



ETHICS IN THE DESIGN OF KUHP: SPECIAL STUDY ON LGBT

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Abstract: Indonesia is a state of law that has a Muslim majority population. Issue of LGBT (Lesbian, Gay, Bisexual, and Transgender) has come to the forefront in Indonesia. Situation illustrates the debate over the legalization of LGBT in Indonesia which is still multiple interpretations (pros and cons). Some opinions state that sexual deviations of LGBT people, as long as they do not harm others certainly do not have an impact. However, several studies have mentioned a causal relationship between sexual deviation with crime. Criminal Law has regulated crimes including those arising from LGBT, but initially only focused on LGBT crimes with child victims. However, the expansion of the articles of decency has been carried out, such as adultery (Article 284), rape (Article 285) and same-sex/homosexual sexual abuse (Article 292) in KUHP.

Keywords: *criminal law, KUHP, LGBT*

Abstrak: Indonesia adalah negara hukum yang memiliki populasi mayoritas Muslim. Masalah LGBT (Lesbian, Gay, Biseksual, dan Transgender) telah menjadi yang terdepan di Indonesia. Situasinya menggambarkan perdebatan tentang legalisasi LGBT di Indonesia yang masih multi interpretasi (pro dan kontra). Beberapa pendapat menyatakan bahwa penyimpangan seksual orang LGBT, selama mereka tidak membahayakan orang lain tentu tidak berdampak. Namun, beberapa penelitian telah menyebutkan hubungan sebab akibat antara penyimpangan seksual dengan kejahatan. Hukum Pidana telah mengatur kejahatan termasuk yang timbul dari LGBT, tetapi pada awalnya hanya berfokus pada kejahatan LGBT dengan korban anak-anak. Namun, perluasan pasal kesusilaan telah dilakukan, seperti perzinahan (Pasal 284), pemerkosaan (Pasal 285) dan pelecehan seksual sesama jenis / homoseksual (Pasal 292) dalam KUHP.

Kata Kunci: *hukum kriminal, LGBT, KUHP*

Introduction

Indonesia is a country of law and to realize the rule of law one of them is required legal instruments, which is used to adjust the balance and justice in all fields of life and people's livelihood through statutory regulations without prejudice to the function of jurisprudence. This shows that laws and regulations have an important role in the rule of law in Indonesia. Basically in the context of the Indonesian rule of law, we must consider all social, state and national behavior in the eyes of the law.

The Indonesian nation with its Muslim majority population inevitably requires the implementation of religious teachings in all aspects of life, including in behaving and socializing in the community. Lately, the issue of LGBT (Lesbian, Gay, Bisexual, and Transgender) has come to the forefront in Indonesia. LGBT community and LGBT supporters seem to be more confident in voicing their rights and existence after the emergence of a counseling institution called the Support Group and Resource Center on Sexuality Studies (SGRC) at UI (Universitas Indonesia). SGRC UI is considered as one of the supporting institutions of LGBT, especially in the campus environment.

As this issue became popular, the Indonesian people were also intrigued. According to data record from Ministry of Health, in 2012 there are at least 1,095,970 people with LGBT status in Indonesia. The number is not small, even other sources reveal that around 3% of Indonesia's population is LGBT. With growth of 10% per year, and today there are around 1,500,000 people with gay status in Indonesia. One of the driving factors the rise of LGBT in the country is the existence of popular culture products that are slowly entering Indonesia. For example, a film that shows gay life for Indonesian people is still not acceptable. Promotions and different sexual orientations can come from the campus and intercommunication. Basically LGBT has been everywhere since ancient times but what distinguishes the current LGBT more open themselves and not afraid to indicate sexual orientation. Now, LGBT become a world trend and many foreign countries have accepted LGBT.

Reaction of LGBT people in Indonesia is quite diverse, especially among scholars and Muslims. Situation illustrates debate over the legalization of LGBT in Indonesia which is still multiple

interpretations (pros and cons). Knowing further the existence of LGBT which has recently become a polemic in the expansion of the articles of ethic offense is important to do further discussion.

A. Phenomenon of the LGBT Existence in Indonesia

LGBT phenomenon in Indonesia is classified into two different entities, namely: the first LGBT entity is that LGBT includes mental illness or deviations of sexual orientation, which is attached to someone as an individual. The disease is caused by two factors, namely biological and sociological factors, and can be transmitted to others. At the first level entity, LGBT is divided into two identities; The first is those who cover themselves (conceal their identity) as LGBT so that no one else (outside themselves) knows. The second identity, are those who dare to outcome (open their identities) to others and hope for the help of others (outside himself) to help cure it.

The second entity is LGBT as community, or group, or can also be called Organization, who have a vision, mission, and certain activities or movements. At the level of this second entity, which is now rife in debate in Indonesian society, whether the LGBT movement can be legalized or not.

LGBT, short for Lesby, Gay, Bisexual and Transgender, then additional terms have sprung up over time such as the addition of the letter Q (Queer) to LGBTQ which aims to accommodate people who are still questioning their sexual identity. In addition to adding the letter Q, some are adding the letter I for intersex, LGBTIQ.

1. Lesbian

According to Wikipedia, lesbian is a term for women who direct their sexual orientation to fellow women. This term also refers to women who love women physically, sexually, emotionally, or spiritually. Lesbians can also be interpreted as a woman's habit of venting sexual desires in each other as well (Mahjuddin, 2003).

Ibn Qudamah explained that if two women have rubbed together, both of them commit adultery which is based on what is narrated from the Prophet sallallahu 'alaihi wasallam that he sallallahu 'alaihi wasallam said: "If a woman comes to (copulate) a woman, then both commit adultery." there is no limit in this to both because there is no ilaj (ilaj is entry of the male testicles head on the female genitals) inside it.

Long before modern civilization, lesbian existed thousands of years ago. The word lesbian comes from the word Lesbos, which is around 580 BC in Eastern Greece has developed a myth about the love story between Sappho princess who came from an elite circle with her female student named Athis on Lesbos Island, from the island of Lesbos that became known as a lesbian for female homosexuals (Sarwono, 2012).

2. Gay

Gay is a term that is generally used to refer homosexual people or homosexual traits. Little different from bisexual, which is an individual who can enjoy emotional and sexual relations with people of both sexes, male or female.

3. Bisexual

Bisexual is a sexual orientation that shows one's interest in other people regardless of gender. Bisexual perpetrators usually does not care about someone who is a heterosexual, homosexual or transgender person. Bisexuals can be classified as sexual behavior which often changes their sexual orientation. People of all ages, different cultural and religious races do not prevent a person from becoming a bisexual agent. Bisexual is not a combination of masculinity and femininity but heterosexuality and homosexuality.

4. Transgender

Transgender is the inequality of a person's gender identity with the gender designated to him. transgender person can identify himself as heterosexual, homosexual, bisexual or asexual.

Based on the description above, it can be concluded that homosexuality is sexual relations between people of the same sex, both men and women. However, usually the term Homosex is used for sex between men; while for female sex, it is called Lesbian (Female Homosex). Opposite of Homosex is Heterosex, meaning sexual relations between people of the same sex (a man and a woman). Homosexual

(Liwath, Arabic) is done by inserting the penis (Zakar, Arabic) into the anus (Dubur, Arabic); whereas lesbians are done by masturbating with each other or by other means to get pleasure or climax of the sex act.

Deeds of gay people, both sex between men (Homosexual), and sex between women (Lesbian), is a crime (Jarimah/Jinayah, Arabic) which can be threatened with a maximum imprisonment of five years according to criminal law in Indonesia (Article 292 of The Criminal Code) (Moelyanto, 1985).

Homosexuals are said to contain negative connotations and tend to be replaced by "homophile" in the 1950s and 1960s, then gay in the 1970s. Phrase of "gay and lesbian" is becoming more common after lesbian identity is increasingly formed. In 1970, the Daughters of Bilitis made the issue of feminism or gay rights as priority. Every community mentioned in the LGBT acronym has struggled to develop their own identities. LGBT acronym is sometimes used in the United States starting around 1988. Term of LGBT began to be popularly used in the 1990s and replaced the phrase "gay community" because it was more representative of the groups mentioned. This acronym was created with the aim of emphasizing the diversity of cultures based on sexuality and gender identity".

Development of the LGBT community in Indonesia is a product of secular liberalism and anti-religion which undermines the life of the nation and state. LGBT is a threat and deviation from the nature, identity of the people, nation and state of Indonesia based on Godhead. In terms of philosophy, ideology, religion and basic thinking the majority of Indonesian people, existence of LGBT supporters clearly deviates from the foundation of the Indonesian constitution.

Foreign intervention is not just propaganda "breeding" LGBT, but it is stated clearly by the United States Ambassador to Indonesia, Robert O Blake "I know this is a sensitive issue, but Indonesia as a democratic country must be able to set an example for other countries" (Harian Republika, 2019). Robert O Blake deliberately wants to plunge the Indonesian government on the grounds of giving examples about giving equality to LGBT people. Because, according to him, Indonesia succeeded in leading regional democracy through the Bali Democracy Forum. Even through program "The Being LGBT in Asia Phase 2 Initiative" (BLIA-2), the UN Development Program (UNDP) poured funds worth 8 million US dollars or around Rp107.8 billion. Abundant funds came from a regional partnership between UNDP, Swedish Embassy in Bangkok and USAID. In addition to the Indonesian LGBTI community, similar communities in China, Philippines and Thailand also received financial support from the UNDP project.

The project began from December 2014 to September 2017. "It aims to advance the welfare of lesbians, gays, bisexuals, transgender people and intersexes (LGBTI), and reduce inequality and marginalization on the basis of sexual orientation and gender identity", written statement from the official UNDP website (Friday (02/12/2016)). This has become a precaution for all stakeholders so as not to be targeted by the project with the large funds it receives. Because LGBT promotion means damaging the social order and character of the nation's generation.

Indonesia as an independent and sovereign country with a majority Muslim population, in the preamble of the 1945 Constitution it was stated that Indonesian independence was a gift from Allah Almighty. So in organizing the life of the state which is regulated by the constitution closely related to religion, as stated in Article 29 (1) and (2).

Indonesia as a country based on Godhead must not provide opportunities for the development of LGBT, because there is no religious teaching in Indonesia that tolerates LGBT. LGBT is not a human right, but it is a disease and social deviation in the middle of society that requires healing, normalization and rehabilitation of life like with other social creatures.

LGBT supporters in addition to violating the country's constitution and Declaration of Human Rights, also plays a role in spreading disease viruses that threaten the generation of adolescents and children of the nation and state. Data and facts prove that the spread of HIV/AIDS is dominated by LGBT. Based on data from the report on the progress of HIV/AIDS Directorate General of Disease Control and Environmental Health of the Indonesian Republic Health Ministry, in 2010 - 2014, people with HIV/AIDS due to heterosexual activity occupied the highest number. Then in 2015-2017, situation becomes more complicated because heterosexual activity is more dominant as the main factor increasing

the number. The highest risk factors for HIV / AIDS sufferers were heterosexual (67%), homosexual (23%), perinatal (2%), and use of non-sterile needles for IDUs (2%).

B. Views of Islamic Law towards LGBT

Islamic social ideals begin with the struggle to grow the aqeedah aspect and ethics in its adherents. starting with psychiatric education for each individual, family and community, until finally creating a harmonious relationship between all members of the community whose reflection is outward welfare. Each person is responsible for purifying his soul and property, then his family. From the family will shift responsibilities to community life which will give birth to responsibilities and rights that must be fulfilled (Shihab, 1994). Islam has set the family life or family concept of *Sakinah Mawaaddah wa Rahmah* which has been explained in the Qur'an, and this family concept is not in line with the existence of LGBT.

In Islam, LGBT is known by two terms, namely *Liwath* (gay) and *Sihaaq* (lesbian). *Liwath* (gay) is an act carried out by a man by inserting his *dzakar* (penis) into the rectum of another man. *Liwath* is a word (naming) attributed to the people of Lut 'Alaihis salam, because the people of the Prophet Lut' Alaihis salam were the first people to do this action (Hukmu al-liwath wa al-Sihaaq, p. 1). Allah SWT names this act with disgusting (*fahisy*) and exceeding limits (*musrifun*). As the word of Allah SWT. in QS Al-A'raf/7: 80-81.

وَلَوْطًا إِذْ قَالَ لِقَوْمِهِ أَتَأْتُونَ الْفُحْشَةَ مَا سَبَقَكُمْ بِهَا مِنْ أَحَدٍ مِنَ الْعَالَمِينَ ٨٠

إِنَّكُمْ لَتَأْتُونَ الرِّجَالَ شَهْوَةً مِنْ دُونِ النِّسَاءِ ۗ بَلْ أَنْتُمْ قَوْمٌ مُّسْرِفُونَ ٨١

Meaning:

"And [We had sent] Lot when he said to his people, "Do you commit such immorality as no one has preceded you with from among the worlds? Indeed, you approach men with desire, instead of women. Rather, you are a transgressing people." (Al-A'raf: 80-81).

While *Sihaaq* (lesbian) is a passionate love relationship between women with the image of two women rubbing their limbs (*farji*) between one another, until both of them feel the delicacy in the touch (Sabiq, 2000). Law of *Sihaaq* (lesbian) is haram. Based on the proposition of the hadith of Abu Said Al-Khudriy narrated by Al-Imam Muslim (No. 338), At-Tirmidzi (No. 2793) and Abu Dawud (No. 4018).

In nature, human beings are created by Allah following with physical and instinctive encouragement. One of the instinctual drives is the instinct to preserve the offspring (*gharizah al na'u*) which among its manifestations is love and sexual urges between the opposite sex (male and female). Views of men towards women as well as women towards men are views to preserve offspring not merely sexual views. The purpose of this instinct is created to preserve offspring and can only be done between married couples. Based on this, it is very clear that homosexuality is contrary to human nature. Therefore, it is certain the root of the problem of the emergence of LGBT irregularities today is because of the ideology of secularism adopted by most Indonesian people. Root problem the emergence of LGBT irregularities today is because the ideology of secularism adopted by most Indonesian people. Secularism is an ideology that separates religion from life (*fash al ddin 'an al hayah*).

Secular society views men and women only as a sexual relationship. Therefore, they deliberately create sensed facts and thoughts that invite sexual desire before men and women in order to arouse sexual instincts, only seek satisfaction. They assume the lack of satisfaction of this instinct will result in danger to humans, both physically, psychologically, and intellectually. This action is a must because it has become part of their system and lifestyle (An Nabhani, 2003).

C. Law and Punishment for LGBT Perpetrators

Enforcement of punishment in Islam aims to make humans like human and preserving the community. Islamic Shari'ah has set lofty goals attached to its laws. These noble goals include; maintenance of offspring (*al muhafazhatu 'ala an nashl*), maintenance of mind (*al muhafazhatu 'ala al 'aql*), maintenance of glory (*al muhafazhatu 'ala al karamah*), maintenance of the soul (*al muhafadzatu 'ala al nafs*),

maintenance of property (*al muhafazhatu 'ala an nafsi*), maintenance of property (*al muhafazhatu 'ala an al maal*), maintenance of religion (*al muhafazhatu 'ala al diin*), maintenance of peace/security (*al muhafazhatu 'ala al amn*), maintenance of the country (*al muhafazhatu 'ala al daulah*) (Abdullah, 1990).

In order to preserve the human offspring and lineage, Islam has forbidden adultery (Sasjid, 1986). Gay, lesbian and other sex aberrations as well as Islam require the imposition of sanctions for the perpetrators. It aims to preserve the sanctity of a descendant. Regarding punishment for LGBT people, some theologian disagree. However, in conclusion the perpetrators must still be given punishment. What remains is how the caliph will determine which law is chosen as the state constitution (*al-Khilafah*). Theologian disagree over penalties for people who commit *liwath*. Among the opinions about the punishment for *liwath* perpetrators include:

First, punishment is to be killed, both the perpetrator (*fa'il*) and the object (*maf'ul bib*), if both of them have reached their full age. Existence of people who do *liwath* with testicles (penis), the punishment is to be killed, even though those who did not get married, it is the same whether *fa'il* (perpetrators) or *maf'ul bib*.

Second, the punishment was stoned, this is as narrated by Al-Baihaqy from Ali that he once stoned a person who did *liwath*. Imam Shafi'y said: "Based on this proposition, we use stoning to punish those who commit *liwath*, either *mubshon* (married) or other *mubshon* (*Ghairu Mubshon*). This is in line with Al-Baghawi, then Abu Dawud in "Al-Hudud" Chapter 28 from Sa'id bin Jubair and the Mujahid of Ibn Abbas: Those who are not married if found *liwath* then stoning (Asy-Syaukani, 2010).

Third, punishment is the same as adultery. This opinion was conveyed by Sa'id bin Musayyab, Atha 'bin Abi Rabbah, Hasan, Qatadah, Nakha'i, Tsauri, Auza'i, Imam Yahya and Imam Shafi'i (in other opinions), said the punishment for those who commit *liwath* as adultery. If *liwath* offender *mubshon* is stoned, and if not *mubshon* is bound (whipped) and exiled (Sabiq, 1980).

Fourth, the punishment with *ta'zir*, as Abu Hanifah has said: The punishment for those who commit *liwath* is to be *ta'zir*, not bound (flogging) nor stoned. Abu Hanifah viewed homosexual behavior enough with *ta'zir*. This type of punishment does not have to be carried out physically, but can be through counseling or psychological therapy in order to recover. In fact, Abu Hanifah considers homosexual behavior is not included in the definition of adultery, because adultery is only done on the vagina (*qubul*), not on the rectum (*sodomy*) as is done by homosexuals.

As for lesbians, the punishment is *ta'zir*. Imam Malik believes that women who do *sibahq*, the punishment is flogged a hundred times. Theologian argue that women who do *sibahq* have no *hadd* for him, it's just that he was *ta'zir*, because only having relationships that really can't be with *dukhul*. He will not be *hadd* like men who have relations with women without the *dukhul at farji*, so there is no *had* for him. And this is a true opinion (Sabiq, 1980).

D. LGBT Ethics in KUHP Plan

LGBT sexual deviations, as long as it does not harming others it certainly does not bring impact. There is an impact if a crime arises and there is a causal relationship between sexual deviation with the crime. Several studies have mentioned there is a causal relationship between sexual deviation with crime, as stated by Doctor David Abrahamsen in his book the psychology of crime, which states the relationship between masturbation and gambling appetite. Abrahamsen also mentioned a causal relationship between homosexuals and the crime of murder committed by Leopold and Loeb in 1924 (Bawengan, 1991).

Criminal Law has regulated crimes including those arising from this LGBT. Article 292 of KUHP: *Any adult who commits any obscene act with it minor of the same sex whose minority he knows or reasonably should presume, shall be punished by a maximum imprisonment of five years.*

Sexual crime by venting sexual satisfaction with boys is specifically regulated in article 292 of KUHP. Apart from including pedophilia, sexual deviation by having sexual relations with fellow men or called sodomy. Sodomy is sexual intercourse through the rectum/anus which is done by the same sex, namely men with men. The word of sodomy itself comes from the word Sodom which is the name of the city in the time of the prophet Luth, where the people of Luth did sodomy.

In addition to the provisions in the articles above, to protect children from various kinds of violence and exploitation of children, the government has issued Law No. 23 of 2002 concerning Child Protection which has been amended and supplemented by Law No. 35 of 2014. The threat of criminal punishment is more severe than the provisions contained in article 81 and article 82 of Law No. 23 of 2002.

From the previous court's provisions above regarding changes in court judgment from the previous rule, however, although the criminal provisions have been aggravated, the crime of violence against children is still high from year to year as reported by the KPAI. The crime of violence against children which is regulated in Law No. 23 of 2002 as amended and supplemented by Law No. 35 of 2014, do not consider whether the perpetrator is a gay, lesbi and others, which is clearly a key element of the provisions of the law, the victims are children. In contrast to article 292 of KUHP, it has been clearly and unequivocally stated that in addition to being underage, the perpetrator and the victim must be of the same sex thus he can be gay or lesbi.

Before the issuance of the Constitutional Court's decision No. 46 / PUU-XIV / 2016 on December 14, 2017 rejecting requests for expansion of decency articles, such as adultery (Article 284), rape (Article 285), same-sex/homosexual sexual abuse (Article 292) in the KUHP, discussion of the expansion of criminal acts of decency in the Draft Book of KUHP also experienced a similar debate. Expansion of the articles of decency, such as adultery (Article 284), rape (Article 285), same-sex/homosexual sexual abuse (Article 292) of KUHP, discussion of the expansion of criminal acts of decency in the Draft Book of KUHP contained in several articles.

Later it became known that the results of the KUHP Draft Book discussion still left a number of issues. Expansion of articles governing adultery and criminalization of lesbian, gay, bisexual and transgender groups (LGBT) raised in the discussion of the Draft Book of KUHP. In the parliament there are still several articles that have not been agreed upon and are pending discussion.

The government insists on maintaining the expansion of the crime of adultery and same-sex / homosexuals in KUHP. That is, the offense of same-sex / homosexual sexual offenses that are not only victims of molestation under the age of 18, but also of adulthood (Article 495 of KUHP). Therefore, the polemic of the expansion of the articles of decency related to the criminalization of free sex, lesbian, gay, bisexual, transgender or LGBT behaviors requested by Professor of IPB Family Resilience, Prof. Euis Sunarti, et.al will continue in the previous Constitutional Court. Because, the Constitutional Court through its decision was not taken unanimously, as if throwing a "hot ball" into parliament on the pretext of not being the authority to formulate new criminal acts.

Conclusion

Based on the discussion about the offense of decency in the draft of KUHP related to LGBT can be concluded as follows: LGBT is deviation of sexual orientation that is prohibited by all religions especially Islam. In addition, this heinous act will damage the sustainability of humans, more importantly God Almighty and the Prophet cursed this act. Therefore, it has become an obligation for Muslims to fight all kinds of opinions that appear to be in the name of human rights in defense of LGBT people, but in fact they are bringing people to more severe damage. Islam's view of LGBT is haram, because Islam has forbidden adultery, gays, lesbians and other sexual deviations and Islam requires the imposition of sanctions for the perpetrators. Some studies have mentioned there is a causal relationship between sexual deviations with crime.

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