

Juridical Study of Criminal Sanctions for Lesbian, Gay, Bisexual and Transgender Perpetrators in the Conception of Criminal Individualization

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Abstract

The purpose of this study is to analyze and find out the urgency of criminal sanctions against the behavior of Lesbian, Gay, Bisexual, and Transgender in the Conception of Criminal Individualization. The type of research used in this study is sociological juridical which is analyzed using qualitative data analysis methods. The results of this study indicate that the actions of Lesbian, Gay, Bisexual and Transgender are regulated in Article 414 of Law no. 1 of 2023 concerning the Criminal Code. In addition, criminal sanctions for same-sex crimes should not be imprisonment, bearing in mind that one of the principles of criminal individualization must look at the conditions and circumstances of the offender.

I. Introduction

The discussion about Lesbian, Guy, Bisexual, and Transgender (LGBT) in Indonesia is an interesting subject that must be discussed. This is because the LGBT group under the umbrella of Human Rights has begun to try to reveal its existence so that it is recognized in Indonesia.¹ The legal umbrella that is often used as a basis for the existence of LGBT groups to be recognized is Article 28J of the 1945 Constitution. In this article, it is stated that:

1. Everyone is obliged to respect the human rights of others in the orderly life of society, nation, and state.
2. In exercising his rights and freedoms, everyone is obliged to comply with the restrictions determined by law with the sole purpose of guaranteeing the recognition and respect for the rights and freedoms of others and fulfilling

¹ Cucuk Kristiono, Anis Mashdurohatun, Suparji, Reconstruction Of Legal Policy On Decency Crime In Indonesia Based On Pancasila Value (Lgbt Rehabilitation Institute For Children), *Legal Reconstruction in Indonesia Based on Human Right*, 2019

just demands by moral considerations, religious values, security, and public order in a democratic society.

Having such a basis has resulted in many people being pro and contra regarding whether the existence of LGBT groups is permissible or not. Based on an estimate made by the Ministry of Health, it is estimated that the number of LGBT people in Indonesia in 2012 reached 1,095,970, of which five percent were affected by HIV/AIDS. In line with that, based on research conducted by Yudiyanto, it was stated that the number of gay people in Indonesia reached 20,000 people. At the same time, the United Nations and experts said that the number of gays from 2010 to 2012 was estimated at 3 million people with details in Jakarta 5 thousand gays and in Java East there are 348 thousand gays.² Furthermore, Destashya Wisna Diraya Putri also stated that according to independent institutions both at home and abroad, in Indonesia there are 3% of LGBT people spread across Indonesia.³ In line with this, according to WHO, an estimated 350 million new cases are caused by sexually transmitted diseases (syphilis, gonorrhea, chlamydia, and trichomonas) that occur in developing countries due to same-sex sexual acts.⁴

The rise of LGBT people who are now starting to clamor for their existence to be recognized is because there are legal provisions regarding same-sex marriage in Western countries such as Belgium, Spain, Canada, and so on. It doesn't stop there, in England the demands for recognition of the existence of LGBT starting in 2016 are increasing. Even Barack Obama was also one of the parties who expressed his support for the LGBT group. Although there are many views related to Obama's support for LGBT groups, it is possible because of political interests, it is acknowledged or denied that such support has created a breath of fresh air for LGBT groups.⁵

Based on this, even though Western countries have started to provide support for LGBT actors, and there are differences of opinion between groups that allow LGBT people based on human rights, and groups that reject LGBT

² Yudiyanto, 2016, *Fenomena Lesbian, Gay, Biseksual dan Transgender (LGBT)*, di Indonesia serta Upaya Pencegahannya, *Nizham*, Vol. 5, No. 1, page. 63.

³ Destashya Wisna Saranda Putri, 2022, *LGBT dalam Kajian Hak Asasi Manusia di Indonesia*, *IPMHI Law Journal*, Vol. 2, No. 1, page. 88.

⁴ Dany Noviyani. 2017, *Perilaku Seksual Berisiko Infeksi Menular Seksual (IMS) pada Kelompok Lesbi di Kota Semarang*, *Jurnal of Health Education*, Vol. 2, No. 2, page. 123.

⁵ Musti'ah, 2016, *Lesbian Gay Bisexual and Transgender (LGBT): Pandangan Islam, Faktor Penyebab, dan Solusinya*, *Sosial Horizon: Jurnal Pendidikan Sosial*, Vol. 3, No. 2, page. 260.

people, of course, a clear policy is needed. about the existence of LGBT groups in Indonesia. Must be acknowledged or rejected in its entirety. In several provisions in Indonesia, the fatwa of the Indonesian Ulema Council also issued MUI Fatwa No. 57 of 2014 concerning Lesbian, Gay Sodomy, and Obscenity which clearly states that such actions are unlawful and prohibited.⁶

However, the existence of the MUI fatwa does not have binding legal force, considering that the position of a fatwa in the Indonesian legal system is non-binding, considering that fatwas are not included in the hierarchy of statutory regulations as stipulated in Law No. 13 of 2022 concerning Amendments to Law no. 12 of 2011 concerning Formation of Legislation.

Despite the differences in views regarding the legalization of LGBT people, in 2023 since the enactment of Law No. 1 of 2023 concerning the Criminal Code, there is an article that prohibits same-sex sexual behavior. This is regulated in Article 414 of Law No. 1 of 2023 concerning the Criminal Code.

In this regard, Indonesia strictly prohibits committing obscene acts of both different types and the same sex. It's just that, criminal sanctions against someone who commits same-sex sexual acts still get criminal sanctions in the form of imprisonment. Meanwhile, according to a Neuro Psychologist from Al-Azhar University Indonesia Ihshan Gumilar, emphasized that LGBT is a mental illness that is not caused by biological or congenital factors. In line with this, the Director for Prevention and Control of Mental Health and Drugs (Dit P2MKJN) of the Ministry of Health, Firdiansyah, acknowledged that Indonesia already has its manual on Indonesian mental health guidelines and the LGBT dilemma is a mental health matter that is emphasized in the guideline.⁷ for that reason, on this occasion, it is necessary to conduct a study of the sanctions for criminal acts of obscenity against same sex in Law No. 1 of 2023 concerning the Criminal Code.

2. Research Method

The type of research used in this study is sociological juridical with research specifications in the form of analytical descriptive.⁸ The use of analytical description in this study aims to describe the phenomenon of LGBT in society which is studied by the legal system in Indonesia. The types and sources of data

⁶ Toba Sastrawan Manik, Dwi Riyanti, MUhkammad Murdiono, dan danang Prasetyo, 2021, Eksistensi LGBT di Indonesia dalam Kajian Perspektif HAM, Agama, dan Pancasila, *Jurnal Kwarganegaraan*, Vol. 18, No. 2, page. 88.

⁷ <https://psikologi.uma.ac.id/lgbt-adalah-penyakit-mental-dan-bisa-disembuhkan/> accessed on 7 February 2023 at 11:58.

⁸ Febryan Arda Ayu Lukitosarie dan Andri Winjaya Laksana, Tinjauan Hukum Pelaksanaan Penyidikan Tindak Pidana Pembunuhan Berencana Yang Dilakukan Oleh Anak, *Prosiding Konstelasi Ilmiah Mahasiswa UNISSULA (KIMU)* 7, 19 Januari 2022, page 217-231

needed in this study are primary data and secondary data. Secondary data is divided into primary legal materials, secondary legal materials, and tertiary legal materials. Related to the data analysis method used in this study is the qualitative data analysis method.

3. Results and Discussion

1. *Lesbian, Gay, Bisexual, and Transgender in the Conception of Legal Certainty*

The phenomenon of lesbian, gay, bisexual and transgender is one of the important issues that must be resolved by the Indonesian people. This is because this phenomenon is one of the things that for most people is a problem that must be resolved in the field of decency. In principle, the term LGBT is a term that emerged in the 1990s. Lesbian is a term used for a woman who likes women both physically and sexually and spiritually. While gay is a man who likes men and his actions refer to homosexual behavior. As for bisexual is someone who has an emotional and sexual relationship to both men and women. Meanwhile, transgender is the lack of an actual gender identity with a different gender.⁹

In principle, history related to LGBT has started since ancient times. For example, during the Chinese empire, Gavin Menzies mentioned that there were loyal servants known as Kasim or Thaikam. The existence of eunuchs or thaikam began before the eighth century. Kasim was a man who had his genitals castrated and then was hired as a palace servant whose job was to look after the emperor's closest female relatives. Furthermore, the discussion about eunuchs is not only used as servants for the king. But they are also a group of homosexuals who work as soldiers. An elite Greek army known as Theban is a member who comes from the homo pair.¹⁰ It is based on this fact that in the end became the forerunner of the development of LGBT people around the world.

Discussions related to LGBT behavior and sexual-related activities have gained legitimacy from developed countries. In this context, there are 23 countries that have provided facilities and legalized same-sex marriage. Several countries that have legalized same-sex marriage, for example in 2013 were Denmark, France, England, while in 2014, for example, Finland,

⁹ Meity Marhaba, Cornelius Paat dan John Zakarias, 2021, Jarak Sosial Masyarakat dengan Kelompok Lesbian Gay Biseksual dan Transgender (LGBT) Desa Salilama Kecamatan Mananggu Kabupaten Boalemo Provinsi Gorontalo, *Jurnal Ilmiah Society*, Vol. 1, No. 1, page. 3.

¹⁰ Muhamamd Tisna Nugraha, 2017, Kaum LGBT dalam Sejarah Peradaban Manusia, *Raheema: Jurnal Studi Gender dan Anak*, Vol. 3, No. 1, page. 36-38.

Scotland, and Ireland.¹¹ Although in several other countries it has been shown that it is legal and permissible to carry out same-sex marriages, the Indonesian context prohibits this. Nevertheless, it is reflected in Article 414 of Law no. 1 of 2023 concerning the Criminal Code which states that:

- (1) Every person who commits obscene acts against other people who are different or of the same sex:
 - a. in public, shall be punished with imprisonment for a maximum of 1 (one) year and 6 (six) months or a maximum fine of category III.
 - b. forcibly by force or threat of violence, shall be punished with imprisonment for a maximum of 9 (nine) years; or
 - c. published as pornographic content, shall be punished with imprisonment for a maximum of 9 (nine) years.
- (2) Every person using violence or threats of violence forces another person to commit obscene acts against himself, shall be punished with imprisonment for a maximum of 9 (nine) years.

Even though in the implementation of the new rules regarding the Criminal Code, it took effect three years after it was ratified, as Article 624 of Law No. 1 of 2023 concerning the Criminal Code. However, by looking at this provision, it becomes clear that the attitude of the Indonesian people towards same-sex obscenity is not permitted, and even subject to criminal sanctions.

Given the context of legal certainty that has been reflected in such a new Criminal Code, in principle the prohibition against LGBT behavior or same-sex obscene acts is contrary to Pancasila which is used as a reference in making laws in Indonesia. The provisions governing Pancasila as the source of all sources of state law are regulated in Article 2 of Law no. No. 13 of 2022 concerning Amendments to Law no. 12 of 2011 concerning Formation of Legislation. The existence of this provision gives the meaning that Pancasila is the fundamental norm on which the law is formed. In this case, Hans Nawiasky stated that the composition of the norms consists of:¹²

- a. State fundamental norms (staatsfundamentálnorm);
- b. The basic rules of the state (staatsgrunesetz);
- c. Formal Law (formell gesetz); And
- d. Implementing regulations and autonomous regulations (verordnung en autonome salzing).

¹¹ *Ibid*, page. 39.

¹² Muhammad Fikri Hanafi dan Sunny Ummul Firdaus, 2022, Implementasi Teori Hans Nawiasky dalam Peraturan Perundang-Undangan di Indonesia, *Sovereignty; Jurnal Demokrasi dan Ketahanan Nasional*, Vol. 1, No. 1, page. 80.

So that the position of Pancasila with regard to such theory is in the fundamental norms of the state or (staatsfundamentalnorn).¹³ As a fundamental state norm, Pancasila has five precepts which are interrelated and the main basis is Belief in One Almighty God. According to Wahyuningsih, this first precept is the most basic source which includes aspects of values in the life of the nation and state, so that all kinds of aspects of administering the state must contain values originating from Godhead.¹⁴ The mirror of Belief in the One and Only God is indicated by the existence of religions that are recognized by the Indonesian nation such as Islam, Christianity, Hinduism, Buddhism, and Confucianism.

Discussion of LGBT in the context of religions is one thing that should not be done. Even in Islamic studies, the behavior of Lesbian Gay, Bisexual and Transgender has its own terms which are of course forbidden in a religious context. The term Lesbian is called siaq, while gay or homosexual means liwath. The study of Liwath and Sihaq in the context of Islamic law is strictly prohibited. In fact, in the hadith of the prophet narrated by Abi Musa it is stated that liwath and siaq are part of adultery. In this context Abi Musa narrated:

عن ابي موسى قال قال رسول الله صلى الله عليه وسلم اذا اتى الرجل الرجل فهما زانيان واذا اتت المرأة المرأة فهما زانيتان

Meaning: From Abi Musa, the Messenger of Allah said: If a man comes to (have sex) with a man then both of them have committed adultery, and if a woman comes to a woman then both of them have committed adultery (HR. Al-Baihaqi).¹⁵

In line with that, there is another hadith which forms the basis of the prohibition on LGBT, namely:

لعن الله من عمل عمل قوم لوط ثلاث مرات

Meaning: Allah cursed anyone who did the deeds of the people of Lut (he repeated it three times),¹⁶

¹³ Andri Winjaya Laksana, Manifestation Of Pancasila Values In The Omnibus Law For Justice, *The 6th Proceeding International Conference And Call Paper Sultan Agung Islamic University*, Vol 1, No 1 (2020), page 164-173

¹⁴ Ratna Sari dan Fatma Ulfatun Najicha, 2022, Memahami Nilai-Nilai Pancasila Sebagai Dasar Negara dalam Kehidupan Masyarakat, *Harmony*, Vol. 7, No. 1, page. 55.

¹⁵ Hasan Zaini, 2016, LGBT dalam Perspektif Hukum Islam, *Jurnal Ilmiah Syari'ah*, Vol. 15, No. 1, page. 66.

¹⁶ Muhammad Arif dan Dwi Sukmanila Sayska, 2018, LGBT dalam Tinjauan Al-Quran dan Sunnah, *El-Hikam: Jurnal Pendidikan dan Kajian Islam*, Vol. XI, No. 2, page. 274.

Not only in the context of Islam, Catholicism also prohibits same-sex marriage. In a journal written by Largus Nadeak and Bernardus C.G. Maduwu stated that the Catholic Church has never legalized same-sex marriage, bearing in mind that in the holy book, homosexuality is an act that the church cannot accept (Rom. 1:24-27; Cor. 7:10; Tim. 1:10). This is because the rational arguments built in the church state that marriage is something sacred, whereas homosexual acts are not in accordance with the nature of moral law. The action does not originate from one true need and to complement each other affectively and sexually. However, this act cannot be justified.¹⁷ In line with that, Pope Francis in this case invites all members of the church to show an attitude of sympathy for the LGBT community. This is because the Church should declare the selfless love of Christ, resulting in acts of violence and discrimination against homosexuals. However, such special attention does not mean that the Church agrees with LGBT action because the Catholic Church does not approve of homosexual marriage.¹⁸

Based on this, referring to Pancasila which is used as *staatsfundamentálnorm*, the actions of LGBT are contrary to Pancasila, because religions in Indonesia do not justify such matters. In line with that, the new Criminal Code has also accommodated criminal sanctions for LGBT people as stipulated in Article 414 of Law no. 1 of 2023 concerning the Criminal Code.

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The criminal sanction related to the act of same-sex marriage in the new Criminal Code as stated in Article 414 is a 6-year prison sentence and a fine criminal sanction in the form of category III. Based on Article 79 of Law no. 1 of 2023 concerning the Criminal Code, states that:

- 1) The maximum fines are determined based on:
 - a) Category I, Rp. 1,000,000.00 (one million rupiah);
 - b) Category II, Rp. 10,000,000.00 (Ten million rupiah);
 - c) Category III, Rp. 50,000,000.00 (fifty million rupiah);
 - d) Category IV, Rp. 200,000,000.00 (two hundred million rupiah);
 - e) Category V, Rp. 500,000,000.00 (five hundred million rupiah);

¹⁷ Largus Nadeak dan Bernardus C. G. Maduwu, 2022, "Perkawinan" Pasangan Homoseksual Tidak Sesuai dengan Ajaran Gereja Katolik, *Jurnal Filsafat Teologi*, Vol. 19 No. 2, page. 125.

¹⁸ *Ibid*, page. 123-124.

- f) Category VI, Rp. 2,000,000,000.00 (two billion rupiah);
 - g) Category VII, Rp. 5,000,000,000.00 (five billion rupiah);
 - h) Category VIII, Rp. 50,000,000,000.00 (fifty billion rupiah)
- 2) In the event of a change in the value of money, provisions for the amount of fines shall be stipulated by a government regulation

Based on the provisions regarding this type of crime, the criminal sanction of a category III fine is a maximum of Rp. 50,000,000 (fifty million rupiah). The discussion about imposing sanctions or criminalizing an act has several parameters. Among the parameters that stand out to show how an act falls into the category of a crime according to Sudarto is divided into four, which are as follows:¹⁹

- a. The use of criminal law must pay attention to the goals of national development, so that crime prevention efforts must aim to develop people's welfare.
- b. Actions that are criminalized to be prevented or dealt with must be unwanted actions and cause both material and spiritual harm to members of the public.
- c. The use of criminal law must take into account the principle of cost benefit principal or costs and results.
- d. The use of criminal law must pay attention to the capacity and ability of the law enforcement agencies, so that they do not exceed their workload.

Based on these four conditions for criminalization, of course the act of same-sex marriage and LGBT has met these requirements. It's just that the discussion on criminal sanctions in the form of imprisonment for perpetrators of LGBT crimes needs to be studied more deeply, considering that prison sentences are part of a retributive effort that is oriented towards retaliation. On the other hand, imprisonment in Indonesia has experienced over capacity. Even in 2022, the number of prisoners in Indonesia will be 276,172 prisoners.²⁰

In connection with the large number of such convicts, of course it has an impact on state financial losses, bearing in mind that in an effort to imprison the state must spend funds such as consumption and so on. A small example of such a burden is that in 2018, the state had to spend Rp 1.3 trillion just to provide food

¹⁹ Salman Luthan, 2009, Asas dan Kriteria Kriminalisasi, *Jurnal Hukum*, Vol. 16, No. 1, page. 11.

²⁰ [https://databoks.katadata.co.id/datapublish/2022/09/23/penghuni-lapas-dan-rutan-kelebihan-kapasitas-109-pada-september-2022#:~:text=Berdasarkan%20data%20Direktorat%20Jenderal%20Pemasyarakatan,rutan\)%20pada%2019%20September%202022](https://databoks.katadata.co.id/datapublish/2022/09/23/penghuni-lapas-dan-rutan-kelebihan-kapasitas-109-pada-september-2022#:~:text=Berdasarkan%20data%20Direktorat%20Jenderal%20Pemasyarakatan,rutan)%20pada%2019%20September%202022), accessed on 13 February 2023 at 15:23.

for prisoners. Not only that, even in 2019, consumption costs for convicts also increased by 1.67 billion from funds in 2018.²¹ Due to this overcapacity, prison sentences should no longer be applied to perpetrators of same-sex marriage crimes or LGBT perpetrators.

The discussion on the paradigm of imposing criminal sanctions on perpetrators of criminal acts has indeed progressed.²² The paradigm of imposing criminal sanctions on retribution which prioritizes retaliation has shifted,²³ to the provision of sentencing purposes for the perpetrators, and even continues to criminal individualization. According to Sudarto, individualization of *pidana* means that in imposing criminal sanctions it always pays attention to the characteristics and circumstances of the offender, so that the characteristics of criminal individualization according to Barda Nawawi Arief are:²⁴

- a. Criminal liability is personal or individual (personal principle).
- b. Punishment is only given to those who are guilty (principle of culpability)
- c. Punishment must be adjusted to the characteristics and circumstances of the offender.

In this regard, given that one of the principles of criminal individualization must pay attention to the circumstances of the offender. In this context, referring to the Neuro Psychologist from Al-Azhar University Indonesia Ihshan Gumilar, emphasized that LGBT is a mental illness that is not caused by biological or congenital factors,²⁵ then the effort to punish LGBT perpetrators should be rehabilitation, so that when a person has finished his sentence, he will get back to his normal life. It's just that, of course, it will raise questions, when LGBT perpetrators only need to be rehabilitated, of course it will increase the number of LGBT perpetrators, considering that one of the functions of criminal law is to provide a sense of deterrence and as an effort to prevent it from being carried out by the wider community. On the other side of this, rehabilitation efforts for LGBT offenders will of course cause a financial burden on the state,

²¹ Ilham Panunggal Jati Darwin, 2019, Implikasi Overcapacity terhadap Lembaga Pemasyarakatan Indonesia, *Jurnal Cepalo*, Vol. 3, No. 2, page. 81.

²² Andri Winjaya Laksana, Tinjauan Hukum Pidana Terhadap Pelaku Penyalahgunaan Narkotika Dengan Sistem Rehabilitasi, *Jurnal Pembaharuan Hukum*, Vol 2, No 1 (2015), page 74-85

²³ Eva Achjuni Zulfa, 2007, Menakar Kembali Keberadaan Pidana Mati (Suatu Pergeseran Paradigma Pidana di Indonesia), *Lex Jurnalica*, Vol. 4, No. 2, page. 95.

²⁴ Tri Wahyu Widiastuti, 2010, Prinsip Individualisasi Pidana dalam Hukum Pidana dan Hukum Pidana Islam, *Wacana Hukum*, Vol. 9, No. 2, page. 46-47.

²⁵ <https://psikologi.uma.ac.id/lgbt-adalah-penyakit-mental-dan-bisa-disembuhkan/>, accessed on 14 February 2023, at 17.00

considering that the state has to spend a large amount of funds to carry out rehabilitation efforts.

Based on this, the punishment of LGBT perpetrators apart from rehabilitation should also be carried out by fines and social work. This refers to Article 65 of Law no. 1 of 2023 concerning the Criminal Code which states that:

1) Principal punishment as referred to in Article 64 letter a consists of:

- a. Prison sentence;
- b. Closing sentence;
- c. Supervision crime;
- d. Fine criminal; and
- e. Social work crime

The reason why it is necessary to be given social work punishment and fine punishment, apart from considering one of the conditions for criminalization according to Soedarto is that it must take into account the principle of cost benefit principal or costs and results. The existence of fines and social work punishment also aims to prevent and provide a deterrent effect for society at large. so that perpetrators of LGBT crimes or same-sex marriages can be minimized and even non-existent.

4. Conclusion

LGBT behavior in the Indonesian context has been regulated in Article 414 of Law no. 1 of 2023 concerning the Criminal Code. Efforts to criminalize acts of same-sex marriage or LGBT are caused because these actions are contrary to Pancasila, bearing in mind that such acts are contrary to religious principles which are reflection of Belief in One Supreme God. On the other hand, criminal sanctions for LGBT perpetrators should not be given imprisonment, but rehabilitation, fines, and social work.

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