

LEGAL POLITICS CONCERNING THE FULFILLMENT OF LGBT CONSTITUTIONAL RIGHTS IN THE INDONESIAN LEGAL APPROACH

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Abstract:

Article 28 E paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that everyone has the right to believe in beliefs and express thoughts and attitudes according to his conscience. These provisions are the basis that no one can judge his choices and attitudes. On the other hand, LGBT, as a minority group in Indonesia, often receive unpleasant treatment for their sexual orientation. Referring to WHO data, LGBT cannot categorize as a genetic and natural disease. As a legal state that upholds human rights, the state should protect LGBT people. Such protection can carry out through appropriate legal politics by forming several regulations that allow LGBT people to get the same constitutional rights as others. This policy is essential to manifest the state's presence towards all community groups without exception. Based on these things, this article aims to answer the question of the proper legal policy to provide human rights protection for LGBT groups in Indonesia. The research method used in this article is normative juridical. This article hypothesizes that the correct political law will allow LGBT groups to obtain the same rights as other people.

Keywords: *constitutional, human rights, legal, policy, state*

Abstrak

Pasal 28E ayat (2) Undang-Undang Dasar NRI 1945 menyatakan bahwa setiap orang berhak memperoleh kebebasan untuk menganut kepercayaan serta menyatakan pikiran dan sikap menurut hati nuraninya. Ketentuan tersebut menjadi dasar bahwa tidak seorang pun dapat menilai atas pilihan dan sikap seseorang. Di sisi lain, LGBT sebagai kelompok minoritas di Indonesia seringkali mendapat perlakuan tidak menyenangkan atas orientasi seksualnya. Merujuk data WHO, LGBT tidak bisa dikategorikan sebagai penyakit genetik



dan alami. Sebagai negara hukum yang menjunjung tinggi hak asasi manusia, seharusnya negara melindungi kaum LGBT. Perlindungan tersebut dapat dilakukan melalui politik hukum yang tepat dengan membentuk beberapa peraturan yang memungkinkan kaum LGBT mendapatkan hak konstitusional yang setara dengan warga negara lainnya. Kebijakan ini penting untuk memastikan negara hadir terhadap semua kelompok masyarakat tanpa terkecuali. Berdasarkan hal tersebut, artikel ini bertujuan untuk menjawab pertanyaan tentang kebijakan hukum apa yang tepat untuk memberikan perlindungan hak asasi manusia bagi kelompok LGBT di Indonesia. Metode penelitian yang digunakan dalam artikel ini adalah yuridis normatif. Hipotesis artikel ini adalah bahwa politik hukum yang tepat akan memungkinkan kelompok LGBT mendapatkan hak yang sama dengan kelompok lain.

Kata Kunci: HAM, hukum, kebijakan, konstitusional, negara

INTRODUCTION

Article 28E Paragraph (2) of the 1945 Indonesian Constitution states that everyone has the right to hold beliefs and express thoughts and attitudes according to his conscience. This provision is the basis that no one can judge a person's choice or mood. The freedom to act according to one's conscience is a human right that should protect. The presence of the state is significant to ensure that these rights can still be obtained by anyone regardless of ethnicity, religion, race, or between groups.

LGBT, as a minority group in Indonesia, often gets unpleasant treatment for their sexual orientation. Referring to the International Statistical Classification of Diseases and Related Health Problems (ICD), a guidebook for WHO to diagnose disease, LGBT is not a mental illness. (Cochran et al., 2014) That means that LGBT is a natural phenomenon that occurs since birth, and part of the difference should be the state's obligation to protect it optimally.

However, the fact is the opposite. LGBT, as a minority group, does not have the same rights as other groups. As an implication of their different sexual orientations, the state should give them the same rights as other citizens, namely the right to marry those with the same sexual orientation. That is because the right to have a legal marriage, as stated in Article 28B Paragraph (1) of the 1945 Constitution of the Republic of Indonesia, is a non-derogable right. This prohibition exists in the provisions in Article 1 of Law Number 1 of 1974 concerning marriage which states that a man and a woman can only carry out the marriage bond. This condition contradicts the fact that LGBT people are known for their sexual orientation to same-sex marriage, which means that the state has restricted LGBT people from obtaining their constitutional rights.

Referring to the fundamental conception of marriage, family life, or marriage is a reasonable expectation and intention of everyone. The essence of

the value of marriage is to unite two people who love each other. That is in line with the provisions in Article 1 Paragraph (1) of Law Number 39 of 1999 concerning Human Rights that marriage is one of the rights inherent in the nature and existence of humans as creatures of God and is a gift that must be upheld and protected by the state (Judiasih et al., 2020) Law, Government, and everyone for the sake of honor and protection of Dignity and human beings.

However, the Government of Indonesia's actions contradicts these rights' protection. The Indonesian Government expressly prohibits same-sex marriage, carried out without coercion. (Yen et al., 2020) This prohibition arises because the form of the understanding of the Indonesian people that for a long time accepted heterosexual couples as absolute truth and LGBT as an act that is contrary to morals or religious values. (Usman, 2018) Conceptions based on a particular religion are contrary to the principle of human rights, which does not see anyone based on ethnicity, religion, race, culture, or class. (Hudayar, 2019) In addition, in several countries with a better index of human rights protection, namely Norway and the United States, same-sex marriage has been legalized by the state.

Therefore, the Government, as the leading actor in the state's efforts to provide human rights protection for all groups, should be present to provide security or comfort guarantees for LGBT groups to get their rights. Essentially, that can do the ownership through proper legal politics by establishing several regulations allowing LGBT people the same constitutional rights as others. That is important to realize the presence of the state towards all community groups without exception.

There are many research papers on the constitutional rights of LGBT. The first article was Ita Dwiyantri's, entitled *The Criminal Penalties for LGBT in a Human Rights Perspective*. In the article, Ita Dwiyantri sees the potential for human rights violations related to criminal sanctions for LGBT people. However, Dwiyantri focuses her research on the application of criminal sanctions. On the other hand, this article has not discussed studies related to LGBT constitutional rights at all. (Dwiyantri, 2021) Curi Urjana conducted the second research in his article entitled *Legal Provisions, Discrimination and Uncertainty on the LGBT community in Albania – laws on human rights vs. exerted rights of LGBT persons*. Urjana's research highlights discriminatory acts committed by society against LGBT people. However, the research conducted by Urjana is not related to the fulfillment of constitutional rights that the state must grant. (Curi, 2018)

The third Research is an article by Anne Richard entitled *LGBT: equally entitled to human rights and Dignity*. In the article, Anne discriminatory acts committed by the public against LGBT people. Similar to the previous article, the article written by Anne does not look at LGBT from a legal perspective, especially constitutional law. (Richard, 2013) Based on these previous studies, the author's article has a novelty aspect because there has been no study on the fulfillment of constitutional rights for LGBT people in the Indonesian

constitutional system. Based on the statement above, this paper's problem question is what is the proper legal policy to provide human rights protection for LGBT groups in Indonesia?

METHOD

Based on the background and problem formulation above, the type of research used in this scientific paper is normative juridical based on library research. The writing method used in this paper is to identify problems, study literature, and juridical analysis. (Mahardika, 2020) The technique used in data collection begins with collecting relevant and appropriate references. The data collection method used is the literature study method.

The collected data will later be parsed and processed using substantive juridical analysis. The juridical analysis method is used to conclude efforts to find the characteristics of the substance objectively and systematically.

The data used in compiling this paper consists of primary and secondary data. Preliminary data comes from Indonesia's prevailing laws and regulations, including the 1945 Constitution of the Republic of Indonesia, Law Number 1 of 1974 concerning Marriage, and other relevant laws and regulations. In contrast, secondary data comes from references from credible parties, such as books and journals standardized nationally and internationally and official government websites. The methodology in this research uses descriptive methods by describing objective factual data.

RESULT AND DISCUSSION

Human Rights are a set of inherent rights like human existence as God's creatures and His gifts that must be respected, upheld, and protected by the state, law, Government, and everyone for honor and protection of human Dignity. As mentioned earlier, the origins of the idea of Human Rights (Human Rights) come from the theory of natural rights (natural rights theory). The natural approach to rights stems from the view of natural law (natural law theory). In its development against power, a renewal movement emerged (Renaissance), hoping to return to Greek and Roman culture that respected individuals. The renewal movement from the flow of natural law is Thomas Aquinas's idea, and Grotius asserted that God determines everyone in life. Still, regardless of status, all people are subject to God's authority. That means that divine rules limit not only the power of the King but all humans are endowed with a unique individual identity, which is separate from the state in which he has a natural right which states that each individual is an autonomous being. (K. Smith, 2009)

It can say that human rights are fundamental rights that are inherent or inherent; universal refers to that human rights are without distinction of skin color, race, religion, ethnicity, nation, or other social status and cannot be

revoked. (Ymeraj, 2018) That right is owned by individuals solely because they are His human creations, not because they are citizens of a country. Without these rights, a person cannot be fully human. If these rights are reduced or violated, the quality of being a human created by God will also decrease. Human rights state that human humanity has fundamental rights inherent in human identity. These rights mean a person has a "privilege" to accept according to his privileges. In addition, there is an obligation to follow the "privileges" that exist in other people. Therefore, the claims possessed by every human being must be fulfilled and protected to realize the perfection of human existence.

The right to freedom of expression is the realization of the request that every human has to express something for himself and others. Freedom of expression means that a person has chosen to use their rights because, according to human rights, they can do or not do something. (Peonidis, 2019)

At the level of reality, human rights values have not run optimally, and human rights violations still occur on a massive scale. Human rights often experience reductions and deviations in meaning. Human rights are absolute rights that often forget the importance of the presence of human obligations. This approach often results in the coercion of will based on the common good and interests. The pressure of choice often leads to violent behavior. In harsher language, it can tell that there are "preventive" and "repressive" tendencies. Preventive and repressive is a manifestation of the development ideology that leads to achieving order. (Lubis, 1982)

In human rights, two essential principles underlie the concept of human rights itself, namely the principles of freedom and equality, where these two things are the basis of the existence of justice. John Rawls argues that three things are solutions to the main problem of justice, namely: (Silva, 2019)

1. The principle of the greatest equal liberty for everyone (principle of greatest equal right). These principles include freedom to participate in political life, freedom of speech, freedom of the press, freedom of religion, freedom to be oneself, space from arbitrary arrest and detention, and the right to defend private property.
2. The difference principle. The essence of this principle is that socio-economic differences regulate to provide the most significant benefit to disadvantaged people.
3. The principle of fair equality of opportunity. The essence of this principle is that socio-economic inequalities should regulate in such a way as to open up social positions and positions to all under conditions of equality of opportunity.

Based on the above principles, it seems that these three principles are the main things that exist in human rights, where human rights do not look at a person's economic, social and cultural position and do not see his position as a

civilian or his role in terms of politics, everyone has the freedom and also has the same situation.

Legal politics is "legal policy or official line (policy) regarding law that will enforce either by making new laws or by replacing old laws, to achieve state goals." Thus, legal politics is a choice of laws and an alternative of rules to be repealed or not enforced, all of which intend to achieve state goals as stated in the Preamble to the Indonesian 1945 Constitution.

The definitions that several other experts have put forward show substantive similarities with the author's illustrations. Padmo Wahjono said that legal politics is a fundamental policy that determines the law's direction, form, and content. (Supena, 2019) In another writing, Padmo Wahjono clarifies this definition by saying that legal politics is the policy of state administrators regarding the criteria for punishing something, which includes the formation, application, and enforcement of the law. Teuku Mohammad Radhie defines legal politics as a statement of the will of the state authorities regarding the laws that apply in their territory and the direction of legal development. (Mahardika, 2019)

The various legal experts above do not significantly differ in their understanding of legal politics. The difference is only in the scope or material content of legal politics. Therefore, in this study, legal politics is defined as government policy that is the basis for determining the direction of national law development to achieve the goals of the Indonesian state, including legal structure, legal substance, and legal culture.

According to the Big Indonesian Dictionary (KBBI), homosexuality is a condition in which a person loves people of the same gender. The Malay Archipelago Dictionary provides two definitions of homosexuals, namely. First, homosexuals are individuals who are attracted to their lust for the same sex. Second, homosexual people are in a state of attraction to people of the same sex; or tend to have same-sex relationships.

Siti Musdah Mulia, in the Gandrung Journal, defines homosexuality as someone with a sexual orientation with the same sex. (Harahap, 2016) Djalinus also gave the understanding that homosexuals are people who are attracted to other people of the same gender.

The existence of homosexuals still invites pros and cons in society today because their behavior is against the prevailing norms. Even so, Liza Marie Djaprie, a Clinical Psychologist and Hypnotherapist thinks that LGBT is not a mental disorder experienced by a person. The conditions they experience are considered unique to the person and introverted or extroverted personalities who enter into character, not a mental illness. (Mukhid, 2019)

LGBT regulation in Indonesia

In essence, the Indonesian legal system does not prohibit the existence of the LGBT group. As a reference for criminal law, the Criminal Code does not include LGBT as a deviant act. In addition, several regulations, be it the Sexual Violence Act, the Trafficking in Persons Act, or the Child Protection Act, also do

not prohibit LGBT people. In a sense, the LGBT group is not a restricted community in the Indonesian legal system. The presence of LGBT is part of a minority community that still gets their constitutional rights as regulated in the Constitution.

However, the position of LGBT began to receive discriminatory actions from the state after the implementation of regional autonomy. (Fuad et al., 2022) Giving authority to local governments to issue regional regulations (Perda) fills legal gaps related to LGBT status in the Indonesian legal system. Several regions are noted to have rules that prohibit LGBT, including:

1. Aceh Qanun Number 6 of 2014 concerning Jinayat Law
2. South Sumatra Provincial Regulation Number 13 of 2002 concerning the Eradication of Immorality in South Sumatra Province
3. Banjar Regency Regional Regulation Number 10 of 2007 concerning Social Order
4. Tasikmalaya City Regulation Number 12 of 2009 concerning the Development of Values for Community Life Based on Islamic Teachings and Social Norms of Tasikmalaya City Community
5. Padang Panjang City Regulation Number 9 of 2010 concerning Amendments to Padang Panjang City Regulation Number 3 of 2004 concerning Prevention, Eradication and Enforcement of Community Diseases
6. Pariaman City Regulation Number 10 of 2018 concerning Public Peace and Order

A number of these regulations explicitly prohibit LGBT acts. No law prohibits LGBT activities because the rules in the regional code are new. When referring to Article 10 paragraph (1) of Law Number 23 of 2014 concerning the Regional Government, several things include in the affairs of the Regional Government, including:

- a. foreign policy;
- b. defense;
- c. security;
- d. judicial;
- e. national monetary and fiscal; and
- f. religion

The existence of LGBT, which is considered contrary to morality, is related to religious values. This conception aligns with Rafael Domingo's opinion, which states that religion and morality are intrinsically connected and mutually supporting, especially according to the Abrahamic faith. Therefore, the prohibition of LGBT can classify as an arrangement related to religion.

Based on Article 10, paragraph (1) of the Regional Government Law, issues related to religion are the locus of the authority of the Central Government, which means that local governments are not allowed to regulate

the prohibition of LGBT in the Indonesian legal system. Therefore, the Indonesian legal system does not prohibit LGBT. The existence of several regional regulations that prohibit LGBT is only a form of rejection in several regions based on religion, which should not be allowed to exist in Indonesia.

Protection of Constitutional Rights Against LGBT Group

As Indonesian citizens, LGBT people should still have the same rights. The state should protect human rights as stated in the Constitution. However, in practice, a number of that rights cannot implement optimally due to many things, be it regulations at the regional level or discriminatory actions carried out by several groups. The author summarizes several constitutional rights listed in Articles 22-28 of the 1945 Constitution of the Republic of Indonesia, including: (Mahardika & Anifah, 2021)

Table 1. The Constitutional Rights of LGBT People

| Clump of Rights | State Protection | | Information |
|--|------------------|---------|--|
| | Yes | Not Yet | |
| Right to citizenship | √ | | LGBT groups are still recognized as Indonesian citizens |
| The right to work and a decent living | √ | | LGBT people have the right to a decent life |
| Right to life | √ | | LGBT also have the right to live |
| Family Rights | | √ | LGBT people are not allowed to form a family according to their sexual orientation |
| Right to Freedom of Thought and Freedom of Choice | | √ | LGBT groups often experience discrimination when campaigning to voice their rights |
| Right to be Free from Threats, Discrimination and Violence | | √ | LGBT people often experience discrimination and threats from other communities |
| Right to Self-Development | √ | | Still protected by the state, many LGBT people get higher education |
| Right to Ownership and Housing | √ | | Still allowed |
| Right to Protection | √ | | The state provides optimal protection like other citizens |
| Right to fight for rights | | √ | The state provides opportunities for LGBT people to fight for |

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| | | | their rights, but they are still limited |
| The right to legal certainty and justice | | √ | Still often experience injustice |
| The Right to Health and a Healthy Environment | √ | | Similar to any other citizen |
| Right to Information | √ | | Similar to any other citizen |

Source: Processed from various sources

It can tell from Table 1 that it is evident that the state has not been fully present to protect the constitutional rights of the LGBT community. At the same time, the fulfillment of constitutional rights is a form of state presence to protect its people. However, due to different sexual orientations, the state often ignores and allows discriminatory actions against LGBT community groups. One failed right that seems to have is the right to have a family. Of course, this problem can potentially hinder Indonesia's steps toward achieving a country with better level of Sustainable Development Goals (SDGs). That's because one of the 17 points is Peace, Justice, and Strong Institutions. Based on this, reducing all forms of discrimination and establishing the rule of law and justice for all without exception is a vital indicator for the sustainable development of a country. That can do if the state no longer intervenes in the rights of LGBT people to marry.

This supported fact that several countries that have legalized same-sex marriage are in the highest rank in achieving the SDGs, including Finland, Denmark, Sweden, Norway, and Austria. The five countries are known to have legalized same-sex marriage.

Legal Politics for LGBT Group

One of the estuaries of problems that occur to the LGBT group is that the state's legal politics is still unclear in protecting the rights of LGBT people. This indecisive action has caused several regions to improvise through local regulations, which have resulted in discriminatory acts against LGBT groups. That is different from what happens in other countries. The Government's stance is firm through the law to protect the constitutional rights of LGBT people.

The five countries with the highest rankings for achieving the SDGs have explicitly given LGBT people the right to carry out same-sex marriage, which means that the state is here to provide optimal protection from discriminatory actions:

Table 2

Same-sex Marriage in 5 Countries with Highest Achievement of SDGs

| Country | Status | Years |
|---------|--------|----------------|
| Finland | Legal | 1 March 2017 |
| Denmark | Legal | 1989 |
| Sweden | Legal | 1 May 2009 |
| Norway | Legal | 1 June 2009 |
| Austria | Legal | 1 January 2019 |

Source: Processed from various sources

In many of these countries, it regulates that it is allowed to marry, adopt children and undergo artificial insemination to uphold human rights for LGBT people. On the other hand, in Indonesia, several regulations implicitly restrict LGBT people from being able to fulfill their constitutional rights, including:

- (1) The right to have a family, Article 1 of Law Number 1 of 1974 concerning Marriage, limits the rights of the LGBT group to marry. The definition of marriage implicitly does not allow same-sex marriage "Marriage is an inner and outer bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on the One Godhead."
- (2) The right to adopt children the prohibition for same-sex couples to adopt children is stated in Article 13 of the Government Regulation of the Republic of Indonesia Number 54 of 2007 concerning the Implementation of Child Adoption, which says that prospective adoptive parents must meet several requirements, one of which is not a same-sex couple. Law Number 23 of 2002 does not state this provision concerning Child Protection.

Based on several of these things, the Government needs concrete action as a form of the state's existence to protect every citizen, including the LGBT group. In political law that the Government can do is to make changes to several laws and regulations, including:

- (1) Law Number 1 of 1974 concerning Marriage. Such changes can be made limited to Article 1 by providing a new definition of marriage, "Marriage is an inner and outer bond between a man or woman and a man or woman as husband and wife to form a happy and eternal family (household)."
Eliminating the word God Almighty will illustrate that marriage is a civil bond without any obligation to involve religious elements.

- (2) Government Regulation Number 54 of 2007 concerning the Implementation of Child Adoption, the amendment eliminates the prohibition on adopting children as stated in Article 13.

CONCLUSION

Article 1, paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that Indonesia is a legal state based on a constitution and human rights. However, the concept is still not running optimally. That is because several community groups still have not fully obtained their rights. The LGBT group as part of Indonesian society is explicitly discriminated against; several constitutional liberties are ignored, including the right to have a family, the right to freedom of thought and freedom of choice, the right to be free from threats, discrimination, and violence, the right to fight for fairness and the right to legal certainty and justice.

One of the causes of these rights is the absence of a law that explicitly legalizes LGBT. That has caused several regions to issue several regulations banning LGBT. The state's discriminatory actions can be seen in the Marriage Law and Government Regulations, which explicitly or implicitly prohibit the existence of LGBT people. The Government's actions to discriminate against LGBT people are contrary to the basic principle of equal rights as an effort by the Indonesian state to achieve the SDGs.

Based on several of these things, the right legal politics is needed to overcome these problems. First, amendments to Article 1 of Law Number 1 of 1974 concerning Marriage by providing a new definition of marriage,

"Marriage is an inner and outer bond between a man or woman and a man or woman as husband and wife to form a happy and eternal family (household)."

Second, removing the provisions in Article 13 of Government Regulation Number 54 of 2007 concerning the Implementation of Child Adoption related to the prohibition of adopting children by same-sex couples. These things are essential to protect the rights of the LGBT group in Indonesia. Through the amendment of the two articles, the state will provide optimal protection to the LGBT group, aligning with the state's efforts to improve the achievement of the SDGs.

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