

JURNAL CITA HUKUM

Indonesian Law Journal



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Welcoming contributions from scientists, scholars, professionals, and researchers in the legal disciplines to be published and disseminated after going through script selection mechanisms, reviewing sustainable partners, and rigorous editing processes.

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A Comparative Study of Gay and Lesbian Movement in Indonesia and America for the Struggle of Equality Recognition*

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Abstract:

Studies of sexual orientation or sexual behavior in homosexual groups have been carried out from various aspects, such as religion, health, psychology, philosophy, anthropology, and law. This paper aims both on conducting studies of sexual orientation in gays and lesbians, and also in its movement. This study focuses on the comparison by discussing the history of the entry of gays and lesbians in America first. United State has made policy with the granting of same-sex marriage rights through the 2015 Obergefell Supreme Court ruling; hence, the rejection of same-sex marriage was unconstitutional action. Churches also dare to facilitate the process of same-sex marriage, by reason of following state decisions. The LGBT movement especially gays as a pioneer called the Gay Liberation Movement has a strong influence in America in fighting for equality, and has a big contribution to the granting of the right to same-sex marriage. This right is also supplemented by adoption rights. If this condition is compared to Indonesia which has lots of similar movement and becomes one of the biggest movements in Southeast Asia, in contrast, the majority of people reject the status. Meanwhile, gays and lesbians demand on the basis of human rights protection. Related to this condition, Indonesia has different views on human rights values. Human rights have universal principles, yet the actualization of human rights can be particular. Indonesia could be like America, if there are no regulations and restrictions on gay and lesbian individuals with differences in their sexual orientation, including the and lesbian movements.

Keywords: Movement, Gay, Lesbian, United State, Equality Recognition

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Studi Perbandingan Gerakan Gay dan Lesbian di Indonesia dan Amerika Bagi Perjuangan Pengakuan Kesetaraan

Abstrak:

Kajian tentang orientasi seksual ataupun perilaku seksual pada kelompok homoseksual telah banyak dilakukan dari berbagai aspek, baik aspek agama, kesehatan, psikologi, filsafat, antropologi ataupun hukum. Tulisan ini selain melakukan kajian tentang orientasi seksual pada gay dan lesbian, namun juga pada gerakan gay dan lesbian yang terorganisir. Kajian tentang gerakan gay dan lesbian ini menitikberatkan pada perbandingan dengan terlebih dahulu membahas tentang sejarah masuknya gay dan lesbian di Amerika. Amerika membuat kebijakan dengan dikabulkannya hak pernikahan sesama jenis melalui putusan Mahkamah Agung Obergefell tahun 2015, sehingga tindakan penolakan atas pernikahan sesama jenis merupakan perbuatan inkonstitusional. Gereja-gereja pun berani memfasilitasi proses pernikahan sesama jenis, dengan alasan mengikuti keputusan negara. Gerakan LGBT khususnya gay sebagai pelopor yaitu Gay Liberation Movement memiliki pengaruh yang kuat di Amerika dalam memperjuangkan kesetaraan dan memiliki andil besar atas dikabulkannya hak atas pernikahan sejenis. Hak ini dilengkapi pula dengan hak adopsi. Jika kondisi ini dibandingkan dengan Indonesia yang memiliki banyak gerakan serupa, bahkan menjadi salah satu gerakan terbesar di Asia Tenggara, namun mayoritas masyarakat menolaknya, sedangkan kaum gay dan lesbian menuntut atas dasar perlindungan Hak Asasi Manusia. Tentunya pada peristiwa yang sama Indonesia berbeda pandangan terhadap nilai-nilai HAM. HAM memiliki prinsip universal, namun aktualisasi HAM dapat menjadi partikular. Indonesia bisa menjadi seperti Amerika, jika tidak ada pengaturan dan pembatasan atas individu-individu gay dan lesbian dengan perbedaan orientasi seksual mereka, termasuk pada gerakan gay dan lesbian.

Kata Kunci: Gerakan, Gay, Lesbian, Amerika, Pengakuan Kesetaraan

Сравнительное исследование движений геев и лесбиянок по борьбе за признание равенства в Индонезии и Америке

Аннотация:

Исследования сексуальных наклонностей или сексуального поведения в гомосексуальных группах проводились в различных аспектах, включая аспекты религии, здоровья, психологии, философии, антропологии или права. Данная статья не только проводит исследования сексуальных наклонностей геев и лесбиянок, а также их организованных движений. Данное исследование движений геев и лесбиянок фокусируется на сравнении, начиная с обсуждения истории появления геев и лесбиянок в Америке. Америка провела политику по предоставлению прав на однополые браки на основании решения Верховного суда Обергефелла 2015 года, поэтому отказ от однополых браков является неконституционным действием. Движение ЛГБТ, особенно гей-движение, как пионер Освободительного Движения Геев и Лесбиянок (Gay Liberation Movement) оказывает сильное влияние в Америке на борьбу за равенство и играет большую роль в предоставлении прав на однополые браки. Если сравнивать это состояние с ситуацией в Индонезии, в которой есть много подобных движений, то большинство людей их отвергают, в то время как геи и лесбиянки требуют защиту на основе прав человека. Конечно, люди в Индонезии имеют разные идеи о ценностях прав человека. Индонезия может стать такой же страной, как США, если не будет распоряжений и ограничений перед личностями геев и лесбиянок с разными сексуальными наклонностями, включая движения геев и лесбиянок.

Ключевые Слова: движения, гей, лесбиянка, США, признание равенства

Introduction

The study of "homosexual" orientation is not definitely something new, but it is still very interesting to be discussed from various aspects such as psychology, anthropology, human rights, law, and philosophy. Nowadays, the majority of people know that sexual orientation is limited to heterosexuals. Sexual orientation is defined as the gender in which a person is interested. Heterosexual orientation is defined as sexual attraction to different sexes, as men have sexual attraction to women, and vice versa. Whereas homosexuals are someone who has sexual attraction to same-sex (Oetomo, 2001: 6-7). The term is currently known as LGBT (Lesbian, Gay, Bisexual, and Transgender). Lesbian, is a term derived from the word *Lesbos*, an island in the middle of the sea of Egeis which in ancient times was inhabited by women (Kartono, 2009: 249). In Large Indonesian Language Dictionary (KBBI) lesbians are women who love or feel same-sex sexual stimulation, also called homosexual women (Kartono, 1987: 185). Gay, a colloquial term for homosexuals, is now often recognized by homosexual people, who openly express their sexual orientation (<https://kbbi.web.id/homoseks>). Bisexual (someone who has both same-sex and opposite-sex sexual attraction). Whereas T is to refer to Transgender (which is related to gender identity). This paper narrowed the discussion in gays and lesbians only. The use of the word gay and lesbians is increasingly developing to replace the term homosexual as a social identity around society. Both words are preferred because they are easier and do not include the word sex. But if you read some literature, the term "homosexual" is still used.

The term homosexuality appeared in 1869. This term is firstly appeared rather than the term of heterosexual in 1892 (Julius, 2015: 10-11). Differences in views about norm sex and deviant sex arise when the term heterosexual is associated as a normal type of opposite sex relationship according to doctors. This concept began to be the main model of citizen sexuality since 1930.

Several ways were undergone to show that the deviant sexual concepts labeled with homosexuality were wrong since that sexual orientation is not only heterosexual. One of them is through the Gay, Lesbian or LGBT movement. The formation of this movement is widespread throughout the world, there are large organizations that fight for human rights for lesbians and gays and even become transformed as international organizations, namely ILGA (International Lesbian, Gay, Bisexual, Trans and Intersex Association), which has more than 500 LGBT groups over the world, and this organization is recognized by the United Nations (UN).

The UN has been open to the confession of homosexual orientation, one of these is by encouraging member states to adopt anti-discrimination law based on sexual orientation and gender identity, and encourage the legalization of same-sex marriage. The United Nations through the Human Rights Council on 17 June 2011 issued resolution 17/19 concerning Human Rights, Sexual Orientation and Gender Identity. So it is not surprising if the countries in the world today, especially in Europe, America and Australia, give recognition and legalize same-sex marriage. Whereas in Africa is starting with South Africa, while in Asia countries such as Thailand and Taiwan have also accepted the existence of gays and lesbians. This condition is in contrast to most Islamic countries, the majority of countries in Asia and Africa that up to now do not recognize homosexual sexual orientation. Even some countries such as Singapore, Malaysia, Brunei Darussalam, Arab, Ghana categorize same-sex sexual relations as a crime. Brunei Darussalam which actually applies sharia law, gives penalties to death for homosexuals, although this punishment was later postponed because of protests from countries and also from the United Nations because since it was considered a violation of the right to one's life.

The Gay and Lesbian Movement, in fact, has a big role in negotiating, and even contributing to determine policies when gay or lesbian people sit in parliament. For example, gays and lesbians in Germany form the *arbeitskreise homosexualita* (Louise K. Davidson-Schmich, 2017: 536) who then conducted a series of public conferences on homosexuality in the late 1980s. After the unification of Germany in the 1990s, a similar organization of a national scale was formed namely *Lesben-und Schwulenverband* in Deutschland/LSVD (Schmich, 2017: 541). By pushing the German government to comply with international agreements to respect the rights of gay, lesbians and transgender's citizens. Moreover, they lobbied politics to revoke the prohibition on sodomy, to get marriage rights, eliminate discrimination, help AIDS patients, and others. This condition also occurred in Australia in the state of Victoria, where the first homosexual group was formed, namely the Society Five in 1971 (Carbery, 2014: 26) which promoted their demands, radio broadcasts including political lobbying. The obtained results are the agreement of the sexual intercourse age.

The success of the gay and lesbian movements must also be accompanied by the country's socio-cultural conditions. Indeed, it will be different if the movement is in Asian countries and Africa including Indonesia. For this reason, this article will discuss the issue related to the comparison of gay and lesbian movements in fighting for equality by comparing Indonesia and America. This movement is very possible to influence domestic policy if each country does not make arrangements and restrictions on the scope of the movement. It may be

possible in the future, the gay and lesbian movement will thrive because it was supported by technological advancements and open views about various sexual orientations.

Gay and Lesbian Movement in America

As a democratic and very open country, in fact, America has banned homosexual practices ones, because it is considered a psychological problem. If it concerns the issue of human rights, then the USA is quite detailed as a legal state whose foundation is a constitution which is considered the backbone of a legal system (Schroth, et.al, 2018: 3). America also has a concept about human rights that has been designed in more detail, which is contained in the Declaration of Independence (1776) formulated by Jefferson (Spencer, 2011: 6). Although a liberal, America also regulates marriage in the law of his family. Marriage can only be run by heterosexual couples. What later changed America, so that it also changed the rules of family law to become marriage not only for heterosexuals but also for homosexual couples. Before this time, America had experienced problems related to human rights guarantees, particularly related to equality of civil rights. This is the beginning of the emergence of a movement that fought for civil rights, namely The Rights Movement. People experience discrimination only because they have differences in skin color and religion. Other human rights movement such as the Black Liberation, Black Moslem Movement, and the National Organization for Women which in the 1960s began to be pioneered by Martin Luther Jr. (Kalsum, 2012: 25). This movement triggered a similar movement to fight for homosexual rights in America. Because they as a minority group are certainly more vulnerable to acts of discrimination.

Minority groups according to Yap Thiam Hien are not always determined by the number, but by treatment. Because a large number can have minority status. For instance, as when Indonesia was colonized by the Dutch, there were more Indonesians, but the Dutch had a "dominant group" position (Fadhli, 2014: 536), then activists of human rights concentrated on legal protection for the rights of minority groups, as Clive Baldwin, Chris Chapman, and Zoe Gray explain the need to protect minority rights with the aim of preventing conflicts between minorities and local government. Where rights for minorities include the protection of existence, identity, discrimination, and participation (Baldwin; Chapman; & Gray, 2007: 5), because of discrimination in minority groups, America always has a white President, until Obama's election

as first black President. Discrimination has also happened to homosexual people.

Homosexual has existed in America since the 1920s, particularly in Greenwich Village in New York. In the early 1940s, The Beat Generation appeared. In the 1960s there was a movement of minority groups that became a driver to the Gay Liberation Movements. The peak of the movement, when the Stonewall rebellion occurred in New York in 1969. This riot occurred at Stonewell Inn, Greenwich Village, the United States on June 28, 1969. Because the city police took arbitrary actions (Kalsum, 2012: 27), which triggered the movement Gay human rights in America and in the world and resulted in the emergence of new gay communities as well as the Gay Liberation Front (GLF), The Activists' Alliance (GAA), and the *Front Homosexual d'Action Revolutionnaire*. June 28, 1969 also becomes a day for celebrating LGBT people. Furthermore, labor organizations also play a role in the movement of gay groups. Conditions of discrimination occurred, as the beginning of the struggle for equality of civil rights. Including the struggle for equality of marriage. This is a battle of "rights" since human rights are actually owned by humans and all human beings have this right (Alston, 1990: 10).

Understanding marriage is a debate in America. Generally, the purpose of marriage leads to the existence of lineages (successors of the family). William Eskridge said, if marriage is only for heterosexuals, then marriage is interpreted narrowly and naturally. "That the Court's reasoning in *Loving* should be applied to reject such justifications of the same-sex marriage ban, and find that bans on same-sex marriage are contrary to the due process and equal protection clauses, and are discriminatory on the basis of sex and sexual orientation" (Isailovic, 2018: 11). But not everyone all agrees marriage is not only about relationships with spouses, but also the birth of children (parent and child relationships). Gay people want them to be recognized so that they also have the right to be parents. Parents may be possible as gay or lesbian so that children can live well. One of them adds adoption rights for homosexual couples (Isailovic, 2018: 36-37).

In the proponent's opinion of same-sex marriage, children's growth and development does not lie in the presence of a mother (female) and father (male), but the welfare of children depends on those raised by married couples. In some cases, American LGBT groups associate the rights of parents with parental status. For Advocates, the legalization of same-sex marriage is necessary to protect parents' relationships with children in same-sex

households. Rejecting of same-sex marriage means giving a negative stigma to children that their families are not entitled to any public protection status.

Recognition of same-sex marriage is very essential, and this will affect children condition when living with similar parents. When legal recognition is not recorded in the name of marriage, it will affect children. Emotionally, children grow up in families that do not get recognition, claims for rights in the public are also difficult to obtain. Because children's rights are very much determined by the recognition of the legal status of their parents. So that when the legal status of marriage is only aimed at sexual heterosexual couples, this would become bitter news for gay and lesbian groups. This matter is taken into consideration in the court related to the legal status of same-sex marriage. Ivana Isailovic said:

"By giving legal recognition and legal structure to their parents' relationships, it allows children to understand the integrity and closeness of their own family and concord with other families in their communities and in their daily lives. Marriage also affords the permanency and stability important to children's best interests... Without their recognition, stability, and predictability of marriage offers (Isailovic, 2018: 34).

Giving recognition to the relationship of parent marriage, also guaranteeing children interests. For opponents of same-sex marriage, the existence of a biological relationship is very influential for both parents and children, and it should properly guard the essence of marriage. This is also shown by 4 judges from 9 Obergefell case judges who did not agree with the marriage of each other by giving a statement of disapproval of the legalization same-sex marriage. It is not religion that is used as an expression, although later religion becomes an influence in this debate. Kenji Yoshino said the American debate was not a matter of the nature of being a parent, but a political and legal conflict between the ideal vision of the family and marriage. The debate was drawn in the court area as "producers of truth."

One example of a same-sex marriage case that previously occurred in America was *Perry v Schwarzenegger*, who found that limiting the definition of marriage to unity between men in California was unconstitutional. Judge Walker uses facts from a number of historical witnesses, geographers, and even psychologists. Psychologists research have found that gender and parents of the opposite sex do not become factors in children's adjustment "(Isailovic, 2018: 42-43). Homosexual couples are considered more attentive to their children, even there is no biological connection. Hawaii became the first court to oppose rejection of same-sex marriage. Likewise, the Court stated:

“In the recent landmark Obergefell case, the U.S. Supreme Court settled some of these constitutional debates and found that state bans preventing same-sex couples from marrying were unconstitutional because they were contrary to the equal protection and due process clauses enshrined in the Fourteenth Amendment (Isailovic, 2018).

Prohibiting same-sex couples married is unconstitutional, as in the fourteenth amendment. The Obergefell Supreme Court's decision also stated that the rejection of same-sex marriage could cause psychological disturbances, giving a damaging effect. As Judge Kennedy stated, banning similar marriages will degrade same-sex couples and impose stigma. Not only that, the prohibition will "overlook their choices" and not respect and subjugate them.

Besides these incidents, there are still more courts related to similar marriage decisions, including whether sodomy is a crime or not. Law is considered to play an important role in providing opportunities for surviving or even hindering and destroying community life (gays and lesbians).

The fundamental of constitutional rights is used as a strong argument to reject the prohibition on same-sex marriage. Marriage and legitimate intimate relationships certainly have long consequences related to legal protection, the fulfillment of welfare and even social security issues. In the modern era, marriage has become the institution of central legitimacy by which the state regulates and permeates one's most intimate life; it is a privacy zone outside where sex is not protected.

If homosexual partners are recognized, then it will have an impact on their welfare and vice versa, if the legalization is rejected, consequently, the homosexual will experience legal problems. This encourages them to be more open (Spencer, 2011: 27). The peak when in 2015 the US Supreme Court legalized same-sex marriage. Outstanding achievements for LGBT fighters and human rights fighters, which had previously begun in European countries. This is one of the ways used by Americans to legalize same-sex marriage relations through litigation. It is even possible that someday jurisdictions around the world will adopt and consider adopting laws that legalize same-sex marriage.

The Court's decision regarding the definition of marriage was original as a union between a man and a woman for federal purposes. This statement is, in fact, contrary to the principles, processes, and equality guaranteed in the fifth amendment. If there is a prohibition which is an act of constitutionality and the states should also recognize same-sex marriage.

In the United States, same-sex marriage became available nationwide as a result of two U.S. Supreme Court decisions, one regarding the definition of marriage at the federal level and the other at the state level. In *Windsor v. the United States*, the Court found that the Defense of Marriage Act (DOMA), which defined marriage as a union between a man and a woman for federal purposes, was contrary to the due process and equality principles guaranteed by the Fifth Amendment. In *Obergefell v. Hodges*, the Court held that state bans on same-sex marriage were unconstitutional and that states should recognize marriages performed in sister states. Prior to these two decisions, several states had already legalized same-sex marriage through either legislation, popular vote, or litigation (Isailovic, 2018).

There are several state law that continues to reject the legalization of same-sex marriage, protection in the workplace and civil rights of sexual minorities. Even before the legalization of marriage on May 15, 2008, Roman Catholic bishops in California issued a statement explaining their opposition to the California State Supreme Court on the same day when the court officially allowed same-sex marriage (<https://id.wikipedia.org>).

In terms of religion, homosexual behavior cannot be justified. This situation is contradictory because it basically develops in the politics and culture of the United States of America towards lesbian, gay, bisexual and transgender (LGBT) people. On one hand, in various shows on television portraying gays and lesbians are relatively positive. Religion is not the reason for acceptance and rejection as the results of the study at the beginning. The concept of marriage and family is an important reason why the judge decides the legal marriage. Even related to psychiatric problems is not an important issue that appears when compared with lesbians and gays in America. Although Homosexuality was qualified as a mental disorder, before the elimination of APA (American Psychiatric Association) about homosexual status and transgender in 1974.

Gay and Lesbian Movement in Indonesia

The practice of gays and lesbians has been developed in Indonesia a long time ago since, before the existence of independence, they developed along with the arts and culture of the local community. It was only in the 1960s that gay and lesbian movements are organized in Indonesia. One of the lesbian practices was found in 1939 in West Sumatra. Where a widow and a girl ask the village head to marry them, by reasoning that they have a relationship like 'husband' and 'wife'. In Sulawesi around 1948 has also found several women who dressed as

men wearing *sarongs*, became farmers and lived with their partners who were also women (Blackwood, 1999). Gay practices also existed during the Dutch colonial era, with the recognition of one of the residents who declared himself gay on the book "Gay is a Choice of My Life" by Amen Budiman who discovered the diary of Sucipto, a gay man who lived during the colonial period of the 1920s and 1930s, then in 1938 the Dutch East Indies government arrested homosexual perpetrators (<http://www.suarakita.org/2015/05/resensi-secuil-cerita-dari-gay-masa-kolonial-belanda/>).

According to Dede Oetomo, the term of the homosexual is also found in traditional Indonesian society, such as in Minang known as the *induk jawi-anak jawi*. Referring to the relationship of man to teenage man in the learning process, but also involves emotional and even sexual aspects. In Madura, the term *dalaq* is referred to as the friendship of two children or adolescent boys. There are also reports from the Acehnese (*Hurgronje*) and male-female homosexual relations including those of the Balinese people (Julius Jacobs) (Oetomo, 2001: 10). In Ponorogo, in the art of *reog* known as "*Warok Gemblak*." A *warok* will undergo *Tapabrata* to achieve supernatural power. The thing that must be done is to hold back lust for women, the role of *gemblak* is to replace it. *Gemblak* is a teenage male figure, young and handsome (Oetomo, 2001: 67).

From art, culture, personal desires, both individuals and homosexual groups continue to develop in Indonesia and can be accepted as part of ancestral heritage. This recognition has an impact on the prolonging of homosexual practices, although some of these practices have been separated from cultural activity. Consequently, homosexual become a strategic issue to be debated when dealing with human rights, especially freedom and recognition of differences in sexual orientation. Gay or lesbian people, at that time, have not been able to open up to differences in sexual orientation. Likewise with the movement of lesbian and gay groups coming in, where the receipt of his identity first only to themselves. The majority of people cannot accept this sexual orientation. Some of them reported discrimination based on sexual orientation. One way to accommodate it is by forming a movement, both gay, lesbian, or transgender (LGBT).

Movement is taken from the basic word of motion which means 1). transfer of place or position, both once and repeatedly; 2). encouragement (mind, feeling, etc.). In addition, the movement also has an understanding; 1). actions or moving conditions (water, sea, machinery); 2). movement, business, or activity in the social field (politics and so on). Socially planned actions carried out by a community group are accompanied by a planned program and

aimed at a change or as a resistance movement to preserve existing community patterns and institutions (<https://kbbi.web.id/gerak>).

Generally, the movement leads to activities carried out by community groups accompanied by planned programs and shown on a change or can also be a resistance movement. If it is associated with the gay and lesbian movement, then this movement is carried out in a planned manner and by groups of people who feel they have similarities, namely the similarity of sexual orientation and concepts equipped with programs and aimed at change. One of them is recognition and demands the fulfillment of the same rights as the community in general. It can also be a resistance movement to oppose all forms of discriminatory treatment based on differences in sexual orientation.

The initial of the movement does not come from gay or lesbian groups, yet actually emerged from the transgender group. Using the name *Wadam Djakarta Community (Hiwad)* and was formed in the late 1960s. The name of the *wadam* was taken to eliminate the impression of insulting the word *bencong*. Although the word *Wadam* was also considered offensive, because it was an abbreviation of Adam's Woman, and in 1978 the word *waria* was used (male-female). Today it is more commonly known as transgender. Then the first gay organization was formed with the name "*Lamda Indonesia*" March 1, 1982. The gay movement had existed before the movement incorporated in LGBT or LGBTIQ. The establishment of *Lambda Indonesia* was regarded as an organization born on the basis of the awareness of gay activists who organized themselves to claim their rights (Oetomo & Suvianita, 2013: 4). *Lamda Indonesia* also inspired similar movements spread across major cities in Indonesia. But in 1986 the last meeting was held in Surabaya. In the same year, several lesbians in Jakarta had established the Indonesian Lesbian Association (*Perlesin*) inspired by their participation in the Jakarta branch of the *Lambda Indonesia* organization. This organization is not as widely known as gay organizations and only lasted less than one year (Oetomo & Suvianita, 2013: 19). In 1985, a gay movement was formed, namely the Gay Yogyakarta Brotherhood (*PGY*), which changed its name in 1988 to the Indonesian Gay Society (IGS). The IGS proposes March 1 as the National Gay and Lesbian Solidarity Day (to coincide with the date of the founding of *Lamda Indonesia*). Since gay and lesbian struggles also coincide with bisexuality and transgender, then it is proposed to become the National LGBTIQ Solidarity Day.

In 1987, on August 1, a similar movement was established, namely *Gaya Nusantara (GN)* in Surabaya and incorporated as a legal entity in 2012. The writing was different to show that this was a gay organization after the

Indonesian Lambda organization disbanded. GN is the pioneer and driver of the LGBTIQ movement in Indonesia. There are some activities that were done such as counseling activities, carry out HIV AIDS prevention campaigns, to courses on gender and sexuality. GN became a member (ILGA) and collaborated with the United Nations Development Program (UNDP). Not only the gay group movement but lesbians are growing, call it the *Swara Srikandi* organization which was founded towards the end of the 1990s. Lesbians, both openly and covertly, also played an active role in the increasingly active feminist movement, which also began in the 1980s (Oetomo & Suvianita, 2013: 21). Even at the end of 1993, there were many organizations and individual activists, so they were able to hold the first Indonesian Lesbian and Gay Congress (KLG I) in Kaliurang, Yogyakarta (Muthmainnah, 2016: 16). Turning to the reform era, it brought changes to the progress of the movement based on sexual orientation and gender identity until coming into 2000s.

At the end of 2013, there were two national networks of LGBT organizations that housed 119 organizations in 28 provinces. First, the Gay, Transgender, and Sex-Related Men Network with Other Indonesian Men (GWL Ina), was established in February 2007. This network is supported by International organizations. The second network is the Indonesian LGBTIQ Forum, which was formed in 2008. Today, the main LGBT associations in Indonesia are "*Gaya Nusantara*", "*Arus Pelangi*", Ardhanary Institute, *GWL INA*. The movement of gays and lesbians in Indonesia is one of the oldest and largest in Southeast Asia.

Existing LGBT organizations continue to fight for their rights as individuals. These efforts include: (<https://kabarlgbt.files.wordpress.com>)

1. Internalization that sexual diversity is human rights;
2. Destabilizing and deconstructing concepts of sexuality which are considered standard by using the basic framework of all human rights documents through.
 - a. Changes in the legal system including religious law (re-interpretation of scriptures);
 - b. Counter discourse over the meaning of sexuality issues according to the equality and justice principles;
 - c. Elimination of practices that discriminate against groups that are considered "abnormal" or categorized as the non-normative sexuality;

- d. Socialization of Yogyakarta principles, which is the principles of human rights laws application related to sexual orientation and gender identity. Which was carried out in November 2006 with the support of 2 international human rights organizations namely Service for Human Rights and The International Commission of Jurists?

"The principles of Jogja consist of 29 principles, including; 1). Universal enjoyment of human rights, 2). Right of equality and non-discrimination, 3). Right of recognition under the law, 4). Right to life, 5). Right of individual security, 6). Right of privacy, 7). The right of freedom from abuse against deprivation of liberty, 8). Right to get a fair court, 9). The right to get humane treatment during detention, 10). The right of freedom from torture and cruelty, inhuman or degrading treatment or punishment, 11). The right to protection from all forms of exploitation, sale, and trafficking in persons, 12). Right to work, 13). Right towards social security and other social protection measures, 14). The right to get a decent standard of living, 15). The right to adequate housing, 16). Right of education, 17). The right to the highest achievement of education standards, 18). Protection of Medical Violence, 19). The right to freedom of opinion and expression, 20). The right to peaceful freedom assembly and association, 21). The right of thought freedom, 22). The right of movement freedom, 23). Right to seek protection, 24). The right to find a family, 25). The right to participate in public life, 26). The right to participate in cultural life, 27). The right to advance human rights, 28). The right to effective recovery and compensation, and 29). Accountability.

These efforts are reaffirmed in the Indonesian National Report; Review and Participatory Analysis of the Legal and Social Environment for Lesbian, Gay, Bisexual, and Transgender (LGBT) people, aimed at the government and related parties. One of the most important things is to get official recognition of the existence of LGBT groups that have a variety of sexual orientations and gender identities as an integral part of Indonesian society, while also getting the respect and human rights of LGBT groups who are on par with other Indonesians, both at the national level and international through existing human rights mechanisms (Oetomo & Suvianita, 2013: 14-15). This recommendation was made after the presentation, discussion, and dialogue of the Indonesian National LGBT Community which held on 13rd to 14th of June 2013 in Bali. Many recommendations are addressed to parties directly or indirectly related to LGBT groups.

It is not an easy problem in demanding gay and lesbian rights, especially when related to sexual orientation. Indonesia has a fundamental difference with America, even both countries are equally legal states. It does not mean that ignoring the demands of gays and lesbians is an intentional act carried out by

the state and that the state commits human rights violations. If the recognition of gays and lesbians (LGBT) today was given, it is possible for the state to commit violations of human rights, since reasons of human rights are the most powerful as the basis used. Moreover, the fact is the majority of Indonesians cannot accept the existence of gays and lesbians. Religion-based rejection is one of the most prominent, even the Indonesian Ulema Council (*MUI*) has issued *fatwa* MUI about Lesbian, Gay, Sodomy, and Revocation on Number 57 of 2017.

Law number 1 of 1974 also stated that marriage can only be experienced by men and women. Meanwhile, homosexuality is also not a criminal act if it is done by an adult according to Article 292 of the Criminal Code. Legal rules that lack certainty provide gaps for gay and lesbian fighters to demand equality, including the elimination of the negative stigma attached to them.

The state should be able to realize the goals, where the aim of the modern state is to the maintenance and security, moreover, the purpose is also to carry out public welfare for all its citizens from physical, spiritual, economic, social, cultural and others (Fadjar, 2014: 34).

Furthermore, turning to the development and demands of the gay and lesbian movements, America needs more than 50 years in the struggle for equal human rights. It may be possible in Indonesia even the reality is hard. The actualization of human rights in America is different from Indonesia. Human right is a universal matter, given its inherent nature. Whereas according to the actualization of human rights, it is particular in nature, meaning that the implementation is adapted to the local environmental conditions. The particular nature of human rights is a multidimensional complexity of human rights, meaning that human rights contain many elements in it, such as politics, law, economy, social, culture. Therefore, the implementation is also adapted to these elements which are local in nature (Fadjar, 2015: 21). Hence, it is not surprising that the existence of gay and lesbian movements brings pros and cons in society.

The LGBT movement through groups, foundations, and organizations is actually developing well in Indonesia. There is no prohibition on the establishment of organizations or foundations that focus on advocating LGBT rights. There are only a few activities that are considered unsettling or disturbing, which are finally dissolved. Moreover, regular meetings are always held to discuss the promotion of LGBT rights and issues. Coupled with technological support, LGBT movements actually have more place. Information about LGBT is also easy to obtain. Through the web, facebook, twitter and also Instagram.

Law Number 28 of 2004 concerning Amendments to Law Number 16 of 2001 about Foundations with Government Regulation Number 63 of 2008 becomes a regulation for implementing the Law. In Article 15 paragraph 2, the Foundation may not use names that are "contrary to public order and/or morality." A conflicting assessment of public order and/or decency becomes very relative. Law Number 16 Year 2017 on Determination of Government Regulations Substituting Law Number 2 Year 2017 concerning Amendments to Law Number 17 Year 2013 about Community Organizations Becoming Laws. In Article 59 paragraph 4 letter c, it is explained that mass organizations are prohibited from "adhering to, developing, and spread teachings or understandings that are contrary to the *Pancasila*". Consequently, the gay and lesbian movements continue to grow and be recognized, since there is no prohibition taken by the government. Even what is being fought for is specifically the recognition of homosexual sexual orientations which until now have not been accepted. Even in some regions, regional regulations on same-sex sexuality have been issued.

Conclusion

The gay and lesbian movement or the LGBT movement rapidly got into the 1960s in Indonesia, one of them because of the sexual revolution influence. The development of this movement cannot be separated from similar movements abroad. Especially when APA asked Indonesia to remove homosexuals from a list of mental illnesses since the Americans had applied than previously. It is very possible if the struggle of the gay and lesbian movements will be like in America, even the Indonesian law and culture are different. In Indonesia, gay and lesbian organizations began to develop in the 1960s which was pioneered by Lamda Indonesia, and currently, similar movements have reached more than 200 numbers spread throughout Indonesia. Because the law has not regulated the gay and lesbian movements, while same-sex sexual behavior has not been accepted in Indonesia so that conflicts still arise in the community. The need for legal certainty provided by the state to regulate the pace of development of the gay and lesbian movements (conducting arrangements). By continuing to guarantee human rights, but also guaranteeing the rights of others outside of gays and lesbians.

References:

Books

- Alston, P. *The United Nations and Human Rights: An Appraisal*, Amerika: Oxford University Press, 1990.
- Baldwin, C.; Chapman, C.; & Gray, Z. *Minority Rights: The Key to Conflict Prevention*. London: Minority Rights Group International, 2007.
- Blackwood, E.; and Saskia E.; Wieringa: Editor. *Female Desires; Same-Sex Relations and Transgender Practice Across Cultures*, New York: Colombia University Press, 1999.
- Carbery, G. *Towards Homosexual Equality In Australia Criminal Law- A Brief History*, Australia Lesbian and Gay Archives, 2014.
- Fadja, A.M., *Tipe Negara Hukum*, Malang: Bayu Media, 2004.
- Kalsum, L. *Sejarah Perkembangan Homoseksual Rusia dan Bentuk-Bentuk Keterbukaan (Self Disclosure) 1991-2007 (Tugas Akhir)*. Depok: Universitas Indonesia, 2012.
- Kartono, K. *Psikologi Abnormal dan Abnormalitas Seksual*, Bandung: Mandar Maju, 2009.
- Kartono, K.; and Gulo, D. *Kamus Psikologi*, Bandung: CV. Pionir Jaya, 1987.
- Oetomo, D. *Memberi Suara Pada Yang Bisu*, Yogyakarta: Galang Press, 2001.
- Oetomo, D.; and Suvianita, K. *Hidup Sebagai LGBT di Asia, Laporan Nasional Indonesia; Tinjauan dan Analisa Partisipatif tentang Lingkungan Hukum dan Sosial bagi Orang dan masyarakat Madani Lesbian, Gay, Biseksual dan Transgender (LGBT)*, UNDP dan USAID, 2013.
- Schmich, L.K.D. "LGBT Politics in Germany: Unification as a Catalyst for Change," *German Politics*, Vol. 26, No. 4, 2017.
- Spencer, C. *Sejarah Homoseksualitas, dari Zaman Kuno Hingga Sekarang*, Bantul: Kreasi Wacana, 2011.
- Sujatmoko, A. *Hukum HAM dan HUKUM Humaniter*, Jakarta: Rajawali Pers, 2015.
- Yulius, H. *Coming Out*, Jakarta: Kepustakaan Populer Gramedia, 2015.

Journals

- Fadhli, Y.Z. "Kedudukan Kelompok Minoritas dalam Perspektif HAM dan Perlindungan Hukumnya Di Indonesia," *Jurnal Konstitusi*, Volume 11, Nomor 2, 2014.
- Isailovic, I. "Same-Sex but Not the Same: Same-Sex Marriage in the United States and France and the Universalist Narrative", *The American Journal Of Comparative Law*, Volume XX 2018, Amerika: Oxford University Press, 2018.
- Krismawati, N.U; Warty; and Suryani, N. "Eksistensi Warok Dan Gemblak di Tengah Masyarakat Muslim Ponorogo Tahun 1960-1980", *Religió: Jurnal Studi Agama-agama*, Volume 8, Nomor 1, Maret 2018
- Muthmainnah, Y. "LGBT Human Rights in Indonesian Policies", *Indonesian Feminist Journal*, Volume 4, Number 1, March
- Schroth, P.W.; et.al, "Perspectives on law and medicine relating to Transgender people in the United States," *The American Journal Of Comparative Law*, Volume 66 2018, Amerika: Oxford University Press, 2018
- Yulius, H. *Coming Out*, Jakarta: Kepustakaan Populer Gramedia, 2015.
- Kalsum, L. *Sejarah Perkembangan Homoseksual Rusia dan Bentuk-Bentuk Keterbukaan (Self Disclosure) 1991-2007*, (Depok: Universits Indonesia, 2012).

Online

- <https://kbbi.web.id/homoseks>, diakses 20 Februari 2019, pukul 21.00 WIB.
- "Gay Pilihan Jalan Hidupku", dalam <http://www.suarakita.org/2015/05/resensi-secuil-cerita-dari-gay-masa-kolonial-belanda/>. Diakses 10 Mei 2017, pukul 16.00 WIB.

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