



SAME-SEX MARRIAGE IN THE PERSPECTIVE OF CONSTITUTIONAL RIGHTS AS EXAMINED IN THE CONSTITUTIONAL COURT DECISION

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Abstract: *Same-sex marriage from the perspective of citizens' constitutional rights has become a contentious issue in Indonesia. This is due to the tension between human rights demands and religious values, morals, and applicable legal norms. Law Number 1 of 1974 expressly states that marriage is valid only between a man and a woman, thus disregarding same-sex marriage. This study aims to analyze the legal status of same-sex marriage from the perspective of citizens' constitutional rights based on the Constitutional Court's decision and its comparison with other countries. The research method used is normative juridical with a statutory and conceptual approach through literature study. The results show that the Constitutional Court's decision does not legalize same-sex marriage, but rather emphasizes that the formation of legal norms is the authority of the legislator. Therefore, legal regulations in Indonesia remain based on religious values, morals, and public order in society.*

Keywords: *Same-Sex Marriage, Constitutional Court, Constitutional Rights.*

Abstract: Perkawinan sesama jenis dalam perspektif hak konstitusional warga negara menjadi isu yang menimbulkan perdebatan di Indonesia. Hal ini disebabkan adanya ketegangan antara tuntutan hak asasi manusia dengan nilai agama, moral, dan norma hukum yang berlaku. Undang-Undang Nomor 1 Tahun 1974 secara tegas menyatakan bahwa perkawinan hanya sah antara pria dan wanita, sehingga tidak mengakui perkawinan sesama jenis. Penelitian ini bertujuan untuk menganalisis kedudukan hukum perkawinan sesama jenis dalam perspektif hak konstitusional warga negara berdasarkan putusan Mahkamah Konstitusi serta perbandingannya dengan negara lain. Metode penelitian yang digunakan adalah yuridis normatif dengan pendekatan perundang-undangan dan konseptual melalui studi kepustakaan. Hasil penelitian menunjukkan bahwa putusan Mahkamah Konstitusi tidak melegalkan perkawinan sesama jenis, melainkan menegaskan bahwa pembentukan norma hukum merupakan kewenangan pembentuk undang-undang. Oleh karena itu, pengaturan hukum di Indonesia tetap berlandaskan pada nilai agama, moral, serta ketertiban umum dalam masyarakat.

Keywords: Perkawinan Sesama Jenis, Mahkamah Konstitusi, Hak Konstitusional

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INTRODUCTION

Same-sex marriage is one of the most controversial and contentious issues in Indonesia, particularly in a predominantly Muslim society that upholds conservative values. As the world's largest Muslim population, Indonesia has a legal system heavily influenced by religious values and traditional norms. In this context, the discourse on same-sex marriage intersects not only with legal aspects but also with social, cultural, and moral values held by the community. In Indonesian marriage law, marriage is defined as "a physical and spiritual bond between a man and a woman as husband and wife with the aim of establishing a happy and eternal family (household) based on the belief in the One Almighty God. This definition explicitly states that marriage in Indonesia is only for heterosexual couples, namely between a man and a woman. In this context, same-sex marriage is considered contrary to the principles stipulated in the law. However, in various parts of the world, debates regarding the recognition of marriage rights for same-sex couples continue to rage. Some countries have legalized same-sex marriage, while others, including Indonesia, still maintain conservative views on the heteronormative institution of marriage. This development raises various questions regarding the rights and obligations of same-sex couples from a legal perspective, particularly in the Indonesian context.

Although the Indonesian marriage law explicitly stipulates that marriage can only be between a man and a woman, there is growing discourse in some circles supporting changes to this rule. They argue that human rights, including the right to establish a family, should not be limited by the gender of the couple seeking to marry. This view is supported by international developments that increasingly recognize the rights of same-sex couples in various aspects of life, including marriage. However, with the development of human rights at the global level and international pressure to recognize the rights of sexual minorities, it is important to further examine how the Marriage Law regulates rights and obligations within the context of marriage and whether there is potential room for a more inclusive interpretation of same-sex marriage. The issue of same-sex marriage in Indonesia cannot be separated from existing social and cultural challenges. As a country that highly values traditional family values, marriage is still considered a sacred institution that binds a man and a woman to form a family. In the view of the majority of Indonesians, the heterosexual family is a key pillar in maintaining social and moral stability. This view is reinforced by the religious

teachings of the majority population, particularly Islam, which strictly prohibits same-sex.

Furthermore, in Indonesian culture, the roles of men and women within the family have been shaped by patriarchal values that place men as heads of families and women as homemakers. This structure is considered the ideal order within families and society. Therefore, same-sex marriage is often perceived as a threat to the established social and moral order. However, on the other hand, there are groups that continue to fight for the rights of sexual minorities in Indonesia, including the recognition of same-sex marriage. These groups argue that the right to marriage is a human right that should be guaranteed by the state, regardless of sexual orientation. They believe that recognizing same-sex marriage is a crucial step in creating an inclusive and diverse society. The legalization of Lesbian, Gay, Bisexual, and Transgender (LGBT) individuals, based on human rights and desires, has been supported by all important levels of the state and society, as evidenced by Constitutional Court Decision No. 46/PUU XIV/2016 concerning LGBT. This has naturally generated considerable controversy, ranging from criticism and debate due to disagreements with the Constitutional Court's (MK) decision and groups.

METHOD

This research employs a normative juridical method by reviewing library materials or secondary data. The approach employed includes legislative and conceptual approaches, examining regulations such as Law Number 1 of 1974, the 1945 Constitution, and Constitutional Court decisions. Legal materials were collected through a literature review of journals and legal documents, encompassing primary, secondary, and tertiary legal materials. Furthermore, a qualitative analysis was conducted to draw conclusions regarding the legal status of same-sex marriage in Indonesia and its comparison with other countries.

RESULTS AND DISCUSSION

Results

The legal status of same-sex marriage in Indonesia based on the Constitutional Court's decision

Indonesian positive law regulates all aspects of marriage, from the contract itself to the rights inherent within it. These regulations include Law No. 1 of 1974, which

outlines the basic principles of marriage contained in Articles 1 to 5, the requirements for marriage in Articles 6 to 12, and many other provisions, including the rights and obligations of husband and wife, including those for marriages conducted outside Indonesia. Regarding same-sex marriage, Article 1 of Law No. 1 of 1974 states, "Marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of establishing a happy and eternal family (household) based on the One Almighty God."

LGBT people are striving to achieve their rights, namely to love and marry people of the same sex, and to have them legally recognized. With legalization and protection, they believe they will feel secure. The Marriage Law states that marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy, eternal family (household) based on the One Almighty God. This article is the key word for the form of marriage that applies in Indonesia, which is vertically in harmony with the Constitution Article 28 paragraph (1) which states that everyone has the right to form a family and continue their lineage through a legal marriage. Both articles, Article 28 paragraph (1) of the Indonesian Constitution and the Marriage Law, have synchronously stipulated that the legal form of marriage that is acceptable in Indonesia is a heterosexual marriage between a man and a woman as husband and wife, complete with the humanitarian mission to become a family consisting of husband and wife or the alternative obligation to become a household consisting of father, mother and children, to reflect the initial mission of the initial concept of marriage and the creation of humans by the One Almighty God.

There are pros and cons regarding LGBT behavior becoming more widespread, following the Constitutional Court Decision Number 46/PUU-XIV/2016 concerning the judicial review of Law Number 1 of 1946 concerning Criminal Law Regulations or the Criminal Code in conjunction with Law Number 73 of 1958 concerning the enactment of Law Number 1 of 1946 concerning Criminal Law Regulations or the Criminal Code. Those who are pro-LGBT interpret that the Decision tends to legalize LGBT, while others interpret that the Decision states that the Constitutional Court does not have the authority to create new criminal offenses.

In its ruling, the Constitutional Court explicitly stated that it did not reject the idea of reforming the Criminal Code. However, it argued that it constituted entirely open legal policy in the formation of legislation. Regarding this, four dissenting judges stated that the Constitutional Court did not, in essence, expand the scope of adultery

and LGBT behavior, but merely restored what had been narrowed by the Dutch East Indies colonial government through the *Wetboek van Strafrecht* for hundreds of years. In principle, the Constitutional Court's ruling No. 46/PUUXIV/2016 does not serve as a basis for legalizing LGBT behavior and/or same-sex marriage in Indonesia. This ruling merely stated that the authority to establish new norms in accordance with the opinion of the majority of Constitutional Court justices is the open legal policy of the lawmakers. Whether or not LGBT behavior and/or same-sex marriage are recognized in Indonesia is the responsibility and authority of the lawmakers, in this case the President and the House of Representatives.

The Constitutional Court's ruling has not changed anything regarding the legal framework for LGBT individuals and same-sex marriage. The legal framework for LGBT individuals and same-sex marriage in Indonesia remains unclear. While there are no criminal sanctions for LGBT individuals and same-sex marriage, there is also no legalization of it. However, although there are no legal penalties for LGBT individuals or same-sex marriage, generally and sociologically, LGBT individuals and same-sex marriage are not recognized or accepted in Indonesia. This is evidenced, among other things, by statements from religious groups or organizations from the five major religions in Indonesia, all of which reject LGBT individuals and same-sex marriage as contradicting their respective religious teachings. Likewise, in everyday life within Indonesian society, which remains deeply rooted in religious values, LGBT individuals and same-sex marriage are considered taboo and reprehensible because they violate the religious law of each individual.

The 1945 Constitution of the Republic of Indonesia (UUD NRI) defines marriage as forming a family and continuing the lineage, subject to limitations established by law. Various laws and regulations concerning marriage clearly recognize marriages only between a man and a woman. Therefore, LGBT behavior or the expression of sexual desires through same-sex marriage has no place in our constitution. Furthermore, same-sex marriages are incapable of procreation. This same-sex marriage can deconstruct the institution of marriage as a legal venue for satisfying sexual desires without considering the family as the basis for moral law. Forms of marriage should also conform to norms derived from constitutional values, thereby fostering order in society.

The human rights argument put forward as a justification for accepting LGBT behavior is also irrelevant in Indonesia. Article 28J paragraph (2) of the Constitution of

the Republic of Indonesia stipulates that in exercising their rights and freedoms, every person must submit to restrictions established by law solely for the purpose of guaranteeing recognition and respect for the rights and freedoms of others and of meeting just demands based on moral considerations, religious values, security, and public order in a democratic society. Even in Constitutional Court Decision Number 2-3/PUU-V/2007, the Constitutional Court stated that based on the original intent and systematic interpretation of human rights regulated from Articles 28A to 28I of the 1945 Constitution of the Republic of Indonesia, they are subject to the limitations stipulated in Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Even human rights that do not conflict with religious values can still be limited in their implementation, let alone those that conflict with religious values, which are certainly not recognized as human rights.

In several Western countries, the LGBT movement, with the opportunity for legalizing same-sex marriage, is expanding and recognized as another form of intersex marriage. The United States Constitution, through the Supreme Court, stated that it guarantees same-sex marriage on the grounds of equality before the law, and the United States Constitution recognizes the rights of the LGBT group on the grounds that "marriage is a constitutional right for same-sex couples." The ruling came after the *Obergefell v. Hodges* case was filed in a five-to-four (5:4) decision, which applies in all 50 states in the United States.

Positive law in Indonesia affirms that human rights have limits, namely, those limits must not conflict with morals, religious values, security, and public order. The first principle of Pancasila, "Belief in the One and Only God," states that Indonesia's state administration is based on the morality of God, which serves as the basis for establishing norms in realizing social, national, and state life. Legalizing same-sex marriage based on "human rights" cannot be used as an excuse because the right to marry and found a family is intended for different-sex marriages, not same-sex marriages, as stipulated in the Marriage Law, which states that marriage is a physical and spiritual bond between a man and a woman to form a happy and eternal family based on the One and Only God.

Some time ago, the Constitutional Court's decision to reject a judicial review petition regarding adultery and same-sex relationships or Lesbian, Gay, Bisexual, Transgender (LGBT) as regulated in the Criminal Code came into the public spotlight. There are three articles of the Criminal Code that Prof. Dr. Ir. Euis Sunarti, M.S. and

colleagues requested to be reviewed by the Constitutional Court, namely: 1. Article 284 paragraphs 1 to 5 of the Criminal Code concerning adultery, which was originally limited to marriage, was requested to be expanded to include contexts outside of marriage; 2. Article 285 of the Criminal Code concerning rape, which was originally limited to men against women, was requested to be expanded to include men to men or women to men; 3. Article 292 of the Criminal Code where the Petitioner requested that perpetrators of deviant sex or in this case LGBT, be requested not to be limited to adults only. The Indonesian Constitution has been amended four times, in each of which Pancasila as the grundnorm, whose first principle, Belief in God Almighty, has always been placed as one of the foundations and guiding stars in the creation of the Marriage Law, where the essence of marriage is a physical and spiritual bond between a man and a woman (heterosexual) with the aim of forming a happy and eternal family (household) based on Belief in God Almighty. This article is the key word for the form of legal marriage in Indonesia, which is vertically harmonious with Pancasila, the principles of mainstream religions, and Article 28 paragraph (1) of the Constitution, the Marriage Law, and customary law. Because of the conflict with these things, LGBT same-sex marriage is not accepted, and besides, this new form of marriage is unable to carry out the vision and mission of humanity that it must carry out, so that humans can have offspring in order to ensure the continuity of humanity and humanity in a sustainable manner.

Legal regulations for same-sex marriage from a comparative legal perspective between Indonesia and other countries

Marriage is a physical and spiritual bond between a man and a woman as husband and wife with the goal of forming a happy and eternal family (household) based on the One Almighty God. This is according to Article 1 of Law Number 1 of 1974 concerning Marriage. Therefore, according to this law, marriage only exists if it is between a man and a woman. It is certainly not called marriage if the parties involved in the agreement are only two men (homosexual) or two women only (lesbian). Today, almost all societies worldwide recognize gender equality. Gender equality, or gender quality, has become a constant struggle. The goal is to achieve equality, equity, and non-discrimination based on gender. Therefore, both women and men must be treated equally and without discrimination in any way, because they are equal. In political circles, work, school, and even family, they must have the same roles and rights.

However, as time has progressed, gender is no longer required to be equal, but rather to be free. Gender freedom is the idea that everyone has the right to express and identify with their gender, regardless of their sexual orientation. This gender freedom is the reason for the emergence of the LGBT community. LGBT is an acronym for lesbian, gay, bisexual, and transgender. This term has been used since the 1990s and replaced the phrase "gay community" because it better represents the groups mentioned. This acronym was created with the aim of emphasizing the diversity of "cultures based on sexual orientation and sexual and gender identities."

As one of the countries that legalized same-sex marriage in 2017, Germany is arguably very supportive, even welcoming, and open to the LGBT community. This is evident from a 2013 survey of Germans, which found that 87% of the population supported same-sex marriage. Consequently, on June 30, 2017, the Bundestag passed a law legalizing same-sex marriage and granting same-sex couples the right to adopt children. At the same time, discrimination against the LGBT community, couples, and individuals has been prohibited in the country. The differences in the legal regulation of same-sex marriage between Indonesia and Germany require an in-depth analysis of the values, culture, and socio-political contexts of the two countries. These differences reflect the complex dynamics of legal policy formation, rooted in different factors in each country. In Indonesia, traditional and religious values have a strong influence on the formation of same-sex marriage legal policy. Conservative views on same-sex marriage are reflected in legal policies that describe marriage as a union between a man and a woman.

The development of same-sex marriage legal provisions in the Netherlands, the Netherlands was the first country to legalize same-sex marriage. On December 21, 2000, a draft law regulating the legalization of same-sex marriage was officially passed. However, its implementation took effect on April 1, 2001. The recognition of same-sex marriage has historically been subject to considerable public and political debate. In the 1990s, same-sex couples failed to obtain marriage licenses through Dutch courts. Initially, Article 30 of Book 1 of the Dutch Civil Code (*Burgerlijk Wetboek*) did not contain specific language regarding gender. The petitioners argued that there was no legal requirement that spouses be of different genders. However, the Dutch Supreme Court ruled that the term marriage is only traditionally defined as involving persons of different genders.

Factors influencing the Netherlands's decision to become a pioneering country in legalizing same-sex marriage include: first, the support of the LGBT movement from one of the world's oldest lesbian and gay organizations, the Centre for Culture and Leisure (COC). Although the COC was largely uninvolved in the campaign and did not prioritize same-sex marriage, it did spearhead legal reforms throughout the 1970s and 1980s, providing a favorable policy legacy for same-sex marriage advocates. Second, international surveys have shown that Dutch society in the 1990s was relatively tolerant of homosexuality and moderate in religiosity. However, other literature suggests that levels of religiosity and tolerance for homosexuality did not change dramatically during the decade during which the marriage debate took place.

Same-sex marriage in Indonesia is not recognized in the Indonesian legal system, although it is not explicitly regulated in the Indonesian version of the *Burgerlijk Wetboek* (BW). However, Chapter IV on marriage indirectly provides a brief definition of marriage, as stated in Article 27 of the Civil Code (KUHP), which states, "At the same time, a man may only be bound by marriage to one woman and a woman to only one man." In other words, this article states that marriage means a union between a man and a woman only, not between people of the same sex.

Thailand is noted as a country that officially recognizes same-sex marriage. The presence of the LGBT community in the country has received acceptance and an open attitude from society. However, some members of this group still experience unequal treatment, particularly in the educational and religious spheres. This occurs because some groups view their existence as a form of social regression and an inability to address important societal issues. However, the country's law does not establish criminal sanctions for same-sex sexual orientation. Provisions in the Thai constitution guarantee equal rights for men and women.

Thailand already has a legal framework that officially recognizes same-sex couples. This is supported by Thailand's demonstrated high cultural tolerance. Furthermore, Thailand has demonstrated progressiveness through the Civil Partnership Bill. From a social perspective, the recognition of the rights of same-sex couples through the Civil Partnership Bill has had a positive impact in improving legal protection for the LGBT community. Recognition of same-sex marriage is often linked to the right to equality and the elimination of disparate treatment, as enshrined in various human rights instruments, such as the Universal Declaration of Human Rights (UDHR). Human rights have been inherent in the existence of humanity. This is

because human rights originate from a person's fundamental position as a human being, which fundamentally deserves optimal protection. Efforts to realize human rights have become a major focus for various groups worldwide because they are related to human existence itself. Based on this situation, various parties have emerged to demand their rights, even though this is inconsistent with human nature. Same-sex marriage has been legalized in Thailand through the Civil Partnership Bill, or Thai law. This brings a breath of fresh air to same-sex marriages in Thailand, who feel they have equal rights.

Same-sex marriage has varying provisions in each country. Indonesia itself currently does not legalize same-sex marriage. This is because, according to the majority of Indonesians, it significantly deviates from the law and various religions in Indonesia. There are differences between Indonesia and other countries regarding same-sex marriage. Indonesia has not yet legalized same-sex marriage, while other countries have legalized or permitted same-sex marriage. This is also accompanied by the reasons each country provides for legalizing or not legalizing same-sex marriage.

CONCLUSION

Based on the discussion, it can be concluded that the legal status of same-sex marriage in Indonesia is currently not recognized within the positive legal system. This is affirmed in Law Number 1 of 1974, which states that marriage is only valid if it is contracted between a man and a woman. Constitutional Court Decision Number 46/PUU-XIV/2016 does not legitimize the legalization of same-sex marriage, but rather emphasizes that the Constitutional Court has no authority to create new legal norms and leaves this matter to the legislators as an open legal policy. Furthermore, from a constitutional rights perspective, the right to marry and found a family remains limited by Article 28J of the 1945 Constitution, which emphasizes that the implementation of human rights must take into account religious values, morality, and public order. Therefore, claims to legalize same-sex marriage on the basis of human rights cannot yet be applied in the Indonesian legal context. In comparison with other countries, there are significant differences: some countries have legalized same-sex marriage for reasons of equality and human rights protection. However, Indonesia continues to maintain an approach based on religious and cultural values. Thus, the legal regulations for same-sex marriage in Indonesia are still restrictive and require comprehensive consideration if changes are to be made in the future.

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