitute for the others. The legitimate-aim test filters out grounds of restriction that are not constitutionally recognized at all, such as mere animus toward a particular group unconnected to any legitimate public interest. The suitability test asks whether the chosen means can genuinely achieve the claimed purpose, rather than being merely symbolic. The necessity test asks whether an equally effective but less restrictive alternative is available.

The proportionality *stricto sensu* test, meanwhile, performs the final balancing between collective benefit and individual burden. Failure at any single stage should result in a restrictive policy failing constitutional review, however legitimate its claimed purpose at the first stage. The fundamental weakness of unstructured balancing, as the Indonesian Constitutional Court has long displayed, is its tendency to leap directly from recognizing the legitimacy of a purpose at the first stage to a final conclusion, without explicitly and separately testing suitability, necessity, and proportionality *stricto sensu*, rendering the balancing process less transparent and its legal reasoning difficult for the public and litigants alike to trace.

At the balancing stage, the Constitutional Court would compare the constitutional importance of the public interest pursued with the degree of interference experienced by the affected individuals. A restriction that imposes extensive limitations on constitutional rights while producing only marginal public benefit would weigh against constitutional validity. Conversely, where the restriction demonstrably protects constitutionally recognized interests and is narrowly tailored to achieve that objective, the balance may favour its constitutionality. The decisive issue is therefore not whether one constitutional interest invariably prevails over another, but whether the relationship between the constitutional benefit and the resulting burden remains proportionate.

It should also be underscored that Pancasila values possess a dual character within Indonesia's constitutional construction: on one hand functioning as a ground for restriction, as discussed above, but on the other hand also serving as a source of human-rights protection itself, particularly through the second principle, “A Just and Civilized Humanity,” which affirms respect for the dignity of every human being without exception, and the fifth principle, “Social Justice for All the People of Indonesia,” which affirms the principle of justice for all citizens. This dual character means that Pancasila-based argumentation cannot be applied selectively, invoking only the principle that supports restriction while disregarding other principles that affirm the protection of dignity and justice for every citizen, including minority groups. A truly careful proportionality *stricto sensu* analysis should consider Pancasila in its entirety, as an interrelated whole, rather than isolating a single principle to justify a predetermined conclusion. This reading accords with scholarship situating Pancasila as a source of law that operates through constitutional adjudication rather than alongside it, so that its invocation in a decision carries the same demand for articulated justification as any other legal ground (Muttaqin et al., 2024).

Accordingly, the four-stage proportionality framework functions as a sequential analytical method rather than as a collection of abstract constitutional principles. Constitutional review begins by determining whether the legislative objective is constitutionally legitimate, proceeds to examine whether the chosen measure is suitable for achieving that objective, continues by evaluating whether a less restrictive alternative is reasonably available, and concludes by balancing the constitutional benefit obtained against the burden imposed upon individual rights. Only where all four stages are satisfied should a restriction be regarded as constitutionally justified under Article 28J(2). This sequential methodology enhances transparency and enables constitutional reasoning to be evaluated systematically rather than through broad and unstructured balancing alone.

Reconstructing the Methodology of Constitutional Adjudication: Toward a Structured Proportionality Test

Building on the analysis in the preceding sections, this article formulates four methodological recommendations for future constitutional adjudication. **First**, the Constitutional Court should consistently adopt a structured proportionality framework, rather than unstructured balancing, whenever it adjudicates cases involving tension between human-rights claims and restrictions grounded in Article 28J(2) (Dzadit, et al., 2025). This four-stage framework would compel the Court to explicitly justify each stage of its reasoning, including whether a less restrictive policy alternative exists that achieves the same purpose, making decisions more predictable and more resilient against criticism of inter-decisional inconsistency.

Second, given that Decision No. 46/PUU-XIV/2016 affirms that formulating a new criminal offense is a matter of open legal policy for the legislature, the formulation now in effect under Article 414 of Law No. 1 of 2023, which specifically criminalizes same-sex indecent acts committed in public, accompanied by violence, or bearing pornographic content, deserves to be maintained as a calibration model consistent with the principle of legality, rather than replaced by broader, more indeterminate blanket criminalization. Nevertheless, any future push to expand that scope, including through reliance on the “living law” provision in Article 2 of Law No. 1 of 2023, must still be formulated specifically and measurably, rather than broadly and indeterminately.

Scholarship on the tension between living law and the principle of legality warns that recognizing living law as a basis for criminal liability risks eroding the meaning of legality itself, since it opens the possibility of punishing conduct on the basis of norms not explicitly formulated in statute, thereby requiring a clear institutional mechanism, for instance through local regulations that must first be verified for consistency with Pancasila, the 1945 Constitution, and human rights, to avoid generating legal uncertainty (Hairi, 2017). Recent studies of the same provision arrive at a comparable conclusion, arguing that the prospects of living law under the 2023 reform depend on institutional mechanisms capable of rendering unwritten norms determinate enough for criminal application (Masyhar et al., 2025), and that its present formulation remains internally inconsistent unless supplemented by clearer criteria derived from Pancasila and the 1945 Constitution (Hardinanto et al., 2024).

Third, stricter oversight mechanisms are needed over the application of the public-order and public-morality concepts by administrative authorities at the implementation level, given empirical experience showing that these concepts are prone to arbitrary instrumentalization outside any lawful framework (Damanik, 2018). Comparative constitutional scholarship reinforces the point by stressing the importance of identifying occasions on which constitutional forms and vocabularies are deployed for ends at variance with the constitutional order itself, a concern that strengthens the case for independent review of administrative measures taken in the name of public order (Petrov, 2024). Such oversight may be achieved through strengthening the role of the administrative courts and the National Commission on Human Rights in reviewing administrative actions taken in the name of public order, so that the concept genuinely functions to safeguard the basic tenets of the legal system as intended, rather than serving as a pretext for action that in fact exceeds lawful authority.

These four recommendations, if applied consistently, would place the resolution of tension between LGBT-related human-rights claims and their restriction on grounds of public morality, public order, and Pancasila values within a more disciplined, transparent, and methodologically accountable constitutional framework. This framework is deliberately not aimed at axiomatically vindicating either claim, but at ensuring that whoever argues, whether in the name of human rights or in the name of public morality and Pancasila, is required to construct their constitutional argument through rigorous and verifiable testing, rather than through unilateral normative assertion.

Fourth, beyond the realm of formal adjudication, strengthening constitutional legal literacy among the wider public, including law students and civil-society organizations across the spectrum of views, is an important precondition so that public discourse on this issue no longer rests on the simplifying axiom of “human rights versus morality,” but instead moves toward a discourse that better appreciates the genuine complexity of constitutional review. The widespread misunderstanding of Constitutional Court decisions, as seen in the public's misreading of Decision No. 46/PUU-XIV/2016 as legalizing certain conduct when the decision in fact concerned only the limits of the Court's authority, reveals a gap in constitutional legal literacy that must be addressed through legal education emphasizing the methodology of constitutional reasoning, rather than the mere memorization of norms or the drawing of purely political conclusions.

It should be emphasized that the four recommendations above are not intended to guarantee certainty as to how any given concrete case will be decided, since that will always depend on the specific facts and context of each case. The value of a structured proportionality framework lies not in the certainty of the outcome, but in the discipline of the reasoning process that precedes it. A decision that applies a structured proportionality test honestly and thoroughly, even if it ultimately reaches a conclusion restricting a particular right, is more constitutionally defensible than a decision that restricts a right directly without staged testing, even where the final conclusion is identical. This is precisely what distinguishes a constitutionally valid restriction of human rights from an arbitrary one: not the outcome alone, but the legal reasoning process that underlies it.

CONCLUSION

This study demonstrates that LGBT-related constitutional rights claims in Indonesia cannot be treated as absolute because the rights commonly invoked, namely privacy, equality before the law, and protection from discrimination, are not classified as non-derogable rights under Article 28I(1) of the 1945 Constitution and therefore remain subject to limitation under Article 28J(2). The findings further show that public morality, public order, religious values, and Pancasila constitute constitutionally legitimate objectives, but their application must be examined through a structured proportionality test comprising legitimate aim, suitability, necessity, and proportionality *stricto sensu*.

Rather than relying on unstructured balancing, this framework offers a more transparent and methodologically accountable approach to constitutional adjudication. Accordingly, the study recommends the consistent application of structured proportionality review by the Constitutional Court and legislators so that future restrictions on constitutional rights are

assessed through clear, sequential, and constitutionally verifiable reasoning consistent with Indonesia's Pancasila-based constitutional order.

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