

Lesbian, Gay, Bisexual and Transgender (LGBT) in Indonesia in the Perspective of Traditional Law and National Resilience

Kartono*, Amin Songgirin, Rizky Dwi Pradana, H Muhammad Rezky Pahlawan MP, Henlia Peristiwa Rejeki, Iriyanti

Universitas Pamulang, Tangerang Selatan, Indonesia

**Corresponding author email: dosen01490@unpam.ac.id*

ABSTRACT. Lesbian, Gay, Bisexual, and Transgender (LGBT) enter a new chapter in this country. At least it can be said that they have found a place to disseminate and / or openly campaign that LGBT in Indonesia exists and exists even though they always carry a marginal status. They are, in variously massive ways, open through print, electronic to social media. On the other hand, the LGBT community also continues to demand the State to provide the same treatment as ordinary citizens by obtaining the same rights guaranteed by the Constitution. Debates have emerged in many public spaces between the pros and cons of LGBT and LGBT. Then what is the actual status of LGBT from the perspective of customary law and national resilience. This study aims to answer and describe how: 1). The status of LGBT from the perspective of customary law in Indonesia is because we know that in Indonesia the norms of customary law still apply, 2). LGBT status in an effort to prevent threats to national security; 3). the role of the state in making policies based on legal principles, Pancasila and Human Rights (HAM). This research is a sociological legal research (socio-legal research) which means seeing law as an empirical social phenomenon. This study is to describe LGBT in legal pluralism in Indonesia which is expected to reveal the status of LGBT in statutory regulations, Pancasila and human rights principles. The data used in this study are secondary data and primary data, secondary data. The theoretical urgency of this research is to make a scientific contribution to the development of comparative legal science in Indonesia regarding the status of LGBT especially in accordance with the diversity or plurality of the Indonesian legal system while the practical urgency of this research is. is expected to include, constructive academic advice to improve the laws and regulations on LGBT in Indonesia.

Keywords: *LGBT, Perspective, Traditional Law, National Resilience.*

1. INTRODUCTION

The existence of Pancasila, which was born at the same time as the birth of the Indonesian state, has a logical consequence as a view of life as a nation and state that must be internalized for all Indonesian people. A well-integrated understanding and implementation of Pancasila is absolutely necessary so that every component of the state can become actors who are actively able to be part of efforts to maintain the national resilience of the nation [1]. One of the problems of the Indonesian nation today is the decline of public trust in the government, especially now that we are experiencing an emergency from the spread of the corona virus pandemic or what is commonly called covid-19. The government's failure to respond quickly to stop the spread of the covid-19 virus has made many countries in this case "fear Indonesia". This pandemic emergency is exactly what we have felt for six months. We don't know how long this situation will end.

Furthermore, according to the authors, another problem that is also a real threat and deserves attention with the components of the Indonesian nation is the rampant penetration efforts in many ways carried out

by the lesbian, gay, bisexual and transgender (LGBT) movement to the younger generation either secretly or overt in recent years. In this paper, the author will examine the LGBT phenomenon in Indonesia from the perspective of Customary Law and National Resilience, whether as diversity and respect for human rights or as a threat. Given the lack of literature that discusses and studies LGBT from the perspective of customary law, the study of customary law is important.

The LGBT phenomenon flourishes in Indonesia because the faucet of freedom is increasingly open, so that open campaigns can be carried out by playing the issue of human rights. With this openness, the LGBT community close ranks to influence youths who have not been touched by various modes and what is more important is the existence of activists who are considered heroes to fight for LGBT existence. According to Clara Staples (2016) in Jazim Hamidi and Lukman Nur Hakim [2], LGBT perpetrators massively build group awareness, and make collective efforts to fight for recognition of legal rights for their deviant sexual behavior disorientation by raising defense and advocacy from various circles, both

individuals and institutions who are actively campaigned over social media to invite the dissemination of understanding and mobilize support for legal loopholes. This is often interpreted as freedom of expression and opinion. This is clear, according to the author, to be a concern and vigilance for many parties, especially the day the LGBT community displays more and more wildly, showing all irregularities to society. So it should be a common concern for parents, educators to fortify children and families from the threat of moral damage to the nation's children, one of which is to provide education on understanding religious values and moral norms and other norms growing in society so as to avoid deviant behavior that has been threatening in plain sight.

Interestingly, quoting Andri Hadiansyah, M.Psi, a psychologist in a routine study after prayers at the Al-Azhar Grand Mosque in Jakarta on Thursday, 11 February 2016 with the theme of LGBT in terms of Psychology explained that the LGBT community has a target not only of ordinary people, adults, adolescents, but has been educated from elementary school (SD) children. Andri continued, there was something based on the story of the partner of his patient that regarding the different behavior between LGBT people in Indonesia and LGBT people in Australia, that if there (Australia-pen) they are loyal only with one LGBT partner, they were not contagious, did not transmit to others. Meanwhile, in Indonesia, they need regeneration and as much as possible change partners. Vigilance and caution are important for us after knowing, especially when referring to the statement of the Minister of Defense for the 2014-2019 period Ryamizard Ryacudu which states that the LGBT rights movement in Indonesia is a modern war tactic - he calls it a proxy - from western countries to control a nation without the need to send military troops. According to Ryamizard [3], the threat of proxy war is dangerous for Indonesia because other countries with interests do not directly face each other. Therefore, the phenomenon of LGBT supporters asking their community to be legalized must be watched out for. Ryamizard continued, there was no danger of a war for defense equipment, but a dangerous brainwashing that distorted understanding of state ideology [4]. Meanwhile, Bambang Widodo Umar (2016) argues that strengthening the Pancasila ideology and understanding of religion is an absolute must because like it or not, currently the Indonesian nation has been possessed by understandings from abroad. The proof is that now there are deviations such as LGBT and also acts of terrorism in the name of religion. This means that Indonesia's national resilience is facing a major threat [5]. The same thing was conveyed by the Minister of Religion for the 2014-2019 period Lukman Hakim Saifuddin who said that we see it (LGBT) as a

social problem that threatens religious life, family resilience, national personality and the marriage legal system in Indonesia that does not justify same-sex marriage. According to Lukman, one of the efforts to anticipate LGBT problems that threaten future generations is to strengthen the function of the family as the foundation for the resilience of society and the nation [6].

Indeed, LGBT does not only stop at ideological movements and actions alone, but intensively creates discussions and studies about LGBT and is followed by groups that are both pro and contra in various scientific forums under the pretext of human rights, verbal harassment, physical violence and treatment, and rudeness to the LGBT group. Directing this immoral movement as a violation of human rights, and inviting them to participate in defending the rights of LGBT perpetrators so that they can be legitimized by the state [7]. LGBT campaigns continue to be carried out massively by utilizing public figures such as artists and influential figures, making LGBT a form of freedom, style, modern lifestyle [8]. Especially if LGBT is welcomed as a lifestyle. This will continue to become legality in the form of legalized marriage. Gradually they will sue towards it. And what most frightening is, if LGBT is protected by human rights, as happened in other countries such as America [9]. In fact, human rights in Indonesia originate and lead to Pancasila, which means that human rights are guaranteed a strong guarantee from the nation's philosophy, namely Pancasila [10]. According to Meilanny, leading to Pancasila means that the implementation of human rights must pay attention to the lines that have been determined in the provisions of the Pancasila philosophy [11].

For the Indonesian people, exercising human rights does not mean exercising freely, but must pay attention to the provisions contained in the Indonesian people's view of life, namely Pancasila. This is because basically there are no rights that can be exercised absolutely without regard to the rights of others. Every right owned by someone will be limited by the rights of others. If in exercising our rights, we do not pay attention to the rights of others, then what will happen is a conflict of rights or a conflict of interest in the life of the community, nation and state [12].

2. RESEARCH METHOD

This research is a sociological legal research (socio-legal research) which means seeing law as an empirical social phenomenon. Based on social facts and legal dynamics that develop in society, the approach in this paper is a conceptual approach, which departs from the views and doctrines that develop in legal science. The data collection

technique in this paper uses documentary studies, so data analysis in this paper is a qualitative analysis which tries to provide descriptions (descriptions) of findings, and therefore it prioritizes the quality / quality of the data, and not the quantity.

3. RESULT AND DISCUSSION

The Republic of Indonesia recognizes and upholds human rights and basic human freedoms as rights which are inherent and inseparable from humans that must be protected, respected and upheld for the sake of enhancing human dignity, welfare, happiness, intelligence and justice [13]. Thus, a society that has a new human ethos is characterized by a just and civilized humanity where structurally-institutionally, legal norms, customs and religious morality are upheld by individuals in society [14]. So when the state fails to legalize LGBT behavior, that is when the actual human rights violations have occurred. Borrowing the term Yunahar Ilyas: threatening the existence of Indonesian people so that the population of the Indonesian people, which is one of the largest countries in the world, will become extinct. Although the author strongly believes that this will never happen in this country. The author argues that the constitutional basis has been very strong so as not to legalize LGBT practices in Indonesia as contained in Pancasila and the 1945 Constitution of the Republic of Indonesia. In this case, the state has actually stipulated the prevention of sexual orientation deviations and explains it in Law Number 44 of 2008 concerning Pornography and has included the term "deviant intercourse" as one of the elements of pornography. In the explanation of the meaning of this term includes, among other things, "intercourse or other sexual activity with corpses, animals, oral sex, anal sex, lesbian and homosexuals." On the other hand, in preventing LGBT deviations through the practice of adopting children, the state has also anticipated the motive for this action **through Government Regulation Number 54 of 2007 concerning Adoption** which explicitly stipulates that adopting parents should not be homosexual couples [15].

In Islam, according to Yunahar Ilyas (2016), the law that commits adultery for people who are still not married, they will be caned. If those who commit adultery have their wives or widows, they are punished by stoning or stoning to death. But for homosexuals or the same sex, their punishment is death. In addition, LGBT is against human nature, against religion, Pancasila, marriage, morality, culture, and many more [16]. Yunahar continued, emphasizing that LGBT people could be transmitted because they were a minority. They are always lonely and tend to make friends as regeneration because they cannot produce offspring. This is not a genetic disease; it is still a character that is influenced by the environment,

especially in the TV media where there are many people who wave like women, even though they are male [17].

Indeed, in this competitive and open globalization era, the basic values of society, nation and state contained in Pancasila and the 1945 Constitution are felt to be starting to fade, especially among the younger generation. The reforms have resulted in significant changes in this beloved country of Indonesia. Pancasila in the New Order era occupied the highest place, which is the source of all sources of law. But during this reformation era, Pancasila was not even described in the life of the nation and state [18]. Seeing the conditions, currently Pancasila which is considered as the glue of the unity of the nation has been disturbed. Indonesia is slowly being led towards the disintegration of the nation. Signs of disorientation, distrust (distrust), and disobedience (insubordination) began to occur, even among the younger generation [19].

In the end, the complexity of the problems of the Indonesian nation must be addressed quickly and precisely by adhering to high morality (hi-mo, high morality), not high technology (hi-tech, high-technology) [20]. Therefore, it is necessary to develop a new human ethos based on a just and civilized humanity in accordance with the second principle of Pancasila [21]. These humanistic ideals do not necessarily distance themselves from divine norms. It is a call for religious people to prove with real attitudes and behaviors that religion is not an obstacle to an attitude that respects human dignity and sees differences, plurality and diversity as something that must be recognized and respected [22].

In fact, according to Mohamad Fadhilah Zein (2019), LGBT must be seen as an aberration that must be sought for a cure and a solution. For some circles in Indonesia, the most obvious threat from the LGBT movement is the emergence of same-sex marriage demands and LGBT perpetrators among children and adolescents [23]. Of course, the state must be present and carry out a national campaign that sexual orientation is not only a matter of rights, but also about legal norms, morals and religion. Thus, the gay and lesbian phenomenon, besides being against religious norms and morality, is illegal and unconstitutional [24]. Protecting them is wrong, and campaigning for them is against the law. The homosexual problem cannot be resolved through a human rights approach and liberal democracy because in essence LGBT is a sexual disorder [25]. As we all know that officially the Indonesian Ministry of Health in 2017 has included LGBT as a mental health problem [26].

The same thing was also conveyed by Dr. dr. Fidiansjah Mursjid, Sp.KJ., MPH as the Director for Prevention of Mental Health and Drug Problems at the Indonesian Ministry of Health, that in the knowledge of

LGBT science, we are not familiar with it, we actually know it as a movement which certainly has a target, has a definite mission they are planning, whereas in the realm of science they are known as homosexual, bisexual and transsexual. LGBT is not innate, this is something that causes discomfort because it is outside the nature that God has determined and LGBT insha Allah can be cured.

The fundamental values contained in Pancasila are dynamic in being able to answer all the problems that occur, by using unlimited interpretations as long as they are still in accordance with the values of Pancasila. Based on Article 1 paragraph 3, Article 29, Article 18b Paragraph 2 of the 1945 Constitution of the Republic of Indonesia, that the state of Indonesia is a constitutional state based on the one and only Godhead.²⁷ The Elucidation of the Law implies that every legal norm in effect in Indonesia must reflect justice, certainty and benefit, all of which must be based on the principle of One Godhead [28].

3.1 Traditional Law Perspective

Pancasila is the source of all sources of state law [29]. The placement of Pancasila as the source of all sources of state law is in accordance with the fourth paragraph of the Preamble to the 1945 Constitution of the Republic of Indonesia, namely God Almighty, just and civilized humanity, Indonesian Unity, Democracy led by wisdom in Deliberation / Representation, and social justice for all Indonesian people. Placing Pancasila as the basis and ideology of the state as well as the philosophical foundation of the state so that any material contained in the Legislation must not conflict with the values contained in Pancasila [30].

According to Barda Nawawi Arif (2015), there are three pillars / values of the balance of Pancasila, they are:

1. Oriented to values "Divinity" (religious moral);
2. Oriented to values "Humanity" (humanistic);
and
3. Oriented to "social" values (nationalistic; democratic; social justice) [31].

Customary law is basically an entire legal rule that contains the customs provisions of the entire Indonesian nation, most of which are unwritten laws, in a diverse situation considering that the Indonesian nation consists of hundreds of ethnic groups, each of which has its own customs. customs based on their respective views of life [32]. The basis for recognition of the enforcement and application of customary law in Indonesia is clearly regulated in Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia which reads: *"The state recognizes and respects indigenous peoples and their traditional rights as long as they are still alive and in accordance*

with community development. And the principles of the Unitary State of the Republic of Indonesia, which are regulated in law."

Meanwhile, in particular, the state has determined the prevention of sexual orientation deviations and explains it in Law Number 44 of 2008 concerning Pornography and has included the term "deviant intercourse" as an element of pornography. In the explanation of the meaning of this term includes, among other things, "intercourse or other sexual activity with corpses, animals, oral sex, anal sex, lesbian and homosexuals [33]." As stated in Article 4 paragraph (1) of the Pornography Law, it reads: *"Everyone is prohibited from producing, making, reproducing, duplicating, distributing, broadcasting, importing, exporting, offering, trading, renting, or providing pornography which explicitly contains: a. sexual intercourse, including sexual intercourse that is deviant; " In the explanation of Article 4 paragraph (1) of the Pornography Law, it is stated that what is meant by "deviant intercourse" includes intercourse or other sexual activity with corpses, animals, oral sex, lesbians and homosexuals.*

Then the prevention of LGBT deviations through the practice of child adoption, the state has also anticipated the motive for this action through Government Regulation no. 54 of 2007 concerning Adoption which explicitly stipulates that adopting parents should not be homosexual couples. Likewise, adoption by an unmarried person is not permitted [34]. This is as regulated in Article 13 which reads: *"Prospective adoptive parents must meet the following conditions: a. physically and mentally healthy; b. have a minimum age of 30 (thirty) years and a maximum of 55 (fifty five) years; c. has the same religion as the religion of the adopted child candidate; d. of good character and have never been convicted of a crime; e. married for at least 5 (five) years; f. not a same sex partner; "*

On the other hand, actually long before the Republic of Indonesia existed and became independent, there were regulations regarding the prohibition of sexual deviant acts as contained in the legal provisions and penalties for adultery, rape and sexual fornication in the Majapahit Legislation in the 13th and 13th Century. 14 AD as translated by Prof. Dr. Slamet Muliana (1961) in his book entitled Legislation of Majapahit, Jakarta: Bhratara quoted by Dr. Neng Djubaedah (2016) as the expert of the petitioner in reviewing the Law against the 1945 Constitution at the judicial review at the Constitutional Court, that in Article 17 of the Majapahit Legislation explains the prohibition of homosexual acts:

- *Whether a caddy (homosexual), a thief or a liar if proven, is subject to the death penalty by the ruling King.*

- *Whoever obstructs or subdues the person who has the order to eliminate the kedi, the thief and the liar, will be subject to a fine of four hundred by the ruling king.*
- *After paying a fine, that person is subject to death penalty."*

Furthermore, according to Neng Djubaedah (2016), it explains the existence of legal provisions and penalties for adultery, rape and same-sex fornication in Serat Angger-Angger Jawi (Surakarta and Yogyakarta in 1766) which apply in the Kingdom of Surakarta (Central Java-pen) and the Kingdom of Yogyakarta.

The author has conducted research on several Regional Regulations (Regional Regulations) at the Provincial and / or Regency / City levels in Indonesia, there are at least 7 (seven) regions that prohibit and impose fines and penalties (specifically for the Aceh region) for LGBT acts as contained in the following regional regulations this:

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

Referring to Law Number 23 of 2014 concerning Regional Government, divides and classifies government affairs into three namely: Government Affairs consisting of absolute government affairs, concurrent government affairs, and general government affairs.³⁵ The enactment of regional regulations in some of the areas that the authors

describe above is none other than related to peace, public order, and protection of the people and is the matter of the autonomous regional government. This refers to Article 12 of Law Number 23 of 2014 concerning Regional Government.

Article 12 reads:

"Mandatory Government Affairs relating to Basic Services as referred to in Article 11 paragraph

(2) include:

- a. *education;*
- b. *health;*
- c. *public works and spatial planning;*
- d. *public housing and residential areas;*
- e. *peace, public order and community protection; and*
- f. *social."*

So every regional government everywhere has the authority to regulate itself, including in regulating social order and community order which is adjusted to the values of customs and local wisdom. And the enactment of local regulations on prevention, eradication and prostitution (LGBT) is not a violation of human rights in this country. It is fitting for the state to take quick steps to provide treatment, rehabilitation, religious counseling and psychological guidance to LGBT perpetrators and victims so that they can recover from illness and return to a normal life in society.

3.2 National Resilience Perspective

According to Margaretha Hanita [36], national resilience can be defined as a dynamic condition of a nation which includes all aspects of life to remain organized and stable. All aspects of life can be grouped into 3 (three) relatively static aspects consisting of: human resources, geography and moderate natural resources of which 5 (five) relatively dynamic aspects include: economy, socio-culture, defense, ideology and political [36].

According to Margaretha Hanita [36], at least the study objects of national resilience include:

1. *Resilience and resilience of a nation;*
2. *The fall of a regime of power;*
3. *Nation building, national unity;*
4. *National development and resilience;*
5. *Conflict resolution;*
6. *Role and peace between nations;*
7. *And others that are disturbing, hindering, threatening the safety of the state and nation, such as terror and other*

transnational organized crimes [37].

So the author considers that the existence of the LGBT community in Indonesia is an organized threat to the Indonesian nation. All elements of society need to join hands to prevent the development of lesbian, gay, bisexual and transgender (LGBT) lifestyles in Indonesia. Parents and teachers are reminded to be more sensitive to children's development because the LGBT lifestyle has started threatening children from an early age [38].

Meanwhile, other concerns also came from the Minister of Research, Technology and Higher Education Mohamad Nasir, who emphasized that lesbian, gay, bisexual and transgender (LGBT) groups should not be allowed to enter campus. The existence of LGBT groups can damage the morale of the nation and the campus as the guardian of morals should be able to properly maintain moral values and noble values as the Indonesian nation [39].

Member of Commission III DPR RI from the PKS faction Muhammad Nasir Djamil said the LGBT lifestyle was a serious threat to the Indonesian nation. He emphasized that LGBT people cannot develop freely with all their activities. Moreover, he said, the LGBT community has allegedly begun to penetrate campuses through study groups or scientific discussions [40]. Because of the importance of this crime against LGBT, the government must take quick steps in making criminal arrangements for the offense without having to wait for the new Criminal Code to be ratified so that the morals and culture of this nation remain protected through legal norms in accordance with the principles of the rule of law [41].

Finally, the author argues, as has also been conveyed by many circles to carry out the process of rehabilitation, psychiatric treatment for people who have sexual orientation disorders. The state must be present and act quickly before it is too late. The regulatory process may refer to the rehabilitation of narcotics victims. Considering that every year in Indonesia there continues to be an increase in both children, adolescents and adults who are victims of homosexuality, this must be a common concern of all groups and demand that the country as country tries to stop the increasing growth every year. The threat of moral destruction is clearly real and haunts the younger generation, the nation's future generations who are quite vulnerable to becoming victims of people who have deviant sexual behavior.

4. CONCLUSION

Responding to the real threat of the LGBT community, government of Indonesia must have make rules in the form of laws that prohibit LGBT practices and impose criminal penalties for those who are troubling society so that this problem does not drag on and does not cause public concern to play.

The judges themselves, persecute when this deviant behavior is encountered by the community. Absolute legal certainty must be presented in the midst of a society who is so worried about this LGBT phenomenon. When the state allows this to drag on, it will create more unrest for the community.

Criminalization is definitely a last resort for people with deviant behavior. The state must first seek rehabilitation and treatment, provide psychological counseling and religious counseling so that they (the LGBT community) regain consciousness, recover and live a normal life as before.

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