



## Dualism Criminalization of Homosexual Actions

Moh. Rifky Yunus<sup>1</sup>, Dian Ekawaty Ismail<sup>2</sup>

<sup>1</sup> Faculty of Law, Universitas Negeri Gorontalo, Indonesia. E-mail: [rifkyyunus0@gmail.com](mailto:rifkyyunus0@gmail.com)

<sup>2</sup> Faculty of Law, Universitas Negeri Gorontalo, Indonesia. E-mail: [dian.ismail@ung.ac.id](mailto:dian.ismail@ung.ac.id)

**Abstract:** This study discusses the criminalization of homosexual acts. This research uses normative legal research. It is legal research that places law as a building system of norms. The system of norms built includes principles, norms, rules of law, court decisions, agreements, and doctrines (teachings). The author finds the conclusion in this study that the legal vacuum regarding the regulation of same-sex sexual relations is something that we must pay attention to because the absence of laws governing this matter is a matter that is very urgent for the government to review and must make arrangements as soon as possible. Detailed and clear so that it is precise and easy to implement by law enforcement officials.

**Keywords:** Homoseks; Criminalization; Dualism.

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## 1. Introduction

Homosexuality is no longer taboo in human life in this era. There are lots of problems or issues that arise due to lesbians, gays, bisexuals, and transsexuals (after this, referred to as lgbt), such as issues regarding the legalization of same-sex marriage, the spread of sexually transmitted diseases (after this referred to as STDs) by lgbt people, to cases that give rise to religious issues.<sup>1</sup>

Those who disagree with homosexuality think that homosexuality is an insult to nature and cannot be protected or included in the description of human rights.<sup>2</sup>

In Indonesian law, human rights have limits, where individuals may not violate the norms/values of religion, decency, public order, or security in order to realize the protection of human rights itself.<sup>3</sup> Protecting human rights guaranteed in the Constitution is an obligation for the state,<sup>4</sup> this is due to the development of the times, such rights also develop.<sup>5</sup> However, there are still limits to norms that need to be obeyed. Indonesia is not a country that bases religion based on the state. However, the first precept, which reads "Belief in the One and Only God," illustrates that Indonesia recognizes the existence of religious values/influences.<sup>6</sup>

The factors that cause sexual deviation, according to Kartini Kartono in her book entitled "*Psikologi abnormal dan abnormalitas seksual*" are as follows:<sup>7</sup>

a. Genetic Factors.

This factor is caused by genetic elements formed due to a lack of the male hormone testosterone and the female hormone estrogen. The lack of this hormone causes differences in behavior for an individual, and this is because hormones are the cause of encouragement that makes a person act according to the sex he has.

b. Occurrence in Childhood, Puberty, and Adolescence Factors.

This factor is caused by external factors (events) during the growth and development of a child, such as a child who experienced sexual abuse or

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<sup>1</sup> Nurul Astifah, "Pencegahan Penyebaran Hiv/Adis Melalui Penguatan Budaya," *Jurnal Humanity* 6, no. 2 (2011), 2.

<sup>2</sup> Kuku Prima, Usman Usman, and Herry Liyus, "Pengaturan Homoseksual Dalam Hukum Pidana Indonesia," *PAMPAS: Journal of Criminal Law* 1, no. 3 (2020): 92–105, 92.

<sup>3</sup> Dian Ekawaty Ismail and Yowan Tamu, "Upaya Perlindungan Hak-Hak Tersangka/Terdakwa Melalui Mekanisme Praperadilan Di Kota Gorontalo," *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 21, no. 1 (2009): 81–92, 83.

<sup>4</sup> Ahmad Ahmad and Novendri Mohamad Nggilu, "Denyut Nadi Amandemen Kelima UUD 1945 Melalui Pelibatan Mahkamah Konstitusi Sebagai Prinsip the Guardian of the Constitution," *Jurnal Konstitusi* 16, no. 4 (2020): 785–808, 788.

<sup>5</sup> Lisnawaty Badu, "Euthanasia Dan Hak Asasi Manusia," *Jurnal Legalitas* 5, no. 01 (2012), 3.

<sup>6</sup> Prima, Usman, and Liyus, "Pengaturan Homoseksual Dalam Hukum Pidana Indonesia, 93."

<sup>7</sup> Kartini Kartono, *Psikologi Abnormal Dan Abnormalitas Seksual* (Bandung: CV. Mandar Maju, 1989), 21.

witnessed sexual deviation practices in his environment, which eventually led to sexual deviation.

c. Early education factors.

This period is a very vulnerable period for the growth and development of a child susceptible to a form of deviation that can affect the child's psychology. At this time, children rarely offer resistance when someone is indecent towards them if the child does not know this matter because their parents or guardians give no sex education. Furthermore, the lack of sex education provided by the child's parents or guardians causes a child not to know the concept of this sexual deviance. This makes the child not know what actions are sexual deviations and which are not.

Almost all social systems around the world reject this because it is considered to violate legal and customary religious norms. The homosexual phenomenon in recent years has generated several controversies among various groups of people in Indonesia. This problem was triggered by several things, for example, demonstrations by Indonesian citizens who wanted the Indonesian government to reject the acceptance of this same-sex relationship.<sup>8</sup>

In Indonesia, homosexual behavior crosses the boundaries of age, occupation, economy, and even religion.<sup>9</sup> This has led to rejection from the majority of Indonesian people because of the many problems arising from this deviation of sexual orientation. Society's rejection is based on the reason that homosexual behavior is contrary to the moral values contained in the life of Indonesian society.<sup>10</sup>

Furthermore, there are a lot of bad impacts arising from this same-sex sexual behavior activity, one of which is from the health side, which causes people to reject this behavior. The Ministry of Health stated that when two people of the same sex commit a sexual act, it causes various health problems, from cancer to sexually transmitted diseases (After this, referred to as STD). STD is one of the most feared impacts that will have a bad effect on the Indonesian nation, and this is because STD can have an impact on several generations. After all, STD is

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<sup>8</sup> Sari Nur Azizah, "Konsep Diri Homoseksual Di Kalangan Mahasiswa Di Kota Semarang (Studi Kasus Mahasiswa Homoseksual Di Kawasan Simpanglima Semarang)," *Journal of Nonformal Education and Community Empowerment* 2, no. 2 (2013), 3.

<sup>9</sup> Wa Ode Nurul Yani, "Realitas Pelacuran Pemandu Lagu," *DIALEKTIKA* 6, no. 1 (2019): 95–109, 96.

<sup>10</sup> Roby Yansyah and Rahayu Rahayu, "Globalisasi Lesbian, Gay, Biseksual, Dan Transgender (Lgbt): Perspektif HAM Dan Agama Dalam Lingkup Hukum Di Indonesia," *Law Reform* 14, no. 1 (2018): 132–46, 134.

inherited through genetics, which can result in offspring. If individuals with STD have children, then their parents can inherit the PMS due to genetic factors.<sup>11</sup>

The author's abovementioned threat is even more real if we look at data from the lgbt population in Indonesia. Based on data released by the Ministry of Health, the number of homosexuals is estimated at more than 1 () million people. This is increasingly creating a real threat because the number of perpetrators of homosexual deviation is quite a lot.<sup>12</sup>

The community's rejection is also since the majority of the public believes that there is a legal vacuum governing homosexuality which causes homosexual behavior not to be punished criminally. Until now, homosexual behavior committed by adults has not been specified or regulated clearly in Indonesian regulations.<sup>13</sup>

The prohibition against homosexuals referred to in the two articles, namely article 292 of the Criminal Code and article 494 of the Criminal Code, means that homosexual behavior, whether male/male (Gay/Liwath) or female/female (Lesbian/Musahaqah), is explained that this cannot be classified as an act that can be punished, if both are adults, that is, at least 18 (eighteen) years old and carried out with the consent.<sup>14</sup>

In essence, this cannot be accepted/prohibited because it does not reflect religious, moral, cultural, or natural values as humans who grow and live in society. The meaning of the absence of regulation on this matter can be drawn to an understanding that indirectly, Indonesia justifies this matter. Of course, this cannot be allowed because this matter is urgent, and there must be regulation.

## 2. Research Method

Normative legal research is legal research that places law as a building system of norms. The system of norms built includes principles, norms, rules of laws and regulations, court decisions, agreements, and doctrines (teachings).<sup>15</sup> More about normative legal research, namely research with an object of study on legal rules

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<sup>11</sup> Ade Septia Lumbangaol, Hernawilly Hernawilly, and Gustop Amatiria, "Konsep Diri Pada Wanita Pekerja Seksual Yang Mengalami Penyakit Menular Seksual," *Jurnal Ilmiah Keperawatan Sai Betik* 10, no. 2 (2017): 190–196, 191.

<sup>12</sup> Rita Damayanti, *Pandangan Lesbian, Gay, Dan Biseksual (LGB) Terhadap Status Gender Dan Persamaan Hak Asasi Manusia Di Jakarta, Bogor, Depok, Dan Tangerang* (Jakarta: Kementerian Pemberdayaan Perempuan Dan Perlindungan Anak dan Pusat Penelitian Kesehatan Universitas Indonesia, 2015), 2.

<sup>13</sup> Ranny Intan Rafli, Nur Rochaeti, and Dyah Wijaningsih, "Perlindungan Hukum Bagi Pekerja Rumah Tangga Perempuan Korban Tindak Kekerasan," *Diponegoro Law Journal* 5, no. 3 (2016): 1–26, 2.

<sup>14</sup> Djubaedah. Neng, *Perzinaan Dalam Peraturan Perundang – Undangan Di Indonesia Ditinjau Dari Hukum Islam* (Jakarta: Kencana Prenada Media Group, 2010), 58.

<sup>15</sup> Mukti Fajar and Yulianto Achmad, *Dualisme Penelitian Hukum Normatif Dan Empiris*, IV (Yogyakarta: Pustaka Pelajar, 2017), 33.

or regulations. Normative legal research examines legal rules or regulations as a building system related to a legal event. This research was conducted to provide legal arguments for determining whether an event was right or wrong and how appropriate the event was according to the law.<sup>16</sup>

### 3. The Urgency of Criminalizing Homosexuality

The criminalization of same-sex (homosexual) sexual acts is mandatory for the House of Representative and the Government to serve as a basis for law enforcers to convict homosexual offenders in Indonesia. Article 5 Law no. 12 of 2011 concerning the formation of laws and regulations stipulates that forming a statutory regulation it must be based on the principles of forming a good law:<sup>17</sup>

- a. Clear goals
- b. There are institutions or officials who have accuracy
- c. There are things that are appropriate both in terms of hierarchy, type, and material in the content
- d. Can be run
- e. Has efficiency and is successfull
- f. Have a clear formula
- g. Openness

Article 5 contains the phrase "can be implemented," meaning that statutory regulation can estimate its effectiveness in people's lives,<sup>18</sup> then the research that will be examined is that both the House of Representative and the Government, to establish norms in the Criminal Code, must comply with Article 5 letter d of Law no. 12 of 2011 concerning the formation of laws and regulations, therefore making norms to criminalize homosexual acts can be effective.

In criminalizing an act or action, of course, some things must be considered to determine that an act can be punished. According to Teguh Prasetyo, the things that must be considered in the process of criminalizing something are as follows:<sup>19</sup>

- 1) The act must be an act that disrupts the public interest or attacks legal interests (whether it is the interests of society, individuals, or even state law);

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<sup>16</sup> *Ibid*, 36.

<sup>17</sup> Lihat Pasal 5 UU No. 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang - Undangan.

<sup>18</sup> Amran Suadi, "Peranan Peradilan Agama Dalam Melindungi Hak Perempuan Dan Anak Melalui Putusan Yang Memihak Dan Dapat Dilaksanakan/The Role Of Religious Court In Women And Children Rights Protection Through Partial And Executable Decision," *Jurnal Hukum Dan Peradilan* 7, no. 3 (2018): 353–374, 360.

<sup>19</sup> Teguh Prasetyo, *Kriminalisasi Dalam Hukum Pidana* (Bandung: Nusa Media, 2010), 27-28.

- 2) By considering or looking again at the readiness of law enforcement officials in executing the crime against the said act;
- 3) Pay attention to the "benefit-cost principle", meaning that the cost of criminal arrangements and subsequent criminal prosecution costs must be calculated correctly so that they are in accordance with the objectives of making criminal law regulations.

By paying attention to some of the criteria described above, we can see that criminalizing same-sex sexual acts has fulfilled the three things described above.

There is one thing that causes the criminalization of homosexuals, namely the existence of a legal vacuum. First, from the various existing laws and regulations, no law specifically regulates the prohibition of homosexual acts. Of course, because there is nothing that regulates this same-sex sexual behavior, the consequence is that there is no protection for this behavior either. Related to this, some experts argue that there is no law other than what is written in the law.<sup>20</sup> This determines that homosexual behavior is in a gray position where there is no legal basis to prohibit it and no legal basis to protect it.

One example of criminalization problems that arise as a result of the absence of an explicit legal basis governing homosexual behavior can be seen in the case that occurred in North Bengkulu, where the Ketahun Police Chief, *AKP Umar Fattah*, did not legally process homosexual couples and left the settlement of this problem to the traditional party of Giri Kencana village, North Bengkulu Regency, after previously 65 residents and traditional leaders of Giri Kencana village carried out a raid on the couple in their village.<sup>21</sup>

Although homosexual acts which contain the meaning of same-sex sex or can be called acts of sodomy have not been regulated in detail in Indonesia. Indonesia does not have rules that prohibit same-sex relationships. The only legal basis that currently exists is to regulate sexual harassment by acts of sodomy. These are two different things where same-sex relationships have consensual or coercive implications. At the same time, sexual harassment (sodomy) is harassment that is essentially an act of coercion without any consensual element at all.

Since the enactment of the Criminal Code or other laws and regulations outside the Criminal Code which contain the prohibition of same-sex obscenity, it is not uncommon for law enforcers to apply it to acts of homosexuality or sodomy.

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<sup>20</sup> Lisnawaty Wadju Badu, Julisa Aprillia Kaluku, and Abas Kaluku, "Perlindungan Hak-Hak Konstitusional Masyarakat Adat Di Kabupaten Boalemo Dalam Penerapan Sanksi Adat," *Jurnal Konstitusi* 18, no. 1 (2021): 219–239, 223

<sup>21</sup> Yuliadi Hardjo Putro, "Tanpa Busana, Pasangan Gay Ini Dihajar Massa," . *Liputan6.com*, 2016, <https://www.liputan6.com/regional/read/2459140/tanpa-busana-pasangan-gay-ini-dihajar-massa>.



However, it is limited to the child victim, while this article cannot be used against adult victims.

For example, we can find the things described above in the court decision Number 90/Pid.Sus/2016/PN.Bms with the sodomy case against a child, the public prosecutor provided an alternative indictment to one article 76E Law Number 35 of 2014 concerning changes to Law Number 23 of 2002 concerning child protection, or the second alternative to Article 292 of the Criminal Code,<sup>22</sup> it is stated that “everyone is prohibited from committing violence, threats of violence, coercion, deception, committing a series of lies, or persuading a child to commit a series of lies, or persuading a child to commit a deception, committing a series of lies, or persuading a child to commit or allow an act to be committed. pervert.”

Meanwhile, the substance of Article 292 of the Criminal Code, namely, “a person who is old enough, who commits obscene acts with another person of the same sex, who is known or should reasonably be suspected, that he is not old enough, is threatened with imprisonment for a maximum of five years.”

The judge in the case above has found guilty of sodomy by applying alternative charges to one, namely article 76E Law No. 35 of 2014 concerning amendments to Law No. 23 of 2002 concerning child protection, by stating his legal considerations that the obscenity element in Article 76E Law number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning child protection has been fulfilled by the perpetrator using sodomy.<sup>23</sup> Therefore the legislators did not provide a definition or explanation of obscenity, so the judge, in interpreting the term obscenity in the law, used R Soesialo's doctrine, which stated obscenity as any act that violates decency or a heinous act, where all of it was committed in the sphere of sexual desire, for example kissing; groping the genitals; groping breasts, and so on.<sup>24</sup>

Regarding the interpretation of the term obscenity in the two articles above, especially in article 292 of the Criminal Code, a criminal law expert, namely Mudzakir, in the judicial review of articles 284, 285, and 292 of the Criminal Code at the Constitutional Court contained in the decision of the Constitutional Court of the Republic of Indonesia Number 46/PUU-XIV /2016, explained that the term obscenity is a deviation in the sexual field which leads to sexual intercourse, but not like sexual intercourse.<sup>25</sup> =This can be interpreted that the application of

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<sup>22</sup> Lihat Pasal 76E UU RI No 35 Tahun 2014 Tentang Perubahan Atas UU No. 23 Tahun 2002 Tentang Perlindungan Anak.

<sup>23</sup> Lihat Putusan Pengadilan Negeri Banyumas No. 90/Pid.Sus/2016/PN.Bms.

<sup>24</sup> Raden Soesilo, *Kitab Undang – Undang Hukum Pidana (KUHP): Serta Komentar – Komentarnya Lengkap Pasal Demi Pasal* (Bogor: Politeia, 1995), 212–214.

<sup>25</sup> Lihat Putusan Mahkamah Konstitusi Republik Indonesia Nomor 46/PUU-XIV/2016.

the term obscenity as regulated in article 76E of Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child Protection and article 292 of the Criminal Code is not intended for cases of same-sex or homosexual sexual relations. , because the notion of obscenity is interpreted as an act of sexual deviation that only leads to having sexual relations without consensual action from one of the parties (forced). In contrast, homosexual or sodomy acts are acts or acts of same-sex sexual relations (i.e., sex between men and between women).

Furthermore, the mandate of the 1945 Constitution. Article 28 B, paragraph (1) of the 1945 Constitution of the Republic of Indonesia, states that “everyone has the right to form a family and continue offspring through a legal marriage...” Article 28 B paragraph (1) of the Marriage Law regulates the validity of a marriage, namely, “marriage is valid if it is carried out according to the laws of each religion and belief.”<sup>26</sup>

Furthermore, a marriage that is recognized and legal to perform in Indonesia is a marriage described in article 1 of the Marriage Law, namely, “marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and healthy family or household.” eternal based on Belief in the One and Only God.<sup>27</sup>

This Marriage Law was formed to carry out the mandate of Article 28B paragraph (1) of the 1945 Constitution, that the only way to legalize sexual relations is through a legal marriage, namely one carried out by a man and a woman according to their respective religions.<sup>28</sup>

Acts of same-sex or homosexual sexual relations are not legal sexual relations to be carried out in Indonesia based on the marriage law above, therefore to prevent and stop the rise of homosexual practices in Indonesia can be done through efforts to criminalize homosexual acts by legislators in order to fill the legal vacuum and carry out the rules of the marriage law and Article 28B paragraph (1) of the 1945 Constitution which guarantees or protects the rights of every Indonesian citizen to form a family and continue offspring.

Philosophically, the criminalization of homosexual acts in Indonesia is one of the important foundations for the government and House of Representative of Republic Indonesia in determining homosexual acts committed by a person against another person, both an adult and a child of the same sex.

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<sup>26</sup> Lihat Pasal 2 Ayat (1) UU Nomor 1 Tahun 1974 Tentang Perkawinan.

<sup>27</sup> Lihat Pasal 1 UU Nomor 1 Tahun 1974 tentang Perkawinan.

<sup>28</sup> Dolot Alhasni Bakung, “Analisis UU NO. 1 Tahun 1974 Tentang Perlindungan Anak Terkait Perkawinan Dibawah Umur (Studi Pada Masyarakat Batu Layar Provinsi Gorontalo),” *ALHURRIYAH: Jurnal Hukum Islam* 15, no. 1 (2018): 15–27, 18.



In this case, the discussion of philosophical justification plays a role in obtaining objectivity and validity in efforts to criminalize homosexual acts in Indonesia.<sup>29</sup> The philosophical justification used in this discussion is the philosophy of Pancasila as the way of life of the Indonesian nation. The justification often used to justify that homosexual behavior is deviant is the first precept, "Belief in One and Only God," as the basis for justification. The first precepts are adopted as values that must be adhered to by every citizen. The first precept obliges every individual state to believe in the existence of God Almighty. Of course, this is close to religion because religion is dogmatic and relies on the figure of God in it. Where in religious doctrine, the practice of homosexuality itself is practice that is prohibited and unlawful, so individuals who carry out or practice this are considered sinful. This is one form of justification for criminality against homosexual actors.

Furthermore, in the second precept, "just and civilized humanity," Kaelan argues that it implies that human essence is a natural composition as individuals and social beings, as well as having a natural position as a personal being of oneself and as a creature of the almighty God.<sup>30</sup> The existence of humans as God's creatures constructs the idea that a human must obey and submit to the rules set by God. In this case, homosexual behavior in several religions (which in their teachings are God's words/commandments) prohibits homosexual behavior, so this action is prohibited.

Furthermore, the value of "civilized humanity" embodies the value of humanity as a cultured, moral, and religious creature.<sup>31</sup> Meanwhile, the value of "just humanity" means that human nature as a cultured and civilized living being must have a just nature, be fair with one's self-relationship; fair to other human beings; fair to the people of the nation and state; fair to the environment and fair to the value of God Almighty.<sup>32</sup>

The second precept of Pancasila also contains the nature of human nature itself, that human nature can continue its offspring, namely the existence of pregnancy after going through the process of fertilization, namely the meeting of sperm cells with egg cells in a woman's uterus.<sup>33</sup> While homosexuality is an act of sexual intercourse between a man and a man or a woman and a woman, based on this explanation, it is impossible to continue the practice of homosexuality for offspring. The nature of human pregnancy only occurs after a fertilization process between a sperm cell and an egg cell in a woman's uterus. In contrast, in

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<sup>29</sup> Kaelan, *Filsafat Pancasila Pandangan Hidup Berbangsa Indonesia* (Yogyakarta: Paradigma, 2002), 3.

<sup>30</sup> *Ibid*, 80.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid*, 80–81.

<sup>33</sup> Admin, "Proses Pembuahan Dan Hal – Hal Yang Terjadi Sebelum Hamil," Alodokter, 2022, <https://www.alodokter.com/proses-pembuahan-apa-yang-terjadi-sebelum-hamil>.

homosexual practice, a sperm cell does not meet an egg cell with a homosexual partner because both partners come from the same sex, so the fertilization process cannot occur.

Concerning the application of Pancasila values in realizing the legal ideals of the nation as stated in the fourth paragraph of the opening of the 1945 Constitution of the Republic of Indonesia, which reads "...to promote public welfare, educate the nation's life, and participate in carrying out world order based on peace, eternal life and social justice..." can be implemented through the formation of the rule of law by the formation of laws. A product of this law will be a guarantee for maintaining order, so all strategies for drafting laws, using the law, and legal institutions and law enforcement are very important for the consequences since Indonesia, its state system, and its social order must be regulated by law so that all elements of state power tools and citizens obey the laws they create.<sup>34</sup>

The above view of life should at least be used as a basis and guideline for achieving the ideals of national law, which includes the objectives of criminal law, namely creating public protection and public welfare.<sup>35</sup>

If the act of homosexuality is an act that is violated and will get punishment from God if humans do it, then violating God's prohibition is the same as violating religious values in the first precepts of Pancasila. It is the same as in the second precept of Pancasila, that just and these homosexual practices also violate civilized human values.

The rise of homosexual acts committed in Indonesia has harmed religious values and human values in Pancasila, thus if this homosexual act is not immediately banned or if there is no clarity in the legal rules regarding this matter, it can become one of the inhibiting factors for this nation in realizing legal ideals that can protect all the interests of its citizens.

Even though homosexual acts are considered to be able to hinder and damage the efforts of this nation in realizing its legal ideals until now, homosexual acts have not been regulated clearly and concretely. Law enforcement by law enforcers against homosexual acts so far has only used obscenity prohibition rules, which have a very broad meaning and no clear limit on the size of the prohibition. Thus, one form of effort to create the legal ideals of this nation is through the policy of criminalizing homosexual acts by legislators by formulating homosexual terminology so that law enforcers can effectively apply rules that can include homosexual acts so that law enforcers can effectively to

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<sup>34</sup> Mokh Najih, *Politik Hukum Pidana Pasca Reformasi: Implementasi Hukum Pidana Sebagai Instrumen Dalam Mewujudkan Tujuan Negara* (Malang: In-trans, 2002), 12–13.

<sup>35</sup> Barda Nawawi Arief, *Politik Hukum Pidana Pasca Reformasi* (Semarang: Badan Penerbit Universitas Diponegoro, 2009), 45.

apply rules that may include concrete and clear acts of same-sex intercourse or not have multiple interpretations.

We can also look at/compare countries that have something in common with Indonesia but are firm in dealing with this, for example, Malaysia. The proposed amendments come amid concerns over growing intolerance towards lgbt people in Malaysia in recent years. In 2019, one Muslim group and another Muslim group staged a protest after lgbt activists attended a march for International Women's Day. Shortly after that, five men were sentenced to prison, lashes, and fines for attempting to have same-sex relations.<sup>36</sup>

Based on the information above, we can see that Malaysia has implemented penalties against same-sex sexual offenders. Not only that, in the state of Singapore, which was legalized in 1983, homosexual offenders can be sentenced to a maximum of 2 (two) years in prison.<sup>37</sup>

Based on what has been explained above, it can be seen that our two neighboring countries have established their stance by applying a clear legal basis regarding same-sex marriage. This is certainly an important point. Indonesia also needs to take concrete action by establishing or establishing laws or juridical principles that explicitly provide clarity regarding homosexual behavior to clarify the position of homosexuals in Indonesia to protect the Indonesian people.

#### **4. Enactment of the Law against Homosexual Acts**

People's concern about the presence of LGBT in their lives refers to the impact caused by their sexual acts. They worry about many things that could impact their lives. With the emergence of anxiety, the community automatically wants this matter immediately followed up by the government and law enforcement officials. The follow-up intended by the community is such as punishing them because the community thinks that they have violated nature, which does not reflect human values, along with some impacts that can negatively affect social life.

In accordance with the Criminal Code, there are several types of punishment that are contained in Article 10, namely:<sup>38</sup>

1. Primary Penalties;
  - a. Death Penalty;

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<sup>36</sup> Admin, "Ingin Tindak Pro LGBT, Malaysia Perkuat Hukum Syariah," DW, 2021, <https://www.dw.com/id/tindak-komunitas-pro-lgbt-malaysia-perkuat-hukum-syariah/a-58039749>.

<sup>37</sup> Anton Suhartono, "Lagi, Pengadilan Singapura Menolak Legalkan Hubungan Sesama Jenis," INews, 2020, <https://www.inews.id/news/international/lagi-pengadilan-singapura-menolak-legalkan-hubungan-sesama-jenis>.

<sup>38</sup> Lihat Pasal 10 Kitab Undang – Undang Hukum Pidana.

- b. Imprisonment;
  - c. Detention;
  - d. Fines;
  - e. Alternative Penalty.
2. Additional Penalties;
    - a. Revocation of Certain Rights;
    - b. Confiscation of Certain Goods.

From the several crimes listed above, we can see that many types of crimes or punishments can be given to criminals, ranging from the death penalty to other penalties in the Criminal Code. From here, we can see what penalties can be given to homosexual offenders who commit these sexual acts from the several types of crimes referred to above. However, at present, it is unclear what form of consensual homosexual behavior will be charged with because the current system only regulates the matter of perpetrators of sexual harassment, where a perpetrator of sexual harassment will be sentenced to prison to death if the action taken is serious enough. The author feels that the government needs to establish clarity regarding this matter.

In Indonesia, there are several regulations related to this matter, several laws that are directly related to this matter which are listed in the Positive Law such as:

1. Article 289 of the Criminal Code, which contains sexual behavior/actions that are committed using threats or violence, or that allow for acts of obscenity to be carried out.<sup>39</sup>
2. Article 290 of the Criminal Code regarding obscene acts committed by people who are unconscious or unable to resist, carry out sexual acts with people under 15 years of age or influence someone under 15 years of age to do so or allow sexual acts or sexual relations in out of wedlock.<sup>40</sup>
3. Article 292 of the Criminal Code regarding indecent acts with minors of identical gender or homosexuality.<sup>41</sup>
4. Article 293 of the Criminal Code regarding gifts to influence minors to commit obscene acts.<sup>42</sup>
5. Article 294 of the Criminal Code regarding obscene acts with underage individuals committed by parents or having relationships.<sup>43</sup>
6. Article 295 of the Criminal Code regarding facilitating minors in committing obscene acts.<sup>44</sup>

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<sup>39</sup> Lihat Pasal 289 Kitab Undang – Undang Hukum Pidana.

<sup>40</sup> Lihat Pasal 290 Kitab Undang – Undang Hukum Pidana.

<sup>41</sup> Lihat Pasal 292 Kitab Undang – Undang Hukum Pidana.

<sup>42</sup> Lihat Pasal 293 Kitab Undang – Undang Hukum Pidana.

<sup>43</sup> Lihat Pasal 294 Kitab Undang – Undang Hukum Pidana.

<sup>44</sup> Lihat Pasal 295 Kitab Undang – Undang Hukum Pidana.

7. Article 296 of the Criminal Code regarding livelihoods, procurement and facilitating obscene acts.<sup>45</sup>
8. Article 76E Law no. 35 of 2014 regarding amendments to Law no. 23 of 2002 concerning Child Protection.<sup>46</sup>

However, from the above laws, no law can ensnare same-sex sexual offenders (Homosexuals). So what if, for example, there is a report from the public when this act is committed, and it disturbs the community.

When no law regulates this matter, this act cannot be punished or punished automatically for any reason. It can be understood that implicitly this is legally legalized based on the existence of a legal vacuum against the rules governing this behavior. One of the legal principles is legal certainty, where the law must have a statutory basis in every state administration, especially crime-related.<sup>47</sup>

Talking about a legal settlement on this matter, the author has also conducted interview observations with law enforcement officials to find out whether there is a legal settlement solution for this matter when there is no law that regulates it. By conducting interviews with sources that the authors have met, much information must be included in this research.

To clarify this matter, the author interviewed the police, in this case, the Gorontalo City Police, where representatives of the Polres said that there were indeed no reports or cases related to this matter, there was some information that the author obtained while conducting interview observations, as follows; First, arrest the perpetrators, the purpose of arresting the perpetrators is not to detain the perpetrators, but rather to protect the perpetrators from potentials that could be bad for both parties. Second interrogation. The purpose of interrogating the perpetrator is to find out the chronology of the events that occurred so that a report arises. Third, the police guide the perpetrators to educate them that the act should not have been carried out for several reasons. Fourth, the police repatriate the perpetrators after coaching them.<sup>48</sup>

Another answer from the police is that when someone commits same-sex sexual acts, they can be charged with the law on public order, islamic law, or customary law in that area. However, from some of the information provided by the police regarding this matter, the author considers that these matters were inappropriate to be given to the perpetrators or were ineffective in dealing with this matter for several reasons:

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<sup>45</sup> Lihat Pasal 296 Kitab Undang – Undang Hukum Pidana.

<sup>46</sup> UU RI No 35 tahun 2014 tentang perubahan atas UU no. 23 tahun 2002 tentang perlindungan anak.

<sup>47</sup> Mario Julyano and Aditya Yuli Sulistyawan, “Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum,” *Jurnal Crepido* 1, no. 1 (2019): 13–22, 14.

<sup>48</sup> Hasil Wawancara Dengan Bripka Faisal Karim Selaku Penyidik Di Polres Gorontalo Kota.

1. When the police explained about some of the procedures that were carried out, the author believed that it was not effective in overcoming this because just giving a brief coaching could not have a deterrent effect on the perpetrators. Based on the DSM 5 book on abnormal psychology, it says that lgbt is not a mental/psychiatric illness. From this it can be concluded that when it is said that it is not a psychiatric illness, it can indirectly be believed that it is something that is already ingrained or ingrained in him and cannot be removed with just a short coaching.
2. When the police said that the perpetrators could be charged under the law on public order, however, the authors did not find any article that significantly explained this matter so that they could be prosecuted.
3. When the police say that they can also be charged under the pornography law, the authors find that perpetrators can only be charged when they show it.
4. When the police also say that perpetrators can be charged with KHI, then what about non-Muslim perpetrators.
5. When the police say that they can be charged under the applicable regional regulations, what about the perpetrators in other areas, because this behavior does not only occur in one area, there are even people in all regions of this country who commit this act. Thus the author feels the need for legislation so that this can be regulated nationally.

However, the author got a solution from the police to overcome this by hastening to form a law that regulates this matter so that there is no legal vacuum that causes these actions not to be criminalized. To this day, it is still troubling the community.

Based on some of the information put forward by the author, it can be concluded that when there are no laws and regulations governing this matter, the perpetrators cannot automatically be punished for their actions.

Therefore the author has an idea that it is necessary to make a rule or an ideal plan to overcome this. This intends to fill weaknesses, deficiencies, or legal voids regarding homosexual practices carried out in Indonesia through the renewal of the Criminal Code, which is deemed urgent for discussion of the ideal concept of the formulation of Homosexual Criminalization. This will be carried out by stating several things, which include the subject; his deeds; accountability; the threat of punishment; reporting mechanism and verification; and the execution of the sentence, as follows:

1. The subjects regulated in the criminalization of homosexual acts are everyone, namely each legal subject, both an adult (over 18 years of age) and an immature person (under 18 years of age) who can be responsible and understand the meaning and consequences of his actions. One of the



considerations in formulating the subject of someone who is not yet of age in this criminalization concept is that it does not rule out the possibility of homosexual acts being committed by someone who is not yet of age.<sup>49</sup>

2. The acts prohibited in this criminalization are homosexual acts. The explanation for the term homosexual act is an act of same-sex sex committed by a man with another man or a woman with another woman by inserting a male genital organ (penis) into the anus or rectum of another man. In this criminalization concept, the measure of someone being declared to have committed a homosexual act is if he has inserted the male genitalia (penis) into the anus or other male rectum or rubbed the female genitalia on other female genitalia.<sup>50</sup>
3. The form of responsibility in this criminalization is that everyone, both minors (under 18 years of age) and adults (over 18 years of age), who can be responsible, and when committing homosexual acts must be intentional. There is no excuse for the forgiveness of that person. In this concept, both parties (homosexual couples) who commit homosexual acts must be intentional, and there is no excuse for that person's forgiveness. In this concept, both parties (homosexual couples) who commit homosexual acts can be punished because of their intention, namely the will or knowledge of homosexual acts, which are prohibited. An exception to this liability is someone who commits a homosexual act for reasons of forgiveness.<sup>51</sup>
4. Mechanism of reporting and verification. In the concept of criminalizing homosexual acts, the reporting mechanism is an ordinary offense that anyone who sees; hears; and directly experiences homosexual acts can report to the police, provided that the homosexual act is being carried out, namely that the male genitalia (penis) is being inserted into the rectum or other male anus, or the female genitalia is being rubbed against another female genitalia, for the act Apart from the two explanations above, it cannot be accepted as an act of violating a homosexual prohibition. While the proving mechanism can be done in 2 (two) ways, namely carrying out a "Visum et repertum" examination on a doctor to find the presence of sperm fluid in the anus of another man or female genital fluid in another woman's genitals. The next way of proof is the testimony of someone

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<sup>49</sup> Tengku Mabar Ali, Suhaidi Suhaidi, and Mustamam Mustamam, "Penanggulangan Penyimpangan Seksual LGBT Dalam Perspektif Kebijakan Kriminal (Criminal Policy)," *Jurnal Imiah METADATA* 1, no. 3 (2019): 209–221, 213.

<sup>50</sup> Ateng Sudibyo, "Kebijakan Kriminal Terhadap, Gay, Biseksual Dan Transgender (LGBT) Dikaitkan Dengan Delik Kesusilaan Di Dalam Kitab Undang-Undang Hukum Pidana," *DE LEGA LATA: Jurnal Ilmu Hukum* 4, no. 1 (2019): 28–41, 34.

<sup>51</sup> Agus Hamzah and Septiana Dwiputri Maharani, "LGBT Dalam Perspektif Deontologi Immanuel Kant," *Jurnal Filsafat Indonesia* 4, no. 1 (2021): 100–110, 105.

seeing, hearing, and experiencing first-hand the same-sex couples who commit the most homosexual acts in Indonesia.<sup>52</sup>

The prosecutor against a prison sentence carries out criminal execution in criminalizing homosexual acts if the perpetrator has been terminated and has obtained permanent legal force. The rehabilitation verdict is carried out by a professional therapist or other government-owned health institution through the appointment of a judge in a decision that has permanent legal force.

## 5. Conclusion

In the absence of regulation on this matter, there is a legal vacuum that results in these actions not being punished, and even today, there are still no problems in the community in their lives. Based on some of the information put forward by the author, it can be concluded that when there is no law governing this matter, the perpetrators cannot be automatically punished for their actions. Damage in people's lives that can lead to the destruction of a nation's generation is something we cannot take lightly. The legal vacuum regarding the regulation of same-sex sexual relations is something that we must pay attention to because the absence of laws governing this matter is a very urgent matter for the government to review, and it must be made as soon as possible to make detailed and clear arrangements so that it is precise and easy. To be carried out by law enforcement officials.

## Referensi

Admin. "Ingin Tindak Pro LGBT, Malaysia Perkuat Hukum Syariah." DW, 2021. <https://www.dw.com/id/tindak-komunitas-pro-lgbt-malaysia-perkuat-hukum-syariah/a-58039749>.

— — —. "Proses Pembuahan Dan Hal - Hal Yang Terjadi Sebelum Hamil." Alodokter, 2022. <https://www.alodokter.com/proses-pembuahan-apa-yang-terjadi-sebelum-hamil>.

Ahmad, Ahmad, and Novendri Mohamad Nggilu. "Denyut Nadi Amandemen Kelima UUD 1945 Melalui Pelibatan Mahkamah Konstitusi Sebagai Prinsip the Guardian of the Constitution." *Jurnal Konstitusi* 16, no. 4 (2020): 785–808.

Ali, Tengku Mabrar, Suhaidi Suhaidi, and Mustamam Mustamam. "Penanggulangan Penyimpangan Seksual LGBT Dalam Perspektif

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<sup>52</sup> I Saputra, Wayan Agus Harry, and I Made Arya Utama, "Kriminalisasi Terhadap Perilaku Cabul Antar Orang Dewasa Sesama Jenis (Lesbian Dan Gay)," *Jurnal Ilmiah, Jurnal Ilmiah* 7, no. 2 (2018).

- Kebijakan Kriminal (Criminal Policy)." *Jurnal Imiah METADATA* 1, no. 3 (2019): 209–21.
- Arief, Barda Nawawi. *Politik Hukum Pidana Pasca Reformasi*. Semarang: Badan Penerbit Universitas Diponegoro, 2009.
- Astifah, Nurul. "Pencegahan Penyebaran Hiv/Adis Melalui Penguatan Budaya." *Jurnal Humanity* 6, no. 2 (2011).
- Azizah, Sari Nur. "Konsep Diri Homoseksual Di Kalangan Mahasiswa Di Kota Semarang (Studi Kasus Mahasiswa Homoseksual Di Kawasan Simpanglima Semarang)." *Journal of Nonformal Education and Community Empowerment* 2, no. 2 (2013).
- Badu, Lisnawaty. "Euthanasia Dan Hak Asasi Manusia." *Jurnal Legalitas* 5, no. 01 (2012).
- Badu, Lisnawaty Wadju, Julisa Aprillia Kaluku, and Abas Kaluku. "Perlindungan Hak-Hak Konstitusional Masyarakat Adat Di Kabupaten Boalemo Dalam Penerapan Sanksi Adat." *Jurnal Konstitusi* 18, no. 1 (2021): 219–39.
- Bakung, Dolot Alhasni. "Analisis UU NO. 1 Tahun 1974 Tentang Perlindungan Anak Terkait Perkawinan Dibawah Umur (Studi Pada Masyarakat Batu Layar Provinsi Gorontalo)." *ALHURRIYAH: Jurnal Hukum Islam* 15, no. 1 (2018): 15–27.
- Damayanti, Rita. *Pandangan Lesbian, Gay, Dan Biseksual (LGB) Terhadap Status Gender Dan Persamaan Hak Asasi Manusia Di Jakarta, Bogor, Depok, Dan Tangerang*. Jakarta: Kementerian Pemberdayaan Perempuan Dan Perlindungan Anak dan Pusat Penelitian Kesehatan Universitas Indonesia, 2015.
- Fajar, Mukti, and Yulianto Achmad. *Dualisme Penelitian Hukum Normatif Dan Empiris*. IV. Yogyakarta: Pustaka Pelajar, 2017.
- Hamzah, Agus, and Septiana Dwiputri Maharani. "LGBT Dalam Perspektif Deontologi Immanuel Kant." *Jurnal Filsafat Indonesia* 4, no. 1 (2021): 100–110.
- "Hasil Wawancara Dengan Bripka Faisal Karim Selaku Penyidik Di Polres Gorontalo Kota," n.d.
- Ismail, Dian Ekawaty, and Yowan Tamu. "Upaya Perlindungan Hak-Hak Tersangka/Terdakwa Melalui Mekanisme Praperadilan Di Kota Gorontalo." *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 21, no.

1 (2009): 81–92.

Julyano, Mario, and Aditya Yuli Sulistyawan. "Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum." *Jurnal Crepido* 1, no. 1 (2019): 13–22.

Kaelan. *Filsafat Pancasila Pandangan Hidup Berbangsa Indonesia*. Yogyakarta: Paradigma, 2002.

Kartono, Kartini. *Psikologi Abnormal Dan Abnormalitas Seksual*. Bandung: CV. Mandar Maju, 1989.

Kitab Undang – Undang Hukum Pidana (n.d.).

Lumbangaol, Ade Septia, Hernawilly Hernawilly, and Gustop Amatiria. "Konsep Diri Pada Wanita Pekerja Seksual Yang Mengalami Penyakit Menular Seksual." *Jurnal Ilmiah Keperawatan Sai Betik* 10, no. 2 (2017): 190–96.

Najih, Mokh. *Politik Hukum Pidana Pasca Reformasi: Implementasi Hukum Pidana Sebagai Instrumen Dalam Mewujudkan Tujuan Negara*. Malang: In-trans, 2002.

Neng, Djubaedah. *Perzinaan Dalam Peraturan Perundang – Undangan Di Indonesia Ditinjau Dari Hukum Islam*. Jakarta: Kencana Prenada Media Group, 2010.

Prasetyo, Teguh. *Kriminalisasi Dalam Hukum Pidana*. Bandung: Nusa Media, 2010.

Prima, Kukuh, Usman Usman, and Herry Liyus. "Pengaturan Homoseksual Dalam Hukum Pidana Indonesia." *PAMPAS: Journal of Criminal Law* 1, no. 3 (2020): 92–105.

Putro, Yuliadi Hardjo. "Tanpa Busana, Pasangan Gay Ini Dihajar Massa." . Liputan6.com, 2016. <https://www.liputan6.com/regional/read/2459140/tanpa-busana-pasangan-gay-ini-dihajar-massa>.

Putusan Mahkamah Konstitusi Republik Indonesia Nomor 46/PUU-XIV/2016 (n.d.).

"Putusan Pengadilan Negeri Banyumas No. 90/Pid.Sus/2016/PN.Bms," n.d.

Rafli, Ranny Intan, Nur Rochaeti, and Dyah Wijaningsih. "Perlindungan Hukum Bagi Pekerja Rumah Tangga Perempuan Korban Tindak Kekerasan." *Diponegoro Law Journal* 5, no. 3 (2016): 1–26.

Saputra, I, Wayan Agus Harry, and I Made Arya Utama. "Kriminalisasi

Terhadap Perilaku Cabul Antar Orang Dewasa Sesama Jenis (Lesbian Dan Gay).” *Jurnal Ilmiah, Jurnal Ilmiah* 7, no. 2 (2018).

Soesilo, Raden. *Kitab Undang – Undang Hukum Pidana (KUHP): Serta Komentar – Komentarnya Lengkap Pasal Demi Pasal*. Bogor: Politeia, 1995.

Suadi, Amran. “Peranan Peradilan Agama Dalam Melindungi Hak Perempuan Dan Anak Melalui Putusan Yang Memihak Dan Dapat Dilaksanakan/The Role Of Religious Court In Women And Children Rights Protection Through Partial And Executable Decision.” *Jurnal Hukum Dan Peradilan* 7, no. 3 (2018): 353–74.

Sudibyo, Ateng. “Kebijakan Kriminal Terhadap, Gay, Biseksual Dan Transgender (LGBT) Dikaitkan Dengan Delik Kesusilaan Di Dalam Kitab Undang-Undang Hukum Pidana.” *DE LEGA LATA: Jurnal Ilmu Hukum* 4, no. 1 (2019): 28–41.

Suhartono, Anton. “Lagi, Pengadilan Singapura Menolak Legalkan Hubungan Sesama Jenis.” *INews*, 2020. <https://www.inews.id/news/international/lagi-pengadilan-singapura-menolak-legalkan-hubungan-sesama-jenis>.

UU No. 12 Tahun 2011 tentang Pembentukan Peraturan Perundang - Undangan (n.d.).

UU Nomor 1 Tahun 1974 tentang Perkawinan (n.d.).

UU RI No 35 tahun 2014 tentang perubahan atas UU no. 23 tahun 2002 tentang perlindungan anak (n.d.).

Yani, Wa Ode Nurul. “Realitas Pelacuran Pemandu Lagu.” *DIALEKTIKA* 6, no. 1 (2019): 95–109.

Yansyah, Roby, and Rahayu Rahayu. “Globalisasi Lesbian, Gay, Biseksual, Dan Transgender (Lgbt): Perspektif HAM Dan Agama Dalam Lingkup Hukum Di Indonesia.” *Law Reform* 14, no. 1 (2018): 132–46.