

SAME SEX MARRIAGE IN LEGAL AND HUMAN RIGHTS PERSPECTIVES

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ABSTRACT

Homosexuality, in certain countries, has created crucial controversies from socio-legal point of view. In recent decades, homosexuality has become a growing issue in Indonesia as voices are being heard that demand legislations protecting the rights of homosexuals, bisexuals and transgender. These rights, among others, include the right to enter into a marriage and raise a family. The controversy surrounding this sensitive, yet vital issue is due to the fact that the 1945 Constitution says that Indonesia is a rule of law country despite the predominance of Islam. This research is a socio-legal research that discusses same sex marriage issues by using legislative and conceptual approaches. The research reveals that same sex marriage is legalized in some countries through the recognition and respect for human rights principles demanding that every individual be treated indiscriminately. In the Indonesian legal contest, though same sex marriage is in line with principles of human rights, it is in contradiction with the Indonesian culture and the teachings of Islam.

Keywords: Human Rights, Same Sex Marriage, The Indonesian Marriage Law.

INTRODUCTION

Same-sex marriage, also known as gay marriage, is a marriage entered into by people of the same sex, either as a secular civil ceremony or in a religious setting. The requirements of a marriage in a country depend on its applicable laws and regulations. In religious countries such as Indonesia, it is imperative that a marriage only takes place between a man and a woman who are bond together to form a family based on both religious and national laws, whereas in countries that have a rather liberal view on religion, religious law does not play any significant role in a marriage contract between two individuals but rather the provisions of applicable laws. In the Indonesian contest, a legal and legitimate marriage relationship must occur only between a man and a woman, unlike some countries whereby a legal and legitimate marriage may also take place between persons of the same sex. The United States of America, through its Supreme Court ruling of June 26, 2015, has become the 21st state to legalize homosexuality. Besides the United States, the following countries have also legalized same sex marriage: Ireland, Germany, Iceland, Malta, Mexico, (Joseph & Barry, 2011) England, Argentina, Belgium, Brazil, Canada, Colombia Denmark, Finland, France, Iceland, France, Luxembourg, the Netherlands, New

Zealand, Norway, Portugal, Spain, South Africa,¹ Sweden, the United Kingdom, Uruguay, Australia, Austria, Taiwan² and Costa Rica. The Indonesian Marriage Law not recognizes same sex marriage and therefore it does not provide any legal protection to same sex couples.³ In July 2015, the Indonesian Religious Affairs Minister stated in a newspaper that LGBT was unacceptable in Indonesia, because strongly held religious norms disapprove it (The Jakarta Post, 2015). Similarly, in January 2016, Higher Education minister, Muhammad Nasir went further to say that LGBT people should be barred from university campuses. Defence Minister Ryamizard Ryacudu, on the other hand, called the LGBT movement a "*proxy war*" to brainwash Indonesians (Alisa, 2016). Sexual orientation is not explicitly addressed by the Indonesian constitution, which only guarantees all citizens various legal rights, including equality before the law, equal opportunity, humane treatment in the workplace, freedom of religion and opinion, peaceful assembly and association. This lack of constitutional protection fragilizes human rights along with LGBT rights (Offord & Cantrell, 2001).

Human Rights and the Issue of Same Sex Marriage in Indonesia

Human rights are a concept according to which every human being has universal; inalienable rights regardless of his/her nationality, ethnicity, social status, culture, religion and the law in force in the country where he/she lives. Karel Vasak classified human rights into three categories in 1979 as: (1) Human Rights of First Generation: International Covenant on Civil and Political Rights; (2) Human Rights of Second Generation: International Covenant on Economic, Social and Cultural Rights; (3) Human Rights of Third Generation: Collective Rights. LGBT rights are among these rights. The population of LGBT in Indonesia has increased over last couple of decades. Today, it is estimated to over one million individuals⁴. However, despite its increase in number, the Indonesian society seems not to take kindly to LGBT cause. In 2012 the Ministry of Health reported that LGBT population is estimated to 1,095,970 individuals of whom more than five percent 66,180 have HIV. Additionally, Indonesia UNAIDS reported that in 2016, Indonesia had 48,000 new HIV infections and 38,000 AIDS-related deaths. The agency also reported that there were 620,000 individuals living with HIV in 2016. The report concludes that the key populations most affected by HIV in Indonesia are sex workers with an HIV prevalence of 5.3%, gays account for 25.8%, 28.76% for drug users, transgenders account for 24.8% and prisoners close the statistics with 2.6%⁵. The understanding of human rights tends to vary from one country to another. In the Indonesian concept, article of 1 of Law No. 39/1999 on Human Rights and Law No. 26/2000 on Human Rights Courts stipulate that Human rights are a set of rights attached to the nature and existence of human beings as creatures of God Almighty and is his grace that must be respected and protected by the state for the preservation of human dignity. This law is in line with the 1948 Universal Declaration of Human Rights, which states that human rights are the basic rights inherent in human beings by nature, including the right to build a family, the right to self-development, justice, freedom, communication, security and prosperity. Based on minimum basic rights referred to as non-derogable and inalienable human rights. These two types of rights include, among others, the right not to be arbitrarily arrested; the right to a fair and impartial trial; the right to legal assistance; the right to the presumption of innocence. Inalienable rights, on the other hand, are personal rights held by an individual which

are not bestowed by law, custom, or belief, and which cannot be taken or given away, or transferred to another person, are referred to as “*inalienable rights*.” These fundamental rights are endowed on every human being by his/her creator and are often referred to as “*natural rights*”. Besides Law No. 39/1999 on Human Rights, the Universal Declaration of Human Rights is also the legal basis for proponents of legalization of same sex marriage in Indonesia. As stated earlier, article 1 section 1 of this Human Rights Law defines human rights as a set of rights attached to the nature and the existence of human beings as creatures of the Almighty God and must be protected by the state for the protection of human dignity. The common ground between the UN Universal Declaration of Human Rights and Law No. 39/1999 on Human Rights is that both legal instruments recognize human being as God’s creatures. Consequently, the implementation of these rights, including LGBT rights, should not contradict core religious principles.

Human Rights and Indonesian Ideologies

The respect for human rights, in the Indonesian concept, is further developed in the form of law in order to preserve the honour and dignity of human beings, as set in the 1945 Constitution. Such approach is very crucial in the eyes of Indonesian legislators. Muladi (2005) argues that, conceptually, the implementation of human rights in Indonesia can be divided into three views: (Muladi, 2005)

1. The absolute universal view, which sees human rights as universal values as formulated in The Universal Declaration of Human Rights (UDHR). Those who share this view reject traditional, cultural and religious differences in enforcing international human rights.
2. The universal view, which holds that human rights remain universal but recognizes the existence of certain exceptions in accordance with the provisions of Article 29 of the Universal Declaration of Human Rights.
3. The absolute particularistic view that considers human rights as the issue of each nation without giving a strong reason, especially in the rejection of international documents.

Even though the state must respect and protect the rights of every Indonesian citizen, it is important to note that human rights must be implemented in accordance with the norms, values, principles and believes of the Indonesian people. The respect and protection of human rights in Indonesia shall be adjusted to the values and norms of the Indonesian society. This is not an act of human rights violation because the state also has the obligation to safeguard the rights of others to guarantee public order, peace and the welfare of its people in general. Legalization of same sex marriage remains a very complex and controversial issue in Indonesia due to religious and cultural concerns. Though religious freedom is guaranteed in the 1945 Constitution,⁶ only six religions are official recognized in Indonesia. These include Islam, Protestantism, Roman Catholicism, Hinduism, Buddhism and Confucianism (Yang, 2005). Of these religions, Islam is the most adhered to in Indonesia, with 87.2% of Indonesian population identifying themselves as Muslim.⁷ However, despite this overwhelming Muslim majority, the 1945 Constitution says that Indonesia is a rule of law Country.⁸

The Uncertainty of Legalizing Same Sex Marriage

The issue of same sex marriage is not really welcomed by a great majority of the Indonesian people as well as the government as explained at the outset of this paper. It is considered as a violation of the core principles, norms and believes of the Indonesian people. Therefore, the LGBT community's demand for a lawful marriage in Indonesia violates not only the Marriage Law but also the Indonesian people's way of life. Unless there is change in religious mind-set, the demand for legal protection and lawful marriage by the LGBT community will hardly receive real attention in a conservative Indonesia. These demands are deemed to violate the teaching of Islam and the Indonesian tradition. The Indonesian society traditionally considers marriage to be an exclusive relationship between a man and a woman for the sake of procreation. Granting legal recognition to same-sex unions-whether in the form of domestic partnerships, civil unions could lead to social unrests. Article 1 of Marriage Law No. 1/1974 says that the marriage is the inner birth bond between a man and a woman as husband and wife with the aim of forming a happy family (household) based on the divinity of the One Supreme God. Article 2 of the same law further stipulates that marriage is lawful, if done according to the Marriage Law of the religion of the groom and bride. This marriage law does not include LGBT as subjects of a legal and legitimate union. Legalizing same sex marriage just for the sake of protecting human rights might end up harming human rights concept itself. The constitution guarantees equal treatment and legal protection to every Indonesian citizen but it should also be remembered that in addition to having human rights, the rights of others in the orderly life of society must also be respected and protected to avoid inequality before the law. Thus, in exercising their rights and freedoms, each person shall also be subject to restrictions in accordance with the law. Marriage is not merely a civic engagement, but a matter of fundamental customary and religious laws and believes (Deity, 2015).

CONCLUSION

Same sex marriage violates not only the Indonesian 1945 Constitution and Law No. 1/1974 on Marriage but also the norms, values and believes of the Indonesia people. Preserving marriage as a sacred relationship between a man and a woman is the most effective way to avoid the dangers to religious liberty associated with granting legal recognition to same-sex unions. For thousands of years, societies have considered marriage to be a relationship between a man and woman that forms the cornerstone of family as it guarantees procreation. The Indonesian society has a strong interest in the establishment of strong marriages because procreation is seen as the key element of the survival of human race. Re-legislating on marriage to include same-sex union involves a radical break with this traditional understanding of marriage. Judicial decisions imposing same-sex marriage do not merely add same-sex unions to civil marriage, leaving the institution otherwise intact. Rather, the redefinition of marriage to include same-sex unions fundamentally changes the institution of marriage by rejecting its core feature, an exclusive relationship between a man and woman as a form of irrational discrimination against homosexuals that most Indonesians find difficult to put up with.

ENDNOTE

1. South Africa is the only state on the African continent to include in its 1996 Constitution any prohibition of discrimination with regard to sexual orientation.
2. Taiwan would become the first country in Asia to legalize same-sex marriage if the Civil Code is amended.
3. Marriage Law No. 1/1974.
4. This is based on data from the Ministry of Health (Kemenkes) of the National AIDS Commission.
5. Indonesia UNAIDS: <http://www.unaids.org/en/regionscountries/countries/indonesia>.
6. Chapter XA, Article 28E, 1st Clause of the 1945 Constitution.
7. Penduduk Menurut Wilayah dan Agama yang Dianut. Sensus Penduduk. Jakarta, Indonesia: Badan Pusat Statistik.
8. Article 1 section 3 of the 1945 Constitution.

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