

Judicial Analysis of Homosexual Existence on the Positive Legal Perspective in Indonesia

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ABSTRACT

The problems raised in this study are particularly related to the existence of homosexuals, in which there are no specific rules that govern so that there is a legal vacuum. The purpose of this study is to identify and analyze the juridical status and application of law to the existence of Homosexual in Indonesia and to identify the impact or consequences of legal uncertainty on the existence of Homosexual in Indonesia. The method used in this research is the normative method and the case approach, namely by examining cases that have occurred in Indonesia related to same-sex relations through comparisons. The results showed that legally there were still no rules regulating it in Indonesia, but there were regulations in several areas that could not be used except for these areas which caused some good and bad impacts. The conclusion was that it was known that several regions had regulations. Related to homosexuality, but it is not regulated in the law so that the regulation cannot be widely used, and the result of this legal uncertainty has several positive and negative impacts.

Keywords: Homosexual; Impact; Rules

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1. INTRODUCTION

One of the impacts of the development of the era of globalization in Indonesia is the presence of Homosexuals and/or Lesbians. Homosexual or so-called Gay is a picture of a man who likes another man, while lesbian is a picture of a woman who likes other women. This is strongly opposed by the Indonesian people because it is not in accordance with Indonesian culture which puts forward religious norms and customs as the basis for the life order of citizens of the Republic of Indonesia. The emergence of the presence of Homosexuals and Lesbians is very influential on the Indonesian nation, especially on the growth of teenagers who are in a period of searching for their own identity.

The phenomenon of Homosexuals and/or Lesbians has been very controversial, discussed in the mass media and in forums or other groups. Especially after the signing of The Yogyakarta Principle by countries in the world at a meeting of the International Law Expert Commission, International Service for Human Rights and Human Rights experts from around the world at Gadjah Mada University Yogyakarta on November 6 to 9, 2006 and in the closing document there are 26 principles. Which contains the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. The document is intended to apply the standards of International Human Rights Law to address human rights abuses against LGBT (Lesbian, Gay, Bisexual, Transgender) people (Husaini, 2015).

There are several cases related to the existence of Homosexuals and / or Lesbians, one of which was famous in Indonesia, namely a case that occurred in the Kelapa Gading area of West, North Jakarta province on May 21, 2017, where the Opsnal and Resmo teams from the North Jakarta Police have conducted raids on the prostitution case of a homosexual sex party with the event name "The Wild One". And from the raid, the police arrested 141 people consisting of 6 strippers or striptease and guests who had committed immoral acts. In this case, of the 141 people who were arrested, 126 people have been allowed to return home and the remaining 15 people are still being detained at the North Jakarta Police Headquarters (Mapolres) and the rest of the 15 people, 10 of whom have been named suspects in the case, while the other

5 were detained for consuming drugs (<https://megapolitan.kompas.com/read/2017/05/23/09405501/terbongkarnya.tempat. pesta.seks.kaum.gay.di.kelapa.gading?page=all>)

The case above, if viewed from a legal perspective, by looking at the behavior carried out by homosexuals at the party is related to the problem of pornography and narcotics so that they can be subject to criminal sanctions. However, in a different case, in the sense that homosexuals and/or lesbians are having a gay/lesbi party without any other criminal acts as in the above case, in other words, only having same-sex relations, in Indonesia, there are no regulations or laws that regulate the legal vacuum that causes the Indonesian judiciary to need a legal basis so that there is no misperception that occurs among the public regarding whether or not it is legal to have same-sex relations in Indonesia.

When viewed from the perspective of society, the existence of Homosexuals and/or Lesbians raises pro and contra. For Indonesian people who are contra related to the existence of these people because they are still loyal to religious norms and traditions, so it is very natural that they oppose the existence of these people, another reason is that the community believes that these people can bring influence to the younger generation to violate custom in natural nature and social appropriateness. On the other hand, for people who are pro with the existence of these people, they argue that the state and society must campaign for the principle of non-discrimination between men, women, transgender people, lovers of the opposite sex (heterosexual) and lovers of the same sex/homosexual (Budiarti, 2015).

Based on the description above, the legal position related to same-sex relations creates problems. Same-sex relations in Indonesia are not regulated at all in the law, resulting in a legal vacuum and negative impacts on society. In society, there are various perceptions about whether or not same-sex relations are legal. Judges are also faced with difficulties in deciding cases of same-sex relations because there is no law regulating immoral acts committed by same-sex couples, and in the end the couple is freed from all legal charges.

The purpose of this study is to identify and analyze the juridical status and application of the law to the existence of Homosexuals and/or Lesbians in Indonesia and to identify the impact or consequences of legal uncertainty on the existence of Homosexuals and/or lesbians in Indonesia.

2. METHODS

The method used in this research is a normative approach (*norm ative legal research*) or library research methods. Normative research is research conducted through a statutory approach (*statute approach*) or by reviewing existing legal materials by reviewing all laws and regulations related to the legal issue being handled (Soekanto & Mamudji, 2009)

In addition to using a statutory approach, researchers also use a case approach, namely by examining cases that have occurred in Indonesia related to same-sex relations through comparisons.

3. RESULTS AND DISCUSSION

Juridical Status and Application of Laws against the Existence of Homosexuals in Indonesia.

The existence of homosexuals in Indonesia, juridically (legality) there are still no rules that regulate it, so there is no protection and there are no regulations that prohibit acts against homosexuals/lesbians. In addition, same-sex marriage in Indonesia is also not recognized because the Law on Marriage only regulates marriages between the opposite sex, namely between men and women.

Although there is no legality on same-sex relations in Indonesia, in the Indonesian Criminal Code (KUHP), precisely in article 292, there are rules governing the prohibition of same-sex sexual immorality committed by adults against minors (children), and there are no explicit prohibitions for sexual immorality between adults.

In addition to the Indonesian Criminal Code (KUHP) which alludes to same-sex sexual immorality, there are also regional regulations that regulate same-sex acts as a criminal act and these regulations only apply in that area, that is (Sofyarto, 2018): (1) Regional Regulation (Perda) of South Sumatra Province Number 13 of 2002 concerning the Eradication of Immorality which in the regulation is precisely in Article 1 by classifying LGBT people (Lesbian, Gay, Bisexual, Transgender) as part of the act or act of prostitution. (2) Regional Regulation (Perda) of Palembang City Number 2 of 2004 concerning the Eradication of Prostitution, which also confirms that the Homosexual category is part of the act of prostitution as confirmed in article 1 and article 2 of the perda. (3) Regional Regulation (Perda) of Padang Panjang City Number 9 of 2010 concerning the Prevention, Eradication and Enforcement of Social Diseases, which also includes the LGBT (Lesbian, Gay, Bisexual, Transgender) category as part of social illness. (4) Regional Regulation (Perda) of Aceh Province or Qanun Number 6 of 2014 concerning Jinayah Law, to be precise in article 1 number 28 which states Liwath Acts or homosexual acts, and there is a threat of punishment in the

form of 100 lashes or a fine of 1000 grams of pure gold or law maximum imprisonment of 100 months as stated in article 63 paragraph 1.

Some of these Regional Regulations (Perda) prohibit the existence of LGBT (Lesbian, Gay, Bisexual, Transgender) communities in the area with the aim of protecting their territory from interference from the community which is considered immoral and is a violation of religion and morality.

If it is viewed from a positive legal perspective in Indonesia, that in designing legal regulations (laws) it must be based on the principle of philosophical studies, which in real terms is part of LGBT (*Lesbian, Gay, Bisexual, Transgender*), then it is certain that in Indonesia will not be able to free these people as in other countries, for example in the Netherlands, America, New Zealand and other countries that legalize the community or LGBT people (*Lesbian, Gay, Bisexual, Transgender*). If this is related to Human Rights, which means that every human being has the right to freedom to carry out their respective lives, there must be restrictions, which are based on considerations of moral, religious values and public order, where this is regulated in Article 28J paragraph (2) of the 1945 Constitution of the Unitary State of the Republic of Indonesia which contains:

"Dalam menjalankan hak dan kebebasannya, setiap orang wajib tunduk kepada pembatasan yang ditetapkan dengan undang-undang dengan maksud semata-mata untuk menjamin pengakuan serta penghormatan atas hak dan kebebasan orang lain dan untuk memenuhi tuntutan yang adil sesuai dengan pertimbangan moral, nilai-nilai agama, keamanan, dan ketertiban umum dalam suatu masyarakat demokratis."

Which means is:

"In exercising his rights and freedoms, everyone is obliged to comply with the restrictions established by law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfill fair demands in accordance with considerations of moral, religious values, security, and public order in a democratic society."

So it can be seen that the article explains that every human right is limited in the 1945 Constitution of the Unitary State of the Republic of Indonesia, which makes it difficult for every Indonesian citizen to commit acts according to their respective wishes.

Because the purpose of the life of the Indonesian state does not contain the context of thinking as stated in the American constitution, namely:

"We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America" (Cornell Law Scholl, 2020)

The Indonesian Constitution also does not contain a context of thinking as stated in the UN Charter Preamble, which contains:

"WE THE PEOPLE OF THE UNITED NATIONS DETERMINED..... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained....." (Muftisany, 2016)

On the other hand, the context of thinking that the constitution in the Indonesian state puts forward the unity of an organic society to achieve intelligence, and not just winning personally, which is stated in the Preamble to the 1945 Constitution of the Republic of Indonesia which contains:

"Kemudian dari pada itu untuk membentuk suatu Pemerintah Negara Indonesia yang melindungi segenap bangsa Indonesia dan seluruh tumpah darah Indonesia dan untuk memajukan kesejahteraan umum, mencerdaskan kehidupan bangsa, dan ikut melaksanakan ketertiban dunia yang berdasarkan kemerdekaan, perdamaian abadi dan keadilan sosial, maka disusunlah Kemerdekaan Kebangsaan Indonesia itu dalam suatu Undang-Undang Dasar...."

Which means is:

"Then from that, to form an Indonesian State Government that protects the entire Indonesian nation and all the blood of Indonesia and to advance public welfare, educate the nation's life, and participate in implementing world order based on independence, eternal peace and social justice, national independence is compiled. Indonesia is in a constitution"

Therefore, the term human rights in the Indonesian constitution has no similarity with the human rights context in Western countries.

Homosexual acts are not actually a crime under the criminal law, but in reality today, homosexual acts tend to lead to negative sides such as homosexual sex parties to drug parties, which this makes society uneasy, especially these actions can damage mentally and morally for young people today. As with several

examples of homosexual cases that have occurred in Indonesia (<https://www.liputan6.com/global/read/2963642/4-kasus-lgbt-di-indonesia-yang-disorot-dunia>), including:

Table 1. Examples of Homosexual cases in Indonesia

Time of Incident	Scene	Case
May 2017	Kelapa Gading, North Jakarta	Arrest 141 men, who had a gay party, and 10 people became suspects for consuming drugs.
May 2017	Banda Aceh City, Aceh Province	Arrest a gay couple who committed liwath acts, and immediately executed using the Qanun (Perda Aceh Province).
September 2015	Ubud Area, Gianyar Regency, Bali	Marriage conducted by a gay couple (America - Indonesia), which was opposed by the Governor of Bali - Made Mangku Pastika.
May 2015	Surabaya	The arrests of 14 men who had gay sex parties, who were charged under articles 32, 33, 34 of Law Number 44 of 2008 concerning Pornography and article 45 of Law Number 11 of 2008 concerning Electronic Information and Transactions, because there was evidence in the form of distributing invitations to sex parties through social media and flashdisk containing pornographic films to arouse the passion of these gays.
August 2020	Kuningan area, South Jakarta	Arrest gay lewd party by 56 people, and named 9 suspects and it is known that they created a gay community to entice participants to join the sex party through social media.
June 2020	Baringen Village, Lilirliu District, South Sulawesi	Lesbi couple marriage and identity forgery.

Based on some of the cases above, it can be seen that the application of the law for homosexual perpetrators who do not have regional regulations in their territory, are not charged with criminal sanctions due to homosexual acts but are punished on the basis of other criminal acts such as the use of narcotics, falsification of identity, misuse of information technology, and criminal acts leading to the Pornography Law.

Impact or result of legal uncertainty on the existence of Homosexuals and/or Lesbians in Indonesia

The existence of Homosexuals in Indonesia is not a new thing anymore, so the result or impact of their existence has positive and negative impacts felt by Indonesian citizens, but in this case it is more likely to be negative than positive impacts.

The negative impact of the uncertainty on the existence of homosexuals is the increasing number of homosexual communities in Indonesia because there is no prohibition or protection against homosexuals. Other negative impacts that are obtained as a result of the existence of Homosexuals, including:

Health Impact

Homosexual actors who are known to be same-sex enthusiasts and tend to have multiple partners can trigger the infection of sexually transmitted diseases such as HIV & AIDS. In addition, it can lead to decreased psychological health due to social factors that do not support the perpetrator.

Social Impact

The social impact caused by the uncertainty of the existence of homosexuals, one of which is that it can damage the current young generation if they are infected to follow the homosexual community, which in the end, the actions committed by the homosexual community are one of the violations of social values in society. In addition, the family, friends, or neighbors of the homosexual offender are not necessarily able to accept the conditions of homosexuals because it is considered something inappropriate and violates God's nature and violates the norms of norms in religion, in other words homosexuals experience discrimination.

Effects of Sexual Crime

The rise of homosexuals at this time, who cannot distribute to the same sex has led to sexual crimes against children, which we know that in Indonesia there are acts of sexual abuse against children. Related to this, Indonesia has regulations, namely article 292 of the Indonesian Criminal Code (KUHP), which regulates the prohibition of same-sex sexual immorality committed by adults against minors (children).

Impact on Population

When viewed from an aspect or a demographic perspective, the negative impact in the next few years will be felt due to the decline in population numbers or the decline in the nation's future young generation, as a result of the prevalence of homosexuals.

Impact of Violence

There are several types of violence that will be faced by homosexuals due to the absence of regulations so that they do not get protection by the state against these people, including this violence are as follows:

Physical abuse

Physical violence is violence that can cause physical injury which can have the potential to suffer injury, disability and even death by the partner of the homosexual who has a temperamental nature or can even be committed by his own family or other people.

Psychological/Emotional Violence

Psychological/emotional violence is violence that can be felt through body language such as cynical staring (dislike), through threats or discrimination by people who do not like the existence of these homosexuals.

Economic Violence

Economic violence is violence felt by homosexuals materially where they have to forcibly hand over material or in-kind to their sexual partners, but this does not happen to every couple.

Sexual Violence

Sexual violence is a force imposed on homosexuals to commit sexual acts against their will or harassing the homosexuals.

Verbal Violence (Rahayu & Demartoto, 2019)

Verbal violence is violence that uses harsh words such as insulting, verbally cursing, yelling, humiliating in public, and the like. This violence can be committed by fellow homosexuals themselves or other people.

In addition to the negative impact that is felt due to the uncertainty of regulations related to homosexuality, the positive side can be taken, namely it can be seen from a population point of view, where the population rate decreases so that it can reduce the burden borne by Indonesia in providing welfare guarantees to its people.

4. CONCLUSION

Through a juridical analysis related to the perspective of Indonesian law on the existence of homosexuals, it can be seen that legally there are still no rules regulating it, so there is no protection and there are no regulations that prohibit acts against homosexuals/lesbians. However, in some regions there are regulations set out in Regional Regulations to provide regulations regarding the prohibition of acts committed by homosexuals. In addition, when viewed from a positive legal perspective in Indonesia, in designing a legal regulation (law) it must be based on the principles of philosophical studies that have been previously designed in the National Legislation Program (Prolegnas). So that making a legal rule (law) is not an easy thing, and it is related to regulations related to the existence of homosexuals that have no legality yet, the reason is because it is considered that the level of urgency is not too high so that it is ignored. On the other hand, the existence of legal uncertainty on the existence of homosexuals has either positive or negative impacts or consequences, but tends to have negative impacts. One of the positive impacts is the population aspect, which decreases the population rate so that it can reduce the burden borne by the Indonesian government in providing welfare to its people. The negative impact is the increasing number of homosexual communities in Indonesia because there is no prohibition or protection against homosexuals. In addition, other negative impacts are in the form of health, social, sexual crimes, demographic impacts, as well as physical, psychological/emotional, economic, sexual and verbal impacts.

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