

SAME-SEX MARRIAGE FOR LESBIANS, GAYS, BISEXUALS, AND TRANSGENDERS

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Abstract

People This study aimed to investigate a phenomena of lesbian, gay, bisexual, and transgender in Indonesia and analyze the appropriate implementation of legal sentences for both the registry officials of same-sex marriage and the subjects under the Revision of Marriage Law. It used juridical-normative method with statute (problems were analyzed based on the current applied laws) and conceptual approaches (problems were analyzed based on the perspectives of legal experts in many literatures). It brought two results. First, the marriage registry officials carrying on same-sex marriages would be sentenced by 7 years in prison or fine with Category IV Rp 300.000.000 at most. Second, the subjects of same-sex marriage with identity falsification would be sentenced by 12 years in prison or fine with Category V Rp 1.200.000.000.

Keywords

bisexual, gay, lesbian, legal sentence, transgender

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Introduction

The phenomena of lesbian, gay, bisexual, and transgender (later called LGBT) has rapidly outspread worldwide, including Indonesia. This phenomenon of LGBT is a controversial issue revealing pro and contra in public. Commonly, the members of LGBT are a marginal group experiencing such a discriminative treatment in a society (Fatima Asyari). Although they are marginal, LGBT are incessant in action by promoting their group in public. More extreme, on July 2017, they held a same-sex marriage between two men by falsifying their gender identity in Jember. This couple was Ayu Puji Astuti and Fadholi. In this case, Ayu was actually a male falsifying his identity as female (kemenag.go.id). This same-sex marriage was not the first case that happened as this phenomenon was not new in Indonesia. The similar phenomenon of same-sex marriage had already happened on July 1981 by a lesbian couple, Jossie and Bonie, in a Caffee in Jakarta (Miskari).

A support for the pro-parties toward LGBT has been increasingly developing since 2010 by legalizing same-sex marriage at national level in Europe and America (Nur Chasanah). Furthermore, on 26th of June 2015, when the Supreme Court of the State of America decided that same-sex couples had a constitutional right to conduct marriage (Ari Wibowo). Conversely, Soudan, Somalia, Mauritania, Saudi Arabia, and Uni Emirat Arab took death as sentence for any homosexuals (internasional.kompas.com) The contra-parties saw LGBT as a digression of norms in a society, such as legal norms.

From the perspective of legal norms, Indonesia only recognizes two kinds of gender, male and female, based on Act No. 1 Year 1974 about Marriage and Act No. 23 Year 2006 about Administration of Population (Fatimah Asyari). These two Acts do not mention any sentences, but regulating a male-and-female marriage. The legal sentence for LGBT is set under Criminal Code (later called KUHP) in Article 292; that is five years in prison for same-sex abuse by adults toward teens (Fatimah Asyari). This legal sentence restricted the deviation by LGBT as such deviation might happen between two adults that even lead to a marriage by falsifying their gender identities. Besides the subjects, the registry officials of marriage played an important role on same-sex marriage. From legal norms, the officials were not allowed to organize a marriage that disobeyed the legal law as mentioned in Article 20, Act No. 1 Year 1974 about Marriage. However, it did not set legal sentences for the officials that registered a same-sex marriage with identity falsification.

At one hand, the phenomenon of same-sex marriages was being in concern and should be charged by legal sentences for deterrent effect. On the other hand, this phenomenon could not be charged by legal sentences since it had no legitimate regulation in Marriage Law that set this issue. Therefore, the research problem of this study referred to the implementation of legal sentences for both the registry officials of marriage that helped to organize the same-sex marriage in the Revision of Marriage Law and the subjects having such marriage by falsifying their gender identities.

Research Method

The research methodology of this study was juridical-normative with statute and conceptual approaches. Statute approach analyzed problems based on the current applied regulation and it must have relation with the research problems. Conceptual approach, however, analyzed problems based on positive laws and scholars' perspectives.

In this present study, the provisions of Laws to be analyzed were Act No. 1 Year 1974 about Marriage and Law No. 23 Year 2006 about the Administration of Population.

Kinds of Digression by LGBT

LGBT is a kind of deviation by normal people. Normal people are heterosexuals with normal relationship and sexual orientation. Unlike normal people, LGBT has sexual interest to the same gender (Muhammad Tisna Nugraha). In this case, it seems to deviate from normality, and thus, it is seen as a taboo digression in a society.

The digression by LGBT may happen to both male and female. They are called Gays for males and Lesbians for females. Lesbian is a term for females with sexual orientation to other females, falling in love or having sexual desire to other females; homosexual females. Gay is a term for males with sexual interest to other males by showing their sexual orientation to other males in their community (Imron Muttaqin).

The digression by lesbians and gays is in line with bisexuals and transgenders, and those four communities are seen as a marginal group isolated by society. Bisexual is a term to describe individuals with sexual orientation to both males and females simultaneously. Transgender is a term for individuals whose behaviors and appearances are not in line with their gender, for instance, a male behaving like female (Imron Muttaqin).

The digression by LGBT is not restricted to same-sex interest in secured and tacit manner but has already outspread into various aspects. Broadly, the phenomenon of LGBT that happened in Indonesia was classified into two different entities; LGBT as mental “disease”, and LGBT as a community or organization (Rustam Dahar Karnadi Apollo Harahap). The communities of LGBT had been growing since 1982. These communities were actively promoting their communities, known as Gaya Nusantara, Arus Pelangi, and Ardhanary Institute (Wawan Setiawan and Yudhitiya Dyah Sukmadewi).

One digression by LGBT that seemed taboo by public was same-sex marriage. The pro-parties of LGBT kept striving and struggling to legitimate the same-sex marriage. A common view and perspective used as the supporting basis was that same-sex marriage was a kind of human right to choose their live-partner.

Human Rights did not legalize same-sex marriage

Indonesia is a country that recognizes and upholds human rights as mentioned in the Constitution of the Republic of Indonesia 1945, Chapter XA Article 28A – 28J about Human Rights. Noted that the recognition on Human Rights in Indonesia is not without limitation.

The limitation on human rights is conducted by prioritizing social lives and values rather than individual ones. In the Constitution at Article 28J subsection (2) mentioned a limitation by Acts to conciliate human rights with social norms applied in society (by Musa Aripin). The implication was anything that was considerably appropriate based on socio-cultural viewers by society (Nyoman Trisna Aryanata). As a civilized and religious country that upholds Pancasila as the source of any legal sources, same-sex marriage is considerably taboo and defined as a digression of social norms since it was inconsistent with Pancasila, particularly the first principle; Ketuhanan yang Maha Esa. This principle is considered as reference for Act No. 1 Year 1974 about Marriage. This principle is also fundamental for the system of marriage in Indonesia as it is the manifestation of individuals following irrational natural laws; a legal concept believing that laws are basically derived from God and thus, it should be in line with moral norms from God the Almighty. Thus, the constraint for legalizing the same-sex marriage in Indonesian Law was that it did not meet the components of divinity norms (Timbo Mangaranap Sirait). In six religious tenets recognized in Indonesia, none of them has legalized a marriage between two people with the same sex-gender.

Act No. 1 Year 1974 about Marriage is a legal regulation under Pancasila and it is enacted by referring to the higher acts, the Constitution of the Republic of Indonesia 1945. Same-sex marriage contradicted to the conditions of marriage was legal and it was mentioned in Article 2 subsection (1) Act No. 1 Year 1974; it should be conducted based on laws in each religion and beliefs. The utterance for marriage in each religion and beliefs could not be ignored by any parties that would marry to make it legal (Tengku Erwinsyahbana). The provision of this Law is already consistent with the first principle of Pancasila. Based on the religions that Indonesia has recognized, none of them justified the existence of LGBT. Thus, same-sex marriage is inconsistent with legal norms in Indonesia; Pancasila and Act No.1 Year 1974 including religious norms within.

The Implementation of Legal Sentences toward same-sex Marriage

From the legal norms applied in Indonesia, same-sex marriage was inconsistent with Pancasila, the highest law. The legalization of same-sex marriage would bring negative effects such as the corruptness of value order and norms in society.

The negative effect of same-sex marriages might also happen in health and sustainability. From the aspect of health, same-sex marriage caused various deadly sexually transmitted diseases. From the sustainability, such marriage might cause an extinction of human being in the future since they could not make the next generation (Wawan Setiawan and Yudhitiya Dyah Sukmadewi). However, it was not the end, some researches showed a causal relationship between sexual disorder and crime, as Doctor David Abrahamsen suggested in his book the Psychology of Crime. The study found the relation between masturbation and the desire of gambling and murder (Yuliana Surya Galih). Hence, a sexual disorder was found affecting crimes to happen.

Given that same-sex marriage brought various negative impacts, the legalization of such marriage in Indonesia should be avoided. Besides, the government should implement particular legal sentences to shut down such phenomenon, as mentioned in Revision of Marriage Laws, in which this phenomenon was often along with identity falsification for administration in Religious Affair Office or Registry Office.

References for Enacting Legal Sentences to the Subjects of Same-Sex Marriage

The enactment of legal sentences for LGBT in positive laws in Indonesia was mentioned in Article 292 of Criminal Code (later called KUHP). The implementation of

legal sentences was 5 years in prison. The implementation of this sentence was limitative; only for adults having sexual abuses to minors with the same gender.

Criminal Code is a legacy from the Dutch colonial. It is a criminal law codified by the Dutch, *Wetboek van Strafrecht*, which is still applied in Indonesia with concordance as the base (Endang Nur Ulfah). This Code, however, is so old fashion and should have a revision. Hence, the Draft of Criminal Code (later called RKUHP) is on going process for legitimation, but remains unofficially legal yet.

Adapting to current development and changes in society, Article 492 RKUHP aggravated the sentences to be 7 years in prison for adults committed same-sex sexual abuses to individuals under 18 years old. KUHP and RKUHP were still limitative as they did not set any sentences for adults committed same-sex sexual abuses to other adults, as well as teens to adults, while such crime was against legal norms and might bring various negative impacts on society. Besides, one digression by LGBT that was going too far was same-sex marriage by falsifying their gender identities.

Although RKUHP did not accommodate any sentences to be charged for the same-sex marriages, it was still able to be applied as reference to decide an appropriate sentence toward the registry officials and the subjects of same-sex marriage that falsified their gender identities.

The sentence for sexual abuses mentioned in RKUHP was irrelevant to be applied as references to decide the sentence for same-sex marriage as it did not contain any coercion within but merely an agreement or consent from both parties with sexual interest to each other. Therefore, some articles of RKUHP that seemed relevant to be references were Article 455 about the Crime of Providing Fake Information in Authentic Certificate, and Article 464 about Marriage Crime. Article 455 was considerably relevant to be applied since the falsified birth certificate was one of authentic certificates that recorded important events in individual's life; birth. Article 464 was considerably relevant as it had relation with the obligation to provide information to other parties about a legal preclusion toward marriages.

Legal Sentences for the Registry Officials of Marriage Organizing same-sex Marriage

The Registry Officials of Marriage were obligated to register marriages as mentioned in Governmental Regulation No. 9 Year 1975, as an implementation of Marriage Law No. 1 Year 1974. Article 2 of the Government Regulation No. 9 Year 1975

set the registry of marriage for Moslems by Marriage Registry Officials (or PPN) in Religious Affairs Office (called KUA) and the registry of marriage for non-Moslems by the Registry Officials in Registry Office (Muhammadong). Thus, the Registry Officials of Marriage are ones that play an important role in organizing a marriage. Besides, they have an obligation to refuse any marriage that seems against Marriage Law based on Act No. 1 Year 1974 about Marriage, particularly in Article 21. The implementation of Act No. 1 Year 1974 about Marriage was mentioned in Government Regulation of the Republic of Indonesia No. 9 Year 1975. Article 6 of the regulation had mentioned more specifically the obligations of Marriage Registry Officials to verify the terms of condition of marriage, the preclusion of marriage, and other important documents. Therefore, those organizing same-sex marriage were considerably negligent in conducting the verification. They might even have an agreement with the subjects to ignore the legitimate terms of marriage. Regardless any motives behind such issue, the registry officials that released the same-sex couple to marry had committed a very fatal mistake and should be sentenced in court.

In the context of falsified birth certificate, the Registry Officials of Marriage were considerably guilty as using a falsified birth certificate that might harm public, and thus, they could be sentenced by RKUHP Article 455 subsection (b). The legal sentence for those officials should correspond to the legal sentences mentioned in RKUHP Article 455 subsection (b); they would be sentenced by 7 years in prison or fine with Category IV Rp 300.000.000 at most.

Legal Sentences for the Subjects of same-sex Marriage with Identity Falsification

The LGBT organizing same-sex marriage filed a falsified identity in their birth certificate with various ways, such as using other's birth certificates. The utilization of this falsified identity was for fooling some parties, including the Registry Officials of Marriage and public. Without the falsified identity, the marriage would not be well-organized although it had had a deal between the Registry Officials and the subjects as other parties beyond the Registry Officials of Marriage had authority to guard against such marriage by filing the issue to the Court as mentioned in Chapter III of Act No. 1 Year 1974 about Marriage. Thus, the LGBT decided to use a falsified birth certificate for their marriage to be organized.

In the context of falsified birth certificate, the subjects of same-sex marriage was found guilty of filing fake information in an authentic certificate as it violated RKUHP Article 455 subsection (a). Based on KUHP, the delinquent of RKUHP Article 455

subsection (a) would be sentenced by, at most, 7 years in prison or fine in Category IV Rp 300.000.000 at most. In addition, the subjects of same-sex marriage was found not only falsifying an authentic certificate, but also violating the marriage law as mentioned in RKUHP article 464 by not informing to public (others) about the legitimate preclusion. The same gender was a preclusion of marriage based on Marriage Law, mentioning that a marriage was considerably rightful if it followed norms of religion and beliefs, which entirely fought against same-sex marriage. However, Marriage Laws did not mention any sentences for the subjects of same-sex marriage, resulting in a vacuum of law. The sentence for delinquents of Article 464 RKUHP was 5 years in prison or fine in Category IV Rp 300.000.000 at most. Hence, the LGBT who committed to do same-sex marriage should be charged by two articles simultaneously. The best sentence was 7 years and 5 years in prison, which became 12 years in prison. Alternatively, they should pay fine as mentioned in category V about Rp 1.200.000.000 at most. The more fine would be applied as the subject committed two kinds of crime simultaneously. In addition, having same-sex marriage was considered against morality and societal norms.

The implementation of sentences toward the subjects of same-sex marriage was set more burdening rather than the Registry Officials of Marriage that organized such marriage. It was based on the principle of fairness, as the subjects of same-sex marriage committed to do more crime and had longer-term result.

Conclusion

The phenomenon of same-sex marriage by falsifying gender identity is a big slap for the government of Indonesia and it has smudged the image of this country in international domain. This outspread phenomenon forced the government to immediately establish the revision of Marriage Law. Act No. 1 year 1974 about Marriage was considerably irrelevant with the Indonesian current situation. A crucial aspect to be additionally mentioned in the revision was the implementation of sentences toward same-sex marriage. Sentences should be charged in order to give a deterrent effect, not only to the subjects of same-sex marriage but also to the Registry Officials.

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