

## CRIMINALIZATION OF OBTAINED ACTIONS PERFORMED BY SAME-GENERAL COUPLES (HOMOSEXUAL) IN THE PERSPECTIVE OF CRIMINAL LAW REFORM

Ni Luh Rai Puspawati<sup>1</sup>, I Ketut Rai Setiabudhi<sup>2</sup>

Faculty of Law, Udayana University

Email: raipuspa142@gmail.com<sup>1</sup>, raisetiabudhi\_fhunud@yahoo.com<sup>2</sup>

### Abstract

*Homosexuals are groups that have same sex sexual orientation (gay), different from people in general who are sexually oriented towards people of the opposite sex (heterosexual), resulting in sexual activity deviating from what it should be. The problem that will be discussed in this study is whether homosexuality is part of a crime according to Indonesian criminal law. The research method used in writing this research is a normative legal research method, because there is a norm void. Normative legal research is carried out by examining library materials by studying and reviewing legal principles and positive legal rules derived from library materials and legislation. The approaches used are the statutory approach, the concept approach and the comparative approach. Homosexuality is part of a criminal act according to Indonesian criminal law, but the regulation is still very limited because it only regulates same-sex sexual relations carried out by adults with minors. So it is necessary to criminalize or expand the criminal regulation of deviant acts committed by the gay community in the renewal of criminal law.*

**Keywords:** *Homosexual, deviant, criminalization*

### INTRODUCTION

Indonesia is a country based on law as stated in the 1945 Constitution of the Republic of Indonesia (1945 Constitution of the Republic of Indonesia) in Article 1 point (3) which states "Indonesia is a country based on law". All actions and behavior carried out by Indonesian people are regulated by a set of legal rules or laws and regulations that are established and bind all members of Indonesian society. Previously, the legal relationship that existed at first was a personal or individual relationship or private relationship. Over time, things were taken over by community or ethnic groups, and finally after the founding of the State, they were taken over by the State and turned into public interests (Teguh Prasetyo, 2014:1).

In the changing times, a case developed that became a conversation and debate in the midst of Indonesian society and the world community, namely homosexuality, in which men like and have a sexual orientation towards same-sex men. The existence of homosexuality has caused controversy in various circles of Indonesian society. This controversy was triggered by several things, one of which was the demonstration by the Indonesian people who asked the Indonesian government to refuse to legalize homosexual acts in Indonesia (Safrudin Aziz, 2017:29).

The controversy that was strongly opposed was the holding of a party "The Wild One", which is one example of various homosexual phenomena carried out in Indonesia, carried out by 141 people and along with evidence of contraceptives secured by the North Jakarta Sector Police of the Republic of Indonesia on May 21, 2017. In the party "The Wild One", allegedly held homosexuals or mass same-sex sex. Due to the absence of laws and

regulations governing the prohibition of homosexual acts committed by adults against other adults of the same sex in Indonesia, this results in homosexual perpetrators not being punished for all acts of same-sex intercourse, even though this homosexual act is judged by Indonesian society is an act that is forbidden to do, because it is contrary to the values that live and grow in society, both religious values, moral values, and cultural values and the values of human nature itself. The term homosexual means fellow men while bisexual is a term for people who can be attracted to men and/or women, and transgender itself is a term used for people who behave and look different or do not match their gender.

Coupled with the large number of Indonesian people who are infected with diseases such as HIV/AIDS, which is partly contributed by the gay or homosexual community. "HIV/AIDS is an infectious disease caused by infection with the Human Immunodeficiency Virus (HIV) which attacks the immune system. This infection causes sufferers to experience a decrease in body resistance so that it is very easy for them to be infected with various other diseases. The basis for referring to homosexuality used to date is Article 292 of the Criminal Code, but Article 292 of the Criminal Code which states "anyone who is old enough to commit 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 criminal imprisonment for a maximum of five years" which is still limited to regulate a person who is old enough to commit obscene acts or have sex with someone of the same sex who is known to be not old enough. There is no regulation for people who are old enough to commit obscene acts and/or have sex with people of the same sex and who are also known to be old enough. In fact, obscene acts or sexual relations committed by the gay community that are currently developing are not only committed by adults to children, but are also carried out by adults with fellow adults (Anggraini, S. A, 2019:2).

The provisions of Article 292 of the Criminal Code have been subject to judicial review at the Constitutional Court (MK) by several applicants calling themselves the Indonesian Family Love Alliance (AILA Indonesia) because they are considered to be contrary to the constitution and are no longer relevant to being enforced at this time. Article 292 of the Criminal Code is considered too narrow because it is limited to only regulating adults who commit obscene acts or have same-sex sex with people who are not old enough. AILA Indonesia as the applicant views the formulation of this article very much needs to be expanded, so that obscene acts or same-sex sex committed by adults and adults can also be charged under the provisions of this article.

Two years after the lawsuit was filed, the Constitutional Court through decision number 46/PUU-XIV/2016 dated 14 December 2017 rejected the lawsuit filed by AILA Indonesia, so that the current formulation of Article 292 of the Criminal Code is still valid and acts of obscenity or same-sex sex carried out by adults with adults there is still no regulation until now, so based on all the considerations and data that has been mentioned, it is deemed necessary to criminalize obscene acts or same-sex sexual relations committed by homosexuals in Indonesia, whether committed by adults against minors or by adults against fellow adults. Criminalization is deemed necessary to explore and make legal discoveries (rechtsvinding) that live in society and put them into a formulation of criminal offense rules

to fill the void in the rules that still exist today for obscene acts or same-sex sex committed by adults with the fellow adults.

Based on the problems that have been described above, it will be studied further through the writing of a study entitled "Criminalization of Obscene Acts Committed by Same-Sex (Homosexual) Couples in the Perspective of Criminal Law Renewal". This research focuses on two problem formulations which will be studied further, namely first, is same-sex sexual intercourse committed by homosexuals a part of a crime according to Indonesian criminal law? second, how is the regulation of same-sex sexual relations committed by homosexuals in Indonesia in the perspective of criminal law reform. Based on the literature search that the author has done, the title and discussion contained in this paper have an element of renewal, thus it does not contain elements of plagiarism in it.

## **LITERATURE REVIEW**

### **Criminal law reform**

Efforts to carry out criminal law reforms are in the political field of criminal law. Politically and culturally, the enforcement of the Criminal Code in Indonesia cannot be justified. Even though various amendments and adjustments have been made to the Criminal Code, this does not make this an attempt to reform criminal law in its true sense and has a national character (M. Ali. Zaidin, 2015:59). This assertion was due to changes to the Criminal Code not only to replace the *Wetboek van Straftrecht (WvS)* became the Criminal Code as a national product. Reform of criminal law must touch philosophical aspects, namely changes or orientation towards the principles down to the stage of the values that underlie them.

Criminal law renewal essentially implies an attempt to reorient and reform criminal law in accordance with the central sociopolitical, sociophilosophical and sociocultural values of Indonesian society which underlies social policy, criminal policy and law enforcement policy in Indonesia (Barda Nawawi Arief, 2011:28). In short, it can be said that the reform of criminal law in essence must be pursued with a policy-oriented approach and at the same time a value-oriented approach. Criminal law reform must be carried out using a policy approach, because in essence criminal law reform is part of a policy measure or "policy" (namely part of legal/law enforcement politics, criminal law politics, criminal politics and social politics).

### **Criminal Law Policy**

Criminal law policy can also be referred to as "criminal law politics", or known by the terms "penal policy" and "criminal law policy". Criminal law policy implies how to seek or make and formulating good legislation. According to A. Mulder in his book Barda Nawawi Arief entitled *Criminal Law Policy "Development of Drafting the New Criminal Code"*, criminal law policy is a policy line for determining:

1. to what extent the applicable criminal provisions need to be changed or updated;
2. what can be done to prevent the occurrence of a crime;

3. the manner in which investigations, prosecutions, trials and execution of crimes must be carried out.

## **METHOD**

The type of research outlined in writing this journal is a type of normative legal research, namely research that places law as a building system of norms (Mukti Fajar ND dan Yulianto Achmad, 2017:34). The approach used is statutory approach (Statute Approach), concept approach (conceptual approach) and comparative approach (comparative approach). The main source of legal data needed for research. Sources of Secondary Legal Data - Legal data from library research. In collecting legal data, the author takes steps to collect legal data based on primary and secondary legal data, then categorizes, records or quotes, summarizes, and reviews qualitative methods if necessary. The analysis of legal data used is systematic and descriptive, first of all it describes legal material in a structured way, then analyzes it through demonstration analysis techniques and interpretation of related concepts (Soerjono Soekanto, 2009:34).

## **RESULTS AND DISCUSSION**

### **Regulation of Same-Sex Sexual Relations Performed by Homosexuals in the Criminal Code (KUHP)**

Arrangements for actions that can be classified as criminal acts in Indonesian law are regulated in the Criminal Code and in several special criminal laws for actions that are classified as criminal acts after the stipulation or ratification of the Criminal Code in Indonesia in 1946 (I Wayan Agus Harry Saputra, 2018:7). "The Criminal Code is the book that is used as the first reference when looking for punishment to be imposed on a criminal act, because in the Criminal Code there are general provisions in criminal law enforcement". Homosexual deviant sex is still not regulated clearly and comprehensively in the Criminal Code (Prayitna, Reza Diptha, 2019:16). The article that is used as the basis for referring to deviant sexual acts, especially same-sex obscene acts or same-sex sexual relations committed by the gay community so far is only Article 292 of the Criminal Code which states "A person who is old enough to commit obscene acts with another person of the same sex, who is known or should be presumed that they are not old enough, shall be punished by a maximum imprisonment of five years (Maliarta, I. Nengah, Ida Bagus Surya Dharma Jaya, dan Sagung Putri ME Purwani, 2020:16).

This article is not enough to accommodate all the deviant acts committed by the gay community which have become increasingly widespread lately. Article 292 of the Criminal Code is still limited to only regulating a person who is old enough to commit obscene acts or have sex with someone of the same sex who is known to be not old enough, or in other words the current Criminal Code only regulates deviant sexual acts committed by the community. LGBT who have grown up to children only.

R. Soesilo in his book *The Criminal Code (KUHP) and its Complete Commentary Article by Article* explains that:

1. "Adult = 21 years old or not yet 21 years old, but has been married before.

2. Same sex = male to male or female to female.
3. Obscene acts = all acts that violate decency (decency) or are heinous acts, all of which are in the sphere of sexual desire, for example kissing, groping the genitals, groping the breasts, and so on. In the sense of obscenity, it also includes masturbation.
4. Two people who are all minors or two people who are all adults together commit obscene acts, are not punished according to this Article because what is punishable by punishment is obscene acts of adults against minors (R. Soesilo, 2010:50).

In order to be punished under the Article above, an adult is required to know or at least be able to think that his friend is immature. "Currently, obscene acts or same-sex sexual relations are not limited to only being committed by adults to children, but also carried out by adults with fellow adults, it is even possible that it will be carried out by a child who is not old enough with another. children who are also not old enough". So it is considered very necessary to take concrete steps in terms of forming the formulation of legal rules which state all arrangements for obscene acts or same-sex sexual relations carried out by the gay or homosexual community who are both adults and who are also underage. So that it can be said that homosexuality is part of a criminal act according to Indonesian criminal law, which is regulated in the provisions of Article 292 of the Criminal Code, however, this provision is still very limited to only regulating adults who commit obscene acts or same-sex sexual relations with a minor just.

In addition to Article 292 of the Criminal Code which is the legal basis for criminalizing deviant acts committed by adults who commit deviant sex acts or commit obscene acts with other people of the same sex who are known to be underage or still children, there are also rules outside the Criminal Code that regulate this matter which have been used in several cases and have binding legal force in a court decision, namely Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection in Article 82 paragraph (1) which states: "Everyone who violates the provisions referred to in Article 76E shall be punished with imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah)". Article 76 E in question is "Everyone is prohibited from committing violence or threats of violence, coercing, deceiving, committing a series of lies, or persuading a child to commit or allow obscene acts to be committed (Widayati, Lidya Suryani, 2018:6)

### **Regulation of Same-Sex Sexual Relations Committed by Homosexuals in Indonesia in the Perspective of Criminal Law Reform**

Obscene acts or same-sex sexual relations that are committed by the gay community today are not limited to only being committed by adults to children, but it is also carried out by adults with fellow adults, it is even possible that it will also be carried out by a child who is not old enough with fellow children who are also not old enough. Globalization developments and modernization moves, as well as Western culture coming and going to Indonesia, can undermine Pancasila values. "Modernization and globalization actions must



be prevented by adopting regulations so as to be able to limit actions that are contrary to the moral values of society". Actions caused by morally conflicting masses are acts of homosexual intercourse. Until now, gay people have fled in the name of universal human rights accepted by Western countries, while Indonesia has adopted Pancasila as a norm that accepts human values (Sudibyo, Ateng, 2019:41).

Since tens of years ago, efforts to recode the national Criminal Code have begun to be initiated, to be precise when the National Law Seminar I was held in Semarang in 1963, one of which was discussing the Draft Criminal Code (RKUHP) in addition to the Draft Criminal Procedure Code (RKUHAP), the Draft Criminal Code. Civil Law Act (RKUHPperdata), and Draft Commercial Law Code (RKUHD). This seminar became the starting point for the history of the renewal of the Criminal Code in Indonesia, which a year later the government team began to formulate. Counting from the beginning of the formulation, namely 1964 until now, it has been 54 years since the reform of the Criminal Code was attempted, but in fact until now there has not been a bright spot, namely the legalization of the Draft Criminal Code to become the first national Criminal Code since the state of Indonesia was founded. Various drafts of the RKUHP from the beginning of its formulation until now have been made by the drafting team, starting from the first draft issued in 1964, then the draft RKUHP 1968, RKUHP 1971/1972, RKUHP Basaroesdin (BAS Concept) 1977, then 1979, 1982/1983, 1984/1985, 1986/1987, 1987/1988, RKUHP 1989/1990, 1991/1992 which were revised up to 1997/1998, and so on until the last draft discussed by the DPR to date is the draft RKUHP 2015. Likewise, developments regarding articles that regulate offenses committed by homosexuals. Even though the development of the concept of the RKUHP has experienced very long dynamics with many concepts that have been issued, it is regrettable that it is not in line with the development of reforms in offenses that regulate homosexuality. When viewed from the Criminal Code that is still in effect today, then the first draft in 1964 to the last draft in 2015 there were not so significant developments or changes to this homosexual article (Erfa, Riswan, 2015:13).

The current Criminal Code regulates deviant sex acts in Article 292 of the Criminal Code which states, "anyone who is old enough to commit obscene acts with another person of the same sex, who is known or should reasonably be suspected, that he/she is not old enough, is punishable by a maximum imprisonment of five years", this article, as discussed earlier, is still very, very limited, only regulates a person who is old enough to commit obscene acts or have sex with a person of the same sex who is known to be not old enough. There is no regulation for people who are old enough to commit obscene acts and/or have sex with people of the same sex and who are also known to be old enough.

Until the 2015 RKUHP there were no changes to the regulation of obscenity or deviant sexual acts committed by members of the community, in the 2015 RKUHP which divides the Criminal Code into two books, namely the first book which regulates general provisions and the second book which regulates criminal acts, LGBT is regulated in book two, Chapter XVI which regulates Moral Crimes in the fifth part concerning Rape and Crime Obscenity, paragraph 2 concerning Fornication, Article 496 paragraph (1) and paragraph (2), which states:

1. "Anyone who commits obscene acts with another person of the same sex who is known or reasonably suspected to be under the age of 18 (eighteen) years, shall be punished with imprisonment for a maximum of 9 (nine) years.
2. Punished with the same penalty plus one third if the obscene act as referred to in paragraph (1) is committed by means of oral sex or anal sex or all forms of meeting of non-sex organs with genitals which are carried out homosexually"( Sirait, Timbo Mangaranap,2018:620).

There has been no significant change between the Criminal Code which is still valid today and the 2015 RKUHP, because the 2015 RKUHP still regulates "a person who commits obscene acts or acts of deviant sex with another person of the same sex who is known or reasonably suspected of being underage". This can be seen from each of the elements in Article 292 of the Criminal Code and Article 496 paragraph (1) and paragraph (2) of the RKUHP which can be compared as follows:

Comparison of the Elements of Article 292 of the Criminal Code and Article 496 of the 2015 Criminal Code

<b>ARTICLE 292 of the Criminal Code</b>	<b>Article 496 paragraph (1) RKUHP</b>	<b>Information</b>
1). Old enough people	1). Each person	There is a change from "anyone of age" to "everyone". He phrase in Article 292 of the Criminal Code still limits the offender to people who are old enough, while in Article 496 of the Criminal Code it has developed slightly into "everyone" or there are no restrictions on the offender either old enough or not. However, this change does not seem to be a significant change because the phrase/element of the victim is still the same only for someone who has not old enough.
2). Do obscenity	2). Do obscenity	SAME
3) That which is known or should be suspected that's not old enough	3) Known or proper Presumably not yet 18 (eighteen years).	There is a difference in the phrase "should be presumed that they are not old enough" and the phrase "should reasonably be suspected

		that they are not yet 18 (eighteen) years old", however, even though there are different phrases, the two sentences still have the same meaning and substance, namely "should suspected of not being old enough" because not yet 18 years old also means the same as not enough age.
4) Is punishable by imprisonment for a maximum of five years	4) Convicted with Maximum imprisonment of 9 (nine) years.	There are developments in terms of maximum imprisonment which is punishable by a maximum imprisonment of five years to a maximum imprisonment of nine years.

Based on all of these descriptions, seen from any angle, it can be concluded that the values contained in same-sex sexual acts cannot be justified at all, the intrinsic values contained in these actions are disgraceful acts and have deviated from the light of deity. The basic human rights cannot justify such deviant sexual acts, even though human rights guarantee basic freedom rights as a human being, still in exercising their rights and liberties the gay community must still and be obliged to comply with the restrictions stipulated by law by the purpose of guaranteeing and respecting the rights and freedoms of others to meet just demands in accordance with moral considerations, religious values, security and public order in society.

So, it is necessary to criminalize or expand the regulation of criminal acts committed by the gay community in the RKUHP concept which is currently being discussed by the House of Representatives, so that the articles governing homosexuality are no longer limited to only regulating obscene acts or same-sex sexual relations committed by someone who is an adult against someone who is not old enough. However, it is regulated regarding an adult who has same-sex sex with an adult and/or a child who is not old enough to have same-sex sex with another child who is not old enough to also be regulated in an article formulation. in the RKUHP so that all forms of sexual deviation that exist can be immediately addressed and all risks that arise can be overcome immediately.

## CLOSING

### Conclusion

Same-sex sexual relations committed by homosexuals are part of criminal acts according to Indonesian criminal law, which are regulated in the provisions of Article 292 of the Criminal Code, however, the provisions of this article still only regulate adults who



commit obscene acts or have same-sex sex with a child just minors. Meanwhile, the regulation regarding same-sex sexual relations committed by homosexuals in Indonesian criminal law is currently still very limited in regulating adults who commit obscene acts or same-sex sexual relations with a minor, therefore it is necessary to carry out a wider criminalization. against same-sex sexual relations carried out by the homosexual community, especially those carried out by fellow adults. Regarding the RKUHP which is currently being discussed by the House of Representatives, namely by expanding the regulation that prohibits same-sex sexual relations from just being carried out by adults with minors, it is also extended to same-sex sexual relations carried out by fellow adults and / or other children who are still underage.

### **Suggestions**

The Indonesian government should be more responsive in capturing outstanding issues and the public should be more active in providing input to the government to evaluate laws and regulations that are already classified as old, especially those that are inherited from the Dutch colonial government, to be updated immediately with due regard values that live in Indonesian society.

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