

Criminalization Of Same-Sex Intercourse In Indonesia

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Abstract: *Criminalization policy becomes a State's authority that is exercised before conducting authority to determine criminal sanctions for prohibited acts. To study whether or not same-sex intercourse by fellow adults to be criminalized, the basis of study is approaches used in criminalization policies that are value and policy approaches. In this case, a value approach is a value of communities' decency and the philosophy adopted by the State which will criminalize the act. While, a policy approach are done by considering the costs or burdens borne by the community with the results to be achieved. The purpose to criminalize obscene, gay, and homosexual acts as well as other forms of same-sex intercourse is to protect the community, in this case public order in moral conduct because such actions are not in accordance with the values of Pancasila and the customs of the Indonesian people that adhere to religio-magical.*

Keywords: *Criminalization; Criminal Law; Public Interest; Same-Sex Intercourse*

1. INTRODUCTION

In many places around the world, sexual acts between persons of the same sex have been criminalized for centuries.¹ Over this time period, the dominant discourse on sexuality moved from strategically linking normative gender with heterosexuality and marriage to direct attempts to legislate heterosexual marriage by criminalizing a wide range of sexual practices.²

A review of law constitutionality concerns a review of law constitutionality value, both formal and material. Material review is a review of material contained in the law, while review for its establishment is formal review.³ However, if seeing for all petitions, this petition does not intend to review some provisions of Criminal Code to the constitution, but rather to broaden the interpretation of provisions of Criminal Code. Specifically for the provisions of Article 292 of the Indonesian Criminal Code, the Petitioner requests that same-sex intercourse can be expanded not only by adults towards children, but also against fellow

¹ Hildebrandt, A. (2014). Routes to decriminalization: A comparative analysis of the legalization of same-sex sexual acts. *Sexualities*, 17(1-2), 230-253.

² Blackwood, E. (2007). Regulation of sexuality in Indonesian discourse: Normative gender, criminal law and shifting strategies of control. *Culture, Health & Sexuality*, 9(3), 293-307.

³ Asshidiqie, J. (2005). *Hukum Acara Pengujian Undang-Undang*. Jakarta: Setjen dan Kepaniteraan MKRI. pp.57-58

adults. Based on this, the panel of judges in the petition rejected the petitioner's petition on the basis that the Constitutional Court did not have the authority to make or add new norms.⁴

Post-decision of the Constitutional Court No. 46/PUU-XIV/2016, there was a debate. Some parties consider that with the ruling, the Constitutional Court legalized adultery and acknowledged the existence of lesbians, gays, homosexuals and trans-gender. The Constitutional Court explained that the decision was not legal, but rather that the realm of criminal policy was not in the Constitutional Court, but was in the legislators, namely the President and the parliament.⁵ One of the articles petitioned for judicial review in the case was Article 292 of the Criminal Code. In Article 292 of the Criminal Code, the prohibited crime is committing obscene acts with other people of same-sex who are not yet mature.⁶ Based on the provisions of Article 292 of the Criminal Code, the object of obscene acts in this crime is a person who is not yet an adult. The fact is that same-sex intercourses do not only occur to children by adults, but also by fellow adults known as gay, lesbian or homosexual.

In a criminological perspective, these acts are categorized as social deviant behavior related to sexual objects. From a health perspective, deviant sexual behavior is also one of the behaviors that are susceptible to HIV-AIDS virus. Data from the Ministry of Health of the Republic of Indonesia in 2016 showed that there were 41.520 HIV-AIDS cases reported. Positive-HIV sufferers due to homosexual relations were 26.1%, while AIDS sufferers that are caused by homosexual relationships were 15.8%.⁷ This number is predicted to increase considering that gay, lesbians and homosexuals are increasingly opening up, daring to admit that they are gay where they deliberately choose such a lifestyle because they are considered not to disturb others.⁸

People who conduct this claimed that it is a right to sexual choice as other adults who have intercourse with heterosexual. Moreover, such life choices are considered not to disturb others. Therefore, they reject the criminalization of this act in the Draft Bill of the Criminal Code. Euis Sunarti, Rita Hendrawaty Soebagio, and friends who filed a constitutionality review at the Constitutional Court of the Republic of Indonesia for several articles in the Criminal Code that govern crimes against decency, one of which is the provision of Article 292 of the Criminal Code in case 46/PUU-XIV/2016, precisely postulating that by not including same-sex intercourse committed by fellow adults in Article 292 of the Criminal Code causes adults who are victims of same-sex intercourse not get protection. Certainly, this is contrary to the right to security as regulated in Article 28G of the 1945 Constitution of the

⁴ Ilyas, A., Arisaputra, M.I., Aspan, Z., Bakar, D.U.M., Arifin, A., and Yunus, A. (2020). Omnibus Law in Natural Resource Management: Challenges and the Future Prospect, *Journal of Critical Reviews*, 7 (19): 879-884

⁵ Kompas. *Penjelasan MK Soal Tuduhan Putusan yang melegalkan Zina dan LGBT*. An article of <https://nasional.kompas.com/read/2017/12/18/20155601/penjelasan-mk-soal-tuduhan-putusan-yang-melegalkan-zina-dan-lgbt>

⁶ Ayuni, Q. (2017). Judicial Review of Criminal Code Articles on Adultery, Rape and Same-Sex Obscene in Indonesia Constitutional Court. In *1st International Conference of Law and Justice-Good Governance and Human Rights in Muslim Countries: Experiences and Challenges (ICLJ 2017)*. Atlantis Press.

⁷ The Profile of Indonesian Health 2016, The Ministry of Health of the Republic of Indonesia, p.161, source: <http://www.depkes.go.id/resources/download/pusdatin/profil-kesehatan-indonesia/Profil-Kesehatan-Indonesia-2016.pdf>

⁸ Sindo News, *LGBT Makin Terbuka, Jumlah Homoseksual Di Indonesia Makin Meningkat*, an article on <https://metro.sindonews.com/read/1207367/171/lgbt-makin-terbuka-jumlah-penganut-homoseksual-di-indonesia-meningkat-1495508852>

Republic of Indonesia.⁹ This party actually supports the criminalization of same-sex intercourse committed by fellow adults (homosexual) in the Draft Bill of the Criminal Code.

In the Draft Bill of the Criminal Code, the same-sex intercourse is regulated in Article 420. However, as of this writing the Draft Bill of the Criminal Code has not been ratified into law and the provisions of the article are still being debated. The debate on this subject will certainly not end if only based on the ego and the will of each individual without regard to the interests of society at large. It is also necessary to consider the moral values of the Indonesian people who are well-known for their diverse cultures to be the basis for drafting the norms in the Draft Bill of the Criminal Code, especially to determine whether the same-sex intercourse deserve to be criminalized as criminal acts or not. Based on this consideration, it is necessary to study the criminalization of same-sex intercourse which can be viewed in terms of legal and moral norms that apply in Indonesian society.

2. METHOD

The method of research used is a normative-juridical research, by using statute and conceptual approaches. The legal material used in this study is primary legal material consisting of legislation related to the research issue, while secondary legal material is obtained from literature, magazines, and information, both print and electronic media that supports this research. The collection of legal materials is done through library research that begins with an inventory, classification, and systematization of legal materials.

Criminal Legal Policy: Criminalization of Same-Sex Intercourse

Legal policy or official line for the law that will be enforced either by making new laws or changing old laws in order to achieve the goals of the State.¹⁰ Discussing the criminal legal policy is actually a discussion of criminal policy. Whereas, criminal policy is cannot be separated from the term “*criminalization*”.¹¹ In general, the definition of criminalization is a process to make an act as a crime, so that it can be prosecuted and then provide sanctions.

Based on the definition of criminalization, the scope of criminalization is not only related to the determination of acts which were not originally prohibited acts, then became prohibited accompanied by the threat of certain sanctions, but also related to the imposition of criminal sanctions against existing criminal acts. Criminalization can also be formulated as matters which become the basis or reasons for the legislators to determine a crime.¹² Every time the legislator will declare an act as a crime or an act will no longer be seen as a criminal offense, they must state the motives and reasons for the propriety of that action. Thus, the determination of an action to be a criminal act or called criminalization must be based on motives and reasons so that it is appropriate to be accepted or oriented towards a policy approach.

To conduct a criminal policy must consider that the policy is an integrated part of national development. Criminal policy must be done with a policy approach in the sense that criminal policy is part of the overall social policy and there must be integration between efforts to tackle crime by using penal and non-penal means.

⁹ Petitioner’ argument for the constitutionality review of Article 292 of the Criminal Code in case No. 46/PUU-XIV/2016. Quoted from the minutes of the Constitutional Court decision No. 46/PUU-XIV/2016, pp. 49-71

¹⁰ Mahfud MD. (2009). *Politik Hukum di Indonesia*. Jakarta: PT. Raja Grafindo Persada, p. 1.

¹¹ Sudarto. (2006). *Kapita Selekta Hukum Pidana*. Bandung: Alumni. p. 93.

¹² Joshua, A. S. (2020). Boko Haram Terrorism and a Threat to Right to Education. *Hasanuddin Law Review*, 6(2), 149-164. doi: <http://dx.doi.org/10.20956/halrev.v6i2.2019>

Criminalization policy is determining an action that was not a criminal offense (not convicted) into a criminal act (an act that can be convicted). It is a State authority that is exercised before exercising the authority to determine criminal sanctions for prohibited acts. The results of the National Criminal Law Renewal Symposium in August 1980 stated that the general criteria for the determination of an act to be a criminal offense were the deserving of the act (damaging or bringing victims) and the aim of criminalization to be achieved in balance with the costs and burdens of law enforcement in upholding the law the act.¹³ Therefore, the approach used in conducting criminalization is policy and value approaches. A value approach is used because crime is a humanitarian and criminal problem and it contains elements that can attack the interests or values most valuable to human life. While, a policy approach are used so that the determination of the act becomes a rational crime. The both approaches are not separated, but are used altogether.¹⁴

In the Draft Bill of Criminal Code, the prohibition of same-sex intercourse is regulated in Article 420. This provision expands the provisions stipulated in Article 292 of the Criminal Code which only regulates same-sex intercourse as committed by adults against children. In the provisions of Article 420 paragraph (1) of the Draft Bill of Criminal Code, it is determined that committing obscene acts against other people (interpreted as children or adults) of different or same-sex, with the following provisions:

- a. If commit in public, then the punishment is 1 (one) year 6 (six) month imprisonment or a maximum fine of Category III
- b. If commit with violence or threats of violence, the punishment is a maximum prison sentence of 9 (nine) years.
- c. If it is published as pornographic content, it will be subject to a maximum imprisonment of 9 (nine) years.

If seeing these provisions, the Draft Bill of Criminal Code conducts a criminalization policy of same-sex intercourse by fellow adults with restrictions not in public, not with violence or threats of violence, and/or not published as pornographic content. Thus, if commit voluntarily and not in public and not published, then it cannot be convicted.

To assess the need for same-sex intercourse by fellow adults to be criminalized, the basis of study is approaches used in the criminalization policy, namely value and policy approaches. A value approach is a value of society's decency and philosophy as adopted by the State which will criminalize the act. Countries that consider homosexuality a very despicable act based on their philosophical values not only criminalize these acts, but even threaten the death penalty for anyone who commits homosexuality. These countries include Saudi Arabia, Afghanistan, Iran and Sudan. But there are also countries that even legalize homosexual marriage on the basis of the choice of intercourse as a human right, such as Britain.

Indonesia itself adheres to the philosophy of Pancasila, one of its foundations being the First Principle "Almighty God". From the aspect of the God, the indicator of despicable for act is religious values. For Muslims, the prohibition of homosexuality is emphasized in Q.S. Ash-Syuara:165-166. Then, in Christian teaching, in the Bible, Matthew 15:19, Mark 7:21, and Messenger Story 15:20 and 29 are interpreted as a prohibition on homosexual behavior. In Buddhist teaching, Bhikku Uttamo Mahathera explained that homosexual behavior includes

¹³ Arief, B.N. (2010). *Bunga Rampai Kebijakan Hukum Pidana Perkembangan Penyusunan Konsep KUHP Baru*. Jakarta: Kencana Prenada Media Group. p. 32

¹⁴ *Ibid.* pp. 37-38

violating the Third Principle, by committing immoral acts which means to satisfy deviant sensual desire.¹⁵

In a criminological perspective, homosexuals are categorized as sexual deviant behavior related to sexual objects.¹⁶ This behavior has a potential to give rise to social impacts or crime, for example murder of a partner of his/her homosexuality. A culture that developed in Indonesian society is often referred to as eastern culture. This is a differentiator between western and eastern cultures. Eastern culture generally make taboo sexual relations without being based on marriage ties, while western culture considers that the marriage is merely a formality that does not need to be done for sexual intercourse. In addition, moral values of Indonesian society in general are derived from religious teachings that have developed in Indonesia. As explained earlier, none of the religions in Indonesia legalize same-sex intercourse. Thus, the same-sex intercourse is not an act that can be justified in Indonesia.

The soul of Indonesian people can be seen at least from the customs or habits that are incarnated in customary law and Pancasila. The soul of nation that is incarnated to the Pancasila by the legislators is accommodated by the proclamation of Pancasila as source of all sources of State law. Even the context of criminalization of obscene acts committed by same-sex couples must be seen from the value of the soul of nation where this act can make values contained in Pancasila be ruled out, especially the values in the first principle of the Pancasila "*Almighty God*". Such act will obscure the values that are the spirit of national law development.

In terms of customs or habits incarnated in customary law, one of the forms of customary law is Indonesia is *religio-magical* in which legal behavior or legal rules are related to belief in the disappear and based on Almighty God. Such customary law patterns are the spirit of Indonesian people in behaving in law. Therefore, it is only proper if there is a rejection from the community against homosexual activity, including obscene by same-sex couples.

In a perspective of human rights, gays and homosexuals consider that their conduct is one of the basic rights that needs to be protected, namely the right to sexual choice.¹⁷ However, it is necessary to consider religious values and specifically the moral values of Indonesian society. There is not a single religious teaching in this world that legalizes the act of same-sex intercourse, even prohibiting such acts. The value of ethics of Indonesian society that is culturally diverse also does not justify such actions, even these actions are considered as deviant behavior. Based on this consideration, the act of same-sex intercourse needs to be regulated in the Draft Bill of Criminal Code as a criminal act.

Von Savigny¹⁸ said that humans in this world consist of various nations and each nation has its own national soul which is called "*volkgeist*", the soul of this nation is different from one another according to place and time. The spirit or soul of the nation is incarnated in language,

¹⁵ Sulistiani, S.L. (2016). *Kejahatan dan Penyimpangan Seksual Dalam Perspektif Hukum Islam dan Hukum Positif Indonesia*. Bandung: Nuansa Aulia. pp. 33-34

¹⁶ Sexual deviance is defined as sexual behavior that shows sexual instinct that deviates from one or more of three elements of normal sexual instinct. The three elements are normal sexual energy, different adult human objects, and ways of normal sexual. See in T.B. Roni Nitibaskara. *Penyimpangan Seksual dan Kejahatan Seksual: Suatu pendekatan multidisipliner Kriminologi*. Training Materials in Law and Criminology II, Mahupiki and Faculty of Law, Pelita Harapan University, Surabaya.

¹⁷ Panditaratne, D. (2016). Decriminalizing Same Sex Relations in Asia: Socio-Cultural Factors Impeding Legal Reform. *Am. U. Int'l L. Rev.*, 31, 171.

¹⁸ Manan, A. (2005). *Aspek-aspek Pengubah Hukum*. Jakarta: Prenada Media; Erfa, R. (2015). Kriminalisasi Perbuatan Cabul Yang Dilakukan Oleh Pasangan Sesama Jenis Kelamin. *Jurnal Arena Hukum*, 8 (2): 241

customs and social organizations. The soul of the nation is not static always changes according to the condition of the people from time to time.

The ideas as argued by Von Savigny above can be the basis for certifying that each country has its own peculiarities regarding their laws, because each nation has a different soul from another nation so that the legal structure between one country and another will be different, including in this case related to the regulation of same-sex intercourse. In Indonesia, the legal problem is not only about legal issues, but also about socio-cultural issues and the soul of the nation which can at least be reflected in the basis and ideals of State law.

In the context of human rights, the State does have an obligation to meet the human rights needs of all Indonesian citizens without differentiating ethnicity and religion including minorities and vulnerable groups, in this case gays and homosexuals. However, what needs to be understood is that the guaranteed protection for gays and homosexuals is the protection of their human rights in the form of health insurance to recover from their illnesses, as stated in Article 25 of DUHAM which stipulates that:

Everyone has the right to an adequate standard of living for the health and well-being of her/himself and her/his family, including the right to food, clothing, housing and health care as well as the necessary social services, and is entitled to guarantees when unemployed, suffering from illness, disability, being widowed/widower, old or other conditions that result in lack of income, which is beyond her/his control.

Other considerations are the provisions of Article 29 paragraph (1) and (2) of DUHAM which stipulates that:

- (1) Everyone have obligation to the community in which he/she can develop his/her personality freely and fully.
- (2) In exercising their rights and freedoms, each person must submit only to the limitations imposed by the law whose sole purpose is to guarantee the recognition and proper respect of the rights and freedoms others and to fulfill fair conditions in terms of decency, order and public welfare in a democratic society.

The provisions of Article 29 paragraph (1) and (2) of DUHAM as mentioned above are also adopted in Article 69 of Act No. 39 of 1999 concerning Human Rights which stipulates that:

- (1) Everyone is required to respect the human rights of others, morals, ethics, and the order of life in a society, nation and state.
- (2) Every human right creates a basic obligation and responsibility to respect the rights of others reciprocally and it is the duty of the government to respect, protect, uphold and promote it.

As described above, it is clear that homosexuality is a despicable act and is not in accordance with the values of society. However, not all actions that are denounced and contravene the values of society need to be criminalized. Another indicator to measure an act that deserves to be criminalized is a policy approach. This approach is a rational approach, and to balance the concepts of crime and power or emotionally determined criminalization processes. This approach is also closely related to the economic approach, which is to consider the costs or burdens borne by the community with the results to be achieved.

Based on the approach, if it is related with homosexuality, the purpose to criminalize the act is community protection. In this case, the public order in the field of ethics. The burden or costs that must be prepared if criminalizing include the readiness of law enforcers to enforce

this regulation and the provision of detention centers and correctional institutions and the infrastructure that follows if criminalization is followed by the threat of imprisonment. It should also be noted that efforts to tackle crime do not only depend on efforts to prosecute or use criminal law, one of which is criminalizing an act. The use of criminal sanctions in dealing with crime is compared only as a symptomatic treatment that only treats the symptoms of the crime, and not a causative treatment that heals from the cause of the crime. The crime prevention strategy must be based on eliminating the causes and conditions that give rise to crime.

Therefore, the threat of imprisonment or confinement for homosexual acts if criminalized is certainly not appropriate. This is because homosexual acts are sexual deviations that cannot be dealt with by imprisoning perpetrators in prison or by paying criminal fines. Treatment efforts are needed, especially psychological treatment efforts so that this deviant behavior is not repeated.

3. CONCLUSION

In a value approach, homosexual should be criminalized because these actions are considered despicable in the values of the Indonesian moral. However, with a policy approach, there are a number of things that need to be considered, namely the burden and costs of law enforcement, rule enforcement, and the ineffectiveness of the types of crimes that are threatened with handling these homosexual if criminalized by imprisonment, confinement, or fines. Obscene, gay, and homosexual as well as other forms of sexuality intercourse are categorized as forms of sexual perversion and even become a disease of society because it is not in accordance with the moral values of the Indonesian nation based on Pancasila. The suggestion, if it is necessary to be criminalized, the formulation of a criminal act for homosexual as Article 420 of the Draft Bill of Criminal Code is appropriate given that not all forms of homosexual are criminalized, but the criminal threat needs to be changed so that it can effectively rehabilitate the deviation of the offender.

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